No. 19-8814

In the

SUPREME COURT OF THE UNITED STATES

NICHOLAS ALEXANDER DAVIS,

***Petitioner*,**

-vs-

TOMMY SHARP, 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

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CAPITAL CASE
QUESTIONS PRESENTED

1) Should this Court second-guess the Tenth Circuit's application of the properly stated rule in *Slack v. McDaniel*, 529 U.S. 473 (2000), in deciding that Petitioner's claim was unworthy of a certificate of appealability?

2) Is a habeas case, where the federal courts are limited to clearly established Supreme Court law in deciding constitutional claims, an appropriate vehicle for expanding this Court's definition of mitigating evidence?

3) Did the lower courts properly deny a certificate of appealability on Petitioner's claim where there was an obvious lack of clearly established federal law supporting his claim?

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BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner Nicholas Alexander Davis's (hereinafter, "Petitioner") 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 November 27, 2019, affirming the denial of habeas relief. *Davis v. Sharp*, 943 F.3d 1290 (10th Cir. 2019), Pet'r Appx. A.[1]

[1] References in this brief are abbreviated as follows: citations to Petitioner's Petition for Writ of Certiorari are cited as "Petition"; citations to Petitioner's trial transcripts are cited as "Tr."; citations to the State's trial exhibits are cited as "State's Ex."; citations to the trial court's trial exhibits as cited as "Court's Ex."; citations to the state evidentiary hearing transcripts are cited as "Evid. Hrg. Tr."; and citations to the trial court's evidentiary hearing exhibits are cited as "Evid. Hrg. Court's Ex." *See* Sup. Ct. R. 12.7.

STATEMENT OF THE CASE

A. Factual Background

In his Petition, Petitioner paints an innocuous picture of his crimes that is grossly inaccurate and unsupported by the evidence, including his own actions and statements during and following the shooting. As shown below, contrary to Petitioner's account, the evidence shows that he arrived at the murder scene ready to do violence, burst into an apartment occupied solely by women and children, and unleashed a torrent of bullets that gravely injured two women and killed M.S.—a seventeen-year-old *child* who was present at the apartment only because he had been babysitting his nephews and nieces. On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") set forth the facts[2] in its published opinion:

> On January 15, 2004, at approximately 10:30 p.m., Tia Green picked up her sister, Chinetta Hooks, from work and took her home. Hooks, her husband and four children, all under the age of ten, lived in Apartment 1111 in the Falls Creek Apartments in Oklahoma City. Seventeen year old, [M.S.], Hooks' brother-in-law, had been watching the children while Hooks and her husband worked. When Green and Hooks arrived at the apartment, the children had made a pallet in the living room intending to sleep there all night. Hooks rejected the idea and sent the children to bed. She, Green and [M.S.] then visited for a while.
>
> Shortly after 11:00 p.m., there was a knock on the front door. [M.S.] went to the front door and tried to look out of the peephole. However, the person on the other side had put their thumb over it. The trio inside the apartment repeatedly asked who was at the door but received no response. Thinking it might be his brother, [M.S.] slightly opened the door. Appellant, clad completely in black clothing, forced his way into the apartment with a gun in his hand. He shut the front door behind him and locked it. Appellant was Green's former boyfriend. She had only recently ended a turbulent relationship with him. When

[2] Such facts must be presumed correct. *See* 28 U.S.C. § 2254(e)(1).

Appellant entered the apartment, he pointed the gun at [M.S.] as [M.S.] put his hands in the air and backed up. Green and Hooks remained seated on the sofa. [M.S.] asked Appellant, "what's going on" and "why are you doing this, man?" Appellant offered no reply. Green also asked Appellant what he was doing. Appellant initially gave no response, but eventually looked at Green and said, "you hurt me for the last time." Appellant then lowered the gun to his side. Green reached for her cell phone but Appellant told her, "you bet not touch that phone." Green and Hooks then started screaming for Appellant not to shoot. Appellant responded by raising his gun, pointing it at [M.S.], then lowering the gun. Green pleaded with Appellant to go outside with her and talk things over. Appellant's response was to raise the gun a third time to [M.S.]'s head and fire.

After the first shot, Green ran into the nearby bathroom. She locked the door and attempted to call the police. Unable to get her call to go through, she phoned another sister, told her Appellant had shot her, and directed her to call the police. Appellant followed Green to the bathroom, kicking at the door and shouting at her to open the door.

Meanwhile, intending to call the police, Hooks had run into the kitchen upon hearing the first gunshot. She felt a shot go through her leg before falling to the floor. She heard a total of nine gunshots. The children, upon hearing the gunshots, ran to the kitchen to find their mother on the floor in a pool of blood. When they began screaming that their mother was going to die, Hooks told them to go to the neighbor's apartment. Still holding the telephone, she dialed 911, said she had been shot and then lost consciousness.

Green was still hiding in the bathroom when she heard the children run down the hallway toward the kitchen. As Appellant was no longer kicking the door, Green left the bathroom and sat with her sister until police arrived. Oklahoma City Police Officer Matthew Reed responded to the 911 call and was met at the apartment complex gate by Hooks' children. Before being taken to the hospital, Green identified Appellant as the shooter. She had been shot twice—once in the side and once in the back. The bullet which entered her side became lodged in her chest while the other bullet exited her body.

Hooks had been shot in the right arm, right leg, and the back of her head. Only the bullet to her arm became lodged in her body, the other two having exited. [M.S.] was dead at the scene. He had been shot three times—on the top of his head, the left shoulder, and the back between the shoulder blades. The bullet to his left shoulder was the only

one to exit his body.

