Case No. 18-8583

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

GILBERT POSTELLE,

***Petitioner*,**

-vs-

MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1) Whether this Court should grant a writ of certiorari to review Petitioner's ineffective assistance claims related to intellectual disability and the Flynn Effect where Petitioner merely disagrees with the Tenth Circuit's application of a properly stated rule, raises a waived argument, ignores an unresolved exhaustion issue, and presses meritless claims?

2) Whether this Court should grant a writ of certiorari to review Petitioner's claim concerning the exclusion of evidence of his co-defendant's sentence as mitigating evidence in the penalty phase where Petitioner presents no compelling or unresolved question as to whether there is a lack of clearly established federal law bearing on this claim?

No. 18-8583

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GILBERT POSTELLE,

***Petitioner*,**

vs.

MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,

***Respondent*.**

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner Gilbert Postelle's petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on August 27, 2018, *Postelle v. Carpenter*, 901 F.3d 1202 (10th Cir. 2018), Pet'r Appx. A.[1]

STATEMENT OF THE CASE

An Oklahoma jury convicted Petitioner of four counts of First Degree Murder and one count of Conspiracy to Commit a Felony (First Degree Murder). The jury

[1] Record references in this brief are abbreviated as follows: citations to Petitioner's Petition for Writ of Certiorari will be cited as "Petition"; citations to Petitioner's trial transcripts will be cited as "Tr." with the volume number; and citations to the original record will be cited as "O.R." *See* Rule 12.7, *Rules of the Supreme Court of the United States*. Citations to the federal district court proceedings will be to document number.

sentenced Petitioner to death for the murder of Amy Wright (Count 1) and to death for the murder of James Alderson (Count 4), finding the following aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person; and (2) the murders were especially heinous, atrocious, or cruel. *See* Okla. Stat. tit. 21, § 701-12(2), (4). The jury sentenced Petitioner to life in prison without the possibility of parole for the murders of Terry Smith (Count 2) and James Swindle (Count 3). Finally, the jury sentenced Petitioner to ten years imprisonment and a $5,000 fine for the conspiracy conviction (Count 5).

On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") set forth the relevant facts in its published opinion. *Postelle v. State*, 267 P.3d 114 (Okla. Crim. App. 2011), *cert denied. Postelle v. Oklahoma*, 568 U.S. 891 (2012), Pet'r Appx. E. Such facts are presumed correct under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254(e)(1). According to the OCCA:

> On Memorial Day, 2005, James Donnie Swindle, Terry Smith, Amy Wright and James Alderson were shot to death outside Swindle's trailer located next to a salvage yard and alignment shop in an industrial area of Del City, Oklahoma. Several witnesses in the area heard multiple gunshots and saw a maroon Dodge Caravan leaving the salvage yard shortly after the shots were fired. The owner of a flower shop nearby saw four men in the minivan; she testified that the men had dark hair and that she believed they were either Caucasian or Hispanic. A security camera across the street from the salvage yard captured on videotape the minivan entering and leaving the salvage yard driveway. Neither the license tag nor the occupants could be seen on the videotape. Sandra Frame, a bartender working at a bar next to the alignment shop, heard gunshots around 6:15 p.m. She heard the minivan accelerating and saw it leaving the crime scene. She could see there were at least two men in the minivan and she observed them laughing. She glimpsed the man in the passenger seat for a few

seconds; he was young with dark hair and facial hair, possibly Hispanic. She was later shown a photographic lineup and was "eighty-five percent sure" that David Postelle was the man she saw in the passenger seat of the minivan that day.

Oklahoma City Police Officer Rocky Gregory was on traffic duty down the street from the salvage yard when two people approached him and reported hearing gunfire from the vicinity of the salvage yard. Gregory and his partner investigated and found Smith and Swindle, each dead from multiple gunshot wounds. The bodies of the two other victims, Alderson and Wright, were discovered further north after other officers arrived.

Several people who were at the Postelle home on Memorial Day testified at Gilbert Postelle's trial, including Crystal Baumann, Arthur Wilder, Alvis "Jay" Sanders and Randall Byus. The Postelle home was routinely used by these four and others as a place to smoke methamphetamine in the "smoke room." Memorial Day 2005 was no different. Crystal Baumann and Arthur Wilder, admitted methamphetamine addicts, testified they had gone to the Postelle home on Memorial Day to get high. On that day, they both said, Gilbert and David Postelle talked about their belief that Donnie Swindle was responsible for the motorcycle accident that left their father, Brad, both physically and mentally impaired. Wilder recalled Gilbert and David Postelle naming Swindle as one of those responsible for the accident and saying that those responsible were "going to pay" for the damage done to their father. Their conversation subsequently turned to target shooting. Wilder had come equipped with his newly acquired MAK-90 rifle to go target shooting with the Postelle brothers. David Postelle had an SKS rifle he used for target practice. Because they needed ammunition, Gilbert Postelle, Baumann and Wilder went to a house in Del City where a friend gave Gilbert Postelle a speed loader for the MAK-90 rifle and a bag of bullets that could be used in both the MAK-90 and SKS rifles.

Later that day, Gilbert, David and Brad Postelle, along with Wilder, Baumann and Randall Byus left in the Postelles' maroon Dodge Caravan. Baumann denied knowing about a plan to shoot Swindle at the time they left. She and Wilder were dropped off at the home of Wilder's brother. Wilder, however, testified that he had heard the Postelles talking about a plan to go to Swindle's house and shoot him. He was unsure they would go through with it, but their conversation worried Wilder enough to insist the Postelles take him and Baumann home. Hours later David Postelle returned Wilder's

MAK-90 to him. Wilder and Baumann took the gun to their storage unit and hid it. Wilder heard about the murders from a friend, put "two-and-two together" and worried that the rifle he had left in the Postelles' minivan had been used in the murders. Wilder's fear that the Postelles had used his rifle to commit murder was confirmed when he saw the Postelles' minivan leaving Swindle's property on a surveillance camera video on the local news. A few days after the murders, Gilbert Postelle told Wilder how he had chased everyone outside after breaching the door of Swindle's trailer and how he then shot them outside. Gilbert Postelle then noticed Baumann standing nearby and ordered her to keep quiet about what she had overheard.

