No. 25-5784

CAPITAL CASE

In the

SUPREME COURT OF THE UNITED STATES

DANIEL RAUL SANTIAGO VASQUEZ,
***Petitioner*,**

-vs-

STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari
To the Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Whether the Oklahoma Court of Criminal Appeals' ("OCCA") ruling permitting live, videoconference testimony from seven mitigation witnesses at a time when COVID-19 cases were surging violated Petitioner's Eighth Amendment right to present relevant mitigation evidence in a capital case.

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Respondent respectfully urges this Court to deny Petitioner Daniel Raul Santiago Vasquez's Petition for a Writ of Certiorari to review the judgment and opinion of the OCCA entered in this case on January 30, 2025, *Vasquez v. State*, 564 P.3d 880 (Okla. Crim. App. 2025), Pet. Appx. A.[1]

STATEMENT OF THE CASE

A. Factual Background

In April 2018, Shaliyah Toombs was eight months pregnant with her third child, H.T.,[2] and living in an apartment in Oklahoma City when she mysteriously disappeared. *Vasquez*, 564 P.3d at 888. Around mid-morning on April 29, 2018, Ms. Toombs' mother, Twyla Taylor, awoke to multiple text messages from her daughter, sent hours earlier. The last message, sent at approximately 4:50 a.m., ominously stated: "'They're going to kill me, Mom. Help me.'" *Id.* at 888-889.[3] After Ms. Taylor received no answer to texts and calls to her daughter's cell phone, Ms. Taylor's sister stopped by Ms. Toombs' apartment, finding the patio door unlocked and the lights on,

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[1] Record references in this brief are abbreviated as follows: citations to the original record will be referred to as "(O.R. [Vol.])"; citations to the jury trial transcripts will be referred to as "(JT [Vol.])"; and citations to any other transcripts will be referred to as "([Date] Tr.)." *See* Sup. Ct. R. 12.7. References to Petitioner's Petition for Writ of Certiorari will be cited as "(Pet.)"; references to Petitioner's Appendix will be cited as "(Pet. Appx.)"; and references to Petitioner's briefs filed in the lower courts will be referred to by their respective title. Additionally, for privacy purposes, Respondent will refer to the juvenile victim and any minor witnesses by their initials.

[2] Evidence presented in this case indicated that H.T. was fully developed and exhibited no abnormalities. Had he been born on the day Ms. Toombs was murdered, his survival rate would have been near 100%. *Vasquez*, 564 P.3d at 892-893.

[3] Ms. Toombs sent a similar text message to a friend named Kenneth Smith at the same time she texted her mother. *See Vasquez*, 564 P.3d at 890.

but no one at home. *Id*. at 889. Ms. Toombs was subsequently reported missing to police. *Id*.

Several days later, on May 2, 2018, Chickasaw Nation Lighthorse Police Captain Chad Hillis stopped for refreshments at a Love's convenience store located off Oklahoma State Highway 9; while waiting in the checkout line, he observed a disheveled man, later identified as Petitioner, wander aimlessly around the store before demanding to speak with him outside. *Id*.; (JT VII, 1690-1692, 1704-1705). Outside the store, Petitioner calmly informed Captain Hillis that there was a "'Dodge pickup south of the Love's . . . on [I]-35' . . . with a dead woman on the backseat floorboard.'" *Vasquez*, 564 P.3d at 889. Petitioner identified the woman as Ms. Toombs. He further informed Captain Hillis that Ms. Toombs had died on April 29, 2018, and that he was supposed to burn both the pickup and her remains; however, instead of doing so, "he had just been driving around" with her body until he ran out of gas. *Id*. at 889; (JT VII, 1694-1695, 1708).

Ms. Toombs and her roommate, Cecilia Morales, initially met Petitioner two months prior to Ms. Toombs' death. Their interactions with Petitioner generally consisted of using methamphetamine with him or getting rides to the casino. *Id*. One month before the murders, Petitioner's wallet went missing after a casino trip and while he was searching for it, Ms. Toombs privately told Ms. Morales that, unbeknownst to Petitioner, she had taken it and given it to her cousin, after removing fourteen dollars. *Id*. In the time thereafter, Petitioner "lamented the loss of his wallet" to Ms. Toombs and Ms. Morales, specifying how difficult it would be for him to obtain

a new identification card, which—in turn—would prevent him from being able to visit his daughter who lived out of state. *Id*.

Approximately two weeks before the murders, Ms. Morales met a woman named Stacy Harjo and her boyfriend, Joshua Finkbeiner; she subsequently introduced Ms. Toombs to Ms. Harjo, who—on one occasion—provided a white Jeep to Ms. Toombs so she could travel to a prenatal appointment. *Id*. After returning the Jeep, Ms. Harjo claimed that a backpack had gone missing from the vehicle and suspected Ms. Toombs of stealing it. *Id*.

