

**\*\*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

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**APPENDIX I**  
Excerpts of Habeas Petition

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

|                                    |   |                     |
|------------------------------------|---|---------------------|
| <b>RONSON KYLE BUSH,</b>           | ) |                     |
|                                    | ) |                     |
| <b>Petitioner,</b>                 | ) |                     |
|                                    | ) |                     |
| <b>v.</b>                          | ) | <b>CIV-13-266-C</b> |
|                                    | ) |                     |
| <b>ANITA TRAMMELL, Warden</b>      | ) |                     |
| <b>Oklahoma State Penitentiary</b> | ) |                     |
|                                    | ) |                     |
| <b>Respondent.</b>                 | ) |                     |

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**PETITION FOR A WRIT OF HABEAS CORPUS  
BY A STATE DEATH ROW INMATE, PURSUANT TO 28 U.S.C. § 2254**

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**December 2, 2013**

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**GROUND IV. THE TRIAL JUDGE’S IMPROPER CONSIDERATION OF THE NASH OFFER OF PROOF PREJUDICED MR. BUSH’S RIGHTS UNDER THE 6<sup>TH</sup>, 8<sup>TH</sup>, AND 14<sup>TH</sup> AMENDMENTS**

This claim was presented as Proposition V on direct appeal. As described above in Ground I, pages 17-20, the trial judge’s improper consideration of the belatedly disclosed Nash offer of proof completely undermined Mr. Bush’s second stage defense. The trial judge’s conduct in permitting the offer to be made is all the more egregious considering that he had already ruled the evidence to be inadmissible. (Tr. VII 1314) Having excluded the evidence, there simply was no reason for the trial judge to listen to the improper evidence.

**The Oklahoma Court of Criminal Appeals Decision**

On direct appeal, Mr. Bush claimed that the Nash offer of proof violated Mr. Bush’s Sixth Amendment rights to confront the witnesses against him and Eighth and Fourteenth Amendment rights to a fair and reliable sentencing proceeding, free of arbitrary and prejudicial considerations. The OCCA acknowledged that the offer contained “powerful evidence” but ruled against Mr. Bush because there was “little indication that the trial court utilized this evidence in making a sentencing decision.” *Bush*, 280 P.3d at 349.

**Argument** The OCCA’s decision is contrary to and an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court and was based on an unreasonable determination of facts. 28 U.S.C. §2254. As the OCCA admitted, “the trial court did cite to the instances of attempted escape as factoring into the basis for a finding that the probability existed that Bush would be a continuing threat to society.” *Id.* According to

the OCCA, “[o]ther admissible evidence . . . provided sufficient evidence that Bush was attempting to escape from the Grady county jail.” *Id.* However, the “other admissible evidence” of Mr. Bush’s supposed escape attempt was insufficient to serve as the basis for a finding. That evidence, relating to a damaged window screen, was particularly weak. The damaged screen was located in a cell occupied by Mr. Bush and at least two other inmates. (Tr. VII 1138) The video was not clear enough to identify anyone (Tr. VI 1198-99; Tr. VII 1361), and the surrounding evidence consisted of statements by an inmate who was threatened with escape charges if he refused to testify (Tr. VI 1198-99), hearsay statements of an absent witness (Tr. VI 1216, 1221) and the strenuous denial of an escape attempt by a different inmate. (Tr. VI 1212)

On the other hand, the Nash offer of proof was specifically used by the prosecutor to bolster the testimony of jail administrator, Shane Wyatt. Mr. Wyatt testified to damage to the toilet in Mr. Bush’s single-man cell, and damage to the shower in Mr. Bush’s cell block. (Tr. VII 1354-55) The prosecutor specifically asked, “Did you see damage to that cell, Ronson’s cell, *that was consistent with the information you received from Mr. Nash?*” (Tr. VII 1354-55, emphasis added) Mr. Wyatt answered, “Yes, sir,” but admitted that he did not see who damaged these fixtures; nor could he say when the damage had occurred. (Tr. VII 1355-56, 1362) Nor did he bother to file any reports on the incidents. (Tr. VII 1362)

