

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Case No. 4:18-CR-00036-BCW-01-02
vs.	)	
	)	
SHAWN BURKHALTER, et al.	)	
	)	
Defendants.	)	

DEFENDANT SHAWN BURKHALTER’S MOTION FOR INFORMATIVE OUTLINE

Defendant Shawn Burkhalter, by and through his undersigned counsel, respectfully moves the Court to order the government to provide an informative outline of the statutory proportional intent (“gateway”) factors, and statutory and non-statutory aggravating factors it intends to present to the jury in the event of a penalty phase in this matter. An informative outline is required so that Mr. Burkhalter may be prepared to challenge and rebut the alleged statutory and non-statutory aggravating factors, including conducting necessary investigation and making appropriate legal challenges to the government’s claims and evidence. The Superseding Indictment (Doc. #239) and the Notice of Intent to Seek Death Penalty (Doc. #240) are generically worded and provide insufficient notice of the bases on which the government will seek to put Mr. Burkhalter to death.

I. Introduction

A district court must decide all preliminary questions regarding whether evidence is admissible. That mandate is of no greater importance than when that evidence is being offered to convince a jury that the accused should be put to death. The aggravating factors alleged here

are intended solely for that purpose. (Dkt. #240 at 1 (“As to Shawn Burkhalter, the United States proposes to prove the following factors as justifying a sentence of death . . .”).)

In order for the Court to exercise its mandatory gatekeeping function in assuring that the “heightened reliability” standard of capital cases is met, it should adopt the procedures followed in other death penalty cases, and require the government to provide a detailed, informative outline of the evidence of its proposed aggravating factors. *See generally United States v. Peoples*, 74 F. Supp. 2d 930, 933 (W.D. Mo. 1999) (recognizing that “[t]he gatekeeping or screening role of the court is . . . particularly significant in [death penalty cases]”). The Constitution and case law require no less. *See, e.g., United States v. Karake*, 370 F. Supp. 2d 275, 279 (D.D.C. 2005) (“[I]t has been uniformly recognized that if the death penalty [notice] provides insufficient notice to the defendant, the Court retains inherent authority to require the government to provide more specifics in order to give the defendant the opportunity to prepare for the penalty phase, as well as to provide the court with some frame of reference for ruling on objections to the death penalty notice.”).

Joshua Terriel Nesbitt filed a Motion for Informative Outline of Aggravating Factors and Memorandum in Support. (Doc. #347.) Mr. Nesbitt’s motion thoroughly describes the legal bases for the Court to order an informative outline. (Doc. #347 at 3-9 (page numbers of original document, not ECF).) So as not to burden the Court with duplicative arguments, Mr. Burkhalter adopts the argument made by Mr. Nesbitt and incorporates them by reference.

II. The Court should exercise its inherent authority to order an informative outline because the Superseding Indictment and the Notice of Intent do not provide sufficient notice.

In his Supplement to Reply Regarding Motion for Disclosure of Other Grand Jury Materials (Doc. #481) and in his Motion for a Bill of Particulars (Doc. #503), Mr. Burkhalter described how the Superseding Indictment does not provide sufficient notice of the gateway

factors or the statutory aggravating factors. (Doc. #481 at 2-9; Doc. #503 at 44-50.) Because the Notice of Intent simply replicates these factors in the Superseding Indictment, Mr. Burkhalter adopts his arguments from the two aforementioned filings and incorporates them as though set forth fully herein. Mr. Burkhalter will thus limit additional discussion in this filing to the non-statutory aggravating factors listed in the Notice of Intent.

Because of the malleability of non-statutory aggravating factors, it will be important that the Court scrutinize these aggravators. As one court has determined:

[W]hen assessing a nonstatutory aggravating factor—which, by definition, lacks the stamp of approval that Congress has bestowed upon the statutory aggravating factors—the concept of heightened reliability plays an independently significant role. That is because heightened reliability drives the individualized determination that is fundamental to a constitutionally valid death penalty scheme. And, in ascertaining whether a proposed factor passes the necessarily high bar set for aggravating factors, heightened reliability is the key to a constitutionally defensible determination that death is the appropriate punishment in a specific case.

