No. _____ (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

PETITION FOR A WRIT OF CERTIORARI

JENNAE SWIERGULA
Counsel of Record
ESTELLE HEBRON-JONES
EMILY FOLLANSBEE
TEXAS DEFENDER SERVICE
9390 Research Blvd
Kaleido II, Suite 210
Austin, TX 78759
(512) 320-8300
(512) 477-2153 (fax)
jswiergula@texasdefender.org
ehebron-jones@texasdefender.org
efollansbee@texasdefender.org

Counsel for Petitioner

CAPITAL CASE
QUESTIONS PRESENTED

1. Given that jury selection is one of the most critical phases of a criminal trial, how should courts determine when jury empanelment begins for a particular defendant's case, triggering the due process right to be present?

2. Did the state court err when it held, without analysis of the underlying facts, that the trial court did not violate the petitioner's due process rights when it excluded him and his counsel from proceedings in which members of the jury panel called for his trial—and who knew the case that they were summoned for—sought discretionary excusals from the court?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the caption of the case.

LIST OF PROCEEDINGS

- *State v. Tijerina Sandoval*, 197th District Court of Texas, 2015-DCR-2443-C (Aug. 16, 2018).
- *Tijerina Sandoval v. State*, Court of Criminal Appeals of Texas, No. AP-77,081 (Dec. 7, 2022), rehearing denied May 17, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals of Texas ("TCCA") affirming the trial court's judgment was issued on December 7, 2022, is published at 665 S.W.3d 496, and is attached as Appendix A. The court denied rehearing on May 17, 2023. Appendix B.

JURISDICTION

The TCCA entered judgment on December 7, 2022. Appendix A at 81. It denied a timely motion for rehearing on May 17, 2023. Appendix B. On July 31, 2023, Justice Alito extended the time for filing this Petition to September 14, 2023. *See Tijerina Sandoval v. Texas*, No. 23A80 (Jul. 31, 2023). This Court has jurisdiction pursuant to its authority under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment, in relevant part, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The Fourteenth Amendment, in relevant part, provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Trial

Gustavo Tijerina Sandoval was charged with capital murder for the shooting death of an off-duty border patrol officer in the course of an alleged attempted robbery. The case garnered significant media attention. *See, e.g.,* 1 CR 58–87, 4 CR 1828–

52, 58 RR 35.[1] Potential jurors for Mr. Tijerina Sandoval's trial were summoned as a part of a special venire panel that was called specifically for his case, a process permitted only for capital cases under Texas law. Tex. Code Crim. Proc. art. 34.01. Along with their summons, the prospective jurors called for Mr. Tijerina Sandoval's case received a jury questionnaire meant for the parties' use during voir dire. 26 RR 11; 42 RR 89. This questionnaire included information about his case. 7 CR 3097–116. Specifically, the questionnaires informed the prospective jurors about the identity of the parties, *id.* at 3113, 3115, the facts of the alleged offense, *id.* at 3101 and that the State was seeking the death penalty against Mr. Tijerina Sandoval, *id*. The questionnaires also sought information from prospective jurors about their opinions and knowledge of a variety of topics relevant to the case, including their views on the death penalty and their exposure to media coverage of the offense. *See, e.g.*, *id.* at 3098–99, 3102–03, 3114. Thus, the entire panel of prospective jurors was aware of the case for which they were being called before ever appearing in response to the summons.

The empanelment of a jury in a criminal case in Texas is governed both by the Texas Government Code and the Texas Code of Criminal Procedure. Where there is a conflict between the provisions in these two sources, the Code of Criminal Procedure controls in criminal cases. *Cantu v. State*, 842 S.W.2d 667, 685 n.13 (Tex. Crim. App.

[1] We cite the record as follows, with X representing the volume number and Y representing the page number. The Clerk's Record is cited as X CR Y. The Reporter's Record is cited as X RR Y. Supplemental Clerk's Records are cited as Date CR Y. The record of the remand hearings held April 21 and 22, 2022, is cited as X Remand RR Y.

1995). Under Texas law, in criminal cases, except a capital case in which a special venire is called, a general pool of jurors sufficient in size to satisfy the juror requirements of all the county courts for the week is summoned. *See* Tex. Gov't Code § 62.015, § 62.016(a), § 62.017(a), § 62.0175(a); *see also Jasper v. State*, 61 S.W.3d 413, 422 (Tex. Crim. App. 2001) ("Generally, when prospective jurors are initially summoned, they are assembled in a general jury pool or general assembly."). A prospective juror may claim statutory exemption from jury service with the clerk of the court without appearing on the date for which she was summoned. Tex. Code Crim. Proc. art. 35.04; Tex. Gov't Code § 62.107.

For in-person proceedings with the general jury pool, except in capital cases with a special venire, a district judge in the county is assigned to preside over the general panel. That judge swears in the panel for jury service for the week and hears proffered excuses from prospective jurors. Tex. Gov't Code § 62.016(d); § 62.017(d); § 62.0175(d); *Jasper*, 61 S.W.3d at 423 ("Members of the general assembly are qualified on their ability to serve, and exemptions and excuses are heard and ruled on by the judge presiding over the general assembly."). Prospective jurors who appear on the summons date may be dismissed due to statutory disqualification or exemption, or they may seek to be excused from jury service at the discretion of the court. Tex. Code Crim. Proc. art. 35.03 §1; Tex. Gov't Code § 62.110(a). The court may assign a designee to preside over these proceedings. Tex. Code Crim. Proc. art. 35.03 §2; Tex. Gov't Code § 62.110(b). However, a court (or court's designee) "may not excuse a prospective juror for an economic reason unless each party of record is present and

approves the release of the juror for that reason." Tex. Gov't Code § 62.110. After the panel is winnowed through dismissals based on qualification, exemption, or excuse, the general panel is divided into subpanels that are then assigned to individual cases set to go to trial in the county that week. *Jasper*, 61 S.W.3d at 423.