> After the shootings, Appellant fled the scene. He was eventually arrested four months later in San Antonio, Texas. Appellant voluntarily spoke with police and told them he threw the murder weapon onto the side of an interstate highway in Oklahoma. The weapon has never been recovered. Appellant also told police that Green had called him and told him to meet her at her sister's apartment so they could talk. He said he took a gun with him because he did not trust Green as she had tried to harm him in the past. Appellant said he was surprised to find [M.S.] at the apartment as he was not expecting a man to be there. Appellant admitted shooting Green, Hooks and [M.S.] but said he shot [M.S.] in self-defense after [M.S.] lunged at him.

Davis v. State, 268 P.3d 86, 97-99 (Okla. Crim. App. 2011), *as corrected* (Feb. 7, 2012) (paragraph numbering omitted), Pet'r Appx. E.

Petitioner presents a self-serving version of the facts unsupported by citations to the record. Petition at 4-7.[3] Opening Br. at 6-10. The OCCA found that Petitioner's claim that M.S. lunged toward him before he shot was unsupported:

> Appellant's statement that the decedent moved toward him was not only inconsistent with other statements he made to police (Appellant also admitted at one point that he shot the decedent as the decedent backed away from him) but with the other evidence presented at trial. Both Green and Hooks testified that the decedent did not act aggressively or move towards Appellant but merely stood with his hands up and backed away from Appellant while Appellant pointed the gun at the decedent and lowered it three times before firing.
>
> Further, [t]he medical examiner testified that the gunshot wound to the decedent's head was approximately three-quarters of an inch from the top of his head. She testified that the bullet was fired from long range, traveled downward from the decedent's head and was found at the base of the decedent's tongue. *The wound to the top of the decedent's head is more consistent with him having been shot in a defensive position*

[3] The sole citation offered by Petitioner is to Court's Exhibit 1, Petition at 7, which was a transcript of Petitioner's confession to the police (Tr. III 533-35).

rather than jumping, lunging or moving in some other manner toward Appellant.

Davis, 268 P.3d at 117 (emphasis added).

In addition, Petitioner's claim that he arrived at the apartment full of apprehension, and shot out of fear, is utterly belied by his own words and actions. Petition at 6. When Petitioner arrived at Ms. Hooks's apartment, he knocked on the door but did not answer when M.S. asked who was there (Tr. I 86). Indeed, Petitioner covered the peephole so M.S. could not see who was outside (Tr. I 87-88). As M.S. cracked the door, Petitioner pushed it in and entered the apartment, which was occupied solely by women and children[4] (Tr. I 86-87). Petitioner was dressed all in black, wearing gloves, and holding a gun at his side (Tr. I 92-93). After forcing his way inside, Petitioner closed and locked the front door (Tr. I 169). M.S. backed away from Petitioner with his hands up (Tr. I 87). Ms. Green pleaded with Petitioner to go back to one of the bedrooms with her so that they could talk things out and said that she did not want her family involved in what he was doing (Tr. I 94-95). When Ms. Green reached for her cell phone, Petitioner said, "[Y]ou bet [sic] not touch that phone" (Tr. I 96). Petitioner told Ms. Green that she had hurt him for the last time and then raised the gun and pointed it at M.S. (Tr. I 98-99). The women begged Petitioner not to shoot because there were children in the house, and Petitioner lowered the gun and "just looked" at them without saying a word (Tr. I 99). Petitioner again raised the gun to M.S.'s head but lowered the gun a second time while the

[4] M.S. was only seventeen years old; five feet, six inches tall; and 130 to 140 pounds (Tr. I 450).

women continued to plead with him (Tr. I 99). Finally, Petitioner raised the gun a third time and shot M.S. (Tr. I 99-101, 222). M.S. never made any move toward Petitioner (Tr. I 100, 224).

Petitioner pursued both Ms. Green and Ms. Hooks, shooting them multiple times as they ran from him (Tr. I 101-03, 107, 224-26; Court's Ex. 1 at 4, 31). *Davis*, 268 P.3d at 112. Petitioner shot M.S. once in the head, once in the shoulder, and once in the back (Tr. II 453-60). It appears that Petitioner shot down at M.S., as two bullet holes in the wall near his body are only approximately three feet off the ground (Tr. III 570-71). Petitioner shot Ms. Green twice, once in the chest and once in the back (Tr. I 114). Petitioner pursued Ms. Green to the bathroom, where he kicked on the door and ordered her to open it (Tr. I 107). Petitioner shot Ms. Hooks three times, once in the leg, once in the arm, and once in the head (Tr. I 227). Petitioner shot Ms. Hooks at least once, and likely twice, as she lay on the kitchen floor (Tr. II 430-31, Tr. III 572-73). *Davis*, 268 P.3d at 112. Ms. Hooks—left by Petitioner shot in the head and drifting in and out of consciousness—was discovered by her young children, who tearfully begged a 911 operator to send help because their "momma's dyin'" (State's Ex. 190). Eight of the ten shots fired by Petitioner hit their target (Tr. II 572). *Davis*, 268 P.3d at 98.

Petitioner stated that, after the shooting, he "walked out of the house. I didn't run, I walked out of the house" (Court's Ex. 1 at 32). Petitioner returned to his car, drove away, and discarded the murder weapon out the window (Court's Ex. 1 at 32-33). Petitioner admitted that he was mad at the time of the shooting and that he

called Ms. Green after the murder and told her that it "wasn't over" (Court's Ex. 1 at 5, 48). *Davis*, 268 P.3d at 112, 113. Only once in the forty-nine page transcript of Petitioner's police interview did he claim that he was scared (Court's Ex. 1 at 6). *Davis*, 268 P.3d at 118.

