No. _____

IN THE

Supreme Court of the United States

NICHOLAS ALEXANDER DAVIS,

Petitioner,

v.

TOMMY SHARP, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

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

THOMAS D. HIRD,
Counsel of Record
MICHAEL W. LIEBERMAN
Office of the Federal Public Defender
Western District of Oklahoma
Capital Habeas Unit
215 Dean A. McGee, Suite 707
Oklahoma City, Oklahoma 73102
(405)609-5975
Tom_Hird@fd.org
Michael_Lieberman@fd.org

June 22, 2020

CAPITAL CASE

QUESTIONS PRESENTED

Under the auspices of *Payne v. Tennessee*, 501 U.S. 808 (1991), victim Marcus Smith's life mattered more to the State of Oklahoma in capital sentencing proceedings if he was seen as a hard-working, virtuous Church member, not a cruel and violent gang member. So the State painted a deceptive picture of Mr. Smith and prevented the defense from cross-examining the State's three victim-impact witnesses or presenting evidence to correct and counter the State's one-sided, inaccurate portrayal. On federal habeas, the district court denied all relief and found the excluded defense evidence was "irrelevant" and did "not fit either category" of mitigating evidence from *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), i.e., (1) evidence of the defendant's character or record, or (2) evidence of the circumstances of the offense. Appendix C at 25-27. No certificate of appealability (COA) was given on victim-impact related issues. The following questions warrant this Court's review:

1. Is evidence countering State victim-impact evidence relevant, mitigating evidence eligible for protection by the Sixth, Eighth, and Fourteenth Amendments?

2. In light of the Court's oft-repeated ruling that "States cannot limit the sentencer's consideration of any relevant

circumstance that could cause it to decline to impose the penalty . . . [and] must allow it to consider any relevant information offered by the defendant," should the Court resolve the confusion surrounding its *Lockett*-and-progeny jurisprudence and lay to rest the persistent misperception that mitigating evidence must connect to the offense or the defendant's character or record? *Payne,* 501 U.S. at 824 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 305–06 (1987)).

3. Could reasonable jurists debate whether these issues from Mr. Davis's habeas petition could have been resolved in a different manner and whether they were adequate to deserve encouragement to proceed further? Are generic one-size-fits-all COA denials inconsistent with federal law and the exacting and "painstaking" care required in capital cases? *Burger v. Kemp*, 483 U.S. 776, 785 (1987).

List of Parties to the Proceeding

Petitioner Nicholas Alexander Davis and Respondent Warden of Oklahoma State Penitentiary have at all times been the parties in the action below. There have been automatic substitutions for individuals serving in the Warden's position, to include the following individuals: Randall Workman, Anita Trammell, Maurice Warrior, Kevin Duckworth, Jerry Chrisman, Terry Royal, Mike Carpenter, and presently Tommy Sharp.

RELATED PROCEEDINGS

- *Davis v. Sharp*, Case No. 17-6225, United States Court of Appeals for the Tenth Circuit. Judgment entered November 27, 2019.
- *Davis v. Royal*, Case No. 12-CIV-1111-HE, United States District Court for the Western District. Judgment entered September 20, 2017.
- *Davis v. Oklahoma*, Case No. 11-10892, United States Supreme Court. Petition for writ of certiorari denied October 1, 2012.
- *Davis v. State*, Case No. PCD-2007-1201, Oklahoma Court of Criminal Appeals. Judgment entered January 25, 2012.
- *Davis v. State*, Case No. D-2007-891, Oklahoma Court of Criminal Appeals. Judgment entered December 12, 2011 and entered as corrected on February 7, 2012.

TABLE OF CONTENTS

Question Presented i

List of Parties iii

Related Proceedings iv

Table of Contents v

Index of Appendices vii

Table of Authorities viii

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 2

Statutory Provisions 2

Constitutional Provisions 3

Statement of the Case 4

Reasons the Petition Should Be Granted 13

I. Evidence countering State victim-impact evidence is relevant, mitigating evidence protected by the Sixth, Eighth, and Fourteenth Amendments 13

II. This Court should grant certiorari to clarify its *Lockett*-and-progeny jurisprudence and lay to rest the persistent misperception that mitigating evidence must connect to the defendant's character/record or the crime 20

III. Reasonable jurists could and should debate whether the victim-impact issues from Davis's habeas petition should have been resolved in a different manner and whether they were adequate to deserve encouragement to proceed further. The lower courts' use of generic one-size-fits-all COA denials is inconsistent with federal law and the exacting and painstaking care required in capital cases 25

Conclusion 32

INDEX OF APPENDICES

APPENDIX A - Decision of the Tenth Circuit Court of Appeals

APPENDIX B - Order of Tenth Circuit Court of Appeals Denying Rehearing

APPENDIX C - Decision of the Western District of Oklahoma

APPENDIX D - Order Denying Certificate of Appealability by Western District of Oklahoma

APPENDIX E - Decision of Oklahoma Court of Criminal Appeals on Direct Appeal

APPENDIX F - Decision of Oklahoma Court of Criminal Appeals on Post-Conviction

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Andrus v. Texas,
590 U.S. ___ (2020) 33

Barefoot v. Estelle,
463 U.S. 880 (1983) 14, 25, 26

Booth v. Maryland,
482 U.S. 496 (1987) 14, 17, 18, 28

Buck v. Davis,
137 S. Ct. 759 (2017) 27

Burger v. Kemp,
483 U.S. 776 (1987) . . . . . ii, 34

Davis v. Oklahoma,
568 U.S. 867, 133 S. Ct. 232 (October 1, 2012) 11

Eddings v. Oklahoma,
455 U.S. 104 (1982) 11, 20, 23, 25

Gregg v. Georgia,
428 U.S. 153 (1976) 10, 17

Hodge v. Kentucky,
568 U.S. 1056 (2012) 24

Lockett v. Ohio,
438 U.S. 586 (1978) . . . . . i, ii, 11, 12, 14, 20, 25

McCleskey v. Kemp,
481 U.S. 279 (1987) . . . . . ii, 12, 17

McKoy v. North Carolina,
494 U.S. 433 (1990) 16

Miller-El v. Cockrell,
537 U.S. 322 (2003) 27, 28, 30, 31, 32

New Jersey v. T.L. O.,
469 U.S. 325 (1985) 16

Payne v. Tennessee,
501 U.S. 808 (1991) . . . . . i, ii, 8, 9, 12, 14, 15, 17, 18, 19, 28

