

****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 K

Excerpts of Petitioner's Tenth Circuit Brief

THIS IS A DEATH PENALTY CASE

Case No. 16-6318

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONSON BUSH,	)
Petitioner-Appellant,	)
	)
v.	)
	)
TERRY ROYAL,	)
Respondent-Appellant.	)
	)

On Appeal from the United States District Court
for the Western District of Oklahoma
The Honorable David L. Russell, District Judge
D.C. No. 5:13-CV-00266-R

APPELLANT'S OPENING BRIEF

MARK HENRICKSEN
Henricksen & Henricksen
600 North Walker, Suite 201
Oklahoma City, OK 73102
mark@henricksenlaw.com

VIRGINIA L. GRADY
Federal Public Defender

JOSH LEE
Assistant Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294 7002
josh.lee@fd.org

Oral argument is requested

June 13, 2018

ARGUMENT

I. The Prosecution’s Presentation of a Legally Purposeless “Offer of Proof” That Contained Inadmissible and Tremendously Prejudicial Information Violated Mr. Bush’s Eighth and Fourteenth Amendment Rights.

Mr. Bush’s constitutional rights were violated when the prosecutor told the sentencer about a litany of damaging and inadmissible statements attributed to Mr. Bush. The OCCA denied relief on this claim, but its decision unreasonably applied Supreme Court precedents forbidding fundamental unfairness and arbitrariness in death penalty proceedings. The district court erred by deferring to the OCCA’s decision under 28 U.S.C. § 2254(e)(1), which provides that state-court factual findings “shall be presumed correct.” That statute is categorically inapplicable here because the OCCA’s ruling decided a mixed question of law and fact, not a purely factual issue. In any event, even if the state court’s decision were presumed correct under § 2254(e)(1), Mr. Bush has met his burden of rebutting the presumption by clear and convincing evidence. This Court should reverse.

A. The Prosecution Told the Sentencer About a Series of Damaging and Inadmissible Statements Attributed to Mr. Bush.

At Mr. Bush’s sentencing, the prosecution sought to present testimony from a jail inmate named Jackie Nash. Nash, making a play for leniency on his own pending charges, dubiously alleged that he heard Mr. Bush make a multitude of damaging

statements. The defense objected, and the trial judge was forced to acknowledge that the Oklahoma Constitution prohibited Nash from testifying because his testimony was produced too late. But the judge (also the sentencer and fact-finder) nevertheless wanted to hear what Nash had to say. So, the judge urged the prosecutor to tell him, ostensibly as an offer of proof.

The prosecutor reported that Nash said that Mr. Bush admitted to Nash: that he planned the killing for a week or more; that he was sober and in his right mind at the time of the shooting; that he taunted and tortured Mr. Harrington before killing him; that Mr. Harrington was alive when Mr. Bush dragged his body; that, afterward, Mr. Bush schemed to concoct an intoxication defense; and that he was planning an escape attempt and “would kill whomever was necessary to get away.” *Id.* at 1314–17. The prosecutor also reported that Nash said that Bush showed no remorse and, in fact, “laughed about killing Billy Harrington.” *Id.* at 1317.

None of this so-called offer of proof had any support in the evidence. In fact, although the sentencer never heard this, testimony from other inmates produced during post-conviction proceedings revealed that it was entirely false. The other inmates testified that Mr. Bush told his cellmates that the killing was not planned but impulsive and that he was extraordinarily remorseful.

Defense counsel tried to object, but the prosecutor and the judge told her that there was nothing she could object to because no evidence had been presented. *Id.* at 1317.

B. The OCCA and the District Court Denied Mr. Bush's Claim That the Presentation of Nash's Allegations Violated His Constitutional Rights.

Mr. Bush claimed on direct appeal that airing Jackie Nash's allegations violated the Eighth and Fourteenth Amendments. DA Br. at 46–53. The OCCA denied relief on the merits. App. C at 19–21. It rested its decision on a presumption of regularity: “the presumption that the trial court only considered competent and admissible evidence in reaching its decision.” *Id.* at 19. Judge Smith dissented from the OCCA's decision, explaining that Nash's allegations were extremely prejudicial and presented facts not otherwise known to the sentencer. *Id.* at 34. Judge Smith found it “difficult to believe that this evidence could be ignored” and thought there was a “reasonable probability” that Nash's allegations “impact[ed] the trial court's decision to sentence Bush to death.” *Id.*

Below, Mr. Bush raised this issue as Claim IV of his federal habeas petition. The federal district court denied relief on the merits, deferring to the OCCA's decision. Fed. R. at 492–98.

