No. 22-511

# In The
# Supreme Court of the United States

THOMAS MICHAEL DIXON,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas**

## BRIEF IN OPPOSITION


K. SUNSHINE STANEK
Lubbock County Criminal District Attorney

AMANDA SAY
First Assistant District Attorney

LAUREN MURPHREE
*Counsel of Record*
Assistant Criminal District Attorney
LUBBOCK COUNTY CRIMINAL DISTRICT ATTORNEY'S OFFICE
P.O. Box 10536
Lubbock, Texas 79408
(806) 775-1133
LMurphree@lubbockcounty.gov



COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTIONS PRESENTED

**FIRST QUESTION PRESENTED:** Did the intermediate court of appeals err in overruling Petitioner's confrontation objections when the statements were either not testimonial or not preserved, and neither implicated this Court's holding in *Hemphill*?

**SECOND QUESTION PRESENTED:** Whether the TCCA violated the *Chapman* harmless error rule when it held—not that there was sufficient evidence to support the verdict absent the alleged error—but that the error, if any, was harmless beyond a reasonable doubt.

**THIRD QUESTION PRESENTED:** Contrary to Petitioner's question presented, the TCCA did not apply a triviality test to any of the three alleged closures. Instead, the TCCA held that Petitioner did not preserve error in the first two instances, and there was no violation in the third instance when the courtroom was filled to capacity such that additional members of the public could not also attend.

Is review warranted where Petitioner did not adequately preserve his objection to the alleged closures, there was never a total closure of the courtroom, and the TCCA did not address partial or trivial courtroom closures?

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## BRIEF IN OPPOSITION

## INTRODUCTION

Far from a conviction based on unconfronted hearsay from only two witnesses where the public was given no right to attend, Petitioner received a highly publicized multi-week trial that involved over sixteen days of testimony and over 1,800 exhibits. The State's evidence consisted of extensive witness testimony, physical evidence, DNA evidence, Petitioner's own text messages and voice mails to co-defendant David Shepard, and Shepard's historical cell site location information that corroborated his sua sponte confession.

Petitioner testified in his own defense and offered an alternative theory for his arrangement with Shepard. Petitioner presented several of his own witnesses, including his own expert at trial. After his first trial resulted in a mistrial, a jury convicted Petitioner in his second trial of two counts of capital murder.

## JURISDICTION

The Texas Court of Criminal Appeals (TCCA) is the state court of last resort for criminal cases in Texas. The TCCA refused Petitioner's Petition for Discretionary Review on August 24, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

### A. FACTUAL BACKGROUND

In 2011, Thomas Michael Dixon (Petitioner) had everything going for him: as a successful plastic surgeon he was married with three children and a growing medical practice. 17R42–43, 55–56. In the course of his medical practice, Petitioner met Richelle Shetina—a former professional cheerleader—who was tall, beautiful, and paid attention to Petitioner in a way his wife of over twenty years did not. 17R83. Petitioner and Richelle began dating and Petitioner's marriage dissolved. 17R84–85. Newly single, Petitioner also befriended David Shepard and the two became fast friends. 17R59–60.

In the summer of 2011, Richelle broke things off with Petitioner. 17R89–90. Petitioner was, by his own admission, heartbroken. He "sold [his] family down the river" for Richelle. 19R35. Petitioner soon learned that Richelle had left him for another physician—Dr. Joseph Sonnier, III, a pathologist in Lubbock, Texas. 17R96. Wounded, Petitioner became obsessed with Sonnier and his relationship with Richelle. 17R105, 114–18. Shepard, eager to stay in Petitioner's good graces, became Petitioner's confidant regarding Richelle and Sonnier, and later, his accomplice. 8R55-56.

On July 10th, 2012, Sonnier was brutally murdered in his home. The assailant entered the home through Sonnier's back windows where he shot Sonnier five times and stabbed him eleven times. Pet. App. 4.

***The investigation***

Sonnier's body was found the day after his murder. Pet. App. 4. Richelle's interview with the Lubbock Police Department (LPD) led detectives to Petitioner's house outside of Amarillo where they interviewed Petitioner and his new girlfriend, Ashley Woolbert, separately. Pet. App. 4–5. Petitioner denied any involvement with the death of Sonnier, and any knowledge of what might have happened. In his first contact with law enforcement, Petitioner told the officers he did not know anything about Sonnier and that

he was shocked his name was even mentioned. Pet. App. 5.[1]

But, Woolbert mentioned to LPD Detective Ylanda Pena that the two had dinner with Shepard the night before—a fact Petitioner omitted when speaking to LPD Detective Zach Johnson. Pet. App. 5. As soon as Johnson and Pena left Petitioner's house, Petitioner and Shepard exchanged over a dozen phone calls and text messages, including a text from Petitioner to Shepard: "Just had visit from Lubbock PD, going asap, Ash said came by, said gave cigars from Bermuda, they will see our com phone records tonight anywhere, lay low." *Id.*; 12R116–17.

In the following days, Shepard attempted suicide by slitting his wrist and overdosing on pills. Pet. App. 5. Overcome with emotion one night, Shepard confessed everything to his roommate, Paul Reynolds. 8R70–78. Shepard told Reynolds of the elaborate murder-for-hire plot. Petitioner had given Shepard Sonnier's home address, work address, a description of what he drove, and where he practiced ballroom dancing. Shepard followed Sonnier for months and would often text Petitioner while watching Sonnier.

On July 10, 2012, Shepard waited in Sonnier's backyard for him to arrive. When he did, Shepard entered Sonnier's home where he shot and stabbed Sonnier. Shepard told Reynolds that Petitioner gave him the gun that he used to shoot Sonnier and where

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[1] At trial, Petitioner admitted these statements were lies. Pet. App. 71.

he tossed it. A dive team recovered the gun from a lake in Amarillo where Shepard indicated he had disposed of it. Pet. App. 5. Once recovered, law enforcement traced the gun to Monty Dixon—Petitioner's brother. 8R70–78; 12R200, 227.

