No. 19-8814

IN THE

Supreme Court of the United States

NICHOLAS ALEXANDER DAVIS,

Petitioner,

v.

TOMMY SHARP, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

Reply to Brief in Opposition to the 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

September 9, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

FEDERAL CASES

STATE CASES

MISCELLANEOUS CITES

CAPITAL CASE

REPLY TO BRIEF IN OPPOSITION

Respondent does not dispute that at Mr. Davis's capital sentencing, the State was allowed to present the following evidence about victim Marcus Smith:

> 1. he was a good kid, which is why family members questioned why this happened to him;
> 2. he was enrolling in Job Corp., and was getting his life together so he could support himself and others;
> 3. he had initiative and was always asking if anyone had any work to do so he could make extra money;
> 4. he was a good church member who served breakfast every Saturday, cut grass and cleaned up around the church; and
> 5. he had a strong faith in Jesus Christ and taught his nephews valuable life lessons.

Respondent also does not dispute that Mr. Davis was *not* allowed to cross-examine the State's witnesses' testimony regarding the same or present evidence showing the following information about victim Marcus Smith:

> 1. he was a member of a violent street gang known as the Rollin' 90's Crips;
> 2. he abused animals by encouraging his dog to kill a kitten and to fight with other dogs;
> 3. he assaulted a former employer in the former employer's home;
> 4. he broke the former employer's television and DVD player

when he refused to give Smith money or beer;
5. he burglarized a sixty-two-year-old woman's home at night when she was at home in her bedroom; and
6. he burglarized a fifty-year-old's home on a *Sunday church morning* when the victim was at home.

Given that victim-impact evidence is probative of a "defendant's moral culpability and blameworthiness," and the sentencing jury was told to consider the unique loss to society and the family pursuant to this Court's precedent, the trial court's error rendered Mr. Davis's sentencing proceedings fundamentally unfair and violated this Court's jurisprudence regarding mitigating evidence. *Payne v. Tennessee*, 501 U.S. 808, 822-85 (1991).

For four years prior to the issuance of *Payne*, victim-impact evidence was unconstitutional. *See Booth v. Maryland*, 482 U.S. 496 (1987). The way victim-impact evidence was able to go from unconstitutional to constitutional was to allow "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)); *see also Booth,* 482 U.S. at 506 (citing concerns about the provision of a fair opportunity to counter and rebut such evidence). The failure to provide Mr. Davis *any* opportunity to

counter and rebut the State's victim-impact evidence was gravely and fundamentally unfair.

The Oklahoma Court of Criminal Appeals (OCCA) incorrectly found Mr. Davis's evidence "simply not relevant," and went on to incorrectly opine that a constitutional violation was not "possible." Appendix E; *Davis v. State*, 268 P.3d 86, 128 (Okla. Crim. App. 2012). As this Court well knows, Oklahoma state courts have a long history of flouting the constitutional protections afforded capital defendants. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Cooper v. Oklahoma*, 517 U.S. 348 (1996). The OCCA's history of intransigence regarding victim-impact issues is especially bad. In *Bosse v. Oklahoma*, 137 S. Ct. 1, 1-2 (2016) (*per curiam*), for example, this Court had to chastise the OCCA for refusing to follow the parts of *Booth* that had specifically *not* been overruled by *Payne*.[1] Notably, the one tenet shared by both *Booth* and *Payne* is that a capital defendant "must

[1]See also *Dodd v. Trammell*, 753 F.3d 971, 997-98 (10th Cir. 2013) (noting ten violations of that clearly-established victim-impact law prior to the issuance of *Bosse*).

be given the chance to rebut [victim-impact] evidence." *Booth*, 482 U.S. at 507 (citing *Gardner v. Florida*, 430 U.S. 349, 362, (1977) (opinion of Stevens, J.); *Payne*, 501 U.S. at 823 (quoting *Barefoot v. Estelle,* 463 U.S. 880, 898 (1983).

Like the OCCA, the federal district court was confused about this Court's clearly established law, calling Davis's proposed evidence "irrelevant." Appendix C at 25-27. The district court also found the manifest injustice of the trial court turning *Payne v. Tennessee* on its head did not cause Mr. Davis to be deprived of a "fundamentally fair trial." *Id.* These issues are eminently debatable among jurists of reason and warrant further encouragement under the law.

Respondent essentially asserts certiorari is unattainable in modern habeas corpus, and imagines insurmountable hurdles making presentation of certificate of appealability (COA) issues all but impossible. The Court knows this is not so. *See, e.g., Buck v. Davis*, 137 S. Ct. 759 (2017); *Brumfield v. Cain*, 576 U.S. 305 (2015); *Lafler v. Cooper*, 566 U.S. 156 (2012); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007).

The problems laid out in Davis's petition regarding COAs are real,

and they are not going away. The issues have been greatly studied, researched, and briefed. *See, e.g.,* See Julia Udell, *Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study* (December 24, 2019), https://ssrn.com/abstract= 3506320 (last visited September 8,2020); Luis Angel Valle, *Certificates of Appealability as Rubber Stamps*, SSRN No.3576026 (April 14, 2020), available at https://ssrn.com/abstract=3576026 (last visited September 8, 2020); *Tomlin v. Patterson*, United States Supreme Court, No. 19-7127, Petition for Rehearing, filed June 25, 2020. The *Tomlin* petition for rehearing is particularly helpful in showing the numerous dimensions of arbitrariness in the COA process, and proving the vast differences in COA procedures and resolutions among different circuit courts around the country.

Respondent makes various arguments, but not in regard to this Court's duty to search for constitutional error with painstaking, exacting care in capital cases. *Burger v. Kemp*, 483 U.S. 776, 785 (1987). In 1984, every member of the Court had "written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability,

the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part). To be sure, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). The COA process is broken, and along with it the Great Writ. There is something very wrong when an issue as striking as the victim-impact issue in this capital case is unable to go forward on appeal.

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