C. The OCCA's Decision Denying Relief Was Unreasonable.

This Court should order habeas relief because the OCCA unreasonably applied Supreme Court precedent in denying Mr. Bush's claim. See 28 U.S.C. § 2254(d)(1).

i. Supreme Court Precedent Establishes That the Due Process Clause Prohibits All Manner of Fundamental Unfairness and That the Eighth Amendment Forbids Arbitrariness in Death Penalty Proceedings.

No Supreme Court case specifically addresses prejudicial "offers of proof." But "a general standard may be applied in an unreasonable manner" and support relief under § 2254(d)(1). *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007). And "Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 583 U.S. 53, 76 (2003).

Several lines of Supreme Court precedent establish general standards that support relief here. First, "state-sponsored courtroom practices" may be "so inherently prejudicial that [they] deprive[] a defendant of a fair trial."² *Carey v. Musladin*, 549

² Capital sentencing proceedings are, in fact, *trials* both for constitutional purposes and in common parlance because those proceedings (1) are "like a trial in [their]

U.S. 70, 76 (2006); see *Deck v. Missouri*, 544 U.S. 622, 624 (2005); *Estelle v. Williams*, 425 U.S. 501, 512 (1976). Second, improper comments by the prosecutor violate the Constitution if they are “of sufficient significance to result in the denial of a defendant’s right to a fair trial.” E.g., *Greer v. Miller*, 483 U.S. 756, 765 (1987). Third, the introduction of evidence may “so infect[] the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process.” *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). And, finally, the Eighth Amendment “prohibits the arbitrary or irrational imposition of the death penalty.” E.g., *Parker v. Dugger*, 498 U.S. 308, 321 (1991). These cases establish that the due process clause prohibits fundamental unfairness and that the Eighth Amendment forbids arbitrariness in death penalty proceedings.

adversarial format and in the existence of standards for decision,” *Strickland v. Washington*, 466 U.S. 668, 686 (1984), (2) require the sentencer to find facts that increase the defendant’s maximum punishment, *Hurst v. Florida*, 136 S. Ct. 616, 621–22 (2016), and (3) involve a sanction that, in its “severity and finality,” “is no less important than the decision about guilt.” *Deck v. Missouri*, 544 U.S. 622, 632 (2005).

ii. **Exposing the Sentencer to Jackie Nash's Allegations Was Fundamentally Unfair and Unacceptably Risked Arbitrarily Applying the Death Penalty.**

Airing Jackie Nash's allegations—whether understood as a prejudicial, state-sponsored courtroom practice, as prosecutorial misconduct, as the *de facto* introduction of overwhelmingly prejudicial evidence, or as a practice that risked arbitrary infliction of the death penalty—violated this Supreme Court precedent. The so-called offer of proof presented an unacceptable risk of impermissible factors influencing the sentencing decision. Criminal judgments, including capital sentencing decisions, must be based on admissible evidence that the defense has an opportunity to deny or explain. *See Gardner v. Florida*, 430 U.S. 340 (1977). Presenting Nash's allegations, however, unacceptably risked that the sentencer would impose death based on inadmissible statements not subject to cross-examination or any other challenge by the defendant.

Nash's allegations were extremely damaging to Mr. Bush's case for life. If credited, the statements attributed to Mr. Bush would cinch (and lend great weight to) the prosecution's case that the killing was heinous, atrocious, and cruel and that Mr. Bush represented a continuing threat to society. In addition, Nash's statements uniquely—and, it must be said, conveniently—contradicted the mitigating circumstances offered by Mr. Bush. It strains credulity to suppose that the sentencer could

evaluate Mr. Bush’s evidence that he committed the offense impulsively and was remorseful afterward without Nash’s allegations ringing in his head. In these ways, airing Nash’s allegations so infected the sentencing with unfairness and arbitrariness as to result in a violation of the Eighth and Fourteenth Amendments.

iii. By Reflexively Applying a Presumption Without Considering All the Circumstances That Rebut That Presumption, the OCCA Unreasonably Applied the Supreme Court’s Eighth and Fourteenth Amendment Precedents.