Shepard told Reynolds that Petitioner paid him in three silver bars for the murder. Pet. App. 4. Immediately after the murder, Petitioner also gave Shepard three cigars. *Id*. After Shepard's attempted suicide, Petitioner gave Shepard stitches and suggested that he leave town. Pet. App. 5. Shepard pawned one silver bar on June 15, 2012—Father's Day weekend, and two the morning of July 11—the day after Sonnier was murdered. 7R47–48.

After the murder, Petitioner deleted most of his text messages and jumped in the pool with his phone. Pet. App. 5. What Petitioner did not realize was that when he previously plugged his phone into his laptop, some of the data from the phone transferred to the laptop. *Id*. Detectives recovered approximately fifty percent of Petitioner's text messages. The text messages revealed an ongoing plot to follow Sonnier, learn his movements, and to "get r done." After the murder, the calls and texts between Petitioner and Shepard revealed a continued plot to conceal the murder. Detectives also obtained Petitioner's and Shepard's historical cell site location information (CSLI) from their respective cell-service providers via court orders pursuant to controlling Texas law at the time. Pet. App. 67 n.1.

***The trial***

At trial, the jury heard more than sixteen days of testimony from sixty witnesses, and over 1,800 exhibits were admitted. Pet. App. 63. Petitioner's credibility was damaged from the outset of trial with proven lies to law enforcement. Pet. App. 70–71. Petitioner testified at trial and offered an alternative theory about his arrangement with Shepard. The State presented Shepard's CSLI to the jury at trial, demonstrating months of travel to parts of Lubbock he knew Sonnier to frequent—Sonnier's home, Richelle's home, and a local dance studio. *Id*.

Only a portion of two days of Petitioner's CSLI data was presented to the jury: Petitioner's location on March 12, 2012, and June 15, 2012. Pet. App. 70. The CSLI placed Petitioner and Shepard in Lubbock, pinging off the same cell towers around the same times on March 12, 2012. On direct examination, Petitioner told the jury he was in Lubbock that day but denied being with Shepard. The CSLI also showed Petitioner in Amarillo on June 15, 2012, the day that Shepard pawned the first silver bar. Pet. App. 69–71; 11R113.

Shepard's oldest daughter Haley testified that the Father's Day weekend after Shepard sold the first bar of silver, he took his daughters out for a lavish weekend of spending. When Haley asked her father where he got the money, he told her he did some work for Petitioner, and that Petitioner paid him early, but not to ask what kind of work it was. 15R74–75.

On the first day of voir dire, a sketch artist was temporarily excluded from a portion of jury selection, despite special accommodations being made for Petitioner's parents to be present in the courtroom. The trial court was unaware of the exclusion, but corrected it as soon as it was brought to his attention; the judge allowed the sketch artist to sit in the jury box for the remainder of the day. Petitioner objected to the temporary exclusion the following day. Pet. App. 72. Then, halfway through the presentation of evidence, the trial court excused spectators from the courtroom to admonish the attorneys on appropriate courtroom decorum, but several members of the public remained in the courtroom. Petitioner objected at the time of the ruling, but the trial court never ruled on the objection. Pet. App. 74–75. Last, the trial court implemented a "one in, one out" rule after the courtroom reached full capacity during closing arguments. After a three-week trial, the jury returned a verdict of guilty on both counts of capital murder. Petitioner objected to the "one in, one out" rule from closing arguments for the first time in his Motion for New Trial, filed after the verdict. Pet. App. 75–76.

### B. PROCEDURAL HISTORY

Petitioner was sentenced to life imprisonment without the possibility of parole on two counts of capital murder. Petitioner challenged the convictions via fifty issues on appeal to the Seventh District Court of Appeals at Amarillo, Texas. While the case was pending in the intermediate court of appeals, this Court

issued its decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), holding that the acquisition of historical CSLI was a search under the Fourth Amendment, requiring a warrant. The intermediate court of appeals reversed Petitioner's conviction, holding that it could not conclude that the erroneous admission of Petitioner's historical CSLI did not contribute to the verdict beyond a reasonable doubt. The intermediate court of appeals also held the trial court violated Petitioner's right to public trial and reversed the judgment.

The TCCA granted Respondent's Petition for Discretionary Review, and on January 15, 2020, reversed the intermediate court of appeals, holding that the admission of Petitioner's historical CSLI was harmless beyond a reasonable doubt, Petitioner did not preserve his objection as to the first two alleged public trial violations, and that there was no error as to the third. The TCCA remanded the case to the intermediate court of appeals to resolve the remaining issues on appeal.

On January 13, 2022, the Seventh District Court of Appeals affirmed the judgment as to the first count of the indictment, while reversing and rendering a judgment of acquittal for the offense charged under the second count of the indictment on double jeopardy grounds. The Seventh District Court of Appeals denied Petitioner's request for rehearing, and the TCCA refused Petitioner's Petition for Discretionary Review on

August 24, 2022. Petitioner filed his petition for writ of certiorari in this Court on November 22, 2022.



## REASONS FOR DENYING THE PETITION

**FIRST QUESTION PRESENTED: Did the intermediate court of appeals err in overruling Petitioner's confrontation objections when the statements were either not testimonial or not preserved, and neither implicated this Court's holding in *Hemphill*?**

### I. This case is an exceptionally poor vehicle to review what this Court already settled in *Hemphill* because the court below did not actually rule on the question presented.

