

No. 21-6386

IN THE SUPREME COURT OF THE UNITED STATES

ANTJUAN SYDNOR, Petitioner

v.

THE STATE OF CALIFORNIA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL, THIRD APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner submits this reply brief in support of his petition for writ of certiorari pursuant to rule 15 of the Rules of the Supreme Court of the United States. Respondent filed its Brief in Opposition on February 23, 2022.

In this reply, petitioner addresses arguments made by respondent dealing with denial of the right to counsel at petitioner's jury trial.

QUESTIONS PRESENTED

Respondent's brief in Opposition (Opp.), includes a statement of the question presented. (Opp., p. i.) After briefly reciting events that occurred at petitioner's trial, respondent says the question presented is: "Whether the supplemental arguments constituted structural error, requiring automatic reversal of petitioner's convictions." (*Ibid.*)

Respondent oversimplifies the question this Court is asked to review. A primary question is whether events that occurred during deliberations at trial occurred at a critical stage of the proceedings. (Pet. p. 2.) This petition for writ of certiorari asks the Court to provide guidance in assessing what is, and what is not, a critical stage. That question must be answered before addressing the question posed by respondent.

ARGUMENT

I.

THE SUPPLEMENTAL ARGUMENT PRESENTED DURING DELIBERATIONS WAS A CRITICAL STAGE OF THE PROCEEDINGS FOR PETITIONER.

Respondent disagrees with petitioner's assertion that the supplemental argument amounted to a critical stage of the proceedings. (Opp. pp. 24-25.) First, respondent claims the supplemental argument was not a critical stage because arguments presented by the prosecutor and counsel for Jacob were "tangential" to petitioner. (*Id.* p. 24.) Respondent is wrong. While the initial purpose of the supplemental argument was to address Jacob's level of complicity, the arguments that actually occurred included multiple assertions of petitioner's guilt by both the prosecutor and counsel for Jacob. (See Cert petition pp. 12-13, 17.)

Respondent also disagrees with petitioner's argument that the prosecutor and counsel for Jacob presented new "theories of guilt upon which the jury could find petitioner guilty" during the supplemental argument. (Opp. p. 24.) Respondent claims, "there were no material differences between the theories presented at the lengthy closing arguments and the much shorter supplemental arguments." (Opp. p. 24.)

While some of the supplemental arguments were similar to those made during summation, Jacob's counsel argued a new theory not pre-

viously discussed at trial, that petitioner acted on his own, without Jacob, during the robbery murder. Jacob's counsel argued,

Mr. Sydnor comes to town from Philadelphia. He's interested maybe in doing something that he wouldn't otherwise do back home. He wants to rip somebody off. He says: Hey, Jacob, how about that cat I met out here one time? What's his name? Hollywood or something? What's he up to?

This could as easily have been driven by Mr. Sydnor on his own without Mr. Jacob's participation.

(3 R.T. p. 1586.)

The prosecutor then addressed that new theory. The prosecutor argued, "if you believe Mr. Jacob was not the person, then you must believe there's another person besides Mr. Sydnor in there." (3 R.T. p. 1583.) The prosecutor argued that petitioner did not know anyone in California, and it would have been difficult for Jacob to find someone to accompany petitioner during the robbery-murder. At this point, the prosecutor hypothesized a conversation in which Jacob said,

Mr. Sydnor, meet Joe Blow. You guys don't really know each other. Here's your two guns, the black semiautomatic that Ananjee seen (sic), take those two guns, here's my ex-wife's van, Mr. Sydnor, you drive it, the guy that I'm introducing you to, you sit somewhere in the back or do something, here's this information I'm going to give you, go to this house.

(3 R.T. p. 1584.) The prosecutor claimed this argument by Jacob's counsel made no sense, and that it was logical to believe Jacob accompanied petitioner during the robbery-homicide. (*Ibid.*) The prosecutor

concluded his supplemental argument by referring to petitioner as the second person involved in the offense. (3 R.T. p. 1585.)

These arguments by opposing counsel added a new theory – that petitioner acted alone during the robbery-homicide. Petitioner submits that any time opposing lawyers present arguments to a jury supporting a finding of a criminal defendant’s guilt, it is necessarily a critical stage of the proceedings for that criminal defendant.

II.

SUPREME COURT REVIEW IS NEEDED TO HELP LOWER COURTS DETERMINE WHEN DENIAL OF THE RIGHT TO COUNSEL OCCURS DURING A CRITICAL STAGE OF THE PROCEEDINGS AND REQUIRES REVERSAL WITHOUT ENGAGING IN HARMLESS ERROR ANALYSIS.