The day before Ms. Toombs disappeared, she and Ms. Morales had an argument resulting in Ms. Morales acting as if she were moving out. *Id*. Ms. Morales called Ms. Harjo to pick her up and the pair then met up with Mr. Finkbeiner, who was driving a black Dodge pickup. *Id*. The trio then went to a casino and then back to Oklahoma City where Ms. Harjo obtained a gun and dropped Ms. Morales off with a man name Michael Mate[4] before going over to Ms. Toombs' apartment with Mr. Finkbeiner to confront her about the alleged theft of the backpack. *See id*. at 889-890. Over the course of the evening, Ms. Morales received calls from Ms. Harjo where she heard the voices of both Ms. Toombs and Petitioner in the background; during one phone call, Ms. Morales informed Petitioner that Ms. Toombs had stolen his wallet, which audibly angered him. *Id*.; (JT IX, 1965-1969).

After the discovery of Ms. Toombs' body, Petitioner underwent four interviews with police, during which he admitted to strangling Ms. Toombs; however, he claimed

[4] Mr. Mate drove Ms. Morales to his residence located outside Macomb, Oklahoma, referred to as "the farm." *Vasquez*, 564 P.3d at 889.

he only did so under duress and after Mr. Finkbeiner violently strangled her to death, crushing her trachea in the process. *See Vasquez*, 564 P.3d at 890-892. The following evidence admitted at trial called into question the veracity of Petitioner's statements downplaying his involvement and implicated him in Ms. Toombs' murder: 1) although Ms. Toombs' body was in a state of decomposition at the time she was discovered, she did not exhibit any significant bruising on her neck and her trachea was not fractured; 2) cell phone data from Ms. Toombs' phone indicated the text messages "to her mother and [Mr.] Smith that 'they' were going to kill her occurred only two minutes after" Petitioner learned Ms. Toombs had stolen his wallet; 3) Petitioner sent text messages *before the murder* in which he stated that he was "'[p]issed the fuck off' . . . [l]ike choke a mother fucker the fuck out pissed;'" 4) Petitioner told a cellmate after his arrest that he held Ms. Toombs' legs while Mr. Finkbeiner strangled her and he portrayed himself as a hostage to police to avoid getting caught; and 5) after the arrest of Ms. Harjo and Mr. Finkbeiner, examination of Ms. Harjo's phone revealed an incriminating video created on the night Ms. Toombs died. *Id.* at 892-893. In the video, Petitioner is sitting in the back seat of the Dodge pickup next to Ms. Toombs' body looking "relaxed, smug and pleased with himself." *Id*. After flashing a peace sign for the camera, Petitioner states:

> What's up, I'm Daniel. This dead bitch over here, [[Petitioner] points at [Ms.] Toombs' body] [camera pans to show [Ms.] Toombs' body and then moves back to [Petitioner]] that's LeLe, or Shaliyah. She shouldn't have stole my ID, but she did. She's a dumb fuck. Rest in peace darlin'. I told you I'd fucking get you back, didn't I, bitch?

Id.

B. Relevant Procedural History

In 2021, Petitioner was tried by jury for two counts of Murder in the First Degree (Counts I & II)[5]; Unlawful Removal of a Dead Body (Count III); and Pattern of Criminal Offenses (Count IV), in the District Court of McClain County, State of Oklahoma, Case No. CF-2018-166. The jury found Petitioner guilty as to all counts and sentenced him to death in relation to Counts I and II after finding the following aggravating circumstances in relation to each murder: 1) during the commission of the murders, Petitioner knowingly created a great risk of death to more than one person; 2) the murders were especially heinous, atrocious, or cruel; and 3) there existed a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *Vasquez*, 564 P.3d at 886; OKLA. STAT. tit. 21, § 701.12(2), (4), (7) (2011). Petitioner's death sentence as to Count I was affirmed based on the OCCA upholding the jury's findings as to all three aggravating circumstances; however, the OCCA invalidated the especially heinous, atrocious, or cruel aggravator as to Count II, finding insufficient evidence to support that H.T. "suffered due to infliction of great physical anguish or endured conscious physical suffering prior to his death[.]"*Id*. at 908. Nevertheless, the OCCA upheld Petitioner's death sentence as to Count II, finding

> no impermissible slanting or constitutional error . . . because the continuing threat aggravator and great risk of death to more than one person aggravator allowed the jury to give aggravating weight to the same facts and circumstances used to support the invalid aggravator,

[5] Specifically, Count I was in relation to the murder of Ms. Toombs and Count II referred to the murder of H.T., her unborn child. (O.R. X, 1899-1900, 1921-1922).

> *i.e.*, the death of . . . [H.T.] in his mother's womb due to [Ms.] Toombs' murder by strangulation.

Id.