The Petition distorts the intermediate court of appeals holding in what is an incredibly fact-bound dispute. Petitioner alleges two separate *Crawford* violations: first, the admission of Shepard's confession to Reynolds; second, Detective Johnson's testimony that Shepard implicated Petitioner during the investigation. Contrary to the arguments set forth in the Petition, the intermediate court of appeals held that the statement to Reynolds was not testimonial, and that Petitioner did not preserve his confrontation objection to either Reynolds' or Johnson's testimony. Because the holding below does not actually implicate this Court's recent decision in *Hemphill v. New York* in any way, review of Petitioner's first question presented is

unwarranted. *See generally Hemphill v. New York*, 142 S. Ct. 681 (2022).

*Hemphill* held that a party cannot "open the door" to evidence that would otherwise violate the Confrontation Clause. *Hemphill*, 142 S. Ct. at 692. The Petition asks whether *Crawford* is a one-way street, positing that the intermediate court violated *Hemphill* by allowing the State to present testimonial hearsay without affording Petitioner the same right. Yet, *Hemphill* did not address a defendant's right to present evidence.

Separate from his Confrontation objection, Petitioner also complained in the intermediate court of appeals that he was precluded from his right to present a defense when the trial court excluded Shepard's recantations on hearsay grounds. Pet. App. 24–25. The intermediate court of appeals held that because other means of presenting the same evidence were available, the trial court did not violate Petitioner's right to present a defense. Pet. App. 25–26. This case presents a different issue than that present in *Melendez-Diaz*, where this Court held that the prosecution cannot put the burden on a defendant to call a witness in order to confront testimonial hearsay. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324–25 (2009); *contra* Pet. 13. Here, Petitioner wanted to admit a specific set of statements from a non-testifying witness that were otherwise barred by the rule against hearsay. All the while, the original declarant was sitting in the Lubbock County jail and available to testify. Pet. App. 25. A defendant has a constitutionally guaranteed opportunity

to present a meaningful defense, but the opportunity is not absolute. *Nevada v. Jackson*, 569 U.S. 505, 509 (2013). "Only rarely" has this Court "held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, 569 U.S. at 509. Petitioner's right to confrontation was not violated when the trial court excluded specific statements that violated the rule against hearsay. The intermediate court of appeals also evaluated any possible error under a non-constitutional harm standard, finding none. Pet. App. 26. Neither the objection at trial regarding the exclusion of evidence nor Petitioner's arguments on direct appeal invoked the Confrontation Clause.

Nor was the scope of a defendant's right to present a defense before this Court in *Hemphill*. The purported conflict between the lower court's opinion and this Court's opinion is a legal fiction. Petitioner also fails to allege a conflict between the lower court's opinion and any other state court of last resort or federal circuit. Further, the opinion below emanates from an intermediate state court of appeals and is unpublished. The opinion has no precedential value throughout the state of Texas. Pet. App. 1. Petitioner has presented no compelling reason based in fact for this Court's review of the First Question Presented.

## II. *Hemphill* does not apply.

Petitioner frames the question presented as the lower court's ruling being in conflict with *Hemphill v.*

*New York*. But to this case, *Hemphill* is simply inapposite. Shepard's confession to Reynolds was not testimonial, and its admission did not violate Petitioner's right to confrontation. Petitioner did not object to Johnson's testimony on confrontation grounds, and the testimony was admissible under the rule of completeness because Petitioner first elicited portions of the very same statement. Not only is Petitioner's reliance on *Hemphill* misplaced, but neither the trial court nor the intermediate court of appeals erred in overruling Petitioner's limited objections.

### A. Shepard's statements to Reynolds are not testimonial.

It is axiomatic that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. In *Crawford v. Washington*, this Court concluded that the Sixth Amendment prohibits the introduction of testimonial statements by a nontestifying witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

Whether a statement qualifies as "testimonial" is usually determined by applying the "primary purpose" test. The primary purpose test asks whether, considering all of the relevant circumstances under which the statements were made, the primary purpose of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (quoting *Davis v. Washington*, 547 U.S. 813 (2006) and *Michigan v. Bryant*, 562 U.S. 344 (2011)). In *Clark*, this

Court applied the primary purpose test to statements made to non-law enforcement officers. Declining to adopt a categorical rule that all statements to non-law enforcement were not testimonial, this Court noted that "such statements are much less likely to be testimonial than statements to law enforcement officers." *Clark*, 576 U.S. at 246.

The intermediate court of appeals adopted this Court's analysis and noted "remarks made under more informal circumstances, such as those to family members or friends, are generally not testimonial under the Confrontation Clause." Pet. App. 16–17 (citing *Crawford*, 541 U.S. at 52). Highlighting that Petitioner described Reynolds as Shepard's "roommate, life-long friend, and best man at his wedding," the intermediate court of appeals concluded Shepard's spontaneous confession to Reynolds after a failed suicide attempt was not testimonial. Pet. App. 15, 17.

The lower court also held that Petitioner failed to preserve his confrontation objection to each of Shepard's statements admitted through Reynolds.[2] Additionally, Petitioner admitted his own transcript of Reynold's statement to law enforcement at trial. Pet. App. 13 n.7. The Petition misconstrues the lower court's holding of Shepard's statements to Reynolds

[2] Additionally, the intermediate court of appeals also held that to the extent any of the statements were admitted in error, they were largely cumulative of other evidence properly admitted or that Petitioner himself admitted. Pet. App. 13 n.7 (citing Petitioner's own admission of a transcript of Reynold's interview with law enforcement).

were admissible as a statement against interest. Pet. 12–13. The lower court addressed Petitioner's objections to *both* hearsay and confrontation when it held the statements both did not violate Petitioner's right to confrontation and met an exception to the rule against hearsay. Pet. App. 13–18.

### B. Petitioner did not timely object at trial to Johnson's testimony.

From the outset of trial, Petitioner demonstrated a clear intent to inject out of court statements made by David Shepard into evidence. Counsel for Petitioner testified at the motion for new trial hearing that his intent was to put Shepard's recantation before the jury. 23R61. It is undisputed—by the record evidence and counsel for Petitioner's own admissions—that Petitioner first elicited a hearsay statement from Detective Johnson about what Shepard said in his interview. Pet. App. 9; 23R62.

