



September 12, 2019

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

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# Exhibit A

**IN THE SUPREME COURT OF MISSOURI**

<b>STATE OF MISSOURI,</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>No. SC80052</b>
	)	
<b>RUSSELL BUCKLEW,</b>	)	
	)	
<b>Appellant.</b>	)	

**APPELLANT’S RESPONSE IN OPPOSITION TO  
RESPONDENT’S MOTION TO SET EXECUTION DATE**

Appellant Russell Bucklew respectfully requests that this Court deny Respondent State of Missouri’s Motion to Set Execution Date. This Court should decline to set an execution date for Mr. Bucklew and order an independent medical evaluation to ensure the dignity of the execution process for two reasons. First, Mr. Bucklew’s deteriorating physical condition poses substantial issues for Missouri in its attempt to carry out the execution in a humane and dignified manner consistent with the United States and Missouri constitutions. Second, the United States Supreme Court’s decision authorized the use of state-sponsored torture, but this Court is not required to carry out the execution in a manner likely to lead to Mr. Bucklew’s undignified, horrifying and torturous death.

Per Rule 30.30, Appellant’s response in opposition would ordinarily be due in this Court on or before June 2, 2019. That is extended to June 3, 2019 due to the operation of Rule 20.01 (a), because June 2, 2019 is a Sunday.

In support of his response, Mr. Bucklew respectfully more fully states as follows:

## INTRODUCTORY STATEMENT

1. In 2014 and in 2018, the United States Supreme Court interceded into the proceedings and stayed Respondent's two previous premature attempts to execute Mr. Bucklew. See *Bucklew v. Lombardi*, 572 U.S. 1131 (2014) (mem.); *Bucklew v. Precythe*, 583 U.S. \_\_\_, 138 S.Ct. 1323 (2018) (mem.) The stringent federal stay standards present a high hurdle for any party to satisfy. Yet, Mr. Bucklew satisfied it twice.

2. According to the United States Supreme Court, a state has a legitimate interest in selecting a method it regards as "preserving the **dignity** of the procedure." *Baze v. Rees*, 533 U.S. 35, 57 (2008) (emphasis added). As will be discussed below, there is no dignity in Mr. Bucklew's execution process. Rather, it is reasonably foreseeable that Mr. Bucklew's execution will be an exercise in state-sanctioned torture all in service of proceeding with a sentence using the existing protocol. As set forth more fully below, Mr. Bucklew's serious medical infirmities – including serious medical issues never considered by the federal courts – continue to hamper the prospects of a dignified execution process and weigh in favor of this Court delaying in setting an execution date.

3. It is clear that Missouri will have to perform a medical cut-down procedure to find a vein, a process made more complicated by Mr. Bucklew's cavernous hemangioma. Missouri conceded this the entirety of the federal proceedings – upon which the federal courts relied. Thus, the starting point for Mr. Bucklew's execution is unusually exceptional with added risk – requiring a medical procedure to find the femoral vein.

4. The Supreme Court made clear in *Bucklew v. Precythe*, 587 U.S. ---, 139 S.Ct. 1112 (2019), that the onus is on the states to consider execution claims. Thus, it falls

to this Court.

## **ARGUMENT**

### **I. APPELLANT RUSSELL BUCKLEW'S SEVERELY COMPROMISED MEDICAL STATUS COMPELS THIS COURT TO DENY RESPONDENT'S MOTION.**

5. Missouri has confined Russell Bucklew for the last 23 years. During that time, Missouri has provided sporadic and insufficient medical care leaving Mr. Bucklew a physically broken man with a host of severe medical ailments. Correctional photos aptly document the progression of his ailments over time. Indeed, a review of Mr. Bucklew's prison photos from the time of his incarceration demonstrate the extent to which he has been hobbled by a host of physical and mental infirmities.

1996



2010



2002



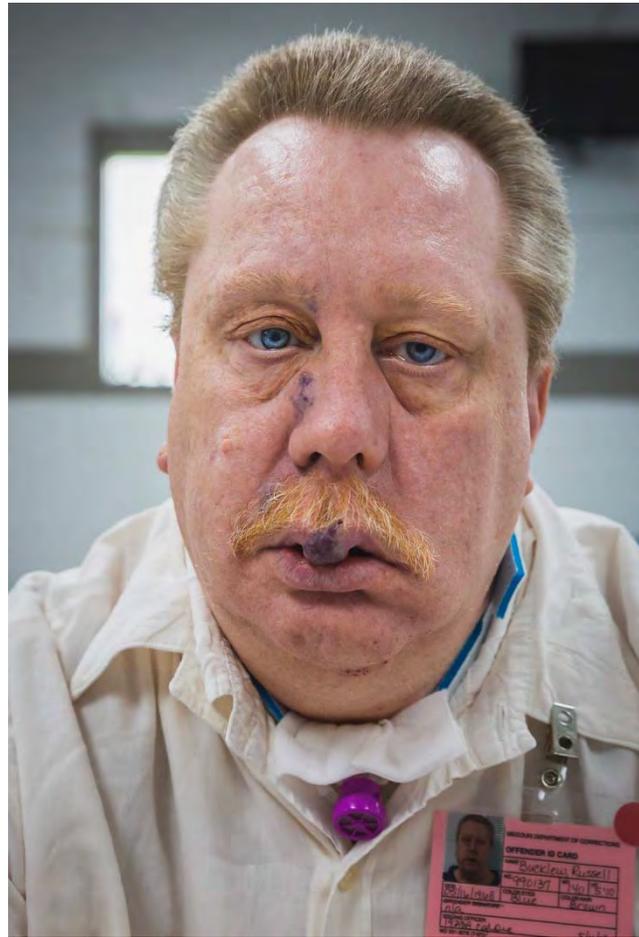
2014



2018



2019



6. Mr. Bucklew’s primary medical ailment – cavernous hemangioma – represents a constant and serious medical condition – but is only one of many maladies that currently impact his health status. Combined, his medical issues make the setting of an execution date an act of cruel and unusual punishment, an undignified act.

***A. Mr. Bucklew contracted meningitis in June 2018 that necessitated lifesaving medical procedures.***

7. Mr. Bucklew nearly died approximately one year ago from a meningitis infection that was misdiagnosed by Missouri DOC medical contractors. In June 18, 2018,

Potosi medical personnel were summoned to Mr. Bucklew's cell to assist him with an emergent medical issue. Specifically, Mr. Bucklew was unable to get out of bed and complained of a fever, diarrhea and vomiting. Mr. Bucklew was taken by wheelchair from his cell and he vomited twice and had diarrhea on the brief trip to the medical unit.

8. Medical staff initially treated Mr. Bucklew with an IV fluid and his condition slowly began to improve over the next 48 hours. Shortly after the IV was removed, though, his vital signs began to deteriorate and medical staff at Potosi summoned an ambulance to take Mr. Bucklew to the local hospital. Physicians at the local hospital diagnosed Mr. Bucklew with pneumonia and gastroenteritis. Medical staff kept him under observation for a short period and then returned him to Potosi only five hours after being rushed to the hospital. His condition continued to deteriorate once he was returned to Potosi and a second ambulance was ordered to transport him to Mercy Hospital in St. Louis only 12 hours later.

9. Contrary to the earlier diagnosis of mere pneumonia and gastroenteritis, medical staff at St. Louis Mercy diagnosed Mr. Bucklew with meningitis. While the medical staff started him on a treatment plan for the meningitis, Mr. Bucklew unexpectedly went into respiratory distress when his airway collapsed and he was intubated by the on-call physician. A tracheotomy was inserted to allow him to breathe and to protect his airway from further obstruction resulting from the intrusion by the cavernous hemangioma. A follow-up procedure was required to again re-set the tracheostomy after initial insertion.

10. Mr. Bucklew remained at Mercy until July 4, 2018, eleven days after being transported and revived by medical personnel. Mr. Bucklew remained in the Potosi

medical ward for several additional days to monitor his progress and he was eventually returned to his housing unit. He cares for his tracheotomy on his own and it remains inserted to this day to prevent a recurrence of his airway obstruction. Mr. Bucklew also executed his do-not-resuscitate order (DNR) on September 17, 2018, should another emergency medical situation occur.

***B. Minor medical procedures require hospitalization and aggressive medical attention as a result of his compromised medical condition.***

11. Mr. Bucklew recently underwent necessary surgery to remove an extremely painful and abscessed tooth. This procedure was done at Barnes Jewish Hospital in St. Louis, Missouri, ultimately resulting in the successful removal of the tooth. However, the process to remove a single tooth underscored the complicated and precarious nature of Mr. Bucklew's medical condition. Indeed, it demonstrated that any procedure on Mr. Bucklew requires handling by a highly skilled medical team to avoid hemorrhaging or a similar calamity.

12. Mr. Bucklew first notified Missouri DOC staff of his infected tooth on August 16, 2018. On August 28, 2018, he was seen by medical personnel at Potosi and they recommend extraction of his tooth due to the seriousness of the infection. They recommend that the tooth be removed off-site because of the extensive hemangiomas at or near the site of the infected tooth. On August 30, 2018, medical staff at Potosi are told that their request for off-site tooth extraction is denied and that Mr. Bucklew's condition does not pose any significant risks to his health. Later on August 30, 2018, medical personnel again request an off-site referral given the seriousness of Mr. Bucklew's medical condition

and their inability to effectively treat his condition on-site.

13. On September 27, 2018, medical personal recommend Mr. Bucklew that the tooth extraction be done at a hospital surgical center, rather than on-site by the oral surgeon. The physician notes that Mr. Bucklew had a prior tooth removed at a hospital in Jefferson City, MO under similar circumstances. The physician noted that a blood transfusion may be necessary due to the potential loss of blood resulting from the extraction affecting the hemangiomas.

14. On September 25, 2018, the oral surgeon made a second request to Missouri DOC authorities to approve a vascular surgery referral. According to the medical records, the on-site oral surgeon refused to complete the surgery without an angiogram and a vascular surgery consultation. Missouri DOC denied the physician's request for an angiogram, but approved for a vascular surgery consult. Three weeks later, on October 17, 2018, Mr. Bucklew was finally seen by the vascular surgeon for a surgical evaluation.

15. Mr. Bucklew was then referred for an MRI examination to determine the impact the hemangiomas are having on his airways and jaw. The records confirmed the oral surgeon's determination that an on-site surgical extraction would not be medically appropriate and Mr. Bucklew was once again referred to a hospital for extraction. In the interim, Mr. Bucklew was provided with antibiotics to control the ever present and dangerous infection.

16. On March 27, 2019, records indicate that Dr. Gantz at Barnes-Jewish Hospital in St. Louis recommended a surgical plan for the removal of the tooth. The plan involves interventional radiology to limit the blood flow to the area during surgery to

reduce the loss of blood during the procedure. Mr. Bucklew was informed that he will undergo surgery for the tooth extraction and he agreed to the procedure. However, a date for the procedure was not then set by the DOC.

17. Mr. Bucklew finally underwent a surgical procedure to extract his tooth on May 8, 2019. Mr. Bucklew was under general anesthesia and a ventilator throughout the procedure. The oral surgeon had on hand two pints of blood to prepare for a possible blood transfusion. The surgeon removed a total of three teeth during the operation due to significant issues relating to the health of the teeth. Mr. Bucklew was returned to Potosi following the procedure on the same day. He remains under a doctor's care for follow-up consultation.

18. The numerous medical consultations and potential serious complications regarding the removal of a tooth demonstrate the great risk, or the reasonable foreseeability, that Mr. Bucklew's execution will necessarily evolve into an undignified spectacle. Simply put, it took approximately ten months to develop and carry out a feasible approach to remove a single tooth. Given the above difficulties, no imagination is needed to visualize the greater difficulty to kill a person using an execution protocol that in this case will **require** a medical cut-down procedure to find the femoral vein.

***C. Mr. Bucklew's physical condition continues to worsen with the onset of Bell's Palsy.***

19. Mr. Bucklew is currently suffering from recurrent Bell's Palsy that has compromised the left side of his face (opposite the hemangiomas) and affected his ability to eat solid foods and drink liquids. Mr. Bucklew initially reported these symptoms to

medical on March 12, 2019. Medical staff informed Mr. Bucklew that his condition might not improve. He currently continues to have symptoms from the Bells' Palsy with the prospect that this will remain a permanent condition.

***D. Mr. Bucklew suffers from a host of mental health issues tied to his incarceration and fragile physical state.***

20. Mr. Bucklew has been under the care of the Potosi mental health staff since he arrived at the Missouri DOC. He is currently diagnosed with PTSD, Major Depressive Disorder (MDD) with psychotic features, anxiety, and pseudobulbar affect. He is treated with a series of medications to control some of the more harmful effects and to assist his ability to sleep. Currently, Mr. Bucklew is prescribed the following medications to treat his mental health issues: Clonazepam, Loxapine, Sertraline, and Trazadone.

21. The mental health issues are linked, in part, to his cavernous hemangioma. The tumors in Mr. Bucklew's head and neck impede blood flow, airflow and have an unknown impact on his brain functioning. The tumors have caused Mr. Bucklew to suffer from pseudobulbar affect (unexplained crying or laughing) and major depression resulting from lifelong pain caused by the tumors.

22. Mr. Bucklew's extended incarceration – including two last minute stays of execution – resulted in a PTSD diagnosis. As this Court is aware, the state twice prematurely sought execution dates while he was actively litigating his lethal injection claims. Mr. Bucklew opposed those execution dates and twice the U.S. Supreme Court stepped in to halt the executions. In each instance, Mr. Bucklew was just minutes from the start of the execution process and had already said his last words to his friends and family.

These experiences have done lasting psychological damage that continue to exist to this day caused by the state's moving for premature dates. In short, the mental health consequences for Mr. Bucklew continue to cascade and are not static.

***E. Mr. Bucklew suffers from a rare and incurable medical condition that imperils the safety, soundness, and dignity of the execution process.***

23. Mr. Bucklew suffers from an exceedingly rare, progressive, and incurable medical condition— cavernous hemangioma—that causes inoperable, blood-filled tumors to grow in his throat and around his face, head, and neck. Cavernous hemangiomas occur in only .2% of the general population, and cavernous hemangiomas in the oral cavity (affecting the lips, tongue, and palate) are prevalent in less than 1% of those who have cavernous hemangioma (only .002% of the general population). Minhua Wang et al., Cavernous Hemangioma of the Uvula: Report a Rare Case with Literature Review, 8 N. Am. J. of Med. & Sci. 56 (2015). A medical presentation like Mr. Bucklew's, involving the uvula, is "extremely rare." *Id.* at 56.

24. Mr. Bucklew's cavernous hemangioma affects nearly every aspect of his life. The tumors growing in his throat restrict his airway, requiring that he manually manipulate his breathing throughout the day and night. He must sleep in an elevated position so that he does not suffocate in his sleep.

25. Mr. Bucklew's hemangiomas bleed constantly, necessitating that he be provided with a supply of gauze and medical waste bags for use in his cell. This persistent condition recently caused Mr. Bucklew to cancel a pre-planned visit with counsel because

he was unable to effectively manage the bleeding to allow for an attorney-client visit. The hemangiomas are particularly sensitive to rupturing when even the slightest amount of pressure is applied to them. For instance, even eating certain foods as benign as potato chips can cause the tumors to rupture and bleed substantially.

26. The cavernous hemangioma also imperils other aspects of Mr. Bucklew's well-being. The location and sensitivity of the tumors affect every aspect of his care from mental health to otherwise routine medical procedures. These problems underlie the immense, indeed insurmountable, challenges in carrying out the execution in a dignified manner, given Mr. Bucklew's congenital condition and his recent medical and mental health problems.

**II. EXECUTING RUSSELL BUCKLEW UTILIZING MISSOURI'S CURRENT SINGLE DRUG PROTOCOL WOULD REPRESENT CRUEL AND UNUSUAL PUNISHMENT IN ALLOWING AN UNDIGNIFIED AND TORTUROUS EXECUTION TO OCCUR.**

27. The Supreme Court's recent decision dismissed Mr. Bucklew's lethal injection litigation, but the decision did not resolve whether, as a factual matter, Missouri's execution protocol would result in a horrific, undignified, and torturous execution in violation of Mr. Bucklew's right to be free from cruel and usual punishment. Rather, the Court only considered the single alternative method of execution in light of Missouri's current execution protocol and determined that Mr. Bucklew could not prevail on those facts. Significantly, the Court noted, "[a]n inmate seeking to identify an alternative method

of execution is not limited to choosing among those presently authorized by a particular State's law." *Bucklew*, 139 S.Ct. at 1128. This clarifying ruling comes at a point in the litigation that no longer serves to the benefit of Mr. Bucklew, but demonstrates that he would have prevailed had this rule of law had been available to him at the outset.

28. The only methods of execution authorized under Missouri law at the time Mr. Bucklew initiated his litigation in 2014 were lethal gas or lethal drugs. *See* 546.720 RSMo. However, Missouri conceded to the Supreme Court of the United States that the use of the firing squad or other alternatives outside Missouri's current statutory framework were available. *See Bucklew*, 139 S.Ct. at 1128. The State's concession has current legal effect.

29. Mr. Bucklew almost certainly can prevail under the Supreme Court's holding that litigants may propose alternative methods of execution beyond those authorized by state law. *Id.* The Supreme Court criticized Mr. Bucklew for proposing an alternative method of execution that has not yet been tested or proven as an efficacious alternative. *Bucklew*, 139 S.Ct. at 1131-32. The Court noted that comparing the unproven method of execution against the current protocol undermined Mr. Bucklew's assertion that Missouri's one-drug protocol was sufficiently more painful than the proposed alternative. *Id.* In essence, stated the Court, Mr. Bucklew lacked the necessary factual support because his alternative method of execution – even one that was allowed under Missouri law – had not been implemented anywhere in the United States, preventing the Court from evaluating safety and efficacy of the method in comparison to Missouri's current protocol. The Court

suggested other methods, though, that bear the track record sufficient to meet the burden in this case.

30. The Supreme Court suggested several proven methods of execution that may be proposed in the future. For instance, the majority opinion suggested hanging, firing squad, and electrocution. *Id.* at 1125; *Id.* at 1136 (Kavanaugh, J., concurring). For each of these methods, there is a significant track record and protocols available that would allow swift implementation while reducing the risk of Mr. Bucklew's tortuous and undignified execution associated with Missouri's current execution protocol.

31. The purpose of Mr. Bucklew's lethal injection litigation was to ensure that the ultimate punishment carried out against him complied with United States and Missouri constitutional safeguards against cruel and unusual punishment. *See* U.S. Const. Amend. 8 and 14; V.A.M.S. Art. 1, §21. Mr. Bucklew's lethal injection litigation did not challenge his underlying conviction. Instead, Mr. Bucklew merely challenged the right of the State to utilize a method of execution that would amount to torture, given his unique medical circumstances. Mr. Bucklew's deteriorating medical and mental health conditions, combined with Missouri's current approach to execution and its unwavering desire to proceed despite the immense risks, require this Court's consideration to ensure that the execution is carried out in a humane and dignified manner.

## CONCLUSION

WHEREFORE, Appellant Russell Bucklew prays that this Court will deny Respondent's Motion to Set an Execution Date. Instead, this Court should defer setting an execution date to allow for the appointment of an independent medical expert to evaluate Mr. Bucklew's present fitness for Missouri's current execution protocol. In light of Mr. Bucklew's ongoing and increasing physical deterioration, the appointment of such an expert is necessary to comply with United States and Missouri's constitutional guarantees against cruel and unusual punishment.

Dated: June 3, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 31, 2019, the foregoing was served via the Court's electronic filing system on Michael J. Spillane, Assistant Attorney General, mike.spillane@ago.mo.gov, counsel of record for Respondent.

*/s/ Jeremy S. Weis*

\_\_\_\_\_  
Jeremy S. Weis

# Exhibit B

No. 17-8151

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IN THE  
*Supreme Court of the United States*

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RUSSELL BUCKLEW,

—v.—

ANNE PRECYTHE, *et al.*,

*Petitioner,*

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**BRIEF *AMICI CURIAE* OF THE AMERICAN  
CIVIL LIBERTIES UNION AND THE ACLU OF MISSOURI  
IN SUPPORT OF PETITIONER**

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## INTERESTS OF AMICI<sup>1</sup>

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of approximately 1.75 million members dedicated to the principles of liberty and equality embedded in the United States Constitution. In the nearly 100 years since its founding, the ACLU has appeared in myriad cases before this Court, both as merits counsel and as an *amicus curiae*, to defend constitutional rights, including numerous cases involving the criminal justice system and capital punishment, such as *Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Terry v. Ohio*, 392 U.S. 1 (1968); *Furman v. Georgia*, 408 U.S. 238 (1972); *Chicago v. Morales*, 527 U.S. 41 (1999); *Atkins v. Virginia*, 536 U.S. (2002); and *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

The ACLU represents Petitioner Russell Bucklew before the Inter-American Commission on Human Rights (IACHR). The Commission has ruled that, in light of Mr. Bucklew's unique medical condition and the excruciating pain he would suffer if executed by lethal injection, doing so would violate the prohibition on cruel and inhuman punishment and amount to torture. Inter-American Commission on Human Rights, Report No. 28/18, Case No. 12,958, Report on Merits, Russell Bucklew, United

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have provided blanket consent to the filing of amicus briefs in this case, and copies of the letters of consent are on file with the Clerk's Office.

States (March 18, 2018) (IACHR Report), *reproduced in* Amicus Br. of ACLU in Support of Petitioner App., *Bucklew v. Precythe*, No. 17-8151 (Apr. 6, 2018) (ACLU Cert. Amicus App.).

The ACLU of Missouri is one of the ACLU's statewide affiliates and has more than 19,000 members. The ACLU of Missouri has provided direct representation and acted as an *amicus curiae* in numerous state and federal cases challenging the administration of the death penalty.

### **SUMMARY OF ARGUMENT**

I. If Missouri is allowed to execute Russell Bucklew by lethal injection, he will choke on his own blood and suffocate for four minutes before dying. This does not happen with other lethal injection executions. But Mr. Bucklew suffers from cavernous hemangioma, a rare medical condition that will lead to these results and make the lethal injection procedures particularly excruciating in his case. To subject Mr. Bucklew to such severe pain and suffering, far beyond that involved in lethal injection generally, would be cruel and unusual punishment. Just as a state could not subject a criminal defendant to waterboarding, a form of temporary suffocation, as punishment for a crime, so Missouri cannot constitutionally subject Mr. Bucklew to the prolonged suffocation that lethal injection would create in his particular circumstance.

This conclusion is reinforced by the fact that subjecting anyone to such prolonged and intense pain and suffering is contrary to global standards of decency, reflected in international and national law the world over. The Court's Eighth Amendment

jurisprudence looks to such international law not because it is binding, but to inform its judgment about the standards of decency that the Eighth Amendment protects. Here, international law makes clear that a state cannot lawfully subject a criminal defendant—or anyone else—to suffocation in his own blood.

While international law does not prohibit capital punishment *per se*, nor all forms of lethal injection, it does prohibit any execution method that would constitute torture or cruel, inhuman, or degrading treatment. And in assessing whether a given practice amounts to torture or cruel, inhuman, or degrading treatment, international law takes into account the particular characteristics of the individual affected. It therefore requires considering the effects of Mr. Bucklew's cavernous hemangioma on the suffering he will endure. While others executed by lethal injection will not suffocate in their own blood, Mr. Bucklew will.

Asphyxiation in one's own blood for four minutes until one dies certainly qualifies as torture or cruel, inhuman, or degrading treatment or punishment, and, as such, is absolutely prohibited by international law. If subjecting Mr. Bucklew to the substantially less severe practice of waterboarding would violate these international norms, then *a fortiori*, subjecting him to prolonged suffocation in his own blood until he dies does as well.

II. In as-applied challenges to a method of execution, neither the Eighth Amendment nor international law supports placing the burden of identifying a non-cruel method of punishment on the defendant rather than the state. While this Court

has held that a *facial* challenge to a method of execution requires a showing that a less painful execution alternative exists, that burden is inappropriate where, as here, an individual mounts only an *as-applied* challenge. The Court in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), reasoned that because a facial challenge to a method of execution would, absent an available alternative method, constitute a *de facto* invalidation of the death penalty itself, the defendant must show an available alternative. This as-applied challenge, however, does not implicate the *de facto* validity of the death penalty. To rule for Mr. Bucklew would leave unaffected lethal injection as to other condemned persons.

This Court's rulings that "deliberate indifference" to an inmate's medical needs violates the Eighth Amendment also supports imposing on the state the obligation to avoid a method of execution that, because of Mr. Bucklew's unique medical condition, will inflict prolonged and excruciating suffering, far beyond that generally associated with lethal injection. Thus, *Glossip's* requirement for facial challenges should not be extended to this as-applied challenge.

International law also supports placing the burden of proving a non-cruel method of execution on the state rather than the defendant in an as-applied challenge. International law imposes an affirmative obligation on states to *prevent* torture or cruel, inhuman, or degrading treatment or punishment. The United States has ratified both the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights,

both of which impose an affirmative duty of prevention upon signatory states. Where, as here, a particular execution method as applied to a particular individual will foreseeably result in torture or cruel, inhuman, or degrading treatment or punishment, the state's duty to prevent such conduct means that it can proceed only if it identifies an alternative method that will *not* inflict torture or cruel, inhuman, or degrading treatment or punishment.

## ARGUMENT

### I. SUBJECTING MR. BUCKLEW TO PROLONGED SUFFOCATION IN HIS OWN BLOOD IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

If Missouri executes Mr. Bucklew by lethal injection, the results will be gruesome and excruciatingly painful. Mr. Bucklew's rare condition, cavernous hemangioma, has caused blood-filled tumors to grow in his head, neck, and throat—tumors that often block his airway and easily rupture and bleed. A medical expert who examined Mr. Bucklew concluded that if Missouri is permitted to execute him by lethal injection, he is “highly likely to experience . . . the excruciating pain of prolonged suffocation resulting from the complete obstruction of his airway.” Pet. App. 109a ¶ III.E. Mr. Bucklew's throat tumor will likely rupture, and “[t]he resultant hemorrhaging will further impede his airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood during the lethal injection process.” *Id.* ¶ III.F.

Subjecting an individual to four minutes of suffocation in his own blood until he dies is indisputably cruel and unusual. A plurality of this Court noted in *Baze v. Rees*, 553 U.S. 35 (2008), that absent the initial drug in the lethal injection protocol, which renders an individual unconscious, the suffocation caused by the second two drugs would be unconstitutionally cruel and unusual. *Id.* at 53 (“It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.”). Because, in Mr. Bucklew’s case, the process of administering the initial drug will cause prolonged suffocation *before* he loses consciousness, it is indisputably cruel and unusual.

As this Court stated more than a century ago, “Punishments are cruel when they involve torture or a lingering death.” *In re Kemmler*, 136 U.S. 436, 447 (1890). The Eighth Amendment prohibits the kinds of punishments that “disgraced the civilizations of former ages, and make one shudder with horror to read of them.” *Whitten v. State*, 47 Ga. 297, 301 (1872); *State v. Feilen*, 126 P. 75, 76 (Wash. 1912) (quoting *Whitten*, 47 Ga. at 301); *State v. Woodward*, 68 S.E. 385, 388 (W. Va. 1910) (same); *see also Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (“[T]he primary concern of the drafters [of the Eighth Amendment] was to proscribe ‘torture(s)’ and other ‘barbar(ous)’ methods of punishment.” (quoting *Gregg v. Georgia*, 428 U.S. 153, 170 (1976))). That is precisely what is contemplated if Mr. Bucklew is subjected to lethal injection.

