

****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 J

Motion to Expand Certificate of Appealability

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONSON BUSH,	)	
Petitioner-Appellant,	)	
	)	Case No. 16-6318
v.	)	
	)	
TERRY ROYAL,	)	
Respondent-Appellee.	)	

MOTION TO EXPAND THE CERTIFICATE OF APPEALABILITY

Ronson Bush, through counsel, respectfully moves this Honorable Court to expand the certificate of appealability. Specifically, Mr. Bush respectfully requests that the Court certify the following question for appeal: whether, in light of *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017), the evidence was insufficient to support the heinous, atrocious, and cruel aggravating circumstance.

BACKGROUND

An Oklahoma state court convicted Mr. Bush of one count of capital murder after Mr. Bush shot and killed Billy Harrington. The prosecution sought the death penalty, and to impose death, the sentencer had to find that an aggravating circumstance existed and that any aggravating circumstances outweighed any mitigating circumstances. The jury found as an aggravating circumstance that the shooting death was heinous, atrocious, and cruel (HAC) and, based in part on that finding, sentenced Mr. Bush to death.

Mr. Bush appealed to the Oklahoma Court of Criminal Appeals (OCCA). In Proposition III of Mr. Bush’s direct appeal brief, he claimed that the evidence was insufficient to support the HAC aggravator. Mr. Bush’s challenge to the HAC aggravator in state court relied on both the Eighth and Fourteenth Amendments. Proposition III explicitly invoked the Fourteenth Amendment and cited *Jackson v. Virginia*, 443 U.S. 307 (1979), a due process sufficiency-of-the evidence case. As for the Eighth Amendment, Mr. Bush’s Proposition III cited an OCCA case, *Cudjo v. State*, in which the OCCA held that a victim’s suffering stemming from “the act of killing itself” is not enough to make a murder heinous, atrocious and cruel because “the Eighth Amendment requires that the aggravator . . . be applied only to that class of murders which is most egregious.” 925 P.2d 895, 901–02 (Okla. Crim. App. 1996) (citing *Maynard v. Cartwright*, 486 U.S. 356 (1988)).¹ In addition, a related proposition in Mr. Bush’s direct appeal brief, Proposition VIII, argued that the HAC aggravator was unconstitutionally overbroad under the Eighth Amendment. The

¹ “[A] state defendant may fairly present to the state courts the constitutional nature of his claim . . . without citing chapter and verse of the Constitution;” he may do so by relying solely “on state cases employing [federal] constitutional analysis in like fact situations.” *Daye v. Atty. Gen.*, 696 F.2d 186, 194 (2d Cir. 1981) (en banc); see 2 Randy Hertz & James S. Liebman, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 23.3[c][i], nn. 33–37 (6th ed. 2017 Update) (collecting other authorities).

OCCA denied the claim on the merits. *See Bush v. State*, 280 P.3d 337, 345–37 (Okla. Crim. App. 2012).

Mr. Bush timely filed a federal habeas petition in Oklahoma federal court, seeking relief under 28 U.S.C. § 2254. Ground X of the federal habeas petition argued, among other things, that the evidence was insufficient to support the HAC aggravator. R. vol. I at 96–99. Again, Mr. Bush relied on both the Eighth and Fourteenth Amendments, citing cases from this Court explaining how both amendments place constitutional restrictions on aggravating circumstances. *Id.* at 96–97 (citing *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008), and *Romano v. Gibson*, 239 F.3d 1156, 1176 (10th Cir. 2001)). The district court denied the claim on the merits and denied a certificate of appealability (COA). *Id.* at 533–35, 545–46.

Mr. Bush timely appealed to this Court and renewed his application for a COA. Judge Murphy granted a COA on other claims but declined to certify the question of whether the evidence was sufficient to support the HAC aggravator.

Mr. Bush now requests that the panel expand the COA to encompass his challenge to the sufficiency of the evidence on the HAC aggravator.