In contrast, a different procedure may be used in a capital case. The trial judge may issue an order for a special venire that is assigned solely to the particular capitally-charged defendant's case prior to the winnowing through the qualification, exemption, and excusal process. Tex. Code Crim. Proc. art. 34.01. Unlike in all other cases where the trial judge is only required to preside over requests for economic-based excusals, the trial court judge presiding over a capitally-charged defendant's special venire must personally preside over all requests to be released, including claims of exemption and lack of qualification. Tex. Code Crim. Proc. art. 35.03 §2*;* *Chambers v. State*, 903 S.W.2d 21, 30 (Tex. Crim. App. 1995) ("In the case of a special venire called in a capital case, the trial judge cannot designate others to make decisions with respect to excuses."). A prospective juror summoned as a part of a special venire may be excused from attendance by the court before he is impaneled, but only with the consent of both of the parties. Tex. Code Crim. Proc. art. 35.05.

In Mr. Tijerina Sandoval's case, the trial court ordered a special jury panel, directing that 400 persons be selected and ordered to appear for jury selection in the case on February 13, 2018. 5 CR 2395. The order explained that the court would "try the qualifications and excuses from service of all such prospective petit jurors." *Id.* The jury pool members received a questionnaire along with the summons informing

them of the date they must appear. 26 RR 11. The questionnaire asked basic demographic information as well as the juror's opinions related to the death penalty, the criminal justice system, criminal law, and religious and political activities. 7 CR 3097–105, 3112–113. It informed jurors that this was case in which the State was "seeking the death penalty for a person who is accused of killing an off-duty Border Patrol Agent who was fishing with his family." *Id.* at 3101. It identified the name of the decedent and asked whether the prospective juror knew the "deceased victim" or any of the "deceased victim's" relatives or friends. *Id.* at 3113. It asked whether the prospective juror knew "the Defendant, Gustavo Tijerina Sandoval" or had any opinions "as to the guilt or innocence or punishment of Gustavo Tijerina Sandoval who is accused of capital murder." *Id.* at 3114–115. It identified Mr. Tijerina Sandoval's co-defendant and asked if any prospective jurors knew him. *Id.* at 3115. It asked whether the prospective juror knew the judge or any of the attorneys of record for the State and defense. *Id.* at 3114.

On the morning of February 13, 2018, summoned prospective jurors arrived at the central jury room. *Id.* at 3373–94. Appellant and his counsel were not present. 27 RR 4.[2] The court introduced its staff, including the court interpreter. 27 RR 4–5. The judge then excused the interpreter because "she does[not] need to be here for a while."[3] *Id.* at 5. The court told the veniremembers that they would be "examined for

[2] One of Mr. Tijerina Sandoval's trial counsel observed some portion of the excusal proceedings on February 13, 2018. However, he was unable to hear those proceedings, which occurred in *sotto voce* at the bench. June 23, 2022 Supp. CR at 12.

[3] Mr. Tijerina Sandoval speaks Spanish and requires an interpreter to understand proceedings in English.

inclusion on a jury hearing a capital murder case." *Id.* It further explained the statutorily required qualifications to the assembled panel. *Id.* at 6–11. As the court was to begin hearing jurors' disqualification claims, the court reporter asked, "Is this off the record?" *Id.* at 11. Prior to trial, Mr. Tijerina Sandoval had moved for complete recordation of all proceedings. 4 CR 1956–59. The trial court granted that request. 5 CR 2119–20. Nonetheless, the trial court responded affirmatively to the court reporter's inquiry. 27 RR 11. The record then reflects, "(Off the record) (Excuses/exemptions given at the bench in sotto voice off the record. Defendant, Interpreter and Counsel are not present.) (Off the record)." *Id.*

When the court went back on the record, Appellant and counsel were still absent. *Id.* The court then explained to the venire the grounds for exemption from jury service. *Id.* at 12–16. The court misstated one of the bases for being exempted from jury service, telling potential jurors they could exercise an exemption if they had "legal custody of a child under the age of 15." *Id.* at 12. *Compare* Tex. Gov't Code § 62.106(2) (person may be exempted from jury service if they have legal custody of child younger than 12 and person's service on jury would leave child without adequate supervision). Off the record, the court then heard and ruled on claimed exemptions and excuses. *Id.* at 17. Following this, the record resumed with Appellant and counsel present for the first time. *Id.* The court proceeded with general voir dire. *Id.* at 22.

Because the parties were unable to seat a jury from the first panel, the trial court issued an order for a second special jury panel of 150 people. 6 CR 2669. This panel also received the juror questionnaire along with their summons. 42 RR 89.

