No. 23-5618

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
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court grant certiorari to review Petitioner's first question presented where he waived his due process claim by not raising it in the court below, the question presented does not comport with his argument, and the split he asserts is illusory and inapposite?

2. Should the Court grant certiorari to review Petitioner's second question presented where it raises nothing more than a request for error correction, and Petitioner fails to show the lower court's denial of his claim was contrary to this Court's precedent?

LIST OF PROCEEDINGS

State v. Tijerina Sandoval, 2015-DCR-2443-C (197th Dist. Ct. Cameron Co., Tex. Aug. 18, 2018)

Tijerina Sandoval v. State, 665 S.W.3d 496 (Tex. Crim. App. 2022), *reh'g denied* (May 17, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

BRIEF IN OPPOSITION

Petitioner Gustavo Tijerina Sandoval was convicted and sentenced to death for the murder of Javier Vega, Jr. (Harvey). In the court below, Sandoval raised a claim alleging his Sixth Amendment right to confrontation and his rights under state law were violated because the trial court called special venires and conducted preliminary hearings on prospective jurors' statutory qualifications, excuses, and exemptions outside his presence. The Texas Court of Criminal Appeals (CCA) rejected the claim because the preliminary inquiry into a prospective juror's "general qualifications, excuses, and exemptions is not the sort of proceeding that needs to be conducted in the defendant's presence." Pet'r's App. A at 11. Relying on this Court's opinion in *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964), Sandoval asks this Court to grant certiorari to determine, for purposes of assessing whether a defendant's right to due process is violated, when empanelment of a jury begins and to set forth factors a court must consider in making that determination. Pet. Cert. 13, 19. But Sandoval does not present a compelling reason justifying certiorari review, and his case is an inapt vehicle for the question he presents.

First, Sandoval neither cited *Snyder* in his briefing in the court below nor raised a due process claim in relation to his complaint that he was absent during the trial court's preliminary statutory inquiry. He has, therefore,

waived the first question he raises in his petition. Second, the issue of when empanelment of a jury begins is, at bottom, one of state law, not due process. Consequently, Sandoval's first question presented does not comport with his argument that the CCA incorrectly found his presence at the trial court's preliminary inquiry did not have a reasonably substantial relationship to his opportunity to defend himself. Third, the CCA's opinion does not reflect a categorical rule like Sandoval suggests it does. Sandoval's petition is, therefore, an inappropriate vehicle for addressing the first question he presents. For the same reasons, Sandoval's petition does not present an important issue of federal law for this Court to resolve and, relatedly, he fails to identify a relevant split that requires resolution by this Court. Lastly, his second question presented is nothing more than a request for error correction, and he fails to show the CCA's decision was inconsistent with this Court's precedent. Consequently, Sandoval's petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Facts from Trial

> On Sunday, August 3, 2014, Harvey Vega, a border patrol agent, and his family and one of his son's friends went to Harvey's parents' house for a barbeque. Afterwards, Harvey and some of the others left to go target shooting. Later, they all decided to meet up again to go fishing. Harvey's parents drove their own

truck. Harvey's father, Javier, always carried his gun for protection when he went somewhere, so along with their fishing gear, he brought his .40 caliber Sig Sauer, a .22 pistol, and a .22 rifle.

As the two vehicles traveled to the fishing spot, they passed a red SUV parked on the side of the road with two men inside. Harvey's mother noticed that the SUV was parked on an upslope. That was unusual to her because, "No one ever parks on the upslope." Harvey's father got a good look at the two men, and his mother made eye contact with them. Both parents waved at the two men as they passed. The SUV started following them. After the Vega family arrived at and set up the fishing site, the SUV drove to within 30 yards but then reversed and drove away.

Ten or fifteen minutes later, the SUV returned. Two men jumped out and began firing their guns at the Vega family. The driver shot Harvey point blank and the passenger shot at the parents. According to the parents, the driver shouted "Al suelo, cabron," meaning "Down to the ground, motherfucker." After [Sandoval] shot Harvey, the passenger shot Javier. Javier fell to the ground, went for his gun, and shot at the passenger. When that happened, the two men got back into the SUV and drove away, with the passenger hanging on to the door. Harvey's parents identified [Sandoval] as the driver and testified that [Sandoval] shot Harvey. The friend, Aric Garcia, testified that the driver shot Harvey. Harvey's wife testified that [Sandoval] was one of the men in the SUV. Harvey died, never regaining consciousness.

Around 2:00 the next morning, the SUV broke down and [Sandoval] and his passenger were forced to walk. They went to a house and asked for help. The woman who lived there let them in, but she alerted border patrol agents after seeing a helicopter search light.

[Sandoval] and his passenger were arrested. Swabs from testing [Sandoval's] hands tested positive for gunshot residue. A .45 caliber Taurus pistol was later found near the scene of [Sandoval's] arrest. Four .45 caliber cartridge casings found at the crime scene and the bullet that killed Harvey were consistent with having been fired from the Taurus. Bloodstains on the driver's side

seatbelt and the passenger seat backrest of the red SUV matched [Sandoval's] DNA.