While cross examining Detective Johnson, Petitioner asked Johnson if Shepard implicated Reynolds. Pet. App. 9. Detective Johnson responded that he had. In response, the State asked Johnson:

> Q: You were asked whether David Shepard had implicated Paul Reynolds in this murder?
>
> A: Yes, sir.

> Q: Did David Reynolds—I mean, did David Shepard implicate Mike Dixon in this murder?
>
> A: Yes, sir, he did.

*Id*. Later, the State asked Johnson to explain how Shepard had implicated Petitioner. Petitioner eventually objected to hearsay but did not object on confrontation grounds. *Id*. The right to confrontation, though constitutional in nature, remains subject to preservation requirements and can be waived. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009); *Wright v. Quarterman*, 470 F.3d 581, 586–87 (5th Cir. 2006).

Though Petitioner has persisted in his confrontation arguments on appeal, he failed to object to Johnson's testimony on federal constitutional grounds at trial. This Court will only consider claims that were addressed by, or properly presented to, the state court that rendered the decision to be reviewed. 28 U.S.C. § 1257. The objection must be made "with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). In reviewing the sufficiency of objections, this Court has "applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review" before this Court. *Douglas v. State of Alabama*, 380 U.S. 415, 422 (1965). Before the trial court, Petitioner did not object to Johnson's testimony on

confrontation grounds where it could take corrective action if appropriate.[3] The intermediate court of appeals correctly held that Petitioner failed to preserve his confrontation objection to Johnson's testimony. Pet. App. 12.

### C. Johnson's testimony was admissible under the rule of completeness.

Even if Petitioner had timely objected on Confrontation grounds, the statements were admissible under the rule of completeness—an issue not addressed in the Petition. Petitioner first introduced portions of Shepard's statement to Johnson. Pet. App. 9. Respondent then asked Johnson about other statements made by Shepard during the same interview. *Id*. In *Hemphill*, the parties agreed the rule of completeness did not apply because the plea allocution was not part of any statement that Hemphill introduced. *Hemphill*, 142 S. Ct. at 693. This Court expressly declined to decide whether and under what circumstances the rule of completeness might allow the admission of testimonial hearsay against a criminal defendant. *Id*.

In his concurring opinion to *Hemphill*, Justice Alito wrote separately to address the possible application of the rule. *Id*. at 694 (Alito, J., concurring); Fed.

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[3] The Petition incorrectly argues that Respondent successfully argued to the trial court that Petitioner opened the door to Johnson and Reynold's testimony. Pet. 9 n. 12. Petitioner cites to "16R109," which dealt with the admission of opinion testimony from Shepard's daughter, a completely separate issue raised and rejected on direct appeal. Pet. App. 23–24.

Rule 106. In summarizing the Rule's intent, Justice Alito likened it to implied waiver, stating:

> By introducing part or all of a statement made by an unavailable declarant, a defendant has made a knowing and voluntary decision to permit that declarant to appear as an unconfronted witness. As a result, the defendant cannot consistently maintain that the remainder of the declarant's statement or the declarant's other statements on the same subject should not be admitted due to the impossibility of cross-examining that declarant. *Id*. (internal citations omitted).

The Texas counterpart to the federal rule of completeness provides in part that if a party introduces part of a conversation, writing, or recorded statement, an opposing party may inquire into any other part on the same subject, as well as introduce any other conversation or writing that is necessary to explain what was offered by the party's opponent. TEX. R. EVID. 107. Though slightly broader than the federal rule, both the Texas and federal rules serve the same purpose. *Compare* TEX. R. EVID. 107; *with* FED. R. EVID. 106. Because the statements admitted by both Petitioner and Respondent were part of Shepard's singular interview with law enforcement, the statements were admissible under either construction of the rule.

Petitioner asked Detective Johnson if Shepard had implicated Reynolds in his three-hour interview with law enforcement. Pet. App. 9. Respondent then asked a similarly narrow question—whether Shepard had also

implicated Petitioner. *Id*. This question was both 1) on the same subject; and 2) necessary to give the jury a full understanding of the conversation that transpired between Shepard and law enforcement. The testimony was admissible under the rule of completeness. TEX. R. EVID. 107.

This case is a poor vehicle to settle a question that was not squarely presented in the proceedings below. Because Shepard's statement to Reynolds was not testimonial, and the objection to Johnson's testimony was both not preserved and admissible on an independent state law ground, review is not warranted.

**SECOND QUESTION PRESENTED: Whether the TCCA violated the *Chapman* harmless error rule when it held—not that there was sufficient evidence to support the verdict absent the alleged error—but that the error, if any, was harmless beyond a reasonable doubt.**

The State obtained Petitioner's historical CSLI records via a court order shortly after the murder-for-hire in 2012. In 2018, while Petitioner's case was pending in the intermediate court of appeals, this Court issued its decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), holding that the acquisition of historical CSLI was a search under the Fourth Amendment, requiring a warrant. The intermediate court of appeals reversed Petitioner's conviction, holding that it could not conclude that the erroneous admission of Petitioner's historical CSLI did not contribute to the

verdict beyond a reasonable doubt. Pet. App. 127. The TCCA reversed the intermediate court of appeals, holding that the admission of Petitioner's historical CSLI was harmless beyond a reasonable doubt. Pet. App. 65.

Petitioner asks this Court to correct the TCCA's alleged persistent refusal to follow this Court's application of the harmless error rule first set out in *Chapman v. California* for constitutional error. *Chapman v. California*, 368 U.S. 18 (1967). What Petitioner ultimately seeks is error correction—a seldom granted ground for this Court's review that is not required here.