Jay Sanders testified that he had been living at the Postelle home the month before the murders. Sanders said that the patriarch, Brad Postelle, talked about having bad dreams about his motorcycle accident and his conviction that Swindle was responsible for that accident. According to Sanders, Gilbert and David Postelle were devastated by the accident and its effect on their father.

On Memorial Day, Sanders said he was in and out of the smoke room throughout the day, getting high and working on his broken-down van. Sanders was in the smoke room when he learned that the Postelles were going to go target shooting. Sanders said someone put the SKS rifle in the Postelles' minivan, and he helped Brad Postelle into the van. David, Gilbert and Brad Postelle left with Wilder and Byus, but only the Postelles returned. Later that night or the next morning, Sanders learned of the murders from the news; all the television sets in the Postelle home were tuned to news stations showing the security videotape of the minivan entering and leaving the murder scene. The Postelles also received several telephone calls from friends telling them about the murders. Sanders recalled that the Postelle home had "a different kind of atmosphere" and that there was a lot of whispering among the Postelle family.

Sanders testified that a couple of days after the murders, the Postelles were discussing different ideas about what to do with the minivan "since it might be the van on the news." It was decided that Sanders and Daniel Ashcraft would take the minivan to Indiana, set it on fire and ultimately put it in a lake. Sanders wiped the van down and drove it to Indiana to the home of a Postelle relative. Sanders also purged the Postelle home of drugs and drug paraphernalia. He buried gun parts and the minivan license plate in the backyard. After Sanders returned from Indiana, he was privy to a conversation in which Gilbert Postelle said, "I shut that bitch up in the corner" and mimed shooting a

rifle at someone. Sanders testified that he, Gilbert, David and some other Postelle family members discussed fabricating a story for the police to shield the Postelles from being implicated in the murders.

The State's firearm and toolmark examiner examined the many casings collected at the murder scene and determined that they were fired from two guns: Wilder's MAK-90 rifle and another rifle, possibly an SKS rifle. David Postelle's SKS rifle was never found. Law enforcement located the Postelles' van in Indiana and searched it. The alterations to the van observed by the investigators were consistent with Sanders's testimony about efforts to disguise it.

Randall Byus was with the Postelles when they shot the victims. According to Byus, he accompanied the Postelles, Wilder and Baumann, believing the Postelles were taking Baumann and Wilder home and then going target shooting. He saw Wilder's MAK-90 and David Postelle's SKS rifle in the Postelles' minivan. Nothing appeared unusual as they dropped off Baumann and Wilder. When David Postelle turned the van around and headed away from their normal place for target shooting, Byus asked where they were going, and was told that they were going to Swindle's house first, for some "shit," which Byus understood meant drugs. Byus first understood the Postelles' murderous plan when Gilbert Postelle asked his father a block from Swindle's trailer what to do if Donnie Swindle's father was there and Brad Postelle said to kill everybody there. Byus voiced disbelief and Brad Postelle responded that Donnie Swindle had tried to kill him. At the trailer, Byus witnessed Gilbert Postelle open the van door and shoot Terry Smith, who was near the minivan, in the face. Gilbert Postelle and his father then shot Donnie Swindle, causing him to fall to the ground. Swindle looked up and asked what was going on and David Postelle took the gun from his father and shot Swindle in the head. Gilbert Postelle turned and ran through the trailer, looking for others and firing his gun. He emerged and chased down James Alderson and shot him as Alderson tried to seek cover under a boat. After David Postelle told his cadre to get in the van, Byus heard two more shots. When Gilbert Postelle got in the van, he said, "that bitch almost got away." As they drove away, Brad Postelle hugged his sons and said, "That's my boys." On the way back to the Postelle home, the Postelles warned Byus against telling anyone what they had done.

Postelle, 267 P.3d at 123-26 (footnotes and paragraph numbering omitted).

The OCCA affirmed Petitioner's convictions and sentences, *id.* at 147, and subsequently denied rehearing. Thereafter, the OCCA denied Petitioner's application for post-conviction relief in an unpublished decision. *Postelle v. State*, No. PCD-2009-94, slip op. (Okla. Crim. App. Feb. 14, 2012) (unpublished).

The federal district court denied Petitioner's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, in an unpublished memorandum opinion. *Postelle v. Royal*, No. CIV-12-1110-F, slip op. (W.D. Okla. Sept. 2, 2016); Pet'r Appx. C. On appeal, the Tenth Circuit affirmed the denial of habeas relief. *Postelle*, 901 F.3d at 1226. The Tenth Circuit also denied panel and *en banc* rehearing. *Postelle v. Carpenter*, No. 16-6290, *Order* (10th Cir. Oct. 26, 2018) (unpublished); Pet'r Appx. B. On March 25, 2019, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision.

REASONS FOR DENYING THE WRIT

In his first question presented, Petitioner presses two grounds for relief, both related to the Flynn Effect, a theory of IQ norm obsolescence. Specifically, Petitioner claims that direct appeal counsel was ineffective for failing to raise claims that trial counsel was ineffective for (1) failing to pursue a freestanding *Atkins*[2] claim based on the Flynn Effect (hereinafter, "*Atkins* Flynn Effect Claim"), and (2) failing to investigate and present Flynn Effect evidence as mitigating evidence (hereinafter, "Mitigating Flynn Effect Claim").

Certiorari review should be denied because, as to both these claims, Petitioner has not presented this Court with a compelling, unresolved issue

[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).

warranting certiorari review and, at most, alleges the misapplication of a properly stated rule. The Tenth Circuit correctly stated the tests applicable to Petitioner's ineffective assistance claims, and at bottom, Petitioner merely disagrees with the Tenth Circuit's ultimate conclusion that his claims did not warrant habeas relief.

Certiorari review is further unwarranted because, as Respondent argued below, Petitioner did not fairly present his Mitigating Flynn Effect Claim to the OCCA, such that it is unexhausted. While the Tenth Circuit chose to assume exhaustion and deny relief on the merits of the claim, the exhaustion issue must be addressed prior to the grant of relief. Petitioner makes no argument that the question of whether he exhausted the Mitigation Flynn Effect Claim presents a compelling issue worthy of certiorari review.

