NO:

IN THE
SUPREME COURT OF THE UNITED STATES

LOURDES MARGARITA GARCIA,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Counsel for Petitioner
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone (305) 536-6900

QUESTION PRESENTED FOR REVIEW

The district court ordered the government, at a critical stage of the trial, to present inculpatory and disputed evidence in the absence of the defendant and her counsel. Did the Eleventh Circuit err by holding this "startling, intentional" violation of the defendant's constitutional and statutory rights did not constitute structural or hybrid error and therefore required a showing of prejudice.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

No:

LOURDES MARGARITA GARCIA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Lourdes Margarita Garcia respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 14-11845-FF in that court on October 19, 2018, *United States v. Lourdes Margarita Garcia*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1). A copy of the decision of the United States Court of Appeals for the Eleventh Circuit denying Ms. Garcia's Petition for Rehearing *En Banc* is contained in the Appendix (A-2).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 19, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

The Fifth Amendment to the Constitution of the United States provides:

No person shall be . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

Federal Rule of Criminal Procedure Rule 43 provides:

(a) WHEN REQUIRED. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

. . . (2) every trial stage, including jury impanelment and the return of the verdict; and . . . .

STATEMENT OF THE CASE

After a federal grand jury charged Ms. Garcia with various tax-related offenses, she proceeded to trial. For the first five days of trial and the morning of the sixth, Ms. Garcia and her counsel were present for the start of all court proceedings. On the sixth day of trial, however, the district court ordered the trial to resume without Ms. Garcia or either of her two lawyers present. During the time that Ms. Garcia and her lawyers were not present, the government elicited incriminating evidence from IRS Revenue Agent Angela Arevalo who had been called as a witness prior to the lunch break. Ms. Garcia's lead counsel missed approximately three minutes of the direct examination, while Ms. Garcia missed approximately five to ten minutes.

After a weekend break, trial continued the following Monday. At the request of the government, the parties approached sidebar. Ms. Garcia remained at the defense table.

At sidebar, the prosecutor reminded the district court that after the lunch break on the previous Friday, trial had commenced without Ms. Garcia or her counsel being present. The prosecutor informed the district court that he understood that "they had a big crowd at the security station downstairs and they were caught up in that and I think we only proceeded a minute or two." The prosecutor suggested that the testimony be read back into the record for the benefit of Ms. Garcia and her counsel.

The district court reacted this way: "She didn't have to be here if she didn't want to be here. I mean, everybody else seemed to be able to make it on time." Although unclear (because her two lawyers were women), presumably the district court was rereferring to Ms. Garcia. The district court stated that the defense could order a copy of the transcript if they wanted. Despite being informed by the prosecutor that Ms. Garcia and her counsel were delayed due to the crowd at the security checkpoint, the district court concluded that "she voluntarily absented herself from the proceedings." The district court ended the discussion by describing the problem as "self-inflicted." "She manufactured the problem herself; I don't know how she can fault anybody else for it." The district court asked Ms. Garcia's lawyer if she had an objection and she stated "not at this time." The district court did not inquire of Ms. Garcia nor was she even aware that this discussion occurred. Ultimately, the jury convicted Ms. Garcia of all counts.

Ms. Garcia then filed a Motion for New Trial. In her motion, she asserted that the district court's decision to resume the trial in her absence and the absence of her counsel violated her Fifth and Sixth Amendment rights, and her right to be present under Federal Rule of Criminal Procedure 43. In support, Ms. Garcia's lead counsel submitted an affidavit in which she stated under oath that courthouse officials, employees of the court, prohibited Ms. Garcia from clearing the security checkpoint because they erroneously believed that she had a telephone in her purse. (A-3). As a result of this mistaken belief, the courthouse officials ordered Ms. Garcia to remove all the contents from her purse. *Id.* While the wrongful search occurred,

Ms. Garcia's lead counsel left the security checkpoint to return to the courtroom. *Id.* When lead counsel returned, the prosecutor was eliciting testimony from Agent Arevalo. *Id.* By her estimation, counsel missed approximately 3 minutes of government directed questioning. *Id.*

Ms. Garcia waited downstairs for the officials to complete their search. *Id.* Only after these officials thoroughly searched Ms. Garcia's belongings did they allow her to enter the courthouse. *Id.* Ms. Garcia arrived in the courtroom 5-10 minutes after the proceedings had commenced. *Id.*

The district court denied Ms. Garcia's Motion for New Trial. First, the district court held that by not allowing herself sufficient time — by assuming that she would have to pass through a "longer security check than usual" — her absence from the trial was "voluntary" and she had waived the right to be present under Rule 43. (A-4). The court also faulted Ms. Garcia's defense counsel for not raising a contemporaneous objection or an objection the following trial day. *Id.* The district court never examined his own actions in ordering the trial to commence with a completely empty defense table. *Id.*