Penry v. Johnson,
532 U.S. 782 (2001) 22

Penry v. Lynaugh,
492 U.S. 302 (1989) 22

Skipper v. South Carolina,
476 U.S. 1 (1986) 11, 15, 16, 25

Slack v. McDaniel,
529 U.S. 473 (2000) 27, 29

Smith v. Texas,
543 U.S. 37 (2004) 22

Tennard v. Dretke,
542 U.S. 274 (2004) 16, 18, 23, 32

Williams v. Taylor,
529 U.S. 362 (2000) 16

FEDERAL CASES

Andrews v. Davis,
866 F.3d 994 (9th Cir. 2017) 23

Coppage v. McKune,
534 F.3d 1279 (10th Cir. 2008) 29

Cuesta-Rodriguez v. Carpenter,
916 F.3d 885 (10th Cir. 2019) 20, 21

Davis v. Sharp,
943 F.3d 1290 (10th Cir. 2019) 1, 6, 13, 31

Dockins v. Hines,
374 F.3d 935 (10th Cir. 2004) 29

Duvall v. Reynolds,
139 F.3d 768 (10th Cir. 1998) 19

English v. Cody,
241 F.3d 1279 (10th Cir. 2001) 32

Grant v. Royal,
886 F.3d 874 (10th Cir. 2018) 21

Hanson v. Sherrod,
797 F.3d 810 (10th Cir. 2015) 21

Harmon v. Sharp,
936 F.3d 1044 (10th Cir. 2019) 20

Hedlund v. Ryan,
854 F.3d 557 (9th Cir. 2017) 23

Le v. Mullin,
311 F.3d 1002 (10th Cir. 2002) 21

McKinney v. Ryan,
813 F.3d 798 (9th Cir. 2015) 23

Paxton v. Ward,
199 F.3d 1197 (10th Cir. 1999) 12

Poyson v. Ryan,
879 F.3d 875 (9th Cir. 2018) 23

Simpson v. Carpenter,
912 F.3d 542 (10th Cir. 2018) 21

Underwood v. Royal,
894 F.3d 1154 (10th Cir. 2018) 21

United States v. Barrett,
496 F.3d 1079 (10th Cir. 2007) 15

United States v. Brown,
441 F.3d 1330 (11th Cir. 2006) 15

United States v. Shaw,
717 F.App'x 783 (10th Cir. 2017) 32

United States v. Springfield,
337 F.3d 1175 (10th Cir. 2003) 32

United States v. Williams,
18 F.Supp. 3d 1065 (D. Haw. 2014) 24

Young v. Sirmons,
551 F.3d 942 (10th Cir. 2008) 12

STATE CASES

Davis v. State,
268 P.3d 86 (Okla. Crim. App. 2012) 1, 2, 10, 11, 19

State v. Anderson,
111 P.3d 369 (Ariz. 2005) 23

State v. McKoy,
323 N.C. 1 (1988) 16

State v. Newell,
132 P.3d 833 (Ariz. 2006) 23

FEDERAL STATUTES

28 U.S.C. §2253 . . . . . 2, 26, 27, 29, 31

28 U.S.C. §2254 . . . . . 2, 3, 28, 29, 33

42 Cong. Rec. 608-609 (1908) 26

Anti-Terrorism and Effective Death Penalty Act (AEDPA) Publ. L. 104-12,
Title 1, §102, April 24, 1996, 110 Stat. 1217 . . . . . 26, 27

Habeas Act of 1867 (Act of Feb. 5, 1867, ch. 28 §1, 14 Stat. 385) 25

Habeas Act of 1867 (Act of Mar. 10, 1908, ch. 76, 25 Stat. 40) 25

H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908) 26

U.S. Const. amend. VI 3, 4

U.S. Const. amend. VIII 4, 11

U.S. Const. amend. XIV 4, 11

DOCKETED CASES

Cuesta-Rodriguez,
Case No. CIV-11-1152-M 31

Davis v. Royal,
Case No. CIV-12-1111-HE (W.D. Okla. Sept. 20, 2017) 1

Davis v. Sharp,
Case No. 17-6225 (January 23, 2020) 1, 13

Davis v. State,
Case No. D-2007-891 11

Davis v. State,
Case No. PCD-2007-1201 (January 25, 2012) 2, 11

Malone v. Royal,
Case No. CIV-13-1115-D 30

Pavatt v. Royal,
Case No. CIV-08-470-R 31

Smith v. Royal,
Case No. CIV-14-579-R 31

MISCELLANEOUS CITES

Kirchmeier, Jeffrey L. *Beyond Compare? A Codefendant's Prison Sentence As A Mitigating Factor in Death Penalty Cases*, 71 Fla. L. Rev. 1017 (2019) 24

O'Brien, Sean D. and Kathleen Wayland. *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 Hofstra L. Rev. 751 (2015) 6

PETITION FOR WRIT OF CERTIORARI

Petitioner Nicholas Alexander Davis respectfully petitions this Court for a writ of certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit, Case No. 17-6225.