Furthermore, assuming the Mitigating Flynn Effect Claim was exhausted, below Petitioner did not press, and the Tenth Circuit did not pass upon, any argument that the OCCA overlooked this claim and thereby failed to adjudicate it on the merits. Thus, Petitioner has waived his present assertion, to which he devotes much of his certiorari petition, that no AEDPA deference applies to the Mitigating Flynn Effect Claim.

Finally, even setting aside the above issues, both Petitioner's *Atkins* Flynn Effect Claim and Mitigating Flynn Effect Claim are without merit. To begin with, Petitioner has never presented any expert support for his claim that he is intellectually disabled, with or without application of the Flynn Effect. And trial counsel consulted with more than one expert concerning Petitioner's intellectual

functioning, and the experts determined he is not intellectually disabled. Moreover, as to the *Atkins* Claim, Oklahoma law precludes the consideration of the Flynn Effect in the intellectual disability consideration. Accordingly, neither appellate counsel nor trial counsel was ineffective in failing to pursue a claim foreclosed by state law. As to the Mitigating Flynn Effect Claim, counsel reasonably decided against presenting Flynn Effect evidence in light of its controversial nature and the battle of the experts it could have generated, and these same reasons are fatal to Petitioner's claim of prejudice. Given that Petitioner's trial counsel ineffectiveness claim lacks merit, his appellate counsel claim fails as well.

As to the second question presented, Petitioner claims that the Tenth Circuit improperly refused to grant him a certificate of appealability ("COA") on his claim that the trial court erred in refusing to admit his co-defendant's sentence as mitigating evidence in penalty phase. This does not present a compelling issue for this Court's review for the simple reason that no clearly established Supreme Court law supports this claim, and Petitioner does not even attempt to point to a case that provides clearly established law. Further, the Tenth Circuit's conclusion that this claim fails for lack of clearly established law is in line with other federal circuit courts to have addressed this issue. This Court's review is unwarranted.

I.

CERTIORARI SHOULD BE DENIED AS TO THE FIRST QUESTION PRESENTED BECAUSE PETITIONER PRESENTS A MERE DISAGREEMENT WITH THE APPLICATION OF PROPERLY STATED RULES, IGNORES AN UNRESOLVED EXHAUSTION ISSUE, HAS WAIVED A MAIN ARGUMENT, AND PRESSES MERITLESS CLAIMS.

A. Background of Petitioner's Claims

In his post-conviction application, Petitioner raised his *Atkins* Flynn Effect Claim, alleging that appellate counsel was ineffective for failing to assert that trial counsel was ineffective for failing to investigate and present evidence of intellectual disability in support of an *Atkins* claim. 8/30/2010 Application for Post-Conviction Relief (OCCA No. PCD-2009-24) (hereinafter, "PC App.") at 9-10. At the conclusion of a two-page discussion of this claim, Petitioner offered a single sentence that, at most, hinted at his Mitigating Flynn Effect Claim: "[E]ven if counsel had been unsuccessful in obtaining a pre-trial finding that Mr. Postelle is mentally retarded, counsel could have still presented the evidence as mitigation during the second stage of his trial" (hereinafter, "throw-away assertion"). PC App. at 10.

Not commenting on the throw-away assertion, the OCCA rejected Petitioner's *Atkins* Flynn Effect Claim through the rubric of ineffective assistance of appellate counsel[3] as follows:

[3] Petitioner's trial counsel ineffectiveness claims were procedurally barred because they were not raised on direct appeal. *Postelle*, No. PCD-2009-24, slip op. at 10-14. Although the Petition includes a passing assertion that these claims could not be procedurally barred, Petition at 6 n. 1, this contention need not be addressed as the OCCA ruled on the merits of the defaulted trial counsel ineffectiveness claims in denying the appellate counsel ineffectiveness claims.

Postelle admits that trial counsel had him evaluated early on to address suspicions that Postelle suffered from mental retardation. According to Postelle, the testing revealed I.Q. scores within the borderline range of mental retardation; the scores were too high, however, to qualify Postelle as mentally retarded for purposes of being ineligible for the death penalty. Postelle now claims that the I.Q. scores obtained failed to account for the scientific principle known as "the Flynn Effect" and the Standard Error of Measurement. When these factors are considered, Postelle argues that his I.Q. falls within the range required in 21 O.S.Supp.2006, § 701.10b (the statute setting forth the procedure to determine if a defendant is mentally retarded and ineligible for the death penalty).

Under 21 O.S.Supp.2006, § 701.10b, the defendant bears the burden of demonstrating, *inter alia*, significantly subaverage general intellectual functioning. An intelligent quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning. 21 O.S.Supp.2006, § 701.10(C). "In determining the intelligence quotient, the standard measurement of error for the test shall be taken into account."[6] *Id.*

> [6] In *Smith v. State*, 2010 OK CR 24, ¶ 10, n. 6, 245 P.3d 1233, 1237 n. 6, this Court noted that under the Oklahoma statutory scheme, "the Flynn Effect, whatever its validity, is not a relevant consideration in the mental retardation determination for capital defendants."

Postelle's I.Q. was calculated at 79 in November 2006 based on his scores on the Wechsler Adult Intelligence Scale – Third Edition (WAIS III) administered by Dr. Terese Hall. Dr. Ruwe calculated Postelle's I.Q. at 76 approximately a year later.[7] (Tr. 2861) Postelle maintains that both of his previous I.Q. scores fall into a range whose lower limits fall into the mentally retarded category when the standard error of measurement and Flynn Effect are considered for each score.

> [7] Dr. Ruwe testified that Postelle was not mentally retarded during the second stage of trial.

We rejected a similar claim in *Smith v. State*, 2010 OK CR 24, ¶ 10, 245 P.3d 1233, 1237, stating:

> The problem with this argument is that while the language of section 701.10b directs that an I.Q. score near the cutoff of 70 be treated as a range bounded by the limits of error, it also directs unequivocally that no such treatment be afforded to scores of 76 or above. In particular, after stating that "[i]n determining the intelligence quotient, the standard measurement of error for the test administered shall be taken into account," section 701.10b goes on to say: "however, in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on *any* individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section" (emphasis added). By directing that no defendant be considered mentally retarded who has received an I.Q. score of 76 or above on *any* scientifically recognized standardized test, the Legislature has implicitly determined that any scores of 76 or above are in a range whose lower error-adjusted limit will always be above the threshold score of 70.
>
> Neither Postelle's I.Q. nor the statute setting forth the procedure for determining mental retardation has changed since trial. The facts underlying Postelle's claim of mental retardation were known to both trial and appellate counsel. It stands to reason that neither trial nor appellate counsel pressed a claim under § 701.10b because Postelle's I.Q. scores prevented him from being found mentally retarded under the express language of the statute.