Prospective jurors appeared on April 18, 2018, the date for which they were summoned. 50 RR. Mr. Tijerina Sandoval and his counsel were not present. 50 RR 4. The court began the proceedings by hearing excuses off-the-record from prospective jurors who sought to be dismissed from jury service. *Id.* The court then explained the statutory qualifications to serve on a jury. *Id.* at 12–14. The prospective jurors' answers to the qualification questions were on the record for this panel. *Id.* One requirement to be qualified to sit on a jury under Texas law is that jurors cannot have been formally accused or convicted of "misdemeanor theft or a felony." Tex Code Crim. Proc. art. 35.16(a)(2) and (3); Tex. Gov't Code § 62.102(2). In response to being informed of this qualification, one prospective juror informed the court that he had "court for reckless driving" and was "under probation right now for a DWI." 50 RR 14. Reckless driving is not a felony under Texas law. Tex. Transp. Code § 545.401. Driving while intoxicated is typically a misdemeanor but can be a felony if the person has prior convictions related to operating a vehicle while intoxicated. *See* Tex. Penal Code §§ 49.045, 49.09. The trial judge excused this prospective juror without inquiring into whether he was statutorily disqualified from jury service. 50 RR 13–14.

The court's explanation of permissive exemptions and at least some of the prospective jurors' claimed exemptions also took place on the record for this panel. *Id.* at 14–19. The court again misstated one of the grounds for exemption, informing jurors they could be excused if they had "legal custody of a child or children younger than 14 years of age and their [jury] service [would require] leaving the child alone or without adequate supervision[.]" *Id.* at 14–15. *Compare* Tex. Gov't Code § 62.106(2)

(person may be exempted if they have legal custody of child younger than 12). The trial court then excused at least one potential juror who stated she was a stay-at-home mom, without inquiring into the age of her children. *Id.* at 18.

Following a break in the proceedings, an unidentified prospective juror informed the court, "In this case, I feel uncomfortable." *Id.* at 20. The court did not inquire further. It did not dismiss the juror but instructed the juror to raise his or her concerns during individual voir dire. *Id.* There is no indication in the record that this prospective juror ever raised their discomfort during voir dire or that the parties were made aware of this interaction. *See* 50–54 RR. Another prospective juror then informed the court that he was "in the process of a misdemeanor" DWI. 50 RR 20. Even though this juror plainly did not meet the criteria for disqualification, the judge dismissed him. *Id.* The proceedings then went off the record. *Id.* When the court came back on the record, the parties were present for the first time. *Id.* The court then conducted general voir dire. *Id.* at 21.

The parties were still unable to seat a jury with the second panel. Therefore, the court ordered that a third special venire of 150 people be summoned. 7 CR 3134. Like the prior two venires, the third panel received the juror questionnaire with its summons. *See* 42 RR 88–89. Potential jurors appeared on May 1, 2018, the date for which they were summoned. 55 RR. Mr. Tijerina Sandoval and counsel were not present. 55 RR 4. After the third panel was sworn, the court explained the required qualifications and the available exemptions. *Id.* at 11–15. The court again misstated one of the grounds for exemption, informing jurors they were exempt from jury service if

they had "legal custody of a child or children younger than 14[.]" *Id.* at 14. *Compare* Tex. Gov't Code § 62.106(2) (person may be exempted if they have legal custody of child younger than 12). Following the court's explanation of the qualifications for jury service and grounds for exemptions, the court stated: "If any of you feel there is any reason why you cannot sit as a juror today, please come up to the bench now, and I will hear your excuses." 55 RR 15. Excuses and exemptions then took place off the record and without Mr. Tijerina Sandoval or counsel present. *Id.* at 17. When the proceedings came back on the record, the parties were present for the first time. *Id.* The court then proceeded with general voir dire. *Id.*

It is unclear from the record how many prospective jurors called for Mr. Tijerina Sandoval's case were dismissed by the trial court in his absence for lack of qualification, exemption, or excuse. However, in arguments on a motion for mistrial, Mr. Tijerina Sandoval's trial counsel stated that the defense had been concerned because the court released "a lot of the jurors" during these proceedings. 76 RR 176. This characterization was not disputed by the court.

Appeal

TCCA precedent recognized a right under the Sixth Amendment to the United States Constitution for a defendant to be present at jury selection. *See Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001); *see also Suniga v. State*, No. AP-77,041, 2019 WL 1051548, at *10–11 (Tex. Crim. App. Mar. 6, 2019) (defendant had Sixth Amendment right to be present when trial judge questioned potential juror) (not designated for publication). In *Jasper*, like here, the trial court heard juror exemptions

and excuses in the appellant's absence. 61 S.W.3d at 422. The court excused two potential jurors without the appellant present. *Id.* While the trial record in *Jasper* did not specifically reflect that a special venire had been summoned, the trial court began the proceedings in the appellant's absence by telling the jury that it had "been summoned for a capital murder case." *Id.* The TCCA noted that

> the trial judge assigned to preside over appellant's trial appears to have functioned as a general assembly judge over prospective jurors *already assigned to appellant's specific case*. Before addressing qualifications and excuses, the judge told the prospective jurors that they had been summoned for a capital murder case, although he did not introduce appellant until after ruling on the qualifications and excuses. We will therefore assume that appellant's trial had begun at the time of the exemptions, excuses and qualifications, and therefore we will assume that to be the case for purposes of addressing this point of error.