The state court’s contrary holding was not just wrong but unreasonable. As noted, the state court relied on the presumption of regularity, i.e., the notion that judges in bench trials only consider admissible evidence. To be sure, “judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.” *Harris v. Rivera*, 454 U.S. 339, 346 (1981). But “the presumption of regularity is subject to be rebutted.” *R.H. Stearns Co. v. United States*, 291 U.S. 54, 63 (1934); see *Bracy v. Gramley*, 520 U.S. 900, 909 (1997) (holding that the petitioner had “soundly rebutted” the presumption of regularity). It is not a license for an appellate court to “be ignorant as judges of what we know as’ human beings.” *Hooks v. Workman*, 689 F.3d 1148, 1185 (10th Cir. 2012) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (plurality opinion)). The Supreme Court has repeatedly held, under the circumstances of particular cases, that a judge in a bench trial improperly relied on

inadmissible evidence. *See, e.g., Lee v. Illinois*, 476 U.S. 530, 531, 546 (1986); *Moore v. United States*, 429 U.S. 20, 21 (1976); *Wong Sun v. United States*, 317 U.S. 407, 491–93 (1963).

In this case, multiple circumstances, both individually and cumulatively, resoundingly rebut any presumption of regularity. First, the very fact that the judge invited the “offer of proof” in the first place was highly irregular. Consider the two reasons that judges may hear offers of proof. An offer of proof may cause the judge to reconsider the admissibility of evidence based on the content of the offer, or it may help preserve an issue for appeal. Here, however, the Oklahoma Constitution required exclusion of the evidence regardless of its content, because it was produced too late. Tr. at 1310–14. And the State had no ability to appeal. *See, e.g., Arizona v. Rumsey*, 467 U.S. 203, 209–13 (1984). Thus, there was no legitimate basis for the sentencing judge to hear Jackie Nash’s allegations. Why, then, did the judge demand to hear Nash’s allegations? The simple and obvious explanation is that he wanted to hear them—to consider what Nash had to say in making his sentencing decision. Neither the State, nor any court, has ever offered any alternative explanation.

Second, the very content of Nash’s allegations counter any presumption of regularity. In presenting those allegations, the prosecutor told the sentencer that Mr. Bush had confessed to, among other things, (1) plotting Mr. Harrington’s murder for

days, (2) taunting and torturing Mr. Harrington, (3) dragging the body while knowing Mr. Harrington was alive, (4) concocting a fraudulent intoxication defense, and (5) threatening to murder people in an effort to escape custody. The prosecutor also told the sentencer that Mr. Bush laughed about the killing and showed no remorse whatsoever for the crime. The sentencer had not heard, and would not hear, anything like this lurid tale from any other source. “[J]udges are human beings, not computerized robots.” *United States v. La Guardia*, 902 F.2d 1010, 1014 (1st Cir. 1990). “Judges and lawyers, like other humans, are moved by natural sympathy” and may “yield[] to th[e] impulse” to make a decision on such grounds. *DeShaney v. Winnebago County Dep’t of Social Svcs.*, 489 U.S. 189, 202 (1989). Here, Nash’s allegations struck at the emotional heart of this case. As Judge Smith wrote in dissent, “it is difficult to believe that this evidence could be ignored.” App. C at 34. Just as inadmissible evidence presented to a jury may be so damaging “that the effect . . . cannot be wiped from the brains of the jurors” by a curative instruction, *Bruton v. United States*, 391 U.S. 123, 128–29 (1968), the sentencer’s understanding that he should not consider inadmissible information could not wipe the slate clean of Nash’s statements.

Third, direct evidence indicates that the judge was emotionally affected by the allegations. During or immediately after the “offer of proof,” Mr. Bush passed a handwritten note to his attorney observing that the judge looked “MAD” and that he was “going to get punished” for what the prosecutor was saying or said. PC Ex. 6 at 4. One of Mr. Bush’s attorneys agreed, writing that “he’s so mad.” *Id.* An investigator on Mr. Bush’s trial team “paid particular attention to the trial judge during the offer.” PC Ex. 9. He observed that “the judge’s whole body language and demeanor changed . . . and that he was visibly affected by the information.” *Id.* The investigator saw the judge “turn his whole body away from the prosecutor and the gallery. He appeared to be shocked and troubled by the contents of the offer.” *Id.* Mr. Bush’s other attorney evidently also believed that the information was affecting the judge. Immediately after the proffer she stood to “caution” the judge that “this is a proffer and you’re sitting” in “judgement of facts.” *Id.* at 1317. She pleaded with the judge to “put it [the proffer] in it’s proper place,” *id.*—which would be impossible because there was no proper place for such a proffer.

