No. 23-5618
(CAPITAL CASE)

In the Supreme Court of the United States

GUSTAVO TIJERINA SANDOVAL,

Petitioner,

vs.

STATE OF TEXAS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Mr. Tijerina Sandoval and his counsel were not permitted to be present at initial proceedings for the pool of jurors assigned to his case. The potential jurors in that pool had received questionnaires, meant for the parties' use in jury selection, along with their jury summons. 26 RR 11; 42 RR 89.[1] The questionnaire provided jurors with information about Mr. Tijerina Sandoval's case, including his name, the decedent's name, facts of the alleged offense, and that the State had charged Mr. Tijerina Sandoval with capital murder and was seeking the death penalty against him. 7 CR 3101, 3113, 3115. At the proceeding conducted in the absence of Mr. Tijerina Sandoval and his counsel, the trial court had the discretion to excuse potential jurors for any reason they provided that the judge deemed "sufficient." Tex. Code Crim. Proc. Art. 35.03 § 1. In the proceedings below, the State conceded Mr. Tijerina Sandoval's exclusion from these proceedings violated his constitutional rights. State's Br. at 29. However, the court below held that this proceeding did not constitute a part of Mr. Tijerina Sandoval's trial and that, consequently, he had no constitutional right to be present. Mr. Tijerina Sandoval now seeks review of that decision in this Court.

In its Brief in Opposition, Texas argues that this Court should decline certiorari review because: 1) Mr. Tijerina Sandoval purportedly waived his due process claim below; 2) the first question presented in his petition is a matter of state law; 3) Mr. Tijerina Sandoval's arguments do not comport with his question presented; and

[1] We cite the record as follows, with X representing the volume number and Y representing the page number. The Reporter's Record is cited as X RR Y. The Clerk's Record is cited as X CR Y.

4) the petition does not present an important question of federal law. These arguments are predicated on a misunderstanding of relevant law and pose no obstacle to this Court's review.

I. Mr. Tijerina Sandoval's Constitutional Right to Be Present at the Proceeding Was Raised and Decided by the Court Below.

This Court will review claims "pressed or passed upon" in a state court. *Illinois v. Gates*, 462 U.S. 213, 218–19 (1983) (citing *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435–436 (1940)). That standard requires that a claim must "*either* be raised or squarely considered and resolved in state court." *Id.* at 218 n.1. Pursuant to Texas Court of Criminal Appeals ("TCCA") precedent at the time he filed his brief, Mr. Tijerina Sandoval alleged that the trial court violated his rights under the Sixth Amendment's Confrontation Clause when it excluded him from the jury excusal proceedings in his case. *See Miller v. State*, 692 S.W.2d 88, 90 (Tex. Crim. App. 1985) (evaluating claim that appellant's right to be present was violated when jury was seated and sworn in his absence under Sixth Amendment); *Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001) (recognizing right to be present for jury excusal proceedings "under the Sixth Amendment to the United States Constitution"). However, when the TCCA decided Mr. Tijerina Sandoval's claim, it instead expressly grounded the constitutional right to be present at jury selection in the Due Process Clause. Pet'r's App. A at 8 ("Although the right to be present at trial is rooted to a large extent in the right to confrontation, when the defendant is not confronting witnesses or evidence, the right to presence is rooted in due process."). It is the TCCA's resolution of his claim under the Due Process Clause that Mr. Tijerina Sandoval challenges here.

The Sixth Amendment right urged by Mr. Tijerina Sandoval in his brief below is fundamentally the same right as the due process right adjudicated by the TCCA and urged in his petition for certiorari. As described in his petition, the right of a person facing criminal charges to be present at their trial is grounded in both the Due Process Clause and the Sixth Amendment's Confrontation Clause. *See Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)) ("The Due Process Clause and the Confrontation Clause of the Sixth Amendment . . . both guarantee to a criminal defendant . . . the 'right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.'"); *United States v. Gagnon*, 470 U.S. 522, 526–27 (1985) ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment . . . but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.").