Id. at 423 (emphasis in original). Because the court assumed that the appellant's trial had begun at the time the court heard juror qualifications, exemptions, and excuses, the TCCA stated that it was "constitutional error for the trial court to proceed with the excuses and qualifications in appellant's absence." *Id. See also Calvert v. State*, No. AP-77,063, 2019 WL 5057268, at *64 n.292 (Tex. Crim. App. Oct. 9, 2019) (*Jasper's* "holding [was] that 'it was statutory and constitutional error for the trial court to proceed with the excuses and qualifications in [the] appellant's absence' because the prospective jurors were '*already assigned to [the] appellant's specific cas*e.'") (emphasis in original) (not designated for publication). However, the *Jasper* court found based upon review of the record of the proceeding that the trial court had acted within its discretion when it dismissed the two prospective jurors. *Id.* at 424. Therefore, the error was harmless. *Id.*

On appeal, Mr. Tijerina Sandoval alleged that, just as in *Jasper*, the trial court violated his Sixth Amendment rights by excluding him from the proceedings in which prospective jurors called specifically for his case were excused. He also alleged that, because the proceedings were held off the record, the State could not meet its burden to prove that the error was harmless. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

In its brief, the State concurred that "[i]n *Jasper v. State*, [the TCCA] found that when a special venire (i.e., when prospective jurors are summoned for a specific case) is called in a capital case, trial begins at the time the determinations of excuses, disqualifications, and exemptions are heard." State's Br. at 21. The State therefore conceded that "[a] reasonable interpretation of the record[4] indicates that Appellant was not afforded his right to be present during the qualifications, excuses, and exemptions proceedings." *Id.* at 29. Further, regarding the harm caused by the error, the State agreed that "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 [the issue of Mr. Tijerina Sandoval's absence]." *Id.*

Decision Below

Despite the State's concession of error, the TCCA affirmed the trial court's judgment. App. A at 10, 81. The Court began by noting that, "[a]lthough the right to be present at trial is rooted to a large extent in the right to confrontation, when the

[4] Mr. Tijerina Sandoval's absence from these proceedings was conclusively found by the trial court in remand proceedings on direct appeal. June 23, 2022 Supp. CR 15, 17–18.

defendant is not confronting witnesses or evidence, the right to presence is rooted in due process." *Id.* at 8. A defendant's absence violates due process "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *Id.* (*quoting United States v. Gagnon*, 470 U.S. 522, 526 (1985)).[5]

The Court then walked back its opinion in *Jasper*, stating:

> *Jasper* did not hold that a defendant's presence is required if the trial court hears general qualifications, excuses, and exemptions for a panel assigned to the defendant's case. *Jasper* assumed it for the sake of argument, and then found the assumed error to be harmless.

App. A at 10. The court further determined that there was no basis for distinguishing a defendant's right to presence at special venires versus general venires. The court reasoned that the process of granting excusals and exemptions lacks "the traditional adversarial elements of most voir-dire proceedings" and that "the right to be excused from the venire belongs to each of its individual members, not to the defendant." *Id.* at 11 (quoting *Black v. State*, 26 S.W.3d 895, 900 (Tex. Crim. App. 2000) *and Moore v. State*, 999 S.W.2d 385, 399 (Tex. Crim. App. 1999)). Consequently, the state court concluded that "whether the prospective juror is assigned first to the central jury room or to a special venire, a preliminary inquiry into his general qualifications, excuses, and exemptions is not the sort of proceeding that needs to be conducted in the defendant's presence." *Id.*

---

[5] This is the same standard that the state court has applied to claims that a defendant was absent during a part of jury selection in violation of the Sixth Amendment. *See Suniga*, 2019 WL 1051548, at *10–11. Therefore, regardless of whether the TCCA analyzed the claim under the Sixth or Fourteenth Amendment, it applied the standard announced by this Court in *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), to determine whether error occurred.

REASONS FOR GRANTING THE WRIT

While it is undisputed that jury selection is one of the most critical phases of trial, high state courts and federal courts of appeals are split in how they determine when jury empanelment begins. Some courts, like the state court here, have drawn a bright-line rule that proceedings in which a court decides qualifications, exemptions, and requested excusals are administrative and never a critical stage of trial. Others have engaged in a factual inquiry into what information prospective jurors had about the case they may be selected to try and what occurred at the proceedings in the defendant's absence to determine whether the defendant had a right to be present when prospective jurors were excused. The Court should grant certiorari to resolve the important, unanswered question of how courts should decide when empanelment begins – that is, how courts should determine if early excusal proceedings are administrative or if they are substantive selection proceedings at which a defendant has a right to be present. Can excusal proceedings be wholesale categorized as administrative regardless of the specific circumstances of a given case? Or does such a determination require examining the relevant facts? Alternatively, this Court should grant certiorari and reverse the state court's judgment because it erred in holding Mr. Tijerina Sandoval had no right to be present when prospective jurors assigned to his case were excused from service in his absence.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT QUESTION OF WHEN "THE WORK OF EMPANELING THE JURY BEGINS" FOR PURPOSES OF THE CONSTITUTIONAL RIGHT TO BE PRESENT.

A. Lower Courts Are Divided on How to Interpret this Court's Precedent and Distinguish Administrative Jury Empanelment Proceedings from Substantive Jury Selection.

One of the most basic constitutional rights of a person defending against criminal charges "is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970). This right derives from both the Sixth Amendment's Confrontation Clause and due process clause of the Fifth and Fourteenth Amendments. *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (citing *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975)). However, it is not absolute. A defendant's right to be present, at least for proceedings where he is not confronting witnesses, only extends so much as "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend" against the charges he faces. *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). In other words, due process only requires the presence of the defendant "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.* at 108.

There is no question under this Court's precedent that, in general, jury selection is a "critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present[.]" *Gomez v. United States*, 490 U.S. 858, 873 (1989). This is because "[j]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice

. . . or predisposition about the defendant's culpability." *Id.* (internal citations omitted). A defendant's presence is required at jury selection because "his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors." *Lewis v. United States*, 146 U.S. 370, 373 (1892), *abrogated in part on other grounds by Diaz v. United States*, 223 U.S. 442 (1912) and *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *as recognized in Illinois v. Allen*, 397 U.S. 337 (1970).