OPINIONS/PROCEEDINGS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *Davis v. Sharp,* 943 F.3d 1290 (10th Cir. 2019), No. 17-6225 (November 27, 2019). *See* Appendix A. The order of the United States Court of Appeals for the Tenth Circuit denying rehearing is found at *Davis v. Sharp*, No. 17-6225 (January 23, 2020). *See* Appendix B. The federal district court decision denying Mr. Davis's petition for writ of habeas corpus is found at *Davis v. Royal*, No. CIV-12-1111-HE (W.D. Okla. September 20, 2017) (unpublished). *See* Appendix C. Its opinion denying a certificate of appealability (COA) is also found at *Davis v. Royal*, No. CIV-12-1111-HE (W.D. Okla. September 20, 2017) (unpublished). *See* Appendix D. The decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Davis's state direct appeal is reported at *Davis v. State*, 268 P.3d 86 (Okla. Crim. App. 2012), No. D-

2007-891 (February 7, 2012). *See* Appendix E. The decision of the OCCA denying Mr. Davis's state post-conviction action is found at *Davis v. State,* Case No. PCD-2007-1201 (January 25, 2012) (unpublished). *See* Appendix F.

JURISDICTION

The Tenth Circuit rendered its opinion denying relief on November 27, 2019. Mr. Davis filed a timely petition for rehearing and rehearing en banc, which the Tenth Circuit denied on January 23, 2020. *See* Appendix B. On March 19, 2020, this Court entered an order relating to the COVID-19 pandemic that extended Mr. Davis's deadline to file his petition for certiorari to 150 days from the date of the order denying the petition for rehearing, i.e., until June 22, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §2254(1).

STATUTORY PROVISIONS

Title 28 U.S.C. §2253(c) provides the following:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Title 28 U.S.C. §2254(d) provides the following:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(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.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides the following:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE[1]

Nicholas Davis killed Marcus Smith. One side said it was the work

---

[1]References to transcripts, records, and exhibits will be designated as follows: Trial Transcripts: "Tr. __" followed by volume and page numbers, Trial Exhibits: "Def. Ex., St. Ex., or Ct. Ex." followed by exhibit number, Motion Hearing Transcripts: "M. Tr. (Date)" followed by page number, Original Record: "O.R." followed by page number.

of a cold-blooded killer, the other side said it stemmed from a passionate, toxic love between two people. While there are two distinctly different accounts of what happened, the truth is the case does not have the egregious facts ordinarily seen in death-penalty cases. This is not merely defense counsel's view, it is the view of the person in the best position to know, the trial judge. He said "this case falls short of what is viewed, by this court, as a typical death penalty case." Findings, January 4, 2010, at 38.

Mr. Davis shot and killed Mr. Smith, a known gang member, after unexpectedly encountering him at an apartment where Mr. Davis was to meet his ex-girlfriend, Tia Green. Mr. Davis had gone to the apartment at Green's invitation to discuss a lawsuit he had filed against Green for her share of the rent on an apartment they had leased together. Ms. Green had told Mr. Davis only she and her sister, Chinetta Hooks, and Hooks's children, would be at the apartment.

Mr. Davis, who suffers from Post-traumatic Stress Disorder (PTSD), brain impairment, and depression, believed Marcus Smith was at the

apartment at Green's direction to do him harm because of the lawsuit.[2] Mr. Davis was extremely fearful of Green because of her violent actions towards him in the past, which had often been perpetrated with the help of others. Because of his intense apprehension of a set-up, Mr. Davis had a gun ready in his hand, but pointed down by his side. After some menacing words, Mr. Smith suddenly lunged quickly toward Mr. Davis, scaring him, and Davis reacted by pulling the trigger. Mr. Davis kept on shooting because he thought he would be killed if he didn't. Ms. Green and

---

[2]Although trauma has been the defining feature of Mr. Davis's life, the jury did not know about his PTSD because trial counsel did not conduct a full and thorough investigation and failed to follow the numerous red flags for it. Both trial counsel and appellate counsel (who worked just down the hall from trial counsel) failed to thoroughly investigate mental health issues because they were apparently afraid of the specter of antisocial personality disorder (ASPD). *See* Appendix A; 943 F.3d at 1301-03. Due to an inadequate record, conflict, and unyielding procedural and systemic roadblocks, Mr. Davis could not overcome the ineffectiveness of counsel. His claims should have gone the way of a similar petitioner, Ronald Rompilla, whose mental health was also not thoroughly investigated, and who was also tagged with a falsely idyllic narrative and the false specter of ASPD. Sean D. O'Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 Hofstra L. Rev. 751, 775-79 (2015). The post-script for Mr. Rompilla was as follows: "The new narrative based on a thorough investigation worked; Rompilla's sentence of death was vacated, and on remand, the Allentown prosecuting attorney waived the death penalty, commuting Rompilla's sentence to life." *Id.* at 778.

her sister were also shot and injured. Regarding these facts, see generally Ct. Ex. 1.

Due to errors by defense counsel, the jury never had the option of convicting Mr. Davis of any lesser-included offenses. The jury was faced with the stark choice of first-degree murder or acquittal. The jury found Mr. Davis guilty of first-degree murder, two counts of shooting with intent to kill, and possession of firearm after former conviction of a felony. O.R. 1332-34; 1383-84.

The State presented three different victim-impact witnesses during the sentencing stage of trial: Gretchen Smith (mother of Marcus Smith); Lamont D. Smith (father of Marcus Smith); and Lamont D. Smith, Jr. (older brother of Marcus Smith). Tr. VI at 1007-10; 1012-14; 1034-39. These witnesses painted a very flattering picture of Mr. Smith. For example, the jury heard:

- Mr. Smith was a good kid, which is why family members questioned why this happened to him. *Id.* at 1010, 1013-14, 1035-36.

- Mr. Smith was in the process of enrolling in Job Corp., had an interest in becoming an auto mechanic, and was getting his life together so he could support himself and others. *Id.* at 1010.

- Mr. Smith had initiative because he always asked if anyone had any work to do so he could make extra money. *Id.* at 1038.