The OCCA failed to recognize that the evidence was so prejudicial that it was impossible for the trial court to ignore. *Bush*, 280 P.3d at 349. According to the Nash offer of proof, Mr. Bush had confessed to (1) planning to kill Mr. Harrington for a week or a week

and a half; (2) going to detox to “get his head straight so he could get his plan together”; (3) torturing Mr. Harrington in an effort to get him to admit to having had sex with Stephanie Morgan; (4) dragging Mr. Harrington’s body behind a pickup truck, knowing Mr. Harrington was still alive; (5) attempting to escape from the county jail twice; and (6) threatening to kill a jailer, a guard, or court personnel to escape while being transferred to court. Still worse, the inadmissible offer also accused Mr. Bush of laughing about killing Mr. Harrington and showing no remorse.<sup>27</sup> (Tr. VII 1314-17) It’s hard to imagine a more thorough refutation of Mr. Bush’s anticipated sentencing stage arguments.<sup>28</sup>

Regarding the continuing threat aggravator, the trial judge stated that Mr. Bush had

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<sup>27</sup>The Nash offer of proof had an apparent effect on the victim impact testimony of Bobby Harrington. Bobby testified, “He’s setting over there crying like a little puppy dog like there’s something wrong with him like he’s sorry. He’s not sorry. I can’t believe I even had any compassion for him the day he even signed his right whenever he pleaded guilty. A tinge of me, a hope thinking, we, maybe he had some compassion, maybe he does – is really doing this, but he’s not.” (Tr. VIII 1424-25) Bobby’s compassion for Mr. Bush disappeared the day after Mr. Bush pled, when the Nash offer of proof was made. The Nash offer of proof also had a palpable effect on the testimony of Kathy Harrington, Billy Harrington’s mother and the State’s final sentencing witness. Kathy testified, “Ronson, I don’t believe you’re sorry that you killed my son. I think you enjoyed it. I think you bragged about it.” (Tr. VIII 1448) Even if the trial judge were able to somehow ignore the explosive allegations contained in the Nash offer of proof, it’s clear that he not only did not ignore the victim impact testimony, but he relied upon Billy’s parents’ plea that he restore their faith in the justice system by sentencing Ronson to death. (Sent. Tr. X 1875) *See also infra* Ground V (victim impact evidence).

<sup>28</sup>When he learned of the Nash allegations, Mr. Bush wrote the following note to his trial counsel: “Now I’m going to be treated like shit all over a guy lying about crap. How do we prove it’s a lie or he’s only trying to get out of trouble? I’m going to get punished and for nothing, fuck. I want to pull my fucking plea, just on Mrs. Pointer’s findings, cause everything I’ve done is wrong and nothing has changed at all but the day. You said you would support me. HELP tell me anything because I’m really wanting to pull my damn plea, we got a better shot with those 12 [jurors] because [Judge] Richard [Van Dyck] is mad. *See* Exhibit 6, Affidavit of Vicki Floyd with handwritten notes from trial file; PC App. p. 39, and Attach. 6 to PC App.).

attempted and/or conspired to escape from the Grady County Jail.” (S. Tr. X 1877) As Judge Smith of the OCCA noted in her dissent to the court’s treatment of the continuing threat aggravator,

“[t]his offer of proof was extremely prejudicial and contained evidence that was not known to the Court through any other witness or document. As pointed out by Bush, the State had no appeal of this ruling of the Court and the ruling did not depend on the content of the testimony, hence there was no reason for the court to allow this very extensive and prejudicial offer of proof. The trial court enjoys the presumption that only competent and admissible evidence was considered, but it is difficult to believe that this evidence could be ignored. I cannot find that there is no reasonable probability that the evidence did not impact the trial court’s decision to sentence Bush to death.”

*Bush*, 280 P.3d at 353-54. Indeed, Judge Smith’s view was apparently shared by prosecutor Bret Burns who praised the Nash information in a letter to Nash’s lawyer as “very valuable in the Bush prosecution.” (Exhibit 18, Nov. 13, 2009 letter from Bret Burns to Jeff Byers)

#### **GROUND V. ADMISSION OF IMPROPER VICTIM IMPACT TESTIMONY VIOLATED MR. BUSH’S FAIR SENTENCING RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS**

This claim was presented as Proposition V on direct appeal.