A defendant's physical presence is critical because selecting jurors requires "scrutiniz[ing] not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality." *Gomez*, 490 U.S. at 875. Observation of prospective jurors' verbal and nonverbal responses to questions is an essential part of the process by which a defendant and his counsel glean information about which jurors they wish to empanel, those whom they may seek to remove for cause, and those on whom they wish to exercise their peremptory strikes. Information about a potential juror's demeanor or attitude about serving cannot reasonably be conveyed, by a transcript or summary from the court, when the parties are absent. *See United States v. Curtis*, 635 F.3d 704, 715 (5th Cir. 2011) ("One purpose of the right to presence is to protect the defendant's exercise of his peremptory challenges, which means the defendant 'should be allowed to obtain as much first-hand information as feasible to facilitate his ability to participate in the selection of a jury.'") (*quoting United States v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983) (per curiam); *People v. Sloan*, 592 N.E.2d 784, 787 (N.Y. 1992) (where prospective jurors had learned information about

some of the facts and witnesses involved in the case, "[d]efendants' presence at the questioning on such matters and the resultant opportunity for them to assess the jurors' facial expressions, demeanor and other subliminal responses as well as the manner and tone of their verbal replies so as to detect any indication of bias or hostility, could have been critical in making proper determinations in the important and sensitive matters relating to challenges for cause and peremptories"); *Boone v. United States*, 483 A.2d 1135, 1138 (D.C. 1984) ("It is difficult to articulate what constitutes the basis prompting an exercise of a peremptory challenge. But, it is precisely the vagueness of an impression or intuitive feeling, or the desire 'to express an arbitrary preference,' which serves to illustrate the need for the defendant to be present when a prospective juror is being examined so that his impressions may be gained first hand.") (quoting *Frazier v. United States*, 335 U.S. 497, 506 (1948)). For these reasons, this Court has long held that a defendant has the right to be present at his trial "at least from the time when the work of impaneling the jury begins." *Lewis*, 146 U.S. at 374.

The Court has also recognized, however, that relatively minor or administrative interactions between a trial judge and prospective jurors in a defendant's absence may not run afoul of a defendant's constitutional rights. *See Rushen v. Spain*, 464 U.S. 114, 118 (1983) (brief *ex parte* interactions between judge and juror often do not violate constitution); *compare Gomez*, 490 U.S. at 874 (voir dire is "far from an administrative empanelment process" because it "represents jurors' first introduction to the substantive factual and legal issues in a case").

These general principles announced by the Court have resulted in differing approaches from federal and state courts of appeals seeking to determine if early jury selection proceedings in which prospective jurors are seeking to be excused are administrative interactions or if they are substantive empanelment of the jury in a defendant's case. Some federal courts of appeals and high state courts have announced seemingly *per se* rules that proceedings in which jurors are seeking excusals based on qualifications, exemptions, and hardship are administrative and, therefore, not a critical stage of trial. *See United States v. Greer*, 285 F.3d 158, 167–68 (2nd Cir. 2002) ("Since [*United States v.] Woodner*, [317 F.2d 649 (2nd Cir. 1961)] we have reaffirmed that hardship questioning is not a part of voir dire—and thus not a critical stage of the trial during which the parties and counsel must be present."); *State v. Dangcil*, 256 A.3d 1016, 1029 (N.J. 2021) ("process in which jurors were removed based on substantiated hardships, scheduling conflicts, and similar considerations" was not a critical stage of trial); *People v. Streeter*, 278 P.3d 754, 778–79 (Cal. 2012) ("Hardship screening of the jury pool is not a critical stage of the proceedings."); *Davis v. State*, 767 So. 2d 986, 992 (Miss. 2000) ("Today we adopt 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."). That is the approach taken by the state court here. App. A at 11 ("Whether the prospective juror is assigned first to the central jury room or to a special venire, a preliminary inquiry

into his general qualifications, excuses, and exemptions is not the sort of proceeding that needs to be conducted in the defendant's presence.").

Other courts, however, have engaged in a fact-intensive inquiry into when the work of empaneling the jury begins for a particular defendant's case. *See United States v. Bordallo*, 857 F.2d 519, 522, 523 (9th Cir. 1988) ("This case falls somewhere between the ministerial stage of drawing the prospective juror pool and the formal pretrial narrowing of the pool through voir dire for a particular trial. We conclude the present situation is more appropriately analogized to voir dire, because the prospective jurors knew which specific case they would hear, and some were excused due to factors related to Bordallo's particular cause."); *State v. Irby*, 246 P.3d 796, 801 (Wash. 2011) ("In Irby's case, 'the work of empaneling the jury' began on January 2, when jurors were sworn and completed their questionnaires" and thus defendant's right to be present was violated when jurors were dismissed for hardship in his absence after this stage); *State v. Wilson*, 918 P.2d 826, 830–31 (Or. 1996) (error to exclude defendant from preliminary orientation where jurors received questionnaire, were informed about the offense defendant was charged with, learned that State was seeking the death penalty, and "received preliminary instructions about the charges against defendant, the state's burden of proof, and the responsibilities of jurors"). *Cf. State v. Cosme*, 943 A.2d 810, 814 (N.H. 2008) (Jury orientation not a part of a particular defendant's trial because "[n]o specific case, whether civil or criminal, nor any specific defendant, is presented to the pool of prospective jurors," nor is the jury pool "informed of any specific facts or witnesses").