Both Fifth and Sixth Amendment cases recognizing the right to be present at trial derive from due process decisions by this Court, including *Hopt v. Utah*, 110 U.S. 574 (1884), *Lewis v. United States*, 146 U.S. 370 (1892), and *Diaz v. United States*, 223 U.S. 442 (1912). *See Illinois v. Allen*, 397 U.S. 337, 342–43 (1970) (recognizing *Diaz*'s narrowing of the absolute right to presence created in *Hopt* and *Lewis*); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (discussing historical precedent defining defendant's right to be present at trial, including, *inter alia*, *Hopt*, *Lewis*, and *Diaz*), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). Mr. Tijerina

Sandoval raised a claim challenging his exclusion from jury selection proceedings at his trial under the Sixth Amendment as recognized by the TCCA at the time. That the TCCA deviated from its precedent and decided that claim on due process grounds, which are connected to the Sixth Amendment grounds, does not frustrate review of the TCCA's decision. *See Gates*, 462 U.S. at 220 (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197–198 (1899)) (internal brackets omitted) ("[I]f the question [presented] were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the lower court's judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued."). In other words, the question of whether Mr. Tijerina Sandoval's right to be present was violated under the Sixth Amendment is not separate from the question of whether that right was violated under due process. *Cf. Gates*, 462 U.S. at 223 (declining review of question about "whether the exclusionary rule's remedy is appropriate in a particular context" because it "has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct" raised in petition for certiorari). Because the TCCA resolved Mr. Tijerina Sandoval's constitutional right to be present under the Due Process Clause, this Court can review the question presented to it.

II. The Claim Decided by the State Court was Grounded in Federal Law.

In its Brief, the State argues this Court should decline certiorari review because the TCCA's "opinion centered on state law, likely because Sandoval's claim did."

Resp.'s Br. in Opp. at 23. Similarly, the State argued that "underneath" the due process claim raised in this Court "is a pure matter of state law." *Id.* at 14. Contrary to the State's position, Mr. Tijerina Sandoval's right to be present at a criminal trial is plainly a federal constitutional issue.

In Mr. Tijerina Sandoval's brief in the court below, he raised a federal constitutional claim regarding his right to be present and a corresponding state statutory claim. Appellant's Br. at 131, 133. Indeed, in the proceedings below the State conceded both federal constitutional error and that it could not meet its burden on the constitutional harm standard. State's Br. at 29. Specifically, the State conceded that "it is statutory and constitutional error for the trial court to proceed with the excuses and qualifications in an appellant's absence under these circumstances." *Id.* at 21. Furthermore, the State conceded:

> A reasonable interpretation of the record indicates that Appellant was not afforded his right to be present during the qualifications, excuses, and exemptions proceedings. *Jasper* instructed that when error such as this has occurred, the harm must be analyzed under the standard for constitutional error. [*Jasper*, 61 S.W.3d at 422–23.] Therefore, the State must demonstrate that the error was harmless beyond a reasonable doubt. *Id.* However, the absence of a record on two of the three occasions, through no fault of Appellant, means that the State does not have the evidence necessary to meet its burden as to Issues eleven, twelve, and thirteen.

Id. at 29. Thus, the State's concession below was plainly on federal constitutional grounds.

Moreover, in its Brief in Opposition, the State concedes that the TCCA "considered whether the trial court's preliminary inquiry [into prospective jurors' qualifi-

cations and excuses] had a reasonably substantial relationship to [Tijerina] Sandoval's opportunity to defend himself." Resp.'s Br. in Opp. at 10 (internal quotation marks omitted). That is, there is no dispute that the TCCA considered whether Mr. Tijerina Sandoval's exclusion from the excusal proceedings violated the federal constitution. The TCCA then proceeded to assess whether Texas's procedure for qualifying a jury comports with due process. Pet'r's App. A at 11 ("[I]t seems nonsensical to suggest that a perfectly permissible procedure becomes a constitutional violation based on how or where the prospective juror is first summoned.").