1. Pretrial Litigation Regarding Presentation of Mitigation Testimony.

Leading up to trial, Petitioner filed a "Motion on Cost/Need for Appearance of Out of State Witnesses," wherein he indicated that he had identified approximately fifteen out-of-state witnesses who were willing to testify on his behalf during the sentencing phase of his trial. (O.R. VII, 1286-1290). Petitioner further argued to the state district court that given the clear obligation imposed on a defendant in a capital case to discover and present mitigation evidence, the trial court should approve a proposed order directing the McClain County District Court Clerk's Office to assist Petitioner's counsel in providing funding for travel arrangements for these witnesses. (O.R. VII, 1287-1289). Petitioner asserted that if the court required these witnesses to testify via videoconferencing technology, any such requirement would be "inadequate in the capital context." (O.R. VII, 1288-1289).

On June 25, 2021, the district court issued an extensive order denying Petitioner's funding request, recognizing that Oklahoma law, specifically OKLA. STAT. tit. 20, § 130 (Supp. 2021), explicitly permitted the use of videoconferencing or its equivalent in all stages of civil or criminal proceedings, the workings of which are governed by Oklahoma State District Court Rule 34 ("Rule 34"). Rule 34 gives Oklahoma trial courts "broad discretion" and permits them to consider, *inter alia*, multiple factors in making these decisions.[6] OKLA. DIST. CR. R. 34(C); (O.R. VIII,

[6] Specifically, these factors consist of:

1380-1386). In finding the use of videoconferencing technology appropriate in Petitioner's case, the court specifically outlined the following:

- Travel and lodging expenses for Petitioner's multiple out-of-state witnesses were impractical due to the COVID-19 pandemic making safety and reliability of travel uncertain.[7]

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(1) Whether any undue surprise or prejudice would result;
(2) Whether the proponent of the use of videoconferencing technology has been unable, after diligent effort, to procure the physical presence of a witness;
(3) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony;
(4) Whether the procedure would allow for full and effective cross-examination, especially where such cross-examination would involve documents or other exhibits;
(5) The importance of the witness being personally present in the courtroom where the dignity, solemnity, and decorum of the surroundings will impress upon the witness the duty to testify truthfully;
(6) Whether a physical liberty or other fundamental interest is at stake in the proceeding;
(7) Whether the court is satisfied that it can sufficiently know and control the proceedings at the remote location so as to effectively extend the courtroom to such location;
(8) Whether the participation of an individual from a remote location presents such person in a diminished or distorted sense such that it negatively reflects upon such individual to persons present in the courtroom;
(9) Whether the use of videoconferencing diminishes or detracts from the dignity, solemnity, and formality of the proceeding such as to undermine integrity, fairness, and effectiveness;
(10) Whether the person proposed to appear by videoconferencing presents a significant security risk to transport and present personally in the courtroom;
(11) Waivers and stipulations of the parties offered and agreed upon and approved by the court, including waiver of any requirement set forth in this Rule, or stipulation to any different or modified procedure; and
(12) Such other factors as the court may, in each individual case, determine to be relevant.

OKLA. DIST. CR. R. 34(C).

[7] As will be shown, the very premise upon which Petitioner's Question Presented hinges, that "this was *not* a COVID case", is false. (Pet. at i) (emphasis in original).

- The out-of-state witnesses delineated by Petitioner were mitigation witnesses, as opposed to "'fact witnesses,'" which supported their appearance by videoconference, given that nothing indicated personal appearance by these witnesses was necessary to ensure truthful testimony.
- The court planned to ensure that the presentation of remote videoconference testimony would allow full and effective cross examination by both parties, while at the same time ensuring jurors had full view of the witnesses and attorneys in real time.
- The court acknowledged that Petitioner's life and liberty were at stake in these proceedings and noted it was appropriate to weigh these factors alongside the other factors set forth in Rule 34.
- The court could "not foresee how the presentation of remote testimony would negatively reflect upon" Petitioner, especially considering the court's inclination to give a jury instruction in relation to remote witness testimony.
- The court would ensure preservation of the fairness, effectiveness, and integrity of all proceedings in Petitioner's case.

(O.R. VIII, 1380-1386).

In response to the court's order, Petitioner moved for reconsideration of his request for financial assistance in securing the presence of out-of-state-witnesses, claiming that a supposed lack of COVID-19 infections in Oklahoma, as well as the previous (pre-COVID 19) version of OKLA. STAT. tit. 20, § 130 (Supp. 2020), which specifically excluded utilizing videoconference testimony in jury or bench trials,

justified his request.[8] Petitioner also claimed: 1) testimony via videoconference could never achieve the same effect as live, in-person testimony; and 2) the McClain County District Courthouse did not have a reliable internet connection. (O.R. VIII, 1428-1434). The court denied Petitioner's request for reconsideration and in response, Petitioner initiated a mandamus action in the Oklahoma Supreme Court. This action was later transferred to and denied by the OCCA based on a finding that Petitioner had failed to "demonstrate the inadequacy of other relief." (O.R. X, 1812-1814).

