CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

Ronson Bush
Petitioner,

v.
Tommy Sharp, Interim Warden,
Oklahoma State Penitentiary,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX H

Excerpts of State Direct Appeal Brief

DEATH PENALTY CASE

Case No. DC-2009-1113

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONSON KYLE BUSH

Petitioner,

vs.

THE STATE OF OKLAHOMA

Respondent.

Appeal from the
District Court of Grady County

BRIEF OF PETITIONER

Traci J. Quick
Appellate Defense Counsel
Oklahoma Bar Assoc. No. 18813

Michael D. Morehead
Appellate Defense Counsel
Oklahoma Bar Assoc. No. 18114

Homicide Direct Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, Oklahoma 73070
(405) 801-2666

ATTORNEYS FOR PETITIONER

March 31, 2011

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he did not do so, he left the record virtually void of any meaningful evidence for the trial judge to consider on the validity of the pleas. Therefore, counsel could have been nothing but ineffective in his efforts to withdraw Mr. Bush's plea of guilty, and consequently, Mr. Bush should be entitled to a new hearing on his motion to withdraw his guilty pleas.

PROPOSITION III

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING OF THE HEINOUS, ATROCIOUS, OR CRUEL AND THE CONTINUING THREAT AGGRAVATING CIRCUMSTANCES IN VIOLATION OF MR. BUSH'S RIGHTS SECURED TO HIM UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE II, §§ 7, 9 OF THE OKLAHOMA CONSTITUTION.

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence of an aggravating circumstance, this Court will review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt. *See DeRosa v. State*, 89 P.3d 1124, 1153 (Okl.Cr. 2004). This is the same, well-known standard articulated by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S.Ct. 2781, 2789-90, 61 L.Ed.2d 560 (1979), and applied by this Court in all sufficiency of the evidence cases. *See Easlick v. State*, 90 P.3d 556, 558-59 (Okl.Cr. 2004). *Jackson* recognizes that an appellate court reviewing a verdict for sufficiency of the evidence is not merely to act as a rubber stamp of that verdict and automatically affirm a properly instructed jury's determination. Rather, the job of a reviewing court is to ensure that the State has met its burden of proof beyond a reasonable doubt. 443 U.S. at 317-20, 99 S.Ct. at 2788-90. In enunciating this rather unremarkable proposition, the High Court explicitly rejected the "any evidence" standard for reviewing sufficiency of the evidence challenges. The Court recognized that, under our constitution, a "mere modicum" of evidence cannot

rationally support a conviction beyond a reasonable doubt. *Id.* Mr. Bush submits that under this standard, the evidence was insufficient to support the trial court's finding that the murder was especially heinous, atrocious, or cruel or the probability that Mr. Bush will commit criminal acts of violence to the extent that he constitutes a continuing threat to society.

B. Especially Heinous, Atrocious, or Cruel

One of the aggravators found by the trial court in support of the death penalty was that the murder was especially heinous, atrocious or cruel. (Sent. Tr. 1876) To establish this aggravator, the State argued that Billy Harrington was alive when he was dragged behind the pickup truck. (Tr. IX 1859) The State also suggested that had Billy Harrington suffered any pain whatsoever, that in itself would have been sufficient for this aggravator. (*Id.*) The trial court, in passing judgment, found that Billy Harrington's death was preceded by great pain and serious physical abuse due to the six gun shots he received and that the dragging was heinous and atrocious and extremely cruel. (Sent. Tr. 1876) The court also found that Mr. Bush was indifferent to Billy Harrington's suffering. (*Id.*) The trial court also found as an established fact that "shots were fired both inside and outside of the house." (*Id.*)

Torture or serious physical abuse may take any of several forms and may include the infliction of either great physical anguish or extreme mental cruelty. *Cheney v. State*, 909 P.2d 74, 80 (Okl.Cr. 1995). Conscious physical suffering must occur before death and any extreme mental distress must be the result of intentional acts by the defendant and must produce mental anguish in addition to that which of necessity accompanies the underlying killing. *Berget v. State*, 824 P.2d 364, 373 (Ok.Cr. 1991); *Cheney*, 909 P.2d at 80.