Similarly, the district court concluded that counsel's absence did not work a constitutional violation. *Id.* The district court held that by starting trial without her counsel, Ms. Garcia was not "completely denied" counsel. *Id.* Furthermore, the district court did not deem "critical" the portion of trial missed by counsel because the testimony concerned a previously admitted government exhibit, counsel did not

object, counsel did not ask for the testimony to be read back, counsel failed to order the transcript of the testimony she missed, and she cross-examined the witness. *Id.* Finally, the district court held that no prejudice occurred from counsel's absence because the evidence was against Ms. Garcia was overwhelming, and therefore any error was harmless. *Id.*

On appeal, the Eleventh Circuit Court of Appeals affirmed. Given the district court's actions, the majority opinion began by stating the obvious: "[t]his is a troubling case." *United States v. Garcia*, 906 F.3d 1255, 1260 (11th Cir. 2018). The concurring opinion, while also calling the case "troubling" and "startling," made a sharper point by commenting that the district court had committed this type of violation in a different case:

> This troubling case presents a familiar factual scenario—a district court judge permitted a criminal trial to resume, and inculpatory evidence to be taken, without defense counsel present. We recently confronted a nearly identical appeal from the same district judge as an en banc court in *United States v. Roy,* 855 F.3d 1133 (11th Cir. 2017) (en banc). In *Roy*, we determined that such constitutional violations can—and usually will—be harmless. The facts of this case, however, are even more egregious than those in *Roy* because here, the defendant was also absent. Despite the deserted defense table, the district court judge prompted the government to continue its direct examination of an important witness.

Id. at 1284 (Wilson, J., concurring).

Despite the acknowledged troubling nature of this case, both the majority and concurring opinions found that the district court's deliberate and intentional constitutional violations were "trial errors" susceptible to plain or harmless error review. *Id.* at 1266; at 1284 (Wilson, J., concurring). To reach this conclusion, each

opinion treated *United States v. Roy,* 855 F.3d 1133 (11th Cir. 2017) (*en banc*) as controlling the issue.

In *Roy, a* four-judge plurality found that a Sixth Amendment violation occurred when the prosecutor introduced inculpatory evidence without the defendant's counsel present. *Id*. at 1142-43 (plurality opinion). Notwithstanding, the plurality reasoned that unless counsel missed a "substantial portion" of the trial prejudice would not be presumed and the court would engage in a harmless error analysis. Because the court deemed counsel's absence to be for an "insubstantial" period, the court affirmed Roy's conviction under the constitutional harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967). *Id.* at 1164 (plurality opinion). Four concurring judges disagreed with the plurality's creation of this "substantial portion" test (dubbed the "New Rule" in various opinions), as did all three dissenting judges.

Judge Rosenbaum's concurring opinion rejected the New Rule, and contended that the New Rule violated this Court's instruction to use a categorical approach to determining whether error is structural. Two other concurring opinions also rejected the New Rule. Instead, Judges William Pryor and Jordan would have simply applied the *Chapman* harmless error doctrine in any case, without adverting first to the New Rule. Crucially, however, Judge Jordan left open the issue presented here – the absence of both counsel and defendant.

Judge Tjoflat, concurring specially, had his own approach, arguing that "the New Rule cannot exist side by side with *Strickland v. Washing*ton, 446 U.S. 668

(1984), the Court's formulation for reviewing ineffective-of-assistance of counsel]"; that it "materially alters the scheme the Supreme Court has established to protect the right to the assistance of counsel," and it changes the standard of review this Court applies by not only replacing *Strickland* with *Chapman*, but also by setting aside plain-error review when defense counsel fails to object to the introduction of inculpatory testimony taken in his absence.

Three other opinions, authored by Judges Wilson, Martin and Jill Pryor, dissented entirely, rejecting the New Rule and requiring adherence to the categorical formulation of structural error, presumed prejudice, and automatic reversal.

As this recitation makes clear, *Roy* did not control Ms. Garcia's case, and the panel here never grappled with what made Ms. Garcia's case different: (1) the absence of *both* Ms. Garcia *and* her lawyer; and (2) the undisputed fact that the district court deliberately and intentionally violated Ms. Garcia's constitutional rights.

Instead, the panel made the determination that the district court's intentional and deliberate violation of Ms. Garcia's constitutional rights was not a structural error because: (1) the Supreme Court has stated "the vast majority of constitutional errors that occur at a criminal trial, including Sixth Amendment violations, should be examined for prejudicial effect and those errors do not require reversal if they are harmless"; and (2) "[s]ound considerations of judicial policy show why we rarely treat an error as structural." *Garcia*, 906 F.3d 1255, 1264 (11th Cir.