Postelle, No. PCD-2009-24, slip op. at 11-13 (footnote omitted).

In the district court, Petitioner did not present so much as a single sentence in support of his Mitigating Flynn Effect Claim, instead focusing entirely on his *Atkins* Flynn Effect Claim. Doc. 19 at 20-22; Doc. 48 at 4, 10-11. Nevertheless, apparently seizing on the throw-away assertion included in Petitioner's post-conviction application, the district court construed Petitioner as raising "two distinct challenges to how trial counsel handled evidence of mental retardation.

First, Petitioner claims that counsel should have argued mental retardation as a complete defense to the death sentence under *Atkins v. Virginia*. Second, Petitioner says that counsel should have used evidence of mental retardation as mitigating evidence." Doc. 74 at 18.

On appeal to the Tenth Circuit, Petitioner argued that the OCCA's rejection of his *Atkins* Flynn Effect and Mitigating Flynn Effect Claims was contrary to, and an unreasonable application of, *Atkins* and *Lockett*[4] and its progeny.[5] In relevant part, Respondent argued that Petitioner's Mitigating Flynn Effect Claim was unexhausted. The Tenth Circuit, however, "bypassed" this issue and went "straight to the substance of" the Mitigating Flynn Effect claim. *Postelle*, 901 F.3d at 1208 n. 1.[6] Assuming exhaustion of the Mitigating Flynn Effect claim, the Tenth Circuit held, as a preliminary matter, that the OCCA had either silently rejected the claim, "not comment[ing] on [Petitioner's] throw-away assertion," or summarily rejected it as part of its overall holding that "trial counsel had not, in fact, rendered ineffective assistance in the mitigation phase." *Id.* at 1213. The Tenth Circuit observed that Petitioner had not "asserted the OCCA ignored his mitigation-based argument." *Id.* at 1213-14.

By way of footnote, the Tenth Circuit noted the dissenting opinion's argument that *de novo* review applied because, by failing to expressly address

[4] *Lockett v. Ohio*, 438 U.S. 586 (1978).

[5] Before this Court, Petitioner references other alleged failures of trial counsel with regard to mental illness evidence, Petition at 7-8, but he did not receive a COA on this claim.

[6] The Tenth Circuit also bypassed Petitioner's argument, which Respondent disputed, that the bar against his trial-level ineffectiveness claims was inadequate. *See Postelle*, 901 F.3d at 1208 n. 1; Petition at 6 n. 1; Brief of Respondent at 32-34 (10th Cir. Oct. 30, 2017) ("Resp. Br.").

Petitioner's Mitigating Flynn Effect Claim, the OCCA failed to adjudicate it on the merits. *Id.* at 1214 n. 7. Rejecting this position, the Tenth Circuit noted that *Johnson v. Williams*, 568 U.S. 289 (2013), required it to presume that the OCCA rejected the claim on the merits and that Petitioner had "never so much as attempted to argue that the OCCA ignored his mitigation-based claim." *Id.* The Tenth Circuit further noted the exhaustion question the dissent's reasoning left unresolved: "[I]n concluding the OCCA ignored Postelle's mitigation-based claim, the dissent's position raises the question of whether Postelle fairly presented that claim to the OCCA in the first place." *Id.*

Finally, applying AEDPA deference to both of Petitioner's ineffective assistance claims, the Tenth Circuit denied relief on grounds that the OCCA had reasonably rejected the claims. *Id.* at 1212-20.

B. Petitioner Presents No Compelling Reason for this Court to Review His Claim

This Court should deny certiorari review because Petitioner does not present any compelling federal constitutional issue requiring resolution by this Court. Rule 10, *Rules of the Supreme Court of the United States*, provides in pertinent part the following:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has

> decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Here, Petitioner has failed to develop a compelling federal constitutional issue that even approaches the above categories of cases. To begin with, Petitioner does not even acknowledge Rule 10, let alone marshal any argument that he has presented a compelling issue worthy of certiorari review. In fact, his petition reads as if an appeal to this Court is a matter of right and the petition is his opening brief. Petitioner does not allege a split in authority or a novel issue requiring this Court's resolution. *See generally* Petition at 5-33. At most, he suggests that the Tenth Circuit's opinion conflicted with *Strickland*[7] and its progeny, *Atkins*, and *Lockett*/*Eddings*[8] because the Tenth Circuit improperly denied relief on his claims, and with *Johnson*/*Richter*[9] because the Tenth Circuit improperly applied deference to the OCCA's decision. Petition at 29-31.

[7] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[8] *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

[9] *Harrington v. Richter*, 562 U.S. 86 (2011).

This is merely a disagreement with the Tenth Circuit's application of properly stated rules. Petitioner does not assert that the Tenth Circuit failed to apply the proper test from any of these cases. Nor could he. The Tenth Circuit cited each case and properly stated its test. *See Postelle*, 901 F.3d at 1209 (citing *Strickland* and holding that, to prove ineffective assistance, a defendant must show deficient performance and prejudice); *id.* at 1210 (recognizing that *Atkins* prohibits the execution of intellectually disabled persons); *id.* at 1210-11 (explaining that, under *Lockett* and *Eddings*, a sentencer cannot be prevented from hearing or considering any relevant mitigating factor); *id.* at 1214 n. 7 (stating that, under *Johnson*, it must presumed that, where a state court addressed some but not all of a habeas petitioner's claims, the court silently rejected the remaining claims on the merits, and that, under *Richter*, this presumption can be rebutted). Moreover, as to *Atkins* and *Lockett*/*Eddings*, the Tenth Circuit expressly recognized that "Flynn Effect evidence could potentially play an important role within each of these two jurisprudential veins." *Id.* at 1211. Accordingly, at bottom, Petitioner merely disagrees with the Tenth Circuit's application of these cases, and such does not provide a compelling reason for certiorari review.