Fourth, Nash’s statements demonstrably affected later testimony that the judge heard from the victim’s family, who were present throughout the trial and would have heard the “offer of proof.” *Id.* at 1015–16, 1061, 1068–69, 1082, 1424, 1427. The victim’s family had been divided about whether they wanted the death

penalty or life without parole. *Id.* at 1448–49. However, after hearing from Nash that Mr. Bush tortured Mr. Harrington, “bragged about” killing him, and wasn’t sorry for what he had done, the family lost any compassion for Mr. Bush and “united” in calling for the death penalty during their victim impact testimony. *Id.* at 1412, 1424–45, 1448–49. As described below, in connection with Issue II, the judge did consider this testimony in sentencing Mr. Bush to death and, in doing so, was indirectly influenced by Nash’s statements.

Fifth, and finally, just a few weeks after the sentencing, the prosecutor submitted a letter for use in Jackie Nash’s federal criminal proceedings. The letter expressed that “Nash’s cooperation and information was [sic] very valuable in the Bush prosecution.” PC Ex. 18 at 3. In other words, the prosecutor believed that the “offer of proof” that Nash enabled him to give had an impact. This Court can hardly second-guess the prosecutor, who was present at the trial and was intimately familiar with sentencing judge, about what was “very valuable” in securing a death verdict against Mr. Bush. *Cf. Dodd v. Trammell*, 753 F.3d 971, 997 (10th Cir. 2013) (“For this court to decide that such testimony did not have a substantial effect on the jury would be to impugn the expertise of a very experienced and highly successful prosecutor, whose firsthand knowledge of Oklahoma capital juries far exceeded what we could possibly acquire”).

In denying relief, the state court failed to consider any of these circumstances. Rather, the court treated the mere existence of a presumption of regularity as *ipso facto* reason to deny Mr. Bush's claim.

The Supreme Court has granted relief under § 2254(d)(1) in similar situations. For example, in *Wiggins v. Smith*, the Supreme Court held that a state court unreasonably denied an ineffective assistance of counsel claim by uncritically applying the presumption that counsel performs in a reasonable manner rather than systematically scrutinizing the relevant facts. 539 U.S. 510, 527–28 (2003). Similarly, the Court has repeatedly held that a state court unreasonably applies a general legal standard where it fails to give appropriate consideration and weight to pertinent facts. See *Porter v. McCollum*, 558 U.S. 30, 42 (2009) (per curiam); *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000).

That is precisely what happened here. In applying a rebuttable presumption in a perfunctory and uncritical fashion, and failing to give appropriate consideration and weight to pertinent facts, the OCCA unreasonably the Supreme Court's due process and Eighth Amendment precedents. Accordingly, the Court should grant relief under § 2254(d)(1).

D. The OCCA’s Decision Was Not a Finding of Fact That Warrants Deference.

The district court rejected Mr. Bush’s claim on the ground that the OCCA’s denial of relief amounted to “a determination of a factual issue” that is “presumed correct” under § 2254(e)(1). Fed. R. at 492–98. This was wrong for three independent reasons.

First, the presumption of correctness is categorically inapplicable here because the OCCA decided a mixed question of law and fact, not a purely factual issue. The presumption of correctness “applies only to ‘basic, primary, or historical facts.’” *Chaney v. Brown*, 730 F.2d 1334, 1346 (10th Cir. 1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 341–42 (1980)). It “does not apply to legal questions or mixed questions of law and fact,” such as whether an unfair practice “might have affected the guilt or punishment decisions and thus infringed [the defendant’s] due process rights.” *Id*; see also *Herrera v. Lemaster*, 225 F.3d 1176, 1178–79 (10th Cir. 2000) (presumption of correctness doesn’t apply to a state court’s determination that an error was harmless); *Trice v. Ward*, 196 F.3d 1151, 1169 (10th Cir. 1999) (whether a defendant’s confessions were voluntary was a “mixed question” to which presumption of correctness did not apply); *Martinez v. Sullivan*, 881 F.2d 921, 926 (10th Cir.

1989) (whether the prosecution made “a good faith effort to obtain a witness’ presence” was a “mixed question” to which the presumption of correctness did not apply). Here, whether Nash’s inadmissible allegations “might have affected” the judge’s “punishment decision[,]” in violation of due process, as well as whether those allegations unacceptably risked an arbitrary sentencing decision, in violation of the Eighth Amendment, are not questions of basic, primary, or historical fact. Rather, they are mixed questions of law and fact. Accordingly, the district court erred in applying the presumption of correctness to the state court’s resolution of those questions.