Respondent strongly disagrees with Petitioner's suggestion that the facts in this case are not egregious enough to warrant the death penalty. Petition at 5. More importantly, the jury disagreed with Petitioner. In addition to the calculated and cold-blooded crimes described above, the jury also heard evidence overwhelmingly establishing Petitioner's continuing threat to society, a factor that drove its sentencing decision. In 1991, Robert Bartlett was walking home from school when four people, including Petitioner, stopped their car and demanded his jacket (Tr. VI 963-65). Mr. Bartlett was a schoolmate of Petitioner (Tr. VI 964). When Mr. Bartlett refused to hand over his jacket, Petitioner and the other individuals got out of the car and began punching and kicking him until he gave them the jacket (Tr. VI 965-66). Shortly after the attack, police stopped the car and found Petitioner wearing Mr. Bartlett's jacket (Tr. VI 967-68). Mr. Bartlett's jaw was dislocated in the assault (Tr. VI 967).

In 1992, Petitioner had an accident in a stolen car he was driving (Tr. VI 975-77). The steering column of the car had been tampered with as if the car was hot-wired (Tr. VI 977). The officer who responded to the accident found a loaded handgun, which Petitioner admitted was his (Tr. VI 978-80). Petitioner said he was a member of the Dope Overthrowing Gangsters gang, and that he needed the gun to protect

himself against a rival gang (Tr. VI 980). Petitioner was charged with unauthorized use of a motor vehicle (Tr. VI 981). Petitioner, who was eighteen at the time, had three juveniles in the car with him (Tr. VI 982).

Takisha Powdrill testified that she started dating Petitioner when she was in sixth grade (Tr. VI 983-84). Petitioner was three or four years older than Ms. Powdrill and was physically abusive toward her (Tr. VI 984). Approximately two weeks after Ms. Powdrill broke up with Petitioner, she was walking to the store with a friend when Petitioner drove up, jumped out of his car, and started calling her names (Tr. VI 984-85). Petitioner pushed Ms. Powdrill into a wall and held a gun to her head because he had found out she was dating someone else (Tr. VI 986-88). Petitioner told Ms. Powdrill he was going to come back (Tr. VI 988). Indeed, Ms. Powdrill's family moved a number of times, but Petitioner always found her (Tr. VI 990).

In 1994, Petitioner was arrested for, and subsequently convicted of, possession of crack cocaine and felonious possession of a firearm (Tr. VI 994-99). At the time of his arrest, Petitioner had in his possession a handgun that was loaded with twenty-three rounds, including one in the chamber (Tr. VI 997). Petitioner also had a box of extra ammunition (Tr. VI 997).

While on parole from his conviction for possessing crack cocaine, Petitioner met Ms. Green (Tr. I 71-72, 122). As with Ms. Powdrill, Petitioner was physically abusive toward Ms. Green (Tr. I 76-77, 137-42; Tr. III 632-33). Again, displaying an alarming lack of remorse, Petitioner called Ms. Green after the murder and told her it "wasn't over" (Court's Ex. 1 at 48). *Davis*, 268 P.3d at 113.

Petitioner has a history of violent behavior and an affinity for carrying and using guns. Moreover, as to Petitioner's complaint that trial counsel did not present evidence of his alleged Post-Conviction Stress Disorder, Petition at 6 n. 2, this claim has been rejected on its merits by every court to have considered it—including the Tenth Circuit below—because counsel decided against presenting mental health evidence to avoid opening the door to Petitioner's diagnosis of Antisocial Personality Disorder. *See Davis*, 943 F.3d at 1300-03. Dr. Terese Hall, the clinical psychologist who diagnosed Petitioner with Antisocial Personality Disorder, described Petitioner thusly to counsel:

> Teresa [sic] said that after seeing [Petitioner] for several hours at the county jail (a visit she characterized as "what an impression."), and after reviewing our reports of interviews with family members, Terese is of the opinion that nothing about [Petitioner's] upbringing was "that bad," such that we should be seeing the kind of person that he is. Terese said she sees nothing to explain why [Petitioner] is what he is – a psychopath.
>
> Terese said that she does not need to do testing to see clearly that [Petitioner] is anti-social personality disordered. He scores high on any risk assessment scale, without her even needing to test him. He's high on the Hare Psychopathy Checklist.
>
> Terese said what literature there is out there on psychopaths tells us that they are born not made. She said nothing about his upbringing explains his psychopathy; his neuro deficits are born with him – the risk taking, the not caring for others, only caring for self. . . .
>
> Terese noted that [Petitioner] is highly resistant to suggestion that his view of the case is indefensible and unrealistic. She also noted that he is agitated enough – filled with anger and self-justification – that he will frighten a jury. She does not think he should testify, but doubts we will be able to keep him from doing so, as he is convinced that once a jury hears what he has to say that they will acquit him.

(Evid. Hrg. Tr. IV 380-83; Evid. Hrg. Court's Ex. 3).

In sum, Petitioner's crimes stemmed not from "toxic love," Petition at 5, but from Petitioner's history of violence, lack of empathy for others, selfishness, and anger. His attempt to blame his crimes on Ms. Green is especially unconvincing given his history of abusing and threatening women with a gun. *Cf. Davis*, 268 P.3d at 112 ("In his statement to police, Appellant discussed at length his feelings for Green and the many ways he believed she had 'wronged' him, despite his love for her. Appellant's statements show he was obsessed both with Green's treatment of him and with making amends for these perceived wrongs."). Given Petitioner's Antisocial Personality Disorder and criminal history, as well as the facts of the murder—including Petitioner's attire and gloves; his locking of the door; his quiet, calm, and calculating actions; and his total lack of remorse—Petitioner is a cold-blooded killer worthy of the ultimate penalty.