2018). As for whether the intentional constitutional violations were "hybrid" errors under *Brecht v. Abrahamson,* 507 U.S. 619 (1993), the court stated in a footnote that "[w]e have never recognized this standard—known as "hybrid error"—and decline to do so here.' *Garcia*, 906 F.3d at 1263 n.1.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

This Court's cases recognize two broad categories of constitutional errors in criminal trials: trial errors (as to which prejudice must be demonstrated) and structural errors (as to which prejudice is presumed). A trial error is a discrete error that "'occur[s] during presentation of the case to the jury.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991)). A trial error is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Id*. at 307-08.

Trial errors include, for example, admission of evidence obtained in violation of the Fourth Amendment (*Chambers v. Maroney*, 399 U.S. 42 (1970)), a prosecutor's comment on the defendant's silence in violation of the Fifth Amendment (*Chapman v. California*, 386 U.S. 18 (1967)), and a restriction on a defendant's right to cross-examine a witness in violation of the Sixth Amendment (*Delaware v. Van Arsdall*, 475 U.S. 673 (1986)). *See Fulminante*, 499 U.S. at 306-307 (collecting examples).

Structural defects, on the other end of the spectrum, are "defects in the constitution of the trial mechanism" that affect "the framework within which the trial proceeds," with such a resulting impairment in the trial's function of determining guilt or innocence that "'no criminal punishment may be regarded as fundamentally fair.'" *Fulminante*, 499 at 309–10 (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986). Structural defects lead to automatic reversals because they are *per se* prejudicial. *See id*. at 307–10.

This Court also has identified a mode of review that lies between structural defects and trial errors. In *Brecht v. Abrahamson,* 507 U.S. 619 (1993), this Court held that to obtain relief on collateral review, a habeas petitioner must establish that the constitutional trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637–38 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946). In other words, the habeas petitioner must establish actual prejudice. But, this Court also stated that:

> in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

Id. at 638 n. 9. Although decided in the habeas context, *Brecht* review has been found to be applicable to cases on direct appeal with the burden of proof falling on the party defending the verdict. *See United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015); *United States v. Harbin,* 250 F.3d 532, 545 (7th Cir. 2001).

In this case, the district court committed both a standard Fifth and Sixth Amendment violation and a "deliberate and egregious" error by ordering the government to present inculpatory evidence in the absence of Ms. Garcia and her lawyer. First, the district court's actions violated Ms. Garcia's right to due process and right to counsel. Second, these violations were intentional and purposeful. The government concedes (and the Court of Appeals did not question) that the district court knew that Ms. Garcia and her counsel were absent. When court resumed after lunch, the defense table was completely empty. Despite the knowing absence of Ms. Garcia and her lawyers, the district court directed the prosecutor to continue his direct examination of Agent Arevalo. The prosecutor, who also knew that Ms. Garcia and her lawyers were absent, took this opportunity to elicit inculpatory evidence from Agent Arevlo.

Third, the district court's actions were egregious. As Judge Rosenbaum wrote in *Roy* "the right to counsel—particularly during trial—is absolutely fundamental to our system of justice. A single-defendant trial where counsel is absent for more than a very brief period inflicts great damage upon our system of justice; it is antithetical to it, to our sense of fairness, and to the reliability of any resulting verdict." *Roy*, 855 F.3d at 1228 (Rosenbaum, J., concurring in part and concurring in the result). And we know from *Roy* that this is not the first time this district court judge has invited the government to elicit inculpatory evidence in the absence of the defendant's lawyer. *Id*. at 1135. The district court's pattern of permitting the government to introduce inculpatory evidence against a defendant in the absence of

counsel, without any inquiry as to why counsel was not present, is an affront to the Constitution and the law of the United States. The government exacerbated the violation by eliciting disputed and objectionable testimony during their absence.

I. The Application of *Cronic*'s Automatic Reversal Rule to a Direct Appeal Challenging Defense Counsel's Absence During a Critical Stage of Trial Has Deeply Divided the Courts of Appeals, and is an Open Question Under Supreme Court Precedent.

In *United States v. Cronic*, 466 U.S. 648 (1984), the Court drew on the fundamental principle of *Gideon v. Wainwright*, 372 U.S. 335 (1963), to establish a categorical rule for review of a criminal trial from which defense counsel was absent: "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Cronic*, 466 U.S. at 658-59. In declaring its rule of presumptive unfairness, the Court reasoned that "[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658-659 & n.25. These include if "the accused is denied counsel at a critical stage of his trial." *Id.*

Cronic explains that the automatic reversal rule derived from a long line of Court precedent: "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." 466 U.S. at 659, n.25 (alternate citations omitted) (citing *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612–613 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373

U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475–476 (1945)).