At the punishment stage of trial, the State introduced evidence that [Sandoval] participated in three other robberies against people fishing in the area. During these robberies, the victims were ordered at gunpoint to get on the ground. One victim was struck twice in the head with the butt of a gun. [Sandoval] also had convictions for misdemeanor assault, unlawful carrying of a weapon, and driving while intoxicated, as well as two convictions for possession of marijuana. And [Sandoval] had a federal conviction for illegal reentry after deportation.

[Sandoval] presented the following mitigating evidence at punishment: The woman who lived in the house where [Sandoval] was arrested testified that [Sandoval] did not mistreat, harm, or act disrespectfully to her or her four children while he was there and that she did not feel threatened by him. The evidence also showed that [Sandoval] surrendered peacefully to border patrol agents when they found him. And a director from the Texas Department of Criminal Justice testified that she saw nothing in [Sandoval's] records that indicated he was part of a security threat group, though she testified on cross-examination that he had previously been placed in administrative segregation.

Pet'r's App. A at 2–4 (footnotes omitted).

II. The Lower Court's Opinion Regarding Sandoval's Voir Dire Claim

Prospective jurors can be summoned for jury service in general and sent to a central jury room, to be sorted into panels later, or they can be summoned to a "special venire," one that is already assigned to a particular case. [Sandoval's] jury was selected from three special venires called on three different days. The court reporter's record indicates that [Sandoval] and his attorney were not present when the trial court conducted a general inquiry into the prospective jurors' qualifications, excuses, and exemptions but arrived afterwards. We initially perceived a possible conflict in the record because the docket sheets seemed to suggest that [Sandoval] and his attorney were present on these

occasions. And in a hearing on [Sandoval's] motion for mistrial, the trial court suggested that [Sandoval] and his attorney were present:

> Okay. Hold on. What I told you was, we had to qualify them just to make . . . certain that, you know, they were—they were a U.S. citizen and a citizen of Texas, presiding in . . . Just pre-qualifications. And I told you you didn't need to be there. *In fact, you were there, though.*

Pursuant to our authority to have an inaccuracy in the record corrected, we remanded the case to the trial court to determine if there was an inaccuracy in either the clerk's record or the reporter's record. On remand, the trial court concluded that neither record was inaccurate. Rather, the clerk's record simply denoted the date and general time period for when [Sandoval] and counsel were present but did not pinpoint specific times they were present. The trial court found that [Sandoval's] attorney observed—but did not participate in—a portion of the first qualifications, excuses, and exemptions proceeding. The trial court also found that the court's questioning of prospective jurors at this time was *sotto voce*, at a whisper, and that [Sandoval's] attorney could not hear what was being said. The trial court further found the court reporter's record to "be the most reliable source for what occurred" and that [Sandoval], his attorney, and the interpreter were not present during the second and third hearings on qualifications, excuses, and exemptions. The trial court also found that all three hearings were held off the record.

. . . .

[T]he reasons we have given for permitting a judge to conduct this type of proceeding outside the presence of the defendant and his attorney apply with equal force to special venires. We have explained that the "process of hearing and granting juror exemptions and excuses of this type lack the traditional adversarial elements of most voir-dire proceedings." Further, the "right to be excused from the venire belongs to each of its individual members, not to the defendant." And it seems nonsensical to suggest that a perfectly permissible procedure

> becomes a constitutional violation based on how or where the prospective juror is first summoned. 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. And nothing in the statute authorizing a special venire for a capital case requires that an Article 35.03 proceeding be held in the presence of the defendant.

Pet'r's App. A at 7–11 (footnotes omitted).

III. Procedural History

Sandoval was convicted and sentenced to death for the murder of Harvey Vega, which was committed during the course of committing or attempting to commit robbery. Pet'r's App. A at 1–2. The CCA upheld Sandoval's conviction and death sentence on direct appeal. Pet'r's App. A at 81. Sandoval filed a motion for rehearing, which the CCA denied on May 17, 2023. Pet'r's App. B. Sandoval then filed a petition for a writ of certiorari. The instant Brief in Opposition follows.

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied on the First Question Presented.

Sandoval asks this Court to grant review to set forth a test for determining when jury empanelment begins, triggering the due process right to be present. Pet. Cert. ii. But Sandoval provides no compelling reason to expend limited judicial resources on this case. *See* Sup. Ct. R. 10(a)–(c). Indeed, Sandoval has waived the issue he presents because he did not raise a due

process claim in the court below, his first question presented is premised on a matter of state law, the question presented does not comport with his argument, and the split he alleges is inapposite and illusory. Consequently, his petition should be denied.

A. Relevant law

The Texas Code of Criminal Procedure establishes the procedure to be followed in empaneling a petit jury. Tex. Code Crim. Proc. art. 33–35. Article 33.03 requires that a defendant in a felony prosecution "be personally present at the trial[.]" *See Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001). Prospective jurors can be summoned for service and sent to a central jury room to be sorted into panels later, i.e., a general assembly. Pet'r's App. A at 7 (citing Tex. Code Crim. Proc. art. 33.09). In a capital case, a court may summon prospective jurors as a special venire assigned to that particular case. Tex. Code Crim. Proc. art. 34.01; *see* Pet'r's App. A at 7.