STANDARD OF REVIEW

In deciding whether to grant a COA, “the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues are adequate to deserve encouragement to proceed further.’” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). The Supreme Court has repeatedly admonished courts of appeals that “[t]he COA inquiry...is not coextensive with a merits analysis.” *E.g., id.* Rather, it is a “threshold question [that] should be decided without ‘full consideration of the factual or legal basis adduced in support of the claims.’” *Id.* “A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” A merits panel has the authority to expand a COA to cover an issue that a motions judge declined to certify. *See, e.g., United States v. Shipp*, 539 F.3d 1084, 1087–88 (10th Cir. 2009).

ARGUMENT

Mr. Bush’s sufficiency challenge to the HAC aggravator warrants certification because there was no evidence that the victim in this case endured more than a brief period of conscious physical suffering between the time of the fatal blow and death. Because many murder victims suffer briefly before death, and whether a murder

victim dies instantaneously may be purely a matter of chance, the happenstance that a victim endures a brief period of conscious physical suffering is not a principled way to determine who should suffer the death penalty and who should not. As in *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017), the OCCA's decision upholding the HAC aggravator in this case, where there was no evidence that the victim experienced more than a brief period of suffering between the fatal blow and death, unreasonably determined the facts and unreasonably applied Supreme Court precedent.

I. Under Clearly Established Federal Law, the HAC Aggravator May Not Be Used Where the Evidence Shows Nothing More Than That the Victim Experienced a Brief Period of Conscious Physical Suffering Between the Fatal Blow and Death.

Any decision to impose the death penalty must be based on objectively defined aggravating facts specified in advance of the crime. *See, e.g., Godfrey v. Georgia*, 446 U.S. 420, 427–33 (1980). “[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983). In other words, “aggravating circumstances must be construed to permit the sentencer to make a *principled* distinction between those who deserve the death penalty and those who do not.” *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) (emphasis added). Further, for any aggravating circumstance alleged, the prosecution must present sufficient evidence

for a rational trier of fact to find beyond a reasonable doubt that the aggravating circumstance exists. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

Here, the sentencer imposed the death penalty based, in part, on 21 Okla. Stat. Ann. § 701.12(4) (2008), which makes a defendant eligible for death where “[t]he murder was especially heinous, atrocious, or cruel.” But a finding that a murder was “heinous, atrocious, or cruel” in some generic or ordinary-language sense of those words cannot justify the death penalty because, in that sense, all murders could be characterized heinous, atrocious, or cruel. See *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988). Thus, *Maynard* allows Oklahoma to use the HAC aggravator only if Oklahoma limits its application to cases in which the defendant inflicted “extreme mental cruelty” or “conscious physical suffering” on the victim. See, e.g. *Thomas v. Gibson*, 218 F.3d 1213, 1226–27 (10th Cir. 2000). No one has argued that Mr. Bush inflicted extreme mental cruelty in this case, so the only question is whether the evidence proves beyond a reasonable doubt that he inflicted conscious physical suffering upon the victim.

This Court recently addressed a sufficiency challenge to the conscious-physical-suffering prong of the HAC aggravator in *Pavatt v. Royal*, 859 F.3d 920, 929–38 (10th Cir. 2017). *Pavatt* held that *Maynard* clearly establishes that “a brief period of conscious physical suffering between the time of the fatal blow and death”

is insufficient to prove the HAC aggravator. *Id.* at 936. This is because most murder victims suffer briefly before death, and whether they suffer briefly or die instantaneously “would so often be purely a matter of chance” that this contingency “is not a principled way to determine who should suffer the penalty of death and who should not.” *Id.* In *Pavatt*, the victim was shot, and his wife called 911 to report the shooting. *Id.* at 924. The prosecution presented evidence that the victim stayed alive and conscious long enough to try to talk to his wife while she was on the phone with the 911 operator. *Id.* at 935. This Court held, however, that such brief suffering between the fatal blow and death was “not the sort of suffering that could, in a ‘principled way . . . distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.’” *Id.* at 935 (quoting *Godfrey*, 446 U.S. at 433). Thus, *Pavatt* makes clear that Supreme Court precedent requires the prosecution to present evidence sufficient for a rational trier of fact to find beyond a reasonable doubt that the victim experienced conscious physical suffering beyond a brief period between the time of the fatal blow and death. *Id.* at 929 (citing *Maynard* and *Ring*).