B. Procedural Background

A jury found Petitioner guilty of one count of First Degree Malice Murder, two counts of Shooting with Intent to Kill After Former Conviction of Two or More Felonies, and one count of Possession of a Firearm After Former Conviction of a Felony, in the District Court of Oklahoma County, State of Oklahoma, in Case No. CF-2004-347. The jury sentenced Petitioner to death for the murder (Count 1), finding the following aggravating circumstances: (1) during the commission of the murder, Petitioner knowingly created a great risk of death to more than one person; (2) the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; and (3) at the present time there exists a probability

Petitioner will commit criminal acts of violence that would constitute a continuing threat to society (O.R. 1339). *See* OKLA. STAT. tit. 21, § 701.12(2), (6), (7). The jury imposed sentences of forty-five years for the shooting of Tia Green (Count 2) and sixty-seven years for the shooting of Chinetta Hooks (Count 3) (O.R. 1332-33). Finally, the jury sentenced Petitioner to twenty-five years imprisonment for the felonious possession of a firearm conviction (Count 4) (O.R. 1334).

Petitioner's convictions and sentences were affirmed on direct appeal by the OCCA. *Davis*, 268 P.3d at 139. In relevant part, the OCCA rejected Petitioner's claim that the trial court improperly excluded his proffered evidence of victim M.S.'s criminal history and alleged bad character:

> At trial, defense counsel argued: 1) the State's victim impact evidence showed the decedent's good character and therefore opened the door to defense evidence regarding the decedent's criminal history; 2) the evidence was relevant in showing Appellant's state of mind when he fired the gun; and 3) the evidence reduced Appellant's moral culpability for the crime and presented an accurate portrayal of the life that was extinguished . . . .
>
> In rejecting these arguments, the trial court stated that it had reviewed the victim impact statements and any references to the decedent's character had been redacted. Our review of the victim impact evidence supports this conclusion. Testimony from the decedent's mother, father and brother related each family member's sense of loss and grief, the impact the murder had on each of them and the fact that they loved the decedent. At trial, defense counsel claimed that the decedent's father's testimony that the decedent was a Christian and a member in good standing of his church was improper character evidence. Even if this was a reference to the decedent's character, it was not sufficient to open the door to evidence of the decedent's history of juvenile crime. "[A] criminal trial is not to be based upon so-called 'character' evidence, and the same principle applies to sentencing proceedings." *Malone v. State,* 2002 OK CR 34, ¶ 8, 58 P.3d 208, 210.
>
> Further, the evidence was properly excluded [under state law].

> . . . [T]he decedent's history of juvenile crime had nothing to do with his murder and inclusion of the evidence would not have added to the jury's picture of the crime. The trial court appropriately noted that in looking at the entire crime in this case, "it had nothing to do with self-defense issues . . . It has to do with a person that was a bystander. He just happened to be there at the wrong time."
>
> To the extent the decedent's juvenile crimes were relevant to Appellant's state of mind when he fired the gun; the jury had already found Appellant intentionally and with premeditation killed the decedent. Any evidence concerning his state of mind was no longer relevant. *See Rojem v. State,* 2006 OK CR 7, ¶ 56, 130 P.3d 287, 298–99 (improper for issue of residual doubt to make its way into a capital sentencing proceeding).
>
> Further, we fail to see how this evidence could in any way be considered mitigating. Evidence of the decedent's criminal history which had no relation to the crime and of which the Appellant was not aware does not reduce the degree of Appellant's moral culpability or blame, and are not circumstances which in fairness, sympathy or mercy may lead jurors to decide against imposing the death penalty. *See* OUJI–CR (2d) 4–78 (definition of mitigating circumstances).
>
> . . . Evidence of the decedent's history of juvenile crime, unrelated to his murder, was simply not relevant in either the first or second stage of this case and was properly excluded. There is no possible federal constitutional violation from the omission of the evidence. This assignment of error is denied.

Davis, 268 P.3d at 126-28 (paragraph numbering omitted).

The OCCA thereafter denied rehearing. *Davis v. State*, No. D-2008-891, Order Denying Rehearing (Okla. Crim. App. Jan. 17, 2012) (unpublished). This Court denied certiorari review. *Davis v. Oklahoma*, 568 U.S. 867 (2012). The OCCA denied Petitioner's application for state post-conviction relief. *Davis v. State*, No. PCD-2007-1201, slip op. (Okla. Crim. App. Jan. 25, 2012) (unpublished).

The federal district court denied Petitioner's § 2254 petition in an unpublished memorandum opinion. *Davis v. Royal*, Case No. 12-CIV-1111-HE, slip op. (W.D.

Okla. Sept. 20, 2017), Pet'r Appx. C. In particular, the federal district court rejected Petitioner's claim that the OCCA unreasonably denied relief on his claim that evidence regarding M.S.'s criminal history and allegedly bad character was improperly excluded in second stage. *Davis*, Case No. 12-CIV-1111-HE, slip op. at 22-27. The district court denied a certificate of appealability ("COA") on all issues. Pet'r Appx. D. The Honorable Michael R. Murphy of the Tenth Circuit granted Petitioner a COA on two issues, but not on the issue of whether evidence of M.S.'s criminal history and allegedly bad character was improperly excluded. *Davis v. Royal*, No. 17-6225, Order (10th Cir. Mar. 28, 2018) (unpublished) ("COA Order"). The Tenth Circuit subsequently affirmed the denial of habeas relief. *Davis*, 943 F.3d at 1293. The Tenth Circuit also denied Petitioner's pending motion to expand his COA order to include additional issues, including the aforementioned claim regarding the exclusion of second stage evidence regarding M.S. *Id.* at 1303 ("As a final matter, we deny Davis's request for an expanded COA to appeal the district court's order denying relief on three additional claims he presented in his § 2254 petition because reasonable jurists could not debate the district court's resolution of those claims. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).").