Cronic's categorical rule about the absence of counsel fortifies the Sixth Amendment's expectations about the role of defense counsel. Thus, a critical stage arises whenever "[a]vailable defenses may be . . . irretrievably lost, if not then and there asserted," *Hamilton v. Alabama*, 368 U.S. at 54, "where rights are preserved or lost," *White v. Maryland*, 373 U.S. at 60, "whenever necessary to assure a meaningful 'defence,'" *United States v. Wade*, 388 U.S. 218, 225 (1967), where "'potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice,'" *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (alteration in *Coleman*) (quoting *Wade*, 388 U.S. at 227), and when the stage holds "significant consequences for the accused," *Bell v. Cone*, 535 U.S. 685, 696 (2002).

Thus, for example, the presence of counsel during the examination of an adverse witness is "necessary to assure a meaningful 'defence.'" *See Wade*, 388 U.S. at 225. This is for good reason. The absence of counsel during the presentation of inculpatory evidence used by the government to convict the defendant eliminates the opportunity for the defense to decide whether to lodge an objection and how to frame the objection, as well as the ability to conduct cross-examination. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974) ("[D]eni[al of] the right of effective cross-examination [is] constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (internal quotation marks omitted)).

Indeed, a defendant may irretrievably lose available defenses and rights during direct testimony of a prosecution witness. *See Hamilton*, 368 U.S. at 54; *White*, 373 U.S. at 60.

Cronic's categorical rule of presumed prejudice mirrors the Court's declaration 75 years ago that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from denial." *United States v. Glasser*, 315 U.S. 60, 76 (1942). For this is a structural error, which is "markedly different" from trial errors (which *can* be "quantitatively assessed"), and it is for this reason that structural errors "defy analysis by harmless-error standards." *Arizona v. Fulminante*, 499 U.S. 279, 308-09 (1991) (Rehnquist, C.J., maj. op.) (internal quotation marks omitted). The Court's decision in *United States v. Gonzalez-Lopez,* 548 U.S. 140, 150 (2006) highlights "the myriad aspects of representation" the participation of an attorney entails that make it impossible to truly quantify the extent of error resulting from the absence of one's counsel.

Cronic's categorical rule is also entirely consistent with Court's most recent discussion of structural error on direct appeal, in which the Court reminded that, in such cases, "the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Weaver v. Massachusetts*, ___ U.S. ___, 137 S. Ct. 1899, 1910 (2017) (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)). On direct appeal, the Court noted, "the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a

reasonable doubt' [under *Chapman v. California*, 386 U.S. 18 (1967)]." *Weaver,* 137 S. Ct.; *see also*, *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (where counsel of one's choice is denied, "it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation."). The latter decision was reiterated in *Weaver*: "Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error." (citing *United States v. Gonzalez–Lopez*, 548 U.S. at 149, n. 4).

The reason that structural error requires automatic reversal on direct appeal (as opposed to on collateral review) is described in some detail in *Weaver*, which discusses the types of structural errors that may arise and the purposes for recognizing them. One "purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial" 137 S. Ct. at 1907. "Thus," the Court explained, "the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" (quoting *Arizona v. Fulminante*, 499 U.S. at 310). "For the same reason, a structural error 'def[ies] analysis by harmless error standards.'" *Id.* (quoting *Fulminante*, 499 U.S. at 309).

Although *Weaver* addressed a different type of structural error – a closed courtroom – the decision nevertheless discusses the structural error resulting from absent counsel: "[A]n error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an

attorney . . . , the resulting trial is always a fundamentally unfair one." 137 S. Ct. at 1908 (citing *Gideon v. Wainwright*, 372 U.S. at 343–345). "It therefore would be futile for the government to try to show harmlessness." *Weaver*, 137 S. Ct. 1908.

Cronic's rule governing the absence of counsel from a critical stage of trial is different from the analytical rule for claims of ineffective assistance of counsel by lawyers present in the courtroom. On the day *Cronic* was decided, the Court also decided *Strickland v. Washington*, 446 U.S. 668 (1984), which sets forth the formulation for addressing ineffective assistance of counsel claims. Although *Strickland* claims require a showing of prejudice, *Cronic* dispenses with the prejudice component in cases in which counsel was absent from a critical stage.