- Mr. Smith "was a Christian and a member in good standing at Abyssinia Missionary Baptist Church where he . . . served breakfast every Saturday, cut grass and cleaned up around the church." *Id.* at 1014.

- Mr. Smith had a strong faith in Jesus Christ and taught his nephews valuable life lessons. *Id.* at 1038.

The State elicited this evidence in attempting to secure a sentence of death by representing to the jury that Mr. Smith's death was a "unique loss to society and the family." O.R. 1357. This jury-instruction language came directly from *Payne*. 501 U.S. at 822, 825.

Mr. Davis properly sought to introduce relevant information in relation to the loss to the family and to society. He further wished to challenge inaccurate and incomplete evidence presented by the State.

In order to rebut the State's evidence and give the jury an accurate picture of Mr. Smith, Mr. Davis sought to cross-examine the three state witnesses with Mr. Smith's history of bad acts and criminal activity, and present seven witnesses regarding it. This evidence included and was not limited to the following: Mr. Smith being a member of a violent street gang known as the Rollin' 90's Crips; Mr. Smith engaging in animal

cruelty when he encouraged his dog to kill a kitten and to fight with other dogs; Mr. Smith assaulting a former employer in the former employer's home and breaking the former employer's television and DVD player when Mr. Smith's former employer refused to give an underage Mr. Smith beer or money to purchase beer; Mr. Smith burglarizing a sixty-two-year-old woman's home at night when the victim was at home in her bedroom; and Mr. Smith burglarizing a fifty-year-old's home on a Sunday morning when the victim was at home. Tr. III at 614-617; Tr. VI at 1001-04, 1006, 1011-12,1023, 1025-32; Ct. Exs. 5, 7-9, 11.

The trial court refused to allow Mr. Davis to present any of this evidence or cross-examine any of the victim-impact witnesses about it. Tr. VI at 1031-33. The jury was thereby given a false impression of the overall nature of the crime[3] and a false impression of the victim and the "loss to the victim's family and to society which has resulted from the defendant's homicide." *Payne,* 501 U.S. at 822. In addition, the jury was deprived of

[3] It is worth noting Nicholas Davis knew Marcus Smith because Smith was Chinetta Hooks' brother-in-law. Tr. I at 101. Mr. Davis did not immediately recognize Mr. Smith (who was someone Davis knew to be "a gangster"), but soon realized it was him after Davis stepped into the apartment. Ct. Ex. 1 at 26, 41.

"accurate sentencing information . . . an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die" *Gregg v. Georgia,* 428 U.S. 153, 190 (1976).

The jury found the existence of the three aggravating circumstances urged,[4] and sentenced Mr. Davis to death on Count 1, 45 years on Count 2, 67 years on Count 3, and 25 years on Count 4. O.R. 1331-34, 1339. Mr. Davis was formally sentenced on August 31, 2007.

Mr. Davis commenced a direct appeal and alleged a violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights in relation to his victim-impact related claims. After an evidentiary hearing regarding his claim of ineffective assistance of trial counsel (doomed due to fractured appellate representation, conflict of interest, and ineffectiveness of appellate counsel), his conviction and sentence were affirmed by the Oklahoma Court of Criminal Appeals (OCCA). *Davis v. State*, 268 P.3d 86 (Okla. Crim. App. 2011). *See* Appendix E. Regarding Mr. Davis's victim-

[4] 1) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; 2) the defendant knowingly created a great risk of death to more than one person; and 3) the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony.

impact related claims, the OCCA held the excluded evidence could not "in any way be considered mitigating," "was simply not relevant," and there was "no possible federal constitutional violation from the omission of the evidence." Appendix E; 268 P.3d at 127-28. Mr. Davis filed a petition for rehearing, which was denied by the OCCA on January 17, 2012. *Davis v. State*, Case No. D-2007-891, *cert. denied Davis v. Oklahoma*, 568 U.S. 867, 133 S. Ct. 232 (October 1, 2012).

Mr. Davis also pursued a state post-conviction action during the pendency of the direct appeal under Case No. PCD-2007-1201. The post-conviction application and motion for evidentiary hearing were denied by order entered January 25, 2012. *See* Appendix F.

Mr. Davis filed a petition for writ of habeas corpus raising his victim-impact related claims in Ground Three of the petition. Doc. 17 at 38-42. From the opening paragraph of Ground Three:

> The United States Constitution guarantees the accused a fair, reliable, and individualized sentencing hearing when the death penalty is sought. U.S. Const., amend. XIV; U.S. Const., amend. VIII; *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). However, Davis was denied these rights when the trial court prevented him from introducing evidence of Marcus Smith's criminal history, which would have provided

> the jury with an accurate picture of Mr. Smith's life. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (recognizing the introduction of rebuttal victim impact evidence as a tactical decision made by trial counsel); *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987) (finding "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty"); *Young v. Sirmons*, 551 F.3d 942, 951-52 (10th Cir. 2008) (finding the presenter of victim impact evidence is subject to cross-examination); *Paxton v. Ward*, 199 F.3d 1197, 1211 (10th Cir. 1999) (holding the petitioner had a right to confront the witnesses in the second stage through cross-examination).

Doc. 17 at 38. Mr. Davis argued further the jury was given a grossly inaccurate vision of the "unique loss to society" that occurred as a result of Mr. Smith's death. Doc. 17 at 41 (quoting *Payne*, 501 U.S. at 825).

The district court denied relief in its Memorandum Opinion of September 20, 2017, and issued judgment for Respondent. Appendix C; Docs. 38, 39. The district court held the excluded evidence did "not fit either category" of mitigating evidence from *Lockett v. Ohio* and was "irrelevant evidence," thus negating Petitioner's Sixth, Eighth, and Fourteenth Amendment claims. Appendix C at 25-27. The district court denied a certificate of appealability as to all of the grounds of Mr. Davis's habeas petition in a boilerplate two-page order devoid of specificity. Doc. 40. *See* Appendix D.