II. The Prosecution Presented No Evidence That the Victim in This Case Suffered More Than a Brief Period of Conscious Physical Suffering Between the Fatal Blow and Death.

The prosecution presented no evidence to satisfy that requirement here.

The undisputed facts in this case show that Mr. Bush shot and killed another adult man, Mr. Harrington, based on Mr. Bush's belief that Mr. Harrington was sleeping with his ex-girlfriend. There was no evidence that Mr. Harrington consciously suffered before the shooting began. The shooting occurred inside Mr. Harrington's home, and after the shooting, Mr. Bush tied Mr. Harrington's body behind a truck and dragged the body to the back of Mr. Harrington's property in an effort to hide it (though Mr. Bush confessed to the killing just hours after it occurred). The dragging seriously damaged Mr. Harrington's body.

There was no witness to the shooting death of Mr. Harrington. The key testimony on how long Mr. Harrington suffered before he died is that of Dr. Inas Yacoub, the forensic pathologist. Trial Tr. vol. VI at 1069–1133. Dr. Yacoub testified that the cause of death was “[m]ultiple gunshot wounds,” and she found six such wounds. *Id.* at 1075–76. Dr. Yacoub could not determine the order in which Mr. Harrington sustained the gunshot wounds. *Id.* at 1085; *see also id.* at 1114 (“I couldn’t tell you this was definitely number one and this is number two and this is number three and this is number four.”).

Dr. Yacoub determined that one of the gunshot wounds “by itself would have been fatal” “because of the damage to the vital organs” and “the bleeding associated with th[e] wound.” *Id.* at 1085.

She opined that the fatal wound was not “necessarily...instantly fatal”—that “[t]h[e] person *may* not necessarily have dropped dead right then after that wound.” *Id.* (emphasis added); *see also id.* at 1108 (“*possibly* not instantly fatal”) (emphasis added).

When asked if any or all of the gunshot wounds caused Mr. Harrington to lose consciousness, Dr. Yacoub testified that the victim was evidently able to walk after receiving one or more of the gunshot wounds, as crime scene photos showed “bloody footsteps coming out of the residence to the outside.” *Id.* at 1113–14. She also stated, though, that she didn’t know “any expiration of time from receiving the gunshot wounds to how long he would have walked or anything”—i.e., that she “d[id]n’t know...how long any of those events took place.” *Id.* at 1116–17. In other words, she said: “There was an interval of time that he was able to walk and leave bloody footprints before collapsing outside.... But how much this time interval is, I don’t know.... I could not tell you the exact amount of time.” *Id.* at 1124–25. The outdoor porch where the bloody footprints were found was directly adjacent to the indoor room where Mr. Harrington was shot, and Mr. Harrington evidently walked no more than several yards before collapsing. *Compare* State’s Ex. 94, *with* State’s Ex. 50.

Dr. Yacoub testified that gunshot wounds cause pain and suffering. *Id.* at 1109–11.

As noted, after the shooting, Mr. Harrington's body sustained damage as it was dragged to the back of his property. Dr. Yacoub testified that she could not absolutely rule out the possibility that Mr. Harrington was still alive at the time his body was dragged to the back of his property. *Id.* at 1112 (“wasn’t *definitely* postmortem”) (emphasis added); *id.* (“it’s *possible* that Billy Harrington was still alive”) (emphasis added); *id.* at 1112–13 (“*could have* been still alive or dying at that point”) (emphasis added); *id.* (“I did not feel that he was *definitely* dead when he sustained the injuries...with the dragging”) (emphasis added). She was never asked whether, and did not say that, there was any possibility that Mr. Harrington remained conscious while his body was dragged.

This evidence is insufficient to support a finding that Mr. Harrington experienced more than a brief period of conscious physical suffering.