This latter approach comports with this Court's recognition that there may be circumstances where a defendant's due process rights are violated by his exclusion from proceedings which generally do not correspond to a reasonably substantial relationship to the fullness of his opportunity to defend. *Snyder*, 291 U.S. at 336 ("Nor is there need for us to hold that conditions can never arise in which justice will be outraged if there is a view in the defendant's absence."); *Rushen*, 464 U.S. at 119 ("This is not to say that *ex parte* communications between judge and juror are never of serious concern . . . .").

However, without guidance from this Court, the question of whether courts can determine when empanelment of the jury begins—and thus when a particular defendant's trial starts—by announcing *per se* rule or whether courts must engage in a factual inquiry to make that determination will likely continue to divide lower courts. Given the critical nature of jury selection, this Court should grant certiorari to specifically address the factors courts should consider when asked to decide when the "work of empaneling the jury begins"—and thus when a defendant's constitutional right to be present attaches.

B. This case is a good vehicle for deciding this question.

The question presented is squarely in front of the Court in this case. Factors present in other cases where courts have declared a bright-line rule, and which might have made such a rule sensible in those circumstances, are not present here. First, one consistent reason that courts have declined to find a constitutional violation where preliminary jury selection proceedings occur in a defendant's absence is

because these proceedings often take place before jurors are assigned to a particular case. *See, e.g.*, *Dangcil*, 256 A.3d at 1029 ("To recognize [the process of statutory qualification, excusal, and deferral] as a critical stage would require the participation of countless sets of parties and counsel on the off chance that one of the prospective jurors will be directed to a particular case."); *State v. Baker*, 819 P.2d 1173, 1181, 1182 (Kan. 1991) ("A criminal defendant's statutory and constitutional rights to be present in person and by counsel at trial do not extend to the determination of excuses from jury service sought by individuals who have received summons for jury duty but have not reported for service on a particular case."). Therefore, the practicalities of requiring a defendant's presence weigh against finding a due process violation when these proceedings occur in a defendant's absence. *Id.* ("More often than not, one panel serves many cases in different divisions. Often it is uncertain at this stage which cases will actually be tried during their service. . . . It would be impossible to bring all defendants and their counsel together to be present when the decision is to be made on a panel member's request to be excused from jury service."). *See also Rushen*, 464 U.S. at 117–18 ("At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice.").

Second, in other instances, even where a panel is assigned to a particular case, the prospective jurors have received no information about the case for which they have been called. *See United States v. Moreland*, 703 F.3d 976, 982 (7th Cir. 2012) ("But 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."); *Greer*, 285 F.3d at 158 ("Here, the District Court questioned the prospective jurors prior to announcing the case."). Consequently, the risk that the jurors will disclose anything relevant to their ability to be impartial in that particular defendant's case is negligible.

Finally, some courts have created a bright-line rule that a defendant has no right to be present where the trial court is merely ruling on enumerated statutory grounds for excusal based on hardship or qualification. *See Streeter*, 278 P.3d at 779 (no error where trial court granted hardships pursuant to Cal. Rules of Court, rule 2.1008 in defendant's absence); *Davis*, 767 So. 2d at 991 ("In actuality all that happened in [Davis's] absence was the statutory qualifying process, during which the trial judge ascertained which, if any, of the prospective jurors should be excused or exempt based on the factors set forth in Miss. Code Ann. §§ 13–5–1, –23, & –25.").

When confronted with the question of whether a defendant's constitutional right to presence was violated, this Court has examined whether the defendant could have contributed to the proceeding or gained information from attending. *See Gagnon*, 470 U.S. at 527 (finding no due process violation where defendants were excluded from in chambers proceeding with juror, which their counsel attended, because "[r]espondents could have done nothing had they been at the conference, nor would they have gained anything by attending"). Where the factors described above are present, it may be reasonable for a court to conclude that there would be little a

defendant could glean from, or that a defendant would add to, qualification or excusal proceedings. *See Dangcil*, 256 A.3d at 1029 ("Further, defendant fails to articulate what vital information he and counsel may have gleaned from participation, given that disqualifications, excusals, and deferrals precede the revelation of any case-specific information."); *Moreland*, 703 F.3d at 983 ("It is difficult to see what the defendant could have added to this proceeding" in which jurors unaware of the case for which they were called were excused for "age, hardship, etc."). In other words, the courts could reasonably conclude that the defendant's absence did not impair the "fullness of his opportunity to defend." *Snyder*, 291 U.S. at 336.

By contrast, the excusal proceedings that the trial court held in Mr. Tijerina Sandoval's absence were with a jury panel exposed to information about the offense and the parties. They were also proceedings in which the trial judge was not merely applying strict statutory criteria in deciding whether to excuse jurors. Instead, the trial court had broad discretion to dismiss prospective jurors for any reason they might offer. Tex. Code Crim. Proc. Art 35.03 §1 (court may dismiss prospective jurors for excuse it deems "sufficient"); *Jasper*, 61 S.W.3d at 423 n.4 (Under Texas law "[e]xcuses are not specifically enumerated, but are considered on a case by case basis within the broad discretion of the court."). Additionally, Mr. Tijerina had a statutory right to object to and prevent the dismissal of any juror for economics-based reasons. Tex. Gov't Code § 62.110(c).

Under these circumstances, the chance that prospective jurors would divulge information specific to their fitness to serve on Mr. Tijerina Sandoval's jury was much

greater than in cases where the jurors either had no information about the case for which they were called or were only asked to provide statutorily enumerated reasons why they could not serve. Consequently, this case differs from other cases in which courts have created a *per se* rule that jury qualification and excusal proceedings are not a critical stage of trial.