Respondent claims that petitioner has not identified any “persuasive reason for this Court to grant review of this intensely case-specific claim.” (Opp. p. 19.) Respondent says there is no reason to think the unusual circumstances of this case are likely to recur. (*Id.* p. 26.) In the next sentence, however, respondent concedes that lower courts have occasionally addressed other types of brief attorney absences during trial. Examples cited by respondent include: 1) defense counsel briefly leaving a courtroom during the prosecution’s direct examination of a co-conspirator, and 2) both the defendant and her lawyer being absent for

three to ten minutes during a trial that lasted more than 49 hours. (*Id.* p. 26.)

Respondent argues that no case supports petitioner's claim that trial counsel's brief absence from an ongoing trial is structural error. (*Ibid.*) On the other hand, respondent cites no case where counsel was involuntarily absent while opposing counsel argued his client's guilt to a jury. Supreme Court review is needed to determine when the absence of counsel during trial occurs at a critical stage of the proceedings, and when it does not. No case has addressed this question in the context of events like those that occurred during the supplemental argument at petitioner's trial.

Respondent also claims,

[Petitioner] has not established that the trial court's inadvertent mistake was in the nature of structural error, requiring automatic reversal of the judgment without any inquiry into prejudice.

(Opp. p. 19.) However, respondent ignores the suggestion petitioner makes in section "C" of his petition for writ of certiorari. (Pet. pp. 22-24.) There, petitioner asks this Court to grant certiorari and consider adopting the test used by the Ninth Circuit Court of Appeals to determine when a denial of the right to counsel has occurred at a critical stage of the proceedings. (*Ibid.*) In support of that suggestion, petition-

er cites *United States v. Benford*, 574 F.3d 1228 (9th Cir. 2009), which says this Court has not provided a definitive list of “critical stages,” as that term is used in *United States v. Cronin*, 466 U.S. 648 (1984). (*Benford*, *supra*, 574 F.3d p. 1232.)

Respondent cites and briefly discusses *Benford* in the opposition brief, but ignores petitioner’s suggestion that this Court adopt the test described in *Benford*. Instead, respondent merely distinguishes *Benford* from petitioner’s case on the facts. (Opp. p. 27.) But petitioner does not claim the holding in *Benford* should be applied in his case. Rather, he uses *Benford* to describe the test used by the Ninth Circuit to determine what is, and what is not, a critical stage of a criminal proceeding. (Pet. pp. 22-24.) Thus, respondent has failed to acknowledge a primary reason for granting certiorari in this case.

Respondent argues that no precedent of this Court (or any lower court) compels the conclusion that the error committed at petitioner’s trial is structural, requiring reversal per se. (Opp. p. 21.) It is equally true, however, that no precedent of this Court, or any lower court, compels the opposite conclusion – that the error was merely “trial error.”

Respondent cites and discusses only one case – *Rushen v. Spain* 464 U.S. 114, 117, (1983)(*Spain*) – for the proposition that the error at petitioner’s trial was not structural. (Opp. p. 22.) Respondent says

that in *Spain*, this Court used a harmless error standard to evaluate an alleged violation of the right to counsel. (Opp. p. 22.) *Spain* does not support respondent's argument, however. In that case the trial judge had two private conversations with a sitting juror during trial. The conversations were not disclosed to counsel until trial concluded.

(*Spain, supra*, 464 U.S. p. 116.) On federal habeas corpus, the district court held the ex parte communications violated Spain's right to counsel at a critical phase of trial. The district court ruled the error required automatic reversal because the absence of a record made harmless error analysis impossible. The Circuit Court of Appeals affirmed the district court. (*Id.* p. 117, including fn. 2.)

In *Spain*, this Court disagreed with the lower court rulings. (*Ibid.*) This Court assumed, without deciding, that the ex parte communication implicated the right to counsel. Based on footnote 2 in *Spain*, however, it is not clear the absence of counsel during an ex parte communication between the judge and a sitting juror actually violated the right to counsel. (*Ibid.*) The error in *Spain* was far different from the error at petitioner's trial. *Spain* does not help respondent establish the error in petitioner's case is subject to harmless error analysis

Respondent does not acknowledge cases that hold some violations of the right to counsel are not subject to harmless error analysis, but

instead require reversal per se. (*Neder v. U.S.*, 527 U.S. 1, 31 (1999) (Scalia, J. concurring and dissenting [points out that deprivation of the right to counsel can be structural error].) In *Geders v. United States*, 425 U.S. 80 (1976) (*Geders*), the trial court ordered counsel not to talk to his client during a 17-hour overnight recess, during a time when the defendant was testifying at trial. (*Geders, supra*, 425 U.S. pp. 81, 91.) This Court found a violation of the defendant's right to counsel, and reversed the conviction without harmless error analysis. (*Id.* p. 92.)