United States v. Friend, 92 F. Supp. 2d 534, 542 (E.D. Va. 2000) (quotation marks omitted). At this time, Mr. Burkhalter is not asking the Court to rule on the validity of any of the non-statutory factors alleged. Mr. Burkhalter seeks adequate information to apprise him of what is alleged, which will enable him to bring any challenges as appropriate. The requirement of heightened reliability demands no less.

For ease of reference, Mr. Burkhalter will use numbering consistent with the Notice of Intent.

I.D.i. Shawn Burkhalter committed the murder of Anthony Dwayne Johnson to obstruct justice.

The first non-statutory aggravating factor alleges that Mr. Burkhalter “committed the murder of Anthony Dwayne Johnson to obstruct justice.” (Doc. #240 at 2.) “Obstruction of

justice” is a legal term of art with a precise definition under federal law. *See* 18 U.S.C. §§ 1501-1521; U.S.S.G. § 3C1.1.

The Notice of Intent does not describe how the killing of Anthony Johnson was to obstruct justice, nor how Mr. Burkhalter himself committed the murder of Johnson for that purpose. Neither does the Notice of Intent describe any evidence the government will rely on to prove such factor.

Nor does the Notice of Intent describe how this aggravating factor is not already part of the elements of Counts Eight and Nine of the Superseding Indictment. If this aggravating factor merely restates the offenses themselves, it makes the mere fact of a conviction of an offense itself aggravating. “To allow the jury to weigh as an aggravating factor a crime already proved in a guilty verdict would unfairly skew the weighing process in favor of death.” *United States v. McVeigh*, 944 F. Supp. 1478, 1489–90 (D. Colo. 1996).

The Court should therefore order an informative outline regarding the non-statutory aggravating factor alleging that Mr. Burkhalter committed the murder of Anthony Johnson to obstruct justice, as specifically distinguished from the elements of Counts Eight and Nine. *See United States v. Lujan*, 530 F. Supp. 2d 1224, 1271 (D.N.M. 2008) (ordering informative outline regarding obstruction-of-justice factor); *United States v. Diaz*, No. CR 05-00167 WHA, 2007 WL 196752, at *6 (N.D. Cal. Jan. 23, 2007) (same).

I.D.ii. Following Anthony Dwayne Johnson’s murder, Burkhalter acted to obstruct justice by threatening to kill witnesses and by attempting to conceal or destroy the firearm used to murder Danny Lamont Dean and Anthony Dwayne Johnson.

The second non-statutory aggravating factor alleges that Mr. Burkhalter threatened to kill witnesses and attempted to conceal or destroy the firearm allegedly used in both the Dean and Johnson homicides. (Doc. #240 at 3.) Similar to the previous non-statutory aggravator,

substantive counts against Mr. Burkhalter, namely Count Eight and Count Eleven, appear to allege the same.

The Notice of Intent does not identify the multiple witnesses Mr. Burkhalter is alleged to have threatened. Count Eleven of the Superseding Indictment alleges that Mr. Burkhalter and others threatened a single, unidentified witness, referred to simply as Witness #1. The Notice of Intent, however, goes farther, referring to “witnesses” in the plural. This incomplete allegation sets the stage for Mr. Burkhalter to be ambushed by the government during a penalty phase unless the Court directs the government to provide information on why the Notice of Intent uses the word “witnesses” instead of witness.

The Notice of Intent also does not describe what the alleged threats were, when they were made, how they were communicated, or any other information.

The allegation that Mr. Burkhalter attempted to conceal or destroy a firearm also provides little actual information. As discussed in Mr. Burkhalter’s Motion for a Bill of Particulars, the allegation in the Superseding Indictment is actually that he tried to get someone to reveal, not *conceal*, the whereabouts of this firearm. (*See* Doc. #239 at 12 (Superseding Indictment alleging that Mr. Burkhalter and others threatened to kill Witness #1 if that person did not “provide information concerning the whereabouts” of the firearm); Doc. # 503 at 40.)

The Court should therefore order the government to provide an informative outline to provide information regarding these allegations.