The Tenth Circuit denied panel and *en banc* rehearing. *Davis v. Sharp*, No. 17-6225, *Order* (10th Cir. Jan. 23, 2020) (unpublished); Pet'r Appx. B. On June 22, 2020, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision.

REASONS FOR DENYING THE WRIT

Although not exhaustive, Rule 10 of this Court's rules sets forth examples of grounds for granting a petition for writ of certiorari. These include a conflict among the United States courts of appeals, a conflict between a United States court of appeals and a state court of last resort, a conflict between state courts of last resort, an opinion by a state court or United States court of appeals that decides an important federal question in a way that conflicts with relevant decisions of this Court, and an opinion by a state court or United States court of appeals that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Petitioner cannot make any of these showings. Rather, Petitioner's questions presented fall outside of the universe of cases that typically garner review by 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." SUP. CT. R. 10.

At bottom, Petitioner asks this Court to second-guess the Tenth Circuit's application of *Slack v. McDaniel*, 529 U.S. 473 (2000), to Petitioner's claim that he was improperly precluded from presenting allegedly mitigating evidence. Thus, Petitioner alleges the misapplication of a properly stated rule. To the extent that Petitioner claims the courts below did not apply the correct COA standard, he did not raise that argument below. Nor has he shown that this Court's intervention is warranted to rectify "inconsistent" practices among the lower courts in the consideration of COA applications. In any event, the Tenth Circuit properly denied

Petitioner a COA on the claim at issue given that reasonable jurists could not debate that the claim fails for lack of clearly established law from this Court. Finally, even accepting Petitioner's claim that state courts need guidance in defining the scope of mitigating evidence, Petitioner's case is a poor vehicle for providing such guidance.

This Court should deny Petitioner's request for a writ of certiorari.

PETITIONER HAS IDENTIFIED NO CERTIORARI-WORTHY ISSUE AS TO WHETHER HE SHOULD HAVE RECEIVED A CERTIFICATE OF APPEALABILITY ON HIS CLAIM THAT "MITIGATING" EVIDENCE WAS IMPROPERLY EXCLUDED.

A. Petitioner's Claim He Should Have Received a COA Is Unworthy of Certiorari Review

Petitioner contends that the Tenth Circuit should have granted him a COA on his claim that the trial court improperly excluded evidence of his child victim's prior bad acts. Petition at 25, 28. In support of this contention, Petitioner offers a number of arguments, ranging from complaints about the lower courts' denial of a COA on this issue to claims of inconsistent "COA practice" among federal courts across the nation. Petition at 25-34.[5] Petitioner's arguments fail to show certiorari review is warranted.

For starters, at bottom, Petitioner alleges the misapplication of a properly stated legal rule, an issue that is unworthy of certiorari review. "A petition for a writ

[5] Before reaching these arguments, Petitioner spills considerable ink on the merits of his underlying constitutional claim. But of course the Tenth Circuit did not pass on the ultimate merits of this claim, as it found the claim not debatable and denied a COA. Thus, the only real question before this Court is whether Petitioner has shown a certiorari-worthy issue as to whether he should have received a COA. Accordingly, Respondent addresses that question first.

of certiorari will be granted only for compelling reasons," including for example where "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." SUP. CT. R. 10(c). However, "[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." SUP. CT. R. 10.

Here, citing this Court's opinion in *Slack*, the Tenth Circuit denied Petitioner a COA on his claim that he should have been permitted to introduce evidence of M.S.'s prior bad acts on grounds that "reasonable jurists could not debate the district court's resolution of those claims." *Davis*, 943 F.3d at 1303. The federal district court had previously rejected this claim on the merits, holding Petitioner did not satisfy his burden under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Davis*, Case No. 12-CIV-1111-HE, slip op. at 22-27. Accordingly, the Tenth Circuit's articulation of the rule for whether Petitioner should receive a COA was undeniably correct under *Slack*. *See Slack*, 529 U.S. at 484 ("Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."). While Petitioner contends he did present a claim that reasonable jurists could debate,

such is merely a disagreement with the *application* of the rule the Tenth Circuit applied, not the rule itself. Certiorari review is unwarranted.[6]

Attempting to avoid the conclusion that he is alleging the "misapplication of a properly stated rule of law," Petitioner appears to suggest that the Tenth Circuit in fact applied the wrong rule. Somewhat contradictorily, he intimates that the lower federal courts in this case both applied an overly rigorous COA standard—that equated to inquiring whether Petitioner's claims were meritorious enough to entitle him to habeas relief—and were too cursory—failing to "careful[ly] and thoughtful[ly] reflect[] on the issues and supporting facts." Petition at 30, 32. To the extent that Petitioner claims the lower federal courts applied an incorrect rule, his theory as to how they did so is unclear.

In any event, whatever theory Petitioner is now advancing, it was neither pressed nor passed upon below. At no stage—including in his initial COA application before Judge Murphy, his motion to expand Judge Murphy's COA order, or his petition for rehearing—did Petitioner hint at, let alone develop, an argument that the federal district court, Judge Murphy, or the panel applied the incorrect standard for determining whether a COA was warranted. *See generally* Appellant Nicholas Alexander Davis's Case Management Statement of Issues and Motion for Certification of Issues for Appeal, *Davis v. Royal*, Case No. 17-6225 (10th Cir. Jan.