## I. Petitioner complains only of a misapplication of the well-settled *Chapman* harmless error rule.

In *Fahy v. State of Connecticut*, this Court distinguished the standard of review for constitutional error from a sufficiency of evidence review, holding that the Court is "not concerned . . . with whether there was sufficient evidence on which petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. State of Connecticut*, 375 U.S. 85, 86–87 (1963). *Chapman* cemented the *Fahy* rule insofar as it applied to constitutional error on direct appeal. *See Chapman*, 368 U.S. at 24 (holding that based on *Fahy* and the original common law

harmless error rule, the burden is on the beneficiary of the error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained).

Since *Chapman*, this Court has consistently phrased the rule as one of harmless error but has employed semantic variations on the reviewing court's duty to review all of the evidence and the beneficiary's burden of proof. *Neder v. U.S.*, 527 U.S. 1, 15 (1999) (quoting *Chapman* when describing test as "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Chapman*, 368 U.S. at 24)); *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995) (describing test as placing the burden on the non-aggrieved party); *Yates v. Evatt*, 500 U.S. 391, 405 (1991) (describing *Chapman* as requiring review of the entire record); *Arizona v. Fulminante*, 499 U.S. 279, 295–96 (1991) (describing the burden as resting with the State to prove the burden did not contribute to the verdict); *Satterwhite v. Texas*, 486 U.S. 249, 258–59 (1988) (describing test as not one of legal sufficiency but "whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."); *Delaware v. Van Arsdall*, 405 U.S. 673 (1986) (describing test as whether "a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt."); *Harrington v. California*, 395 U.S. 250, 251 (1969) (quoting *Chapman* as holding "before a federal constitutional error can be held harmless, the court must be

able to declare a belief that it was harmless beyond a reasonable doubt.") (*Chapman*, 368 U.S. at 24)).

While some cases highlight the beneficiary of the error's burden in demonstrating harmless error, others point to the reviewing court's role in assessing the error in light of all of the evidence adduced at trial. Whether the emphasis is placed on the court or the beneficiary, the core principle of the rule is unchanged: the error must not have contributed to the verdict obtained.

Similarly, not every instance of this Court's application of *Chapman* speaks directly to the effect of the error on the minds of the jurors. This is another distinction without a difference. The heart of *Chapman* is that the error must not have contributed to the verdict, and that it is not incumbent upon the victim of the error to make the showing. For over half a century, this Court has scrupulously applied the *Chapman* rule to federal constitutional error review. So too has the TCCA.

This Court has also denied certiorari where an actual, and certainly greater, departure from *Chapman* was present. In *Gamache v. California*, 562 U.S. 1083 (Cal. 2010), the Court denied certiorari notwithstanding the California Supreme Court's holding that "in the absence of misconduct, the burden remains *with the defendant* to demonstrate prejudice under the usual standard for ordinary trial error." *Gamache v. California*, 562 U.S. at 1083 (emphasis added). Because the lower court's analysis found that the error was

harmless, regardless of burden assignment, the Court denied certiorari. *See generally People v. Gamache*, 227 P.3d 342 (Cal. 2010). Similarly, this Court denied certiorari in *Anthony v. Louisiana*, 143 S. Ct. 29 (Mem.) (2022), where the lower court applied a sufficiency test in lieu of the *Chapman* harmless error rule. The departures in *Gamache* and *Anthony*, where this Court deemed review inappropriate, stand in stark contrast to the analysis employed by the TCCA below.

## II. The TCCA has consistently and correctly applied *Chapman*, including in this case.

Petitioner points to a number of cases from the TCCA in support of his position that the TCCA consistently and pervasively misapplies the *Chapman* rule. Pet. 15–18 (citing *Mallory v. State*, 752 S.W.3d 566 (Tex. Crim. App. 1988); *Davis v. State*, 203 S.W.3d 845 (Tex. Crim. App. 2006); *Saylor v. State*, 660 S.W.2d 822 (Tex. Crim. App. 1983)); and *Wesbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000).

Yet each of the cited cases correctly states and applies the *Chapman* rule. *See Mallory v. State*, 752 S.W.2d 566, 568 (Tex. Crim. App. 1988) (citing both *Chapman* and the Texas Rules of Appellate Procedure as requiring the reviewing court to determine beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment); *Davis v. State*, 203 S.W.3d 845, 849–50 (Tex. Crim. App. 2006, cert. denied) (citing several of this Court's cases in articulating and applying the *Chapman* harmless error rule);

*Saylor v. State*, 660 S.W.2d 822, 824–25 (Tex. Crim. App. 1983) ("The test to determine whether the error is harmless error is not whether a conviction could have been had without the improper argument, but whether there is a reasonable possibility that the argument complained of might have contributed to the conviction"); and *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000) (cert. denied) (citing *Chapman* and noting that the appellate court should calculate as much as possible the probable impact of the error on the jury in light of the other evidence).

Petitioner accuses the TCCA of reaching a conclusion that this Court has changed the rule. Pet. 15. In so doing, Petitioner incorrectly states that the TCCA held that this Court applied a sufficiency test in *Harrington*. Pet. at 15 (citing *Mallory*, 752 S.W.2d at 568). *Mallory* notes that the "*Chapman* test for harmless error has experienced numerous semantic modifications" but goes on to conclude:

> The comparative, yet distinguishable language utilized to express the tests for harmless error, is not indicative that they are erroneous or that they departed significantly from the analysis endorsed by the Supreme Court in *Chapman v. California*, supra. On the contrary, under the facts of the case each test was properly expressed.

*Mallory*, 752 S.W.2d at 569. Further, *Mallory* quotes this Court's holding that the evidence against *Harrington* was so overwhelming that the constitutional error was harmless beyond a reasonable doubt. *Mallory v.*

*State*, 752 S.W.2d at 568. *Mallory* plainly follows *Chapman* and supports the argument that original wording of the test does not amount to a departure from the rule.