While it is true that Mr. Harrington did not die immediately upon receiving

the first shot, and that no one would doubt that being shot is painful, this aggravator requires more than the pain associated with the act of killing in order that it be established. This Court has held serious physical abuse is synonymous with gratuitous violence, and serious physical abuse will not be found to have occurred in cases where there was no violence inflicted on the victim beyond the act of killing. *Cudjo v. State*, 925 P.2d 895, 901-02 (Okl.Cr. 1996); *Hawkins v. State*, 891 P.2d 586, 596-97 (Okl.Cr. 1994). Here, the conscious physical suffering that occurred did so as a result of the killing, and the court's conclusion that the shooting itself was particularly prolonged, by its finding that shots were fired outside, was not based on evidence. The only testimony touching on the location of the body vis-a-vis the shooting came from the medical examiner, who testified that she could *not* tell where the shooting occurred. (Tr. VI 1128) Thus, the trial court relied, in part, on evidence not in the record when it found the existence of this aggravator.

While the medical examiner testified that some of the trauma associated with being dragged indicated that Mr. Harrington may have been alive, others indicated that the trauma was post-mortem. (Tr. VI 1121-23) Given the relatively short amount of time it would have taken to drag the body approximately two hundred yards, it is likely that, if he were still alive for a portion of the dragging, he most certainly was not conscious. The medical examiner testified that if there were a lot of blood lost quickly which was not replaced, then a person would lose consciousness quickly. (*Id.* at 1118) She could not say how long Mr. Harrington was conscious. (*Id.* at 1124) We know that Mr. Harrington's blood was not replaced and that nearly one-fifth of his total blood volume had pooled in his chest. (*Id.* at 1125) The only logical conclusion that can be drawn from these uncontested facts is that, even if technically alive, Mr. Harrington was not conscious at the time he

was dragged, therefore the fact of the dragging cannot be used to support this aggravator. As there was no evidence of acts beyond those necessary to carry out the murder, this aggravator should fail.

In the mental cruelty context, this Court emphasized knowledge of impending death is not alone sufficient to support this aggravator. The torture "must produce mental anguish in addition to that which of necessity accompanies the underlying killing." *Cheney*, 909 P.2d at 80. The evidence in this case does not establish the kind of prolonged torment necessary for a finding of mental torture. Even if Mr. Harrington had apprehension of serious injury or death before he died, this factor exists in almost every homicide. The mental torture element requires evidence the victim is terrorized for a significant period of time before death. *Cheney*, 909 P.2d at 81; *Washington v. State*, 989 P.2d 960, 975 (Okl.Cr. 1999).

The inevitable conclusion is the trial court was improperly influenced by the prosecutor's arguments and the overwhelming number of gruesome photographs of Billy Harrington's body. The court likely found the murder was heinous, atrocious or cruel based on these inappropriate considerations. Over defense counsel's objection, several unnecessarily gruesome pictures of the victim's body were provided admitted into evidence by the court. *See Spears v. Mullin*, 343 F.3d 1215, 1227-29 (10th Cir. 2003)(gruesome photographs depicting postmortem wounds not relevant to show conscious suffering).

Under the facts of this case, there is a significant and constitutionally unacceptable risk the trial court premised its finding of this aggravator upon the fact the prosecutor alleged the victim was still alive *and conscious* when his body was dragged, and that the court's reason was overborne by the particularly gruesome photographs of the victim. As such, this Court must reverse his death sentence or otherwise modify his sentence, as none of the facts adduced in support

of this aggravator could have been used by the judge in support of the other alleged aggravators. *See Brown v. Sanders*, 546 U.S. 212, 220, 126 S.Ct. 884, 892, 163 L.Ed.2d 723 (2006)(holding that an invalid aggravator will render a death sentence unconstitutional *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances). *Accord Myers v. State*, 133 P.3d 312, 337 (Okl.Cr. 2006).