Dr. Yacoub's testimony that she could not definitively rule out that Mr. Harrington was not yet dead at the time he was dragged does not prove anything beyond a reasonable doubt, and it certainly does not indicate that he was conscious while the dragging damaged his body. Causing damage to the victim's body after he or she has died or become unconscious is not an aggravating circumstance in Oklahoma.

The only pain and suffering that Dr. Yacoub could say that Mr. Harrington consciously experienced was the pain and suffering inherent in dying from a gunshot wound, which is indistinguishable from the evidence that the Court found insufficient in *Pavatt*, 859 F.3d at 934–35. Just as the evidence in *Pavatt* that the victim was alive and conscious long enough to try to talk to his wife while she was on the phone with the 911 operator was not enough, that Mr. Harrington remained was alive and conscious long enough to walk outside “is not the sort of suffering that could in a ‘principled way...distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.’” *Pavatt*, 859 F.3d at 935 (quoting *Godfrey*, 446 U.S. at 433). Rather, it was “purely a matter of chance” (*id.* at 936) that Mr. Harrington did not die instantaneously or nearly so.

The prosecution’s closing argument at Mr. Bush’s sentencing confirms that its proof failed to meet the Constitution’s requirements. The prosecutor urged in summation:

The heinous, atrocious and cruel can come from the first time he shoots him and when he starts bleeding out and falling down in his kitchen....If he had just fallen down on the ground and bleed [sic] out right there that meets the definition of heinous, atrocious and cruel....We don’t have to prove that he lingered [sic] and died.

Trial Tr. vol. IX at 1859. The prosecution’s misrepresentation of clearly established constitutional law—i.e., its mistaken assertion that the HAC aggravator could be

found even if the victim immediately fell down and succumbed from his wounds after the first shot—supports an inference that the evidence was insufficient under the correct standard. If the prosecution’s evidence had been sufficient under the correct standard, it would not have been boxed into advancing a spurious legal theory.

III. The OCCA’s Decision Upholding the HAC Aggravator Unreasonably Determined the Facts and Unreasonably Applied Supreme Court Precedent.

The OCCA’s decision affirming the HAC aggravator cannot survive scrutiny under 28 U.S.C. § 2254(d). Under § 2254(d), habeas relief can be granted based on a claim adjudicated on the merits in state court only if the state court ruling:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Here, the OCCA adjudicated Mr. Bush’s sufficiency claim on the merits, but its decision was so far off the mark as to qualify as unreasonable.

Significantly, this Court evaluated the claim in *Pavatt* under § 2254(d), and this case is indistinguishable from *Pavatt*. Just as the OCCA’s decision denying the

claim in *Pavatt* flunked § 2254(d) review, its decision denying Mr. Bush's claim flunks § 2254(d) review.²

The OCCA's decision rejecting Mr. Bush's claim in this case fails under both § 2254(d)(1) and (d)(2). It both unreasonably determined the facts and contradicted or unreasonably applied Supreme Court precedent.

First, the OCCA unreasonably determined the facts. That court stated that Dr. Yacoub testified that "the victim could have lived *for several minutes* after the fatal shot." *See Bush I*, 280 P.3d at 346 (emphasis added). Dr. Yacoub never said that. She never quantified how much time Mr. Harrington may have lived after the *first* shot, much less after the *fatal* shot, which may have been the first shot, the last shot, or anything in between. The OCCA's description of Dr. Yacoub's testimony amounts to an unreasonable determination of the facts under § 2254(d)(2), and this blatant factual error warrants habeas relief. (In any event, a pathologist's statement about

² In denying a COA, Judge Murphy evidently believed that he could not consider *Pavatt* because § 2254(d)(1) requires evaluating whether a state court decision is contrary to or an unreasonable application of Supreme Court precedent, not circuit precedent. This is plainly wrong. *Pavatt* wasn't about what *this Court* believes, *on its own view*, that the Eighth and Fourteenth Amendments require; it was about what *Supreme Court precedent clearly establishes* that the Eighth and Fourteenth Amendments require. *Pavatt* stands as binding precedent for the proposition that OCCA decisions upholding the HAC aggravator based on a brief period of conscious physical suffering *flunk* § 2254(d)(1)'s *standard of review*, the same standard of review that applies in this case.

what is theoretically possible—i.e., how long the victim “could have” lived—would have failed to prove anything beyond a reasonable doubt. Moreover, even affirmative testimony that the victim remained *alive* for several minutes would not have established that the victim was *conscious* during that period.)