This case also demonstrates the risk of creating a bright-line rule with no consideration of the underlying facts. During the excusal proceedings for the second panel, a prospective juror approached the court and informed the judge: "*In this case*, I feel uncomfortable." 50 RR 20 (emphasis added). The trial court did not inquire further and did not dismiss that juror. There is nothing in the subsequent voir dire proceedings that identifies that juror or indicates that the parties learned about the juror's expressed discomfort. *See* 50–54 RR. That juror's remark is undoubtedly something the parties would have wanted to inquire into further, especially in a high-profile capital case. Yet, the basis for that juror's discomfort is unknown. It is also unknown whether that juror was subsequently excused by agreement of the parties, was struck for cause or peremptorily, or sat on Mr. Tijerina Sandoval's jury. This Court should grant certiorari to provide clear guidance on the important question squarely presented by this case of when the work of empaneling the jury begins.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE STATE COURT ERRED IN HOLDING THAT THE TRIAL COURT DID NOT VIOLATE MR. TIJERINA SANDOVAL'S DUE PROCESS RIGHTS WHEN IT EXCLUDED HIM FROM THE EXCUSAL PROCEEDINGS OF THE JURY PANEL SUMMONED FOR HIS CASE.

Alternatively, this Court should grant certiorari and reverse the judgment below. In holding that excusal proceedings are *per se* not a critical stage of trial, the state court ignored the facts demonstrating error here. To reach this conclusion, the court relied in part on reasoning that the "process of hearing and granting juror exemptions and excuses of this type lack the traditional adversarial elements of most voir-dire proceedings." App. A at 11 (quoting *Black v. State*, 26 S.W. 3d 895, 900 (Tex. Crim. App. 2000)). The TCCA also focused on a defendant's minimal power to prevent a prospective juror from being excused, stating that "the 'right to be excused from the venire belongs to each of its individual members, not to the defendant.'"[6] *Id.* (quoting *Moore v. State*, 999 S.W.2d 385, 399 (Tex. Crim. App. 1999)). In reaching these conclusions, the court ignored several important factors that weigh in favor of Mr. Tijerina Sandoval's right to be present at the excusal proceedings in this case.

First, the TCCA's opinion does not account for the information that Mr. Tijerina Sandoval could have learned about jurors' willingness to serve in his case specifically. The prospective jurors were aware of the case they had been called for and the basic alleged facts of the offense Mr. Tijerina Sandoval was charged with. 7 CR

[6] This is an inaccurate statement of state law. At a minimum, both parties must approve of a juror's excusal for economic reasons. Tex. Gov't Code § 62.110 (c). Consequently, a defendant has a right to prevent the excusal of a juror whose excuse is economic in nature.

3101, 3113, 3115. Texas does not statutorily limit the reasons jurors can seek excusal from a jury. Tex. Code Crim. Proc. Art 35.03 § 1; *see also Jasper*, 61 S.W.3d at 423 n.4 These circumstances created a significant risk that some of the reasons provided by prospective jurors seeking to be excused from jury service would be based on the specific circumstances of this case, which could potentially reveal individual prospective jurors' bias. For example, the vast majority of prospective jurors reported seeing some of the media coverage about the offense. *See* 58 RR 35 (trial court noting that the media had "publicized [this case] so much" that "almost all" the potential jurors knew something about the alleged offense). Some of those stories published prior to jury selection disclosed that Mr. Tijerina Sandoval is a Mexican national. *See, e.g.*, 1 CR 92, 132, 194, 197, 224, 227, 241–42; 2 CR 522, 626. Others falsely alleged Mr. Tijerina Sandoval was involved with Mexican cartels, an allegation never asserted by the State at trial. *See, e.g.*, 1 CR 225, 418, 456, 472; 2 CR 581, 598, 631, 634, and 695.

Prospective jurors were not consistently asked about their opinion of Mexican nationals, or immigrants generally, residing in the United States on the questionnaire or in voir dire.[7] Nor were they asked about any opinions they may have related to cartels, as it was not a fact the State was attempting to prove. However, because

[7] The only question about immigration on the questionnaire was in the "Criminal Justice System" section of the questionnaire, which contained a question about whether the prospective juror believed that "foreign nationals" should have the same rights as United States citizens. 7 CR 3104. Some prospective jurors were asked about this question during individual voir dire, *see, e.g.*, 29 RR 83–85, 32 RR 133–34, some were asked more general questions about their opinions on whether they could be fair to someone who was a non-citizen, *see, e.g.*, 38 RR 157, 57 RR 58–59, and some were asked no questions related to immigrants or immigration, *see, e.g.*, 53 RR 149–93.

of prospective jurors' exposure to pretrial media, it is possible that some potential jurors volunteered knowledge or opinions about Mr. Tijerina Sandoval's immigration status or his purported cartel membership while seeking to be excused from the jury. It is plausible, for example, that a prospective juror could have seen media stories about Mr. Tijerina Sandoval's purported cartel membership and sought excusal due to fear about being seated on the jury of someone he or she believed was cartel-affiliated. If the court denied their request to be excused, there is no assurance that prospective jurors would voice that opinion again during voir dire or that Mr. Tijerina Sandoval or his attorneys would learn of it. Yet, it is, without question, information the defense would want to have an opportunity to ask a potential juror about and to consider when making its strikes.