State law also provides ways prospective jurors may be dismissed by the court. *See generally* Tex. Code Crim. Proc. art. 35. They may be excused for sufficient reason under article 35.03, by claiming an exemption from jury service under article 35.04, because they are disqualified from jury service under article 35.16, or because they are absolutely disqualified under article 35.19. *See* Tex. Gov't Code §§ 62.102–106.

Article 35.03 states that a trial court shall "hear and determine excuses offered for not serving as a juror, including any claim of an exemption or a lack of qualification, and if the court considers the excuse sufficient, the court shall discharge the prospective juror[.]" *See* Tex. Gov't Code § 62.110(a). Article 35.03 does not enumerate bases for excusing a potential juror. It "gives a trial court broad discretion to excuse prospective jurors for good reason." *Crutsinger v. State,* 206 S.W.3d 607, 608 (Tex. Crim. App. 2006). "Unless the excuse given is economic in nature, neither appellant nor his attorney is required to be present." *Id.* An excusal under article 35.03 of a prospective juror is subject to review for an abuse of discretion. *Butler v. State*, 830 S.W.2d 125, 130–32 (Tex. Crim. App. 1992) (en banc).

The Texas Government Code provides general qualifications for and exemptions from jury service. Tex. Gov't Code §§ 62.102–1041, § 62.106. Article 35.16 of the Texas Code of Criminal Procedure also provides a list of qualifications that a prospective juror must meet or otherwise be subject to a challenge for cause.[1] Article 35.19 specifies that three of the qualifications in article 35.16 are absolute and that jurors disqualified under those criteria may

[1] "A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the [enumerated] reasons." Tex. Code Crim. Proc. art. 35.16(a). Under Texas Code of Criminal Procedure article 35.21, "[t]he court is the judge, after proper examination, of the qualifications of a juror, and shall decide all challenges without delay and without argument thereupon."

not serve even "though both parties may consent."[2] The list of qualifications in article 35.16 is a complete list of challenges for cause. *Butler,* 830 S.W.2d at 130. A challenge for cause under article 35.16 against an unqualified prospective juror is "qualitatively different" than the excusal of a prospective juror for personal reasons under article 35.03. *Butler*, 830 S.W.3d at 130. "Where a party wishes to challenge a potential juror for bias, that party must demonstrate, through questioning, that the potential juror lacks impartiality." *Buntion v. State*, 482 S.W.3d 58, 84 (Tex. Crim. App. 2016).

B. Sandoval did not raise a due process claim in the court below.

Relying on the right to due process, Sandoval asks this Court to grant certiorari to set forth a test to determine when jury empanelment begins. Pet. Cert. ii. But he did not raise a due process claim in the court below. Br. of Appellant 129–36, *Sandoval v. State*, No. AP-77,018 (Tex. Crim. App. Dec. 15, 2020) (Br.). Rather, Sandoval only raised claims relating to his absence during the trial court's preliminary inquiry at voir dire under the Confrontation Clause and Texas statutes. *Id.* Moreover, he did not argue in the court below that he had a right to be present during the trial court's preliminary inquiry because the process of empaneling his jury had begun at that time. *Id.*

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[2] Those three absolute qualifications provide that a prospective cannot be insane or have been convicted of, indicted for, or otherwise legally accused of misdemeanor theft or a felony. Tex. Code Crim. Proc. art. 35.16(a)(2)–(4).

Consequently, Sandoval has waived his due process claim. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) ("The Yees did not include a due process claim in their complaint. . . . In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."); *Sims v. Apfel*, 530 U.S. 103, 109 (2000) ("'Ordinarily an appellate court does not give consideration to issues not raised below.'" (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941))).

Concededly, the CCA considered whether the trial court's preliminary inquiry "had a reasonably substantial relation to" Sandoval's opportunity to defend himself. Pet'r's App. A at 8. But 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. Br. at 129–36. Nor did he argue in the lower court that any of the trial court's interactions with prospective jurors outside his presence had any relation to his ability to defend himself. *Id.*

Moreover, the lower court's focus and the bulk of its discussion regarding Sandoval's claim centered on state law and the court's precedent applying it, Pet'r's App. A at 8–11, likely because Sandoval's briefing did not allege he was denied the right to due process. Specifically, the CCA's analysis centered on Texas Code of Criminal Procedure article 33.03, which requires that a

defendant in a felony case be "personally present at the trial[.]" The court discussed at length its precedent applying article 33.03 to determine whether "the trial" began during the trial court's preliminary inquiry into prospective jurors' qualifications, excuses, and exemptions. Pet'r's App. at 8–11. That precedent did not rely on the right to due process. *See Jasper*, 61 S.W.3d at 422–24 (assuming for purposes of article 33.03 and the right to confrontation that the defendant's trial began at the time of the qualifications, excuses, and exemptions inquiry because the venire was already assigned to the defendant's case, but finding a lack of harm); *Crutsinger*, 206 S.W.3d at 608–09 (applying Tex. Code Crim. Proc. art. 35.03); *Black v. State*, 26 S.W.3d 895, 899–900 (Tex. Crim. App. 2000) (en banc) (addressing claim under state law and alleging ineffective assistance of counsel).