Second, the OCCA contradicted and unreasonably applied *Godfrey*, *Maynard*, and *Ring*. The state court affirmed the HAC aggravator merely because Mr. Harrington did not die immediately and gunshot wounds are painful. See *Bush I*, 280 P.3d at 345–47. In *Pavatt*, this Court held that the OCCA’s decision flunked § 2254(d)(1) because,

[t]o properly decide whether there was sufficient evidence to sustain the aggravator, the court needed to determine that the evidence would support a finding of conscious physical suffering under a definition of that term that satisfied both Oklahoma law and the Eighth Amendment. Although it could certainly determine how conscious physical suffering should be defined under Oklahoma law and (we will assume) it properly concluded that the evidence at trial satisfied that definition, it totally failed to consider the other component of the analysis—whether the definition it applied satisfies the Eighth Amendment.

859 F.3d at 936–37. Precisely the same thing is true here. The state court in *Bush* totally failed to consider whether the definition of conscious physical suffering it applied satisfies the Eighth Amendment or whether the evidence was sufficient under the standard the Eighth Amendment requires. *Bush I*, 280 P.3d at 345–47. More broadly, the OCCA affirmed the sentencer’s finding of the HAC aggravator

despite the absence of evidence that would distinguish in a principled manner Mr. Bush's case from the many cases in which death was not imposed. This conclusion is impossible to reconcile with *Godfrey*, *Maynard*, and *Ring*. See *Pavatt*, 859 F.3d at 929–38. Accordingly, § 2254(d)(1) authorizes relief.

IV. At a Minimum, Reasonable Jurists Could Debate Whether Mr. Bush Has a Meritorious Claim That the Prosecution Presented Insufficient Evidence to Establish the HAC Aggravator.

The foregoing establishes that Mr. Bush is entitled to relief on his claim. At this stage, however, the only question before the Court is whether Mr. Bush's claim is at least *debatably* valid, such that he should be allowed to brief it. *Buck*, 137 S. Ct. at 773. The foregoing discussion shows that Mr. Bush's claim easily clears that low hurdle.

CONCLUSION

WHEREFORE, this Court should expand the COA to include Mr. Bush's sufficiency challenge to the HAC aggravator.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

s/ Josh Lee
JOSH LEE
Assistant Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202

(303) 294-7002

josh.lee@fd.org

MARK HENRICKSEN

Henricksen & Henricksen

600 North Walker, Suite 201

Oklahoma City, OK 73102

(405) 609-1970

mark@henricksenlaw.com

Counsel for Ronson Bush

CERTIFICATE OF COMPLIANCE

I certify that this motion is proportionally spaced and contains 3446 words and thus, complies with Fed. R. App. P. 27(d)(2). I relied on my word processor, Microsoft Word 2013, to obtain the count. I certify that the information in this certificate is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ Josh Lee
JOSH LEE
Assistant Federal Public Defender

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing that

- (1) all required privacy redactions have been made;
- (2) if required to file additional hard copies, that the ECF submission is, with the exception of any redactions, an exact copy of those hard copies; and
- (3) the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program Symantec AntiVirus Corporate Edition, which is continuously updated, and, according to the program is free of viruses.

s/ Josh Lee

JOSH LEE
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2018, I electronically filed the foregoing using the CM/ECF system, which will send notification of this filing to the following e-mail address:

Jenny Dickson, Assistant Attorney General
jenny.dickson@oag.ok.gov

Caroline Hunt, Assistant Attorney General
caroline.hunt@oag.ok.gov

I further certify that I have mailed this motion to the following by United States mail:

Ronson Bush (via U.S. Mail)

s/ Josh Lee

JOSH LEE
Assistant Federal Public Defender