This conclusion is reinforced by reference to international law. For well over half a century, “the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’” *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (plurality opinion), and collecting cases).

In *Roper*, for example, this Court held that the juvenile death penalty offends civilized standards of decency, in part because “the weight of authority against it . . . in the international community, has become well established.” 543 U.S. at 578. “The opinion of the world community,” the Court observed, “while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Id.*; see also, e.g., *Graham v. Florida*, 560 U.S. 48, 80 (2010) (examining the juvenile sentencing practices of other countries in accordance with the Court’s “longstanding practice in noting the global consensus against the sentencing practice in question.”).

Here, international law is informative in two respects: (a) it requires that assessing whether a given punishment is permitted or prohibited requires consideration of the individual’s subjective characteristics; and (b) international law absolutely forbids torture and cruel, inhuman or degrading treatment or punishment, and those prohibitions bar the four-minute asphyxiation of Mr. Bucklew in his own blood at issue here.

**A. The Assessment of Whether a Given Practice is Torture or Cruel, Inhuman, or Degrading Under International Law Considers an Individual’s Specific Characteristics.**

International law does not generally prohibit the death penalty following a fair trial. *See e.g.*, International Convention on Civil and Political Rights, art. 6 (2), Dec. 16, 1966, 999 U.N.T.S. 171 (ICCPR) (recognizing that states may impose the death penalty under certain limited circumstances); *see also* African Charter on Human and Peoples’ Rights art. 4, 24-26, Nov. 2015, 21 I.L.M. 58 (1982) (ACHPR); General Comment No. 3 on the ACHPR: the Right to Life, art. 4 at ¶¶ 24-26 (2015); American Convention on Human Rights, art. 4(2), Nov. 21, 1969, 1144 U.N.T.S. 123 (ACHR); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), Nov. 4, 1950, E.T.S. No. 5; 213 U.N.T.S. 221. But it does require that executions be carried out “in such a way as to cause the least possible physical and mental suffering.” Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), ¶ 6 U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994). And international law prohibits states from using methods that constitute torture or cruel, inhuman, or degrading treatment or punishment.

Human rights bodies have upheld the lawfulness of lethal injection under this framework. *Cox v. Canada*, Comm. No. 539/1993, U.N. Doc. CCPR/C/52/D/539/19930 (1994); *Kindler v. Canada*, Comm. No. 470/1991, U.N. Doc. CCPR/C/48/D/470/

1991 (1993) (lethal injection found not to violate ICCPR, art. 7 (prohibition on torture and other cruel, inhuman, or degrading treatment or punishment). But where a method of execution as applied to a specific individual would inflict pain and suffering sufficiently severe to constitute torture or cruel, inhuman, or degrading treatment or punishment, it is absolutely prohibited.

To constitute cruel, inhuman, or degrading treatment or punishment, suffering must go beyond “that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.” *Iorgov v. Bulgaria*, no. 40653/98, ¶71, E.C.H.R. 2004-I. This assessment necessarily looks to the effect of the treatment, *taking into account the individual’s particular characteristics*. Whether conduct amounts to torture, for example, “depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, and, in some cases, the *sex, age, and state of health of the victim, etc.*” *Selmouni v. France*, no. 25803/94, ¶100, E.C.H.R. 1999 (emphasis added); see also *Vuolanne v. Finland*, Comm. No. 265/19867 U.N.Doc. Supp. No. 40 (A/44/40) at 249, 256 (1989); *Al-Saadoon v. United Kingdom*, no. 61498/08, ¶121, E.C.H.R. 2010-IV; *Prosecutor v Delic*, IT-04-83-T Trial Judgment, 50-a (15 Sept. 2008).

So, too, “[t]he assessment of th[e] minimum” required under the cruel, inhuman, or degrading punishment standard “is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects.” *Cicek v. Turkey*, no. 25704/94, ¶ 172, E.C.H.R. 2001.

Courts regularly consider the health and age of an individual in evaluating whether treatment constitutes torture or cruel, inhuman, or degrading treatment or punishment. *See, e.g., Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 226-28 (D.D.C. 2002) (discussing plaintiff's pre-existing medical condition in assessing whether his alleged pain and suffering was sufficiently severe to hold Iran responsible for plaintiff's torture under 28 U.S.C. § 1605A(a)(1)); *Trajano v. Marcos-Manotoc*, 978 F.2d 493 (9th Cir. 1992) (determining whether plaintiff's pain and suffering was sufficiently severe to constitute torture based on numerous factors including the alleged victim's age); *Aydin v Turkey*, no. 57/1996/676/866, E.C.H.R. 2001-I (1997) (considering individual's age in assessing whether police interrogation methods amounted to torture); *Case of the "Street Children" v. Guatemala*, Judgment of Nov. 19, 1999, Inter-Am. Ct. H.R. ¶ 152 (1999) (noting individual's "tender age" in assessing whether alleged conduct constituted torture).

For this reason, the African Commission on Human and Peoples' Rights has held that while execution by hanging may *generally* be consistent with international law, it may "not be compatible with the respect for the inherent dignity of the individual" as applied in some instances, such as when it is "carried out without appropriate attention to the weight of the person condemned" and thus could result in "either slow or painful strangulation, because the neck is not immediately broken by the drop, or at the other extreme, in the separation of the head from the body." *Ditschwanelo v. Botswana*, no. 277/2003, Merits, ¶169, Afr. Comm. H.P.R. (2003).

The gruesome chain of events contemplated in Mr. Bucklew's case are not the consequence of Missouri's protocol *in general*, but of its particular application to Mr. Bucklew, whose rare medical condition renders his prolonged suffocation in his own blood all but certain, and far in excess of the pain and suffering that generally accompanies lethal injection. As the Inter-American Commission concluded, for the state to execute Mr. Bucklew in such a fashion would constitute torture or cruel and inhuman punishment in violation of international law. IACHR Report ¶ 98 (ACLU Cert. Amicus App. 53a).

**B. International Law Deems Forms of Treatment Short of Four-Minute Asphyxiation in One's Own Blood as Torture or Cruel, Inhuman, or Degrading.**

International, regional, and national laws around the world categorically prohibit torture and other cruel, inhuman, or degrading treatment or punishment.<sup>2</sup> Those prohibitions are so universally

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<sup>2</sup> All of the major international and regional human rights treaties and other international instruments prohibit torture and other cruel, inhuman, or degrading treatment or punishment. *See, e.g.*, Universal Declaration of Human Rights, Dec. 10, 1948, art. 5, G.A. Res 217A (III), U.N. Doc. A/810 (1948) ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."); ICCPR, art. 7; CAT, arts. 2, 16; ACHPR, art. 5; American Declaration on the Rights and Duties of Man, May. 2, 1948, art. XXV, OEA/Ser.L/V.II.23, doc. 21, rev. 6 (1948); ACHR, art. 5; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221; *see also* European Convention for the Prevention of Torture and

recognized that they now form part of customary international law. *Restatement (Third) of the Foreign Relations Law of the United States* §§ 331 cmt. e; 702(d) cmt. n (1987).

As noted above, those laws prohibit punishment that inflicts pain or suffering beyond “that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.” *Soering v. United Kingdom*, no. 14038/88, Judgement, ¶ 100, E.C.H.R. 1989; *see also Iorgov*, no. 40653/98 at ¶ 71; *Ireland v. United Kingdom*, no. 5310/71, E.C.H.R. (1978) (noting that the prohibition on torture was meant to “attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering”).

Missouri’s proposed method of executing Mr. Bucklew would violate these international prohibitions, which have recognized other forms of treatment short of four-minute asphyxiation in one’s own blood resulting in death as torture or cruel, inhuman, or degrading treatment or punishment.

For example, waterboarding—which produces the sensation of suffocation for a far shorter length of

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Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S. No. 126.

The United States has ratified the CAT and the ICCPR. *See* Addendum 5, Oct. 21, 1994, CAT/C/28/Add.5; ICCPR, June 8, 1992, 138 Cong. Rec. S4781-01. In addition, more than eighty national constitutions prohibit torture, and other forms of cruel, inhuman, or degrading treatment or punishment. M. Cherif Bassiouni, *Human Rights in Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int’l L. 235, 263-64 & n.128 (1983).

time than Mr. Bucklew is expected to suffer—constitutes torture under international law. The International Military Tribunal for the Far East (IMTFE), convened by the Allied nations, including the United States, following World War II, concluded that Japanese forces committed torture when they subjected prisoners-of-war and civilian internees to waterboarding. Transcripts of the Proceedings and Judgment of the International Military Tribunal for the Far East at 48,413 (Nov. 4, 1948) (IMTFE Record), *reproduced in* The Tokyo War Crimes Trial (R. John Pritchard & Sonia Magbanna Zaide eds., 1981); *see also* Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007) (collecting decisions of domestic and international courts finding waterboarding and other forms of water torture illegal). “Among these tortures [used by Japanese forces was] the water treatment,” IMTFE Record at 49,663, in which an individual was tied or held down on his back, a cloth placed over his nose and mouth, and water poured over the cloth to create the sensation of drowning or held under water until almost drowned, IMTFE Record at 12,940, 14,168, 49,663-64. *Cf. United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984) (affirming federal conviction for civil rights violations in case of sheriff and several deputies who used “water torture” against suspects during interrogation).

In its annual reports on other countries’ human rights practices, the State Department has repeatedly classified “near-drowning,” “asphyxiation in water,” and “submersion of the head in water” as forms of torture and condemned those practices. *See, e.g.,* U.S. Dep’t of State, Bureau of Democracy,

Human Rights, and Labor, Country Reports on Human Rights Practices, Sri Lanka 2014 Report (Jun. 25, 2015), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dliid=252975>; U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Sri Lanka 2011 Report, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186475>; U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Tunisia 2010 Report (Apr. 8, 2011), <https://www.state.gov/j/drl/rls/hrrpt/2010/nea/154474.htm>.

The severe psychological suffering caused by asphyxiation has also been demonstrated in the social scientific literature. See Metin Basoglu, *Waterboarding is severe torture: Research findings* (Dec. 25, 2012), <https://metinbasoglu.wordpress.com/2012/12/25/waterboarding-is-severe-torture-research-findings/> (surveying research of a leading scholar on torture and cruel, inhuman, and degrading treatment and punishment, including the results of a study finding that, as among 45 different forms of torture, treatment involving suffocation or asphyxiation was the strongest predictor of post-traumatic stress disorder (PTSD)).

Applying these principles to Missouri's plan to execute Mr. Bucklew by lethal injection, the Inter-American Commission found that doing so would inflict cruel and inhuman punishment and could result in torture:

The Commission considers that this particular risk of choking on his own blood, being aware of it, and for a period

of up to four minutes, taking in consideration the context of extreme stress and anxiety, would constitute cruel and inhuman punishment. The IACHR finds that the severity of the suffering that would be imposed under such circumstances could amount to torture.

IACHR Report ¶ 78 (ACLU Cert. Amicus App. 42a). The Commission ruled that allowing Missouri to proceed with the execution of Mr. Bucklew in such a fashion would violate the United States' international obligations to ensure it does not inflict cruel and inhuman punishment. *Id.* at ¶ 83 (ACLU Cert. Amicus App. 45a).

In short, international law further confirms that executing Mr. Bucklew in this manner would “offend civilized standards of decency,” *Roper*, 543 U.S. at 578, and would constitute either torture or cruel, inhuman, and degrading punishment. This supports the conclusion, independently compelled by Eighth Amendment jurisprudence itself, that Mr. Bucklew’s execution would be cruel and unusual. As this Court reasoned more than a century ago, “[p]unishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishment of life.” *In re Kemmler*, 136 U.S. at 447.

**II. BECAUSE LETHAL INJECTION IS CRUEL AND UNUSUAL AS APPLIED TO MR. BUCKLEW, THE STATE BEARS THE BURDEN OF IDENTIFYING AN ALTERNATIVE LAWFUL METHOD IF IT SEEKS TO EXECUTE HIM.**

**A. *Glossip* Places the Burden on the Offender Where a Facial Challenge Would Have the Effect of Invalidating the Death Penalty Across the Board, But that Logic Does Not Extend to an As-Applied Challenge that Affects Only a Single Person.**

In *Glossip*, this Court placed the burden on an inmate raising a *facial* challenge to his method of execution to specify an alternative method “that is ‘feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.’” *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52). It did so precisely because *Glossip* involved a *facial* challenge. The Court reasoned that “because it is settled that capital punishment is constitutional, ‘[i]t necessarily follows that there must be a [constitutional] means of carrying it out.’” 135 S. Ct. at 2732-33 (quoting *Baze*, 553 U.S. at 47); for this reason, the Court held that an inmate who facially challenges a method of execution must identify a feasible and readily implemented alternative method. *Id.* at 2737. That reasoning is inapplicable here.

*Glossip* placed the burden on the inmate so as not to permit facial challenges to methods of execution from *de facto* rendering the death penalty

unconstitutional across the board. That logic has no bearing, however, on Mr. Bucklew's individualized as-applied challenge. Should this Court conclude that executing Mr. Bucklew by lethal injection will cause a substantial risk of severe suffering because of his rare medical condition, lethal injection will otherwise continue to be available as a method of execution in Missouri.

This Court has in fact long recognized that while the death penalty is generally constitutional, *see Gregg*, 428 U.S. 153, it is not constitutional as applied to every individual. In *Atkins*, 536 U.S. 304, for example, the Court concluded that the execution of persons with intellectual disability would offend the standards of decency required by the Eighth Amendment. And in *Roper*, 543 U.S. 551, it held unconstitutional the death penalty as applied to juvenile offenders. Those holdings did not undermine the constitutionality of the death penalty in other contexts, as applied to other individuals who do not share the specific characteristics that rendered their executions cruel and unusual.

Moreover, this Court's longstanding rule that "deliberate indifference" to an inmate's specific medical condition can rise to the level of cruel and unusual punishment, *Estelle*, 429 U.S. at 104, further supports placing the burden on the state in as-applied cases. If Mr. Bucklew's medical condition required treatment and the state were deliberately indifferent to that fact, its actions would violate the Eighth Amendment. So, too, where it seeks to carry out a method of execution that it knows will inflict severe and excruciating pain because of his medical condition, the Eighth Amendment imposes on the

state an affirmative obligation to respond—here, by not using that method, and only proceeding with the execution if it can identify a method that would not inflict cruel and unusual punishment.

In short, the state’s affirmative Eighth Amendment obligation to attend to the specific medical needs of its inmates supports the conclusion that, if Missouri seeks to execute Mr. Bucklew, it must identify a non-cruel way to do so. And because this challenge does not call into question lethal injection generally, nothing in *Glossip* or this Court’s death penalty jurisprudence suggests that the burden of identifying an alternative method of execution should be placed on the inmate when the state’s chosen method would constitute cruel and unusual punishment only as applied to him.

**B. International Law Supports Placing the Burden on the State Because the State Has an Affirmative Duty to Prevent Torture or Cruel, Inhuman, or Degrading Treatment or Punishment.**

International law also supports placing the burden of identifying a non-cruel method of execution on the state if it seeks to go forward with Mr. Bucklew’s execution. The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and other international treaties that prohibit torture and cruel, inhuman, or degrading treatment or punishment all impose affirmative obligations on states to prevent

such conduct.<sup>3</sup> States are required “to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment.” *Abu Zubaydah v Lithuania*, no. 46454/11, [GC] ¶632, E.C.H.R. 2018-I (2018).

This affirmative duty to *prevent* torture and cruel, inhuman, or degrading punishment means that unless Missouri can identify a method of execution that would not foreseeably violate these prohibitions, it cannot proceed with Mr. Bucklew’s execution. In other capital cases, international human rights bodies and national courts have recognized that the state must bear this burden. *See* Committee Against Torture, Concluding Observations on the United States, CAT/C/USA/CO/3-5 ¶25, 19 January, 2014 (recommending that the United States “review its execution methods in order to prevent pain and prolonged suffering”); *Deena v. Union of India*, (1983) 4 SCC 645, 688 ¶¶ 81-82 (India), *available at* <https://www.aclu.org/legal-document/deena-v-union-india-decision> (finding that under India’s constitution a “heavy burden”

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<sup>3</sup> *See* CAT arts. 2(1), 16; Committee Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007); ICCPR, art. 2; Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); footnote 2, *supra* (citing international and regional human rights treaties); *see also* Afr. Comm. H.P.R., *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Comm. 74/92, Merits, 9th Annual Activity Report 1995-1996/96, 4 IHRR 94 1997; *Velásquez Rodríguez v. Honduras*, Merits. Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 174-75 July 29, 1988; IACHR Report ¶ 76 (ACLU Cert. Amicus App. 41a).

rests on the state to demonstrate that any method used “causes no greater pain than any other known method of executing the death sentence and it involves no barbarity, torture or degradation.”).<sup>4</sup>

The Inter-American Commission’s decision in Mr. Bucklew’s case confirms this approach:

The IACHR reiterates that, under peremptory norms of international human rights law and as reflected in the American Declaration, the United States has the duty to abstain from carrying out an execution when there is significant risk that it would breach the prohibition of cruel and inhuman treatment or torture. Compliance with this duty cannot be conditioned on the existence of “alternatives.”

IACHR Report ¶ 80 (ACLU Cert. Amicus App. 43a).

Under both constitutional and international law, subjecting Mr. Bucklew to a method of execution that will result in prolonged suffocation in his own blood, inflicting pain far in excess of that inherent to lethal injection generally, is prohibited. If the state seeks to execute Mr. Bucklew, it bears the burden of identifying an alternative method that is not cruel and unusual.

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<sup>4</sup> The Nebraska Supreme Court has also followed this same approach. *See State v. Mata*, 275 Neb. 1, 67-69 (2008) (holding that electrocution is unconstitutional under the state constitution because it will inflict “intense pain and agonizing suffering” and requiring the state to “allege and demonstrate that a constitutionally acceptable method” is available).

## CONCLUSION

For the above reasons, this Court should hold that the Eighth Amendment prohibits Missouri from executing Mr. Bucklew by lethal injection.

Respectfully submitted,

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Ithaca, NY 14853-4901

Date: July 20, 2018

# Exhibit C

**Declaration of Dr. Bruce Harry**  
Pursuant to 28 U.S.C. § 1746

I am over the age of 18, am of sound mind, and am competent to testify regarding the matters below.

1) I am an Associate Professor of Clinical Psychiatry and Forensic Psychiatry at the University of Missouri School of Medicine in Columbia, Missouri. I have been asked to provide the following declaration regarding my work as a retained trial expert for Russell Bucklew's trial team in 1996 and 1997.

2) Mr. Robert Wolfrum, an attorney with the Missouri State Public Defender's Office, retained me to conduct a psychiatric evaluation of his client, Russell Bucklew. The State of Missouri had charged Mr. Bucklew with several felony charges that could result in a death sentence upon a guilty verdict. As noted with my report, I was asked to address to a reasonable degree of medical certainty whether:

- a. Mr. Bucklew has a mental disease or defect in the duration thereof;
- b. As a result of a mental disease or defect, whether Mr. Bucklew lacked the capacity to understand the proceedings against him or to assist in his own defense;
- c. If, at the time of such criminal conduct, as a result of mental disease or defect, Mr. Bucklew was incapable of knowing or appreciating the nature, quality or wrongfulness of his conduct;
- d. Whether Mr. Bucklew satisfies any of the statutory mitigating circumstances pursuant to section 565.032, RSMo (1994);

e. Whether and to what extent Mr. Bucklew's statement to police was affected by a mental disease or defect.

3) The list of materials I reviewed and received from defense counsel is contained in the March 14, 1997 report issued to Robert Wolfrum of the Missouri State Public Defender System.

4) I also met with Mr. Bucklew, and conducted telephonic interviews of Robert and Fran Bucklew (his parents), Dr. Zitsch (consulting physician), and Jeanette Bucklew (his former sister-in-law) prior to reaching my conclusions and formulating my opinion.

5) I consulted the then applicable Diagnostic and Statistical Manual of Mental Disorders - IV ("DSM-IV") to reach my ultimate diagnosis of Mr. Bucklew. At the conclusion of my review, I diagnosed Mr. Bucklew as follows:

Axis I: Depressive Disorder, Not Otherwise Specified (311)  
Rule/Out Opioid Induced Mood Disorder (292.84)  
Rule/Out Opioid Dependence (304.00)  
Alcohol Abuse, by History (305.00)  
Polysubstance Dependence, by History (304.80)

Axis II: Antisocial Personality Disorder (301.7)

Axis III: Massive Cavernous Hemangioma  
Nonpenetrating Gunshot Wound to the Head

6) These diagnoses were determined based on my interviews, a review of the records provided and an analysis of the DSM-IV, the manual applicable at the time.

7) I testified at the trial of Mr. Bucklew before the Circuit Court of Boone County, Missouri, in April 1997. I testified as to these diagnoses before the jury in its consideration of punishment for Mr. Bucklew. I was called by Mr. Bucklew's trial attorney,

Beth Davis, as a witness for the defense during the penalty phase of the trial. I did not testify in any subsequent hearings nor did I review my findings until recently when I was contacted by one of Mr. Bucklew's current counsel, Laurence Komp.

8) Mr. Komp asked me to review my report and trial testimony to explain the basis for my conclusion that Mr. Bucklew suffers from Antisocial Personality Disorder. In preparation for those meetings with Mr. Komp, I reviewed my report issued March 14, 1997, my trial testimony from April 1997, as well as the DSM-IV.

9) My re-review of my report, testimony from 1997, and the diagnostic criteria of the DSM-IV convince me that there was insufficient evidence in the materials and documentation provided to support a diagnosis of Antisocial Personality Disorder for Mr. Bucklew. Specifically, a diagnosis of Antisocial Personality Disorder requires evidence of a conduct disorder with an onset prior to the age of 15, Criterion C. DSM-IV p. 650.

10) In this case, this would require evidence of conduct disorder prior to 1983 when Mr. Bucklew turned 15. Having reviewed the diagnostic criteria of Conduct Disorder of the DSM-IV, requiring a repetitive and persistent pattern of required behaviors (DSM-IV p. 90-91), the records and interviews do not support a finding that Mr. Bucklew had a conduct disorder with an onset prior to the age of 15 as required to diagnose Antisocial Personality Disorder. In fact, the records support a finding that Mr. Bucklew's criminal conduct began much later in time, which does not support the Conduct Disorder requirement of Criterion C, and thus, would not support a diagnosis of Antisocial Personality Disorder.

11) Mr. Komp provided me a June, 1996, letter written by Mr. Bucklew to Ms. Stephanie Ray that was part of the trial discovery but not provided to me. (Attachment A). The letter provides valuable insight into Mr. Bucklew's thought process following the crime and demonstrate remorse for his conduct. The remorse expressed in this letter is consistent with his expressions of remorse in my interactions with him and further confirms that Antisocial Personality Disorder is not an appropriate diagnosis for Mr. Bucklew.

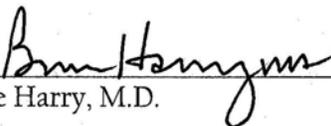
12) I have not re-evaluated Mr. Bucklew. I am simply stating that I lacked the evidence required to satisfy Criterion C of the DSM-IV when I conducted my evaluation in 1997. I was incorrect in diagnosing Antisocial Personality Disorder, and my testimony at the sentencing hearing that I had diagnosed Mr. Bucklew with Antisocial Personality Disorder is wrong.

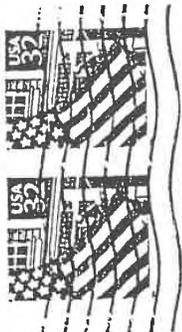
13) I was also made aware for the first time of the arguments made by the trial prosecutor, Morley Swingle, in interpreting my diagnosis of Antisocial Personality Disorder. He stated: "Ladies and gentlemen, one thing that Miss Davis said that was totally incorrect was her comment that the psychiatrist [Dr. Harry] said antisocial personality disorder is something different from sociopath. What he admitted on the stand is that a sociopath is another name for someone with an antisocial personality disorder. It's an older term, but it means the exact same thing. Their own psychiatrist diagnosed this man as a sociopath." (Trial Tr. 1160-61). I did not testify that Mr. Bucklew was a sociopath. Equating a diagnosis of Antisocial Personality Disorder with a sociopath is wrong from a diagnostic perspective.

14) With respect to another aspect of my diagnosis, I continue to agree that I was unable to confirm or rule out opioid addiction. Such a diagnosis would require Mr. Bucklew to be off the opioids in order to evaluate him to determine the impact the opioids had on his psychiatric condition. Furthermore, I am not an addiction expert, and such an expert would be more qualified to evaluate what, if any, impact such an addiction may have had on Mr. Bucklew's thought processes at the time the crime occurred.

15) I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

02.23.2018  
Date

  
Bruce Harry, M.D.



S.S. Ray  
199 E Cape Rock Dr.  
Cape Girardeau Mo 63701

Mark Kinsler  
215 N. High  
Jackson Mo. 63755

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STeph

1

Hells Baby, Happy B-Day.  
I am Taking a Big risk By writing  
you this. you could Give it to the  
prosecutor for more evidence against  
me and probly another charge. But  
I just have to Contact you some How!  
I know you Hate me ad want me  
Dead ad most likly you will get  
your wish. But my last thoughts ad  
images Before I leave this world will  
Be of you Baby. Because I am Totally  
and Hoplessly in love with you. No  
matter what you say at my trial or  
to other people or what you have  
Done to me or lied to me about. I  
cant Help But love you more. I  
am truly sorry about Mike. I really  
never wanted to hurt anybody But it  
still Happed. I really didnt want to hurt  
you either. I lost it Steph. Its just  
with losing the baby, my tumors hurting  
all the time ad getting worse. then you cheating  
on me. was just more than I could  
take. you Broke me Baby, also about  
my Escape. Look I was not at the Home  
to get you or anythg like that. I was  
cold wet Hungry. I needed food + water +  
→ over

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+ Clotis. I knew they would be there and  
 I figured there would be medication for pain.  
 Well I was covered with mud so I  
 took a bath I figured you where at  
 your new job and your ~~mom~~ was at  
 work also. Well I figured I would get some  
 cloth that when I found your boyfriends  
 pictures and letters. After I got out  
 of bath I was going to eat and then  
 leave. I was going to write you a note  
 not to worry I would not come after  
 you or anything like that. Anyway I had  
 a car pull up I looked it was odd. I  
 jump up in the closet and hide with the  
 police searched. Well they left so I  
 stayed in the closet for a long time  
 I knew I had to get out of there. So I  
 jumped down and just waited. I thought  
 every Buddy was gone. I grabbed the  
 hammer off the tray self so I could take it  
 with me for driving stakes in the ground.  
 (I had a tent) I open the door and  
 some one was walking towards me. I  
 really didn't no who because it was so  
 bright after being in closet. Well I punched  
 them in the head →

over

and ran for the Door. and there was Edd Bob. I saw then that I had hit your mom. I was really scared then I never wanted to hurt your mom well Edd started screaming like a little school girl and I pinched him on the head and he took a step ~~as~~ to me and I pinched him again. I grabbed the knife off the stove and told them to get down on the ground all I wanted was out of that house. Well Edd ran out the door leaving your mom with me. Tell ya the truth I don't know who was more scared your mom or me? But I do know Edd was scareder than both us put together. Your mom said Renty, you don't know what you are doing. If I was the crazed maniac cold blooded killer everybody says I am. Your mom and Edd would be dead. I just dropped my arms and your mom went out the back door and I was out the front. I hope this helps you understand I didn't mean to hurt your mom. If I did don't you ~~think~~ <sup>say</sup> think I would have waylaid them with the Hammer or stabbed them. or brought a Gun?   
 → over

I had many chances to do these things  
 But that is not me! and I think if  
 you recall back a little you would see  
 it is true also. I never layed a hand on you  
 baby until I caught you cheating on me!  
 and then I regretted that the second I  
 did it. Steph please just step back  
 and take a look at the big picture.  
 I am going to jail for the rest of my life  
 and probably going to die by lethal injection.  
 (Good ya say) Because I shot my fiancys  
 boy friend and he died. I lost my mind  
 and shot it out with police after kidnapping  
 you. ya no baby I really am begging to  
 believe you are a witch after all. Because  
 I cannot stop loving you. or thinking about  
 you every day! I just wish the cops  
 would have killed me and got it over with  
 I guess you think the same way. I also  
 that shot in the leg was a accident ya no!  
 If they would have killed me, at least  
 I would have died thinking you loved me  
 some where in your heart! instead I  
 must only chase memories of the past  
 to feel that warmth we once ~~shared~~ shared  
 and try and block out those cold wicked words  
 that came out of such a lovely soft mouth  
 →over

You are so beautiful. I see you on T.V. My heart races and you do what that means!! all the Guys in here saw you on the news with those shots and they started cheering for me! said they would escape to if there old lady looked as good as you!!! I am sorry I forgot you are no longer mine. It is very hard to accept. But I have no choice. But I am forever yours Steph. I have no one else with and want anybody. It seems pointless to try after everything we shared I guess you are in love with the Guy in prison that sent you a picture of his Dick! I hope party heard Steph. But to each his own. atleast you have sex out there. It kills me to think of you with some one. Well I will go. like I said Give this to prosecutor if you want. Or write me. Back would be better. Even if it says fuck off rather my dying thoughts will be of what we once had together. Thank you for that chapter in my life. I truly love you if this dont prove it nothing will.