C. The Lingering Exhaustion Issue Makes this a Poor Case for Certiorari Review

Certiorari review is also inappropriate due to the lingering issue of exhaustion as to Petitioner's Flynn Effect Mitigation Claim. Habeas relief may be *denied* notwithstanding a petitioner's failure to exhaust his state court remedies, but exhaustion is a prerequisite (absent certain exceptions) to the *grant* of habeas

relief. 28 U.S.C. § 2254(b)(1), (2). Moreover, "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Here, when Petitioner raised the Mitigating Flynn Effect Claim for the first time, in the Tenth Circuit, Respondent asserted at length that the claim was not fairly presented to the OCCA, was therefore unexhausted, and was subject to an anticipatory procedural bar. Resp. Br. at 23-26.[10]

As shown above, the Tenth Circuit chose to bypass the exhaustion issue and deny relief on the merits of the Mitigating Flynn Effect Claim, while noting the unresolved "question of whether [Petitioner] fairly presented that claim to the OCCA . . . ." *Postelle*, 901 F.3d at 1208 n. 1, 1214 n. 7. Petitioner now seeks certiorari review for this Court to reverse the judgment of the Tenth Circuit and grant him habeas relief. Petition at 37. To do that, however, this Court would have to address the exhaustion question. *See* 28 U.S.C. § 2254(b)(2). But Petitioner all but ignores the issue of exhaustion,[11] and he certainly makes no argument that the question of whether he exhausted the Mitigating Flynn Effect Claim presents a compelling issue for certiorari review. Indeed, such does not present a compelling issue for review, as the question of whether Petitioner fairly presented his claim to

[10] The State certainly did not concede exhaustion as to the Mitigating Flynn Effect Claim in the district court, where Petitioner raised only his *Atkins* Flynn Effect Claim. Doc. 39 at 37-40; *see also* Doc. 39 at 9-10 (stating that the *Atkins* Flynn Effect Claim was exhausted).

[11] The most he does is state, without citation or discussion, that "[p]ost-conviction counsel fairly presented a claim that Flynn Effect evidence could be used in mitigation." Petition at 20. He also asserts the claim was not a "throw-away assertion," but he does not cite or apply any law pertaining to fair presentation. Petition at 21-24.

the OCCA requires a case-specific examination of the state court pleadings and whether they adequately raised the claim.

Finally, it is clear that Petitioner did *not* fairly present the Mitigating Flynn Effect Claim to the OCCA. As previously noted, Petitioner's post-conviction application raised only his *Atkins* Flynn Effect Claim. PC App. at 9-10. At the very end of the claim, Petitioner added the throw-away assertion: "[E]ven if counsel had been unsuccessful in obtaining a pre-trial finding that Mr. Postelle is mentally retarded, counsel could have still presented the evidence as mitigation during the second stage of his trial." PC App. at 10. This single sentence suggesting that trial counsel "could" have presented Flynn Effect evidence as general mitigating evidence—tacked onto the end of his *Atkins*-based claim as little more than an afterthought—was not sufficient to present the substance of the Mitigating Flynn Effect Claim to the OCCA. *See Anderson v. Harless*, 459 U.S. 4, 6 (1982) (fair presentation requires that a petitioner present the state court with "the 'substance' of his federal habeas corpus claim," give the court "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim," and do more than simply present "all the facts necessary to support the federal claim" or raise "a somewhat similar state-law claim"). Petitioner developed zero argument that counsel was ineffective for failing to present Flynn Effect evidence as mitigating evidence: his observation that counsel "could" have presented such evidence, PC App. at 10, offered no argument that counsel was objectively unreasonable for failing to do so or thereby prejudiced him.

Petitioner's arguments that his Mitigating Flynn Effect Claim was more than a throw-away assertion in state court are completely disingenuous. Petitioner notes that he cited *Atkins* and *Strickland* in the section of his post-conviction application raising his *Atkins* Flynn Effect claim, quotes the throw-away assertion, and then states that "[t]his assertion is supported . . . by the *Lockett*/*Eddings* line of cases." Petition at 22. To the extent that Petitioner is implying that he cited *Lockett* or *Eddings* in this section of his post-conviction application, this is untrue. PC App. at 9-10. Petitioner also claims that, "[i]mmediately after" the throw-away assertion, he noted capital counsel's duty to investigate and present mitigating evidence. Petitioner fails to mention that this statement was in a new and different section of the post-conviction application. Specifically, the throw-away assertion came at the end of a section, concerning ineffective assistance, that was labeled, "**Failure to Investigate and Present Evidence of Mental Retardation**." PC App. at 10. After the throw-away assertion concluded that section, a new section began, which was labeled, "**Failure to Investigate and Present Mitigating Evidence**." PC App. at 10. Petitioner then noted capital counsel's obligation to investigate and present mitigation evidence. In that latter section of the post-conviction application, Petitioner alleged mitigation failings of trial counsel unrelated to intellectual disability and never mentioned the Flynn Effect. PC App. at 10-17.

D. One of Petitioner's Main Arguments is Waived

Certiorari review is further unwarranted because Petitioner has waived one of the main arguments he now presses. Petitioner devotes much of his petition to

arguing that the OCCA overlooked the Mitigating Flynn Effect claim, such that the Tenth Circuit improperly found an adjudication on the merits and applied AEDPA deference. Petition at 17, 20-21, 23-26, 29-31. Below, however, as the Tenth Circuit noted, Petitioner did not "assert[] the OCCA ignored his mitigation-based argument." *Postelle*, 901 F.3d at 1213-14. The Tenth Circuit further stressed that "[Petitioner] has never so much as attempted to argue that the OCCA ignored his mitigation-based claim," and that "neither Postelle nor the dissent gives us any reason to believe the OCCA did so." *Id.* at 1214 n. 7. Indeed, Petitioner argued quite the opposite—he focused on the OCCA's statement that the Flynn Effect was not a relevant consideration under Oklahoma's intellectual disability statutory scheme and strenuously argued that this was contrary to *Lockett*. Brief of Petitioner at 14, 18, 25, 29-30, 33-34 (10th Cir. Aug. 31, 2017) ("Pet. Br.").