Cronic appears to provide a straightforward categorical rule: A defendant's conviction should be reversed if the defense attorney was absent from a critical stage of his trial. Yet, the circuits have wrestled with the meaning of the phrase "critical stage of his trial" in cases in which counsel was temporarily absent during trial. The *Roy en banc* opinion upon which the decision in Ms. Garcia's case rested, candidly shared the lament of the Sixth Circuit about the lack of clear guidance on the question: "We, like the Sixth Circuit, 'would welcome a final and one-line definition of "critical stage" for the purposes of determining whether error is *Cronic* error. *Van v. Jones*, 475 F.3d 292, 312 (6th Cir. 2007). Relatedly, the *en banc* plurality opinion lamented the absence of Court guidance on the application of critical-stage analysis to temporary absence of counsel: "[T]he Supreme Court has never addressed th[e] issue [of whether prejudice is presumed when a defendant is

temporarily without counsel during a critical stage of trial]." *Roy*, 855 F.3d at 1160 (plurality opinion).

The uncertainty has existed for many years and has plagued a wide variety of cases. In *United States v. Russell*, 205 F.3d 768, 771-72 (5th Cir. 2000), the Fifth Circuit recounted a number of such cases through the last century:

> Since *Cronic* was announced, various Courts of Appeals have struggled to define the "critical" stages of trial during which the absence of counsel creates a presumption of prejudice. *See e.g., Hernandez v. United States*, 202 F.3d 486, 489 (2d Cir.2000) (finding that counsel's failure to prosecute direct appeal of conviction is prejudicial per se); *United States v. Lampton*, 158 F.3d 251, 255 (5th Cir.1998) (finding that absence of counsel at juror-tampering hearing due to illness was harmless error); *Vines v. United States*, 28 F.3d 1123, 1129 (11th Cir.1994) (in a multi-defendant case finding that absence of counsel during the taking of non-inculpatory evidence at trial is not prejudicial per se); *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir.1992) (finding that constructive absence of counsel at re-sentencing hearing was prejudicial per se); *United States v. O'Leary*, 856 F.2d 1011, 1019 (7th Cir.1988) (finding that absence of counsel on appeal and failure to timely file brief was prejudicial *per se*); *Green v. Arn*, 809 F.2d 1257, 1263 (6th Cir.1987) (finding the absence of counsel during the taking of evidence on the defendant's guilt at trial was prejudicial per se), vacated on other grounds, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987), *reinstated*, 839 F.2d 300 (1988); *Siverson*[*v. O'Leary*], 764 F.2d [1208 (7th Cir. 1985)] at 1220 (finding the absence of counsel during jury deliberations was harmless error); *see also Hunte v. Keane*, CV–97–1879 (RR), 1999 WL 754273, at *8 (E.D.N.Y. Aug. 24, 1999) (finding that absence of counsel at suppression hearing is not prejudicial).

205 F.3d at 771-72.

That uncertainty continues because the Court specifically deferred addressing the substantive question in its recent decision in *Woods v. Donald*, 575 U.S. ___, 135 S. Ct. 1372, 1378 (2015) (per curiam). Donald's counsel was temporarily absent from a multi-defendant trial while testimony was elicited about

a chart of phone calls among his co-defendants. Donald's counsel had disclaimed his client's interest in, or dispute with, the chart both before and after his absence. The question presented was whether the temporary absence of counsel, under these circumstances, constituted *Cronic* error. Although this Court noted that "none of our cases confront the specific question presented by this case," it deferred answering the constitutional question based on prudential grounds reserved to habeas corpus review: "Because we consider this case only in the narrow context of federal habeas review, 'we express no view on the merits of the underlying Sixth Amendment principle.'" 135 S. Ct. at 1378 (quoting *Marshall v. Rodgers*, 569 U.S. 58 (2013) (per curiam).

The decision below illustrates the resulting uncertainty. The district court denied Ms. Garcia her counsel because he commenced the post-lunch afternoon session before defense counsel returned to the courtroom. Despite Ms. Garcia and her counsel's absence, the district court directed the government to resume its direct examination of disputed inculpatory expert testimony. There is no dispute that the absence of both the defendant and her counsel was known to both the court and the prosecutor.

As noted, the Sixth Circuit has openly pondered, "What is a critical stage?" and welcomed this Court's guidance. *Van v. Jones*, 475 F.3d at 312: "The case law available suggests that the pithy definitions we have do not simply capture the sometimes permissive or inclusive conclusions by the Supreme Court and our court that this or that period, moment, or event in the course of a criminal proceeding is a

critical stage." *Id.* (holding absence of counsel at a consolidation hearing was not a critical stage).