P.S.  
 reader  
 OZZY you on  
 522 THE OTHER SIDE?  
 OR UNCHAINED melody  
 a broken  
 over man!

X	0	one
X	0	for
X	0	each
		596

Steph

Hello Baby, I am just lying here  
in my cell thinking of you as usual. Just  
wondering where I went wrong. I know being  
the Baby was hard on you. It was hard  
on me also more than you no! I am sorry  
I am or was not a very romantic guy.  
But I did try and when I did something always  
seemed to come up. Like on Valentines Day  
or I had to go to Hospital. Steph we ~~so~~  
shared so many dreams and special moments  
together. Our love was so real I just can't  
believe or won't believe you have no love  
for me what so ever. Look Baby ~~we~~ we  
were 2-weeks away from my 5.5  
settlements. 2-weeks we could have  
paid off Bill's bought House property and  
had a big beautiful wedding like we dreamed  
of. My heart aches all the time when  
I think of it. I can't get you off my mind.  
I can't believe you say I loved you!?  
I have never forced my self on you Steph.  
if anything you forced your self on me.  
But all that's over now I will pay for  
my sins and you for yours. I just miss  
you and yearn for you. Please write  
me Steph? all this happen out of my  
undying love for you and only you.

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its like you never believed I loved you  
but you had to. You are the most beautiful  
woman in the world. Even in court  
when you give me the death look  
my heart aches for you. I always reflect  
back to last ~~summer~~ summer walking down  
the L.R. Tracks at trail of tears. Just  
you me and Nature. I felt so loved and  
secure then. May be I took to much for  
Granted. please write me and tell me your  
reasons and feeling. If not for me for my  
family they dont understand either. and they  
never did anything but Good to you.  
steph. love and miss you and Girls.

11

Hopely  
Zoums

# Exhibit D

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1 could not, he was having nightmares. He could not cope with  
 2 it. The youngest one all he knows, now he thinks that if  
 3 anybody dies it's because they were killed. That's all he  
 4 says. And it's, I don't know.  
 5 MR. SWINGLE: No further questions, Your Honor.  
 6 THE COURT: Cross.  
 7 MS. DAVIS: No questions, Your Honor.  
 8 THE COURT: May this witness be excused?  
 9 MR. SWINGLE: She may, Your Honor.  
 10 MS. DAVIS: Yes.  
 11 THE COURT: Thank you so much.  
 12 MR. SWINGLE: I want to be sure that I've offered  
 13 all the other exhibits we've identified during this phase.  
 14 We're not sure that 177 and 178 were offered.  
 15 MR. WOLFRUM: They were.  
 16 THE COURT: 109 has been admitted for the purpose of  
 17 playing the videotape. 153 through 165 excluding 161 have  
 18 been admitted.  
 19 MR. SWINGLE: Your Honor, I would offer 161, that  
 20 was the photograph of the .22 shell which Brad Smith  
 21 identified.  
 22 MS. DAVIS: No objection.  
 23 THE COURT: 161 admitted.  
 24 - \* -  
 25 (State's Exhibit Number 161 was admitted into evidence.)

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1 - \* -  
 2 THE COURT: 153 through 165 admitted. 166 through  
 3 171, through 170 have been admitted.  
 4 MR. SWINGLE: I'm not offering 171. Omit that.  
 5 THE COURT: And 172 has not, has been previously  
 6 admitted. 173 through 181 have been admitted. 182 has been  
 7 admitted.  
 8 MR. SWINGLE: Your Honor, I would offer 183.  
 9 THE COURT: Any objection?  
 10 MS. DAVIS: I'm sorry, the number?  
 11 MR. SWINGLE: 183. Outside area of the Pruitt  
 12 home.  
 13 MS. DAVIS: No objection.  
 14 THE COURT: 183 admitted. 194 through 191  
 15 admitted.  
 16 MR. SWINGLE: Omit 192.  
 17 THE COURT: 204 through 210 have been admitted.  
 18 MR. SWINGLE: Omit 211 and 212.  
 19 THE COURT: 228, 229, 230, 231, 232, 233, 234, 227,  
 20 26, 20, 21, 22, 24 and 25 have been admitted.  
 21 MR. SWINGLE: State rests, Your Honor.  
 22 - \* -  
 23 STATE RESTS - PENALTY PHASE  
 24 - \* -  
 25 (Counsel approached the bench and the following

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1 proceedings were had:)  
 2 MS. DAVIS: Bob has two short witnesses he wants to  
 3 put on first. Dr. Harry is going to be my longest witness.  
 4 THE COURT: How long is he going to be?  
 5 MS. DAVIS: I expect he will be close to an hour, an  
 6 hour total I'm expecting between both the State and the  
 7 defense. Perhaps not that long. But the better part.  
 8 THE COURT: These first two witnesses take too long,  
 9 you'll have Dr. Harry tomorrow morning. I just want to warn  
 10 you. Proceed.  
 11 (The following proceedings were had in open court:)  
 12 MS. DAVIS: Judge I need to get my co-counsel. I'm  
 13 not sure where he is.  
 14 (Pause in proceedings.)  
 15 (Marla Sweede and Fred Baer, Bailiffs, were sworn by  
 16 Betty Coleman, Deputy Clerk.)  
 17 THE COURT: Call your next witness.  
 18 MS. DAVIS: Your Honor, defendant would call Dr.  
 19 Bruce Harry to the stand.  
 20 - \* -  
 21  
 22  
 23  
 24  
 25

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1 - \* -  
 2 DEFENSE EVIDENCE - PENALTY PHASE  
 3 - \* -  
 4 BRUCE HARRY,  
 5 being first duly sworn by Betty Coleman, Deputy Clerk,  
 6 testified as follows:  
 7 DIRECT EXAMINATION  
 8 By Ms. Davis:  
 9 Q. Would you state your name to the jury, please.  
 10 A. Yes, ma'am. My name is Bruce Harry, H-A-R-R-Y.  
 11 Q. And would you tell the jury what kind of doctor you  
 12 are.  
 13 A. I'm a psychiatrist.  
 14 Q. Are you also an MD?  
 15 A. Yes.  
 16 Q. All right. And could you tell the jury your  
 17 education, your background?  
 18 A. Certainly. I graduated from the University of  
 19 Missouri-Columbia in 1972. And then finished the University  
 20 of Missouri-Columbia School of Medicine in 1977. And then had  
 21 my training in psychiatry after that and finished that in  
 22 1981. That's the extent of my formal training.  
 23 Q. All right. And how are you currently employed,  
 24 Dr. Harry?  
 25 A. Well, I teach at University of Missouri-Columbia

1 School of Medicine as an associate professor of psychiatry.  
 2 And as part of that I also do work at the Fulton State  
 3 Hospital in the maximum security unit because of my interests  
 4 in working with violent mentally disordered people. And so  
 5 that's the major part of my employ.  
 6 Q. All right. And do you belong to any professional  
 7 organizations or associations?  
 8 A. Yes, I do.  
 9 Q. And what are those, please?  
 10 A. The American Psychiatric Association which is the  
 11 major professional organization for organized psychiatry in  
 12 the United States. And also the American Academy of  
 13 Psychiatry and the Law which is the major organization for  
 14 forensic psychiatry. Those are the matters that deal with,  
 15 you know, mental disorders, mental health and the law. And  
 16 also the American Academy of Forensic Scientists, another such  
 17 organization only this one for a broader types of membership.  
 18 And it seems like there might be others. Those are the main  
 19 ones.  
 20 Q. Okay. And have you had any articles or journals or  
 21 publications?  
 22 A. Yes, I have.  
 23 Q. And could you give the jury an idea of what those  
 24 would be?  
 25 A. Certainly. I've had about 25, 24, 25 I believe over

1 Q. All right.  
 2 Your Honor, may it please the court. I would tender  
 3 Dr. Harry as an expert witness in this case.  
 4 MR. SWINGLE: No objection, Your Honor.  
 5 THE COURT: So noted.  
 6 Q. Dr. Harry, how did you come to be involved in  
 7 Russell's case?  
 8 A. Well, I was contacted by Mr. Wolfrum in this  
 9 matter. And he asked if I would consider reviewing the  
 10 materials in the case and interviewing Mr. Bucklew and doing  
 11 whatever other evaluation I felt necessary to determine  
 12 whether he had the capacity to stand trial, what his mental  
 13 state was at the time of the offense and some related matters  
 14 to that. And I agreed to do it after looking at some of the  
 15 preliminary materials and then proceeded with the evaluation.  
 16 Q. Are you being compensated for your work in this  
 17 case?  
 18 A. Yes.  
 19 Q. Let me start here. So far I'd like to talk to you  
 20 and ask you to please explain to the jury about Russell's  
 21 physical condition the jury has heard about called cavernous  
 22 hemangioma. If you could give the jury an idea of what  
 23 exactly cavernous hemangioma is.  
 24 A. Well, a hemangioma is a large distorted collection  
 25 of blood vessels. And they can take any number of sizes and

1 the years. A collection of chapters in books, a number of  
 2 papers published in different journals. All of them have to  
 3 do with except for maybe one or two have had to do with the  
 4 issues revolving around mental disorders and crime and  
 5 violence and the like.  
 6 Q. All right. And you talked a little bit about  
 7 working at Fulton State Hospital. Your area being in mental  
 8 disorders and violence?  
 9 A. Yes.  
 10 Q. Okay. And what do you do in relation to that  
 11 specialty?  
 12 A. I work in the maximum security unit there. And  
 13 while there, do evaluations of persons who are referred by the  
 14 courts to determine whether they have, they presently have the  
 15 capacity to stand trial or the mental state at the time of the  
 16 offense. And also I'm involved in the diagnosis and  
 17 assessment and treatment of mentally disordered prisoners and  
 18 others who come in from various correctional facilities  
 19 throughout the state.  
 20 Q. Do you do this kind of work on a private basis as  
 21 well?  
 22 A. Yes.  
 23 Q. And is that the capacity in which you worked in this  
 24 case?  
 25 A. Yes.

1 shapes and can occur in many different places of the body.  
 2 Cavernous hemangioma is by the name cavernous is very large  
 3 like a cavern. It occupies a very large space. In  
 4 Mr. Bucklew's case it was noted first when he was a small  
 5 child, I think maybe on a routine examination or something by  
 6 one of his pediatricians. And it's continued to grow  
 7 throughout his life and now it occupies a better part of the  
 8 right side of his face and portion of his head. It occupies,  
 9 it basically grows, it's like a cancer. It's not malignant in  
 10 the sense of some other cancers, but it is still like a cancer  
 11 of sort. It grows and infiltrates into things and can cause a  
 12 number of problems. But it occupies basically the right side  
 13 of his face, the right part of his nose into the wall of the  
 14 nose, the nasal septum into the roof of his mouth, both the  
 15 hard and soft palates. The thing that hangs down at the back  
 16 of your mouth, the uvula, and also other portions of the face  
 17 and some deep structures as well. I don't think it goes into  
 18 the bone though or has invaded the brain or anything. But  
 19 nonetheless, it occupies a fairly sizable portion of his face  
 20 and head.  
 21 Q. What kind of symptoms in working on this case have  
 22 you learned Mr. Bucklew to have as a result of this  
 23 hemangioma?  
 24 A. He's had complaints of swelling and bleeding and  
 25 pain are the primary ones. Also the swelling can take various

1 forms. On the outside, you can't see it swelling on the  
2 outside but on the inside it can swell and swell, close his  
3 nose and make it difficult to breathe. It can swell closed  
4 different aspects of his inner or middle ear I should say so  
5 that he gets congestion in the ear. It can also make it  
6 difficult for him to swallow because the swelling can occur in  
7 the back of his mouth, way in the back of his throat, for  
8 example where other portions of the hemangioma reside. Those  
9 are the major symptoms that he's talked about. The pain, the  
10 swelling, the difficulties with swallowing and chewing and  
11 eating, breathing and ear stuffiness, that sort of thing.

12 Q. Is it fair to characterize these symptoms that  
13 you've just discussed as sometimes being more prevalent, more  
14 bothersome and other days not as prevalent, not as bothersome?

15 A. Yes, that's fair. It will change with time, with  
16 humidity, air pressure as well as for other reasons that are  
17 unknown.

18 Q. Now, the jury has heard a lot about Russell having  
19 pain as a result of this and then as a result of his pain he  
20 would seek medication to help ease the pain or control the  
21 pain. Are you familiar with Russell's medical records  
22 concerning his pain treatments?

23 A. Yes.

24 Q. Okay. Could you give the jury an idea? And I would  
25 just like to confine it, I would say from 1995 through the

1 of more potent medications as time passed. So even the  
2 doctors who were seeing him in the emergency room were  
3 impressed enough to be giving him narcotics. Almost every  
4 occasion I think but maybe once or twice he didn't get a pain  
5 medicine.

6 Q. Now, in addition to his visits to emergency rooms,  
7 Russell went to a number of doctors for consultation for  
8 treatment on this hemangioma; is that correct?

9 A. Yes, he did.

10 Q. Could you give the jury an idea of those programs or  
11 those doctors or those clinics where he went seeking some kind  
12 of resolution or long-term treatment for this matter?

13 A. Yes. He went to the University of Missouri  
14 Hospitals first in April of 1991 seeking help for this. Then  
15 at that point continued on with trying to manage this  
16 conservatively because it was so massive it wasn't thought to  
17 be amenable to resection or in other words they couldn't  
18 remove it surgically, lose too much blood. Massive  
19 disfigurement and the risk of death was quite real from that  
20 time.

21 Q. And to your knowledge had he been advised of the  
22 risks involved with that surgery?

23 A. I believe so. That's what the records state to my  
24 knowledge.

25 Q. All right.

1 present time.

2 A. All right. Well, if I could just refer to the  
3 report I prepared for this.

4 Beginning in 1995 and actually this, he had been  
5 having complaints of pain before that time but beginning in  
6 1995 just in the first half of 1995 he went to the emergency  
7 rooms seeking pain medications on two occasions. Once on the  
8 7th of March and again on the 13th of April. He did not go  
9 back to the emergency room that we could find records for.  
10 And there's no indication that he did until the next time on  
11 the 20th of July. But then beginning on the 20th of July  
12 until the end of the year he had numerous visits and I'd have  
13 to count them all up. It takes, oh, about, um --

14 Q. You don't have to count them all up, doctor.

15 A. It's a large number. It's in excess of 25 or 30  
16 visits.

17 Q. That would be in the latter half of '95?

18 A. Just the latter half of 1995 alone.

19 Q. Just looking at his records and overall medical  
20 history, is it your opinion that he was experiencing or  
21 complaining of more frequent and more severe bouts of pain?

22 A. Yes, at that time that's why he was going to the  
23 emergency room is for more and more pain. He was having more  
24 complaints of pain, more frequent visits to the emergency room  
25 and they were giving him larger and progressively larger doses

1 A. Then he went back to the University of Missouri  
2 again in 1992 and then also in the latter part of 1995 was  
3 referred to neurologist, Dr. David Lee in Cape Girardeau.  
4 That was for a social security disability claim, but  
5 nonetheless it still was related to the pain, the neurological  
6 impact of this hemangioma that he had. He also began seeing  
7 in September of 1995 or, I'm sorry, I take that back, yes, in  
8 December or September of 1995 excuse me, a Dr. Janet Seabaugh  
9 also of Cape Girardeau. Dr. Seabaugh is an ear, nose and  
10 throat specialist in that area. And she also had begun seeing  
11 him. He at that time said that he was having the severe pain  
12 and sometimes needed narcotics for this as the records had  
13 demonstrated and told her essentially the same history that  
14 he's told me and has been told in the records. He also was  
15 referred by Dr. Seabaugh to see a Dr. Moore who I believe saw  
16 him around January the 10th of 1996. Dr. Moore runs a pain  
17 clinic and also in Cape Girardeau. Dr. Moore was sufficiently  
18 impressed by the quality of the pain, started him on treatment  
19 with Methadone which is something, it's a very strong  
20 synthetic narcotic that's commonly used to withdraw people  
21 from heroin addiction, morphine addiction but also can be used  
22 in increasing doses to control very severe pain such as what  
23 one sees with cancer and terminal diseases of the sort. So he  
24 begun him on treatment with that at that time.

25 Those are essentially the other sources that he saw

1 for this. There may have been others. I think he was  
2 referred to a source in, I mentioned the one in Columbia, I'm  
3 sorry.

4 Q. Yes.

5 A. It was in Columbia.

6 Q. In addition to the pain that Russell was reporting  
7 to the various doctors, after looking through his medical  
8 records, could you tell, had you formed an opinion as to what  
9 Russell had been advised regarding his life span as a result  
10 of this hemangioma?

11 A. Yes. The records clearly said, several of the  
12 doctors had told him that this was not operable, it could not  
13 be removed by surgery because of again the risk of massive  
14 bleeding, massive disfigurement and death would be quite real  
15 in an operation like that.

16 Q. Should an operation occur?

17 A. Should an operation occur. There was also a mention  
18 in one record about or perhaps even more but at least one that  
19 I can recall that this would, would likely continue to grow  
20 until it invaded his brain and killed him.

21 Q. At least one doctor has told him that?

22 A. Yes. Yes.

23 Q. Now I just wanted to make perfectly clear for the  
24 jury, there's different opinions on whether this is a fatal or  
25 terminal condition?

1 A. Yeah.

2 Q. Now, I'd like to talk to you about you mentioned  
3 already that he was on some fairly, for lack of a better word,  
4 heavy narcotics as a way to manage or control his pain; is  
5 that correct?

6 A. Yes.

7 Q. All right. And in looking through his records, you  
8 came up with some charts?

9 A. Yes.

10 Q. To help give the jury an idea in understanding  
11 emergency room visits and the types of medication he was on?

12 A. Yes.

13 Q. All right. Let me have these marked.

14 You've already mentioned Methadone, said that's  
15 something that they used to help heroin addicts withdraw?

16 A. Yep.

17 Q. Is that right?

18 A. Yes.

19 Q. Now I want to show you what's been marked as  
20 Defendant's Exhibit 5 and let me put it up here if I could.

21 A. Thank you.

22 Q. If you could just show the jury --

23 A. Sure.

24 Q. -- or explain to the jury what this is?

25 A. Do the best I can.

1 A. Yes.

2 Q. From the various doctors?

3 A. By itself, yes. But there was I think uniform  
4 agreement that any type of surgery would just not be tolerated  
5 and would be practically fatal or very disfiguring.

6 Q. Well, some doctors weren't calling the condition  
7 terminal; they were calling it chronic?

8 A. Oh, yes, quite chronic and severe. This is a  
9 massive cavernous hemangioma.

10 Q. At least on one or two occasions Russell had been  
11 given to understand not only was it chronic, it was terminal,  
12 something he would die from?

13 A. I believe so, yes. There was to the point, if I may  
14 interrupt a second. That they were also in discussing with  
15 him doing some experimental treatment such as using  
16 alpha interferon which is, I admit I don't know much about the  
17 use of alpha interferon but it's an experimental treatment.  
18 Such as embolism shooting tiny plastic or balls into the  
19 vessels that feed into it in hopes of collapsing it to some  
20 extent. Again these things were thought to be quite risky or  
21 otherwise not done.

22 Q. All of these things had been, all this information  
23 had been conveyed to Russell Bucklew?

24 A. Yep. That's what the records say.

25 Q. Okay.

1 THE COURT: Counsel, I don't think the people on the  
2 far end can see.

3 MS. DAVIS: I'm sorry.

4 A. Okay. There you go. This is a chart that I  
5 prepared by entering in all the numbers for all the emergency  
6 room visits and all the doses of each of these different  
7 medicines that he received. Beginning in 1991 I believe.

8 Q. Yep.

9 A. Or 1990. Yes. And it contains, I apologize for the  
10 difficulties with some of the marks here, but it --

11 THE COURT: Dr. Harry, just a minute.

12 May we agree to let the three alternate jurors sit  
13 up on the back row where they can see?

14 MS. DAVIS: That would be fine.

15 THE COURT: I don't think they can see from where  
16 they are. If you all would take the seats behind Ms. Edwards,  
17 those first three seats there, right there. Right there.  
18 That's fine.

19 MS. DAVIS: Judge, if we could, I could hold this,  
20 ask that Dr. Harry be allowed to step down.

21 A. This is a display of all the different narcotic  
22 medications that Mr. Bucklew was getting only through his  
23 emergency room visits. And it begins with various kinds.

24 Codeine for example which is a common every type of narcotic  
25 that's used say after you have a broken bone or pulled tooth

1 or very severe type of headache. Oxycodone is synthetic  
 2 variation of codeine. I don't believe it occurs in nature but  
 3 it's some tinkering with the codeine molecule to make it more  
 4 potent. Then Meperidine is Demerol that is a medicine that's  
 5 used following major surgery for example to relieve the pain  
 6 of major surgery where someone is cut into or again has had a  
 7 major operation of some kind. Propoxyphene I believe is  
 8 Darvon. That's also something that's used for severe pain  
 9 such as headaches, broken bones and the like, pulled teeth and  
 10 so forth. Nalbuphine, Nalbuphine, excuse me, is also called  
 11 Nubain, and that is a medicine that's used for treatment of  
 12 in-stage cancer pain if someone has widespread cancer that's  
 13 into the bone causing a great deal of pain, it's commonly used  
 14 for that. It's a highly potent medication that only can be  
 15 given by injection. And it's typically only given again for  
 16 severe cancer pain. Pentazocine is Talwin. That's also a  
 17 severe, for moderate to severe pain and it's also a synthetic  
 18 narcotic.

19 And what I've done on this graph is show, I'll do  
 20 the best I can to point this out, what I've done on this graph  
 21 if I may point to it is just plot out the number of milligrams  
 22 of each different dose that he was getting over time beginning  
 23 in roughly November of '90 all the way up until May 15 of 1996  
 24 which was you know after the date of this offense. One can  
 25 clearly see that there's not as much here in the early years

1 themselves are not powerful enough or not giving enough relief  
 2 then one gives an additional medicine to augment the power of  
 3 it. There's belief that it not only helps relax the person  
 4 and quiet them down, make them more able to tolerate the pain  
 5 but also helps potentiate or augment or adds on top of the  
 6 effect of the narcotic. This is a common practice in again in  
 7 moderate to severe pain, in severe to extremely severe pain as  
 8 we're seeing. These include different ones that were given  
 9 during this time. I did the same basic procedure. I have  
 10 plotted it according to when they were given and the doses  
 11 they were given. And one can again see that here in the very  
 12 beginning, 1990, nothing was given. By the time we got to  
 13 1991 there has only been one dose of 25 milligrams. Then by  
 14 the time we got to 1994 we were starting to get higher doses  
 15 like 50 milligrams at a time then down to 25 then finally in  
 16 1990, late 1995 and into 1996 we were almost consistently  
 17 getting doses of 50 milligrams of each of these different  
 18 agents. One that he was getting was Hydroxyzine which I  
 19 believe is Vistaril. Another one is Promethazine which is  
 20 another name for Phenergan. Then one called Prochlorperazine  
 21 which is another name for Compazine. And then finally  
 22 Amitriptyline which is an anti-depressant medicine which is  
 23 sometimes used also in the management of pain and chronic  
 24 pain. So this would be a fairly common practice to be adding  
 25 these medicines on top of narcotics especially when they're

1 because, but there's a very dramatic increase both in terms of  
 2 height, in terms of the higher doses of the medicines but also  
 3 more and more doses of them. They're all bunching together  
 4 right around this ending part of the graph here. And you can  
 5 see when you look at this graph that Demerol for example is a  
 6 small triangle. Codeine is a small diamond shape. Oxycodone  
 7 is a small square. A cross is Propoxyphene. A double cross  
 8 is Nalbuphine. And then I believe a small circle is  
 9 Pentazocine. But in effect you can see not only was there  
 10 more and more medicine but also increasing doses over time so  
 11 that by the time that the incident, that this crime occurred  
 12 Mr. Bucklew had regularly been getting very large doses of  
 13 Demerol and other medications such as Nubain and on a fairly  
 14 regular basis, sometimes several times a week. One or more  
 15 instances of several times a day for the time.

16 Q. While you're down here, doctor, let me show you  
 17 what's been marked Defendant's Exhibit 6 and ask if you  
 18 recognize that?

19 A. Yes.

20 Q. What is this, please?

21 A. This is a graph of the medicines that the doctors in  
 22 the emergency room used to give Mr. Bucklew that augment the  
 23 potency of the narcotics. This is done commonly in again  
 24 surgery and in orthopedic surgery and other types of  
 25 medicine. When the medicines by, the pain relieves by

1 not working. And the doctors didn't think they were working  
 2 so they started adding them on top.

3 Q. Okay. Thank you. Have your seat back.

4 Is it true when you were looking through Russell's  
 5 records that various doctors from say this period of 1990  
 6 through 1996 when the shooting occurred had some concerns  
 7 about whether or not Russell was truly in need of this type of  
 8 narcotic medication or whether he was drug-seeking?

9 A. Yes. Yeah, it was mentioned a few times in there.

10 Q. All right. And did any of the doctors ultimately  
 11 draw any conclusions or did they continue to give the  
 12 medicine?