Another case that ordered per se reversal for a violation of the right to counsel is *U.S. v. Yamashiro*, 788 F.3d 1231 (9th Cir. 2015). There, the trial court allowed victim allocution to proceed at a sentencing hearing in the absence of trial counsel. (*U.S. v. Yamashiro, supra*, 788 F.3d p. 1234 (*Yamashiro*).) On the day scheduled for sentencing, Yamashiro requested substitution of counsel. The trial court granted the motion, set a new sentencing date, and released Yamashiro's original counsel from further representation. Although newly substituted counsel had not yet arrived, the court listened to allocution from victim witnesses who were in attendance. The court asked Yamashiro's original counsel, who had just been released, to stay for the victim allocution until the new attorney arrived, but advised that counsel need not do anything. One of the victim witnesses then described the devastat-

ing impact of the defendant’s crime, and requested the maximum penalty. After that witness concluded, Yamashiro’s new counsel arrived and was present during the allocution of five victim witnesses. Three months later, at the second phase of the sentencing hearing, the court heard additional allocution from victim witnesses and imposed a sentence of 189 months. (*Id.* p. 1234.)

On appeal, the government argued that victim allocution is not a critical stage of a criminal proceeding because crime victims have a nearly unfettered right to be heard at sentencing, and are not subject to cross-examination or other trial-like confrontations. (*Id.* p. 1235.) The Circuit Court rejected that argument, saying the essence of a “critical stage” is not its formal resemblance to a trial, but rather the adversary nature of the proceeding, combined with the “possibility” a defendant will be prejudiced in a significant way by counsel’s absence. (*Id.* p. 1235.) Explaining its rationale, the circuit court said, in pertinent part,

There is also a possibility of significant prejudice if counsel is not present to hear what was said, how it was said, and how it was received by the court.

(*Yamashiro, supra*, 788 F.3d p. 1235.)

In *Yamashiro*, the Ninth Circuit found the Sixth Amendment violation was “structural error,” and that “no additional showing of preju-

dice was required.” (*Yamashiro, supra*, 788 F.3d p. 1236.) It reversed the sentence and remanded for a new sentencing hearing before a different judge. (*Yamashiro, supra*, 788 F.3d pp. 1236, 1238.)

The *Yamashiro* opinion explains, in language quoted on the preceding page, why an error like the one that occurred at petitioner’s trial requires reversal per se. Counsel’s absence during supplemental argument made it difficult for him to fully understand how arguments made by the prosecutor and Jacob’s counsel were presented to the jury. The cold record that counsel read after-the-fact did not include voice inflections, physical gestures, and the like, which would enhance comprehension. In addition, counsel’s absence made it impossible for him to evaluate how the jury received those arguments. In petitioner’s case, the trial court’s efforts to “cure” the error by letting counsel state objections he might have made if present, and to provide further argument, could not mitigate the error. Counsel needed to be personally present to hear and see arguments being made by opposing counsel, and to observe how the jury reacted to those arguments.

Geders and *Yamashiro* demonstrate that violations of the right to counsel can occur in a variety of ways and require scrutiny to determine whether the error is structural.

III.

CONCLUSION - THIS COURT SHOULD GRANT CERTIORARI AND CONDUCT PLENARY REVIEW, OR IN THE ALTERNATIVE, MAKE A GVR ORDER, REMANDING TO THE CALIFORNIA COURT FOR FURTHER CONSIDERATION.

For all the reasons set forth here and in the petition for writ of certiorari, petitioner asks the Court to grant certiorari and hear petitioner's case on plenary review. In the alternative, petitioner asks the court to issue a GVR order, remanding the case to the California Court of Appeal for reconsideration. (*Lawrence v. Chater*, 516 U.S. 163, 166-169 (1996).) A remand order should require the California court to apply the test in *United States v. Benford*, *supra*, 574 F.3d 1228, 1232, to determine whether petitioner's right to counsel was violated at a critical stage of the proceedings.

DATED: March 7, 2022

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In pro bono publico