In his certiorari petition, Petitioner now offers various reasons he claims can rebut the presumption that the OCCA silently adjudicated on the merits his Flynn Effect Mitigation Claim. Petition at 30-31. But Petitioner did not offer these reasons below. *Postelle*, 901 F.3d at 1214 n. 7. Thus, these reasons were neither pressed nor passed upon, such that certiorari review is unwarranted. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002) (the Supreme Court does not grant certiorari to address arguments not pressed or passed upon below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (Supreme Court's traditional rule precludes grant of certiorari where "the question presented was not pressed or

passed upon below"). This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005).

E. Petitioner's Ineffective Assistance Claims are Without Merit

Certiorari review is further unwarranted because Petitioner's Flynn Effect ineffective assistance claims are utterly without merit. As a preliminary matter, Petitioner has never presented any expert Flynn Effect calculations. Instead, before the OCCA—and the district court and Tenth Circuit for that matter—Petitioner offered only his own calculations of the Flynn Effect's application to his IQ scores, without any expert support for these calculations. PC App. at 9-10, 19-21; Doc. 19 at 79-81; Pet. Br. at 24-28 & n. 9. Nor has he ever presented any expert's opinion that his IQ scores should be adjusted based on the Flynn Effect or that he is intellectually disabled if the Flynn Effect is accounted for. Namely, Petitioner has not presented any expert's opinion that he meets the other prongs of Oklahoma's test to show intellectual disability, instead relying only on the affidavits of family members and friends in an attempt to show adaptive functioning deficits. PC App. at 9-10, 22-24; *see* Okla. Stat. tit. 21, § 701.10b(C) (Supp. 2006) (in addition to showing "significantly subaverage general intellectual functioning," defendant claiming he is intellectually disabled must demonstrate "significant limitations in adaptive functioning" and "that the onset of the mental retardation was manifested before the age of eighteen (18) years"). But even setting aside the lack of expert support for his intellectual disability claims, Petitioner's case does not warrant certiorari review.

As to the *Atkins* Flynn Effect Claim, the Tenth Circuit properly denied relief on grounds that Oklahoma law forbade consideration of the Flynn Effect in the intellectual disability determination, such that the OCCA reasonably found that trial and appellate counsel were not ineffective. *See Postelle*, 901 F.3d at 1212-13. A federal court is bound by a state court's interpretation of state law, *see Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (*per curiam*), and counsel cannot be ineffective for asserting a meritless claim, *see Jones v. Barnes*, 463 U.S. 745, 750-54 (1983). Furthermore, to the extent that Petitioner suggests that *Atkins* requires consideration of the Flynn Effect, Petition at 12, 15-16, 26, *Atkins* is not the "clearly established" measuring stick for this claim—*Strickland* is. 28 U.S.C. § 2254(d)(1); *see Premo v. Moore*, 562 U.S. 115, 127-28 (2011) (admonishing the Ninth Circuit for measuring a state court's adjudication of an ineffective assistance claim not against *Strickland*, but against a Fourth Amendment case concerning the admission of an involuntary confession, which "says nothing about the *Strickland* standard of effectiveness").

As to the Mitigating Flynn Effect Claim, Petitioner complains that "[t]he majority speculated that trial counsel may have relied on her expert to rule out the Flynn effect." Petition at 26. This was not speculation; it was a presumption, and a presumption the Tenth Circuit was required to apply. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). To the extent that prevailing professional norms at the time of Petitioner's 2008 trial called for

awareness of the Flynn Effect,[12] it must be presumed that trial counsel was aware of the Flynn Effect and decided not to utilize it based on sound trial strategy. *See Burt v. Titlow*, 571 U.S. 12, 22-23 (2013) (rejecting Sixth Circuit's conclusion that counsel was ineffective because the record contained no evidence that he gave constitutionally adequate advice, as "counsel should be strongly presumed to have rendered adequate assistance" and defendant has the burden to show deficient performance); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (holding that trial counsel's performance is "measured against an objective standard of reasonableness under prevailing professional norms" (citation and internal quotation marks omitted)).

Further, Petitioner's assertion that his counsel failed "to investigate his cognitive limitations as a mitigating factor" is totally belied by the record. Petition at 27. This is not a case where trial counsel failed to recognize or investigate the possibility of intellectual disability. To the contrary, Dr. Hall evaluated Petitioner, and she determined that Petitioner's IQ was 79 and "was pretty convinced she didn't see any evidence suggesting neurological impairment" but suggested an evaluation by a neuropsychologist (Tr. 2861, 2870-71, 2876). Trial counsel then had Petitioner evaluated by Dr. Ruwe, a clinical neuropsychologist, who administered numerous tests to Petitioner and assessed his IQ (Tr. 2845-50, 2860-63, 2870-71). Dr. Ruwe concluded that Petitioner was *not* intellectually disabled (Tr. 2860-63,

[12] This is dubious given that, as the Tenth Circuit observed, at the time the Flynn Effect was mentioned in "only a small proportion of cases and secondary literature citing *Atkins*" and not at all in the then-current Diagnostic and Statistical Manual of Mental Disorders. *Postelle*, 901 F.3d at 1215-17.

2871-72). Despite this assessment, Dr. Ruwe offered ample mitigating testimony at trial.[13]

The Tenth Circuit also correctly concluded that trial counsel could reasonably have decided against presenting Flynn Effect evidence. *Postelle*, 901 F.3d at 1217; *see Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard" in not presenting such evidence. *Richter*, 562 U.S. at 105.[14] Here, all things considered, as shown below, the Flynn Effect's application is hotly contested and highly controversial among intellectual disability experts, such that trial counsel could reasonably have decided that its presentation to the jury would ultimately be unpersuasive, would generate a battle of the experts, and would run the risk of distracting the jury from the rest of the mitigating evidence. *See Postelle*, 901 F.3d at 1217.

To begin with, the Flynn Effect is never used in clinical practice to reduce IQ scores and is never seen outside the context of capital litigation. *Ledford v. Warden*,

[13] Dr. Ruwe testified to Petitioner's borderline intellectual disability, significant neurocognitive impairments, probable learning disability, psychological difficulties, and deficits in brain development due to early, long-term methamphetamine use and to his medical opinion that Petitioner's brain would continue to mature and develop with the aid of a structured environment (Tr. 2849-63, 2868-69).