Because the overwhelming majority of the proceedings in question were not on the record, it is impossible to know the entirety of information Mr. Tijerina Sandoval could have learned about prospective jurors and facts they shared with the court that were relevant to his defense. However, even from the minimal record available, there is evidence that at least one juror sought to be excused from jury service based on their discomfort in sitting in this case specifically. 50 RR 20. That information would undoubtedly be something both parties would want to inquire into on voir dire to determine if that prospective juror's discomfort rendered them a biased or undesirable juror. Indeed, at the remand hearing, Mr. Tijerina Sandoval's trial attorney confirmed that the knowledge he would have gained during the excusal proceedings would have been important to him during voir dire. 2 Remand RR 39; *see also id.* at

52 ("And then there's some jurors that will vastly try to get off a jury simply because of the nature of the case, you know. And so that's—I mean, then that's when you find out. . . . And then when they do individual voir dire, that's when you go ahead and question them in more detail so you can make an informed decision whether that . . . person is a good juror.").

Second, the state court's analysis omitted any mention of the errors that the trial court made and that are evident even on the limited record here. For example, the judge misstated the requirements for a juror to claim statutory exemption based on having custody of a minor child. Texas law permits a custodian of a child under 12 to claim an exemption if the potential juror's service on the jury would leave the child without adequate supervision. Tex. Gov't Code § 62.106(2). Here, the trial court informed the panels of potential jurors that they could claim an exemption if they had custody of a child under 14 or 15. 27 RR 12; 50 RR 14–15; 55 RR 14. The court then excluded at least one juror without verifying whether that the person met the statutory criteria for that exemption. 50 RR 18. The presence of Mr. Tijerina Sandoval and his counsel could have prevented the court from dismissing prospective jurors without confirming whether they qualified for an exemption and prevented their wrongful dismissal if they did not so qualify.

The record also reveals that the trial judge improperly excused at least one juror, apparently based on statutory disqualification, even though the juror was not actually disqualified. Under Texas law, a prospective juror is disqualified from service if they have a conviction for, or have been formally charged with, a felony or

misdemeanor theft. Tex Code Crim. Proc. art. 35.16(a)(2) and (3); Tex. Gov't Code § 62.102(2). However, the court here excused a prospective juror who merely reported a misdemeanor DWI conviction, 50 RR 20, which is not grounds for disqualification. It also excused another juror with a DWI conviction without inquiring whether that conviction was a felony. *Id.* at 13–14. Mr. Tijerina Sandoval's presence could have prevented the wrongful dismissal of jurors who were not statutorily disqualified.

Third, the TCCA did not adequately address the fact that Mr. Tijerina Sandoval had a statutory right to object to juror excusals on the financial hardship grounds. Tex. Gov't Code 62.110(c). Instead, the state court merely recognized that right exists but held that right does not entitle a defendant to be present at the proceeding in which special venire members are seeking to be excused. App. A at 10.[8]

Finally, the TCCA did not address the number of rulings that the trial court made regarding the jury panels called specifically for Mr. Tijerina Sandoval's case. While it is unclear from the record exactly how many prospective jurors were dismissed by the court in Mr. Tijerina Sandoval's absence, his counsel noted that it was "a lot." 76 RR 176. Moreover, the number of jurors dismissed does not account for the number of potential jurors who sought to be excused but whose requests were denied

[8] In addressing a separate point of error in which Mr. Tijerina Sandoval challenged the trial court's failure to record the excusal proceedings, the state court further held that a defendant has no right to have the proffered excuses by special venire members recorded. App. A at 12. In rejecting that point of error, the court penalized Mr. Tijerina Sandoval for "point[ing] to nothing to suggest that a juror was in fact excused for an economic reason," *id.* at 12–13, even though the complained-of proceedings were off-the-record, which, in conjunction with Mr. Tijerina Sandoval's absence, made it impossible to determine if any such example existed.

by the court. Only a handful of the judge's rulings are on the record. The court dismissing numerous jurors outside the presence of Mr. Tijerina Sandoval raises significant concerns about the integrity of the panel and the information the court received about potential jurors that Mr. Tijerina Sandoval was denied access to. Yet, the TCCA held that there is no requirement that courts record excusal proceedings, App. A at 12, so no defendants charged with capital murder in Texas will be able to ascertain whether prospective jurors called for their specific case pursuant to a special venire were improperly excused in their absence. Nor will they have a means of discovering if prospective jurors, aware of the case for which they were called, shared information during the proceedings in the defendant's absence that revealed potential bias, or that otherwise would make them an undesirable juror under the particular circumstances of the defendant's case.

Under these circumstances, it is clear that Mr. Tijerina Sandoval could have "gained information from attending" the proceedings in which special venire members assigned to his case were excused in his absence. *Gagnon*, 470 U.S. at 527. He could have gained information about why prospective jurors sought dismissal from jury service in his case. That information would have been relevant to his decision in how to exercise his strikes. Moreover, he could have prevented prospective jurors who were not exempt or disqualified from being improperly excused, protecting the integrity of the jury panel called in his case. Thus, the benefit of his attendance would have been more than a "shadow." *Snyder*, 291 U.S. at 107.

Finally, the State conceded in the proceedings below that the absence of a record—through no fault of Mr. Tijerina Sandoval's—precluded the State from meeting its burden on harm. State's Br. at 29. Indeed, because the trial court ordered the excusal proceedings off-the-record, there is not an adequate record by which the State can meet its burden of proving the error harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 297 (1991); *Chapman*, 386 U.S. at 24.

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,

JENNAE SWIERGULA
Counsel of Record
ESTELLE HEBRON-JONES
EMILY FOLLANSBEE
TEXAS DEFENDER SERVICE
9390 Research Blvd
Kaleido II, Suite 210
Austin, TX 78759
(512) 320-8300
(512) 477-2153 (fax)
jswiergula@texasdefender.org
ehebron-jones@texasdefender.org
efollansbee@texasdefender.org

Counsel for Petitioner