I.D.iii. Shawn Burkhalter demonstrated a lack of remorse for the murders of Danny Lamont Dean and Anthony Dwayne Johnson.

The next allegation is that Mr. Burkhalter demonstrated a lack of remorse following the deaths of Dean and Johnson. (Doc. #240 at 3.) The Notice of Intent gives no information how Mr. Burkhalter allegedly demonstrated a lack of remorse.

If the government's allegation of lack of remorse is based in any way on Mr. Burkhalter's exercise of his constitutional privilege to keep silent, that would violate both Mr. Burkhalter's Fifth Amendment privilege to remain silent and his Sixth Amendment right to trial, because it imposes an impermissible penalty upon the exercise of those rights. *See generally Lesko v. Lehman*, 925 F.2d 1527, 1543-45 (3d Cir. 1991). In a capital case, permitting the jury to weigh the accused's lack of remorse against him, in deciding whether to impose the death penalty, substantially penalizes the exercise of his Fifth Amendment right to remain silent and Sixth Amendment right to trial. To make a sincere showing of remorse, after all, a defendant must first admit guilt of the capital offense with which he is charged and thereby waive his privilege against self-incrimination, in essence pleading guilty. To permit "lack of remorse"—the absence of an admission of guilt and expression of contrition for it—to be a factor weighing in favor of the death penalty directly permits the jury to punish the defendant for exercising his right not to admit guilt and go to trial. To burden a defendant's exercise of his rights under the Fifth and Sixth Amendments by making that exercise a basis for imposing the death penalty clearly violates the constitution. *United States v. Jackson*, 390 U.S. 570, 582-83 (1968); *see also Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (death sentence "cannot be predicated . . . on 'factors that are constitutionally impermissible'") (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

Here, the government asserts that Mr. Nesbitt, not Mr. Burkhalter, killed both Dean and Johnson. The government has provided Mr. Burkhalter with no evidence suggesting that he played a role in the decision to shoot Dean or had anything to do with the killing of Johnson. Mr. Burkhalter was incarcerated at the time of the Johnson murder, and there is no evidence that

has been provided in discovery suggesting that he ordered, suggested, or agreed with the killing. The killing of Johnson was a surprise act that occurred in the moment.

Of course, Mr. Burkhalter does not know what evidence the government would seek to use to demonstrate a lack of remorse. Thus, this case is similar to *United States v. Glover*, 43 F. Supp. 2d 1217, 1226 (D. Kan. 1999), where the court first noted the subjectivity of a lack of remorse. The court then found that the information the government provided in the notice of intent was insufficient to allow the court to assess whether submission of a lack of remorse factor to the jury would be appropriate. *Id.* at 1227. The court thus required the government “to more specifically articulate the nature of this aggravator by setting out the factual basis on which it intends to show Mr. Glover’s lack of remorse.” *Id.*

To allow Mr. Burkhalter to bring any challenges to this inherently subjective factor, and to allow him to prepare to confront and challenge whatever evidence the government might present, the Court should order the government to provide an informative outline specifically articulating the factual basis for the allegation of a demonstrated lack of remorse.

I.D.iv. Shawn Burkhalter committed multiple murders.

The next non-statutory aggravator simply alleges that Mr. Burkhalter committed multiple murders. (Doc. #240 at 3.) The Notice of Intent does not specify that it is referring to the Dean and Johnson murders. It also does not specify whether Mr. Burkhalter is alleged to be a principal in these murders or an aider and abettor. It does not say whether the government claims Mr. Burkhalter is guilty under a theory of premeditated murder or felony murder. The government should be required to give more specificity regarding this non-statutory aggravating factor.

I.D.v. Shawn Burkhalter caused injury, harm, and loss to Danny Lamont Dean and his family and friends (Count Six); and Anthony Dwayne Johnson and his family and friends (Counts Seven, Eight and Nine). The injury, harm and loss caused by Shawn Burkhalter with respect to each victim is evidenced by the victim's personal characteristics and by the impact of the victim's death upon his or her family and friends.

The fifth non-statutory aggravating factor alleged against Mr. Burkhalter is what is commonly referred to as "victim impact." The government's notice quite frankly could not be more generic. It is so generic that, although both decedents are male, the Notice of Intent refers to the impact of the victim's death upon "his or her" family and friends.