C. Continuing Threat to Society

In the Bill of Particulars, the State listed several instances of conduct which, it alleged, sufficiently demonstrated that Mr. Bush constituted a continuing threat to society. (O.R. 39-40) These instances included: (a) Mr. Bush's alleged attempts at escaping from the Grady County Jail as well as his fashioning of a "shank" while in that jail; (b) his violation of a restraining order placed against him by his former girlfriend, Stephanie Morgan, as well as numerous "uncharged property crimes" against Ms. Morgan; (c) his callousness during the commission of the instant crime; (d) his victimizing "his own family"; (e) his use and abuse of drugs; and(f) breaking into the victim's house in the weeks prior to the instant offense. The State further claimed that the above-referenced evidence showed "a pattern of escalating criminal activity and general disregard for the rules of society." (*Id.* at 40)

The trial court appeared to have accepted all of the State's allegations for, during formal sentencing, it simply summarized the Bill of Particulars and concluded that "the State of Oklahoma had met its burden that the defendant will commit future acts of violence that constitute a continuing threat to society." (Tr. at 1877-79) As will be argued, the vast majority of the evidence in support of this aggravator should not have been admitted in the first place as it did not evince any violent tendencies, the touchstone of the "continuing threat" aggravator. *See, e.g.,*

Bush's conduct evinces a continuing threat to society. As such, this Court must reverse his death sentence or otherwise modify his sentence, as none of the facts adduced in support of the continuing threat aggravator could have been used by the jury in support of the other alleged aggravators. *See Brown v. Sanders*, 546 U.S. at 220, 126 S.Ct. at 892; *Myers v. State*, 133 P.3d at 337.

PROPOSITION IV

THE TRIAL JUDGE'S CONSIDERATION OF AN IMPROPER OFFER OF PROOF REGARDING THE TESTIMONY OF A JAILHOUSE SNITCH PREJUDICED MR. BUSH'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE II, §§ 7 , 9 AND 20 OF THE OKLAHOMA CONSTITUTION.

On the first day of the sentencing trial, the prosecutor notified the trial judge that a jailhouse informant, Jackie Nash, had come forward with evidence pertinent to Mr. Bush's case, including evidence of an alleged escape attempt by Mr. Bush. (Tr. VI 1011) Defense counsel immediately objected to the endorsement of Mr. Nash as a witness and, in the alternative, requested a continuance in order to investigate Mr. Nash's allegations, his criminal background, his jail records, and his prior testimony and deals, if any, in other cases. (Tr. VI 1013-14) The defense also filed a written objection to the endorsement and testimony of Jackie Nash. (O.R. 719-21) The trial judge deferred his decision to the next day of trial. (Tr. VI 1015)

On the second day of the sentencing trial, the defense objected once again to the endorsement of Jackie Nash. Citing to Article 2, Section 20 of the Oklahoma Constitution, and Title 22, Section 701.10 of the Oklahoma Statutes, the defense argued that "[o]nly such evidence in aggravation as the state has made known to the defendant prior to the trial shall be admissible." (Tr. VII 1310) The defense acknowledged they had interviewed Mr. Nash, but maintained the interview had "opened up more investigation." (Tr. VII 1310) If the trial judge allowed Mr. Nash's

testimony to go forward, the defense contended, then a continuance should be allowed. (Tr. VII 1311) The prosecutor countered by asserting that the evidence should come in because "[t]hese things are admissible in sentencing. I would agree if this was a jury trial. Defense counsel may be entitled to a continuance to – prepare longer. This is a sentencing." (Tr. VII 1313) The prosecutor continued, "[defense counsel's] effects of persuading a jury on this matter are a lot different than a sentencing in front of the Judge when her client's already pled guilty to his actions." (Tr. VII 1313)

After considering these arguments, the trial judge stated, "In an abundance of caution, the State is – I mean, the Court is going to sustain the defendant's motion and not allow the testimony." (Tr. VII 1314) The trial judge then asked the prosecutor to present an offer of proof. (Tr. VII 1314) The prosecutor proceeded to give a lengthy explication of Mr. Nash's proposed testimony as follows:

> [I]f Mr. Nash was called to testify he would testify he had conversations with Ronson Bush where Ronson Bush told him he was manipulative, he deliberately intended to kill Billy Harrington. He sat around for a week, week and a half and thought about how he was going to do it. Then he used some meth and went to the detox for a few days to get his head straight so he could get his plan together.
>
> That he planned this. That he waited for Mr. Billy Harrington to be at his house alone. He held a gun on him. Held him hostage basically yelling and screaming at him trying to make him confess to having a sexual relationship with Stephanie Morgan.
>
> He basically sat over him and taunted him with the gun the .357 while – while the victim Billy Harrington was sitting in his chair. That at one point he held the gun to the shoulder of Billy Harrington in contact wound pulls the trigger. Shoots Billy Harrington. And Billy Harrington reaches forward and puts his hands up and he shoots him again. Which would explain the injuries.
>
> ***
>
> Mr. Nash would say that at some point Mr. Harrington went outside. Mr. Bush told him that he followed him outside and Billy Harrington was still alive when Ronson Bush tied a rope on his feet and drug him until he thought maybe he was dead, his chest was still moving and he drug him approximately 200 yards.
>
> ***
>
> That he wasn't even drunk when he started doing these things to Billy

> Harrington. He waited until afterwards to get drunk so he would have a defense to this crime of intoxication.
>
> ***
>
> He will also testify Bush bragged about his two previous escape attempts where he used other inmates to help him in the cells. This court's heard some of that evidence.
>
> And then he will say during the course of this trial and leading up to it Ronson Bush was planning a third escape. That he had manipulated his toilets manipulated his showers. He caused damage to those cells thinking he could get out behind the toilet behind the shower and dig out of his cell. And if that didn't work he would escape on his way to Court. He would overpower a jailer, a guard, he would kill whomever was necessary to get away.
>
> ***
>
> That if he had to kill people to get out of this courtroom and to get out of there that's what he would do.
>
> He showed no remorse. He laughed about killing Billy Harrington.

(Tr. VII 1314-17)

Obviously troubled by this damaging and prejudicial recitation, defense counsel immediately asked the judge to consider the proffer "in its proper place." (Tr. VII 1317) The trial judge responded, "Any argument or statement by counsel is not evidence." (Tr. VII 1317)

The Offer of Proof was Improper

There are two reasons for making an offer of proof with respect to excluded evidence. The first is to preserve the error for appeal. 12 O.S. Supp.2002, § 2104(A)(2); *Kaiser v. State*, 673 P.2d 160, 161-62 (Okl.Cr. 1983) The second is to give the judge an opportunity to further consider a party's claims of admissibility after ruling the evidence to be inadmissible. *Vanscoy v. State*, 734 P.2d 825, 828 (Okl.Cr. 1987); *Kaiser*, 673 P.2d at 162. Neither reason was applicable in this case. First, the exclusion of the prosecutor's jailhouse informant was not an appealable issue, because the State would not be appealing Mr. Bush's sentence. Thus, there was no discernible need for the prosecutor to make an offer in order to preserve the error. Second, the trial judge excluded the evidence based on lack of notice. (Tr.

VII 1314) There was, in effect, nothing the prosecutor could tell the trial judge about the substance of the excluded evidence that would allow him to better assess and rule on defense counsel's notice objection. An offer of proof in this situation was, therefore, unnecessary. By inviting and receiving such an offer, the trial judge erred.

The Offer Prejudiced Mr. Bush

The prosecutor's offer of proof was extremely harmful to Mr. Bush's case for life. In the offer, the prosecutor told the trial judge Mr. Bush had confessed, *inter alia*, to (1) planning Mr. Harrington's death, (2) torturing Mr. Harrington, (3) dragging Mr. Harrington's body while knowing Mr. Harrington was alive, (4) planning an intoxication defense to the crime, (5) trying to escape from the jail through the toilet and the shower, and (6) threatening to overpower a guard and kill whomever was necessary to get away from the courtroom. In addition, the prosecutor told the trial judge Mr. Bush laughed about the killing and showed no remorse whatsoever for the crime. (Tr. VII 1314-16) All of this was in direct contrast to Mr. Bush's own account of the crime as an unplanned, unpremeditated reaction to Mr. Harrington's revelation of an affair with Ms. Morgan, and that the shooting was something about which he was deeply saddened and almost ill. (State's Exh. 12; Tr. 1396)

Although the trial judge assured defense counsel that statements by counsel were not evidence,(Tr. VII 1317), this offer of proof was far too inflammatory for the trial judge to disregard. Mr. Bush recognizes that, in bench trials, this Court will presume that "only competent and admissible evidence [was] considered in reaching a decision." *Long v. State*, 74 P.3d 105, 107 (Okl.Cr. 2003) However, given the highly prejudicial nature of the offer of proof in this case, Mr. Bush contends that presumption should not lie.