Sandoval's failure to squarely present to the lower court the issue he wants this Court to expend its limited resources to resolve counsels against granting such a request. This Court has stated that a "rigid and undeviating" application of waiver may be inappropriate where, *inter alia*, doing so would not "promote the ends of justice." *Hormel*, 312 U.S. at 557. But as discussed below, the ends of justice do not require the Court to condone Sandoval's failure to raise in the court below the question he raises in his petition because he does not raise an important issue of federal law for this Court to resolve, and the lower court appropriately rejected his claim. There is simply nothing

exceptional about Sandoval's case that justifies reaching an issue that was not properly raised in the court below.[3] Therefore, Sandoval's petition should be denied.

C. Sandoval's petition is a poor vehicle for his first question because it does not comport with his argument, and it rests on a matter of state law.

Sandoval's first question presented asks this Court to set forth a test for determining "when the work of impaneling the jury begins," which he argues triggers the due process right to be present. Pet. Cert. ii, 16 (citing *Lewis v. United States*, 146 U.S. 370, 373 (1892), *abrogated on other grounds by Diaz v. United States*, 223 U.S. 442 (1912)). But his argument does not comport with the question presented.

As discussed above, Sandoval did not raise a claim in the court below that his absence during the trial court's preliminary inquiry violated his right to due process because that inquiry was part of the jury empanelment process. Moreover, the bulk of Sandoval's argument in his petition rests not on the question implicated by *Lewis* of when the work of jury empanelment begins

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[3] Sandoval may argue the State's concession of error in the court below renders this case exceptional. Not so. The concession was premised on the CCA's opinion in *Jasper*, which as noted above, did not involve a due process claim but rather the issue of whether for purposes of state law the defendant's trial began during the preliminary qualifications, excuses, and exemptions inquiry since the venire was assigned to the defendant's case. Br. for State 28, *Sandoval v. State*, No. AP-77,081 (Tex. Crim. App. Dec. 20, 2021) ("As all three panels were designated special jury panels, the Appellant had the unwaivable right to be present during the proceedings." (citing *Jasper*, 61 S.W.3d at 422–23)).

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. *Compare United States v. Gagnon*, 470 U.S. 522, 526 (1985) (explaining the rule from *Snyder* as requiring a defendant's presence when it has a reasonably substantial relation to his opportunity to defend against the charge), *with Lewis*, 146 U.S. at 373 (stating that for purposes of the requirement that a defendant be present at a felony trial, "the trial commences at least from the time when the work of impaneling the jury begins").[4] Indeed, while Sandoval urges this Court to grant review to set forth a test to determine when jury empanelment begins, Pet. Cert. 13, this Court has already provided the test for the relevant due process question: whether the defendant was absent during a proceeding that had a reasonably substantial relation to his opportunity to defend himself, *Gagnon*, 470 U.S. at 526.

Sandoval fails to show there exists, as his first question presented suggests, an absolute right to be present at trial once the jury empanelment process begins. Indeed, as Sandoval concedes, the right is *not* absolute. Pet. Cert. 14; *see State v. Irby*, 246 P.3d 796, 800 (Wash. 2011) (en banc). It is implicated only where the defendant's presence has a reasonably substantial

[4] This Court noted in *Snyder* that its statements in *Lewis* "on the subject of the presence of a defendant was dictum, and no more." *Snyder*, 291 U.S. at 118 n.2.

relation to his opportunity to defend himself. *Snyder*, 291 U.S. at 105–06. As discussed below, the opinions on which Sandoval relies to urge a split regarding when jury empanelment begins do not revolve around that question. The bulk of those opinions, instead, apply the *Snyder* standard. So Sandoval's argument simply does not comport with his first question presented and is therefore an inapt vehicle to address that question.

Moreover, underneath Sandoval's purported due process claim is a pure matter of state law. As discussed above, Sandoval's failure to properly raise a due process claim in the court below deprived that court of the opportunity to fully address it and likely led the court to focus on state law. *See* Pet'r's App. A at 10–11. Specifically, the CCA addressed whether Sandoval's trial "had begun" for purposes of Texas Code of Criminal Procedure article 33.03 at the time of the trial court's preliminary inquiry because the prospective jurors were summoned as a special venire rather than a general assembly. *Id.* (quoting *Jasper*, 61 S.W.3d at 423); *see* Tex. Code Crim. Proc. art. 33.03 ("In all prosecutions for felonies, the defendant must be personally present at the trial[.]"). In that way, Sandoval's petition conflates the issue of when jury empanelment begins with the state law issue under article 33.03 of when "the trial" begins. At bottom, Sandoval's first question raises only the issue of whether the CCA erred in determining Sandoval's trial had not begun for purposes of article 33.03 at the time of the trial court's preliminary inquiry.