2. Presentation of Videoconference Testimony During the Penalty Stage of Petitioner's Trial.

Petitioner's trial commenced on August 10, 2021, and defense counsel initially requested a continuance due to his alleged inability, "through the [state district] [c]ourt's ruling, [to] have witnesses appear in person in the penalty phase"; the court subsequently denied this request. (JT I, 4-5). During Petitioner's presentation of mitigation evidence, he called seventeen witnesses, ten of whom testified in person and seven of whom testified with the aid of videoconferencing software.[9] (*See* JT XVI, 3083-3099, 3100-3108, 3135-3165; JT XVII, 3272-3364, 3462-3467). The broadcasting of remote testimony occurred via three large screens placed around the courtroom, all of which were visible to the jury. (JT VII, 1685).

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[8] On April 13, 2021, the Oklahoma legislature superseded the pre-COVID 19 version of OKLA. STAT. tit. 20, § 130 (Supp. 2020) and replaced it with the version that was in effect at the time of Petitioner's trial. *See* OKLA. STAT. tit. 20, § 130 (Supp. 2021).

[9] One of Petitioner's witnesses, Aimee Feather-Hall, was a local witness who testified remotely because she tested positive for COVID-19, such that she was not the subject of Petitioner's request for financial assistance to secure live presence of out-of-state witnesses. (*See* JT XVII, 3363). If not for the technology about which Petitioner complains, this witness would not have testified.

Of the relevant defense witnesses, M.S., Bruce Henson, Tiffany McFarlane, Stanville Coleman, and Scott Gimmer had minor technical difficulties during their testimony. The extent of these difficulties consisted of either: 1) the internet connection or video feed briefly malfunctioning; or 2) the video picking up unwanted background noise, which affected the audibility of the testimony. Nevertheless, the quick resolution of these issues ensured that the vast majority of their testimony was presented without issue. *Vasquez*, 564 P.3d at 904-905; (*see e.g.*, JT VII, 1685; JT XVI, 3099-3107, 3135-3165).

Furthermore, the record reflects that during individual *voir dire*, Petitioner's trial counsel specifically asked multiple potential jurors if they could give the same weight, attention, and credibility to testimony presented via videoconference, as opposed to live, in-person testimony, and all responded in the affirmative. Moreover, in line with the court's pretrial order, the jury instructions in Petitioner's case specifically directed jurors to consider videoconference testimony in the same manner as they would a live witness. (*See* JT IV, 1123; JT V, 1152-1153, 1185, 1227, 1260, 1288, 1307, 1326-1327, 1372-1373; JT VI, 1395, 1435-1436, 1454-1455, 1484, 1514; JT XVI, 3100, 3135-3138; JT XVII, 3292, 3314).

The record also indicates that the State and Petitioner utilized different videoconferencing platforms to facilitate remote witness testimony and the State's chosen platform—Google Meet—presented no technical difficulties. (JT XVIII, 3551). The State repeatedly suggested to Petitioner that he could also utilize Google Meet and even offered to share the prosecutor's Google account for that purpose. (JT XVIII,

3551). However, "it appeared that . . . [Petitioner] just refused to want to try something else." (JT XVIII, 3551). Notably, Petitioner's counsel claimed the issue was with the internet used by the remote witnesses but then stated that the witnesses had been directed "to be somewhere where [they] had a strong internet connection." (JT XVIII, 3551).

Importantly, COVID-19 remained a glaring issue throughout the entirety of Petitioner's trial, to the point where two of the State's guilt-stage witnesses—Lieutenant Jay Brasket, who responded to the missing person's report about Ms. Toombs, and Ms. Morales, a material witness for the State—testified remotely due to testing positive for the virus. Moreover, a third State witness (Dr. Stephanie Bryant, Ms. Toombs' obstetrician), who was key in establishing H.T.'s viability, likewise testified via videoconference from Hawaii. Additionally, Ms. Toombs' mother delivered her victim impact statement remotely during the penalty phase. (JT VII 1677; JT IX 1932-1997; JT XII 2369-2370; JT XIV, 2791-2792; JT XV, 2991).