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[6] Judge Murphy granted Petitioner COAs on two meaty, multi-faceted claims regarding trial and appellate counsel's alleged failures to investigate and pursue various types of mental health evidence—claims so substantial that each party was permitted 17,000 words for its opening brief. COA Order at 1-2. Certiorari review is not appropriate for this Court to second-guess the judges of the Tenth Circuit on which of Petitioner's numerous habeas claims were debatable among jurists of reason.

26, 2018); Appellant Nicholas Alexander Davis's Motion for Modification of the Certificate of Appealability by the Merits Panel, *Davis v. Royal*, Case No. 17-6225 (10th Cir. Apr. 9, 2018); Appellant's Petition for Rehearing and Request for En Banc Consideration, *Davis v. Sharp*, Case No. 17-6225 (10th Cir. Dec. 20, 2019). Given Petitioner's failure to raise this argument below, such that it was neither pressed nor passed upon, certiorari review is not appropriate. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) (Supreme Court is "a court of review, not of first view"); *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").

Relatedly, Petitioner complains of "vast inconsistencies in COA practice in federal courts around the country" and the Tenth Circuit's alleged internal inconsistency in COA practice. Petition at 32. He suggests this Court should solve these inconsistences by prohibiting federal courts from issuing "generic" or "summary" COA denials. Petition at 30-33. Again, these arguments were neither pressed nor passed upon below. Moreover, Petitioner cites to no authority suggesting that this Court's supervisory authority of federal courts extends so far as to dictate how they process, and write orders disposing of, the thousands of COA applications they receive each year. Indeed, in *Buck v. Davis*, 137 S. Ct. 759, 774 (2017), where this Court looked unfavorably upon the extensive briefing and oral argument conducted at the COA-stage in the Fifth Circuit, this Court nevertheless made clear:

"We do not mean to specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry."[7] Clearly, this Court did not believe that COA practices needed to be identical across the federal courts, nor even consistent across cases within a single circuit.[8]

B. The Lower Courts Correctly Denied a COA

Petitioner claims reasonable jurists could debate whether he should have been permitted to present evidence of M.S.'s bad acts. However, Petitioner does not engage with the problem with this claim that is fatal both to its worthiness for a COA and its ultimate merit—a 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

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[7] In contrast to *Buck*, where the circuit court treated the COA inquiry as akin to a determination of the merits of the claims, the district court here simply relied upon its analysis of the merits of the claim to rule, independently, that Petitioner could not meet even the lower COA standard.

[8] In any event, *Buck* suggests that this Court would not advise federal courts to issue lengthy orders justifying the denial of COAs. *Cf. Buck*, 137 S. Ct. at 773 ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis."). Indeed, requiring federal courts to explain these denials in depth would defeat one of Congress's objectives in enacting the COA requirement—speeding up federal habeas proceedings. *See Gonzalez v. Thaler*, 565 U.S. 134, 144-45 (2012) (explaining that "Congress' intent in AEDPA [was] to eliminate delays in the federal habeas review process" and that "[t]he COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels" (quotation marks omitted)). Were Petitioner's proposed mandate adopted, this objective would be particularly undermined in capital cases, where represented capital defendants raise *numerous* claims in habeas. Petitioner's suggestion that federal courts must offer reasoned decisions as to every claim it denies a COA on—separate and distinct from any reasoned decision denying relief on a claim—is untenable.

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").

Here, Petitioner wanted to introduce evidence that M.S., who, again, was seventeen when he was murdered, had engaged in criminal activity (Tr. III 613-18; Court's Exs. 4-12). Petitioner claims the evidence was intended to rebut evidence of good character offered by M.S.'s family. Essentially, Petitioner claims a constitutional right to argue to the jury that he does not deserve the death penalty because the person he murdered was "bad." No such right exists.

Petitioner claims evidence of M.S.'s history was mitigating. This Court has defined mitigating evidence as "any aspect of a *defendant's* character or record and any of the circumstances of the offense . . . ." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added). As broad as this definition is, it obviously does not encompass evidence of the *victim's* character. Similarly, although *Payne v. Tennessee*, 501 U.S. 808, 822 (1991), recognized that States "cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death," the Court in no way held that evidence of the supposed

bad character of the victim is a "relevant mitigating" factor. *See also Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) ("The sentencer, and the [appellate court] on review, may determine the weight to be given *relevant* mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." (emphasis added)). In *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), this Court held that a capital defendant should have been permitted to present testimony "regarding his good behavior during the over seven months he spent in jail awaiting trial." The Tenth Circuit has described *Skipper* as "arguably" this Court's "broadest reading of what constitutes mitigating evidence," and even then "the evidence in question directly concerned the petitioner's own conduct, and thereby his character." *Coleman v. Saffle*, 869 F.2d 1377, 1392-93 (10th Cir. 1989).

"'[C]learly established Federal law' in § 2254(d)(1) refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Carey v. Musladin*, 549 U.S. 70, 74-75 (2006) (quotation marks omitted). "[R]elief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question." *White v. Woodall*, 572 U.S. 415, 427 (2014) (quotation marks omitted). The holding in *Payne* was "only that the Eighth Amendment does not erect a per se bar to victim impact evidence and that such evidence is admissible unless it is 'so unduly prejudicial that it renders the trial fundamentally unfair.'" *United States v. Fields*, 483 F.3d 313, 340 (5th Cir. 2007) (quoting *Payne*, 501 U.S. at 825).