In *Commonwealth v. Conti*, 345 A.2d 238 (Pa. Super. 1975), the Superior Court of Pennsylvania dealt with the issue of a trial judge hearing highly prejudicial and inadmissible evidence in a bench trial. In that case, the trial judge discovered through testimony that the defendant had pled guilty at preliminary hearing, thereby indicating that the defendant was lying either at preliminary hearing or at trial. On appellate review, the defendant complained that the trial judge should have declared a mistrial, as requested by defense counsel, as soon as he heard this inadmissible evidence. *Id.* at 241-42. The appellate court noted the general rule that a trial judge who is a trier of fact is presumed to disregard inadmissible evidence and rely only on competent evidence. *Id.* at 243. However, the court recognized that "judges are subject to the same emotions and human frailties as affect all persons, lay juror or not." *Id.* at 244. Thus, the court found that even though it "may well be that the trial judge attempted to disregard the statement...[it] was so prejudicial and so vitally important to appellant's case that we cannot presume he succeeded." *Id.* at 246. Based on the prejudicial nature of the evidence as well as the fact that the case against the defendant was not overwhelming, the court reversed the case for a new trial. *Id.*

Here, a similar situation is evident. Jackie Nash's proffered testimony was exceedingly prejudicial. Not only did it make the case for a planned, premeditated murder replete with torture and accounts of Petitioner's morbid delight, it contained references to escape attempts and threats by Mr. Bush against jailers and court personnel. (Tr. VII 1315) *Cf United States v. Greenspan*, 26 F.3d 1001, 1005 (10th Cir. 1994)(finding that judge who learned that defendant had made threats against him should have recused from sentencing defendant because judge's impartiality might reasonably be questioned in such circumstances). Such evidence was simply too provocative to be ignored, despite the trial judge's

assurances to the contrary.

Confessions of a defendant have a profound impact on the trier of fact, so much so that the Supreme Court has expressed doubt that juries will fail to disregard them even if told to do so. *Jackson v. Denno*, 378 U.S. 368, 389, 84 S.Ct. 1774, 1787, 12 L.Ed.2d 908 (1964). Other courts have found that similar concerns apply to judges, as well as juries. *United States ex. rel. Spears v. Rundle*, 268 F.Supp. 691, 695 (E.D.Pa. 1967)(finding that, in bench trial, judge's determination of voluntariness of confession could be colored by evidence as to guilt and, therefore, is prohibited by *Jackson*); *United States ex rel. Owens v. Cavell*, 254 F.Supp. 154, 155 (M.D. Pa. 1966)(determining trial judge cannot, at the same time, hear evidence of guilt and evidence pertaining to voluntariness of confession without violating *Jackson*).

While the judge in this case was not faced with the issue of an involuntary confession, he was in the related position of trying to ignore an inadmissible confession (from Mr. Bush to Mr. Nash) while also determining guilt (as to aggravators). Thus, just as courts have expressed doubts about a judge's ability to separate evidence of voluntariness of a confession from evidence of guilt, so too is there serious doubt in this case about the trial judge's ability to keep a highly prejudicial confession from seeping into his sentencing considerations. This is especially true where, as here, evidence of the aggravators was not overwhelming (*see* Proposition III), yet the trial judge handed down the *maximum sentence for all charges*. (S.Tr. 1880)