The State persists that Mr. Tijerina Sandoval "did not argue—and the CCA did not consider—whether he had a right to be present as a general matter during the trial court's preliminary inquiry because the jury empanelment process had begun." Resp.'s Br. in Opp. at 10. The reason the jury empanelment process is noteworthy is because this Court has recognized it as the marker of when trial begins. *Lewis*, 146 U.S. at 374 (quoting *Hopt*, 110 U. S. at 578) ("[T]he trial commences at least from the time when the work of impaneling the jury begins."), *abrogated in part on other grounds by Diaz v. United States*, 223 U.S. 442 (1912). In his brief below, Mr. Tijerina Sandoval argued that because the jury panel had been called specifically for his case, "the hearing and determination of juror excuses and exemptions form[ed] part of the proceedings for the purpose of the Sixth Amendment right to confrontation." Appellant's Br. at 132. That is, he argued the excusal proceedings were a part of his criminal trial at which he had a constitutional right to be present.

Moreover, the statutory claim raised by Mr. Tijerina Sandoval under Article 33.03 of the Texas Code of Criminal Procedure is interwoven with the federal constitutional claim. Both in Mr. Tijerina Sandoval's case and in its precedent, the TCCA has considered right-to-presence claims raised under Article 33.03 and under the federal constitution together. In *Jasper*, 61 S.W.3d at 422, the appellant raised a claim that the trial court violated his rights under the Sixth Amendment and Article 33.03 when it excused jurors in his absence. The TCCA found that "it was statutory and constitutional error for the trial court to proceed with the excuses and qualifications in appellant's absence." *Id.* at 423. That court considered the claims together and, with regard to its harm analysis, stated that "[b]ecause we are faced with non-constitutional and constitutional error, we will apply the standard of harm for constitutional error." *Id.*

Similarly, in its opinion in Mr. Tijerina Sandoval's case, the TCCA considered the constitutional and statutory claims together. Pet'r's App. A. at 6. The court did not apply a separate state law standard but instead stated that the "question here is whether the hearings on general qualifications, excuses, and exemptions were part of his 'trial' or otherwise had a reasonably substantial relation to his opportunity to defend himself." *Id.* at 8. In other words, the TCCA did not "indicat[e] clearly and expressly" that its decision was "alternatively based on bona fide separate, adequate, and independent [state] grounds." *Florida v. Powell*, 559 U.S. 50, 59 (2010) (brackets in original). Instead, it treated the federal and state law claims as "interchangeable and interwoven." *Id.* at 57. Consequently, there is no basis on which to find that the

TCCA's decision here was on state law grounds and therefore out of reach of this Court's review.

III. The State Misapprehends the First Question Presented.

The State argues that Mr. Tijerina Sandoval's arguments do not comport with his first question presented because "the bulk of [Tijerina] Sandoval's argument in his petition rests not on the question implicated by *Lewis* of when the work of jury empanelment begins but on whether the CCA correctly applied the *Snyder* standard to determine the trial court's preliminary inquiry did not have a reasonably substantial relation to his opportunity to defend himself." Resp.'s Br. in Opp. at 12–13. But the question in *Lewis*, 146 U.S. at 374, of when jury empanelment begins, i.e., when trial commences, is not mutually exclusive from the standard in *Snyder*, 291 U.S. at 105–06, used to determine if due process was violated by a defendant's absence. In the context of jury selection, both *Lewis* and *Snyder* are relevant because there are often administrative proceedings involved in summoning and selecting a jury that may not be a part of any particular defendant's trial and for which the *Snyder* standard may not even apply. The commencement of jury empanelment, or substantive, as opposed to administrative, jury selection provides a clear demarcation of when a constitutional right to be present exists. *See Gomez v. United States*, 490 U.S. 858, 873–74 (1989). Mr. Tijerina Sandoval's claim is that his trial had begun, i.e., that substantive jury selection had commenced in his case, when the trial court exercised discretionary excuses of potential jurors assigned to his case in his absence.

Contrary to the State's assertions that the TCCA's opinion "did not rest on a bright-line rule," Resp.'s Br. in Opp. at 21, it is clear from the lower court's opinion that it *per se* does not consider excusal proceedings a part of trial. Prior to its opinion in this case, the TCCA had held that excusal proceedings for a general venire are "not considered part of 'the trial'" and consequently, defendants do "not have a constitutional right to be present." Pet'r's App. A. at 9. In other words, the court did not determine under *Snyder* that a general venire does not bear a substantial relationship to the opportunity to defend in a particular case, it issued a blanket rule that defendants had no constitutional right to be present at general venire regardless of what occurred.