Other portions of the record provide further details of ongoing COVID-19 concerns and steps taken by the state district court to minimize risk of exposure: 1) Petitioner's trial was continued in February, 2021, due to cancellation of the McClain County jury docket for COVID-19 reasons; 2) there was a sheet of Plexiglass utilized in the courtroom during the trial and "masks . . . face shields, hand sanitizer, and other PPE" were made available; 3) the general *voir dire* in this case took place at a large exposition center to allow more room for social distancing; and 4) prior to the trial's commencement, Petitioner's own counsel, in requesting a continuance, noted

that "COVID numbers are extremely high." (*See* 2/24/21 Tr. at 4; JT I, 4-5; JT IV, 979, 1057-1058)

Although Petitioner's trial counsel claimed that the minor technical difficulties associated with certain witness testimony had a "negative impact" on the jury, the State, in response, pointed out that the technical difficulties perceived by Petitioner did not appear to affect the jury's level of engagement or attentiveness. (JT XVIII, 3547-3553). The court likewise concluded that the "videoconferencing testimony utilized by both the State and [Petitioner] was effective," specifically articulating the following observations of the proceedings:

> With regard to asking witnesses to slow down and speak up, I believe Mr. White [prosecutor] has been asked to slow down several times during this trial. Live witnesses were asked to slow down and speak up repeatedly. I certainly have not kept count, but would venture a guess that the times live witnesses were asked to slow down and speak up is commensurate with the times that videoconferencing witnesses were asked to do the same; so there was no difference with regard to that aspect.
>
> In the [case of a] couple of witnesses where there was freezing of the video momentarily, which did again catch up quickly—and . . . the Court does note that the audio was never delayed or unavailable. It was . . . only the video that on a couple witnesses was delayed or froze a couple times.
>
> The Court did, at times, check its download speed just to make sure that the issue was not within this courtroom and this courthouse, and it was not. The upload and download speeds provided by our internet was more than sufficient to . . . effectively have videoconferencing in real time.
>
> With regard to [Mr.] Coleman's inability to identify the [Petitioner], there was no allegation . . . that Mr. Coleman's description of Daniel Vasquez and the person that he testified about was not one and the same Daniel Vasquez who was seated in court. The Court finds if he failed to identify [Petitioner] because he didn't properly know how to use the platform, it was not prejudicial in any way; as through both the direct,

> cross, and redirect, . . . it was implied that he was speaking of the one and the same defendant in this courtroom.
>
> With regard to Aimee Feather, she effectively testified. Maybe she was called at a different time than the preference would have been, but the Court has witnessed that a few times during this case. The State's rebuttal witness could only be here at a certain time. I don't know this, but I assume the State would have preferred to call that rebuttal witness in complete rebuttal at the end of the testimony. However, because of certain things, we have called witnesses out of time; that has happened. It has—it has not been a problem up to this point.
>
> The Court further wants to note two things about COVID: Number one, both the State and the defendant have had witnesses who have either been exposed or diagnosed with COVID who have been allowed to testify in this court effectively. Had videoconferencing not been utilized and not [been] provided for by statute and the court rules, those witnesses would not have been allowed to have been there and testify in this trial. That, ladies and gentlemen, would have been detrimental to [Petitioner].
>
> And, lastly, the Court is reviewing the COVID numbers for McClain County. COVID has surged—I believe we can all agree, and if anyone does not agree, feel free to make a record on that conclusion—during the pendency of this trial. COVID was high when we summoned our jurors, and we have gone through many great lengths to keep them safe and, up to this point, have done so. During the last four weeks of this trial, the COVID numbers in McClain County have surged. McClain County has more COVID than any of the surrounding counties. During the pendency of this trial, we have learned that there are no available hospital beds nor ICU beds for COVID patients. Therefore, because of the times, because of the emergency circumstances of this trial, the Court finds good cause to use the videoconferencing testimony as it was utilized in this particular manner.

Vasquez, 564 P.3d at 904-905; (JT XVIII, 3553-3556).

3. Direct Appeal Proceedings.

On direct appeal, Proposition V of Petitioner's brief-in-chief argued that the district court abused its discretion by not permitting the presentation of wholly live, in-person testimony in the penalty stage of his trial, which, in turn, violated his

constitutional rights. *Vasquez*, 564 P.3d at 902. More specifically, Petitioner argued: 1) that the minor technical issues associated with the presentation of some remote mitigation witnesses ran afoul of the Eighth Amendment; and 2) the court's refusal to authorize funding to have these witnesses physically present during the trial violated his right to compulsory process under the Sixth Amendment. *Id*.

In a published opinion wholly rejecting Petitioner's claims, the OCCA found that the record supported a finding that videoconference testimony was appropriate under the circumstances in this case. Recognizing that a core component of the Eighth Amendment affords a capital murder defendant the opportunity to "'present relevant mitigating evidence for consideration by the jury[,]'" *Vasquez*, 564 P.3d at 905 (quoting *Tryon v. State*, 423 P.3d 617, 644 (Okla Crim. App. 2018) (citing *Tennard v. Dretke*, 542 U.S. 274, 284 (2004))), the OCCA clarified that, pursuant to this Court's precedent, "presentation of mitigation evidence is not unfettered and is subject to a state's 'authority to set reasonable limits upon the evidence a [capital] defendant can submit, and to control the manner in which it is submitted.'" *Vasquez*, 564 P.3d at 905 (quoting *Oregon v. Guzek*, 546 U.S. 517, 526 (2006)). Thus, based on this Court's holding that the Eighth Amendment is violated only when mitigation evidence is "limited too severely" or excluded altogether, *Vasquez*, 564 P.3d at 905 (citing *Johnson v. Texas*, 509 U.S. 350, 361 (1993)), and in light of the ongoing global COVID-19 pandemic "at the time of [Petitioner's] trial," the OCCA determined that, under Oklahoma law, the state district court's "refusal to allow [Petitioner] to physically bring in numerous witnesses from other states while allowing them to testify via