His petition is, therefore, an inapt vehicle to resolve any broader matter of constitutional law.

Sandoval argues this case is a good vehicle for this Court to determine when jury empanelment begins because the prospective jurors in his case were assigned specifically to his case, the prospective jurors may have disclosed to the trial court information regarding their ability to be impartial in Sandoval's case, and the trial court had latitude to excuse prospective jurors. Pet. Cert. 19–23. But he fails to show this Court can resolve the question he presents.

First, Sandoval's vehicle argument is nothing but an argument that the CCA should have found he had a right to be present during the trial court's preliminary inquiry because the prospective jurors were called as a special venire. Pet. Cert. 19–23. That does not make this case a good vehicle for the first question presented; it is a request for error correction.

Second, Sandoval argues the Court should use this case to lay down a rule setting forth factors to consider in determining when jury empanelment begins. Pet. Cert. 19. But as discussed above, his argument does not comport with his first question presented, which renders his case an inapt vehicle for resolving it. Moreover, rather than providing factors courts should consider in making an inquiry under *Snyder*, Sandoval instead seeks a categorical rule that a defendant has a due process right to be present during all interactions

between a trial court and prospective jurors if they were summoned specifically for the defendant's case. Pet. Cert. 19–23.

Importantly, Sandoval provides no reason for the rule he seeks other than speculation that prospective jurors may disclose information outside a defendant's presence about their ability to serve in a particular case. Pet. Cert. 22–23. But Sandoval's speculation does not warrant this Court's attention or the sweeping rule he seeks. *See Rushen v. Spain*, 464 U.S. 114, 118–19 (1983) ("There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The lower federal courts' conclusion that an unrecorded ex parte communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice."); *People v. Rogers*, 141 P.3d 135, 158 (Cal. 2006) (declining to engage in speculation that prospective jurors' in-chambers discussions with the trial court involved matters of personal bias). Indeed, the trial court *in this case* admonished a prospective juror that his or her case-specific reasons not to serve as a juror were not an appropriate topic for the court's preliminary inquiry but should instead be raised during individual voir dire. 50 RR 20 ("I understand, but that's something that you're going to have to—when we do the individual voir dire, *that's when you bring that up*." (emphasis added)). The

trial court's comment belies the notion that this case is an appropriate vehicle to expand *Snyder* into a categorical rule, and the comment belies the notion that Court's intervention is necessary to set forth a broad constitutional test. Sandoval's petition should be denied.

D. The lower court's opinion does not reflect a per se rule, and the split Sandoval alleges is inapposite and illusory.

Sandoval argues this Court should grant his petition to resolve a split regarding how to determine when jury empanelment begins. Pet. Cert. 13. But the split he alleges is illusory, and his petition does not present an issue worth of this Court's attention.

Sandoval argues the lower court's opinion reflects a rigid per se rule that a defendant does not have the right to be present when the trial court conducts its preliminary inquiry into veniremembers' qualifications, excuses, and exemptions. Pet. Cert. 24. He argues the CCA's ruling conflicts with the approach of several courts that conduct a fact inquiry to determine when the jury empanelment process begins. Pet. Cert. 18. But, again, his argument about the CCA's application of *Snyder* does not comport with his first question presented regarding jury empanelment. Moreover, the CCA's opinion does not represent a relevant split.

For instance, in *United States v. Bordallo*, the prospective jurors knew which case they would hear if chosen to serve as a juror. 857 F.2d 519, 522 (9th

Cir. 1988). The defendant was not present when the trial judge excused prospective jurors specifically because they were friends or supporters of the defendant. *Id.* The Ninth Circuit held the trial court's excusal of the prospective jurors outside the defendant's presence was error because "some were excused due to factors related to [the defendant's] particular case." *Id.* at 523.

Similarly, in *State v. Irby*, the trial judge and attorneys for the prosecution and defense discussed over email excusing several potential jurors. 246 P.3d at 800. The judge and attorneys discussed dismissing several potential jurors because they had parents who had been murdered.[5] *Id.* at 801. The Supreme Court of Washington held those discussions, which occurred without the defendant, were part of voir dire because they tested the prospective jurors' ability to try the defendant's specific case and the prospective jurors were dismissed for cause. *Id.* at 801. Therefore, the defendant's absence from those discussions violated his right to due process. *Id.*

In *State v. Wilson*, the defendant was absent during the trial court's preliminary orientation when the prospective jurors were asked whether they knew the parties or witnesses and completed a questionnaire. 918 P.2d 826,

[5] The defendant in *Irby* was charged with first degree murder. *Irby*, 246 P.3d at 798.

830 (Or. 1996). The Supreme Court of Oregon found the defendant's absence was error *under state law* but harmless. *Id.* at 831–33. The court addressed whether the defendant was harmed as a matter of federal law, but the court did not hold there was error as a matter of federal law. *Id.*

In *State v. Cosme*, the defendant complained of the trial court's unrecorded orientation of prospective jurors. 943 A.2d 810, 812–13 (N.H. 2008). The Supreme Court of New Hampshire held the defendant's absence during juror orientation did not deprive him of any constitutional right because the prospective jurors were not informed in those proceedings of any specific facts or witnesses nor asked about their potential prejudices. *Id.* at 814.