**The Facts** From the outset, Mr. Bush’s trial was focused on the wishes of Billy Harrington’s family members. Indeed, Mr. Bush only faced capital murder charges because Mr. Harrington’s family members scuttled a plea agreement by refusing to give their blessing to Mr. Bush’s agreement to plead guilty in exchange for a life without parole sentence. *See* Exhibit 5 ( PC App. Attach. 5), Affidavit of Mary S. Bruehl. The State’s last five sentencing stage witnesses – the victim’s sister Rebecca, brother Bobby, 11-year-old daughter Kaci,

**GROUND VI. IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS INFLUENCED THE VERDICT OF DEATH AND PREVENTED THE TRIAL COURT FROM MAKING A REASONED MORAL RESPONSE TO THE EVIDENCE**

On direct appeal,<sup>40</sup> Mr. Bush argued that his death sentence was issued under the influence of passion, prejudice, and other arbitrary factors. Specifically, Mr. Bush claimed that the combination of the highly inflammatory Nash offer of proof coupled with the extremely prejudicial and emotional victim impact testimony prevented the trial court from making a reasoned moral response to the evidence. Pet. Br. at 88. The OCCA rejected this argument, noting that the aggravating circumstances were supported by the record and that Mr. Bush was able to present mitigating evidence in support of a sentence less than death. *Bush*, 280 P.3d at 353. The court acknowledged that “some of the victim impact evidence was emotionally charged,” but concluded that Mr. Bush failed to “show that the trial court was influenced into issuing a sentence which was unwarranted by the evidence.” *Id.* No mention was made of the Nash offer of proof in this regard.

The OCCA’s reliance on the presumption that the trial court only considered competent and admissible evidence in reaching its sentencing decision is particularly unjustified in this case. During formal sentencing, the court replied directly to the victim impact pleas of David and Kathy Harrington, that “this time the justice system won’t fail our

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<sup>40</sup>This claim was raised as Proposition IX on direct appeal.

family.”<sup>41</sup> Before sentencing Mr. Bush to death, the judge responded, “I hope that some confidence has been regained in the legal system.” (Sent. Tr. X 1875)

The myriad constitutional infirmities in the drumbeat of victim impact testimony are described in Ground V, *supra*. Family members’ testimony splashed gas on a sentencing fire sparked by the incendiary Nash offer of proof. The combined effect was to supercharge the aggravators and dampen the force of the mitigating evidence.

As the prosecutor urged the judge during closing, “[t]here’s no getting around” the tear jerking testimony of Billy Harrington’s 11-year-old daughter, Kaci.<sup>42</sup> Likewise, as Judge Smith of the Court of Criminal Appeals suggested, there’s no getting around the devastating Nash offer of proof. It was extensive and so extremely prejudicial that, although not specifically mentioned by the trial court during formal sentencing, it simply could not be ignored.<sup>43</sup> Mr. Bush’s death sentence was imposed under the influence of these double-barreled constitutional defects and should be overturned.

**GROUND VII. MR. BUSH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION**

This claim was presented as Proposition VI on direct appeal. Mr. Bush was denied effective assistance of counsel guaranteed to him under the Sixth, Eighth, and Fourteenth

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<sup>41</sup>Tr. VIII 1436 (testimony of David Harrington). *See also* Tr. VIII 1448 (testimony of Kathy Harrington) (“I pray that my faith may be reassured in the justice system.”).

<sup>42</sup>Tr. IX 1866.

<sup>43</sup>*Bush*, 280 P.3d at 353 (Okla. Cr. 2012) (Smith, J., concurring in result).

unreasonable application of, federal law as determined by the United States Supreme Court.