Courts have regularly recognized that victim impact evidence can be problematic. *See, e.g., McVeigh*, 944 F. Supp. at 1491 (referring to victim impact as "the most problematical of all of the aggravating factors"); *see also United States v. Hammer*, No. 4:96-CR-239, 2011 WL 6020581, at *3 (M.D. Pa. Dec. 1, 2011) (citing *McVeigh* and recognizing that victim impact aggravator "may present the greatest difficulty in determining the nature and scope of the 'information' to be considered in support").

Because of the difficulties surrounding this aggravating factor, it is important that the Court have the information to exercise its crucial gatekeeping function. Courts have routinely required the government to provide more specific notice of victim impact evidence. *See, e.g., United States v. O'Reilly*, No. 05-80025, 2007 WL 4591856, at *5 (E.D. Mich. Dec. 28, 2007) (requiring government to present more specific information akin to an informative outline regarding how the murder caused a substantial and significant effect on the decedent's family); *United States v. Cooper*, 91 F.Supp.2d 90, 111 (D.D.C. 2000) (requiring government to amend its notice of intent to include more specific information concerning the victim impact factor); *United States v. Llera Plaza*, 179 F. Supp. 2d 464, 472 (E.D. Pa. 2001) ("In order to allow the defendants to adequately prepare responses to sentencing phase evidence, and in order to allow

the court to determine if a pre-sentencing hearing will be necessary to review [victim impact] evidence, the government will be ordered to submit an outline of its proposed victim impact evidence.”); *United States v. Bin Laden*, 126 F.Supp.2d 290, 304 (S.D.N.Y.2001) (“The Court orders that the Government provide Defendants with a limited bill of particulars specifying the particularized categories of ‘injury, harm, and loss’ that will be proffered at sentencing, whether it be suffered by a victim or a victim’s family.”); *Glover*, 43 F.Supp.2d at 1225 (holding that the defendant is entitled to greater specificity regarding the victim impact factor); (see also Doc. #347 at 16-17 (discussing victim impact aggravating factor and citing cases).)

Due to the generic nature of the notice the government has provided, this Court should follow these other courts and require the government to provide an informative outline describing the victim impact evidence it proposes eliciting.¹

I.D.vi. Shawn Burkhalter is a continuing danger to the lives and safety of other persons, and he is likely to commit criminal acts of violence in the future.

The last non-statutory aggravating factor alleges that Mr. Burkhalter is a future danger, stating as follows:

Shawn Burkhalter is a continuing danger to the lives and safety of other persons, and he is likely to commit criminal acts of violence in the future as evidenced by:

- a) a willingness to take human life and a lack of remorse for his acts of violence and attempted acts of violence as demonstrated by statements that he made following these violent acts;
- b) a demonstrated capacity for orchestrating acts of violence while incarcerated; and
- c) a low potential for rehabilitation as demonstrated by acts of misconduct while in custody.

¹ Counsel for both Mr. Burkhalter and Mr. Nesbitt have made repeated requests for discovery relating to the victim impact aggravating factor, but the government has to date refused to provide the requested information.

(Doc. #240 at 3.)

Future dangerousness is a favorite non-statutory aggravating factor of federal prosecutors. Indeed, this factor has been alleged in 73% of federal death penalty cases. (*See* Declaration of Kevin McNally, May 27, 2020 (attached as Exhibit 1).) Perhaps for this reason, this factor is also subject to overinclusion by the government. It is essential that the government be required to describe with a reasonable degree of precision what the allegation is actually based on.

The government has previously acknowledged that “[w]here release into society is unlikely to occur soon or at all (because the alternative sentence to death is a substantial term of imprisonment or life without parole), a jury considers the defendants’ future dangerousness in terms of their ‘propensities for danger to inmates and prison staff.’” (Doc. #341 at 6 (quoting *United States v. Peoples*, 74 F. Supp. 2d 930, 931 (W.D. Mo. 1999)).)² Mr. Burkhalter agrees with the government that (1) future dangerousness analysis must be limited to evidence demonstrating propensities for danger to inmates and staff, and (2) *Peoples* provides beneficial guidance on the issue of future dangerousness.