13 A. Then continued to give him the medicine. He  
 14 continued to get the doses in increasing frequencies,  
 15 increasing amounts. There was questions being raised but at  
 16 the same time they were still giving it to him so they were  
 17 impressed enough to think that he was having real pain to keep  
 18 doing that.

19 Q. Okay. And you talked to Russell in person?

20 A. Oh, yes.

21 Q. All right. And could you give the jury an idea of  
 22 how much time you spent with Russell in working on this case?

23 A. It was about three hours, three and a half hours.

24 Q. All at once or over a period of time?

25 A. No. Spread out over a period of time.

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1 Q. As well as reviewing his records?  
 2 A. As well as spending many hours poring over the  
 3 records.  
 4 Q. All right. Did Russell talk to you about his  
 5 hemangioma?  
 6 A. Yes.  
 7 Q. All right. And did he also talk to you about when  
 8 he was, how -- Let me back up here a minute. Can you tell  
 9 the jury how old Russell is?  
 10 A. I'd have to look in here. I'm embarrassed to say.  
 11 Excuse me just a minute.  
 12 This is embarrassing. I should know this. I'm  
 13 sorry. He is 29.  
 14 Q. 29?  
 15 A. Or approaching 29. He's 28, missing, and some  
 16 months.  
 17 Q. The jury has already heard about Russell's prior  
 18 criminal convictions, but what I'd like to ask you about is  
 19 the reporting that Russell may or may not, may or may not have  
 20 been abusing alcohol or street drugs in his younger years.  
 21 Did you see reports of that?  
 22 A. He I think had made mention of that or there was  
 23 some mention of it in Florida in the Department of Corrections  
 24 there I believe or possibly, I'm sorry, maybe in the Missouri  
 25 Department of Corrections when he was in the Missouri

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1 Department of Corrections.  
 2 Q. My question would be this.  
 3 A. Yes.  
 4 Q. The increased use of narcotic pain medication  
 5 coupled with some of the doctors' concerns that he may be  
 6 seeking drugs inappropriately, did you form any opinion as to  
 7 whether or not Russell is a drug addict or drug abuser or is  
 8 there some sort of like fine line issue given his condition?  
 9 A. Unfortunately there's a fine line. I couldn't  
 10 decide. I tried to, I mean I used the established diagnostic  
 11 criteria for this. And my honest opinion, all these doctors  
 12 were continuing to give him this medicine. They were  
 13 convinced enough that it was real to continue to give him the  
 14 medicine. Some of the same doctors were seeing him time and  
 15 time again in various facilities. And I think the pain was  
 16 sufficiently impressive at that time that they were more  
 17 impressed by the pain than the possibility of him being  
 18 drug-seeking and abusing it.  
 19 Q. Okay. Now, I'd like to move out of the category of  
 20 the hemangioma for just a bit. And I'd like to talk to you  
 21 about other things, other records, other documents, other  
 22 information you looked at in working on this case. One of  
 23 which was a report from a neuropsychologist named Dr. Gelbort;  
 24 is that correct?  
 25 A. Yes.

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1 Q. Can you tell the jury what a neuropsychologist is?  
 2 A. Yes, a psychologist is someone who goes to graduate  
 3 school, they're not a physician but they study various aspects  
 4 of human behavior and mental functioning. And a  
 5 neuropsychologist is someone who specializes in the psychology  
 6 and the measurement of behavior as it relates to the brain and  
 7 the nervous system. And they're specialists who have given us  
 8 examples of some testing such as the intelligence test is a  
 9 neuropsychological test. Another better example perhaps might  
 10 be something called the Halstead-Reitan Neuropsychological  
 11 Battery. There are any number of them that are available, but  
 12 they're basically designed to measure the way that the central  
 13 nervous system and especially the brain works with integrating  
 14 things and coordinating activities between its various parts  
 15 and then coming up with solutions to problems and actions and  
 16 the like.  
 17 Q. How a person's brain comes up with solutions to  
 18 problems?  
 19 A. Yes.  
 20 Q. All right. And have you worked in conjunction with  
 21 or along with neuropsychologists in other cases?  
 22 A. Oh, sure, yes.  
 23 Q. So you have some experience in working with  
 24 neuropsychologists?  
 25 A. Yes.

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1 Q. And the type of information that they gather?  
 2 A. Yes.  
 3 Q. All right. And did you do so in this case?  
 4 A. Yes.  
 5 Q. All right. And did you rely upon the findings of  
 6 the tests and the scores Dr. Gelbort obtained in his work with  
 7 Russell Bucklew?  
 8 A. Yes.  
 9 Q. And you used those in coming to your opinions in  
 10 this matter?  
 11 A. Yes.  
 12 Q. Okay. Could you tell the jury what, if anything,  
 13 you learned about the tests, the neuropsychological testing  
 14 that had been conducted?  
 15 A. I can, as an example. Can I just relate what Dr.  
 16 Gelbort had in the report?  
 17 Q. Is it something you relied on in concluding your  
 18 report?  
 19 A. Yes.  
 20 May I?  
 21 Q. Yes.  
 22 A. He talked about Mr. Bucklew being alert, oriented to  
 23 person, place, time and situation. Had a normal range of mood  
 24 and was mildly sad under the circumstances. He had some  
 25 problems with mental control. He specifically mentioned that

1 while he was able to do more straight-forward tasks, his  
 2 mental control, that is the ability to control his mental  
 3 activity broke down as the complexity of the tasks increased.  
 4 In addition, he noted that his information processing speed,  
 5 that is the ability in the speed with which he can take in new  
 6 information coming at him from a variety of sources and put it  
 7 together and make some sense out of it also declined  
 8 significantly with more complex tasks. He showed some mild  
 9 disinhibition and impulsivity. That is a tendency to act  
 10 before thinking, act suddenly and without thought or warning.  
 11 And trouble managing multiple cognitive tasks at one time.  
 12 What that means is the ability to solve several problems  
 13 alongside one another. For example, we do this commonly when  
 14 we go to the grocery store. While we need eggs, milk, cheese,  
 15 bread, so on. You line these things up in your mind. You go  
 16 down the aisles and solve these problems and then you leave.  
 17 But his problems would be such that he would have difficulty  
 18 doing some things like that. Also he had an I.Q. Test that  
 19 showed a verbal intelligence of 88, a performance intelligence  
 20 of 85 and a full scale intelligence of 88 on a standard I.Q.  
 21 Test. And that is in the low normal range. Dr. Gelbort  
 22 concluded with the following impressions: He said he had an  
 23 I.Q. in the low average range with some variability in its  
 24 sub-tests. That's a common feature in someone who has  
 25 attention deficit disorder for example.

1 confronted with rapidly evolving complex types of activities,  
 2 cognitive activity he's expected to respond at essentially  
 3 chance levels. That is as likely as not to do something.  
 4 Almost at random in effect.  
 5 Q. Would that apply in the situation that Russell found  
 6 himself on March 21st when he shot Mike Sanders that night?  
 7 A. Very well could, yes. Yes.  
 8 Q. Did you talk to Russell about that?  
 9 A. Yes.  
 10 Q. And did he tell you things that supported that?  
 11 A. Yes. It was, if I may, such things as hearing a  
 12 song going, replaying itself over and over in his head.  
 13 Feeling bewildered by what was happening around him. Not  
 14 knowing what to make of the situation.  
 15 Q. Okay. And yet he was continuing to act?  
 16 A. Yes.  
 17 Q. And is it fair, I'm trying to put it into more  
 18 laymen's terms. Is it fair to say he's having problems  
 19 controlling his impulses?  
 20 A. Yes.  
 21 Q. All right. Now we talked kind of about two  
 22 different subjects here. The neurological finding that you've  
 23 used and this whole other issue of hemangioma and the use of  
 24 narcotic pain medication and his belief that he was going to  
 25 die from this. Can you tell, in your own words, can you

1 Q. Did Russell have attention deficit disorder?  
 2 A. I believe that's what Dr. Gelbort found, yes. There  
 3 was also, he had some problems paying attention to things in  
 4 structured tasks although it was better when it was highly  
 5 structured when things became more functional or real life as  
 6 Dr. Gelbort said. His abilities to pay attention declined.  
 7 That is it was more and more difficult for him to focus on  
 8 specifics or to sort out what is relevant from irrelevant in a  
 9 situation.  
 10 Q. Are these matters that you're mentioning to the  
 11 jury, are they lack of will power on Russell's part or caused  
 12 by some actual brain deflection?  
 13 A. To the extent we know, it's brain deficits, it's not  
 14 lack of desire or not wanting to. It's a person can't do it.  
 15 Q. All right. If I could have just a moment to look at  
 16 my notes.  
 17 Were there any other findings from Dr. Gelbort's  
 18 testing that relied on this?  
 19 A. He also just talked about for example that his, most  
 20 affected in all of these abilities were his abilities to  
 21 encode more complex information into memory quickly as well as  
 22 to reason and make judgments and solve problems about these.  
 23 In other words, to take in new information, to reason it  
 24 through and to make a reasoned conclusion. That was also  
 25 something that Dr. Gelbort's found. And he noted that when

1 explain to the jury, you know, how these two connect? What  
 2 was significant, I'm sorry, what was significant about these  
 3 two aspects or these like, you know, the neurological  
 4 deficits, the cavernous hemangioma and the use of narcotics  
 5 which were escalating close to the time of this case, close to  
 6 the time of this crime?  
 7 A. If I, I'll do my best to explain this.  
 8 Q. And I'll do my best to clarify.  
 9 A. At that time not only did he have these longstanding  
 10 problems with difficulties paying attention under certain  
 11 conditions and solving problems in a reasonable manner and  
 12 paying attention and the like, but also he was under  
 13 increasing stress. One he said, and I confirmed this when  
 14 talking with his parents and his sister-in-law, that he  
 15 learned that this was a terminal condition. He believed he  
 16 was going to die from a hemangioma. So he felt a great deal  
 17 of stress and anxiety and apprehension and agitation about  
 18 this. Secondly, the relationship between he and his  
 19 girlfriend had deteriorated and ultimately broke off after she  
 20 lost a child.  
 21 Q. Is it Stephanie Ray?  
 22 A. Stephanie, yes.  
 23 And then another matter that occurred was the  
 24 increase in pain which further confirmed his suspicion that he  
 25 was going to die from this hemangioma. It became more and

1 more scattered. He was reaching out from one emergency room  
 2 to another. Hopping all over the place trying to get some  
 3 help. Went again to several different doctors. They told  
 4 him, basically threw up their hands, said there was nothing  
 5 they could do. You know, maybe we could try some experimental  
 6 treatments but we're not going to guarantee anything.  
 7 Traditional treatments will be unsuccessful and probably kill  
 8 you. I mean, that's specially what he believed at that time.  
 9 All of these things combined together. He also was beginning  
 10 to experience some significant symptoms of depression. Again  
 11 this was confirmed by both what he told me as well as what his  
 12 family, his parents and sister-in-law told me. That he was  
 13 having problems with low mood, lack of motivation,  
 14 difficulties with energy, pessimism and the like. And all  
 15 these things basically build up very rapidly beginning after  
 16 the first of 1996 and culminating in the present shooting and  
 17 the sequence of events that followed.

18 Q. I want to just stop here and ask you a question.

19 Some doctors over the past few years have told Russell it's  
 20 terminal, the hemangiomas, others have told him it's chronic.  
 21 Do you have an opinion either way as to that?

22 A. No, I don't myself.

23 Q. All right.

24 A. It's clearly at least chronic, if I may add. I mean  
 25 he's had it for almost all of his life and he's going to have

1 it for the rest of his life and it will probably continue as  
 2 it has. It became dramatically worse beginning the last  
 3 several years prior to this occasion. And it's continued.

4 Q. All right. And whether it's chronic or whether it's  
 5 terminal, do you have an opinion as to what Russell believed  
 6 it to be, this condition?

7 A. Yes.

8 Q. And what was that?

9 A. Well, he himself told me he thought it was  
 10 terminal. He told me that he told his parents, and his  
 11 parents confirmed that in conversation I had with them. I  
 12 honestly don't remember what he told his sister-in-law or  
 13 whether I asked her that explicitly. But I think he believed  
 14 it, yes. He was acting as though he was going to die from it.

15 Q. His belief in that was genuine?

16 A. He believed his life was at an end or soon to be at  
 17 an end. And then on top of all of this when he was getting  
 18 the narcotic pain medicine, narcotics initially create a  
 19 tremendous sense of well-being and euphoria. It's an  
 20 artificial sense. Not only does it relieve the pain, but it  
 21 also makes you feel better for a while but that only lasts for  
 22 so long. Once it wore off, the pain returns with a vengeance  
 23 sometimes and could even have withdraw symptoms such as  
 24 increased irritability, increased agitation, increased  
 25 distractibility in the final days before the shooting.

1 Q. Just give me a minute here to get my notes  
 2 organized, please.

3 Dr. Harry, in addition to just reviewing all of this  
 4 information for purposes of testifying here before this jury,  
 5 were you also asked the question of whether or not Russell is  
 6 mentally competent to even stand trial?

7 A. Yes.

8 Q. And your finding was?

9 A. That he was, yes. Or is.

10 Q. And you're not saying he's insane?

11 A. No.

12 Q. And you're not saying that this shooting of Mike  
 13 Sanders was temporary insanity or something?

14 A. No. No.

15 Q. Over which he was completely helpless?

16 A. No.

17 Q. But is it fair to say that he was acting or  
 18 operating on a lower impulse control?

19 A. Yes. He has a long history of having this problem  
 20 with lower impulse control. Both historically but also in the  
 21 neuropsychological testing. And that's clear. But all these  
 22 other factors, the increased stress, again the loss of the  
 23 baby, the loss of the relationship, the imminent, the belief  
 24 in his imminent loss of life of his own, difficulties just  
 25 coping day-to-day, the increasing pain, that further worsened

1 his ability to deal with his impulses and he became more  
 2 impulsive. I mean the sister-in-law talked about this. That  
 3 he was more irritable and impulsive. And then adding on top  
 4 of that the use of the narcotics. And especially not so much  
 5 while he was taking them but when he wasn't taking them. That  
 6 was even, that's even worse because then he would have a  
 7 withdrawal symptom or withdrawal syndrome from it in effect.  
 8 Increasing the agitation, the irritability, distractibility  
 9 and the impulsivity that goes along with it.

10 Q. And can you give the jury an idea, he had several  
 11 narcotic uses of narcotics and narcotic pain killing  
 12 injections in all throughout the month of March of 1996?

13 A. Oh, yes. Yes.

14 Q. Is that fair to say?

15 A. The last one right before this I believe was the  
 16 18th or 19th of March that I have. So it was considerable  
 17 throughout the month of March.

18 Q. Okay. And then you say in addition to I guess the  
 19 higher the euphoria he's getting from the narcotic when he's  
 20 getting them. When he's not getting them then he's  
 21 experiencing withdrawal?

22 A. Yes. In addition to the pain, the pain would come  
 23 back, sometimes even comes back with a vengeance. That's the  
 24 nature of pain when you go off a narcotic. Comes back and  
 25 sometimes is worse. But in addition a withdrawal syndrome

1 especially from the increasing amounts that he had been  
2 having, the escalation of it, it was increasing so rapidly  
3 over the last several months and weeks that then it abruptly  
4 stopped on the 18th and that was the last dose. And he would  
5 be expected to have been much more irritable and impulsive and  
6 just frantic given everything that was going on in his life at  
7 the time.

8 Q. Okay. Now, you made some formal diagnoses?

9 A. Yes.

10 Q. In this matter?

11 A. Yes.

12 Q. Could you turn to those, please?

13 A. Sure.

14 Q. Now.

15 A. Yes, ma'am.

16 Q. In looking at your diagnosis, I notice that you have  
17 axis one diagnosis, axis two and axis three.

18 A. Yes, ma'am.

19 Q. Could you just before you go into them, could you  
20 explain to the jury why there are three different types of  
21 diagnoses?

22 A. Sure. In psychiatry and psychology, we found that  
23 it's very helpful for us to split different kinds of  
24 conditions apart from one another. Start with axis three  
25 which is the one on the very bottom. Those are physical

1 neuropsychological deficits, antisocial personality disorder?

2 A. No.

3 Q. Okay. How does a person get that?

4 A. We don't know. There's no way to know.

5 Q. Is there a cure for it?

6 A. No.

7 Q. All right. I think people often assume that all  
8 criminals have antisocial personality disorder. Have you  
9 experienced that in your work?

10 A. No, that's not, it's not true. A sizable portion of  
11 criminals do not have antisocial personality disorder.

12 Q. And there are people who do not engage in criminal  
13 behavior and can they be antisocial personality?

14 A. Yes. That's not, they're not, one does not have to  
15 have the other, they're not, I mean they can be mutually  
16 exclusive to some extent but they mostly overlap. I mean  
17 there's some criminals have antisocial personality disorder  
18 and some with antisocial personality disorder don't have  
19 criminal behavior too.

20 Q. All right. And then let's go on. You made axis one  
21 diagnosis. Could you tell the jury what those are?

22 A. Those are the things that are more traditionally  
23 regarded to be mental illnesses. Typical of this would  
24 include things like depression, severe anxiety, schizophrenia,  
25 manic depressive, certain forms of brain damage, severe brain

1 conditions like broken bones, massive cavernous hemangiomas,  
2 heart attacks, diabetes or whatever. That's axis three. Axis  
3 two is what we call personality and personality disorders and  
4 some other conditions, but essentially it's personality and  
5 personality disorders. Those are long-term characteristic  
6 patterns of behavior that someone will have that is fairly  
7 predictable from time to time and over a length of time. They  
8 usually begin in adolescence and extend into adulthood for  
9 example.

10 Q. And you made a diagnosis on personality disorder in  
11 this case?

12 A. Yes, I did.

13 Q. Could you tell the jury what that is?

14 A. This is antisocial personality disorder.

15 Q. Could you give the jury an idea of what that means?

16 A. The quick summary is that it is basically a pattern  
17 of getting into conflicts with people, with institutions, with  
18 authority, beginning again in adolescence, sometimes it even  
19 begins in childhood with some people. But typically it's  
20 usually around the start of adolescence and extending into  
21 adult life. It can often be associated with difficulties at  
22 work, at home, in school and ultimately leading someone to  
23 difficulties with the criminal justice system, getting them  
24 arrested for a variety of things.

25 Q. Is that part of the neurological or the

1 injuries. And also we include under this alcohol and drug  
2 abuse or alcohol and drug addiction depending on the extent of  
3 them. And then in these instances Mr. Bucklew had this  
4 depression that I talked about. As well as I said rule out  
5 opioid induced disorder. Rule out opioid dependence which is  
6 basically psychiatry talk for whether or not he was addicted  
7 to opiates, the medication he was getting for pain. I could  
8 not tell. I don't think that there's any answer to that.

9 Q. All right. And then you mentioned alcohol abuse.  
10 What's that?

11 A. Yes. The alcohol abuse by history. That was in the  
12 past he had been involved in heavy drinking and he told me  
13 about that. And also poly-substance dependence by history.  
14 Also in the past had used various drugs.

15 Q. Street drugs?

16 A. Yes.

17 Q. All right. And he told you about that also?

18 A. Yes.

19 Q. And at times he told you he had made efforts to get  
20 off of drugs?

21 A. Yes, I think, yes. He was in treatment once, for  
22 example, he said.

23 Q. And was successful in stopping the use of street  
24 drugs at times?

25 A. I think. I think that's what he said. I'm sorry.

1 I don't remember.  
 2 Q. All right. Now, is it your opinion that Mr. Bucklew  
 3 had a mental disease or defect?  
 4 A. Yes.  
 5 Q. And what is that?  
 6 A. In this instance it's this depression.  
 7 Q. Now, there's a place in your report where you talk  
 8 about the issue of responsibility for criminal conduct.  
 9 A. Yes. That would be on page 48. Is that what you're  
 10 referring to?  
 11 Q. Yes.  
 12 A. Yes, ma'am.  
 13 Q. I just want to make clear we're not saying that  
 14 Russell is not responsible for these acts, are you?  
 15 A. No. I'm not saying that.  
 16 Q. Okay. But did he have some deficits?  
 17 A. Yes.  
 18 Q. All right. Could you tell the jury -- Well, no.  
 19 Let me move forward.  
 20 Is it fair to say that while he is responsible for  
 21 his actions his deficits did come into play?  
 22 A. Yes.  
 23 Q. During the shooting of Mike Sanders?  
 24 A. Yes.  
 25 Q. And is it your opinion that the murder of

1 CROSS-EXAMINATION  
 2 By Mr. Swingle:  
 3 Q. Dr. Harry, the report here dated March 14, 1997,  
 4 your amended report about Russell Bucklew; is that right?  
 5 A. Yes, sir, that is correct.  
 6 Q. This is the most recent report you've prepared?  
 7 A. That's the final one, yes.  
 8 Q. And have you had any further lengthy interviews or  
 9 analysis of him since you prepared this report?  
 10 A. No, sir.  
 11 Q. Now, earlier you had testified that you had spent  
 12 maybe three hours and 40 minutes with him. Would it be more  
 13 accurate to say that in looking at page three of this report  
 14 that you were with him for one hour on September 7th, one hour  
 15 on September 11?  
 16 A. Yes.  
 17 Q. That's two hours altogether?  
 18 A. Yes.  
 19 Q. 35 minutes on October 3rd?  
 20 A. Yes.  
 21 Q. And one hour five minutes on December 7th?  
 22 A. Yes.  
 23 Q. So it is three hours and 40 minutes total that you  
 24 have been with him in interviews?  
 25 A. Yes, sir.

1 Mr. Sanders was committed while Mr. Bucklew was under extreme  
 2 mental or emotional disturbance?  
 3 A. Yes, that's what I believe.  
 4 Q. All right. And you've already talked about his  
 5 medical condition, stress factors in his life, the breakup of  
 6 the relationship, the loss of a child?  
 7 A. Yes. His belief that he was going to die. And the  
 8 increasing pain and difficulties with hemangioma.  
 9 Q. Is it your opinion that Mr. Bucklew, the capacity of  
 10 Mr. Bucklew to conform his conduct to the requirements of law  
 11 was substantially impaired?  
 12 A. Yes.  
 13 Q. At the time of the shooting?  
 14 A. Yes.  
 15 MS. DAVIS: Judge, if I may I'd just like to make  
 16 sure I'm not missing anything. I'd just like to go through my  
 17 notes and check with my co-counsel, make sure I'm not missing  
 18 anything.  
 19 Judge, I don't think I have anything else of  
 20 Dr. Harry.  
 21 THE COURT: Cross.  
 22 \* \* \*  
 23  
 24  
 25

1 Q. And the first interview was September 7th, 1996  
 2 which was about six months after the crime had occurred?  
 3 A. Yes, sir.  
 4 Q. And before you interviewed Russell Bucklew, you  
 5 talked with him to see whether you felt he was in touch with  
 6 reality as you were talking with him, didn't you?  
 7 A. I'm not sure I understand what you're asking, sir.  
 8 Q. Well, you told him he had the right to refuse to  
 9 talk with you, didn't you?  
 10 A. Oh, yes.  
 11 Q. And he seemed to understand he had that right?  
 12 A. Yes.  
 13 Q. You told him anything he could tell you you would be  
 14 relating on to his lawyers; is that right?  
 15 A. Yes.  
 16 Q. And he seemed to understand that?  
 17 A. Yes.  
 18 Q. And during all the times you were talking with him  
 19 this three hours and 40 minutes, you never once felt that he  
 20 was not comprehending what you were saying and was out of  
 21 touch with reality, that he's sitting there talking to  
 22 psychiatrists and knew where he was and what he was doing?  
 23 A. Yes. I always believed he was in touch with reality  
 24 and knew what he was doing as we spoke.  
 25 Q. And in making your diagnoses of him, you would have

1 used the DSM-IV which is a Diagnostic and Statistical Manual  
2 for mental disorders, didn't you?

3 A. Yes, sir.

4 Q. That's recognized as an authoritative source in the  
5 field of psychiatry, and in your profession you use it to  
6 characterize different mental illnesses into different  
7 categories, that sort of thing?

8 A. Yes, sir, we do.

9 Q. Now, in your opinion even though Russell Bucklew had  
10 what you had described as depressive disorder, not otherwise  
11 specified, which is a major depression as referred to in this  
12 book, it never rose to the point, did it, in your opinion at  
13 the time of killing Michael Sanders that it would have made it  
14 unable for him to appreciate that what he was doing was a  
15 criminal act?

16 A. No, I don't think it rose to that level, no.

17 Q. In other words, in spite of his depression he knew  
18 that shooting another human being was wrong?

19 A. Yes.

20 Q. And in spite of his depression, he knew it was wrong  
21 to handcuff and kidnap a person?

22 A. Yes.

23 Q. And in spite of his depression, he knew he was  
24 carrying loaded guns on his person?

25 A. Yes.

1 because there were so many other things compounding this, the  
2 use of the narcotics and pain and everything else, I couldn't  
3 say for certain that it was a major depression. So I have  
4 used that term to describe it.

5 Q. It has similar characteristics, though, to major  
6 depression?

7 A. Yes. Yes, sir, it does.

8 Q. And isn't it true that 20 to 25 percent of the  
9 public who suffer from medical conditions like diabetes, heart  
10 conditions, cancer, also suffer from a major depression?

11 A. It's a, it's fairly high. I don't know the exact  
12 number, sir, but I think that's a fair statement.

13 Q. And you were talking about his I.Q. as far as being  
14 measured earlier as being 88?

15 A. Yes.

16 Q. That is considered in the low normal range?

17 A. Yes, sir.

18 Q. In general is normal, I guess 100 is exactly normal,  
19 sort of 90 to 100 is generally the normal range?

20 A. Well, generally we talk about maybe between 80 and  
21 120, 85-115, somewhere in there is about normal range.

22 Q. Is normal?

23 A. Yes.

24 Q. And when we'd be talking about people who are  
25 retarded, isn't it true that mild mental retardation would be

1 Q. And he knew he was aiming and firing a gun at the  
2 time he pulled the trigger?

3 A. Yes.

4 Q. And he knew he was putting handcuffs on another  
5 human being when he put handcuffs on another human being?

6 A. Yes.

7 Q. And in spite of his depression, he had the ability  
8 to conform his conduct to the requirements of law if he wanted  
9 to?

10 A. Yes, I think so.

11 Q. In other words, he was not robbed of his free will  
12 by his depression?

13 A. I don't think entirely, no.

14 Q. And as far as you can determine, he was not having  
15 any hallucinations or seeing things that weren't there in  
16 terms of, you know, being out of touch, reality and thinking  
17 he's seeing pink elephants or anything like that?

18 A. No, sir, he was not. He both denied that to me.  
19 And there's no evidence of it in the records.

20 Q. And, doctor, a major depression like this is a  
21 fairly widespread thing among our general public, isn't it?

22 A. Depression is, yes. I might be misunderstanding  
23 you. Please correct me. He doesn't have a major depression.

24 He has a depressive disorder not otherwise specified which I  
25 realize may be somewhat like splitting hairs, but it's just

1 50 to 70, moderate retardation 35 to 55, severe 20 to 40 and  
2 profoundly mentally retarded as below 20?