On appeal, Petitioner filed his Case Management Statement of Issues and Motion for Certification of Issues for Appeal on January 26, 2018. *Davis v. Sharp*, Case No. 17-6225. Judge Murphy granted a certificate of appealability for two grounds. *Davis v. Sharp*, Case No. 17-6225, Order (March 28, 2018) (whether Davis received ineffective assistance of counsel from his trial and appellate counsel, limited to counsel's assistance with respect to evidence of PTSD and depression). The order did not explain why a COA was not granted regarding the victim-impact claims.

Mr. Davis next filed a motion for modification of the COA to include the victim-impact related claims with the Tenth Circuit merits panel. In its decision affirming the district court's denial of habeas relief, the panel spent one sentence on Mr. Davis's motion, denying it "because reasonable jurists could not debate the district court's resolution of those claims." Appendix A; 943 F.3d at 1303.

REASONS THE PETITION SHOULD BE GRANTED

I. Evidence countering State victim-impact evidence is relevant, mitigating evidence protected by the Sixth, Eighth, and Fourteenth Amendments.

The district court (like the OCCA) based its denial of habeas relief on the following rationale:

> In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Supreme Court held that a capital offender has a constitutional right to present evidence of "[his] character or record and any of the circumstances of the offense that [he] proffers as a basis for a sentence less than death." However, the evidence which petitioner wanted to present does not fit either category.

Appendix C at 25. The district court further concluded "petitioner was not denied a fundamentally fair trial by the trial court's exclusion of *irrelevant* evidence." *Id.* at 27 (emphasis added).

The OCCA and district court found the evidence irrelevant despite the fact that this Court, in justifying its overruling of *Booth v. Maryland*, 482 U.S. 496 (1987), ruled that capital jurors "would have the benefit of cross-examination and contrary evidence by the opposing party." *Payne*, 501 U.S. at 823 (quoting *Barefoot v. Estelle,* 463 U.S. 880, 898 (1983)). To be sure, if there is one bit of consistency between the *Booth* opinion ruling against victim-impact evidence and the *Payne* opinion four years later ruling in favor of victim-impact evidence it is the recognition that with victim-impact evidence the defendant "must be given the chance to rebut." *Booth*, 482 U.S. at 507. By wrongly labeling the evidence irrelevant, the

district court negated all Confrontation Clause and Due Process Clause concerns.[5]

In addition, the lower courts' stubbornly narrow understanding of mitigating evidence is from a bygone era. Over 30 years ago the Court in *Skipper v. South Carolina*, 476 U.S. 1 (1986) "observed that even though the petitioner's evidence of good conduct in jail did not relate specifically to petitioner's culpability for the crime he committed, there is no question

---

[5] The district court presented two other reasons in addition to the evidence being "irrelevant" that the Confrontation-Clause aspect of the claim failed. The first reason given was that Mr. Davis did not adequately present it in his habeas proceedings. Appendix C; Doc. 38 at 26. However, Mr. Davis articulated the need to confront and cross-examine Mr. Smith's family regarding the flattering picture they painted of Mr. Smith in order for the jury to get an accurate picture of his life, and twice referenced the Confrontation Clause by name. *See* Doc. 17 at 39-42. The second reason given for denial of the claim by the district court concerned uncertainty over whether the Confrontation Clause applies to a capital sentencing proceeding. Doc. 38 at 26. As a general proposition, circuit courts appear split, and there is a "lack of clarity" on the matter. *United States v. Barrett,* 496 F.3d 1079, 1100 (10th Cir. 2007) (citing *United States v. Brown,* 441 F.3d 1330, 1361 n.12 (11th Cir. 2006)). The capital and victim-impact context of the Confrontation Clause error here sharpens the need for clarity. In *Payne,* the Supreme Court harkened to Confrontation Clause rights when it spoke of "cross-examination and contrary evidence by the opposing party" as protections surrounding victim-impact evidence. 501 U.S. at 823. These additional reasons are eminently debatable, and worthy of certification (and certiorari). Further encouragement under the circumstances was warranted.

but that such [evidence] would be mitigating in the sense that [it] might serve as a basis for a sentence less than death." *Tennard v. Dretke,* 542 U.S. 274, 285 (2004) (internal quotation marks and citations omitted).

Numerous examples exist in addition to *Skipper* of the expansive nature of mitigating evidence in this Court's jurisprudence over the years. For example, as Justice O'Connor put it:

> When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in *McKoy v. North Carolina*, 494 U.S. 433, 440–441, 110 S. Ct. 1227, 108 L.Ed.2d 369 (1990), we spoke in the most expansive terms. We established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard—" ' "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" ' "—applies. *Id.*, at 440, 110 S. Ct. 1227 (quoting *New Jersey v. T.L. O.*, 469 U.S. 325, 345, 105 S. Ct. 733, 83 L.Ed.2d 720 (1985)). We quoted approvingly from a dissenting opinion in the state court: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 494 U.S., at 440, 110 S. Ct. 1227 (quoting *State v. McKoy*, 323 N.C. 1, 55–56, 372 S.E.2d 12, 45 (1988) (opinion of Exum, C. J.)). Thus, a State cannot bar "the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death." 494 U.S., at 441, 110 S. Ct. 1227.

Dretke, 542 U.S. at 284–85. *See also, e.g., Williams v. Taylor*, 529 U.S.

362, 398 (2000) (noting mitigation "may alter the jury's selection of penalty" though it does not undermine or rebut the prosecution's death eligibility case); *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987) (finding "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty . . . [and] must allow it to consider any relevant information offered by the defendant"); *Gregg v. Georgia,* 428 U.S. 153, 190 (1976) (recognizing "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die").