In its opinion in Mr. Tijerina Sandoval's case, the TCCA, for the first time, eliminated a previously recognized distinction between general venire panels and special venire panels assembled for a specific capital murder case. *Id.* at 11. In doing so, the TCCA created a bright line that defendants in criminal cases, including Mr. Tijerina Sandoval, never have the right to be present at jury excusal proceedings, i.e., that these proceedings are not part of a defendant's trial in either circumstance. Therefore, Mr. Tijerina Sandoval's argument in this Court is not that the TCCA misapplied the *Snyder* standard. His argument is that the TCCA erroneously held that *Snyder* does not apply to the proceedings he was excluded from because those proceedings were not a part of his trial, and consequently, he had no right to presence at all. Therefore, despite the State's argument that an opinion from this Court would be "advisory," Resp.'s Br. in Opp. at 21, a decision from this Court reversing the court

below and announcing a standard for determining when empanelment of the jury begins, requiring application of *Snyder*, would apply to Mr. Tijerina Sandoval.

As described in his petition, other courts around the country have likewise created *per se* rules that excusal proceedings, or other qualification, exemption, or hardship-related questioning, are not a part of trial. The State argues that the opinions relied upon by Mr. Tijerina Sandoval in his petition to demonstrate that the question of when jury selection, i.e., a defendant's trial, begins has resulted in differing and inconsistent approaches are simply different applications of the *Snyder* standard. Resp.'s Br. in Opp. at 14. However, some of these cases make clear that the question courts are answering is whether jury empanelment has begun, i.e. whether a right to be present exists at all for this type of proceeding. Indeed, the decisions do not even cite to *Snyder*.

In *Davis v. State*, 767 So. 2d 986 (Miss. 2000), the Mississippi Supreme Court was confronted with that question and asked:

> Does "impaneling of the jury" begin when the prospective jurors report for duty and continue until those actually chosen to serve are sworn, seated and testimony begins? Or does it begin only after completion of the statutory qualifying process, when those disqualified or exempt have been excused and the questioning begins of the remaining prospective jurors by the court and the attorneys for each side? Does "voir dire" include the trial judge's questions regarding qualifications and exemptions, or only the questions asked of the qualified prospective jurors who remain after others are excused for statutory reasons?

Id. at 992. In resolving those questions, the court concluded that it was "adopt[ing] a bright line rule that the trial judge's general questioning of prospective jurors, to ascertain those who are qualified for, or exempt from, jury service is not a critical stage

of the criminal proceedings during which a criminal defendant is guaranteed a right to be present." *Id.* The *Davis* court was, in part, interpreting the language in Mississippi's statute on juror qualifications. But, of course, if this Court provided guidance on when empanelment of the jury begins for constitutional purposes, that would define the floor for state statutory interpretation on the same question.

Similarly, in *United States v. Moreland*, the Seventh Circuit held that "issuance of jury summonses, submission of responses to those summonses in which the responders asked to be excused, and action on those submissions—all before the jury venire is created and the members of the venire seated in the courtroom when the trial is called—precede jury impanelment." 703 F.3d 976, 982 (7th Cir. 2012); *see also United States v. Greer*, 285 F.3d 158, 167 (2nd Cir.) ("We have held, however, that routine administrative procedures relating to jury selection are not part of the true jury impanelment process in which parties and counsel have a right to participate.").

Moreland cited this Court's opinion in *Gomez*, 490 U.S. 858, for support of this proposition. In *Gomez*, this Court drew a comparison between the "administrative empanelment process" and voir dire, which "represents jurors' first introduction to the substantive factual and legal issues in a case." *Id.* at 874. But it did not further define those concepts, particularly for proceedings like the one at issue here, that had both administrative elements and where prospective jurors had been introduced to substantive and legal issues in the case. Thus, the question of the precise contours of when juror empanelment begins remains open. For example, does administrative empanelment end once jurors are assigned to a particular case by court order? Or when

they are exposed to facts or the law about the case for which they were called? Or does it depend on whether the trial court's inquiry and discretion in excusing jurors will be cabined to enumerated statutory qualification or hardship grounds, regardless of the jurors' assignment or exposure to relevant facts and law? These are the questions Mr. Tijerina Sandoval's first question presented requests this Court address.