In any event, the record reflects that the trial judge did explicitly rely on a portion of Mr. Nash's statements when he admitted additional evidence about Mr. Bush's alleged escape attempts as contained in the offer of proof. Over defense counsel's objection, the trial judge allowed the jail administrator, Shane Wyatt, to

testify about damage to the toilet in Mr. Bush's cell and damage to Mr. Bush's shower. (Tr. VII 1354-55) Mr. Wyatt testified that the toilet in Mr. Bush's single-man cell had been tampered with in an apparent attempt to escape. Mr. Wyatt further testified that the shower in the F-pod, to which Mr. Bush and other inmates had access, was also damaged in an apparent escape attempt. (Tr. VII 1356) On cross-examination, Mr. Wyatt admitted he did not see who did the damage, nor had he filed any incident reports on the damage. (Tr. VII 1362) He also could not say when the damage had occurred. (Tr. VII 1356, 1362)

In his findings with respect to continuing threat, the trial judge stated that Mr. Bush had "attempted and/or conspired to escape from the Grady County Jail." (S.Tr. 1877) By making this finding, the trial judge had to have relied on the Jackie Nash offer of proof, because, otherwise, there was no evidence demonstrating that Mr. Bush was the person who tampered with the shower and toilet.[9] Indeed, during Mr. Wyatt's testimony, the prosecutor made this point explicit when he prefaced his examination with this question, "Did you see damage to that cell, Ronson's cell, *that was consistent with the information you received from Mr. Nash.*" (Tr. VII 1354, emphasis added) In other words, Mr. Wyatt could testify only about the damage to the cell. Mr. Wyatt could not say whether Mr. Bush was the cause of that damage, and neither could the judge, without reference to Mr. Nash.

This Court reviews a trial court's decision on evidentiary issues for an abuse of discretion. *Pavatt v. State*, 159 P.3d 272, 286 (Okl.Cr. 2007). That is, the decision of the trial court to allow the evidence will not be disturbed absent an

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[9] Mr. Bush realizes the State presented evidence of another alleged escape attempt relating to damage to a window screen. However, this evidence was extremely weak in that it was supported by an unclear video, (Tr. VI 1198-99; Tr. VII 1361), an inmate who was threatened with escape charges if he did not testify, (Tr. VI 1198-99), hearsay of an absent witness, (Tr. VI 1216, 1221), and the adamant denial of an escape attempt by a second inmate. (Tr. VI 1212) Accordingly, this evidence could not have provided the trial judge with a basis for a valid finding on this issue.

abuse of that discretion. *Pickens v. State*, 19 P.3d 866, 876 (Okl.Cr. 2001); *Omalza v. State*, 911 P.2d 286, 303 (Okl.Cr. 1995). Further, if the error is not met with a contemporaneous objection, as was the case here, this Court's review is limited to plain error. "Plain error is that error which is plain from the record, and which goes to the foundation of the case or takes from a defendant a right essential to his defense." *Andrew v. State*, 164 P.3d 176, 188 (Okl.Cr. 2007)

In this case, the improper offer of proof as to Mr. Nash's testimony was so prejudicial, it was impossible for the trial judge to ignore it. By inviting the offer, and by listening to its contents, the trial judge violated Mr. Bush's rights to confront the witnesses against him and to a fair and reliable sentencing proceeding, free of arbitrary and prejudicial factors. 21 O.S. 2001, § 701.13(C)(1). Accordingly, Mr. Bush's sentences must be vacated.

PROPOSITION V

MR. BUSH'S DEATH SENTENCE MUST BE VACATED BECAUSE THE ADMISSION OF IMPROPER OPINION TESTIMONY DURING THE PRESENTATION OF VICTIM IMPACT EVIDENCE VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 9, AND 19 OF THE OKLAHOMA CONSTITUTION.

The last five witnesses presented by the State of Oklahoma were the victim's sister, Rebecca LaTorre; brother, Bobby Harrington; eleven-year-old daughter Kaci Harrington; father, David Harrington; and mother, Kathy Harrington. Each delivered a prepared victim impact statement. Each witness, except Kaci, concluded his or her testimony by asking the jury to sentence Mr. Bush to death. (Tr. 1412, 1425, 1436, 1449) Although each witness read from a prepared statement, and these statements had been redacted to comport with constitutional requirements, each witness deliberately strayed from the approved text and amplified their testimony with highly emotional pleas and appeals to biblical scripture. The admission of this evidence exceeded permissible bounds of victim

discretion in finding a sufficient factual basis. Furthermore, this Court should reverse Mr. Bush's convictions on his guilty pleas and vacate his sentences and remand this case for a trial on the merits so that an impartial trier of fact can hear all of the evidence and determine whether Mr. Bush is actually guilty of the crimes charged.