Moreover, a major part of this Court's justification in *Payne* for overruling *Booth* was how expansive the concept of mitigating evidence had become under the Court's constitutional jurisprudence. The Court even quoted from *McCleskey* regarding the Eighth Amendment's "special limitations" on the capital-sentencing process:

> States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Payne, 501 U.S. at 824 (quoting *McCleskey,* 481 U.S. at 305–06).

The Court *expressly* said victim-impact evidence presented by the State is probative of the "defendant's moral culpability and blameworthiness." *Payne*, 501 U.S. at 825. Such evidence shows the "specific harm caused by the defendant" and the "unique loss to society and . . . family." *Id.* Evidence rebutting State "moral culpability and blameworthiness" evidence ineluctably has "mitigating value." *Dretke,* 542 U.S. at 284.

This stark error in Davis's case was not just an error in the exclusion of constitutionally required mitigation evidence: It was an error in the exclusion of constitutionally-required mitigation evidence that could have made a crucial difference. The perception of the entire case against Mr. Davis and whether he should receive the State's harshest punishment may have changed for one or more of the twelve Oklahoma jurors. The district court's ruling otherwise was, at the least, constitutionally debatable.

At its core, *Payne* held that *Booth* "unfairly weighted" the scales between aggravating and mitigating circumstances, but "[w]e are to keep the balance true." *Payne,* 501 U.S. at 822, 827. As Justice Scalia put it,

"The Court correctly observes the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence." *Id.* at 833 (Scalia, J., concurring).

Through a misunderstanding of Supreme Court jurisprudence the State was able to take the principles *Payne* was founded on and absolutely turn them on their head. This Court held victim-impact evidence can meaningfully help the jury assess moral culpability and blame; and the OCCA held ***Petitioner's*** victim-impact evidence could ***not*** affect his moral culpability or blame. *Payne,* 501 U.S. at 825; *Davis,* 268 P.3d at 127. This unbalanced and blatantly unfair advantage itself is of constitutional import.

Oklahoma jurors have complete discretion to choose life, even if aggravating circumstances outweigh mitigating circumstances. *See, e.g., Duvall v. Reynolds*, 139 F.3d 768, 789-90 (10th Cir. 1998). The excluded evidence and cross-examination could have changed one single Oklahoma juror's perceptions of the entire case against Mr. Davis and the appropriateness of the most severe of all penalties. Undoubtedly, a

fairminded jurist could (and Petitioner suggests should) consider the false picture that was allowed to be presented to the jury an absolute travesty of justice. These issues are, at minimum, highly debatable and well-deserving of further encouragement and review, and a COA should have been granted.

II. This Court should grant certiorari to clarify its *Lockett*-and-progeny jurisprudence and lay to rest the persistent misperception that mitigating evidence must connect to the defendant's character/record or the crime.

Oklahoma was a pioneer in improperly limiting mitigation evidence, requiring it to connect to "criminal responsibility." *Eddings v. Oklahoma*, 455 U.S. 104, 109 (1982). It continues to improperly limit consideration of mitigating evidence, not only in regard to victim-impact evidence (as demonstrated in the previous section), but in regard to other issues as well.

For example, Oklahoma prosecutors cannot seem to keep from circumscribing mitigating circumstances by limiting it to moral culpability only. *See, e.g., Harmon v. Sharp*, 936 F.3d 1044, 1074-77 (10th Cir. 2019); *Cuesta-Rodriguez v. Carpenter,* 916 F.3d 885, 893-95, 910-15 (10th Cir.

2019); *Simpson v. Carpenter*, 912 F.3d 542, 578-82 (10th Cir. 2018); *Underwood v. Royal*, 894 F.3d 1154, 1171-73 (10th Cir. 2018); *Grant v. Royal*, 886 F.3d 874, 935-38 (10th Cir. 2018); *Hanson v. Sherrod*, 797 F.3d 810, 850–52 (10th Cir. 2015); *Le v. Mullin*, 311 F.3d 1002, 1016-18 (10th Cir. 2002).

A second example from the *Cuesta-Rodriguez* case cited above shows a faulty understanding of mitigating circumstances and the corresponding need for a definitive clarifying statement from this Court. In *Cuesta-Rodriguez*, the Tenth Circuit relied on old law to hold statements of a capital defendant's family members that they love him are not relevant mitigating evidence. *Cuesta-Rodriguez*, 916 F.3d at 908.

Oklahoma and the Tenth Circuit are not alone in their outdated understanding of the scope of mitigating circumstances. Most death-penalty jurisdictions around the country have similar problems. For example, imposition of a "nexus" requirement for mitigating circumstances has plagued death-penalty schemes in Texas, Arizona, and California, among other jurisdictions.

In Texas, juries have had to answer special issues about whether the

defendant caused the death deliberately; whether it was done with the reasonable expectation death would result; and whether there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. If the answer was yes, the trial judge automatically imposed the death penalty.

This Court has reversed Texas death sentences where juries are prohibited from considering or giving effect to mitigating evidence not specifically connected to the answers of the special issues. In *Penry I*, this Court held that when a defendant places mitigating evidence before the jury, the trial court must give an instruction to allow the jury to consider and give effect to this evidence in its "reasoned moral" response to whether the defendant should live or die. *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989). In *Penry II*, this Court held a confusing instruction on the connection between mitigating evidence and answers to the special issues did not permit the jury to consider and give effect to evidence. *Penry v. Johnson*, 532 U.S. 782, 797 (2001). And in *Smith v. Texas*, 543 U.S. 37, 44-46 (2004) (per curiam), this Court rejected a requirement there must be a "nexus" between mitigating evidence and the special issue questions.

See also Tennard, 542 U.S. at 287 (noting jury cannot be prevented from giving effect to mitigating evidence solely because the evidence has no causal "nexus" to a defendant's crime).