Circuit confusion over what constitutes a critical stage increased when recently the Ninth Circuit noted it had itself "muddled" the answer by its own cases that have accorded different meanings to the phrase critical stage based on whether the Sixth Amendment right is being enforced, or its violation is analyzed as error. "Our circuit has muddled the analysis of which trial stages are 'critical stages' so as to trigger Sixth Amendment rights and which are 'critical stages' so that the absence of counsel during the stage is structural error." *United States v. Martinez,* 850 F.3d 1097, 1104 n.4 (9th Cir. 2017) (holding that critical stage includes trial court's response to substantive jury note during deliberations).

This confusion stands in contrast to decisions of some other circuits, and the Court, which have understood *Cronic*'s categorical critical stage approach. In protecting a defendant's Sixth Amendment right to counsel, *Cronic* speaks specifically to "a critical stage of his trial." 466 U.S. at 658-59. The Fifth and Sixth Circuits have held that the presentation of inculpatory testimony by a government witness is a critical stage of trial. *United States v. Russell*, 205 F.3d 768 (5th Cir. 2000) (reversing conviction due to counsel's absence during presentation of evidence, a "critical stage" of trial); *United States v. Olden*, 224 F.3d 561 (6th Cir. 2000) ("When the government presents evidence probative of a defendant's culpability in criminal activity, or evidence that further implicates a defendant in criminal conduct, that portion of the trial is sufficiently critical to trigger the

protections of *Cronic*."); *Green v. Arn*, 809 F.2d 1257, 1263 (6th Cir.1987), *rem. other grounds* (mootness), 484 U.S. 806 (1987), *reinstated following remand*, 839 F.2d 300 (6th Cir. 1988 (*Cronic* rule of automatic reversal applies when counsel is absent during taking of evidence).

The *Cronic* rule applies to temporary absences of counsel from a critical stage of trial. *Green*, 839 F.2d 300; *see Russell; Olden; see also, United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992) (citing *Cronic*) (when a defendant has been denied counsel's presence from a critical stage of proceedings, an ensuing conviction must be reversed, without any specific showing of prejudice).

Green v. Arn addressed what the prosecution estimated was a five-minute absence of counsel during testimony by a prosecution witness. Counsel for co-defendants remained in the courtroom. During Green's lawyer's absence, co-defendants' counsel conducted cross-examination of a prosecution witness. Ultimately, Green was convicted of kidnaping and gross sexual imposition. In affirming a grant of habeas corpus based on his counsel's absence, the Sixth Circuit determined that "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id.* at 1263 (quoting *Cronic*, 466 U.S. at 659). As the Sixth Circuit stated, "the present case is one where a harmless error inquiry should be foreclosed. It is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt." *Id.* at 1263. *Green* held: "The absence of counsel during the taking of evidence on the defendant's guilt is prejudicial per se and justifies an

automatic grant of the writ 'without any opportunity for a harmless error inquiry.'" *Id.* (quoting *Siverson v. O'Leary*, 764 F.2d at 1217 n.6).

The Fifth Circuit's decision in *United States v. Russell* is in accord. Russell's lawyer became ill during his conspiracy trial. A co-defendant's lawyer offered to sit in and "[t]he district court instructed the government not to call any witness relevant to Russell" while Russell's counsel was absent. 205 F.3d at 769-70. None of the testimony presented during counsel's absence "directly implicated Russell," but evidence relating to the conspiracy, which detailed the co-conspirators' attempts to launder money and import marijuana, was introduced. *Id.* at 770. Before counsel became ill, the government had presented evidence "about Russell's management of the distribution of marijuana operations and involvement in providing [a co-conspirator] with funds." *Id.* The evidence presented during counsel's absence therefore "flowed directly from Russell's role in the money laundering conspiracy to the roles of [his co-conspirators] in the same money laundering conspiracy and the overall conspiracy to import and distribute marijuana." *Id.* The Fifth Circuit held that counsel was denied at a critical stage of his trial and that the *Cronic* presumption applied because "Russell [was] without counsel as the probability of his guilt increased during the government's presentation of evidence against his co-conspirators." *Id.* at 772.

