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Honorable Scott S. Harris
Clerk of the Supreme Court of the United States
One First Street, NE
Washington, D.C. 20543

RE: *Bucklew* v. *Precythe*, No. 17-8151
Opposition to Request to Lodge Non-Record Materials

Dear Mr. Harris,

Respondents Anne Precythe, et al., ("the State") respectfully oppose Petitioner Russell Bucklew's request to lodge non-record material with the Clerk in this case. Lodging non-record materials is rarely justified, and Bucklew has not provided any convincing "reasons why the non-record material may properly be considered by the Court, as required by this Court's Rule 32.3.

In an appeal on the merits, appellate courts and parties are nearly always "limited to reliance on facts in the record." Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 743 (10th ed. 2013). Parties have sometimes tried "to influence the Court's decision in a case by attaching to a brief . . . some additional or different evidence that is not part of the certified record." *Id.* But "[t]he Court has consistently condemned such efforts." *Id.*; *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157–58 n.16 (1970) ("Manifestly, it [an unsworn statement of a witness] cannot be properly considered by us in the disposition of the case."); *Russell v. Southard*, 12 How. 139, 158–59 (1851) ("This court must affirm or reverse upon the case as it appears in the record."); *Hopt v. Utah*, 114 U.S. 488, 491–92 (1885) ("The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record . . . and not by ex parte affidavits . . . .").

Courts occasionally can take judicial notice of uncontroversial facts outside the record, and this Court's Rule 32.3 provides a vehicle for counsel to lodge non-record materials that are subject to judicial notice. Shapiro, *supra*, at 744. But lodging materials is allowed only "[o]n rare occasions." *Id.*

This is not one of those "rare occasions" where lodging materials is justified, *id.*, and Bucklew has failed to provide any convincing justification why the proposed non-record material "may properly be considered by the Court." Sup. Ct. R. 32.3. The critical issue in this appeal is whether Bucklew submitted sufficient evidence before trial to establish his claim. Bucklew cannot now try to meet that burden by submitting medical records that did not exist until after this appeal was pending. None of his evidence has been subjected to adversarial testing, and it includes extensive hearsay. None of it is properly subject to judicial notice.

Bucklew contends that lodging these materials is justified because "respondents have referred to these developments in their briefing." To the contrary, in its briefing, the State did not rely on such non-record evidence about Bucklew's medical condition. Bucklew referred to this non-record evidence in his initial brief, and the State merely pointed out that the assertions Bucklew made about recent events, even if true, further undermine his claim. Resp. Br. 12–13.

Bucklew also seeks to lodge just 16 pages out of nearly 500 pages of medical records that were presented to Respondents' counsel just a few days ago. If Bucklew's request is granted, the State will likely need to make its own lodging request to provide complete context to the selected records that Bucklew wishes to submit.

Respectfully submitted,

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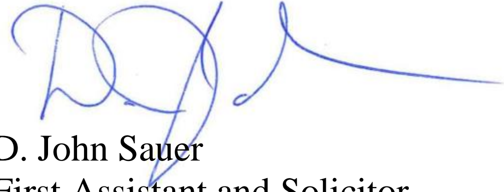

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Attachment