Like Texas, Arizona has applied a causal-nexus test for non-statutory mitigating evidence, before finally abandoning that practice. *See State v. Anderson*, 111 P.3d 369, 392 (Ariz. 2005); *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006). Cases arising before abandonment of this requirement arrived in the Ninth Circuit in a habeas posture. In 2015, the circuit held Arizona's "causal nexus test" was "contrary to" *Eddings*. *McKinney v. Ryan*, 813 F.3d 798, 822 (9th Cir. 2015) (en banc). *See also Hedlund v. Ryan*, 854 F.3d 557, 587 (9th Cir. 2017); *Poyson v. Ryan*, 879 F.3d 875, 888 (9th Cir. 2018).

The "nexus" issue continues to confound. *See Andrews v. Davis*, 866 F.3d 994, 1054 n.7 (9th Cir. 2017), *aff'd en banc,* 944 F.3d 1092 (9th Cir. 2019) ("The California Supreme Court suggested there was 'no compelling connection' between the un-presented mitigating evidence and the crimes Andrews committed. To the extent the California Supreme Court suggested a causal nexus is required between mitigating evidence and

defendant's crimes, the California Supreme Court's decision was contrary to Supreme Court law") (internal citations omitted); *Hodge v. Kentucky*, 568 U.S. 1056 (2012) (Sotomayor, J., dissenting from denial of certiorari) (noting nexus requirement should not have been used in prejudice determination for ineffective-assistance-of-counsel claim because this Court has consistently rejected any requirement that mitigating evidence can alter a jury's recommendation only if it explains or provides some rational for his criminal conduct).

The issue of the scope of constitutionally protected mitigating evidence is not going away. It will continue to arise in context after context until the Court clarifies and cuts through the confusion. *See, e.g.,* Jeffrey L. Kirchmeier, *Beyond Compare? A Codefendant's Prison Sentence As A Mitigating Factor in Death Penalty Cases*, 71 Fla. L. Rev. 1017 (2019) (discussing how courts are currently split on the issue of whether a capital co-defendant's prison sentence may be mitigating evidence); *United States v. Williams*, 18 F. Supp. 3d 1065, 1070 n.1 (D. Haw. 2014) (noting the differing opinions around the country regarding "execution impact" mitigating evidence).

Examples from around the country indicate this Court should make crystal clear that mitigating evidence has value and must be considered even if it has no connection to the crime or the defendant's character or record. Now is the time for the Court to revisit and clarify the confusion existing due to an outdated understanding of the constitutional principles first set forth in *Lockett*, *Eddings,* and *Skipper*.

III. Reasonable jurists could and should debate whether the victim-impact issues from Mr. Davis's habeas petition should have been resolved in a different manner and whether they were adequate to deserve encouragement to proceed further. The lower courts' use of generic, one-size-fits-all COA denials is inconsistent with federal law and the exacting and painstaking care required in capital cases.

In the Habeas Act of 1867 (Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385), Congress initially empowered federal courts to issue writs of habeas corpus for persons in state custody which presumed the right to appeal the habeas decision of a lower federal court. *See Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1983). Subsequently, "Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so. Act of Mar. 10, 1908, ch. 76, 25 Stat. 40. See

H.R.Rep. No. 23, 60th Cong., 1st Sess., 1-2 (1908); 42 Cong.Rec. 608-609 (1908)." *Id*.

This Court has pointed out that "[T]he primary means of separating meritorious from frivolous appeals should be the decision to grant or withhold a certificate of probable cause." *Barefoot*, 463 U.S. at 892-93. Further, probable cause was something more than the mere absence of frivolity. *Id*. at 893. In order to make the required "substantial showing of the denial of [a] federal right," the petitioner need not demonstrate any likelihood of success on the merits of his habeas appeal. *Id*. "Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Id*. at n.4 (citation omitted; alterations in the original).

In 1996, 28 U.S.C. § 2253 was amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) (Pub. L. 104-132, Title I, § 102, April 24, 1996, 110 Stat. 1217). Although the formal name "certificate of probable cause" was changed to "'certificate of appealability," the concept and standards are the same.

"Our conclusion follows from AEDPA's present provisions, which incorporate earlier habeas corpus principles. Under AEDPA, a COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c) (1994 ed., Supp. III)." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). A petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted).

This "threshold" inquiry is more limited and forgiving than "'adjudication of the actual merits.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 337); *see also id.* at 336 (noting that "full consideration of the factual or legal bases adduced in support of the claims" is not appropriate in evaluating a request for a COA). 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 [an applicant] will not prevail." *Miller-El*, 537 U.S. at 338.

Mr. Davis should have cleared the COA hurdle by a substantial margin. A threshold inquiry reveals the district court was flat wrong under *Booth / Payne* to call the excluded evidence irrelevant. It should not take much debate for reasonable jurists to agree that the Sixth and Fourteenth Amendment claims could have and should have been "resolved in a different manner." *Miller-El*, 537 U.S. at 336. And due to this Court's long and inconsistent evolution regarding mitigating evidence protected by the Eighth Amendment, at the very least reasonable jurists could debate whether introduction of the proffered evidence and cross-examination of the victim-impact witnesses were constitutionally required. This is especially so considering the fact the evidence was offered to counter State evidence noted by this Court as relevant to Mr. Davis's "moral culpability and blameworthiness." *Payne,* 501 U.S. at 825.