The government’s vague notice does not give Mr. Burkhalter notice of how the government intends to demonstrate that, if incarcerated in the federal prison system, he would be a danger to inmates and staff. For instance, the government alleges that future dangerousness is evidenced by “a willingness to take a human life.” (Doc. #240 at 3.) But such a finding is inherent in murder itself. If the jury gets to the weighing stage, it will already have determined this beyond a reasonable doubt. And the same could be said for anyone in the Bureau of Prisons

² Mr. Burkhalter maintains his innocence as to each and every count in the Superseding Indictment; therefore, future dangerousness will be applicable only in the event of a conviction(s).

who has been convicted of murder or even attempted murder. Thus, the government must provide information beyond “a willingness to take human life” so Mr. Burkhalter can be advised what evidence of future dangerousness he needs to be prepared to rebut beyond what is charged in the Superseding Indictment.

The government also alleges that future dangerousness is evidenced by a lack of remorse in relation to unidentified “acts of violence and attempted acts of violence” (Doc. #240 at 3.) The notice references statements “that [Mr. Burkhalter] made following these violent acts[.]” (*Id.*) Because the Notice of Intent gives no further information about these alleged acts of violence and attempted acts of violence, and does not identify the alleged statements made, counsel is left to guess whether this is duplicative of the freestanding non-statutory aggravator alleging a lack of remorse. In addition to any issues of duplicativeness, there are also the identical issues already discussed regarding the “lack of remorse” aggravator.

The Notice of Intent also alleges that future dangerousness will be evidenced by a demonstrated capacity for orchestrating multiple “acts” of violence while incarcerated. One of these acts may be the allegation that Mr. Burkhalter ordered the killing of Anthony Johnson. As stated in other filings, the government has provided no evidence in support of the allegation that Mr. Burkhalter orchestrated this killing. (*See* Doc. #481 at 7-9.) Indeed, a codefendant told law enforcement that the killing of Johnson was “very much a surprise” and an investigating detective referred to it as a “robbery gone bad.”

Additionally, the Notice of Intent alleges plural “acts of violence.” The government has not produced any other allegation that Mr. Burkhalter orchestrated an act of violence while incarcerated.

The government has also indicated that future dangerousness will be evidenced by an asserted “low potential for rehabilitation” and claims that this is demonstrated by unidentified “acts of misconduct” while in custody. The Notice of Intent does not define “low potential for rehabilitation” or how this is indicative of propensities for danger to inmates and prison staff. “Rehabilitation” is “[t]he process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.” REHABILITATION, Black’s Law Dictionary (11th ed. 2019). Thus, a low potential for rehabilitation is not synonymous with or even analogous to a propensity for future violence. A career thief may have a low potential for rehabilitation, but he is not necessarily a “continuing danger to the lives and safety of other persons” or “likely to commit criminal acts of violence in the future” as alleged by the Notice of Intent. (Doc. #240 at 3.)

The Notice of Intent also alleges that this ambiguous low potential for rehabilitation will be evidenced by “misconduct while in custody,” yet it fails to identify the misconduct it alleges or even define what is meant by this term. It seems obvious, however, that the “misconduct” attributed to Mr. Burkhalter does not include violent conduct, because the Notice of Intent for Mr. Nesbitt similarly alleges a “low potential for rehabilitation” but claims this will be evidenced by “misconduct *and violence* while in custody” (Doc. #240 at 5 (emphasis added).)

Non-violent acts of misconduct are not appropriate for a jury to consider in determining if a defendant is a future danger such that he cannot be allowed to live. As *Peoples* discussed, acts of non-violent misconduct may be appropriate for a judge to consider in a non-capital sentencing, but the analysis must be different where death is the penalty sought:

What may have been widely accepted as a matter of past practice in federal criminal sentencing is plainly unlike what a death penalty jury may appropriately consider. Tampering and dealing in stolen goods may well alter judicial views as to the number of months a defendant should serve in federal prison. They are

pernicious distractions, however, in considering whether a defendant shall live or die. For evidence to be relevant, the statute must mean that the evidence tendered bears on the consideration of who should live and who should die.