Petitioner erroneously conflates a reviewing court's view of all the evidence in making its determination with sufficiency review. This Court and the TCCA have consistently rebuked sufficiency reviews for harmless error, looking instead to the impact the error might have had on the verdict, *in light of all of the evidence*. *See Arizona v. Fulminante*, 499 U.S. 279, 295–96 (1991) ("The Court has the power to review the record de novo in order to determine an error's harmlessness."). Petitioner's argument begs the question—how else would a reviewing court determine the effect of an isolated error on the verdict, if not with a view of the entire record?

Certainly, there exists no authority that a reviewing court should engage in such an endeavor. Instead, this Court's direction is to do exactly what the TCCA did, which was to review the magnitude of the error and determine whether it was harmless beyond a reasonable doubt. Pet. App. 69–72 (examining the weight of the alleged error in light of the remaining evidence for its probable effect on the verdict).[4] The rule is a nuanced one, to be sure, but this Court noted in *Chapman* that "[w]hile appellate courts do not ordinarily have

[4] Petitioner argues to this Court the TCCA held that the CSLI "had an effect on the verdict" but that it was not a significant pillar of the State's case. Pet. 18. The TCCA never so states.

the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard. . . ." *Chapman*, 386 U.S. at 24. The TCCA has demonstrated an unwavering commitment to correct and consistent application of the *Chapman* rule. This case presents no exception.

**THIRD QUESTION PRESENTED: Contrary to Petitioner's question presented, the TCCA did not apply a triviality test to any of the three alleged closures. Instead, the TCCA held that Petitioner did not preserve error in the first two instances, and there was no violation in the third instance when the courtroom was filled to capacity such that additional members could not also attend.**

**Is review warranted where Petitioner did not adequately preserve his objection to the alleged closures, there was never a total closure of the courtroom, and the TCCA did not address partial or trivial courtroom closures?**

## I. Petitioner seeks review of a claim that was not addressed by the decision below.

Unlike the right to public trial cases this Court has been inclined to review, the alleged closures in this case do not reflect a trial court's continued insistence that a person or persons be excluded from the courtroom over a defendant's objection. In order of occurrence, the alleged closures were inadvertent, incomplete, and inevitable. And error was not preserved in any of the instances.

In *Weaver v. Massachusetts*, this Court noted that when a defendant does not simultaneously object to a public trial violation, it deprives the trial court of the opportunity to cure the violation or explain the reason for the closure. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1912 (2017); *see also United States v. Ramirez-Ramirez*, 45 F.4th 1103, 1108–12 (9th Cir. 2022) (holding that appellant failed to preserve for review his right to public trial objection). For substantially the same reasons, the TCCA held that Petitioner failed to preserve his objection to the first two alleged closures and did not address the closures on the merits. Pet. App. 78–80. This Court has stated that when the highest state court fails to pass upon a federal question, the Court will assume it is because the question was not properly presented to the state court. *Street v. New York*, 394 U.S. 576, 581–82 (1969) (citing *Bailey v. Anderson*, 362 U.S. 203, 206–07 (1945)); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); 28 U.S.C. § 1257. This case requires no assumption—the TCCA expressly held that Petitioner failed to preserve his objection to the first and second alleged closures. Pet. App. 78–80.

Petitioner first alleges that a sketch artist was excluded from the morning portion of the first day of jury selection. Petitioner did not object to the temporary exclusion of the sketch artist until the following day. By the time Petitioner objected to the temporary exclusion, the trial court had already remedied the situation and invited the sketch artist to sit in the jury box for the remainder of jury selection. Because Petitioner did

not object to the exclusion of the sketch artist until the following day—after the trial court had remedied the issue—he did not preserve his complaint for appellate review. Finding that Petitioner offered no justification for his late objection, the TCCA held the brief exclusion of the sketch artist was not preserved for review. Pet. App. 72, 78–79. The TCCA did not address the merits of the closure. Pet. App. 78–79.

Next, Petitioner argues that the trial court's excusing of the trial audience—outside the presence of the jury—to admonish the attorneys violated his right to a public trial. Petitioner objected at the time the trial court excused the audience, but never obtained a ruling. Pet. App. 74–75. There continued to be back and forth on the issue of who was entitled to make objections; Petitioner then revisited the issue of the trial court's attempt to clear the courtroom:

> MR. HURLEY: I want to say for the record that the Court has excused about 50 people from the gallery, and they are not present for this conference, this discussion we're having. We object under the 6th Amendment, the 14th Amendment and right now it's basically all lawyers and staff from the D.A.'s office in the courtroom and all of the public has been excused.
>
> MR. POWELL: I don't know who this is, and Rod Hobson is here. Neither one of these guys are with our office. I don't know. I don't know who they are.

> MS. STANEK: Two people for the record from our office.
>
> MR. POWELL: Investigators working on the case—
>
> THE COURT: Well, there's going to be a $500.00 fine for everybody that makes some comment other than asking questions. These side bar comments are going to stop, or you're going to start writing checks, every one of you. Anybody have any questions about that? Pet. App. 74–75.

The District Attorney and Petitioner both responded "No, sir," and indicated there was nothing further the trial court needed to address. Petitioner then reinitiated conversation with the trial court about Shepard's video recorded statement. The trial court did not return to its initial unsuccessful order clearing the courtroom; and Petitioner never secured a ruling on his objection in accordance with Texas preservation rules. Nor did Petitioner object to the trial court's refusal to rule on the objection. Further, Petitioner continued discussions with the Court despite many members of the audience having exited the courtroom. Pet. App. 75.

To preserve a complaint for review, Texas Rule of Appellate Procedure 33.1 requires the record reflect that a timely complaint was made and that "the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal." TEX. R. APP. P. 33.1. Here, the record does not reflect a ruling by the trial

court on the matter of the alleged closure, and Petitioner never objected to the trial court's refusal to rule on the matter. The TCCA held that preservation is a systemic requirement that a reviewing court is obligated to address before reversing a conviction. In so doing, the TCCA held that Petitioner did not adequately preserve the issue for appellate review and declined to address the second alleged closure on the merits. Pet. App. 79–80.