PROPOSITION VIII

THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS IT IS CURRENTLY BEING APPLIED IN OKLAHOMA.

Prior to trial, counsel filed a motion to strike the heinous, atrocious or cruel aggravating circumstance, arguing it was "unconstitutional on its face and as applied." (O.R. 334-38) The motion was denied. (10/8/09 M.Tr. 94)

Oklahoma has a checkered past with the heinous, atrocious or cruel aggravator. In *Cartwright v. Maynard*, 822 F.2d 1477, 1484, 1490 (10th Cir. 1987), the Tenth Circuit found Oklahoma's heinous, atrocious or cruel aggravator ran afoul of the Eighth Amendment narrowing requirement, in part, because the terms *heinous*, *atrocious* and *cruel* were vague and not sufficiently limited and defined for a jury's consideration. *Id.* at 1489-90. This decision was upheld in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

Oklahoma ostensibly narrowed the aggravator by requiring it could be established only when the evidence proved beyond a reasonable doubt the murder was preceded by torture or serious physical abuse. *Stouffer v. State*, 742 P.2d 562, 563 (Okl.Cr. 1987). This Court has identified two kinds of murder meeting this standard: murders involving the infliction of "great physical anguish" and murders involving the infliction of "extreme mental cruelty." *Cheney v. State*, 909 P.2d 74, 80 (Okl. Cr. 1995). The torture or serious physical abuse standard is met only when there is proof of inordinate conscious physical suffering beyond that attendant to

the homicide. *See Crawford v. State*, 840 P.2d 627 (Okl. Cr. 1992), *abrogated on other grounds*, 168 P.3d 185, 197 (Okl.Cr. 2007).

Oklahoma's use of the heinous, atrocious or cruel aggravator has remained under scrutiny from the Tenth Circuit, which has expressed concern the use of this aggravator once again resembles the catch-all approach found unconstitutional in *Cartwright*. *See Romano v. Gibson*, 239 F.3d 1156, 1176 (10th Cir. 2001); *Thomas v. Gibson*, 218 F.3d 1213, 1229 n.17 (10th Cir. 2000); *Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000). As established in *Cartwright*, 822 F.2d at 1489, aggravating factors may be neither vague nor overbroad. In Oklahoma, there is no consistent or reasoned basis upon which a murder can confidently be excluded as especially heinous, atrocious or cruel. In *Romano v. Gibson*, 239 F.3d 1156, 1176 (10th Cir. 2001), the Tenth Circuit pointed to examples of this inconsistent application, citing *Fluke v. State*, 14 P.3d 565, 568 and n. 9 (Okl. Cr. 2000)(noting evidence victim was aware of attack sufficient to show torture); and *Washington v. State*, 989 P.2d 960, 974-75 (Okl. Cr. 1999)(holding sufficient evidence supported this aggravator where victim may have consciously suffered for less than one minute after defendant shot her eight times after brief encounter). There is certainly a concern that Oklahoma's interpretation of its narrowing language could again render this aggravator unconstitutional. *See Thomas*, 218 F.3d at 1228 and n. 17.

Even this Court's most recent attempts at narrowing the breadth of this aggravator have not done enough to guide the sentencer toward the small number of cases to which it is supposed to be applied. *See DeRosa v. State*, 89 P.3d 1124 (Okl.Cr.2004). The re-worked uniform instruction still fails to inform the jury that "extreme mental cruelty" and "great physical anguish" must last for an appreciable amount of time prior to death, and that "conscious physical suffering" is supposed to refer to suffering beyond the brief period of conscious suffering that

accompanies virtually every homicide.