74 F. Supp. 2d at 932 (quotation marks omitted).

The Court should therefore order the government to provide an informative outline regarding this non-statutory factor. An outline similar to that ordered in the Middle District of Pennsylvania would be appropriate:

(1) The Government is ordered to provide to Defendant an informational outline with regard to the “future dangerousness” factor containing: (1) a comprehensive list of each act and characteristic alleged; (2) a list of witnesses for each act and characteristic, with a summary of each witness's proposed testimony; and (3) all evidence (documents, FBI 302 interviews, BOP records, exhibits, etc.) the government intends to introduce to prove future danger;

United States v. Con-ui, No. CV 3:13-CR-123, 2016 WL 11571306, at *1 (M.D. Pa. Jan. 28, 2016); *see also, e.g., United States v. Hammer*, No. 4:96-CR-239, 2011 WL 6020157, at *4 (M.D. Pa. Dec. 1, 2011) (ordering informative outline “summarizing how the Government intends to prove the intent factors, the statutory aggravating factor of substantial planning and premeditation, and the two non-statutory factors of future dangerousness and victim impact”).

III. Conclusion

As pointed out in Mr. Nesbitt’s Reply Regarding Motion for Informative Outline, the government frequently provides greater notice than here. (Doc. #386 at 4-6.) As Mr. Nesbitt discussed, even in a case relied on by the government in opposition to Mr. Nesbitt’s request for an informative outline, the government provided a notice of intent that itself listed specific facts that would support the aggravating factor alleged. (*Id.* (quoting *United States v. Jones*, No. 10-03090-01-CR-S-DGK, 2017 WL 10940490, at *3-4 (W.D. Mo. July 25, 2017)).)

Here, the government filed a vague notice that gives no real guidance on what the government alleges in support of the death sentences it seeks. Had the government provided a

notice of intent like the one in *Jones*, the Court would be presented with a very different issue. But because the government has proceeded in the manner it has, it has made it necessary for the defendants to seek informative outlines and has invited action by the Court. The law requires the government to do better—and it often does—so this Court should not hesitate in holding it accountable here.

Due process requires “that a defendant not be sentenced to death ‘on the basis of information which he had no opportunity to deny or explain.’” *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)). Mr. Burkhalter must be given an opportunity to challenge the evidence on which the government would rely to prove aggravating factors and to introduce evidence of his own that would undermine the government’s allegations. *See id.* But in this case, the notice provided by the government is so vague and general as to leave Mr. Burkhalter unable to deny or explain what is alleged.

The government has claimed that except for a discrete class of documents relating to 16 witnesses, it is practicing an “open file” policy of discovery in this case. (*See* Doc. #359 at 5 (asserting, “Save for the Jencks material discussed above [relating to 16 witnesses], it is fair to describe the manner of production as ‘open file’ discovery.”).) Taken at its word, the government should have no objection to providing the informative outline Mr. Burkhalter seeks. However, as counsel have established here and in Mr. Burkhalter’s Motion for a Bill of Particulars, discovery provided to date fails to inform the defense regarding the aggravating factors the government alleges and how the government will prove the aggravating factors alleged.

This Court has an interest in an orderly proceeding. Without notice of what the government actually intends to use to prove the aggravating factors, there is no logical manner

the defense can raise challenges to that evidence. The vagueness of these factors and the generic language of the Notice of Intent leaves Mr. Burkhalter to guess what the government alleges, handcuffing him from investigating or defending against the grave allegations in this case. The Court should therefore order the informative outline requested.

The Court should further set a hearing at which the Court can assess the reliability and potential for prejudice of the evidence the government intends to offer. *See* 18 U.S.C. § 3593(c) (providing that at capital sentencing hearing, “information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury”).

WHEREFORE, Mr. Burkhalter respectfully asks the Court to order the government to produce an informative outline as described herein. Mr. Burkhalter further requests that the Court order a hearing to determine the admissibility of information in support of aggravating factors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system for electronic delivery to all counsel of record.

/s/ Eric K. Klein

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Attorney for Shawn Burkhalter