videoconference can hardly be viewed as an unreasonable limitation on the manner in which his mitigation evidence was presented." *Id*. In so finding, the OCCA highlighted: 1) Petitioner "faced no limitations on the presentation of mitigation evidence, only on the *manner* of its presentation[;]" 2) only seven of Petitioner's seventeen mitigation witnesses testified via videoconference; and 3) any technical problems presented by the remote testimony were "minor and did not affect the jury's ability to consider the evidence." *Id*. (emphasis added).

Regarding Petitioner's Sixth Amendment compulsory process claim, the OCCA determined, based on its own precedent and this Court's precedent, that to show a violation Petitioner must demonstrate

> (1) that the court prevented him from obtaining or presenting evidence; (2) that the court's action was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose; and (3) that the excluded evidence "would have been relevant and material, and . . . vital to the defense."

Vasquez, 564 P.3d at 905-906 (quoting *Harris v. State*, 450 P.3d 933, 945 (Okla. Crim. App. 2019) (quoting *Washington v. Texas*, 388 U.S. 14, 16 (1967))). Based on its prior holding in *Harris*, which stated that there is no absolute right to live, in-person testimony under the Compulsory Process Clause, the OCCA determined: 1) Petitioner "was not prevented from obtaining or presenting" mitigation evidence; and 2) the district court's extensive rationale for denying Petitioner's request for funding for live, in-person testimony during the COVID-19 pandemic was valid. *See Vasquez*, 564 P.3d at 906.

On July 24, 2025, Petitioner filed a Petition for Writ of Certiorari with this Court seeking review of the OCCA's decision. This brief in opposition follows. For the following reasons, this Court should deny the Petition.

REASONS FOR DENYING THE WRIT

Rule 10 provides that "a petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Here, Petitioner asks this Court to grant certiorari to consider whether: 1) "the Eighth Amendment allow[s] the State to prevent live mitigation testimony in favor of a capital defendant based on financial reasons alone[;]" and 2) "[i]f so . . . does video testimony subject to extensive technical difficulties that blunted" its impact "deprive the defendant of his right to meaningfully present mitigation evidence[,]" in contravention of *Lockett v. Ohio*, 438 U.S. 586 (1978). (Pet. at i, 14). Petitioner contends that the OCCA erred in determining "that as long as the trial judge does not preclude a witness from testifying, the Constitution is satisfied even if the quality of that testimony is impersonal on a screen and subject to irritating technological glitches[.]" (Pet. at 14). Petitioner further contests the OCCA's approval of the district court's restrictions on mitigation testimony, arguing that "forcing the accused to present witnesses in mitigation via video-conferencing should be limited to the most extreme of circumstances[,]" and "the State trying to save money cannot be among them." (Pet. at 14). In support, Petitioner insists: 1) the spread of COVID-19 was not a serious concern underlying the state district court's decision; and 2) live, in-person testimony is simply "more powerful than listening to someone on a television screen[,]" because

any "empathetic bonding" between Petitioner and his mitigation witnesses could not "be conveyed in any meaningful way through the video-conferencing process, and especially when that process is faulty as was the case here." (Pet. at 14-15).[10]

Respondent respectfully submits that a grant of certiorari review to consider these issues is unwarranted. Petitioner fails to identify a compelling issue worthy of this Court's review, given that he has not alleged a split amongst state or federal courts, nor has he alleged that the OCCA's ruling in any way conflicts with a decision of this Court. Furthermore, Petitioner's case is a poor vehicle for the question presented because: 1) Petitioner now improperly attempts to advance an argument never specifically presented to, or addressed by, the OCCA below; and 2) it is undeniable that the district court's decision to require videoconference testimony was not based solely on financial reasons. Finally, and critically, the OCCA's decision was well in accordance with this Court's precedent. *See* Sup. Ct. R. 10.

For the foregoing reasons, the writ of certiorari should therefore be denied.