Also illustrative of the *Cronic* rule's application is the Fifth Circuit's decision in *Burdine v. Johnson*, 262 F.3d 336, 339 (5th Cir. 2001) (en banc) (citing and quoting *Cronic*). In *Burdine* the en banc Fifth Circuit considered an occasionally

sleeping lawyer, who was physically present at trial, but mentally absent. The court began its analysis by recognizing that "[t]he Supreme Court has long recognized that a 'trial is unfair if the accused is denied counsel at a critical stage of his trial.'" *Id.* "To justify a particular stage as critical, the Court has not required the defendant to explain how having counsel would have altered the outcome of his specific case. Rather, the Court has looked to whether the substantial rights of a defendant may be affected during that type of proceeding." 262 F.3d at 347. "[I]n such circumstances, the Supreme Court's Sixth Amendment jurisprudence compels the presumption that counsel's unconsciousness prejudiced the defendant." *Id.* Applying that rule to a sleeping lawyer, the court noted that counsel was "absent" by virtue of his unconsciousness during sleep "through a not insubstantial portion of the 12 hour and 51 minute trial." *Id.* Significantly, the *Burdine* court equated unconsciousness "to no counsel at all," because "[u]nconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client." *Id.* Thus, the court ruled that "[w]hen we have no basis for assuming that counsel exercised judgment on behalf of his client during critical stages of the trial, we have insufficient basis for trusting the fairness of that trial and consequently must presume prejudice." *Id.*

The *Cronic* rule has been reiterated by the Court, as in *Bell v. Cone*, 535 U.S. 685, 695-96 (2002): "A trial would be presumptively unfair, we said [in *Cronic*], where the accused is denied the presence of counsel at a 'critical stage,' . . . a phrase we used in *Hamilton v. Alabama*, . . . and *White v. Maryland* . . . to denote a step of

a criminal proceeding . . . that held significant consequences for the accused." (citing and quoting *Cronic*) (citations omitted).

This is consistent with the position previously taken by the Eleventh Circuit before the development of the "New Rule." Prior to the *Roy en banc* decision, the Eleventh Circuit summarized *Cronic*'s impact on appellate review, the presumption of prejudice, and the application of the automatic reversal rule:

> *Cronic* recognizes that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* 466 U.S. at 658. *Cronic* teaches that prejudice will be presumed if: (1) counsel is completely denied; (2) counsel is denied at a critical stage of trial; or (3) counsel fails to subject the prosecution's case to meaningful adversarial testing. *Id.* at 659. This presumption of prejudice is seemingly irrebuttable since "the cost of litigating [its] effect . . . is unjustified." *Id.* at 658.

United States v. Vines, 28 F.3d 1123, 1127 (11th Cir. 1994 (alternate citations omitted) (ultimately finding that counsel's absence was not during a critical stage of trial because inculpatory evidence had not been presented). *Vines*' understanding of what constitutes a critical stage has now been repudiated and expressly limited by the *Roy en banc* decision relied upon by the panel in this case. Notably, however, the Fifth Circuit's decisions in *Russell*, 205 F.3d at 772 and *Burdine*, 262 F.3d 387, previously relied on *Vines'* original pronouncement, citing it with approval, heightening the present inter-circuit conflict.

The circuits are at odds. They have expressed confusion and acknowledged their own muddling of what constitutes a critical stage of trial. The issue is ripe for certiorari review.

II. Petitioner's Case Provides an Ideal Vehicle to Resolve Cronic's Application to Direct Appeals Challenging Defense Counsel's Absence During a Critical Stage of Trial.

Ms. Garcia's case is an ideal vehicle with which to clarify the framework for reviewing temporary absence of counsel from trial. It was a jury trial of a single defendant with a lawyer who was absent during a portion of trial in which the prosecution elicited disputed testimony used to convict her. The record of these events is clear and undisputed.

The facts and procedural posture of the present case permit the Court to set forth a clearly defined interpretation of *Cronic*'s rule governing the presence of counsel during trial court proceedings: A trial judge has a duty to ensure the Fifth and Sixth Amendment right to counsel at each critical stage of proceedings, including trial. *See Gideon* and *Cronic*. A session of trial at which incriminating evidence will be adduced may not commence in the absence of defense counsel.

The transcript of proceedings in the present case provides an uncluttered backdrop for application of the *Cronic* rule when a direct appeal challenges the temporary absence of counsel during trial. Here, there is no dispute that the trial judge intentionally violated Ms. Garcia's rights by ordering the prosecutor to continue despite a completely empty defense table. Moreover, the prosecutor also conceded on appeal that he too knew that the defense table was empty. These record facts and circumstances permit a clear-cut application of *Cronic*'s categorical rule to the temporary absence of counsel caused when a trial judge intentionally violates a defendant's constitutional right to the assistance of counsel.

III. The Eleventh Circuit's Decision To Not Recognize The *Brecht* "Hybrid" Error Standard Has Created a Conflict And Is An Open Question Under Supreme Court Precedent.