28 U.S.C. §2254(d)(1).

**GROUND IX. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL**

This claim was presented as Proposition Eight in Mr. Bush's Application For Post-Conviction Relief. (PC App. at 48) When the OCCA determined the issue of ineffective assistance of trial counsel in Ground VIII, the OCCA also determined that appellate counsel was not ineffective for failing to raise the claims on appeal. (Exhibit 1, p. 10 *Bush v. State*, PCD-2010-399 (2012)) Mr. Bush does not duplicate those claims and the decisions of the OCCA here. *Evitts v. Lucy*, 469 U.S. 387 (1985) provides that a criminal defendant is entitled to effective assistance of counsel on appeal. The decisions of the OCCA holding appellate counsel was not ineffective in the claims presented resulted in decisions contrary to, or involved unreasonable applications of, federal law as determined by the United States Supreme Court. 28 U.S.C. §2254(d)(1).

**GROUND X. 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 UNDER THE FOURTEENTH AMENDMENT**

This claim was presented as Proposition III on direct appeal.

**The Law** "In a sufficiency of the evidence claim on habeas corpus, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Wilson v. Sirmons*, 536 F.3d 1064, 1105 (10<sup>th</sup> Cir. 2008) (citing *Jackson v. Virginia*,

443 U.S. 307, 319 (1979). 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 constitutes a continuing threat to society.

**A. Especially Heinous, Atrocious, or Cruel** A federal court looks at Oklahoma law to determine the substantive elements of the heinous, atrocious, or cruel aggravator. *Wilson*, 536 F.3d at 1105. "This aggravator 'requires proof that the death was preceded by torture or serious physical abuse.'" *Wilson*, at 1105 (citing *Lott v. State*, 98 P.3d 318, 358 (Okla. Cr. 2004)). "Torture may include the infliction of either great physical anguish or extreme mental cruelty . . . [it] *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. Analysis must focus on the acts of the defendant toward the victim and the level of tension created." *Wilson*, at 1105 (emphasis added). Serious physical abuse requires evidence of "conscious physical suffering." *Romano v. Gibson*, 239 F.3d 1156, 1176 (10th Cir. 2001).

To establish this aggravator, the State argued that Mr. Harrington was alive when he was dragged behind the pickup truck. (Tr. IX 1859) The State also suggested that had Mr. Harrington suffered any pain whatsoever, that in itself would have been sufficient for this aggravator. *Id.* The trial court said that "[t]he evidence is *unclear*, but I make the finding that the shots were fired both inside and outside the house." *Id.* at 1876. The trial court found that death was preceded by great pain and serious physical abuse due to the six gun shot wounds Mr. Harrington received and that the dragging was heinous and atrocious and extremely cruel. (Sent. Tr. X 1876) The court also found that Mr. Bush was indifferent to

Mr. Harrington's suffering. *Id.*

**The Oklahoma Court of Criminal Appeals Decision**

Although the OCCA apparently determined that insufficient evidence existed to find that Mr. Harrington was conscious when he was dragged behind the pickup, it nonetheless held that “[e]ven if we assume that Harrington was unconscious during the dragging, the amount of suffering which occurred before the dragging is sufficient to support the trial court’s finding of conscious physical suffering.” *Bush*, 280 P.3d at 346. The OCCA stated that the trial court “was very careful in its own questioning of the Medical Examiner to clarify that Harrington would not have become immediately unconscious due to any particular gunshot wound, nor due to the effect of the totality of the gunshot wounds.” *Id.* at 347. Immediate unconsciousness is not required in order to invalidate the aggravator. Any conscious physical suffering that Mr. Harrington endured was a result of the killing, and does not support the aggravator. 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. (Tr. VI 1118) She could not say how long Mr. Harrington was conscious. *Id.* at 1124. Mr. Harrington’s blood was not replaced and nearly one-fifth of his total blood volume had pooled in his chest. *Id.* at 1125. The OCCA’s decision was an unreasonable application of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. §2254(d)(1). A writ of habeas corpus should be granted to Mr. Bush.

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

(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).

**B. Continuing Threat to Society** In the Bill of Particulars, the State listed several actions which it alleged sufficiently demonstrated that Mr. Bush constituted a continuing threat to society. (O.R. 39-40) These actions 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 conduct demonstrated "a pattern of escalating criminal activity and general disregard for the rules of society." *Id.* at 40.