A. Petitioner seeks review on a question advanced for the first time in this Court.

This Court's "traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (collecting cases) ("The Court has consistently refused to decide federal constitutional issues raised for the first time on review of

[10] In contrast to direct appeal proceedings, Petitioner does not appear to raise a Sixth Amendment compulsory process claim in the instant Petition; thus, this brief in opposition will address only Petitioner's Eighth Amendment claim. (*See* Pet. at i, 2, 13-15).

state court decisions . . . ."). The rationale for declining to consider claims not first raised and addressed in lower courts is twofold: First, it furthers the interests of comity and federalism by allowing state courts the first opportunity to address federal law concerns and resolve any potential questions on state-law grounds; and second, "the creation of an adequate factual and legal record" developed by the court below can better aid this Court's understanding and determination of the case at issue. *Adams v. Robertson*, 520 U.S. 83, 90-91; *see also Lucia v. S.E.C.*, 585 U.S. 237, 244 n.1 (2018) (noting this Court will "ordinarily await 'thorough lower court opinions to guide our analysis of the merits'" (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012))); *Illinois v. Gates*, 462 U.S. 213, 221-222 (1983).

Here, the Petition frames the question presented in a way that ignores the valid COVID-19 concerns underlying the OCCA's decision, such that Petitioner effectively requests this Court take up a legal question that the OCCA did not actually reach—*i.e.*, whether the Eighth Amendment permits limitations on mitigation testimony due to "*financial reasons alone*." (*See* Pet. at i, 14-15 (emphasis added)). This question is one of first impression because a review of the OCCA's decision clearly indicates: 1) COVID-19 was a material and inseparable component of its ultimate holding on this issue; and 2) in lower court proceedings, Petitioner's argument that "[t]his is *not* a COVID claim" was relegated to his reply brief. *See* Reply Brief for and on Behalf of Appellant Daniel Raul Santiago Vasquez at 13-16, *Vasquez*, 564 P.3d 880 (No. D-2021-1249); *see also Vasquez*, 564 P.3d at 905; Original Brief for

and on Behalf of Appellant Daniel Raul Santiago Vasquez at 65-67, *Vasquez*, 564 P.3d 880 (No. D-2021-1249).

In his opening brief, Petitioner did not ask the OCCA to decide whether limitations may be placed on mitigating evidence for "financial reasons alone." Rather, Petitioner focused on his allegation that he was not able to present an effective case in mitigation, with a brief aside accusing the district court of "simply want[ing] to save the State a buck[.]" Original Brief for and on Behalf of Appellant Daniel Raul Santiago Vasquez at 66, *Vasquez*, 564 P.3d 880 (No. D-2021-1249). In his reply brief, Petitioner then asserted that "[t]his is *not* a COVID claim" and that the court "simply" made "a money saving decision[.]" Reply Brief for and on Behalf of Appellant Daniel Raul Santiago Vasquez at 13, *Vasquez*, 564 P.3d 880 (No. D-2021-1249). The OCCA's rules require that all "contentions of the appellant" be set forth in the opening brief and provide that propositions of error "advanced for the first time in any reply brief shall be deemed waived and forfeited for consideration." Rules 3.4(F)(1), 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, tit. 22, Ch. 18, App. (2025).

Thus, Petitioner's current reframing of the issue presented appears to advance a new argument, indeed a new constitutional claim, for why he should prevail in this case. This defect renders the instant Petition improper for certiorari review. *Compare Vasquez*, 564 P.3d at 902-906 *with* (Pet. at i, 13-15); *see also Byrd v. United States*, 584 U.S. 395, 404 (2018) ("Because this is 'a court of review, not of first view,' . . . it is

generally unwise to consider arguments in the first instance . . . ." (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005))); *Cardinale*, 394 U.S. at 438.

B. Certiorari review should be denied because Petitioner's case is a poor vehicle for the question presented.

Certiorari review is also unwarranted here because Petitioner's case is a poor vehicle for resolution of the question presented. It is simply undeniable here that the state courts' decisions were *not* purely financial in nature. This Court does not issue advisory opinions "advising what the law would be upon a hypothetical state of facts." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (internal quotation marks omitted); *see McClung v. Silliman*, 19 U.S. 598, 603 (1821) ("The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed.") (emphasis in original); *see also The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (this Court only decides "questions of public importance" 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 the issue is posed less abstractly").

The state district court and OCCA both relied upon the COVID-19 pandemic in explaining their decisions relating to videoconferencing testimony. *See Vasquez*, 564 P.3d at 902-906; (O.R. VIII, 1380-1386; JT XVIII, 3553-3556). Petitioner's assertion to the contrary is simply false. Therefore, a decision by this Court in this case would not answer the presented question of whether a capital defendant can be denied funds to present in-court testimony for purely financial reasons.

C. Certiorari review should be denied because the question presented lacks merit under this Court's precedent.

As a final matter, the OCCA's analysis, outlined above, clearly comports with this Court's precedent and the Constitution, such that the nature of Petitioner's question is meritless.