3 A. Yes, I think that's generally what's agreed on.

4 Q. In 88, he's up there in low normal, nowhere really  
5 being considered mentally retarded?

6 A. Yes.

7 Q. In fact, from your discussions with him you found  
8 out he attended two to three years of college?

9 A. I think that's what he told me, yes, sir.

10 Q. Now, you testified in direct that he was

11 experiencing extreme emotional disturbance at the time he  
12 killed Michael Sanders?

13 A. Yes.

14 Q. And saying that he was under extreme emotional  
15 disturbance does not mean that he did not understand the  
16 nature and consequences of what he's doing, does it?

17 A. No.

18 Q. And saying that he was acting under extreme  
19 emotional disturbance does not mean that he was not capable of  
20 thinking about what he's doing, does it?

21 A. No.

22 Q. And when you interviewed him, didn't you notice that  
23 to him honor and protecting his honor is a big thing?

24 A. Honestly I don't remember. I, it seems like that's  
25 something he said, but honestly I don't remember.

1 Q. Do you remember quoting in your report a letter that  
2 he had written to his girlfriend Cindy that previously has  
3 been introduced?  
4 A. Yes, sir.  
5 Q. State's Exhibit 234?  
6 A. Yes, sir. I think that was in 1992 perhaps.  
7 Q. Yes, sir. 1992?  
8 A. Ah, yes, okay. I see it, yes, sir.  
9 Q. And he had talked to her that he had, she had to  
10 understand that he did what he did for his honor?  
11 A. Yes. Yes.  
12 Q. As to his hemangioma, he's had that condition almost  
13 since his birth; isn't that right?  
14 A. I believe so, yes. It was detected shortly after  
15 that, when he was a small child.  
16 Q. And in layman's terms, isn't a hemangioma, I guess a  
17 birthmark is a type of hemangioma, isn't it?  
18 A. It can be, yes. Certain types of birthmarks can be  
19 hemangiomas.  
20 Q. Hemangioma is sort of a cluster of blood vessels?  
21 A. Yes. And it's typically they're knotted up and  
22 largely dysfunctional. Then don't serve a functional purpose.  
23 Q. And the testing that was done by your order of  
24 Russell Bucklew in January 1997 showed that has not reached  
25 his brain at this time, has it?

1 A. That's correct, yes.  
2 Q. And that it's not diverting blood away from his  
3 brain at this time, is it?  
4 A. That, if I may say, that particular test probably  
5 would not have shown that. But in my discussions with his --  
6 Q. Dr. Zitsch?  
7 A. Dr. Zitsch. He said that he did not think that was  
8 the case.  
9 Q. And Dr. Zitsch is the primary doctor here in  
10 Columbia who had been treating him over the years?  
11 A. I believe so, yes, sir.  
12 Q. And Dr. Zitsch believes it, doesn't he, if he would  
13 be operated on it would be a life-threatening thing?  
14 A. That's my understanding, yes, from some of the  
15 records.  
16 Q. But if he's not operated on, it's not a  
17 life-threatening thing is it?  
18 A. At least not immediately so. That was my  
19 understanding from our conversations.  
20 Q. Now, your diagnosis that Russell Bucklew has an  
21 antisocial personality disorder. Isn't that also sometimes  
22 referred to as being a sociopath?  
23 A. It has in the past been referred to that, yes.  
24 Q. And in fact in the Diagnostic and Statistical Manual  
25 at page 645, talking about antisocial personality disorder?

1 A. Yes, sir.  
2 Q. This pattern has also been referred to as  
3 psychopathic, sociopathic or dissocial personality disorder?  
4 A. Yes.  
5 Q. And isn't it true that the essential feature of  
6 antisocial personality disorder is a pervasive pattern and  
7 disregard for and violation of the rights of others that  
8 begins in childhood or early adolescence and continues into  
9 adulthood?  
10 A. I believe that essentially sums it up, yes.  
11 Q. And aren't lying, deceit and manipulation central  
12 features of antisocial personality disorder?  
13 A. They can be, yes.  
14 Q. And don't persons who have an antisocial personality  
15 disorder typically disregard the wishes, rights and feelings  
16 of other people?  
17 A. They can, yes.  
18 Q. Don't persons with an antisocial personality  
19 disorder frequently lack empathy and tend to be callous,  
20 cynical and contemptuous of the feelings, rights and  
21 sufferings of others?  
22 A. Sometimes, yes.  
23 Q. Don't persons with an antisocial personality  
24 disorder, aren't they frequently deceitful and manipulative in  
25 order to gain personal pleasure or profit?

1 A. Sometimes, yes.  
2 Q. Don't people who have antisocial personality  
3 disorder typically lie, con and malingering?  
4 A. Sometimes, yes.  
5 Q. Don't individuals with antisocial personality  
6 disorder tend to be irritable and aggressive and may  
7 repeatedly get into physical fights or commit acts of physical  
8 assault?  
9 A. Yeah, sometimes they can.  
10 Q. Don't individuals with antisocial personality  
11 disorder show little remorse for the consequence of their  
12 acts?  
13 A. That's something that's also been talked about.  
14 Q. And another typical trait of people with antisocial  
15 personality disorder is to tend to blame their victims for  
16 being foolish, helpless or deserving of their fate?  
17 A. Sometimes, yes.  
18 Q. And don't people with antisocial personality  
19 disorder tend to minimize the harmful consequences of their  
20 own actions?  
21 A. Yes, that sometimes happens with it as well.  
22 Q. And don't people of antisocial personality disorder  
23 tend to take a position that one should stop at nothing to  
24 avoid being pushed around?  
25 A. I don't know that I've ever heard it said in that

1 way but --  
 2 Q. But you do recognize the Diagnostic and Statistical  
 3 Manual as being an authoritative source?  
 4 A. Yes.  
 5 Q. At the bottom of page 656 here.  
 6 A. Yes, sir.  
 7 Q. When it's talking about people with antisocial  
 8 personality disorders.  
 9 A. Yes.  
 10 Q. This book says they may believe that everyone is out  
 11 to help Number 1 and that one should stop at nothing to avoid  
 12 being pushed around?  
 13 A. Yes, that's what it says.  
 14 Q. And isn't another typical trait of people of  
 15 antisocial personality disorder that they often display a  
 16 superficial charge?  
 17 A. Yes.  
 18 Q. Now, on your chart I wasn't sure when I was looking  
 19 at it exactly where one would draw the line as to where March  
 20 21st, 1996, would be. If you could maybe just --  
 21 A. Sure. I'll do the best I can.  
 22 Q. Do the best you can.  
 23 A. I apologize for the, let's see.  
 24 Q. Oh, we're looking for March 21st, 1996?  
 25 A. Oh, boy, it's somewhere right in here. Again I

1 THE COURT: Redirect.  
 2 - \* -  
 3 REDIRECT EXAMINATION  
 4 By Ms. Davis:  
 5 Q. Are you lying about anything for your \$200 an hour?  
 6 A. Oh, no, no.  
 7 Q. Let's go back over some of this. When you talked to  
 8 Russell --  
 9 A. Yes.  
 10 Q. -- about shooting Mike Sanders.  
 11 A. Yes.  
 12 Q. Did he express to you remorse at various times?  
 13 A. Yes.  
 14 Q. Do you feel that he suffers from a particular lack  
 15 of remorse over this shooting?  
 16 A. He didn't show that to me, no. He seemed to be  
 17 genuinely upset by it.  
 18 Q. All right. And does he in fact admit that he was  
 19 the one that shot Mike Sanders?  
 20 A. Yes.  
 21 Q. And has he in fact admitted to you that he shouldn't  
 22 have gone there with a gun?  
 23 A. Yeah. I think that's what he told me.  
 24 Q. And I know you said earlier you can find people who  
 25 have antisocial personality disorder in all walks of life, is

1 don't know exactly where. I'm sorry. It's not, the computer  
 2 didn't print it out on here. So I --  
 3 Q. Okay. And likewise --  
 4 A. I'll do the best, I'll do the best. There you go.  
 5 There you go.  
 6 Q. So everything to the right of the line you've drawn  
 7 would have been medication he had been receiving after he had  
 8 been shot by the Highway Patrol?  
 9 A. I believe so, yes. Yes. He did continue to get  
 10 some of the narcotics afterwards.  
 11 Q. And I may have missed this earlier when I was taking  
 12 some notes. You had indicated that you were being paid?  
 13 A. Yes.  
 14 Q. What are you being paid as far as hourly rate or a  
 15 lump sum fee or what?  
 16 A. It's an hourly rate.  
 17 Q. And what is the hourly rate?  
 18 A. \$200 per hour.  
 19 Q. And how many hours would you estimate you've spent  
 20 so far?  
 21 A. I, I don't know. I haven't added it up yet. I  
 22 couldn't tell you. Probably 20, 30, something like that.  
 23 Maybe more.  
 24 Q. Thank you.  
 25 No further questions, Your Honor.

1 that fair to say?  
 2 A. That's correct.  
 3 Q. In fact, some lawyers can have antisocial  
 4 personality disorder?  
 5 A. I guess that could happen. It could happen in any  
 6 number of fields. And also if I can add, not everyone who has  
 7 antisocial personality disorder necessarily has all of the  
 8 attributes that are ascribed to it.  
 9 Q. That are contained in DSM-IV?  
 10 A. Right. That's only the generic description. And  
 11 people may have different portions, lesser or greater  
 12 extents. It doesn't mean they're going to have all of them  
 13 just because they have two, for example or just because they  
 14 have five or four.  
 15 Q. Okay. And you know, Mr. Swingle said, you know, at  
 16 the time of the shooting Russell was not robbed of his free  
 17 will, was he?  
 18 A. No.  
 19 Q. And we've never said that, have we?  
 20 A. No.  
 21 Q. However, he was emotionally disturbed?  
 22 A. I think extremely so, yes.  
 23 Q. And that somehow decreased his ability or his  
 24 capacity to conform his behavior to a desirable conduct, to  
 25 follow the law?

1 A. I think so, yes.

2 MS. DAVIS: I don't have anything further.

3 MR. SWINGLE: No recross, Your Honor.

4 THE COURT: May this witness be excused?

5 MR. SWINGLE: He may.

6 MS. DAVIS: Yes, please.

7 THE COURT: Thank you so much.

8 (Counsel approached the bench and the following  
9 proceedings were had:)

10 THE COURT: I would think this would be a good time  
11 to break for the evening. It's seven o'clock. They've had a  
12 lot to do today. Can we agree on that?

13 MR. WOLFRUM: Yeah, that's fine. Ten o'clock  
14 tomorrow?

15 THE COURT: I think we need to make a record that we  
16 went this late because you wanted to put a witness on that  
17 wasn't available even though you filed a motion asking to  
18 adjourn at reasonable times.

19 MR. WOLFRUM: The court was very good.

20 (The following proceedings were had in open court:)

21 THE COURT: Ladies and gentlemen of the jury, it's  
22 seven o'clock. I've got to get you to the hotel, motel for  
23 supper. We're going to take our evening break at this time.

24 I want you to have them back if you will at 8:30 in  
25 the morning.

1 Please over the evening recess do not talk about  
2 this case. Don't permit anyone to discuss it with you.  
3 Particularly while the bailiffs are charged with the  
4 responsibility of keeping the alternate jurors from discussing  
5 the case with you. If in some way you come in contact with  
6 one of the alternates, please don't talk about the case.  
7 Okay. Theoretically I've got to keep the 12 of you sterilized  
8 from everybody. I've got to keep the three of them sterilized  
9 from everybody, and I can't let the 15 of you get together.  
10 If you'll cooperate with the bailiffs, we'll do our very  
11 best. I'll have you back here at 8:30 in the morning.

12 (The trial adjourned for the evening at 6:55 p.m.)

13 - \* -  
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1 Statutory Scheme for the Imposition of the Death Penalty and  
 2 objections to Missouri Approved Instructions 313.30 to 313.48  
 3 where victim impact testimony is considered by the sentencer.  
 4 We want to renew all those written objections and all the  
 5 grounds contained therein which the court I believe has  
 6 already ruled on. But if the court hasn't, I'd ask for a  
 7 ruling.

8 THE COURT: Are there any specific objections to the  
 9 instructions as framed?

10 MR. WOLFRUM: None other than what is in the  
 11 written.

12 THE COURT: Very well.

13 Any objections by the State to Instruction 32?

14 MR. SWINGLE: No, Your Honor.

15 THE COURT: Any other instructions that either party  
 16 wants given?

17 MR. SWINGLE: Not on behalf of the State, Your  
 18 Honor.

19 MS. DAVIS: Not on behalf of the defense.

20 THE COURT: Other than what has been requested by  
 21 the motions which have been previously ruled, are there any  
 22 other instructions which you want?

23 MR. WOLFRUM: No.

24 THE COURT: Okay. I will give you about three or  
 25 four minutes to collect your thoughts and we'll get started.

1 guns, at least 34 bullets, two knives, two sets of handcuffs,  
 2 duct tape, rubber gloves, drove an hour and a half to the  
 3 scene of the crime, waited another 30 minutes putting the  
 4 final touches to the plan and then went in and executed a man  
 5 in his own home in front of his own children in front of the  
 6 woman he loved. And then kidnapped and raped and terrorized  
 7 the woman. This is the ultimate crime, and it deserves the  
 8 ultimate punishment. The punishment should fit the crime.  
 9 And I'm asking you with your verdict to draw a line in the  
 10 sand, to draw a line in the sand for Boone County, for Cape  
 11 Girardeau County and for the State of Missouri and say to  
 12 jilted ex-boyfriends who are contemplating stalking and  
 13 killing their ex-girlfriend and the girlfriend's new boyfriend  
 14 that if you carry out a plan like that, you will get the death  
 15 penalty. You will get the death penalty if you do a  
 16 premeditated first degree murder like this that involves a  
 17 home invasion burglary, a rape and a kidnapping. Don't give  
 18 any hope to these jilted ex-boyfriends that if they do  
 19 something like this they won't get the death penalty. Draw a  
 20 line in the sand for Boone County and for the state of  
 21 Missouri that if you cross this line, you will get the death  
 22 penalty.

23 It's not easy to render a verdict saying to a man  
 24 you must die for the crime you committed. But the punishment  
 25 fits the crime in this case. And can anyone have any doubt

1 MR. WOLFRUM: Just because now seems like the  
 2 appropriate time to do it although the court has already ruled  
 3 on them, we would renew the Motion in Limine to prevent  
 4 argument concerning opinions of lack of remorse and the Motion  
 5 in Limine to prohibit comments lessening the jury's sense of  
 6 responsibility and suggestions in support thereof. And I  
 7 assume the court is adhering to its earlier rulings.

8 THE COURT: The court will adhere to its earlier  
 9 rulings.

10 (The following proceedings were held in the  
 11 courtroom in the presence of the jury commencing at 9:41  
 12 a.m.)

13 THE COURT: Ladies and gentlemen, I give you these  
 14 further instructions at this time.

15 (The court read Instructions 29-35.)

16 THE COURT: Argument by the State.

17 - \* -

18 STATE'S OPENING ARGUMENT - PENALTY PHASE

19 - \* -

20 MR. SWINGLE: It's a cardinal principle of law, a  
 21 cardinal principle of justice, that the punishment should fit  
 22 the crime. This crime was the ultimate crime. The first  
 23 degree murder of Michael Sanders. It would be hard to imagine  
 24 a more premeditated murder than you had in this case. A case  
 25 where a man had equipped himself as you've seen, with two

1 after hearing the testimony in the guilt phase which you're  
 2 allowed to consider in rendering your verdict and in the  
 3 punishment phase, that as long as this man breathes a breath  
 4 of air he is a danger to other human beings, whether it's  
 5 Cindy Boyer, Linda Beard, Stephanie Ray, another inmate, a  
 6 prison guard, or members of the public if he should happen to  
 7 escape again as he has already? As long as this man breathes  
 8 a breath of air, he is a sociopathic danger to the community  
 9 and the people in it and to the people whoever happens to be  
 10 around him at any given time.

11 We've already shown that he has a, he has already  
 12 shown that he has a willingness and a capability to track down  
 13 and terrorize and traumatize and hurt whoever he happens to be  
 14 mad at at that particular time. And he has shown that like  
 15 some homicidal and blood thirsty Energizer Bunny he just keeps  
 16 on coming. You can shoot him, you can jail him, you can lock  
 17 him up but he'll just keep on coming with any weapon at his  
 18 disposal, whether it's a gun, a knife or a hammer. He just  
 19 keeps on coming wanting to cause hurt to whoever he's mad at  
 20 at that time.

21 We talked, I talked yesterday about jurors as a  
 22 group being representatives and sending messages. Please  
 23 don't forget that when you go back in that jury room because  
 24 by your verdict you can send a message, not just to Russell  
 25 Earl Bucklew in particular but to other jilted boyfriends out

1 there who are considering stalking and tracking down their  
 2 prey, their ex-girlfriends and the new boyfriends and doing  
 3 exactly what he did, and that message can be, if you do it,  
 4 don't have any doubt about it, you will get the death  
 5 penalty. And by your verdict you might save the lives of some  
 6 other victims out there if even one stalker like Russell  
 7 Bucklew says I heard about what happened to Russell Bucklew.  
 8 I think I won't do this. I think I'll calm down. If you can  
 9 save one life like that, your verdict would be worthwhile.  
 10 This was an ultimate crime. It was the most  
 11 abominable crime there is and it deserves the ultimate  
 12 punishment.

13 Clearly it was a first degree murder case. You've  
 14 already decided that. But in many, many ways his selfishness,  
 15 his thinking only of himself also produced stealing because he  
 16 stole so many things from so many people.

17 From Michael Sanders he stole many years of life.  
 18 Using your common sense and human experience, you probably  
 19 have an idea what the average life expectancy is. If it's 75,  
 20 that's 48 years of human living he stole from Michael  
 21 Sanders. Is anyone willing to give up 48 years of living for  
 22 any price? That's what he stole from Michael Sanders.

23 From John Michael Sanders, age six years old when  
 24 this man shot down his daddy in front of him he stole his  
 25 father. He stole a father that John Michael Sanders would

1 Russell Earl Bucklew stole something else. That is the  
 2 feeling that one can be safe from the cruel world, from a  
 3 sociopathic killer when you're at home in your own home.  
 4 Those boys at ages six and four experienced this evil deadly  
 5 man coming into their home and shooting their daddy who was  
 6 trying to protect his family with a shotgun right in front of  
 7 them. How could they ever be people who can ever have any  
 8 sense of safety in their own home ever again when he so  
 9 cruelly took that sense of safety from them at the ages of six  
 10 and four?

11 From Stephanie Ray he stole the young man who might  
 12 have been the love of her life, who might have been the man  
 13 that she would have loved for the rest of her life.

14 MS. DAVIS: I'll object as to what might have been,  
 15 judge.

16 THE COURT: The objection will be overruled.

17 MR. SWINGLE: From Stephanie Ray he also stole her  
 18 dignity. By killing her new boyfriend in front of her, by  
 19 pistol-whipping her, by handcuffing her, by raping her, by  
 20 ejaculating in her face, he stole her dignity.

21 And from his own family he stole any pride they  
 22 could have had for whatever he might have been before he  
 23 turned into such an evil sociopathic killer. And he forever  
 24 tarnished the last name Bucklew of people who don't deserve to  
 25 have that last name tarnished.

1 have had for another 48 years or so if Michael Sanders would  
 2 have lived a normal life. And he left John Michael Sanders  
 3 essentially an orphan because John Michael's mother had  
 4 already abandoned him.

5 The same for Zachary Sanders. Zachary Sanders four  
 6 years old when he is there when his father is shot dead in  
 7 Zachary Sanders' own home. Had Michael Sanders lived another  
 8 48 years, Zachary Sanders would have been 52 years old when  
 9 his dad died. He would have had 52 years of being with his  
 10 dad. Yet Russell Earl Bucklew took his dad from him at age  
 11 four. And I submit to you that if Zach Sanders ends up with  
 12 any memories of his daddy, it's going to be that traumatic  
 13 event of having his daddy shot down in front of him and  
 14 running to a toy box to hide because of what Russell Earl  
 15 Bucklew did.

16 From Dorothy Sanders and her husband Jerry Sanders,  
 17 Russell Earl Bucklew stole their son, their only son, a fine  
 18 young man who grew up and had a responsible job and had two  
 19 fine young boys and was being a single parent raising those  
 20 boys, as Dorothy Sanders said being everything to those boys,  
 21 not being the kind of dad like Russell Bucklew who's not there  
 22 who's busy running around terrorizing other people but being  
 23 the kind of dad who is there with his boys. He took a son  
 24 from them that they could be proud of.

25 From John Michael Sanders and Zachary Sanders

1 And from his own son he stole a chance to have a  
 2 father. And who made the choice to steal and take away the  
 3 father of his son? Russell Earl Bucklew did. Because he made  
 4 the choice not to stay home there and be a father to his child  
 5 but to arm himself with two guns, at least 34 bullets, two  
 6 knives, handcuffs, duct tape and go on about his perverted  
 7 plan to avenge his honor and to go down in a blaze of glory.  
 8 He's the one that wrote the Will that he was going to die.  
 9 He's the one that made the decision he was going to leave his  
 10 son. Don't let the defense throw that guilt on you, ladies  
 11 and gentlemen. He's the one who made the decision to abandon  
 12 his son.

13 There's a song that goes "I'm a six-gun lover. I'm  
 14 a candle in the wind. Yeah, I'm a wanted man."

15 MS. DAVIS: I'll object to the words of the song.  
 16 That's not evidence.

17 THE COURT: The objection will be overruled.

18 MR. SWINGLE: And that song ends "I'm going down in  
 19 a blaze of glory." And that's what this man saw himself as.  
 20 As a six-gun lover who was going down in a blaze of glory. A  
 21 wanted man who was going down in a blaze of glory. That's how  
 22 he saw himself. He didn't see himself as a father to his  
 23 son. And he didn't see himself as a responsible person who  
 24 cared about or thought about anybody other than his selfish  
 25 miserable self.

1 Rusty Earl Bucklew. If he couldn't have Stephanie,  
2 nobody was going to have Stephanie. Russell Earl Bucklew. If  
3 Michael Sanders was going to not stay away from Stephanie,  
4 then Michael Sanders was going to die. And this is a pattern  
5 of selfish, selfishness and hatred that has gone on and on.

6 Fast forward back to 1992 when Cindy Boyer had been  
7 his girlfriend. She tried to break up with him. They'd been  
8 broken up for about two weeks. She goes to Scott Broeker's  
9 home with another couple on a double date watching TV. And  
10 almost an instant replay of this case except that instead of  
11 being armed with two guns he was armed with a pool stick. He  
12 went in that house uninvited. Went downstairs. And without  
13 any provocation on Scott Broeker's part attacked Scott Broeker  
14 hitting him so hard it left a welt across his back and welts  
15 on his arms that could be photographed later that same day.  
16 Attacking Scott Broeker while he's there putting up his hand  
17 to defend himself hitting him hard enough to leave those welts  
18 and then punching his girlfriend at that time, his  
19 ex-girlfriend at that time Cindy Boyer in the face causing  
20 that bruise to her eye that you saw and apparently a mild case  
21 of amnesia.

22 MS. DAVIS: Objection, been no facts of amnesia.

23 THE COURT: Sorry. I didn't hear your objection.

24 MS. DAVIS: There's nothing about Cindy Boyer having  
25 amnesia.

1 And that was his plan to orchestrate his own exodus. And you  
2 know, it was interesting to hear that tape and hear him talk  
3 about Stephanie. Stephanie had been toying with his  
4 emotions. She had tried to break up with him. Toying with  
5 his emotions. He said let this be a lesson to Stephanie.  
6 That was his words. Let this be a lesson. And I submit to  
7 you what is the lesson? The lesson is you can't break up with  
8 Russell Bucklew and walk away in one piece.

9 This was an abominable crime. It's the ultimate  
10 crime, and it deserves the ultimate punishment. And that's  
11 the real importance of this case because human beings are  
12 born, human beings die. Life goes on. But by your verdict  
13 you are setting a standard, you're setting a standard for  
14 Boone County, you're setting a standard for Cape Girardeau  
15 County, you're setting a standard for the state of Missouri.  
16 That standard is if you are a jilted, mad ex-boyfriend, leave  
17 her alone, let her break up with you, let her walk away  
18 because if you arm yourself with guns, bullets, knives,  
19 handcuffs and if you pursue her and stalk her to the home of  
20 her new boyfriend, if you go in and terrorize her, kill him  
21 and continue terrorizing her throughout the night, you will  
22 get the death penalty.

23 Burglary is sometimes referred to, burglary in the  
24 first degree is home invasion because it's an invasion of  
25 someone's home. The sanctity of their home. That's why one

1 MR. SWINGLE: Your Honor, that was a bit of sarcasm  
2 based on her --

3 THE COURT: The objection will be sustained. Let's  
4 proceed.

5 MR. SWINGLE: What was the offense Cindy Boyer  
6 committed to try to break up with this guy, to leave him?  
7 That was her offense. And he decided to be the man who was  
8 going to fend his honor by teaching her a lesson.

9 Fast forward to 1994 to Linda Beard. The girlfriend  
10 who tried to break up with him in 1994. She broke up with  
11 him. His stuff was out. What does he do? Weeks later he  
12 attacks her outside her own apartment, he punches, beats and  
13 stomps her. And what was her offense? For trying to break up  
14 with this man. Not only did he attack her then but then a  
15 month later in December on December 11, 1992 he showed up  
16 again this time with a sword, pounded on her door and was  
17 there with a sword gesturing it at her. And what was her  
18 offense? Trying to break up with this man. She wasn't  
19 leading him on. He was coming after her. He was stalking  
20 her. He was pursuing her. And what was her offense? Trying  
21 to break up with this man. Trying to get away from him.

22 And then fast forward to 1996 and Stephanie Ray  
23 tries to break up with him. She takes him up to Troy, leaves  
24 him at his parents, tells him it's over. But for him it's not  
25 over until he's dead, she's dead and Michael Sanders is dead.

1 of the aggravating factors is burglary, that if a person  
2 commits a first degree murder in the course of a burglary, a  
3 home invasion, then they can receive the death penalty. Same  
4 thing for rape. Same thing for kidnapping. They are all  
5 things that allow a jury to give the death penalty.

6 If you let him off the hook without the death  
7 penalty, think about the message you're sending. Think about  
8 the message you're sending if you let him off the hook without  
9 the death penalty. You're saying, well, let's see, he took  
10 two knives, at least 34 bullets, two guns, handcuffs, duct  
11 tape, he stalked this woman, he killed her, or killed Michael  
12 Sanders, he raped her, terrorized her, that you, let's not  
13 give the death penalty, let's save it for some other crime.  
14 Let's save it for some other crime. Ladies and gentlemen, if  
15 this crime does not deserve the death penalty, then what  
16 would? Who deserves the death penalty if not this sociopathic  
17 killer? Should he not get the death penalty because he had  
18 this hemangioma, this cluster of blood vessels in his nasal  
19 sinus passages in his throat? Should he not get the death  
20 penalty because he's not healthy because he doesn't feel  
21 good? Well, are we going to save the death penalty just for  
22 criminals who do feel good? Should he not get the death  
23 penalty because he was depressed and unhappy? Well, you heard  
24 the psychiatrist's testimony. That a lot of people are  
25 depressed. People with cancer, heart disease, diabetes up to

1 20, 25 percent of the population are seriously depressed. Are  
 2 we going to say that depression gives you immunity from  
 3 receiving the death penalty? Are we going to say it gives a  
 4 hunting license to a jilted ex-boyfriend? What guy who is  
 5 dumped is not going to be depressed? Are we going to say that  
 6 gives him a hunting license to go stalk and attack and murder  
 7 the new boyfriend of their ex-girlfriend? I submit to you  
 8 that there are not a lot of happy murderers running around out  
 9 there. If you left the death penalty for people who are not  
 10 depressed, it would be a small list of people who are eligible  
 11 to receive it.