Second, the presumption of correctness is categorically inapplicable for another, independent reason. Section 2254(e)(1) applies only to attempts to impeach state-court factfinding based on new evidence that the state court never heard, i.e., “evidence presented for the first time in federal court.” 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 20.2[c] (7th ed. & 2017 Update).³ Here, Mr. Bush bases his challenge to the Nash “offer of proof” solely on evidence that the state court heard. He has not presented any new evidence for the

³ Hertz & Liebman is the leading treatise on the law of habeas corpus and has been cited by this Court and the Supreme Court dozens of times.

first time in federal court. Thus, the district court erred in presuming the OCCA's decision correct for this reason as well.

Third, even assuming that the OCCA's adjudication of his due process and Eighth Amendment claims amounted to a determination of a factual issue, and that his challenge to that determination triggers § 2254(e)(1), Mr. Bush has rebutted any presumption of correctness. Section 2254(e)(1) explicitly provides that a petitioner may "rebut[] the presumption of correctness by clear and convincing evidence." "The standard is demanding but not insatiable; . . . 'deference does not by definition preclude relief.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). Here, as in *Miller-El*, "when th[e] evidence on the issue[] is viewed cumulatively its direction is too powerful to conclude anything but" that the state court got it wrong. *Id.* at 265. The circumstances outlined in the previous subsection—that the sentencer invited the prosecutor to air Nash's allegations without any legitimate purpose, that the nature of those allegations were so prejudicial as to make them impossible to ignore, that the judge was emotionally affected by the allegations, and that the prosecutor believed that Nash's allegations had helped him secure a death sentence—all point toward a violation of Mr. Bush's Eighth and Fourteenth Amendment rights. The only thing that points the other way, the presumption of regularity, is a legal fiction, not a prediction about actual human behavior.

Under the circumstances, “[t]he state court’s conclusion” that Mr. Bush suffered no constitutional violation “is shown up as wrong to a clear and convincing degree.” *Id.* at 266. Thus, even assuming away the threshold problems with applying § 2254(e)(1) to this issue, the district court erred in denying relief based on the presumption of correctness.

One final matter remains to be addressed: 28 U.S.C. § 2254(d)(2). In denying relief, the district court apparently did not rely on § 2254(d)(2). Fed. R. at 492–98. However, Mr. Bush addresses § 2254(d)(2) here out of an abundance of caution. Section 2254(d)(2) provides that a habeas petitioner may secure relief by showing that a state court’s decision was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Many courts have expressed confusion about the fact that the habeas statute contains two different provisions, § 2254(e)(1) and § 2254(d)(2), with two differently-worded standards for addressing state court factfinding. *See generally* Hertz & Liebman, *supra*, § 20.2[c], n.71. This Court need not resolve any tension between the two statutes here. Like § 2254(e)(1), § 2254(d)(2) does not apply to mixed questions of law and fact, such as those presented by Mr. Bush’s Eighth and Fourteenth Amendment claims here. *See Saiz v. Burnett*, 296 F.3d 1008, 1012 n.2 (10th Cir. 2002). And even if the OCCA’s decision were a pure determination of fact, it would be unreasonable

for all the reasons set forth above: the judge invited the “offer of proof” for no proper purpose, Nash’s allegations were so prejudicial that they could not be ignored, those allegations demonstrably affected the judge, and the prosecutor has acknowledged that Nash’s allegations were “very valuable” in securing Mr. Bush’s death sentence. Accordingly, to the extent that it applies, Mr. Bush is entitled to relief under § 2254(d)(2).

* * *

For the reasons above, this Court should reverse and direct the district court to grant relief on Claim IV of Mr. Bush’s habeas petition.

II. Mr. Bush Is Entitled to Habeas Relief Because the Victim Impact Testimony Presented at His Sentencing Violated His Rights under the Eighth and Fourteenth Amendments.

The sentencing proceeding violated Mr. Bush’s Eighth and Fourteenth Amendment rights because the prosecution presented family members’ characterizations of the crime, opinions about the defendant, and desire for the death penalty. Supreme Court precedent flatly forbids this. See *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991) (“[T]he admission of a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.”) (citing *Booth v. Maryland*, 482 U.S. 496, 501–02, 507–09