As relevant here, the OCCA, in its published opinion, scrupulously analyzed: 1) Rule 34 and its application to the facts and circumstances giving rise to the district court's decision to require Petitioner's out-of-state witnesses to testify remotely; 2) the overall quality of the videoconference testimony, finding that it was only occasionally (and briefly) affected by minor technical difficulties; and 3) the district court's determination that any technical problems did not affect the jury's ability to meaningfully consider the evidence. *See Vasquez*, 564 P.3d at 902-906. In so doing, the OCCA specifically relied upon this Court's precedent in holding that presentation of mitigation evidence, including "the manner in which it is submitted," *Vasquez*, 564 P.3d at 905 (quoting *Guzek*, 546 U.S. at 526), can be limited by state courts, provided that the limitations do not "'cut off in an absolute matter the presentation of mitigating evidence . . . or . . . limit[] the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.'" *Johnson*, 509 U.S. at 361 (quoting *McKoy v. North Caroline*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment)); *cf. United States v. Tsarnaev*, 595 U.S. 302, 320 (2022) (reaffirming states have authority to reasonably limit mitigation evidence a capital defendant may present, as well as "'control the manner in which it is submitted'") (quoting *Guzek*, 546 U.S. at 526)); *see also United States v. Saipov*, 412 F. Supp. 3d

295 (S.D.N.Y. 2019) (holding capital murder defendant had no constitutional right to present live, in-person mitigation witnesses when witnesses had applications for nonimmigrant visas denied and government offered to explore alternative testimony options, such as closed-circuit television).

Thus, although cases such as *Lockett* and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), stand to

> prevent a State from placing relevant mitigating evidence "beyond the effective reach of the sentencer," . . . those cases and others in that decisional line do not bar a State from guiding the sentencer's consideration of mitigating evidence. Indeed, we have held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable death penalty.'"

Johnson, 509 U.S. at 362 (quoting *Graham v. Collins*, 506 U.S. 461, 474 (1993)); *Boyde v. California*, 494 U.S. 370, 377 (1990) (quoting *Franklin v Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion)). Here, the OCCA determined that—despite Petitioner's attempts to either ignore or minimize the severity of the pandemic as a circumstance in this case—COVID-19 was still a very real threat in McClain County at the time of Petitioner's trial. Consequently, Rule 34 served as a permissible vehicle to place limitations upon the *manner* in which Petitioner's out-of-state mitigation witnesses could testify because these limitations did not divest Petitioner of the *ability* to present this evidence, nor did they hinder the jury from fully considering it.[11] *See Vasquez*, 564 P.3d at 905.

[11] It is worth reemphasizing that one of Petitioner's local mitigation witnesses, Ms. Feather-Hall testified via videoconference due to contracting COVID-19. Thus, despite his claims otherwise, this circumstance indicates that Petitioner actually *benefitted* from the use of

Moreover, despite Petitioner's attempts to misrepresent the quality of the remote mitigation testimony as a "technical and legal disaster," (Pet. at 6; *see also* Pet. at 9), there is ample evidence in the record indicating this was not the case. (*See, e.g.*, JT XVIII. 3553-3554). Furthermore, the number of witnesses Petitioner presented in person outnumbered those who testified via videoconference.[12] *See Vasquez*, 564 P.3d at 903-904; (JT XVI, 3083-3108, 3136-3165; JT XVII, 3272-3364, 3462-3467). These significant facts underpinned the OCCA's finding that Petitioner

> faced no limitations on the presentation of mitigation evidence, only the manner of its presentation. As shown by the record, seventeen witnesses testified on [Petitioner's] behalf during the penalty phase and only seven of these by video conference. The trial court found the technical problems that occurred during the presentation of some of the witness' video testimony were minor and did not affect the jury's ability to consider evidence. Nothing in the record shows [Petitioner's] Constitutional right to present mitigation evidence was impaired and we find no Eighth Amendment violation.

Vasquez, 564 P.3d at 905.

One additional point buttresses the OCCA's conclusion. The district court specifically instructed the jury that it was to consider the videoconference evidence in the same manner as it would an in-person witness. *Id*. at 904. This instruction had the effect of ensuring that the jury meaningfully considered *all* of Petitioner's mitigation evidence, regardless of the presentation method. *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) ("Jurors routinely serve as impartial fact finders in

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videoconference technology, given that without it, he would not have been able to present this witness at all. (*See* JT XVII, 3363).

[12] Numerically speaking, 41% of Petitioner's mitigation witnesses testified via videoconference, while the other 59% testified in person.

cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions."). In short, despite Petitioner's claims, the record in this case demonstrates that, even with the use of videoconference as a method for relaying portions of the defendant's mitigation case, the jury was permitted to consider "'any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffer[ed] as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 316 (quoting *Lockett*, 438 U.S. at 604); *see also Eddings*, 455 U.S. at 113-114.

Consequently, based on the foregoing, the OCCA in this case appropriately applied this Court's settled precedent, ultimately finding no Eighth Amendment violation. Certiorari review should be denied.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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