12 Remember what their psychiatrist said when he was on  
 13 the stand. This man was not deprived of his free will. He  
 14 knew right from wrong. He could have obeyed the law if he had  
 15 wanted to.

16 His depression, ladies and gentlemen should not give  
 17 him immunity from getting the death penalty. So he was  
 18 depressed. So what? Let's not save the death penalty just  
 19 for happy murderers. The facts are that this crime was  
 20 premeditated, it was calculated, it was cunning. And his plan  
 21 was to go down in a blaze of glory. Don't forget the  
 22 cold-bloodedness of this crime when you go back there because  
 23 those are factors you can consider too in deciding whether  
 24 this crime deserves the death penalty. Think hard about the  
 25 message you want to send about whether by your verdict you

1 get back there and you talk and talk and talk and you simply  
 2 and absolutely cannot come to unanimous agreement, then you  
 3 could fill out this form saying you're unable to decide the  
 4 punishment. In that case it would be left up to the judge.  
 5 But remember, it is your primary duty as the jury to assist  
 6 the court by deciding the punishment yourself.

7 When you're deciding this case, ladies and  
 8 gentlemen, I can't emphasize enough the importance of  
 9 remembering that a case like this is not decided in a vacuum.  
 10 People hear about this case. Some come and watch it. Some  
 11 hear about it through the media. People hear about this  
 12 case. And the people that hear about this case include other  
 13 angry jilted boyfriends. And by this case you want to send  
 14 that message. You want to draw that line in the sand that if  
 15 you cross it, if you stalk and pursue, track down and kill the  
 16 new boyfriend of your ex-girlfriend, kidnap and terrorize her,  
 17 you will get the death penalty. That's the message you want  
 18 to send. Don't give hope to angry ex-boyfriends that if they  
 19 do something like this, they'll be able to live out the  
 20 natural course of their life.

21 In our society unfortunately we've got further and  
 22 further away from the idea that a person is responsible for  
 23 their actions, that a person takes responsibility for their  
 24 actions. A person commits a crime and oh it's society's fault  
 25 for some reason. Or it's the parent's fault for some reason

1 want to stop this kind of conduct, by making an example of  
 2 Russell Bucklew to what happens to somebody who does this the  
 3 message you want to send is simple. If you commit the  
 4 ultimate crime, you deserve, you have earned and you will  
 5 receive the ultimate punishment.

6 Now, there are actually three choices of your  
 7 verdict. The judge read them to you. There's three different  
 8 forms. And you'll have to fill out one of those forms. Your  
 9 foreman will have to do more writing than he did the first  
 10 time. It's a little bit different. On the verdict form as to  
 11 imposing the death penalty, the foreman will have to write out  
 12 the three aggravating factors that you find if you find them.  
 13 And, ladies and gentlemen, I submit to you you've already  
 14 found them. Because the aggravating factors are that this was  
 15 a murder done in the course of a burglary, that's one of  
 16 them. That this was a murder done in the course of a rape.  
 17 This was another. That this was a murder done in the course  
 18 of a kidnapping. That's the third. You've already found that  
 19 he committed those three things. Your foreman will have to  
 20 hand-write out those things on this form and there's no  
 21 signature line that he will then need to sign it at the  
 22 bottom. If you would decide to give him immunity from the  
 23 death penalty, not give it to him, then you would sign the  
 24 form that says you're giving just the life without parole.  
 25 And the third form is the one the judge described that if you

1 for the way I was raised or it's the school's fault for  
 2 something they did or law enforcement officer's fault for  
 3 something they did. They should go back to the academy. My  
 4 girlfriend's fault for trying to break up or a new  
 5 girlfriend's fault for giving her a place to hide out or for  
 6 not staying away from her when he should have stayed away from  
 7 her. It's the new boyfriend's fault for giving her sanctuary  
 8 when she was a person who was in terror for her life. It's  
 9 the new boyfriend's fault for resisting when he was in his own  
 10 home and I was coming into his home with weapons in my hand.

11 There are choices in life, ladies and gentlemen,  
 12 like I mentioned earlier. There are choices in life. And  
 13 this man made his choices. He made his choices. From 1992,  
 14 1994, 1996, he made his choices, that his system of honor is  
 15 more important to him than anybody else. He thinks only of  
 16 himself and nobody else. And he made the choice to arm  
 17 himself with the guns and the bullets and the knives and the  
 18 handcuffs and the duct tape and to go pursuing and stalking,  
 19 kidnapping, home invasion, rape, he made those choices. And  
 20 now he must face the consequences of those choices by hearing  
 21 the verdict that he is to receive the death penalty.

22 The punishment should fit the crime. This crime  
 23 deserves the death penalty. I'm asking you to impose it.

24 THE COURT: Defendant's closing argument.

25 - \* -

1                                   - \* -  
2                   DEFENSE CLOSING ARGUMENT - PENALTY PHASE  
3                                   - \* -  
4           MS. DAVIS: Do not for one minute think that if you  
5 come back with a verdict of death and you take Russell  
6 Bucklew's life that you're going to send a message to any  
7 irate jilted boyfriend that may be sitting here in this  
8 courtroom or that may read about it in the paper. That is  
9 bogus. That argument is full of nothing but hot air because  
10 the fact of the matter is that people who commit an act like  
11 Russell did who take a life in the manner that Russell did,  
12 did it in a haze of pain and anger. He was in a world of hurt  
13 when that happened. And people who are in a world of hurt and  
14 pain and anger aren't stopping to remember an article that  
15 they read about a guy who may have gotten the death penalty  
16 six months ago in the paper. It's crap. Don't be kidded by  
17 that argument. Right now by your verdict of yesterday when  
18 you found him guilty of murder first, and we knew that there  
19 was a possibility you might do that, and you know we accept  
20 your verdict and we respect the hard work you put into this  
21 case. But by your verdict of yesterday, just by the mere fact  
22 that you have found him guilty of murder first degree he will  
23 spend the rest of his life, every single day of the rest of  
24 his life in a maximum security state prison. And, ladies and  
25 gentlemen, that is a far cry from the Cape Girardeau county

1 asked to take the life of another human being. You're being  
2 asked to participate in the death of another human being. And  
3 it can be condoned by the trappings of trial. And it can be  
4 condoned by words on paper that say you can do it. And it can  
5 be condoned by our laws. And it is. But the fact of the  
6 matter is, you're being asked to participate in the taking of  
7 a life. And, yes, I know it's not under the same  
8 circumstances under which Russell took a life. I know you're  
9 doing it with thought. I know you're being asked to do it  
10 with consideration. I know you're being asked to do it after  
11 hearing all the evidence. But the ultimate outcome doesn't  
12 change. You're being asked to take another human being's  
13 life. So what's the punishment going to be for Russell  
14 Bucklew? Does he get sentenced to death? It will probably be  
15 said to you in some form or another that he's not worth  
16 sparing.  
17           Mr. Swingle said if not for Russell Bucklew then who  
18 is the death penalty for. It's not for Russell Bucklew. I  
19 don't care who else it's for. I'm not representing anybody  
20 else but Russell Bucklew. I'm not looking around the  
21 courtroom and seeing anybody else but Russell and his family.  
22 It's not for Russell Bucklew.  
23           May be said to you he killed Mike Sanders so you  
24 take his life in turn. You're being asked to send a message  
25 to irate boyfriends in Cape Girardeau and Columbia and in the

1 jail where another inmate put him in a trash bag and put him  
2 out with the garbage. The analogy might be made, you know,  
3 that Russell is garbage. And it might be said to you take  
4 this garbage and put it to it's ultimate end, put it to  
5 death. But Russell Bucklew is not garbage. Russell Bucklew  
6 is another human being who has some deficits, who has problems  
7 and who has made the ultimate worst choice in the world. But  
8 this man is not garbage. This man is still a human being and  
9 you are being asked to take his life, his life. You want to  
10 send a message? Send a message like this: You stand up as a  
11 jury and you look at Russell and you say: Russell, we don't  
12 like what you did. In fact, we hate what you did. You took a  
13 life and it was wrong. But Russell, we're better than you.  
14 We are a moral group of people. And we are going to punish  
15 you to the last of your days. We are going to make you spend  
16 every day of your life in a prison. For Russell, Russell  
17 we're better than you because we're not going to fall to your  
18 level and we're not going to take your life in exchange for  
19 the life you took. You want to send a message? You send a  
20 message of just morality. You send a message of strength.  
21 You're better than what you're being asked to do, ladies and  
22 gentlemen. You're better than that.  
23           This is one of the most serious decisions you will  
24 probably ever have to make. As serious as any decision you  
25 may have to make in your own personal life. You are being

1 state. I already told you what I think about that message.  
2 It's ridiculous, ladies and gentlemen. If you sentence  
3 Russell to death, you sentence Russell to death. But don't  
4 leave this courthouse thinking that you've done some greater  
5 community service. Sentencing Russell to death is not going  
6 to save a life anywhere else. Realistically it's not.  
7 Mr. Swingle asked you not to leave your common sense behind  
8 you. You know, and I'm asking you the same thing. You know  
9 that the kind of cases in which a life like Mike Sanders was  
10 taken when someone is acting as Russell acted that night, they  
11 don't stop to think about the consequences. They don't stop  
12 to think about whether or not they're going to get the death  
13 penalty. Russell didn't stop to think and neither will  
14 somebody else. That goal that Mr. Swingle is telling you  
15 you're going to achieve by sentencing Russell to death is just  
16 not a realistic goal. Don't fall for it. When you sentence  
17 Russell to death, you are reacting to his violence with  
18 additional tragedy. You can achieve the same goal. You can  
19 punish Russell every last day of his life by putting him in  
20 prison. He will never get out. Never. This isn't something  
21 that he'll ever get paroled for. And there's not going to be  
22 any trustees putting him in the trash bag. A maximum security  
23 prison.  
24           Keep in mind also that the other crimes for which  
25 you found him guilty, the burglary, the rape of Stephanie, the

1 kidnapping, you found him guilty of those. And he will be  
2 duly sentenced on those cases also. That's not an issue that  
3 you have to decide, but rest assured he will be sentenced on  
4 those also.

5 And the aggravating circumstances, you're being  
6 asked to kill Russell based on the fact that he committed  
7 those other crimes. Well, he went into Mike Sanders' house  
8 trying to get his family back. And I'm not going to re-argue  
9 that case with you. But the one thing I will say is he's  
10 already been found guilty of these other crimes, the burglary,  
11 the rape and the kidnapping. He's not getting off on those.  
12 Not only will he be sentenced today on the issue of murder, he  
13 will be sentenced on those other crimes too.

14 It's been said to you and it may be said to you  
15 again. And I should point out, this is the last time I get to  
16 come up here and talk to you. Mr. Swingle gets to come up and  
17 talk to you after I'm finished. But this is the last time I  
18 get to address you on this subject. And I think, and I think,  
19 and I think that there's some kind of special word or special  
20 magic phrase that I'm going to come up with that will make you  
21 see and understand that a verdict of life in prison without  
22 parole or probation is the only right verdict in this case.  
23 And I'm worried that I won't be able to come up with whatever  
24 word it is that triggers you to feel and understand and  
25 believe that is the only right verdict in this case. And it's

1 said to you that prison is not going to be enough for Russell  
2 Bucklew, that he's going to be a future danger to everyone.  
3 There's no evidence of that. And you can't speculate on  
4 that. Major Brewer came in and he runs the jail where Russell  
5 has been for most of this past year awaiting trial and he says  
6 he's calmed down. He's adjusted well to prison life. He's  
7 not assaulted other prisoners. He's not been a predator to  
8 other prisoners. He's respectful to major Brewer and the  
9 other authorities there. There is no evidence that Russell is  
10 going to be a predator or assault other prisoners. None  
11 whatsoever.

12 It is said to you that prison isn't enough, that  
13 spending the last of his life, every last day of his life in  
14 prison isn't enough. That he has to somehow be punished,  
15 really punished, punished greater than that. And the only  
16 thing you can do to punish him greater than that is to  
17 sentence him to death. I'd ask you this. In the face of that  
18 argument, consider what is to be gained by sentencing Russell  
19 to death? Mr. Swingle said don't be, you know, don't let me  
20 send you on a guilt trip about Russell's child Brett. And I'm  
21 not going to send you on a guilt trip. You know, Russell and  
22 Cindy divorced. Cindy has custody of Brett. And like most  
23 divorced fathers, Russell sees him as much as he could before  
24 he was locked up on this case. On the weekends and on  
25 holidays Russell's parents still have contact with Cindy.

1 They live in the same town. They still have contact with  
2 Brett. He was living in a different city, but he was keeping  
3 up with his son. I'm not trying to lay a guilt trip on you,  
4 but the fact of the matter is there's two little boys, like  
5 Mr. Bucklew said, there's already two little boys, Michael and  
6 Zach, who lost their father. If you sentence Rusty to death,  
7 there will be a third little boy who will know what that feels  
8 like to lose his father. Ladies and gentlemen, that's not a  
9 guilt trip. But I'm asking you to consider what you're going  
10 to gain by sentencing Russell to death. It won't bring Mike  
11 Sanders back. It won't ease his mother and father the pain of  
12 having gone through the loss of their son. It won't give John  
13 Michael and Zachary their father back. It will, however,  
14 result in the loss of a father to Brett. You don't know  
15 Brett, and you haven't met Brett. Pictures that we talked  
16 about this morning when Russell's mother was on the stand are  
17 up here. And when you go back in your jury room, I'd ask to  
18 you look at these pictures. You can just ask for them. Just  
19 let the judge know you want to look at them. There's a couple  
20 pictures of Russell and Brett here. And I introduced these  
21 photos not so much to give you any kind of guilt trip but  
22 because I want you to see Russell Bucklew is not all bad.  
23 He's not just the sum of his actions that occurred back in  
24 March of 1996. There's still a human being here. He has a  
25 family. He has a son that he loves. He has people that love

1 him. And I'd ask you to look at this because you're being  
2 asked to take a man's life. I think you should look at some  
3 mementoes of the man's life.

4 You may say to me, you know, if we're looking at the  
5 benefits of sentencing Russell to death, your response to me  
6 may be something like this: What's the benefit to Brett or to  
7 anyone else like his parents of having their son spend the  
8 rest of his life in prison? As far as Brett Boyer Bucklew is  
9 concerned, my answer would be, I don't know yet. He's five  
10 years old. But I think that should be his choice. He gets  
11 older and he wants to know his father, his father will be in  
12 prison and Brett will have the choice to know him. If he gets  
13 older and he wants to go up and say you lousy, cheap son of a  
14 bitch, look what you've done to your life and to my life, he  
15 will be there so that Brett can say that too. Leave the  
16 choice up to Brett. And it may be said, yeah, great, leave  
17 the choice up to Brett but that's not a choice that Michael,  
18 John Michael and Zachary Sanders had. I say I know it's not a  
19 choice that they have any longer. But do you get a benefit,  
20 do they get a benefit by sentencing Russell to death? Do they  
21 get anything back? No, they don't. And none of them have  
22 ever come up and said to you they want him sentenced to  
23 death. They just talked to you about the pain of their loss.  
24 It won't take their pain away. They've still lost. It may,  
25 however, increase the circle of pain that you've already seen

1 in this courtroom.  
 2 You know, Russell's actions put a pebble into the  
 3 water and waves just kept getting bigger and bigger and  
 4 bigger. A verdict of life in prison without parole or  
 5 probation would stop the ever-widening effect of that. A  
 6 verdict of death would just send those ripples out farther and  
 7 farther and they would encompass more and more people.  
 8 Saddest thing about this whole case is you can't bring Mike  
 9 Sanders back. You can't give him back to his mother and his  
 10 father. You can't give him back to his sister. You can't  
 11 give him back to the people who love him. You can't give him  
 12 back. You can take a life, but you can't give one back. You  
 13 take a life, what do you gain? You just take another life.  
 14 It's not fair that Dorothy Sanders and her husband  
 15 have to sit here. It's not fair that Robert and Frances  
 16 Bucklew have to sit here. They're good people. And bad  
 17 things happen to good people. And bad things have happened to  
 18 both of these people. This family has not been untouched by  
 19 what their son did. And this family is living the nightmare  
 20 that Russell did. But you can stop it from getting worse.  
 21 And that's what I'm asking you to do. You can stop it from  
 22 getting worse. You can be just. You can punish him, but you  
 23 can make this matter end. And it would not get any worse than  
 24 it has already gotten today. If you go forward and you  
 25 sentence him to death, it will become worse. It will become

1 will be answering to the consequences of his act. Without  
 2 taking it any further and without causing any more pain. He  
 3 will live out his days in a cinder block building. He will  
 4 see sunlight only at prescribed times during the week. He  
 5 will eat what is served to him. He will sleep when he is  
 6 ordered to. And he will get up when he is told to. And the  
 7 argument could be made to you that that's even more than Mike  
 8 Sanders gets. And I say to you, yes it is. I'm not for one  
 9 minute saying that any of this is going to bring back Mike  
 10 Sanders, but sentencing Russell to death isn't going to bring  
 11 him back either. It's not going to make it up to Mike  
 12 Sanders. It's not going to make it up to his family. Fair to  
 13 say if you ask Dorothy Sanders if she would ever wish the pain  
 14 of losing her son on anyone else in the world, Dorothy Sanders  
 15 would probably tell you no, I wouldn't wish this on anybody  
 16 because Dorothy Sanders is a good person. And she doesn't  
 17 want to take her pain and she doesn't want to make it worse.  
 18 It's hers. She came in here and she's lived here and sat here  
 19 in front of you with dignity this week. She's not asked you  
 20 for anything more than to listen to her about her son and  
 21 about her grandsons. She's not asked you to take this any  
 22 further.  
 23 Mr. Swingle said don't let Russell get away with  
 24 it. Don't let him off the hook. Exactly what are you letting  
 25 him get away with or how is he getting off the hook if he

1 worse.  
 2 When we are looking at his family, I want to answer  
 3 something that Mr. Swingle said to you, that Russell has  
 4 stolen from them and he's tarnished forever the good name  
 5 Bucklew. Well, he hasn't. And that's simply not true. These  
 6 people have come to court every day. They've held their head  
 7 up. They've looked at you. They've listened to the  
 8 evidence. They've been respectful of the Sanders. They live  
 9 their life in their community. They still have their farm.  
 10 They still have their life. This has not tarnished their  
 11 name. And they still love their son. They still love him  
 12 wherever he is. They still love him. You might be thinking I  
 13 don't want to do that to Russell's family. I don't want to  
 14 put them through it, but Russell did it to Mike Sanders. And  
 15 it's different, you know, what you'd be doing by sentencing  
 16 Russell to death is different than what Russell did because  
 17 Russell brought it on himself. And we're not disputing that.  
 18 Not for one minute are we disputing that Russell brought this  
 19 on himself. And we're not disputing that Russell needs to  
 20 face the consequences of his act. But I would answer you with  
 21 this: Spending the rest of his life, every single day of the  
 22 rest of his life in prison, he will answer to the consequences  
 23 of his act. When his son graduates from high school, Russell  
 24 won't be able to go. When his family gathers on weekends and  
 25 Christmas and Thanksgiving, Russell will be in prison. And he

1 spends the rest of his life in prison? Prison is an equally  
 2 harsh punishment in this case. Prison is not easy. Don't let  
 3 Life magazine from 10 years ago tell you that it is. Prison  
 4 is prison. Your freedom is forever taken away. He will  
 5 never, ever get out. You're not letting him get away with  
 6 anything by sentencing him to life in prison. And it matters  
 7 which sentence you do impose or neither one of us would be up  
 8 here fighting so hard for him.  
 9 Very popular concept today. It was already  
 10 mentioned to you. Taking responsibility. And I ask you when  
 11 you go back in your jury room, think to yourselves, what does  
 12 that really mean, taking responsibility? What does it really  
 13 mean? 'Cause Russell took responsibility. He admitted that  
 14 he did this. He has never said it wasn't me. He told you his  
 15 belief that he and Stephanie were truly getting back  
 16 together. He told it in his videotapes. It was an incorrect  
 17 belief. It was an improper belief. And he was not acting as  
 18 a rational individual. But it was his belief. But he also  
 19 said, and don't forget, he said to the officer who took his  
 20 statement in that video, "I shouldn't have gone there with the  
 21 guns." He said "I'm a piece of shit." He said "Those two  
 22 little boys are without their father and I did that." He said  
 23 those things. He's here today in trial and he's been here all  
 24 week because he's taking responsibility for his action. He  
 25 knows that his fate rests with you. And he has accepted

1 that. Taking responsibility for your actions should not be  
2 defined as death. So I don't really know what that term  
3 means, take responsibility for your actions. But it's not, it  
4 doesn't mean death. And as far as he being in an incarcerated  
5 position, he has taken responsibility and admitted he did  
6 this.

7 A less popular concept today is mercy. The old  
8 phrase justice tempered with mercy. Mercy is very unpopular.  
9 And it's gotten out of style. It's fallen on hard times. And  
10 amongst politicians and prosecutors it's almost become a dirty  
11 word. It's been equated with weakness. Mercy is not  
12 weakness. Mercy is right. You can be just and you can be  
13 merciful with a sentence of life in prison. We're not asking  
14 you to let him go. We're not asking you to let him off the  
15 hook. We're not asking you to let him get away with  
16 anything. The whole world who knows, who cares to know will  
17 know that Russell Bucklew is serving the rest of his life in  
18 prison for murder. But we're asking you to spare him from the  
19 execution table. And it doesn't make you weak. It makes you  
20 better.

21 It might be said that he showed no mercy to Mike or  
22 the boys, so kill him. And I would say to you, ladies and  
23 gentlemen, that line of reasoning asks you to think like him.  
24 And you're not, you're not like he was back in March of 1996.

25 You've sat here for a week. We've sat here for a

1 week listening to how bad it is to take a life. And now the  
2 week is ending and you are being asked to take a life. You're  
3 better than that. Mercy and justice don't let him get away  
4 with anything and it doesn't let him get off the hook. And it  
5 might be said to you, well, you know, the death penalty is  
6 only saved for I think he said happy killers. The things that  
7 Dr. Harry came in to talk to you about last night, I'm not  
8 trying to put a smoke screen up. But you are being asked to  
9 take a life. And I want you to know about the life that you  
10 are considering. And I'm not, I didn't call Dr. Harry as an  
11 excuse or to say not to take a life because he has hemangiomas  
12 or because he's been depressed. Mr. Swingle has been  
13 referring to him as a sociopath. I want you to recall what  
14 Dr. Harry said. Dr. Harry said that's not what I'm saying.  
15 That's one in a laundry list of things that go with the  
16 personality disorder. But that's not what Dr. Harry diagnosed  
17 Russell as. Dr. Harry came in to help you understand how  
18 Russell came to make the decisions that he made. The wrong  
19 decisions that he made. Russell has deficits, he has  
20 intellectual deficits. He has low average I.Q. He does not  
21 handle stress well. The time that all of this was going on,  
22 he truly genuinely believed he was going to die from his  
23 condition. None of those are given to you as ways of  
24 excuses. But these are the things that were acting on this  
25 man when he took another life. And I just want you to

1 understand that. He wasn't being cool. He wasn't being  
2 calculated.

3 We never said that he's not responsible for this.  
4 And we never said it was an excuse. But the arena in which  
5 Rusty makes his choices is much smaller than the arena in  
6 which the rest of you was who don't have his deficits make our  
7 choices. And you need to know that about this man. And you  
8 need to consider that about this man. It's important. You  
9 can't just hold him to the same standard as an average man.  
10 He's not average. He has some problems. Is he responsible?  
11 Yes, he is. And can you make him take responsibility? Of  
12 course you can. You can sentence him to prison for the rest  
13 of his life. And it might even be said to you at various  
14 times throughout his statements to the police he wants to  
15 die. So what are we even here for? You know he's told the  
16 police he wants to die. But that's not our way. We've sat  
17 here as members of a community and we're saying --

18 Are you with me? All of you? Okay. My heart is  
19 going out to you guys. Don't loose me.

20 You've said that taking a life is wrong. You said  
21 by your verdict that you value life, that life is important,  
22 life is sacred. Barbara Pruitt got up and said you shouldn't  
23 kill anyone for any reason. You shouldn't kill. You say it's  
24 wrong to kill for any reason. Mr. Swingle said he's a  
25 psychopath, he's a sociopath and he's going to assault and

1 continue to assault. Please, please look closely at the  
2 information concerning assaults that you know about Russell  
3 Bucklew. The one on Cindy Boyer that occurred back in '92.  
4 He and Cindy had had a child. They had yet to be married.  
5 Following that they did marry. Scott Broecker, the man who got  
6 hit with the pool cue, told you, he put Russell, you know, got  
7 him in a grip. Told him to sit down and shut up. Russell in  
8 the same action punches Cindy in the eye and then tells her he  
9 loves her. I mean that is just so characteristic of Russell.  
10 He hits them and he says I love you. I mean he's just, he's  
11 back and forth and back and forth and back and forth. And  
12 that's evidence of the man who committed this crime back in  
13 March. And Stephanie, he loves Stephanie. It was misguided.  
14 It was wrong. It was improper. Bob Wolfrum told you you know  
15 that's never the kind of love you want, but it's the kind of  
16 love that Russell felt.