On the other hand, Sandoval argues the Second Circuit's opinion in *United States v. Greer*, 285 F.3d 158 (2d Cir. 2002), represents a per se approach to determining when jury empanelment begins. Pet. at 17. The Second Circuit in *Greer* distinguished the Ninth Circuit's opinion in *Bordallo*, finding the complained-of procedure during which the defendant was absent was administrative and routine. 285 F.3d at 168. But it did not reach that conclusion by refusing to consider the nature of the interaction between the court and prospective jurors. *Id.* Notably, in a later case, the Second Circuit conducted a fact inquiry and found "pre-screening of prospective jurors" was a material stage of trial because the court was inquiring into the prospective jurors' knowledge of the defendant's case. *Cohen v. Senkowski*, 290 F.3d 485,

487, 489–90 (2d Cir. 2002). This plainly undercuts Sandoval's suggestion that the Second Circuit blindly applies a categorical test regarding when jury empanelment begins and that a deep, irreconcilable conflict exists between the Second Circuit and other courts.

Nothing in the CCA's opinion is inconsistent with the courts Sandoval says conduct fact-intensive inquiries to determine when jury empanelment begins. *See* Pet. Cert. 18. Most importantly, nothing in the CCA's opinion indicates it would pretermit consideration of a claim that a trial court excused prospective jurors in a special venire during a preliminary inquiry for reasons that extended beyond that inquiry, e.g., a prospective juror's bias or ability to render a particular verdict in a capital case. Pet'r's App. A at 11; *cf. Suniga v. State*, No. AP-77,041, 2019 WL 1051548, at *11–12 (Tex. Crim. App. Mar. 6, 2019) (holding that trial court's ex parte inquiry with juror during voir dire regarding her potential bias violated the defendant's right to be present at his trial but finding a lack of harm). Sandoval did not present a claim to the CCA alleging the trial court's inquiry was improper because it went beyond the topics that are covered by an inquiry into prospective jurors' qualifications, excuses and exemptions. Instead, Sandoval argued that his presence was required under state law merely because the trial court called the prospective jurors as a special venire rather than as a general assembly. Br. at 132–33. So the CCA did not apply or set forth a broad per se rule as Sandoval suggests

that would preclude the court from considering whether a trial court's inquiry into the qualifications, excuses, and exemptions improperly extended to matters that required the defendant's presence. Therefore, Sandoval fails to identify a relevant split that this Court could resolve in this case, which renders this case an inapt vehicle for Sandoval's first question. Relatedly, any opinion regarding the first question presented would be purely advisory because the CCA's decision did not rest on a bright-line rule regarding jury empanelment. *See* Pet'r's App. A at 11.

Further, the opinions of the courts Sandoval alleges apply a per se rule regarding jury empanelment are consistent with those of the courts Sandoval argues apply a fact-based approach. For example, in *State v. Dangcil*, the Supreme Court of New Jersey held the defendant's absence during the pre-voir dire disqualification, excusal, and deferral stage was not error, finding the defendant failed to show his participation was necessary when the trial court removed prospective jurors "based on substantiated hardships, scheduling conflicts, and similar considerations." 256 A.3d 1016, 1029 (N.J. 2021). It does not appear the appellate court was presented with a claim that the trial court's questioning of prospective jurors extended to questions regarding their fitness to serve in the defendant's trial. And in *Davis v. State*, the state court held a trial judge's questions on statutory qualifications does not require a defendant's presence. 767 So.2d 986, 992 (Miss. 2000). While the court

indicated its holding was a "bright line," it also recognized that the questioning of prospective jurors regarding a defendant's case requires the defendant's presence. *Id.* ("Regardless of whether it is called 'impaneling the jury' or 'voir dire' or otherwise, the critical stage of jury selection begins at the time when the trial judge and counsel for the parties begin questioning the qualified prospective jurors about such matters . . . specific to the particular case such as opposition to the death penalty[.]").

The opinions cited by Sandoval simply do not reflect disagreement as to how to determine when a defendant's right to be present during voir dire attaches. Sandoval merely points to courts that were presented with different fact patterns. He does not identify any court that pretermits consideration of a claim alleging a trial court's questioning of prospective jurors during an initial qualification procedure exceeded the appropriate bounds.[6]

Relatedly, Sandoval argues this Court should grant review to lay out factors courts must consider in determining when jury empanelment begins, but the cases Sandoval relies on for support did not rely on any such factor-

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[6] *See also People v. Virgil*, 253 P.3d 553, 577 (Cal. 2011) (holding defendant's absence from sidebar conferences during which trial court ruled on for-cause challenges did not violate his constitutional right to be present); *Rogers*, 141 P.3d at 158 (holding defendant's rights were not violated due to his absence during 133 hardship excusals that were unrecorded where some jurors provided answers to a questionnaire regarding their potential bias); *State v. Neal*, 487 S.E.2d 734, 738–39 (N.C. 1997) (holding defendant's absence during bench conferences on hardship excusals did not violate his right to be present).

based test.[7] Rather, the courts addressed whether particular interactions with prospective jurors involved removal of jurors for case-specific reasons. *See Irby*, 246 P.3d at 801; *Wilson*, 918 P.2d at 830–31; *Bordallo*, 857 F.2d at 522–23. The opinions on which Sandoval relies show a consistent ability to determine whether an interaction with a prospective juror was such that the defendant's presence was necessary to test his or her ability to serve. Sandoval does not show any need for this Court to set forth a particular test for all courts to use—irrespective of the nuances of the States' varying voir dire procedures—to determine when jury empanelment begins.