Petitioner last objects to the "exclusion" of spectators from the courtroom during closing arguments because the courtroom was at or near full capacity. Petitioner first objected to the exclusion of extra spectators from closing arguments in his Motion for New Trial. The record does not clearly reflect when Petitioner was made aware of the trial court's stated "one in, one out" policy.[5] The record from the motion for new trial hearing reflects that closing arguments spanned the course of an entire morning, with multiple breaks given to the jurors and attorneys participating in the case. Pet. App. 75–76. When an objection to a public trial violation is made after the fact in a separate proceeding, the trial court is left with limited options to address or explain the error. *Weaver*, 137 S. Ct. at 1912.

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[5] The only mention in the record of when Petitioner became aware of the closing argument closure is in lead trial counsel's affidavit filed with Petitioner's Motion for New Trial, wherein he states: "After the trial, I learned that several people seeking to watch final arguments were told they could not enter the courtroom because the judge said there would be 'no standing' in the courtroom to watch final argument." 2CR761.

Petitioner has not adequately shown that he objected at the earliest possible opportunity.

Like in *Weaver*, the trial court here was unable to address the objection *as the issue was occurring*. *Id*. Because preservation of error—a systemic requirement on appeal—is an issue with each of the three alleged closures, this case presents a poor vehicle for review of the public trial issue because the TCCA's ruling was based on independent state law grounds (preservation of error) in the first two instances. The third alleged closure did not involve a closure at all, but an at-capacity courtroom. Critically, the TCCA did not address partial closures for any of the three alleged closures.

## II. There was never a total closure of the courtroom.

In addition to pervasive preservation issues, this case also does not involve a complete closure. A necessary predicate to prevail on a claim of public trial violation is showing that an actual closure transpired during the trial. Generally, a public trial violation occurs only where there has been a complete and prolonged closure or exclusion from the courtroom. *United States v. Osborne*, 68 F.3d 94, 98 (5th Cir. 1995).

On the first day of jury selection, courthouse security told a sketch artist that there was no room for him inside the courtroom, and he was not allowed to enter. Critically, this brief exclusion was not done at the direction of the trial court. The same day, the trial court

made special accommodations for Petitioner's parents to be present during voir dire. When the trial court became aware that the sketch artist had been excluded, it invited the artist to sit in the jury box for the remainder of voir dire. Pet. App. 140. Petitioner's first alleged closure was brief, inadvertent, and incomplete.

During trial, the trial court excused members of the public from the courtroom—outside the presence of the jury—to "admonish counsel for both sides on appropriate courtroom decorum." Pet. App. 140. Despite the excusal, members of the public remained in the courtroom. Pet. App. 140. This is contrary to Petitioner's claim that there was a "complete clearing" of the courtroom. Pet. 21, 22. Relative to the length of Petitioner's trial, the discussion that took place between the trial court and the attorneys was brief. Petitioner reinitiated conversation with the trial court after the trial court expressed its desire to conclude the discussions. Contrary to Petitioner's assertions, the trial court did not make any evidentiary rulings during the heated exchange. The discussions initiated by the trial court were limited to regulation of the trial and attorney behavior, and discussing prior rulings.

A court's interest in imposing reasonable restrictions on courtroom behavior in the interest of maintaining decorum is not at odds with the right to public trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1980) (Brennan J., concurring); *Cosentino v. Kelly*, 102 F.3d 71, 73 (2d Cir. 1996). The exchange that occurred after the partial closure was akin to a bench conference, or a discussion that could

have been held in chambers. "The presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum. Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as conferences are distinct from trial proceedings." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 598, n.23. This alleged "closure" was not only justified, but was also brief and incomplete.

Last, Petitioner complains of the "one in, one out" rule implemented during closing arguments and continues to disagree with the trial court's finding that the courtroom was at full capacity during closing arguments. The trial court found that the trial was moved to the largest courtroom in the Lubbock County Courthouse to accommodate the highly publicized trial. Pet. App. 140. It is undisputed that a large number of the public was in attendance.

Under *Presley*, "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Presley*, 558 U.S. at 215. The trial court found that during closing arguments, the courtroom was full. As Chief Justice Warren noted:

> Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the

> 'public' will be present in the form of those persons who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.

*Estes v. Texas*, 381 U.S. 532, 588–89 (1965) (Warren, C.J., concurring). Because the courtroom was full, there was no "closure" in violation of the Sixth Amendment. The TCCA correctly held that the "exclusion of spectators from the courtroom because the courtroom is full is not by itself a violation of the right to a public trial." Pet. App. 81 (citing *United States v. Downs-Moses*, 329 F.3d 253 (1st Cir. 2003); *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004); *Williams v. Nelson*, 172 Colo. 176 (1970)); *see also United States v. Cervantes*, 706 F.3d 603, 611–12 (5th Cir. 2013); *State v. Pinno*, 850 N.W.2d 207, 222–23, 235 (Wis. 2014). Because there was no closure during closing arguments, the trial court did not violate Petitioner's right to public trial.

Even if error was preserved, Petitioner's right to public trial was not violated because there was never a complete closure of the courtroom. Chief Justice Warren defined a trial as public if "in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, . . . when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings."

*Estes*, 381 U.S. at 58 (Warren, C.J., concurring). Where a courtroom is not completely closed to the public, the concerns upon which the right is predicated are not fully invoked. The exclusion of only some members of the public for a brief period does not rise to the level of a constitutional violation, particularly when other members of the public remain in the courtroom to ensure the fairness of the proceedings. *Osborne*, 68 F.3d at 98–99. In each instance Petitioner complains of, members of the public remained in the courtroom and observed the proceedings.