Payne in no way held that evidence of the bad character of a victim is mitigating or must be admitted even when it was unrelated to the crime. The defendants in *United States v. Snarr*, 704 F.3d 368, 400 (5th Cir. 2013), similarly argued that the exclusion of evidence of the victim's criminal acts gave the jury a false impression. The Fifth Circuit found no authority to support the defendants' argument "that a defendant must be permitted to offer general evidence of the victim's bad character during the sentencing phase of a federal capital murder case," so called "reverse victim impact" evidence. *Snarr*, 704 F.3d at 400. The court further held that the purpose of victim impact evidence is not to determine the defendant's culpability based on the victim's character, but to rebut the mitigating evidence and explain the harm caused by the murder. *Id.* The court concluded that evidence of the victim's character that did not relate to the circumstances of the murder was properly excluded. *Id.* at 400-01.

Indeed, this Court recognized in *Payne* that victim impact evidence is not generally offered to encourage the jury to sentence the defendant to death based on the character of the victim. *Payne*, 501 U.S. at 823. Rather, the purpose of victim impact evidence is to show that, as the defendant is a unique human being, so too was the victim. *Id.* In this case, the OCCA correctly determined that the focus of the victim impact evidence was on the loss suffered by M.S.'s family members, not on his character.[9] *Davis*, 268 P.3d at 126-27. The OCCA also held that the evidence in

[9] Petitioner's current view of the evidence—that the jury was given "a false impression of the victim," Petition at 9, contradicts his admission at trial that the prosecutor had redacted the references to M.S.'s character (Tr. VI 1024). Although counsel later said the witnesses painted M.S. as a "choir boy," when the trial court disagreed, counsel offered no defense and

question was not related to the murder and was not mitigating as it did not "reduce the degree of Appellant's moral culpability or blame, [nor present] circumstances which in fairness, sympathy or mercy may lead jurors to decide against imposing the death penalty." *Id.* at 127 (citing OUJI-CR (2d) 4-78 (defining mitigating circumstances)). This holding is not foreclosed by *Payne*. Further, no other authority from this Court suggests that Petitioner had a right to present "reverse victim impact" evidence. *Snarr*, 704 F.3d at 400.

The Confrontation Clause aspect of Petitioner's claim also fails for lack of clearly established federal law. No clearly established law from this Court extends the Confrontation Clause to capital sentencing proceedings. *See Carter v. Bigelow*, 787 F.3d 1269, 1294 (10th Cir. 2015) ("The Supreme Court has never held that the Confrontation Clause applies at capital sentencing."); *Wilson v. Sirmons*, 536 F.3d 1064, 1111-12 (10th Cir. 2008) (holding the petitioner's claim failed because it is unclear whether the Confrontation Clause applies to capital sentencing proceedings).[10]

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pointed to no statement made as to M.S.'s character (Tr. VI 1027). Yet again, when the prosecutor said there was no evidence of M.S.'s character, defense counsel responded with only Petitioner's allegation that M.S. lunged at him before the murder (Tr. VI 1030-31). Counsel did not refer to any of the victim impact evidence.

[10] Petitioner's case is also a poor vehicle for consideration of the Confrontation Clause aspect of his claim because there remains an unresolved issue as to whether he waived the Confrontation Clause claim by inadequately briefing it before the district court. As Petitioner admits, the district court alternatively rejected the Confrontation Clause claim because it was inadequately briefed. Petition at 15 n. 5. Petitioner does not suggest that he raises any certiorari-worthy issue as to whether he adequately raised his Confrontation Clause claim to the district court. Moreover, this Court should not grant certiorari to decide whether the merits of Petitioner's Confrontation Clause claim were debatable among reasonable jurists when Petitioner may ultimately not be entitled to a COA on grounds that the claim was not actually raised adequately to the district court. *See The Monrosa v. Carbon Black Exp., Inc.*,

The district court agreed with Respondent's position that the OCCA's denial of relief on this claim did not violate any clearly established law of this Court. *Davis*, Case No. 12-CIV-1111-HE, slip op. at 22-27. In briefing this claim before Judge Murphy, the State asserted that it failed for lack of clearly established federal law, and Judge Murphy apparently agreed. *See* Response to Petitioner's Motion for Certification of Issues for Appeal, *Davis v. Royal*, Case No. 17-6225 (10th Cir. Feb. 23, 2018). Presumably, the panel agreed as well. Based on the cases discussed above, the lower courts were clearly correct to conclude that no clearly established federal law supported this claim. Moreover, the Tenth Circuit's refusal to grant a COA was in line with the Fifth Circuit's analysis in *Snarr*. Petitioner has shown no split in authority or compelling issue worthy of certiorari review.

Petitioner argues that it is, at the very least, debatable whether his evidence of M.S.'s criminal history was relevant and could rebut the victim impact testimony and whether such could have affected at least one juror's sentencing decision. Petition at 14-20. But Petitioner misses the point. As Justice Scalia explained, although a constitutional claim may be debatable when fully considered on its merits, a COA should be denied if it is apparent that the claim lacks clearly established Supreme Court law in support. *See Miller-El*, 537 U.S. at 349-50 (Scalia, J., concurring). Such is plainly the case here.

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359 U.S. 180, 184 (1959) (this Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly").