Moreover, as discussed above, the CCA's opinion centered on state law, likely because Sandoval's claim did. Pet'r's App. at 11. The CCA applied its precedent regarding a defendant's right under state law to be present during "the trial" and held a defendant's absence during a trial court's preliminary inquiry is not error regardless of whether the prospective jurors are called as a general assembly or special venire. *Id.* This is a matter of state law and does not raise "an important federal question," let alone present a split regarding such a question. Because of that, resolution of Sandoval's first question

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[7] Sandoval's argument that the CCA committed reversible error by holding he did not have a right to be present during the trial court's preliminary inquiry belies his argument that the CCA should have conduct a factor-based assessment. That is, Sandoval would have this Court determine as a per se matter that capital defendants in Texas have an absolute right to be present during a trial court's hearing on prospective jurors' qualifications, excuses, and exemptions if they were summoned as a special venire. *See* Pet. Cert. 25–29.

presented would have no bearing on the outcome of his case. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical set of facts." (quotation marks and citation omitted)); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *see also Flast v. Cohen*, 392 U.S. 83, 95 (1968) (no justiciable controversy is presented "when the parties are asking for an advisory opinion").

As discussed above, Sandoval's petition presents neither a pure matter of federal law nor a split that requires this Court's attention. Therefore, his petition should be denied.

II. Certiorari Should Be Denied on Sandoval's Second Question Presented.

Sandoval's second question presented asks this Court to grant review to correct what he believes was an erroneous application of a properly stated rule of law. Pet. Cert. ii. But this Court rarely grants certiorari for such reasons. Sup. Ct. R. 10. Nonetheless, the lower court's decision was correct and is consistent with this Court's precedent. Therefore, Sandoval's petition should be denied.

Sandoval argues the lower court erred in holding he did not have a right to be present during the trial court's preliminary inquiry of prospective jurors regarding their statutory qualifications, exemptions, and excuses. Pet. Cert.

25–29. He speculates that, because the prospective jurors were called specifically for his case, he could have learned during that process whether they were willing and able to serve as a juror in his case. *Id.* at 25–27. But his speculation does not show error.

First, Sandoval does not identify any precedent from this Court that conflicts with the CCA's opinion. *Id.* at 25–29. This, alone, is reason enough to deny his petition. Sup. Ct. R. 10(c). Moreover, while Sandoval alleges the trial court inappropriately excused several prospective jurors for reasons that were insufficient under state law, he fails to show or adequately allege that the trial court's qualification of the jury was reasonably related to his opportunity to defend himself against the capital murder charge.[8]

As the CCA stated, a "defendant has a due process right to be present 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" Pet'r's App. A at 8 (quoting *Gagnon*, 470 U.S. at 526). This Court has stated a defendant's presence is not required if its benefit would be "but a shadow." *Snyder*, 291 U.S. at 106–07. "Due process of law requires that the proceedings shall be fair, but fairness is

[8] During the preliminary inquiry, the trial court asked the prospective jurors, e.g., whether they were at least eighteen years old or not over seventy years old, a citizen of Cameron County, Texas, qualified to vote, of sound mind, able to read and write the English language, and regarding any recent prior jury service, their criminal history, and their custody of minor children. 27 RR 6–20; 50 RR 12–20; 55 RR 11–16; *see* Tex. Code Crim. Proc. art. 35.04 (exemptions); Tex. Code Crim. Proc. art. 35.16, 35.19 (qualifications); Tex. Gov't Code § 62.102–1041, § 62.106.

a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." *Id.* at 116; *see Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (criminal defendants have "the 'right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings'" (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

In *Gagnon*, this Court held the defendant's absence from a hearing in camera regarding a juror's ability to be impartial "clear[ly]" did not violate his constitutional right to be present:

> [T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.

470 U.S. at 526 (quoting *Rushen,* 464 U.S. at 125–26 (Stevens, J., concurring in judgment)); *see Rushen*, 464 U.S. at 118–19 ("The lower federal courts' conclusion that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice."). The CCA's holding that Sandoval's presence was not required during the trial court's preliminary inquiry is entirely consistent with this Court's precedent.

Sandoval essentially argues this Court should hold that a Texas capital defendant has an absolute right to be present during a trial court's inquiry into the qualifications, exemptions, and excuses of prospective jurors if they are summoned as a special venire. Pet. Cert. 25–29. He argues that, because a special venire is summoned for a particular defendant's case, there is a possibility that prospective jurors will discuss case-specific information with the trial judge and be excused for reasons related to that information. *Id.* at 25. But his speculation does not demonstrate that an inquiry into the qualifications, exemptions, and excuses of prospective jurors in a special venire is reasonably related to his ability to defend against the capital murder charge.