How the district court and Tenth Circuit reached the conclusion that no COA should be granted regarding the victim-impact related issues is unfortunately a mystery. The district court used a boiler-plate order covering all issues that is generic enough to be suitable for pasting into any §2254 case. It is attached as Appendix D, but set forth here for the

Court's convenience:

> On this date, the court issued a memorandum opinion and judgment denying petitioner's request for habeas relief. Docs. 38 and 39. Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the court denies a certificate of appealability.
>
> Pursuant to 28 U.S.C. § 2253(c)(1), petitioner may not appeal the denial of his habeas petition unless he obtains a certificate of appealability (COA). A COA is claim specific and appropriate only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2), (c)(3). When a claim has been denied on the merits, the COA standard is whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where AEDPA deference has been applied in the denial of a claim on the merits, that deference is incorporated into the COA determination. Dockins v. Hines, 374 F.3d 935, 938 (10th Cir. 2004).
>
> When a claim has been dismissed on a procedural ground, petitioner faces a "double hurdle." Coppage v. McKune, 534 F.3d 1279, 1281 (10th Cir. 2008).
>
> > When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.
>
> Slack, 529 U.S. at 584.

> Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.
>
> Id.
>
> Having thoroughly reviewed each issue raised by petitioner, the court concludes that, *for the reasons set forth in the memorandum opinion, none satisfy the standard for the granting of a COA. Therefore, the court DENIES a COA as to all of petitioner's grounds for relief.*

Appendix D at 1-2 (emphasis added). The order provides no issue-specific analysis. Moreover, by summarily denying all COA issues for the reasons they were decided *on the merits* in the district court's memorandum opinion, the district court "sidestep[ped]" the proper COA process. *Miller-El*, 537 U.S. at 336.

This type of unhelpful COA order is common in the federal district courts across the country, and appears to be the standard practice in the United States District Court for the Western District of Oklahoma. *See, e.g., Malone v. Royal*, CIV-13-1115-D, Doc. 75 ("for the reasons set forth in the Memorandum Opinion, none satisfy the standard for the granting

of a COA"); *Cuesta-Rodriguez v. Royal*, CIV-11-1152-M, Doc. 43 ("for the reasons set forth in the Memorandum Opinion, none satisfy the standard for the granting of a COA"); *Pavatt v. Royal,* CIV-08-470-R, Doc. 93 ("for the reasons set forth in the Memorandum Opinion, none satisfy the standard for the granting of a COA"); *Smith v. Royal*, CIV-14-579-R, Doc. 49 ("For the reasons set forth in the Memorandum Opinion, Petitioner's remaining claims do not merit the same consideration").

The Tenth Circuit's decision was even less illuminating than the district court's, as it consisted of one sentence denying Petitioner's motion "because reasonable jurists could not debate the district court's resolution of those claims." Appendix A; 943 F.3d at 1303. The range of boilerplate here, from two-pages by the district court to one sentence by the Tenth Circuit panel, makes Davis's case a good vehicle for resolving this recurrent problem in the federal courts.

Unexplained, generic denials are unhelpful to the parties and this Court, and do not comport with the standards required by statute and settled case law. As this Court noted in *Miller-El*: "[t]he COA determination under § 2253(c) requires an overview of the claims in the

habeas petition and a general assessment of their merits." 537 U.S. at 336. The Court further noted that the COA process "must not be *pro forma* or a matter of course." *Id.* at 337. In *Miller-El*, the Court reversed the Fifth Circuit's COA denial because it had "sidestep[ped]" the appropriate procedure. *Id.* at 336. Appropriate procedure calls for an overview and assessment. A careful and thoughtful reflection on the issues and supporting facts is of paramount importance. Merely "paying lipservice" to the principles guiding issuance of a COA is not enough. *Dretke*, 542 U.S. at 283.

This Court is well aware of vast inconsistencies in COA practice in federal courts around the country, in part due to changes in court rules. The Tenth Circuit, like other circuits, is inconsistent. It can issue a full opinion regarding the denial of a COA, *see, e.g.,* for example, *United States v. Springfield*, 337 F.3d 1175, 1177-79 (10th Cir. 2003), *United States v. Shaw*, 717 F. App'x 783, 787 (10th Cir. 2017), *English v. Cody*, 241 F.3d 1279 (10th Cir. 2001), or it can summarily deny a request for a COA on an issue in one sentence, as it did in this case.

One of the most troubling issues arising from the generic or

summary denial practice is the inescapable fact that a summary denial of a COA leaves nothing of constitutional substance to permit meaningful review before the Court of Appeals *en banc* or this Court. As has been noted, "prisoners who are denied appellate review without explanation must then petition for certiorari without benefit of a reasoned judgment to attack." Public Interest Litigation Clinic, comment letter to changes in Rule 11 Governing Section 2254 Cases (2/15/08).

Discretionary review and condemnation of this practice is long overdue because many courts around the country fail to give meaningful effect to this Court's decisions. Generic, summary, or boilerplate denials without case-specific reasoning fundamentally contradicts this Court's prior directives. Pursuant to Rule 10(c), this Court should grant certiorari. Alternatively, this Court should vacate the judgment and remand Mr. Davis's appeal to the Tenth Circuit with directions to properly entertain his COA request in a manner consistent with the Court's opinion. *See, e.g., Andrus v. Texas*, 590 U.S. ___ (2020) (per curiam). Just as the Texas Court of Criminal Appeals "failed to engage in any meaningful *prejudice* inquiry," the Tenth Circuit in Mr. Davis's case did not engage in any

meaningful *COA* inquiry. *Id.* (slip op. at 17) (emphasis added).

Petitioner's case presents an important opportunity for clarification, and this Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The duty must apply to the COA process as much or more than any other.

CONCLUSION

This Court should grant certiorari to address the questions presented, provide the guidance requested, and additionally assure the Constitution is enforced in this capital case and others throughout the country.

Respectfully submitted,

s/Thomas D. Hird
THOMAS D. HIRD, OBA # 13580*
MICHAEL W. LIEBERMAN, OBA #32694
Assistant Federal Public Defenders
Office of the Federal Public Defender
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, Oklahoma 73102
(405) 609-5975 Phone
(405) 609-5976 Fax
Tom_Hird@fd.org
Michael_Lieberman@fd.org

ATTORNEYS FOR PETITIONER
NICHOLAS ALEXANDER DAVIS

*Counsel of Record