Petitioner also contends his claim is debatable because there is allegedly a circuit split over whether the Confrontation Clause applies to sentencing proceedings. Petition at 15 n. 5. But, under the circumstances, this actually makes Petitioner's claim less worthy of a COA and certiorari review. A circuit split is good evidence of a lack of clearly established federal law. *See Musladin*, 549 U.S. at 76-77 (finding a lack of clearly established law where "lower courts have diverged widely in their treatment of defendants' spectator-conduct claims"); *Miller v. Colson*, 694 F.3d 691, 699 (6th Cir. 2012) (suggesting that a circuit split can be one factor indicative of a lack of clearly established federal law). Given the absence of clearly established law, the lower courts properly denied a COA in this case.

Finally, Petitioner appears to suggest that, even assuming evidence of a victim's bad character cannot be considered mitigating evidence, this Court's cases support a defendant's right to "rebut" victim impact evidence. Petition at 14, 18. But this argument ignores the OCCA's presumptively correct finding that "any references to the decedent's character had been redacted." *Davis*, 268 P.3d at 127; *see* 28 U.S.C. § 2254(e)(1). Thus, there was no character evidence for Petitioner to rebut. Evidence that M.S. was allegedly part of a gang, for instance, could not rebut that he attended church or that his death was a great loss to his family. Petition at 8. To the extent that Petitioner disagrees with the OCCA as to whether all character references were redacted, he alleges only an erroneous factual finding—an issue unworthy of certiorari review. *See* SUP. CT. R. 10. And to the extent the Tenth Circuit should have found this claim debatable based on an erroneous factual finding, granting

certiorari review on that issue would be only an exercise in error correction, which is not a worthy basis for this Court's review.

C. Petitioner's Arguments Regarding an Allegedly Improper "Nexus" Requirement Do Not Show Certiorari Review is Warranted

Petitioner further argues that this Court should grant certiorari review in his case "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," *i.e.*, a so-called "nexus" requirement. Petition at 20-21 (formatting omitted). Certiorari review is not justified for a number of reasons.

For starters, even assuming a "nexus" requirement for the admission of capital mitigating evidence is improper, Petitioner's case is a poor vehicle for resolution of that question. As previously noted, the only proper question presented to this Court at this juncture is whether Petitioner was correctly denied a COA on his claim that evidence of M.S.'s criminal history and alleged bad character should have been admitted. Petitioner does not explain how, in resolving whether reasonable jurists could debate this claim, this Court could conduct a full merits evaluation of this claim that would provide guidance to courts as to whether a nexus requirement is constitutional. *See Buck*, 137 S. Ct. at 773 ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis."). Such guidance, even assuming *arguendo* it is warranted, should wait for a case where the petitioner has received a COA and the federal court of appeals has actually passed on the merits of the nexus requirement issue.

Petitioner's case is further a poor vehicle for consideration of this issue given its habeas posture. Petitioner argues that this Court should grant certiorari review and hold "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." Petition at 25. But such a rule would require this Court to change its law defining mitigating evidence in *Lockett* and its progeny. *See, e.g.*, *Lockett*, 438 U.S. at 604 (defining mitigating evidence as "any aspect of a *defendant's character or record* and any of the *circumstances of the offense* . . . ." (emphasis added)). This Court cannot change its clearly established law in a habeas case. *Cf. Woodall*, 572 U.S. at 426 ("Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." (emphasis in original)). Likewise, a habeas case is not an appropriate vehicle for this "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*." Petition at 25.

Petitioner further says that "Oklahoma prosecutors cannot seem to keep from circumscribing mitigating circumstances by limiting it to moral culpability only." Petition at 20. But Petitioner has never raised a prosecutorial error claim in his habeas proceedings, and as such, this issue was neither pressed nor passed upon

below and is not appropriate for certiorari review. *See Cutter*, 544 U.S. at 718 n. 7; *Sprietsma*, 537 U.S. at 55-56; *Williams*, 504 U.S. at 41.[11]

Petitioner has also failed to show that Oklahoma improperly limits the presentation of mitigating evidence in capital sentencing proceedings. Petition at 21. He complains about the Tenth Circuit's recent holding that "[s]tatements of family members that they love a defendant aren't relevant mitigating evidence on which a jury legitimately might ground feelings of sympathy." *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 908 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 844 (2020) (quotation marks omitted, alterations adopted). But based on the discussion of *Lockett* and its progeny above, this conclusion in *Cuesta-Rodriguez* is entirely correct based on this Court's clearly established law. Furthermore, as previously shown, the particular limitation on evidence in this case was entirely consistent with this Court's clearly established law. Again, although *Payne*, 501 U.S. at 823, references a defendant's opportunity "to rebut victim impact evidence," evidence of M.S.'s gang membership does not rebut that he went to church or that his family loved him. Petitioner's reliance on "nexus" cases is misplaced. *Compare, e.g.*, *Smith v. Texas*, 543 U.S. 37, 45 (2004) (holding that the state court improperly concluded that the petitioner had not presented any relevant mitigating evidence in the absence of "any

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[11] Also, Petitioner mixes apples and oranges. The issue in the cases he cites was whether prosecutors made arguments that improperly limited jurors' consideration of *properly admitted* mitigating evidence. *See, e.g.*, *Harmon v. Sharp*, 936 F.3d 1044, 1074-77 (10th Cir. 2019); *Grant v. Royal*, 886 F.3d 874, 935-38 (10th Cir. 2018). Here, Petitioner claims he was improperly limited in the admission of mitigating evidence, and as noted above, he has not raised a prosecutorial error claim in federal court. Quite frankly, it is not clear what relevance the aforementioned cases have to Petitioner's case.

link or nexus between his troubled childhood or his limited mental abilities and this capital murder" (quoting *Ex parte Smith*, 132 S.W.3d 407, 414 (Tex. Crim. App. 2004))); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime.").

CONCLUSION

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