Defense expert Dr. Poyner observed that Mr. Bush's contacts with law enforcement were highly correlated with his mental illnesses. (Tr. IX 1699) In finding that the State had proved this aggravator, the trial court 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." (Sent. Tr. X 1877-79) The vast majority of the evidence in support of this aggravator should not have been admitted because it did not show any violent tendencies, the touchstone of the "continuing threat" aggravator. *See, e.g., Berget v. State*, 824 P.2d 364, 375 (Okla. Cr. 1991). This aggravator

**GROUND XV. THE CUMULATIVE EFFECT OF THE ERRORS IN MR. BUSH'S CASE RENDERED BOTH STAGES OF HIS TRIAL AND HIS DIRECT APPEAL FUNDAMENTALLY UNFAIR IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

This claim was presented as Proposition X on direct appeal and as Proposition Nine in Mr. Bush's application for post-conviction relief. Mr. Bush has identified numerous constitutional errors in his Petition for Writ of Habeas Corpus which were also presented in his direct appeal brief and his application for post-conviction relief. These errors permeated both the first and second stages of his trial and his appeal. Mr. Bush has established that first-stage errors entitle him to relief from his conviction. He has established further that the errors which occurred in second stage entitle him relief from his sentence of death.

Even though each error claimed by Mr. Bush entitles him to relief independently, these errors "provide an even more compelling basis for relief when their combined prejudicial effect is collectively assessed under cumulative-error analysis." *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10<sup>th</sup> Cir. 2003). Even if individual errors are found to be harmless, it does not relieve this Court of the duty to grant relief. In *United States v. Rivera*, 900 F.2d 1462, 1470 (10<sup>th</sup> Cir. 1990) (*en banc*), the Tenth Circuit explained that a cumulative analysis combines all the errors that have been individually found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they cannot be beheld as harmless. The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *Id.* at 1469-1470. *See also United States v. Toles*, 297 F.3d 959, 972 (10<sup>th</sup> Cir. 2002).

This analysis includes the cumulation of errors occurring in both first and second stages of trial because the prejudicial effect of first-stage errors influenced the jury's determination of Mr. Bush's sentences. *Cargle v. Mullin*, 317 F.3d at 1208. The cumulative effect of the errors present warrants relief.

### **REQUEST FOR EVIDENTIARY HEARING**

Mr. Bush attempted to develop his claims in State court but was denied a hearing. When a habeas petitioner did not fail to develop his claim in State court then the federal district court must analyze whether a hearing is required under the pre-AEDPA standard. *Bryan v. Mullin*, 335 F.3d 1207, 1214 (10<sup>th</sup> Cir. 2003) (*en banc*). Thus, Mr. Bush has made allegations which, if proved, would entitle him to relief. *Medina v. Barnes*, 71 F.3d 363, 366 (10<sup>th</sup> Cir. 1995). "If the petitioner does that the court must then determine whether petitioner is entitled to an evidentiary hearing to resolve any disputed fact underlying his claims." *Id.* Mr. Bush has done so as established in this Petition and his Motion for Evidentiary Hearing, entitling him to an evidentiary hearing. 28 U.S.C. §2254(e)(2) does not apply in Mr. Bush's case as he has not failed to develop the factual basis of these claims in State court.

### **CONCLUSION**

Mr. Bush respectfully requests this Court grant a Writ of Habeas Corpus, allowing him to withdraw pleas and remand for a new trial and sentencing.

Respectfully submitted,

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Certificate of Electronic Filing and Service

This is to certify that on the 2<sup>nd</sup> day of December, 2013, I caused the foregoing Petition for Writ of Habeas Corpus to be filed with the Clerk of the Court using the ECF System for filing. A copy will be served electronically to Jennifer Dixon, Oklahoma Assistant Attorney General, 313 N.E. 21<sup>st</sup> Street, Oklahoma City, OK 73105. To counsel's knowledge, there are no non-ECF registrants who are counsel in this case.

/s/ Mark Henricksen