Because Oklahoma is currently applying the especially heinous, atrocious or cruel aggravator in a constitutionally vague and overly broad manner, and has failed to give capital juries constitutionally acceptable guidance as to what situations it applies, Mr. Bush's death sentence must be vacated and modified to life imprisonment.

PROPOSITION IX

THE VERDICT OF DEATH WAS INFLUENCED BY PASSION AND PREJUDICE AND OTHER ARBITRARY FACTORS PREVENTING THE JUDGE FROM MAKING A REASONED MORAL RESPONSE TO THE EVIDENCE.

A capital sentence is supposed to reflect a "'reasoned moral response' to *all* of the evidence relevant to the defendant's culpability. *Smith v. Texas*, 543 U.S. 37, 46, 125 S.Ct. 400, 406, 160 L.Ed.2d 303 (2004). Mindful that events transpiring at trial can distract a trier of fact from this solemn task, the Oklahoma Legislature has directed this Court to review every death sentence imposed in this state to determine, not only whether the aggravating circumstances are properly proven, but also whether the jury's decision to impose the death penalty was influenced by passion, prejudice, or other arbitrary factors. *See* 21 O.S. 2001, § 701.13(C)(1); *Grasso v. State*, 857 P.2d 802 (Okl.Cr. 1993).

As argued previously, Mr. Bush's right to a fair trial was jeopardized by a highly inflammatory offer of proof. *See* Proposition IV, *supra*. This prejudice was exacerbated by the admission of extremely prejudicial and emotional victim impact testimony. *See* Proposition V, *supra*.

The State's case for death was not so strong as to render the cumulative effect of these errors harmless in the instant case. As argued in Proposition III, *supra*, the evidence was insufficient to support the heinous, atrocious, or cruel and continuing threat aggravators. Though the remaining aggravating circumstance,

that Mr. Bush committed the murder while he was serving a sentence of imprisonment was clearly supported by the evidence, under the circumstances of this case, that aggravator alone is a particularly weak showing for a death penalty, especially considering that the conviction for which Mr. Bush was serving parole was non-violent. (State's Exhs. 204-06)

Because it is clear that arbitrary factors determined Mr. Bush's death sentence, the interests of justice require that his sentence be modified to a life sentence.

PROPOSITION X

THE ACCUMULATION OF ERROR IN THIS CASE DEPRIVED MR. BUSH OF DUE PROCESS OF LAW AND A RELIABLE SENTENCING PROCEEDING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, § 7 AND 9 OF THE OKLAHOMA CONSTITUTION.

Even if none of the previously discussed errors can, when viewed in isolation, necessitate the vacating of Mr. Bush's sentences, the combined effect of these errors deprived him of a fair sentencing trial and requires that his sentences be vacated. *See Skelly v. State*, 880 P.2d 401, 407 (Okl.Cr. 1994); *Peninger v. State*, 811 P.2d 609, 613 (Okl.Cr. 1991); *Gooden v. State*, 617 P.2d 248, 249-250 (Okl.Cr. 1980). At the very least, the combined effect of these errors should result in the modification of Mr. Bush's death sentence to life imprisonment with the possibility of parole and his life sentence to a term of years. *See Suitor v. State*, 629 P.2d 1266, 1268-1269 (Okl.Cr. 1981); *see also Barnett v. State*, 853 P.2d 226, 234 (Okl.Cr. 1993) (death sentence modified to straight life imprisonment).

CONCLUSION

Based on the preceding errors, discussion of facts, arguments and citations of legal authority, the record before this Court and any errors that this Court may note *sua sponte*, Mr. Bush respectfully asks the Court to allow him to withdraw his

guilty pleas or order any other relief as justice requires.

Respectfully submitted,

RONSON KYLE BUSH

By: _____

TRACI J. QUICK
Oklahoma Bar Association No. 18813

MICHAEL D. MOREHEAD
Oklahoma Bar Association No. 18114
Appellate Defense Counsel
Homicide Direct Appeals Division
P.O. Box 926
Norman, Oklahoma 73070
(405) 801-2666
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Petitioner was served upon the Attorney General on the date of filing, by leaving a copy of it with the Clerk of the Court of Criminal Appeals.

_____
Traci J. Quick