In addition to the *Cronic* error issue present in this case, Ms. Garcia's petition presents an ideal vehicle for a question left open by this Court in *Brecht v. Abrahamson,* 507 U.S. 619 (1993). To obtain relief on collateral review, a habeas petitioner must establish that the constitutional trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637–38 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946). In other words, the habeas petitioner must establish actual prejudice. But, the Supreme Court also stated that:

> in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

Id. at 638 n. 9. Although decided in the habeas context, *Brecht* review has been found to be applicable to cases on direct appeal with the burden of proof falling on the party defending the verdict. *Brecht* 507 U.S. at 760; *United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015. And, *Brecht* error does not depend on an allegation of prosecutorial misconduct. Rather, *Brecht* error may be predicated solely upon a deliberate and egregious trial error committed by the district court judge. *Brecht,* 507 U.S. at 638 n.9.

In this case, the Court of Appeals recognized that the district court committed a "deliberate and egregious" error by ordering the government to present

inculpatory evidence in the absence of Ms. Garcia and her lawyers. First, the district court's actions were intentional and purposeful. There is no doubt that the district court knew that Margarita and her counsel were absent. When court resumed after lunch, the defense table was completely empty. This could not have escaped the district court's notice.

Moreover, the district court made clear that trial started at the appointed time even if Margarita and her counsel were not present: "She didn't have to be here if she didn't want to be here. I mean, everyone else seemed to be able to make it on time." The reasonable inference based upon these proceedings and *Roy* is that district court's practice is to begin trial without the defendant and counsel being present if everyone else is present.

Despite the knowing absence of Ms. Garcia and her lawyers, the district court directed the prosecutor to continue his direct examination of Agent Arevalo. The prosecutor, who also knew that Margarita and her lawyers were absent, took this opportunity to elicit inculpatory evidence from Agent Arevalo.

Second, the district court's actions were egregious. As Judge Rosenbaum wrote in *Roy*: "the right to counsel—particularly during trial—is absolutely fundamental to our system of justice. A single-defendant trial where counsel is absent for more than a very brief period inflicts great damage upon our system of justice; it is antithetical to it, to our sense of fairness, and to the reliability of any resulting verdict." *Roy*, 855 F.3d at 1228 (Rosenbaum, J., concurring in part and concurring in the result). And we know from *Roy* that this is not the first time this

district court judge has invited the government to elicit inculpatory evidence in the absence of the defendant's lawyer. *Id*. at 1135. The district court's pattern of permitting the government to introduce inculpatory evidence against a defendant in the absence of counsel, without any inquiry as to why counsel was not present, is an affront to the Constitution and the law of the United States. The government exacerbated the violation by eliciting disputed and objectionable testimony.

As previously discussed, both of these constitutional rights are fundamental to our system of criminal justice and infected the integrity of the proceedings. The district court's actions undoubtedly signaled to the jury that the defense was so wanting and deficient that the trial could proceed without the defendant and her counsel.

Judge Wilson's dissenting opinion in *Roy* rings truer in the instant context. In his dissent, Judge Wilson details the real-world impossibility of evaluating, after-the-fact, how counsel's absence altered the outcome of trial, "There is no way to quantify the extent of this error's effects on the jury without speculating. We cannot assess it from a transcript." *Roy*, 855 F.3d at 1236 (Wilson, J., dissenting). As noted by one commentator on whom he relied: "The idea that a reviewing court can assess from a cold transcript the prejudice caused by counsel's absence completely ignores the role that counsel's physical presence in the courtroom actually plays." David A. Moran, Don't Worry, I'll Be Right Back: Temporary Absences of Counsel During Criminal Trials and the Rule of Automatic Reversal, 85 Neb. L. Rev. 186, 207 (2011. "This is because 'the reviewing court cannot possibly discern from the transcript

how the jury . . . reacted non-verbally to the proceedings that occurred in counsel's absence." During trial, these "real-world" issues are exacerbated when the defense table is completely deserted during the taking of inculpatory evidence.

The Eleventh's Circuit's decision not to engage in a *Brecht* or "hybrid" error analysis has created a conflict with the Fifth Circuit in *United States v. Bowen*, 799 F.3d 336, 352 (5th Cir. 2015), the Seventh Circuit in *United States v. Harbin,* 250 F.3d 532, 545 (7th Cir.2001) (trial errors described in *Brecht* footnote nine require automatic reversal), and the Ninth Circuit in *Hardnett v. Marshall,* 25 F.3d 875, 879 (9th Cir.1994) (hybrid footnote nine error is "assimilated to structural error and declared to be incapable of redemption by actual prejudice analysis"). For the reasons stared above in the context of the *Cronic* issue, Ms. Garcia's petition is the ideal vehicle to resolve this important question that has divided the courts of appeals.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

By: */s/ Michael Caruso*
Counsel for Petitioner

Miami, Florida
March 18, 2019