Additionally, courts' willingness to draw a bright line rule that certain proceedings are wholesale not a part of trial undermines the State's argument that the decisions cited in Mr. Tijerina Sandoval's petition are merely different applications of *Snyder*'s due process standard. The TCCA's treatment of Mr. Tijerina Sandoval's claim offers the best example of this. While the Court considered the nature of excusal proceedings as a general matter, its legal analysis of Mr. Tijerina Sandoval's claim included no consideration of the facts particular to this case, including that the prospective jurors possessed case-specific information and were already asked to fill out a questionnaire about, *inter alia*, their views on the death penalty. Pet'r's App. A. at 11. Resolution of a due process claim requires some consideration of the facts and circumstances of the case in question. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (internal quotation marks omitted); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). *See also Rushen v. Spain*, 464 U.S. 114, 117 (1983) ("Our cases recognize that the right to

personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant."). Instead, the TCCA created a categorical rule that the proceedings in question here preceded the start of jury empanelment without any inquiry into the facts about what occurred at those proceedings. The State asserts that Mr. Tijerina Sandoval is seeking a categorical rule, but the opposite is true. He seeks a rule that will guide courts in deciding whether substantive jury selection has begun, so that then the *Snyder* test can be individually applied to determine whether the proceedings in question are reasonably related to a substantial opportunity to defend.

Additionally, the State argues that there is no important federal question at stake in this case. Resp.'s Br. in Opp. at 2, 11, 23. As detailed in Mr. Tijerina Sandoval's petition for certiorari, jury selection is perhaps the most critical phase of trial. Pet. Cert. at 14–16. A bright line rule that denies defendants the right to be present at a portion of jury selection significantly impacts their ability to participate in their defense and constitutes an important federal right for this Court to address.

The State also repeatedly criticizes Mr. Tijerina Sandoval for "speculating" about the harm in this case. Resp.'s Br. in Opp. at 16, 25, 27, 29. However, Mr. Tijerina Sandoval's need to speculate about the proceedings arises directly from his exclusion from them while they occurred without any record being taken—in violation of an order already entered in the case by the court at Mr. Tijerina Sandoval's request that all proceedings be transcribed. 4 CR 1956–59. Moreover, unlike in *Rushen*, the judge spoke to dozens—maybe hundreds—of potential jurors called for

Mr. Tijerina Sandoval's trial. In *Rushen*, the ex parte conversation between the judge and the juror was capable of recreation in a hearing on a motion for new trial. 464 U.S. at 117. Such a recreation is infeasible here.

Even the small amount of record that exists demonstrates the risk that jurors assigned to a particular case and exposed to facts about that case will volunteer information about their willingness to serve on the jury. This is demonstrated by a juror who informed the court that he or she was uncomfortable serving *in this case.* 50 RR 20. The State makes much of the fact that the trial judge told this juror to wait to discuss that concern during individual voir dire. Resp.'s Br. in Opp. at 28–29. But the State does not address the fact that the record does not identify the juror or reflect that the parties were ever made aware of that prospective juror's concerns, which is almost certainly information they would want to have in deciding how to exercise their strikes. Therefore, even though Mr. Tijerina Sandoval had the opportunity to question prospective jurors during individual voir dire, that does not remedy his inability to question jurors about potential bias revealed during the excusal process but not raised again in the parties' presence. The issue is not whether there were mechanisms for Mr. Tijerina Sandoval to remove jurors whose biases he was aware of. It is that there was an opportunity for prospective jurors to reveal case-specific reasons for seeking to be removed from jury service outside of the parties' presence without any way to ensure that information was brought to the parties' attention, creating a possibility that such a juror could be seated on Mr. Sandoval's jury. The ability to remove other biased jurors during individual voir dire does not solve this problem.

Finally, if this Court believes that its opinions in *Lewis, Snyder*, and *Gomez* adequately guide lower courts on how to make the determination of when jury empanelment begins, i.e., when trial commences, it should reverse the decision of the court below for erroneously applying that precedent for the reasons articulated in Mr. Tijerina Sandoval's petition for certiorari. Pet. Cert. at 24–30.

CONCLUSION

For the foregoing reasons, the Court should either summarily reverse the CCA's judgment or grant certiorari to decide the questions presented.

Respectfully submitted,

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