

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DUSTIN MELVIN DAVISON,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS**

APPENDIX "B"

**Petition for Rehearing and
Motion to Recall Mandate**

Filed December 9, 2020

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DUSTIN MELVIN DAVISON,)
)
 Appellant,) APPELLATE CASE
) D-2018-0373
 vs.)
) District Court Case No.
 THE STATE OF OKLAHOMA,) CF-2015-3992
)
 Appellee.)

RECEIVED
DEC - 9 2020
JOHN D. MADSEN
CLERK

PETITION FOR REHEARING AND MOTION TO RECALL MANDATE

Appellant Dustin Melvin Davison petitions for rehearing and reconsideration of an issue raised on direct appeal but not considered by this Court in its November 19, 2020 opinion. *Davison v. State*, 2020 OK CR 22. A petition for rehearing is appropriate where, as here, some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court. Rule 3.14(B)(1), *Rules of the Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App. Mr. Davison petitions this Court to grant rehearing on Proposition X based on the aforementioned ground and incorporates by reference in the previous argument and authorities made in Petitioner's Brief-In-Chief.

PROPOSITION X

IN RELATION TO PROPOSITION X, THE COURT'S OPINION FAILS TO CONSIDER AND DECIDE IF THE CONTINUING THREAT AGGRAVATOR AS APPLIED IN THIS CASE FAILED TO NARROW THE CLASS A PERSONS ELIGIBLE FOR THE DEATH PENALTY.

In making its ruling on Proposition X in Mr. Davison's Brief-in-Chief, this Court focused entirely upon the sufficiency of the evidence offered by the State

to support the aggravator but failed to make a finding on whether the application of the aggravator in the current case made the aggravator too vague and too broad under the Eight Amendment.

Okla. Stat. tit. 21, § 701.12(7) states, “[an] aggravating circumstance shall be . . . the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” However, the State failed to introduce acts of violence to support the aggravator. Instead the State introduced, and this Court pointed to evidence that Mr. Davison 1) was so thin at the time of his arrest that he could and did change the positioning of his cuffed hands from behind his back to his front;¹ 2) that when the officer tried to change the position of the cuffs back to their proper position, Mr. Davison struggled with the officer to avoid it;² and 3) after being punched in the back of the head by Jennifer Young, Mr. Davison reacted. (Tr. 1517-1524, 1554-1555, 1640) (Slip op. at ¶ 101) The other evidence introduced by the State and pointed to by this Court consisted of Mr. Davison’s drug use as he became a drug addict at a very young age, phone calls he made within the first week of K.B.’s death, and the circumstances of the crime. (Tr. 1534-1541)(Slip op. at ¶ 101)

By applying this aggravating circumstance to Mr. Davison’s case, its application has broadened to any first degree murder case. If the death itself

¹ Bethany Police Officer John Drew never described Mr. Davison’s actions as attempting to escape his restraints. (Slip Op. at ¶ 52) Officer Drew never said that he believed Mr. Davison was trying to remove his cuffs. The officer only testified that Mr. Davison had stepped through his cuffed arms and brought them in front of his body. (Tr. 1520)

and the defendant's action within a week of that death are sufficient to establish the necessary pattern of violence, the aggravator as applied no longer sufficiently narrows the class of persons eligible for the death penalty as required by the Eighth Amendment. See, *Myers v. State*, 2006 OK CR 12, ¶ 91, 133 P.3d 312, 334 and *Stouffer v. State*, 1987 OK CR 166, ¶ 5, 742 P.2d 562, 563 (citing *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235, 250 (1983)). See also, U.S. Const. amends. VIII, XIV; Okla. Const. art. 2, § 9.

CONCLUSION

Based upon the above and foregoing prejudicial error supported by arguments and authority, Mr. Davison respectfully requests the Court to grant rehearing in this case, vacate the November 19, 2020 opinion, and grant any other relief which the Court may deem necessary to meet the ends of justice.

Respectfully submitted,

ROBERT A. RAVITZ

Public Defender of Oklahoma County



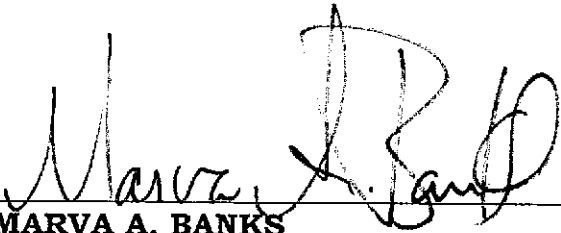
BY: **MARVA A. BANKS** (OBA# 21593)
Assistant Public Defender
320 Robert S. Kerr, Room 400
Oklahoma City, Oklahoma 73102
(405) 713-1550

ATTORNEY FOR APPELLANT

² Officer Drew testified that when he entered the back seat of the patrol car, Mr. Davison began to kick and attempt to strike the officer with his feet. Officer Drew also testified that he did not feel injured or as if he were Mr. Davison's victim, so he did not charge Mr. Davison. (Tr. 1524)

CERTIFICATE OF SERVICE

I certify that on the date of the filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the office of the Attorney General of the State of Oklahoma.


MARVA A. BANKS