Most importantly, Sandoval—like all capital murder defendants in Texas—have the opportunity to inquire into prospective jurors' potential biases and other case-specific information during general and individual voir dire. Indeed, the voir dire record in this case consists of more than twenty volumes of questioning of prospective jurors by the trial court and the parties during which *numerous* prospective jurors were excused by agreement, for cause, and by peremptory challenge.[9] For instance, Sandoval successfully challenged for cause a prospective juror who stated he did not believe he could

[9] *See generally* 28 RR, 29 RR, 31 RR, 32 RR, 35 RR, 36 RR, 37 RR, 38 RR, 39 RR, 40 RR, 41 RR, 42 RR, 43 RR, 44 RR, 45 RR, 46 RR, 47 RR, 48 RR, 49 RR, 51 RR, 52 RR, 53 RR, 54 RR, 56 RR, 57 RR.

be fair and had a predetermined opinion of Sandoval's guilt. 29 RR 57–63; *see also* 35 RR 57–64 (prospective juror who indicated a predetermined opinion of Sandoval's guilt and indicated concern he could not be fair excused for cause); 41 RR 204 (prospective juror who attended the victim's funeral excused for cause); 47 RR 57–58 (challenge for cause granted as to prospective juror who stated he could not vote for a life sentence in a capital case); 56 RR 243–44 (prospective juror who indicated he would automatically vote to impose the death penalty excused for cause). Based on the information learned during voir dire, Sandoval raised claims on direct appeal arguing that his jury was biased due to pretrial exposure to media coverage of his case, Br. at 138–44, and that the trial court erred in its rulings regarding challenges for cause as to certain jurors, *id.* at 144–64. Simply put, the lengthy voir dire process Sandoval participated in allowed him to enforce his right to a jury free from prejudices and predisposition regarding the case. *See Gomez v. United States*, 490 U.S. 858, 873 (1989). Sandoval provides no reason to believe the trial court excused prospective jurors based on reasons related to his case or prevented him from uncovering prospective jurors' biases and prejudices.

Sandoval points to one prospective juror who stated he or she did not feel comfortable in this case. Pet. Cert. 26 (citing 50 RR 20). But the trial court appropriately told that prospective juror, "I understand, but that's something that you're going to have to—when we do the individual voir dire, *that's when*

you bring that up." 50 RR 20 (emphasis added). Consequently, the record simply refutes Sandoval's speculation that the trial court's preliminary inquiry of the prospective jurors' qualifications extended into their case-specific biases such that he had a due process right to be present. *See People v. Lucious*, 269 A.D2d 766, 767 (N.Y. App. Div. 2000) ("A defendant's right to be present is not violated where the sidebar discussions relate to juror qualifications such as physical impairments, family obligations or work commitments. On the other hand, a sidebar interview that concerns a juror's background, bias or hostility, or ability to weigh the evidence objectively is a material stage of trial at which a defendant has a right to be present." (citations omitted)); *Bordallo*, 857 F.2d at 523 (finding defendant's right to be present violated because he was absent during a proceeding "more appropriately analogized to voir dire" where some prospective jurors were excused based on factors related to his case, as opposed to the ministerial drawing of the prospective juror pool); *Porter v. State*, 424 A.2d 371, 377 (Md. 1981) ("The time to explore the possibility of bias or prejudice on such a ground is during the voir dire questioning of the prospective jurors who were not excused, to determine if any should be disqualified for cause.").

Sandoval's speculation that the trial court may have excused individuals for reasons related to his case, Pet. Cert. 25, is contradicted by the trial court's explicit statement to that prospective juror, 50 RR 20. And Sandoval's

speculation assumes trial courts will act with impunity in excusing prospective jurors ex parte in a special venire for case-specific reasons. His speculation is unjustified and is rebutted by the trial court's statement in his case. 50 RR 20; *see Rushen*, 464 U.S. at 118–19 ("emphatically" disagreeing with lower court's conclusion that "an unrecorded ex parte communication between trial judge and juror can never be harmless error").

Lastly, Sandoval complains that the trial court erred in excusing prospective jurors who were not disqualified or exempt from service under state law. Pet. Cert. 27. He fails, however, to show that such disqualifications and exemptions had any, let alone a reasonably substantial, relation to his ability to defend himself against the capital murder charge. *See* Tex. Gov't Code § 62.102, § 62.106; *see also Porter*, 424 A.2d at 376 ("The purpose of the right to be present, in the context of juror selection, relates solely to jury impartiality and the disqualification of prospective jurors. It would not further this purpose to extend the right to communications involving the personal hardship of a juror to serve.").

Sandoval's second question presents nothing but a request for error correction, which is a plainly insufficient justification for certiorari review. Moreover, he fails to show the lower court erred in its application of this Court's precedent, and he fails to identify any reason amplifying the need for this Court's attention. The petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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