17 Linda Beard. The woman from '94. He thought she  
18 was breaking up with him. I mean Mr. Swingle is right, all of  
19 his assaultive behavior centers around women he believes are  
20 breaking up with him. But by a verdict of life in prison  
21 without parole or probation, you will remove him from the  
22 society of women and he will not be in a situations from which  
23 these events seem to arise. Russell is not just all bad  
24 acts. Russell is a whole human being. There's still good in  
25 him. There's still humanity in him. And he can have that

1 wherever he is in a prison setting for the rest of his life.  
 2 Mr. Swingle told you that death doesn't happen in a  
 3 vacuum. Mike Sanders' death didn't happen in a vacuum. Well,  
 4 if you sentence Russell Bucklew to death, his death won't  
 5 happen in a vacuum either. If you sentence Russell Bucklew to  
 6 death today, you're going to sentence Robert and Frances to  
 7 live through his death. And instead of one broken heart  
 8 mother out here who knows of the pain of losing her child,  
 9 we're going to have two. We already have mothers who are  
 10 suffering. But you can punish him and not make it any worse.  
 11 Or you can punish him and make it worse for them. Instead of  
 12 one father who's sitting over here comforting his wife through  
 13 the trial concerning the murder of his son, we're going to  
 14 have two fathers over here comforting their wives trying to  
 15 get them through this event in which their son is lost. All  
 16 the while these fathers sit here quietly in court comforting  
 17 their wives they want to leave and they want to break down.  
 18 Death will not just happen to Russell Bucklew. It  
 19 will happen to his son regardless of what Mr. Swingle tells  
 20 you. It will happen to Cindy. It will happen to Russell's  
 21 family. It will happen to his parents. And what is to be  
 22 gained by that death because their pain remains the same. And  
 23 then their pain increases. And what do you get from it?  
 24 You're not going to save somebody else from another irate  
 25 boyfriend. You're not going to send a message. The only

1 antisocial personality disorder. It's an older term, but it  
 2 means the exact same thing. Their own psychiatrist diagnosed  
 3 this man as a sociopath.  
 4 Something Ms. Davis said that was offensive was the  
 5 idea that you the jury would be immoral, would be sinking down  
 6 to his level and would be no better than he is if you follow  
 7 the Missouri law and sentence him to the death penalty. I  
 8 guess she thinks that I am immoral and as low as he is because  
 9 I'm asking you to do it. I guess she thinks that trooper  
 10 Hedrick would have been immoral and as low as this man is  
 11 because he shot to kill a man who is a murderer who had a  
 12 hostage. I guess she thinks that men who go off to war to  
 13 fight for their country to kill other people to protect their  
 14 country are as low and immoral as this is because they are  
 15 taking lives when they point their weapons at other people.  
 16 There are times when it is legal and the right thing to do, to  
 17 take a life. And this is a time. This man took upon himself  
 18 to be somebody's judge, jury and executioner all by himself in  
 19 that man's own home in front of that man's own children.  
 20 Russell Bucklew has had the process of law. He's had the  
 21 courts. He's had the burden on the State to prove beyond a  
 22 reasonable doubt that he committed this crime. And then a  
 23 jury of 12 people with their 480 years of human knowledge  
 24 living and experience to agree that yes the punishment must  
 25 fit the crime. And punishment in this case should be the

1 message you're going to send is we react to your violence with  
 2 another act of violence. I told you I keep thinking of  
 3 something important, something magical, something key that I  
 4 can say to you to make you realize that this is not the right  
 5 verdict. Death is not the right verdict. The right verdict  
 6 in this case is a sentence of life in prison without parole or  
 7 probation. You will punish him for the rest of his days,  
 8 guaranteed. You will stop any further pain or heartache from  
 9 happening in this case. And you will be the just and the  
 10 moral group of people that I know you are. And if you can't  
 11 do it, for any of those reasons, then I ask you to consider  
 12 that you will gain nothing by sentencing him to death. And I  
 13 will ask you please, if you can't do it for any of those  
 14 reasons, don't do it and spare him for his family. And don't  
 15 cause another family to feel the same pain that he's caused.  
 16 Stop it now. Stop it now.  
 17 THE COURT: Closing argument for the State.  
 18 - \* -  
 19 STATE'S CLOSING ARGUMENT - PENALTY PHASE  
 20 - \* -  
 21 MR. SWINGLE: Ladies and gentlemen, one thing that  
 22 Ms. Davis said that was totally incorrect was her comment that  
 23 the psychiatrist said antisocial personality disorder is  
 24 something different from sociopath. What he admitted on the  
 25 stand is that a sociopath is another name for someone with an

1 death penalty.  
 2 She said to you oh no jilted, no jilted boyfriend  
 3 would be deterred by this. How can she know that? I submit  
 4 to you that is just the kind of crime that does deter by  
 5 seeing what happens to others because this is a crime that  
 6 involved premeditation, deliberation at so many stages. He  
 7 was thinking about what he was doing. He was gathering the  
 8 weapons. He was driving. He was thinking about songs. He  
 9 was thinking about movies. He was deliberating. And if  
 10 somebody had recently got the death penalty for stalking  
 11 someone or doing what he was doing, maybe that is something  
 12 else that he would have paused a moment to think about too.  
 13 But what was his experience? His experience was assault Cindy  
 14 Boyer and Scott Broecker, get probation. Assault Linda Beard,  
 15 get probation. His experience was nothing happens to you in  
 16 the criminal justice system. And, ladies and gentlemen, you  
 17 can't do anything to correct mistakes that may have happened  
 18 in other cases in the criminal justice system. But you can be  
 19 sure in the one case where you sit as a jury that justice will  
 20 be done and the right result will be reached. It's hard to be  
 21 a juror. It's hard to sit in judgment on another person, to  
 22 find that person committed the ultimate crime and deserves the  
 23 ultimate punishment. But is what will face Russell Bucklew  
 24 half so bad as what he did to Michael Sanders? At least the  
 25 last moments of Russell Bucklew's life won't be in his own

1 home being shot to death in front of his children hearing his  
 2 girlfriend screaming, the girlfriend he had loved and tried to  
 3 protect as she's being pistol-whipped and drug out of the  
 4 house. At least Russell Bucklew will live beyond the age of  
 5 27. At least he will have time to revise the Will he already  
 6 made on March 18, 1996 when he had decided he was going to go  
 7 out in a blaze of glory and take his ex-girlfriend and  
 8 boyfriend with him. He can revise that Will. He can formally  
 9 say good-bye to his parents, something Michael Sanders never  
 10 had the chance to do. And he can have time to prepare. He  
 11 can, and in the meantime while he's preparing he can be  
 12 getting up in the morning and feeling his feet on the floor  
 13 smelling the morning coffee, eating breakfast, reading  
 14 periodicals, reading books, watching television, exercising,  
 15 doing all those things that he ended so prematurely and  
 16 permanently and forever for Michael Sanders. It's hard to be  
 17 a juror.

18 She says oh mercy is an unpopular thing, that you  
 19 should forgive him. Well, ladies and gentlemen I submit to  
 20 you that the only people who truly have the right to forgive  
 21 Russell Sanders are Michael Sanders who's been dead for over a  
 22 year, his parents Dorothy and Jerry Sanders, and his  
 23 children. They're the only people that have the right to  
 24 forgive him. And your job as I mentioned earlier is not to be  
 25 the dispensers of forgiveness to murderers. Your job is to

1 assumption.

2 THE COURT: The objection will be overruled. Let's  
 3 proceed.

4 MR. SWINGLE: She's asked what is to be gained by  
 5 giving the death penalty. I can tell you in law school they  
 6 give four reasons for imposing a punishment that fits the  
 7 crime. One is called incapacitation. And you've already  
 8 achieved that by your first verdict because incapacitation  
 9 means we're locking that person up and as long as he's locked  
 10 up he's not going to be a danger to the public. So he's  
 11 incapacitated. But you haven't incapacitated him from harming  
 12 someone else in prison.

13 MS. DAVIS: Judge, I'm going to object to the  
 14 speculation of future danger since they've adduced no evidence  
 15 on that issue.

16 THE COURT: The objection will be overruled.

17 MR. SWINGLE: Incapacitation is one factor to  
 18 consider.

19 Another reason why punishment should be strong is  
 20 specific deterrence, to deter the specific individual from  
 21 ever harming anybody again. And the one way to assure that  
 22 Russell Earl Bucklew sociopath does not ever kill anybody else  
 23 is to give him the death penalty. That's the only way you can  
 24 know he will not harm any other person with certainty.

25 The most important reason for imposing the ultimate

1 see that justice is done. Justice not just for Russell Earl  
 2 Bucklew but also for Michael Sanders, for his family and for  
 3 Stephanie Ray and her family. Remember that because of the  
 4 actions of this man and nobody else six-year-old John Michael  
 5 Sanders and four-year-old Zachary Sanders are growing up for  
 6 all intents and purposes orphans.

7 It's hard to be a juror, but you've shouldered that  
 8 responsibility and took an oath to render a true verdict. And  
 9 the only true verdict, the only verdict that is true justice  
 10 in this case is the death penalty.

11 Something else she said that was incredible was her  
 12 statement that, well, Dorothy Sanders hasn't asked you to  
 13 impose the death penalty. Well, ladies and gentlemen it's  
 14 improper under Missouri law for the prosecutor to ask her what  
 15 she wants you to do. It's improper for me to ask that  
 16 question. And it's offensive for her to suggest because  
 17 something wasn't said that she knows what the answer would  
 18 be. Because that is improper for you to know. But her  
 19 comment to spare others pain makes an assumption that the  
 20 Sanders' family would not feel pain if the criminal justice  
 21 system would let them down and not impose the ultimate  
 22 punishment for the ultimate crime. She's making an assumption  
 23 they're not going to feel any pain if the murder of their son  
 24 does not receive the death penalty.

25 MS. DAVIS: Objection, judge, I didn't make that

1 crime, the ultimate punishment, the ultimate crime is called  
 2 general deterrence. And that means by the punishment of  
 3 Russell Earl Bucklew we are going to hit him so hard, we are  
 4 going to give such a big punishment in his case that anybody  
 5 out there that's in the same circumstances he is out in the  
 6 general public is going to be deterred or stopped from doing  
 7 that same type of thing. And some killers, some killers  
 8 wouldn't be deterred. But ladies and gentlemen, she cannot  
 9 tell you that no killer would not, would, that giving him the  
 10 death penalty will not stop somebody in the same circumstances  
 11 from not causing other pain to other people. She cannot say  
 12 that.

13 And the last and forth reason that's given in law  
 14 school for punishment is called retribution. It's the old  
 15 idea of an eye for an eye and a tooth for a tooth. And as you  
 16 use your collective experience and knowledge and wisdom, you  
 17 might think back to American History class in high school.  
 18 And the Hatfields and the McCoys from 1882 where a Hatfield  
 19 killed a McCoy and McCoy killed a Hatfield and this went on  
 20 with dozens and dozens of people killed until finally the  
 21 government stepped in and successfully prosecuted people and  
 22 stopped it from happening. Each family was wanting  
 23 retribution. Well, in this case you don't see the Sanders'  
 24 family getting their guns and going after Russell Bucklew.  
 25 You see them putting their faith in the criminal justice

1 system that justice will be done. And that's why retribution  
2 in this case calls for the death penalty for this premeditated  
3 deliberated cold-blooded killing during the course of a  
4 kidnapping, rape and home invasion.

5 Sometimes the criminal justice system can be  
6 described as a chain. A chain that is only as strong as its  
7 weakest link. And if there's any weak link in that chain,  
8 then the chain falls apart and the criminal justice system is  
9 a failure as to that particular case. Ladies and gentlemen,  
10 one link in the chain would be the victim reporting the crime  
11 and cooperating and agreeing to testify. And we have that in  
12 the case. Stephanie Ray had been reporting and reporting and  
13 reporting this fact this man was stalking her and trying to  
14 harm her. She was, she did her job in the criminal justice  
15 system by reporting and testifying. Another link in the  
16 criminal justice system is the police investigate and  
17 apprehend. In this case she had the Cape Girardeau Major Case  
18 Squad. David James, Charlie Herbst and the other officers who  
19 did a good job of investigating the crime scene and putting  
20 the evidence together in this case to prove beyond a  
21 reasonable doubt what happened. You had a terrific job by the  
22 Missouri Highway Patrol particularly James Hedrick and James  
23 Gau in apprehending this dangerous man, a killer who had a  
24 hostage. Imagine getting that assignment, you have to try to  
25 catch that killer without killing or harming the hostage. And

1 He was trying to help someone during the last moments of his  
2 life. He was in the sanctity of his own home with the  
3 children he loved and with the woman he had fallen in love  
4 with. And the last moments of his life because of this man  
5 ended up being looking at this man over the end of a gun  
6 barrel as this man was shooting him again and again and again  
7 and again. The last moments of the life of Michael Sanders  
8 had to be intense pain as he felt a shot hitting him in the  
9 chest and go out his back, as he felt a shot hit him in the  
10 buttock and go out near his tailbone, as he felt a shot  
11 hitting in the right leg, as he felt a shot hitting in his  
12 elbow and arm. He had to be feeling intense pain. The last  
13 moments of his life were falling to the ground and losing his  
14 dignity by begging for his own life when Russell Bucklew stood  
15 over him pointing the gun down at him and he lost his dignity  
16 by saying to Russell Bucklew "I'm down. I'm down. I'm  
17 cool." The last moments of his life would have been then  
18 hearing Russell Bucklew dragging Stephanie pistol-whipping her  
19 and handcuffing her and knowing that he had failed in  
20 protecting his girlfriend. That in the last moments of his  
21 life he had failed in trying to save her from this dangerous  
22 evil man. The last moments of his life were hearing her  
23 screams and hearing the screams of her little children as the  
24 blood was flowing out of his body. And you saw from the  
25 bloodstains that the last moments of his life would have been

1 they succeeded. They caught the killer without hurting the  
2 hostage. They did a good job. They apprehended him and here  
3 he is facing trial because the police did a good job of  
4 investigating and prosecuting. The prosecutor has to be  
5 willing and able to do his job. The jury has to follow the  
6 law and has to be able to apply common sense. And then the  
7 last link in the chain is the judge sentencing. If there's a  
8 weak link anywhere in this chain, then the criminal justice  
9 system fails. Ladies and gentlemen, I'm asking you, don't be  
10 the weak link in this chain in this Russell Bucklew case.

11 MR. WOLFRUM: Judge, we'd object to the improper  
12 personalization.

13 THE COURT: The objection will be overruled. Let's  
14 proceed.

15 MR. SWINGLE: Michael Sanders has been dead now for  
16 over a year. In the last moments of his life he was trying to  
17 protect the young woman he had fallen in love with. He was  
18 trying to protect his home. He was trying to protect his  
19 children. He had shoed and sushed those children to a  
20 bedroom behind him trying to get them in an area where they  
21 would be safe. He was thinking of his children in the last  
22 moments of his life. Was Russell Bucklew thinking of his  
23 child? I think not. Michael Sanders was trying to give  
24 sanctuary to a friend from work with whom he had fallen in  
25 love and with whom he was looking forward to a life together.

1 crawling trying to go out of that room while the blood was  
2 pouring from his body.

3 What Russell Bucklew wanted to do was go out in a  
4 blaze of glory. All Michael Sanders wanted to do was create a  
5 happy home for his children and Stephanie and her children.  
6 And it's ironic that Michael Sanders ended up being the one  
7 going out in a blaze of glory, unwanted glory for him.

8 Some day, ladies and gentlemen, John Michael Sanders  
9 and Zachary Sanders will be adults. Now they're seven and  
10 five, but some day they'll be adults. And I submit to you  
11 that they will want to look back at what happened in April of  
12 1997 in the case where the cold-blooded sociopath gunned down  
13 our daddy. Was justice reached? Did the jury in Boone County  
14 achieve justice? Did they impose the ultimate punishment for  
15 the ultimate crime or did the justice system fail in the case  
16 where this man invaded our home and shot our daddy down in  
17 front of us? And I don't care how wonderful anybody's grandma  
18 or grandpa or aunts or uncles are, nobody can replace a  
19 father's love. Nobody is going to give the same rewards for  
20 that finger painting just done, that bicycle just learned to  
21 ride. This man took their father. And I'm asking you to make  
22 the punishment fit the crime and to give him the death  
23 penalty.

24 THE COURT: Ladies and gentlemen, you will now  
25 retire, deliberate and reach your verdict.

# Exhibit E

IN THE OFFICES OF THE MISSOURI GOVERNOR AND  
THE MISSOURI BOARD OF PROBATION AND PAROLE

IN THE MATTER OF: )  
)  
RUSSELL E. BUCKLEW )  
)  
Potosi Correctional Center )  
Route 2, Box 2222 ) WARRANT OF EXECUTION  
Mineral Point, Missouri 63660 )  
) MARCH 20, 2018, at 6:00 PM  
*Applicant* )

PETITION FOR COMMUTATION  
OF THE SENTENCE OF DEATH

TO: The Honorable Eric Greitens  
Governor of the State of Missouri

Missouri is preparing to execute Russell “Rusty” Bucklew for the March 21, 1996 murder of Michael Sanders.

To date, no one has ever conducted a social history investigation on Rusty Bucklew’s behalf. This occurred because of the indifference and inexperience of trial and post-conviction counsel, the court’s repeated refusal to allot funding for an investigator and, most glaringly, because of prior clemency counsel’s behavior and profound betrayal of the attorney-client relationship. The investigation initiated by current counsel with the newly formed Capital Habeas Unit began only three short months ago. For the very first time, Rusty Bucklew has an experienced mitigation team, their mitigation is only in its infancy. Before a final and irreversible decision is made about whether or not Rusty Bucklew is worthy of mercy, he should be afforded enough time to allow his current team to complete a comprehensive and meaningful mitigation investigation.

Trial counsel painted an inaccurate and, indeed, an aggravated portrayal of Rusty and his background. Post-conviction counsel was inexperienced and ill-equipped to conduct an effective investigation. And, in the prior clemency proceeding -- Rusty's last chance for review-- counsel responsible for developing mitigating evidence had an intolerable and disabling conflict of interest. John Simon betrayed his legal and ethical obligations to Rusty by repeatedly borrowing money from Rusty's elderly parents over the course of seven years, at a time when he had the responsibility of building a trusting relationship with the family and developing the case for clemency. In total, John Simon borrowed \$27,000 from Robert and Frances Bucklew, both of whom were nearly 90 by the time they disentangled themselves from Mr. Simon and his scheme.

For the past 22 years, since Rusty's arrest, he has not had a meaningful mitigation investigation. These failure prevented the jury, the courts and the former governor from being able to understand his life story and properly place his wrongful actions in the context of his background and upbringing. Complex and persuasive facts are beginning to emerge from an intensive effort to investigate the circumstances of Rusty's life. What is apparent from the investigation is that the state's arguments for the death penalty are withering in the face of closer examination.

We now have a different story to tell about Rusty Bucklew and one that is far more compelling and mitigating than the one originally presented to the jury. Our recent investigation has uncovered the following:

- Rusty was wrongly diagnosed as having Antisocial Personality Disorder at the time of trial by the defense's own expert, Dr. Bruce Harry. This devastating misdiagnosis formed the basis for the state's argument that

Rusty presented continuing danger and that the death penalty was necessary to protect society. The ASPD diagnosis was the single most damaging piece of evidence presented at trial.

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

**A. THESE RECENT DISCOVERIES MEANINGFULLY CHANGE THE FALSE NARRATIVE THAT HAS PERSISTED THROUGH THE LAST 21 YEARS OF RUSSELL'S LIFE.**

This ongoing investigation is yielding promising leads and persuasive evidence – yet it has been severely hampered by the loss of nearly a decade of precious time because of misconduct by former clemency counsel, John Simon. As a result, Rusty's current legal team can only present a partial and very incomplete picture of Rusty and his life. It is also clear that the inaccurate portrayal of Rusty's background at trial has inflicted lasting damage, and that the present legal team needs to rebut that false narrative.

Trial counsel for Rusty Bucklew conducted a wholly inadequate investigation regarding the circumstances of his life. They spoke only with a handful of witnesses, and

accepted the shallow and inaccurate narrative provided by his parents rather than trying to uncover the true circumstances of his upbringing. (O, at ¶2; Exh. P, at ¶¶4-5). This inadequate investigation ultimately led to the most damaging piece of evidence admitted at this trial, the diagnosis of antisocial personality disorder. (O, at ¶9; Exh. P, at ¶8).

It has long been understood and accepted that capital trial counsel are responsible for conducting a thorough investigation. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (ineffective assistance of counsel where capital counsel in 1986 trial “did not fulfill their obligation to conduct a thorough investigation of the defendant’s background.”) This investigation requires the trial team to investigate not only the circumstances of the crime, but of the defendant and his life history. (Exh. H, at ¶27). These inquiries must include the client’s childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. (*Id.* at ¶27). These investigations take significant time and effort to be done properly. (Exh. G, at ¶22). And we know from the records that trial counsel did not complete the kind of investigation necessary to uncover and develop complete or accurate mitigation case for Rusty.

The most flawed aspect of trial counsel’s efforts is witness development. While trial counsel gathered medical records and school records, they talked to very few witnesses that actually had personal experience and interactions with Rusty. (Exh. O, at ¶7). Trial counsel spoke with Russell’s parents on no more than a couple of occasions and did not interview his siblings prior to trial. They did not speak with a single teacher who knew Rusty as a student. They did not speak with any of childhood friends, some of whom may have shed light on the chaos and troubles in the Bucklew home. And they did not collect

any records for family members, which would have documented troubling issues in Rusty's family, including intellectual disability, psychological issues, medical history, military history, employment history, etc. This information is necessary to develop a full and complete portrait of the defendant's background. Instead, the defense narrative was provided by Russell's parents and their one to two brief meetings prior to trial. Defense counsel accepted their sunny and superficial narrative without question and presented it to the jury as fact. That false portrait only served to conceal deep fissures, tension and conflict in the family – all of which had a lasting impact on Rusty.

- i. **Trial counsel presented a false and materially harmful psychological diagnosis.**

Trial counsel's lack of investigation ultimately informed the decision to retain and present Dr. Bruce Harry, a Columbia, Missouri psychiatrist. Dr. Harry did not conduct his own investigation. (Exh. I, at ¶6). To the detriment of his opinion and his work for Rusty, Dr. Harry relied on the misleading and incomplete information provided by trial counsel. (*Id.* at ¶3) Not surprisingly, the diagnosis presented at trial was inaccurate and was based on the extremely limited information from the short-lived and superficial mitigation investigation.

Dr. Harry diagnosed Rusty with a personality disorder called antisocial personality disorder (ASPD), even though he lacked the data and records to support it. (*Id.* at ¶9). The defense called him to testify despite this inaccurate and devastating determination. (Exh. O, at ¶10; Exh. P, at ¶9). As counsel has now acknowledged, Dr. Harry's ASPD diagnosis occupied center stage during the penalty phase and devastated the defense efforts to

persuade the jury to reject the death penalty. Relying on the defense expert, the state hijacked the ASPD diagnosis to argue that Russell was an unrepentant “sociopath” deserving of death. Indeed, the prosecutor stated in closing argument that “Their *own psychiatrist* diagnosed this man as a sociopath.” *State v. Bucklew*, Trial Transcript, p. 1160 (emphasis added). The state prosecutor then argued to the jury that Russell would pose a grave risk to inmates and guards even at the state’s maximum security prison because of his psychological diagnosis. This argument proved effective even though it was based on a fundamentally flawed and false diagnosis borne of a substandard investigation.

We now know that Dr. Harry’s diagnosis of ASPD is incorrect, was not supported by the record, and should never have been offered. (Exh. I, at ¶9). Because the ASPD diagnosis was *the* central fact in the penalty phase and likely played a large role in the jury’s decision, the failure to pursue leads that pointed away from ASPD was a critical and devastating failure.

As succinctly stated by Dr. Harry, “I was **incorrect** in diagnosing Antisocial Personality Disorder, and my testimony at the sentencing hearing that I had diagnosed Mr. Bucklew with Antisocial Personality Disorder is **wrong**.” (Exh. I, at ¶12) (emphasis added).

ii. **Trial counsel’s narrative was misleading and damaging to Rusty Bucklew**

The defense falsely argued that Rusty Bucklew had an ideal childhood and a picture perfect family, and that the crime in this case happened despite his positive and problem-free upbringing. The defense presented only two family witnesses – Russell’s mother and

father – to testify that he was a valued member of their family and would remain so even if he were imprisoned for the remainder of his life. (Exh. W, at p. 2-3). His mother notably recalled an idyllic childhood spent on the family farm surrounded by a loving and supportive nuclear family. (*Id.*). It was in this environment that Russell’s siblings – all described as successful and well-adjusted – were raised as well. (*Id.*). The jury was left to believe that Russell was simply a bad apple or “sociopath” that could not be helped and must be given the ultimate punishment. Given no reasonable explanation for his behavior, the jury unsurprisingly voted for death.

**iii. Post-conviction Perpetuates and Builds on the False Narrative from the Trial.**

Given the chance at a new start in post-conviction with a new set of attorneys and new investigators, the hope and expectation would be a new, more accurate and complete narrative could be presented. Instead, the post-conviction lawyers built on the original false narrative without ever challenging the faulty underlying assumptions made by trial counsel. (Exh. M, at ¶6; Exh. N, at ¶6). In doing so, post-conviction counsel failed to conduct a meaningful mitigation investigation and failed to develop a social history for Russell. (*Id.*). Rather, post-conviction counsel accepted the false, superficial narrative that Russell grew up in a tranquil, idyllic family environment. (*Id.*). A key opportunity to conduct the rigorous investigation necessary in these types of cases was again squandered.

With the false narrative firmly entrenched, post-conviction counsel sought to speak with additional witnesses. These attorneys conducted what they described as a superficial investigation. (Exh. N, at ¶6). While they met with more people who knew

Rusty, they always entered the discussions with the underlying assumption that Rusty had a good childhood. The interviews themselves were single-shot efforts that lacked the foundation to develop the necessary rapport to obtain the crucial details of Rusty's upbringing. (*Id.* at ¶5). Post-conviction counsel then had witnesses who offered only more platitudes and solely positive life experiences. This was another critical missed opportunity.

**iv. Clemency Counsel's Misconduct Denies Rusty Bucklew a Final Opportunity to Change the Narrative.**

On March 26, 2008, the United States Court of Appeals for the Eighth Circuit appointed a new attorney to represent Russel Bucklew. The Eighth Circuit permitted Charles Rogers to withdraw and appointed John William Simon, a former Assistant Missouri Attorney General, who purportedly had vast experience in representing death row inmates. (Exh. B, at ¶15; Exh. C ). Because of his geographical proximity to Rusty and his family, Mr. Simon took on the task of interviewing witnesses and conducting the investigation necessary to present the clemency case to the Governor. (Exh. Q, at ¶\_). Ms. Pilate remained as co-counsel and continue to focus her efforts primarily on pursuing lethal injection issues as a result of Russell's unique medical condition, cavernous hemangioma, which causes unstable, blood-filled tumors to form in his head, neck and throat. (Exh. Q, at ¶¶16-19).

While Mr. Simon appeared to be undertaking a vigorous mitigation investigation, the investigation abruptly ended just three months after he accepted his appointment. (Exh. E). Mr. Simon labored under a crushing financial burden at the time he accepted the

appointment to Rusty's case. (Exh. D, at p. 3). Owing more than \$100,000 in back taxes, penalties and interest to the IRS, Mr. Simon apparently struggled to make ends meet. (Exh. D, at p. 56). Under financial pressure, he to Russell's elderly parents for help. (*Id.*, at p.3).

Beginning on June 24, 2008, less than three months after being appointed to Rusty's capital case, Mr. Simon solicited the first of eight (8) personal loans from Rusty's parents. (*Id.*, at p.3). Loan documents maintained by Rusty's father detailed the loans and the circumstances under which they were solicited. (*Id.*).

<u>Date</u>	<u>Event</u>	<u>Loan Amount</u>
March 26, 2008	John Simon appointed to represent Rusty Bucklew	
June 24, 2008	Loan #1	\$4,000.
December 22, 2008	Loan #2	\$4,000.
January 29, 2009	Loan #3	\$3,000.
December 14, 2010	Loan #4	\$2,000.
February 16, 2011	Loan #5	\$3,000.
December 14, 2011	Loan #6	\$3,000.
July 30, 2012	Loan #7	\$6,000.
February 12, 2013	Loan #8	\$2,000.

The loan records also revealed that Mr. Simon had borrowed \$27,000.00 over a period of 7 years, culminating in 2015, when he belatedly repaid the outstanding loan balances under

threat of exposure to the Missouri Office of Chief Disciplinary Counsel. (Exh. D; Exh. S, at ¶18).