[14] Pursuant to *Johnson*, 568 U.S. at 293, the Tenth Circuit was correct to conclude that, to the extent Petitioner fairly presented his Mitigating Flynn Effect Claim, it must be presumed the OCCA silently rejected it on the merits. *See Postelle*, 901 F.3d at 1214 n. 7. As previously discussed, Petitioner has waived any argument that the *Johnson* presumption should not apply.

818 F.3d 600, 629 (11th Cir. 2016),[15] *cert. denied*, 137 S. Ct. 1432 (2017). There is also widespread disagreement over the Flynn Effect's application, as many experts and courts have concluded that IQ scores should not be adjusted based on the Flynn Effect, even if its premise of rising scores is valid. *See, e.g.*, *McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015); *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010); *Wiley v. Epps*, 668 F. Supp. 2d 848, 894 (N.D. Miss. 2009); *Carroll v. State*, 215 So.3d 1135, 1150 (Ala. Crim. App. 2015), *cert. granted, judgment vacated and remanded on other grounds based on Moore v. Texas*, 137 S. Ct. 1039 (2017), *Carroll v. Alabama*, 137 S. Ct. 2093 (2017); *Thorson v. State*, 76 So. 3d 667, 683 (Miss. 2011); *State v. Waddy*, No. 09AP-1197, 2011 WL 2536366, at *5 (Ohio Ct. App. June 28, 2011) (unpublished).

Some experts contend that the solution to the alleged problem of outdated IQ tests would not be to subtract from an IQ score, but to re-test with a more recently normed IQ test. *See, e.g.*, *Ex parte Cathey*, 451 S.W.3d 1, 5-6 (Tex. Crim. App. 2014). Even among experts who believe that IQ scores should sometimes be adjusted based on the Flynn Effect, some such experts contend that adjustments should be applied only where a test is "out-of-date or reliant upon old norms." *United States v. Jimenez-Bencevi*, 934 F. Supp. 2d 360, 370 (D.P.R. 2013). In other words, "conceptually, the Flynn Effect was not intended to be applied every year after the publication of an assessment, but was rather intended to offset changes

[15] Respondent recognizes that some of the sources cited herein post-date trial counsel's 2008 decision not to present Flynn Effect evidence. However, these sources nonetheless demonstrate the contested and controversial nature of the Flynn Effect theory and the reasonableness of counsel's decision not to present evidence of same.

that might occur in scoring once an assessment was older than a generation." *Id.* Therefore, for example, according to some experts, a test published in 1992 and administered in 2000 would not be considered an "old test" and the score obtained should not be adjusted for the Flynn Effect. *Id.* Likewise, an IQ test administered in 2013, which was revised in 2008 and was the current version of the test at the time a defendant was assessed, would not be considered an old test in need of Flynn Effect adjustment. *Id.* Here, where Petitioner was administered, in 2006, the then-current WAIS-III and, in 2007, the WASI, which was normed eight years prior, it is not at all clear that these tests were sufficiently old to warrant Flynn Effect adjustments, especially given Petitioner's failure to support this claim with an expert's assessment.

As to Petitioner's WAIS-III score, which he contends should be adjusted based on the Flynn Effect, Petition at 9, numerous experts and courts have declined to apply the Flynn Effect to the WAIS-III test. *See Ledford*, 818 F.3d at 629; *Reeves v. State*, 226 So. 3d 711, 739 (Ala. Crim. App. 2016); *Jahi v. State*, No. W2011-02669-CCA-R3PD, 2014 WL 1004502, at *78 (Tenn. Crim. App. Mar. 13, 2014) (unpublished); *Thorson*, 76 So. 3d at 683; *Martinez Ramirez v. Ryan*, No. CV-97-1331-PHX-JAT, 2010 WL 3854792, at *15 (D. Ariz. Sept. 28, 2010) (unpublished).

Given the hotly contested and highly controversial nature of the Flynn Effect, introducing evidence of norm obsolescence risked creating a battle of the experts over the Flynn Effect and its application that could distract the jury from the substantial mitigation case counsel presented based on Petitioner's childhood and

family history.[16] *Cf. Wiley*, 625 F.3d 583, 215 (9th Cir. 2018) (noting that *Atkins* hearing involving Flynn Effect evidence became "a battle of the experts, who gave competing opinions as to [defendant's] IQ and intellectual functioning"). For all these same reasons, Petitioner's claim of prejudice fails. Accordingly, a fair-minded jurist could agree that trial counsel was not ineffective in failing to present Flynn Effect evidence in mitigation, and appellate counsel was not ineffective in failing to challenge trial counsel's performance in this regard. *See Richter*, 562 U.S. at 103.[17] The Tenth Circuit properly denied relief, and certiorari review is not warranted.

F. Conclusion

For all the above reasons, this Court should not grant certiorari on Petitioner's first question.

[16] Besides the mitigation testimony offered by Dr. Ruwe, described above, trial counsel also presented extensive testimony by Petitioner's family members and friends that Petitioner's mother abused and neglected him as a young boy; Petitioner primarily grew up in his grandparents' household, in which methamphetamine was regularly and openly manufactured and used; Petitioner had been using methamphetamine, with the approval and even encouragement of adults, since the age of thirteen; in the sixth grade Petitioner was removed from school to care for his beloved grandfather, who had become incapacitated by a stroke; Petitioner never complained about caring for his grandfather, who required diaper changes and spoon-feedings, and was devastated when his grandfather died; Petitioner was jealous and hurt by his father's focus on his girlfriend and her children but loved and adored his father and cared for him after his motorcycle accident; and Petitioner had a young daughter who loved him and whom he loved (Tr. 2674-75, 2698-2704, 2726-28, 2742-45, 2747, 2749-55, 2783-86, 2812-14, 2816, 2820, 2823-24, 2835). The jury was instructed on the existence of twenty-two mitigating circumstances (O.R. 1526-27).