## III. Petitioner overstates the degree and practical significance of lower courts' approaches to partial closures, which do not conflict with this Court's precedent.

This Court's landmark decisions in *Waller* and *Presley* deal not with what constitutes a total closure of a courtroom in violation of the right to public trial but with what stages of a criminal proceeding the right applies. The question presented at the core of this case is whether the TCCA's treatment of a less-than-total closure is at odds with this Court's precedent, or the rest of the country's handling of partial closures. It is not.

The TCCA's decision did not address partial closures at all. Instead, the TCCA declined to address the first two alleged closures on the merits, and held there was no public trial violation when spectators who

wished to attend could not because the courtroom was filled to capacity.

Nonetheless, every Federal Court of Appeals and many state courts of last resort have adopted a less stringent test to deal with less-than-total closures. *See*, *e.g.*, *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015) ("Nearly all federal courts of appeals . . . have distinguished between the total closure of proceedings and situations in which a courtroom is only partially closed to certain spectators."); *Garcia v. Bertsch*, 470 F.3d 748, 752 (8th Cir. 2006); *United States v. Osborne*, 68 F.3d 94 (5th Cir. 1995). The courts are not uniform in their naming of the lesser tests, but there is very little practical difference in the way partial closures are handled. Recognizing that the *Waller* test needs to be less stringent in the partial closure context, courts almost uniformly agree that a substantial reason rather than an overriding interest may warrant a closure which still ensures some public access. *Simmons*, 797 F.3d at 413; *Bucci v. United States*, 662 F.3d 18, 23 (1st Cir. 2011); *Osborne*, 68 F.3d at 98–99. Lower courts generally recognize some form of a modified-*Waller* test, substantial-reason test, triviality or de minimis standards, or some combination of the above.

The Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits all recognize a "triviality" standard for courtroom closures that are so brief, inadvertent, or de minimis in nature that they do not touch on the Sixth Amendment right to public trial. *See*, *e.g.*, *United States v. Cervantes*, 706 F.3d 603,

611–12 (5th Cir. 2013); *United States v. Arellano-Garcia*, 503 F. App'x 300, 305 (6th Cir. 2012); *United States v. Greene*, 431 F. App'x 191, 197 (3d Cir. 2011); *United States v. Izac*, 239 F. App'x 1, 4 (4th Cir. 2007); *United States v. Perry*, 479 F.3d 885, 890–91 (D.C. Cir. 2007); *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003); *Braun v. Powell*, 227 F.3d 908, 920 (7th Cir. 2000); *United States v. Al-Smadi*, 15 F.3d 153, 154–55 (10th Cir. 1994); *Peterson v. Williams*, 45 F.3d 39, 42 (2d Cir. 1996). Also recognizing that not all courtroom closures fully implicate the Sixth Amendment right to public trial, the First, Eighth, and Eleventh Circuits each use a lesser partial closure test, looking to whether a substantial reason supports the closure as opposed to an overriding interest. *United States v. Laureano-Perez*, 797 F.3d 45, 77 (1st Cir. 2015); *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013); *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) (holding the exclusion of all attendees during a child's testimony was a complete closure but recognizing a lesser standard in the event of a partial closure).

Many state courts have also adopted a triviality standard. *See*, *e.g.*, *Douglas v. State*, 511 S.W.3d 852 (Ark. 2017); *People v. Lujan*, 461 P.3d 494 (Colo. 2020); *State v. Smith*, 876 N.W.2d 310 (Minn. 2016); *State v. Telles*, 446 P.3d 1194 (N.M. 2019); *Williams v. State*, ___ S.W.3d ___, 2022 WL 4490406 (Tex. Crim. App. 2022); *State v. Turcotte*, 173 N.H. 401 (New Hamp. 2020). Still, a few others have declined to adopt a lesser test, choosing instead to apply a *Waller* analysis even to less than

total closures. *See*, *e.g.*, *State v. Tucker*, 231 Ariz. 125 (Ariz. 2012); *People v. Jones*, 750 N.E.2d 524 (N.Y. 2001).

Both *Waller* and *Presley* dealt with total courtroom closures. The less stringent tests adopted by lower courts are not in conflict with this Court's precedent because they are factually distinguishable. Nor is there a circuit split of any significance: courts apply varying degrees of the *Waller* analysis for varying degrees of closures that do not rise to the degree present in *Waller* and *Presley*. Despite lesser tests circulating in the Federal Courts of Appeals and state courts of last resort for decades, this Court has thus far declined to entertain a true partial closure case on the merits. *See*, *e.g.*, *Smith v. Titus*, 141 S. Ct. 982 (Mem.) (2021) (Sotomayor, J., dissenting from denial of certiorari); *United States v. Lewis*, 2022 WL 216571 (6th Cir. 2022), cert. denied, 143 S. Ct. 328 (2022); *Drummond v. Houk*, 797 F.3d 400 (6th Cir. 2015), cert. denied, 136 S. Ct. 2012 (2016).

Petitioner asks this Court to review a question that is not presented by this case. Because the TCCA did not hold that the hearing outside the jury's presence was "trivial," in direct contravention of his argument and question presented, this case does not present the opportunity to address the extent of *Waller's* application to partial or trivial closures. In addition to the preservation issues inherent in the decision below, the alleged closures were also inadvertent, incomplete, and inevitable. Review is not warranted.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

K. SUNSHINE STANEK
Lubbock County Criminal District Attorney

AMANDA SAY
First Assistant District Attorney

LAUREN MURPHREE
*Counsel of Record*
Assistant Criminal District Attorney
LUBBOCK COUNTY CRIMINAL DISTRICT ATTORNEY'S OFFICE
P.O. Box 10536
Lubbock, Texas 79408
(806) 775-1133
LMurphree@lubbockcounty.gov

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