Prior to January 4, 2018, the loans from Robert and Frances Bucklew to John Simon had only been known to a few individuals. Mr. Simon had kept the loans a secret from Rusty Bucklew, his client – the person to whom he owed a duty of loyalty – as well as from his co-counsel. Mr. Simon's efforts to keep secret the loans from Rusty and undersigned counsel are spelled out in the accompanying letters to the loan agreements. (Exh. D, at p.59). For instance, on April 1, 2014, Mr. Simon wrote to Robert Bucklew and stated:

Once again I must stress the need for discretion in discussing the situation that led me to seek your financial support in continuing my work. Spreading word of this situation even inadvertently would lead to demoralization of your son, his friends, and the other attorneys on whom they depend for representation.

(Exhibit D, at p. 59). Robert and Frances kept their word to Mr. Simon and did not reveal the loans except to their older adult children when repayment became a concern. (Exh. S, at ¶18).

Mr. Simon's mitigation investigation effectively ended when he started soliciting personal loans from Rusty's parents. No follow up was done on the prior interviews and promising leads were abandoned. Mr. Simon was aware of his obligations as clemency counsel. As he noted in his March 25, 2011, letter to the federal district court:

As an attorney appointed to handle the case, and personally bound by the ABA GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. Feb. 2003), 31 HOFSTRA L. REV. 913, 937, 1088 & 1090 (2003), I did not believe I had the discretion to short the client out of concern that someone else

would deny me the statutory compensation for a given piece of work months or years later with the luxury of hindsight.

(Exhibit E, at p. 15). As part of his ethical obligations to Rusty as clemency counsel, Mr. Simon noted that he was compelled to conduct a thorough investigation into his client's background. (Exh. E, at p.21). According to Mr. Simon's CJA records, he began that investigation shortly after his appointment on March 26, 2008. (Exh. E, at p.36).

Mr. Simon's investigation focused on meeting with Rusty and Rusty's immediate family members. According to the CJA records, Mr. Simon met with Rusty's parents, two of his brothers, and his sister. (Exh. E, at p.38-40). All of these interviews were conducted in the first two or three months of the representation. (Exh. E, at p.38-40). These interviews yielded important leads to mitigating circumstances that required further investigation. As Mr. Simon noted:

Mr. Bucklew's family is not the stereotypical "death row" family. He was not born out of wedlock or abandoned by his father. He has a strong extended family. I can tell that there are fault lines of the nature *Wiggins* mandates and its progeny mandate investigation; but it takes years of patient and respectful dialogue to build up the trust that will eventually allow those concerned to share embarrassing facts with counsel or a mitigation specialist.

(Exhibit E, at p.31). This letter was submitted in support of Mr. Simon's request for CJA compensation from the federal district court. (Exh. E, at p.13). He recognized the need for additional investigation based on his interactions with the family, but his billing records submitted with the same letter indicate that he did not follow through on his obligations to investigate.

Mr. Simon submitted to the federal district court a voucher for fees and expenses totaling \$123,217.06 (reduced to \$122,101.62 by the clerk's office, following administrative review). (Exh. E, at p.1). In the voucher, he detailed his contacts with Rusty's family and the time he spent with them. These mitigation interviews totaled 13.2 hours out of the 679.8 hours billed, in other words 2% of the total time billed. (Exh. E, at p. 1). Mr. Simon took notes during the initial interviews conducted with the family members, but the two interviews with Russell's parents occurring after the initial loans were solicited (June 24, 2008), were apparently not documented. (Exh. E, at p. 40). Even with these interviews, there was no follow-up on any of the information purportedly learned from the family.

Mr. Simon billed hundreds of hours to the case but failed to conduct any interviews with other individuals who may have known Rusty when he was growing up. (Exh. E). No time is billed to speaking with key witnesses, including childhood friends, educators, extended family members, employers, neighbors, caregivers or other individuals who may have shed light on the Rusty Bucklew and his family. (*Id.*). Instead, the only additional clemency interviews were focused on other inmates who only knew Rusty once he was an inmate at Potosi Correctional Center. Information purportedly gained through these interviews with other inmates was not included in the final clemency petition submitted to then Governor Nixon on May 14, 2014, prior to the last execution setting in May 2014. (Exh. Y).

By early 2015, Rusty's father had become increasingly concerned that the then-outstanding loan balance of \$8,000.00 plus accrued interest would not be repaid by Mr. Simon. (Exh. S, at ¶18). Robert Bucklew then asked one of his sons, Robert Bucklew, II, a

former law enforcement officer, to contact Mr. Simon and demand payment. (Exh. S, at ¶18). According to Robert Bucklew, II, he contacted Missouri's Office of Chief Disciplinary Counsel (OCDC) to determine whether Mr. Simon had breached any of his ethical obligations in accepting the loans. (Exh. S, at ¶18). According to Robert Bucklew, II, counsel at OCDC were interested in knowing the identity of the lawyer and insisted that the loans may have been improper. (Exh. S, at ¶18). Armed with this information, Robert Bucklew, II, emailed Mr. Simon demanding payment and threatening to report Mr. Simon to OCDC if he did not comply. (Exh. S, at ¶18). Mr. Simon called him "three minutes later." Mr. Simon said, "This doesn't need to go any further," and told Rob that the money would be paid in full by the end of the week. (Exh. S, at ¶18). He also stated that Mr. Simon told him, "*It's over for Rusty if anyone in the AG's office finds out. I won't be able to work on his case any longer.*" (Exh. S, at ¶18) (emphasis added).

On October 5, 2015, Mr. Simon filed a motion in the United States Court of Appeals for the Eighth Circuit to withdraw from further representation of Mr. Bucklew. (Exh. Z). In the motion, Mr. Simon emphasized that he was appointed solely for "pursuing Mr. Bucklew's clemency petition with the Missouri governor." (Exh. Z, at p.5). He argued to the court that there was nothing more he was appointed to do, and he should therefore be granted leave to withdraw. (Exh. Z, at pp. 2-3). He filed this motion aware that Rusty still faced execution and knowing that he had not conducted a thorough mitigation investigation. Rusty's case, though, was no longer a useful source of funds as the family and the District Court had, at that point, cut off further financial payments. (Exh. Q, at ¶33). The Eighth Circuit granted the motion to withdraw on October 6, 2015. Mr. Simon

maintained his secret about the loans and did not disclose them even after withdrawing from the representation.

- v. **The current execution date has severely limited current counsel's ability to effectively investigate the clemency case.**

On November 21, 2017, the Missouri Supreme Court again set an execution date for Rusty Bucklew. With only one counsel, to address clemency, the United States District Court for the Western District of Missouri appointed the newly-formed Capital Habeas Unit (CHU) from the Federal Public Defender's Office to serve as co-counsel with Ms. Pilate. The CHU was appointed on November 29, 2017.

Rusty's current counsel are only now beginning to uncover the damage done by Mr. Simon's conflict-of-interest and his sustained attempts to hide the conflict from his client and co-counsel. (Exh. S; Exh. T). The decade-long conflict and cover-up compromised the quality and extent of the clemency investigation. In squandering the critical commodity of time, Mr. Simon compromised Rusty's opportunity to interview key witnesses and to investigate fully obvious mitigation themes that undermine the state's initial case for death. Mr. Simon effectively abandoned his former client and hid the evidence of his misconduct until it was fortuitously uncovered on January 4, 2018, a mere 55 days from the scheduled execution. Mr. Simon's misconduct left current counsel with precious little time to undertake an investigation that requires years to effectively complete.

**B. RUSSELL BUCKLEW IS WORTHY OF A GRANT OF CLEMENCY.**

Simply put, Mr. Bucklew is deserving of mercy. In addition to the many failures noted above, trial counsel also failed to disclose to Dr. Harry a letter written by Rusty Bucklew to Ms. Stephanie Ray, Rusty's former girlfriend (who is now deceased). Dr. Harry felt that this letter would have been important to his evaluation:

Mr. Komp provided me a June, 1996, letter written by Mr. Bucklew to Ms. Stephanie Ray that was part of the trial discovery but not provided to me. (Attachment A). The letter provides valuable insight into Mr. Bucklew's thought process following the crime and demonstrate remorse for his conduct. The remorse expressed in this letter is consistent with his expressions of remorse in my interactions with him and further confirms that Antisocial Personality Disorder is not an appropriate diagnosis for Mr. Bucklew.

(Exh. I, at ¶11).

- i. **Russell Bucklew's prison record demonstrates he is not a danger to others.**

One of the state's primary arguments in favor of the death penalty was the notion that Russell posed a danger to other inmates and corrections personnel were he allowed to live. We now have more than 21 years of records from his incarceration which prove that the State's contention is completely without merit.

The state's argument was, in part, based on the misdiagnosis by Dr. Harry. In describing Russell as a "sociopath" the prosecutor left the impression with the jury that Rusty was a man who harmed others without remorse. His incarceration record, though, provides an entirely different story. In fact, his records show not a single serious disciplinary write-up in the more than 21 years he has been housed at Potosi Correctional

Center. (Exh. R). His write-ups largely consist of minor and technical violations, and those have decreased in frequency over time. (Exh. R).

As the letters of support indicate, Mr. Bucklew is a man of warmth and character who is willing to help others rather than cause harm. The men who have had an opportunity to live with and around Rusty for these past 21 years uniformly describe him in positive terms. One friend described him as “very trustworthy friend who would help me out anytime I asked for it.” (Exh. U, at p. 1). This theme is evident throughout the letters of support. Another man stated that Russ was always willing to “help anyone and would give you the shirt off back if you needed it.” (Exh. U, at p. 1). His concern for others was exemplified by his outreach on holidays for those men who had no one on the outside that cared for them. (Exh. V). Russell would work with his mother to send holiday cards to other inmates. (Exh. U, at p. 1; Exh. V) (“His mother would send me a Christmas card and keep me informed of her son.”). It was these types of gestures that led to him being described in such positive terms by other inmates.

Other inmates also described Rusty as a positive force in the institution. Rusty is known in the prison as a “very social person” who “mix[ed] well with anyone.” (Exh. U, at pp. 2-5). Another friend noted that Rusty always had an “infectious smile for those who were suffering.” (Exh. U, at p. 6). The experiences these men had with Rusty are not aberrations. Rather, these lifelong traits are what he carried with him into prison and marked his time incarcerated.

Rusty’s behavior while incarcerated is characteristic of the way he carried himself throughout his life. Rusty’s sister-in-law, Janet Bucklew, recalled Rusty as “respectful,

kind and loving to me and my kids.” (Exh. U, at p. 9). She recalled Russel being described by her children as the “fun uncle” and remembers him “spending hours playing with the boys on top of the cellar with their toy soldiers.” (Exh. U, at p. 9). Her son Jason Bucklew echoed these memories in his letter noting that Russell “spent a lot of time with my brother and I when we were children and we always looked up to him as a leader.” (Exh. U, at p.\_12). Jason fondly recalls his time with Russell a “filled with happiness and joy.” (*Id.*).

Russell’s experiences in school demonstrated that while he was often bullied by his peers he remained respectful and mild mannered. Patty Lafoon, a teacher in the Troy School District, recalled that Russell was often “bullied by other students.” (Exh. U, at p.\_7). Despite him being bullied, “he was never aggressive or hurtful toward [the teachers] or other students.” (Exh. U, at p.\_8). He was a “lively child” but never demonstrated “hateful or aggressive behavior.” (Exh. U, at p.\_8). In fact, the teachers could not recall “ever sending him to the principal for being disrespectful or having severe anger issues with other pupils or myself.” (Exh. U, at p.\_10-11).

These personal stories combined with his prison records demonstrate the degree to which the state’s predictions were wrong about Russell. Rather than posing a significant risk to the guards and other inmates, Russell has demonstrated himself to be a compliant inmate and a kind and thoughtful friend.

**ii. Russell Bucklew’s Home Life Was Chaotic.**

Russell’s childhood was anything but the idyllic picture painted by his parents when they testified at trial. Russell is the youngest of five siblings and, from the outside, the family appears may appear to be a typical nuclear family. Russell’s parents remain

married and his siblings all appear to be successful and well-adjusted. Indeed, this is the image that Rusty's trial attorneys presented to the jurors, leading them to wonder how Rusty developed the way that he did. We now know that Russell grew up in a household marked by violence, rage, explosive tempers, and adultery.

Rusty's parents were constantly fighting throughout his childhood. The center of the anger and violence in Russell's childhood was his father, Robert Bucklew, Sr. Mr. Bucklew, Sr., had a volcanic temper. He was constantly screaming at Rusty's mother, Frances. He threw chairs and destroyed other possessions during the arguments. The children were always on pins and needles, trying to avoid triggering their father's rages. The primary target of his anger, though, was Rusty's mother. The ongoing conflict and violent outbursts had disastrous effects for Frances and for her children.

Rusty's father had extra-marital affairs, which were the source of a great deal of conflict and tension in the family. This situation was a widely known fact in the community. These affairs served as the basis for many fights, and ultimately, to Fran's nervous breakdown and suicide attempt. Rusty, as the youngest child, was greatly affected by his father's abuse, betrayal and abandonment. Unlike his siblings, Rusty was at home with no support from other siblings amidst the chaos that engulfed his family.

The chaotic nature of the home life also played a role in the lives of the other siblings. The impression at trial was that Rusty was an outlier when in fact his siblings were also negatively impacted by their home environment. Ron Bucklew struggled in school. In response to behavior problems he was having, his parents sent him off to live with relatives in Ohio for more than a year. Once Ron was able to purchase a car, he spent

as little time at home as he had to. Each of Rusty's brothers enlisted in the military as young men, even while the Vietnam War was ongoing. This fact, more than any other, demonstrated the desire of the older siblings to leave and never look back.

**iii. The lethal injection protocol used in Missouri continues to pose a significant risk of a botched execution for Russell Bucklew.**

Mr. Bucklew suffers from a rare and incurable disease – cavernous hemangioma – that causes large clumps of weakened, malformed vessels to grow in his head, face, neck, and throat. His condition is congenital, severe and progressive. The unstable tumors displace healthy tissue and are highly vulnerable to rupturing under stress or any rise in blood pressure. Indeed, small ruptures occur on a near daily basis, which Mr. Bucklew deals with by keeping gauze and a biohazard bag constantly at hand.

Mr. Bucklew has had this condition since birth, and his vascular malformations have grown progressively worse throughout adulthood, causing constant facial pain and pressure, labored breathing, and impairment of his hearing and vision. The tumors in Bucklew's airway, including his grossly swollen uvula, make it difficult for him to breathe, a difficulty exacerbated when Bucklew is lying supine. When lying down, his uvula is pulled, by force of gravity, back into his airway, thereby effectively blocking airflow.

In May 2014, Mr. Bucklew filed a federal lawsuit against the director of the Missouri Department of Corrections and other DOC personnel. He raised claims under 42 U.S.C. §1983 and the Eighth Amendment, alleging that, during an execution by lethal injection, he is highly likely to suffer excruciating and prolonged pain in violation of the Eighth Amendment.

Mr. Bucklew's "as applied" challenge to Missouri's lethal injection protocol alleges that any execution under the protocol is likely to be especially gruesome and impose needless pain and suffering upon Mr. Bucklew.

In May 2014, Mr. Bucklew sought and was granted a stay of execution from the United States Supreme Court. After that stay was entered, his case returned to the lower courts for further litigation. After the district court dismissed his case by granting the defendants' motion for summary judgment, Bucklew's case returned to the Eighth Circuit Court of Appeals, which affirmed the district court, but on a 2-1 vote. Mr. Bucklew currently has pending a petition for rehearing before the Eighth Circuit, along with a motion for stay of execution.

As required by the United States Supreme Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), Mr. Bucklew has proposed a "feasible" and "available" alternative method of execution – that of lethal gas, namely the use of nitrogen gas. However, the district court rejected Mr. Bucklew's arguments, stating that it believes that nitrogen hypoxia will not "substantially reduce" Bucklew's risk of excruciating pain and suffering. Mr. Bucklew has appealed the district court's ruling, asserting that lethal gas will cause him to lose consciousness more quickly than execution by a lethal drug, and that lethal gas will not require him to lie supine, which, because of his airway obstruction, creates a great risk of choking, gagging and suffocating. Because lethal gas does not require venous access, it also does not create a risk that, if a central line is needed, Mr. Bucklew's femoral vein will have to be accessed through a painful, antiquated "cut-down" procedure.

Mr. Bucklew recognizes that, in clemency, the executive branch generally does not act until all legal proceedings have concluded, and Mr. Bucklew's Eighth Amendment lawsuit is still pending. But because the governor is likely to be the *final* decision maker if the execution goes forward, Mr. Bucklew presents, as a ground for clemency, the great likelihood that he will suffer a prolonged, excruciating and, indeed, gruesome death if he is executed under Missouri's lethal injection protocol. If Mr. Bucklew's tumors rupture or he is forced to lie supine, his airway is likely to become partially or fully obstructed. He is likely to cough, choke, gag and suffocate, all while bleeding from his mouth, nose or even his eyes.

Recent photographs show that Mr. Bucklew's hemangiomas have grown worse recently. He has one very large hemangioma on his upper lip. It is dark purple and the size of a very large grape. (*See* Exh. X). The tumor distorts his features and makes it difficult for him to speak clearly. Four years ago, in 2014, the tumor was far smaller, with little effect on his facial appearance. (*Id.*).

Mr. Bucklew last had imaging to determine the size and progression of his tumors in December 2016. He is now overdue for updated imaging, but, regardless, the photographs of his face, in 2014 and in 2018, readily show the growth in his tumors and establish that any execution of him by lethal injection – in which he will be forced to lie flat and during which he may struggle for air for up to 4 minutes – is highly likely to be exceptionally painful, bloody and gruesome. Because he will suffer excruciating and prolonged pain, including the inability to breathe, he requests that the governor grant clemency on this ground.

- iv. More time is needed to investigate and present a final petition for clemency.

The years of time lost because of Mr. Simon's conduct cannot be made up in the short time that the investigators have available before the March 20, 2018 execution date. There were only 55 days remaining at the time the misconduct was discovered. And while counsel and the investigators have engaged in a non-stop investigatory process, it is simply not possible to complete the investigation that is required to adequately develop Rusty's case for clemency. Indeed, the facts presently known pose many questions but offer few answers yet. The blame for this rests at the feet of Mr. Simon, although it is Rusty who is suffering the consequences of his lawyer's misconduct.

Adequate investigations take time and resources to be done correctly. Russell Stetler, National Mitigation Coordinator for the Federal Death Penalty Project, noted that an adequate social history investigation "requires, at a minimum, hundreds of hours to complete . . . even working under intense time pressure." (Exh. H, at ¶33). In reviewing this case, Mr. Stetler stated that "counsel's request for a stay and a modest continuance of six months is reasonable." (Exh. H, at ¶65). He went on to note that "the additional time would be crucial in allowing current counsel to continue their witness interviews, to develop a complete social history, and to consult with experts armed with a complete social history and medical history necessary to accurately assess Mr. Bucklew's unique life circumstances." (*Id.*). In this case, it is particularly important to conduct this investigation because the failures of Russell's trial and post-conviction counsel, combined with Mr.

Simon's abandonment of his client's interests, have resulted in a failure to obtain, at any point, a complete and accurate picture of Russell's background and upbringing.

The current investigation is beginning to yield additional facts that are worth exploring and they include the following:

◇ **Opioid Addiction.** We know from the records at trial that Russell was using a number of high powered prescription opiates to manage his chronic pain from the hemangioma. Despite the availability of the records and the obvious red flags, his state trial and post-conviction teams ignored the evidence and failed to follow-up with an addiction specialist. (Exh. O, at ¶12; Exh. P, at ¶14). Mr. Bucklew's present counsel have contracted with an addiction specialist and his review of the available data leads him to conclude that Russell would meet the clinical definition for opiate addiction. (Exh. L). This is significant in that it adds additional context to his thought process and erratic behavior at the time of the murder. While this does not legally or morally excuse his behavior, understanding that he was suffering from addiction and not a personality disorder would have better contextualized his behavior in the mind of the jury likely leading to a different result.

The presence of a drug addiction also adds context to argument that Russell posed a continuing threat in prison. As noted, Russell's record of incarceration does not support the State's argument that he poses a continuing threat. Russell is no longer being treated for the pain with the

same types of prescription narcotics that he was at the time of the crime. His improved behavior correlates with the reduction in the opiate medications he is being given, leading to a potential causal relationship between the opioid addiction and his criminal conduct.

The investigators still need additional time to investigate the origin of his drug addiction. The investigators have been identifying and speaking with some of the friends who knew Russell in his early-teen years and have developed a better understanding of their social interactions. These interviews have suggested that drugs and alcohol were a constant part of their social life. And these stories correspond to the time at which Russell began having difficulty with conformity with the law.

◊ **Lead Paint Exposure.** Witnesses have provided information that the Bucklew family home contains significant levels of lead paint. (Exh. S, at ¶10; Exh. T, at ¶49). Witnesses stated that Russell was exposed to lead paint dust and chips throughout his childhood, with the exposure continuing through critical developmental years. (Exh. S, at ¶10; Exh. T, at ¶49). The harmful developmental impacts of lead paint exposure have been known for decades, but no investigation has yet been undertaken to determine whether such exposure had an impact on Russell's development.

Understanding the potential impact on Russell's development is of particular importance given a couple of issues that we know about Russell. The first is a potential impact on Russell's physical development. Witness

accounts and photos tell of Russell being a particularly small and slight child. In addition, we know from school records and from speaking with some of his teachers that Russell was tracked into the learning disabilities classes in school. Dr. Gelbort's report from the post-conviction hearing noted that he had a below-average IQ and the presence of lead paint exposure may offer an environmental reason for this fact. (Exh. K).

◇ **Neuropsychological Evaluation.** While Russell had a prior neuropsychological evaluation completed by Dr. Michael Gelbort, additional testing is required after the preparation of a comprehensive social history report. (Exh. K, at 94). There are substantial indications in the records, combined with his history of hemangioma, that raise substantial questions about Russell's brain development. The social history report, though, is required in order to make this a useful endeavor and shed further light on what Dr. Gelbort identified as organic brain dysfunction. *Bucklew v. State*, 38 S.W.3d 395, 398-99 (Mo. 2001).

◇ **Family and Friend Witnesses.** The investigators still have dozens of additional witnesses who need to be interviewed to further develop the life story for Russell Bucklew. Each of the witnesses interviewed so far have provided useful information relating to his childhood, his personality, challenges in the family home, etc. In addition, it is imperative that as additional information is developed that the investigators have the opportunity to interview family, friends, and

educators more than once to continue to draw upon their memories and follow-up with newly-developed information. This process takes time but is absolutely essential to completing the investigation.

### Conclusion

Executive clemency has proved to be the “fail safe” in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. *Herrera v. Collins*, 506 U.S. 390, 414 (1993). In this unique case, the facts necessary to understand Russell Bucklew, his background, his role in the crime, and the proper context surrounding that fateful day remain largely undiscovered. The glaring gaps in the mitigation investigation can and should be remedied with adequate time to conduct additional investigation. We respectfully ask that the Governor to stay the execution for a period to no less than six (6) months to allow current counsel to complete a comprehensive mitigation investigation and present a fully developed case for clemency on Rusty Bucklew’s behalf.

The clemency decision should be guided not only by an understanding of the crime, but also by a complete understanding of the full facts and circumstances that concern the person who faces society’s ultimate penalty and who respectfully seeks the exercise of the Governor’s power to grant mercy. We very much appreciate your time and consideration of these important issues.

Respectfully Submitted,

/s/ Cheryl A. Pilate

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# Exhibit F

# Declaration of Frank LoVecchio, DO, MPH, FACEP, ABMT

Pursuant to 28 U.S.C. § 1746

I am over the age of 18, am of sound mind, and am competent to testify regarding the matters below.

1. I am board certified by the American Board of Emergency Medicine in emergency medicine, addiction medicine, medical toxicology and medical forensics. I have formed opinions on the medical issues of this case and holds those opinions to a reasonable degree of medical certainty. Based on the records provided and my professional opinion.

2. I have had the opportunity to review the following records of Russell Bucklew:

- a. Social Security Disability File for Russell Bucklew
- b. Medical Records – Lincoln County Memorial Hospital
- c. Medical Records – Southeast Hospital Emergency Room
- d. Medical Records - Southern Cross Medical Services
- e. Medical Records - St. Luke's Urgent Care
- f. Medical Records - Dr. Richard Moore
- g. Medical Records - Cardinal Glennon Hospital
- h. Medical Records – Dr. Jan Deabaugh
- i. Medical Records - St. Joseph Health Center
- j. Medical Records – Doctor's Hospital in Wentzville, MO
- k. Medical Records – St. John's Mercy Hospital
- l. Medical Records – University of Missouri Medical Center
- m. Expert Report - Dr. Bruce Harry

3. Russell Bucklew clearly suffered from opioid use disorder (OUD) or opioid addiction. According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)<sup>1</sup> and my professional opinion the criteria is clearly met.

4. OUD is defined as a problematic pattern of opioid use leading to clinically significant impairment or distress and a few other criteria that Russell Bucklew clearly had namely:

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<sup>1</sup> The DSM-IV was used at the time Mr. Bucklew committed the crime in 1996. However, I believe that the criteria for OUD or opiod addiction are met using the DSM-IV as well.

- Opioids are often taken in larger amounts or over a longer period than was intended
- A persistent desire or unsuccessful efforts to cut down or control opioid use
- A great deal of time is spent in activities necessary to obtain the opioid, use the opioid, or recover from its effects
- Craving, or a strong desire or urge to use opioids
- Continued opioid use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of opioids
- Important social, occupational, or recreational activities are given up or reduced because of opioid use
- Recurrent opioid use in situations in which it is physically hazardous
- Continued opioid use despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance
- Tolerance
- Withdrawal

5. Suffering from OUD would clearly alter the thinking and reasoning of Russell Bucklew as it has done to so many patients. Opiates change the way the brain responds to pain stimuli and can also produce a “high” feeling by disrupting the reward and pleasure centers in the brain. The addiction impacts an individual’s judgement, which impairs an individual’s ability to make rational decisions..

6. The central nervous system, which includes the brain, cardiovascular and respiratory systems, has opioid receptors that receive opiate drugs, and these drugs bring a variety of physical and emotional effects. Heart rate, respiration, blood pressure, and body temperature are common. Alterations in any of these could alter an individual’s judgment.

7. Repeated use or abuse of an opioid drug can actually change the way an individual’s brain chemistry works and lead to physical and psychological dependence. The body may not feel “normal” anymore without the drug’s interaction, and withdrawal symptoms may start in between doses or when an individual stops taking the opiate. Russell Bucklew could not be “normal” mentally without opioids. When he needed his opioids it is very likely and common that he make poor decisions. It is not uncommon for patients to rob, steal and commit crimes to feed this disease of opioid addiction.

8. Russell Bucklew's date of offense was March 21, 1996. Records show him receiving injections of Demerol (100 mg.) and Vistaril (50 mg.) and Loratabs (7.5 mg., 2 x day) on March 18, 1996. These medications would still be present in his body on the day of the crime. Demerol and Lortab are opioids and would clearly impact his judgement. Patients under the influence of opioids can have alteration of their mental status ranging from loss of judgment, sleepiness to coma. Vistaril (Hydroxyzine) causes central nervous system depression which may impair physical or mental abilities. The package insert recommends patients must be cautioned about performing tasks that require mental alertness (eg, operating machinery, driving).

9. Based on my training and experience in emergency medicine and experience and training in medical toxicology and addiction, it is my opinion that it is likely Russell Bucklew's decision making and actions were affected by his addiction and prescribed medications.



2/27/18  
Date

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Frank LoVecchio, D.O.