[17] Again, contrary to Petitioner's arguments, Petition at 32, *Strickland* is the clearly established federal law applicable to this claim, not *Lockett*/*Eddings*, *see Premo*, 562 U.S. at 127-28. In any event, insofar as the OCCA had only the *Atkins* Flynn Effect Claim before it, the OCCA never said whether, or suggested that, the Flynn Effect was inadmissible as general mitigating evidence. *See Postelle*, No. PCD-2009-24, slip op. at 11-13 & n. 6.

II.

CERTIORARI SHOULD BE DENIED AS TO THE SECOND QUESTION PRESENTED BECAUSE PETITIONER PRESENTS NO COMPELLING OR UNRESOLVED ISSUE AS TO WHETHER HIS CLAIM LACKS SUPPORT IN CLEARLY ESTABLISHED FEDERAL LAW.

A. Background of Petitioner's Claim

On direct appeal, Petitioner claimed the trial court erred in failing to admit, as mitigation in the penalty phase evidence, that Petitioner's co-defendant, David Postelle, at a separate trial received sentences of life without parole for the murders at issue in Petitioner's case. The OCCA denied relief, acknowledging as an initial matter that "[c]ourts are divided on whether the admission of evidence concerning the disposition of a co-defendant's case is relevant mitigating evidence." *Postelle*, 267 P.3d at 140. Nevertheless, expressly citing and discussing *Lockett* and *Tennard v. Dretke*, 542 U.S. 274 (2004), the OCCA concluded that proffered mitigation evidence "must necessarily relate to the defendant's personal circumstances, *i.e.,* his character, record or circumstance of the offense." *Postelle*, 267 P.3d at 141. Here, the OCCA explained,

> The district court found that the sentence received by David Postelle was not relevant and that there was evidence showing that Postelle was "by far the most culpable and participated to a larger degree than any of the other charged individuals." Postelle was permitted to present mitigating evidence concerning his character and record, as well as evidence rebutting the aggravating circumstances. The jury examined the evidence and sentenced Postelle to death on the two murder counts where the evidence showed Postelle pursued James Alderson and Amy Wright by himself and shot them as they tried to run away or seek cover. Although a trial court is not necessarily precluded from allowing consideration of co-defendant sentences, we

> find that the district court did not commit constitutional error under *Lockett* by refusing to allow evidence of David Postelle's sentence in this case.

Id.

On habeas review, the district court denied relief and denied a COA based on the lack of clearly established federal law requiring the admission of a co-defendant's sentence as mitigating evidence. Doc. 74 at 35-37; Doc. 76 at 2. A Tenth Circuit judge likewise denied a COA. *Postelle v. Carpenter*, No. 16-6290, *Order* (10th Cir. Feb. 24, 2017) (unpublished). The Tenth Circuit panel denied a COA as well:

> To be sure, some courts have determined that evidence of a codefendant's sentence is relevant to capital sentencing. But the question we must answer is whether the OCCA unreasonably applied or contradicted *Lockett* and its progeny in rejecting Postelle's argument and taking the opposite stance. And the presence of a legitimate controversy regarding the relevance of a codefendant's sentence indicates the *Lockett* line of cases does not answer the question. Thus, even if the OCCA was ultimately wrong, reasonable jurists could not debate that its decision deserves deference under federal habeas law.

Postelle, 901 F.3d at 1223.

B. Given the Obvious Lack of Clearly Established Federal Law, Petitioner Presents No Compelling Reason for this Court to Review His Claim

Certiorari review should be denied on this issue because Petitioner does not even articulate why this claim presents a compelling issue for review, let alone establish that review is warranted. Petitioner claims that the Tenth Circuit "applied an excessively stringent standard" in denying a COA but never explains further. Petition at 35. In any event, Petitioner is wrong. The Tenth Circuit

correctly recognized that, to obtain a COA, Petitioner was required to "demonstrate that reasonable jurists would find the district court's assessment of the relevant constitutional claim debatable or wrong." *Postelle*, 901 F.3d at 1223 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Thus, Petitioner's disagreement is, at most, with the application of a properly stated rule. Certiorari review is not warranted. *See* Rule 10, *Rules of the Supreme Court of the United States*.

Moreover, Petitioner utterly fails to engage with the reason a COA has repeatedly been denied on this claim—the lack of clearly established federal law. Under the AEDPA, a state court's decision is judged only against "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Further, AEDPA's standards are incorporated into a federal court's consideration of a habeas petitioner's COA request. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."); *id.* at 349-50 (Scalia, J., concurring) (explaining that, under the majority's reasoning, a COA should be denied, for example, where "a state prisoner presents a constitutional claim that reasonable jurists might find debatable, but is unable to find any 'clearly established' Supreme Court precedent in support of that claim"). Both the district court and the Tenth Circuit concluded that *Lockett* and its progeny do not clearly establish that a co-defendant's sentence must be admitted as mitigating evidence. Petitioner does not acknowledge this conclusion or cite any case that he contends clearly establishes

this proposition. Thus, certiorari review is not warranted. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonably applied clearly established Federal law." (quotation marks omitted, alterations adopted)).

In any event, the Tenth Circuit's conclusion that no clearly established federal law requires the admission of a co-defendant's sentence as mitigation is in line with other courts to have addressed this issue. While some courts allow the introduction of such evidence in mitigation *under state law*, *see Postelle*, 267 P.3d at 140-41 (collecting cases), multiple federal circuit courts have held that such is not required by Supreme Court law, *see, e.g.*, *Meyer v. Branker*, 506 F.3d 358, 375-76 (4th Cir. 2007); *Beardslee v. Woodford*, 358 F.3d 560, 579 (9th Cir. 2004); *Schneider v. Delo*, 85 F.3d 335, 342 (8th Cir. 1996); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986). Thus, the Tenth Circuit's finding of a lack of clearly established federal law is in line with the other circuit courts to have addressed this issue. Certiorari review is entirely unwarranted.[18] *See* Rule 10, *Rules of the Supreme Court of the United States*.

C. Conclusion

Based on the foregoing, certiorari review should be denied as to Petitioner's second question presented.

[18] It bears repeating that Petitioner received death sentences only for the two victims he chased out of the trailer and gunned down as they desperately tried to hide or escape. *Postelle*, 267 P.3d at 141. Petitioner's jury clearly took his culpability for these murders into account. The fact that David Postelle was sentenced to life in prison for these two murders, which he did not personally commit, is immaterial.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

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