No. 17-6110

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER MICHAEL ROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the absence of petitioner's counsel during seven minutes of the direct examination of a government witness required automatic reversal of petitioner's convictions, without any inquiry into whether petitioner was prejudiced by his attorney's absence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-281) is reported at 855 F.3d 1133. A prior opinion of the court of appeals (Pet. App. 284-384) is reported at 761 F.3d 1285.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2017. On June 21, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 23, 2017. The petition was filed on September 22, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of enticing or attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b), and four counts of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. 394-396. He was sentenced to a life term of imprisonment, to be followed by a lifetime term of supervised release. Id. at 397. A panel of the court of appeals initially reversed the convictions, but the en banc court vacated that initial decision and affirmed. Id. at 1-281.

1. In January 2012, Detective Athena Ross of the Osceola County Sherriff's Office, acting in an undercover capacity, posted an online advertisement on Craigslist that was titled "2 girl on vacation 4 fun" and said "we are staying near Disney if you seek family intimate fun activities," a phrase Detective Ross knew was used on Craigslist to denote sexual activity. Gov't C.A. Br. 3 (citations omitted).[1] Petitioner, a middle-school teacher, Pet. App. 5, responded to the advertisement by email shortly after it was posted, saying it was his "dream" to have a "threesome," Gov't C.A. Br. 3 (citations omitted). Detective Ross told petitioner

[1] Citations to the government's brief in the court of appeals are to the government's brief at the panel stage, not the en banc stage.

she was a 30-year-old mother ("Denise") and that the other person mentioned in the advertisement was her 13-year-old daughter "Torrie." Id. at 3-4.

Petitioner said that a 30-year-old mother and 13-year-old daughter sounded like a "police sting" and "a little too good to be true" and asked for phone numbers and said he wanted to speak with the two by phone before meeting. Gov't C.A. Br. 4 (citations omitted). Detective Ross provided phone numbers as requested, and petitioner texted and spoke over the phone with "Denise" and "Torrie," played by Detective Ross and Detective Amber Warren, respectively. Id. at 3-5. "Denise" told petitioner that she wanted him to "teach" and introduce "Torrie" to sex." Id. at 4-5 (citation omitted). When he spoke with "Torrie," petitioner asked about her sexual experiences and discussed teaching her about different sexual positions and engaging in a "threesome" with her mother, "Denise." Id. at 5 (citation omitted). Petitioner assured "Denise" and "Torrie" that he would "use protection" so that he did not impregnate "Torrie" or give her venereal diseases. Ibid. (citation omitted).

Petitioner made plans to meet "Denise" and "Torrie" at a Waffle House restaurant in Kissimmee, Florida, and then follow them to their house. Gov't C.A. Br. 5. Law enforcement arrested petitioner after he showed up for the meeting. Id. at 6-7. The

officers found four condoms and a bottle of sexual lubricant in petitioner's pockets. Id. at 7.

The police obtained warrants to search petitioner's home and found a desktop computer, a laptop computer, a thumb drive, and three compact discs containing photographs and videos of minor females (some of whom were prepubescent) exposing their genitals or engaging in sexual conduct. Gov't C.A. Br. 7-9. One of the minor girls in the photographs and videos was identified as "L.B." Id. at 8. The materials with L.B. included graphic videos that were created when L.B. was 16 or 17 years old and showed petitioner physically abusing her in a demeaning manner and engaging in sexual intercourse with her. Id. at 8-9; see Pet. App. 9-11 (describing testimony about materials). The materials included "L.B. bound and blindfolded with a 'body net covering her body' and 'a red dildo inserted into her anus'; L.B. 'fully nude' with a 'dildo in her vagina' while she 'perform[ed] fellatio on a white male'; L.B. 'fully nude' with a 'vibrator in her vagina' while a white male 'attempt[ed] to have annal [sic] sex with her'; L.B. performing fellatio after removing a 'school-girl outfit'; L.B. having sexual intercourse with a man while she was tied up; and L.B. lying 'nude in [a] bathtub' with "Alex's little cunt' scrawled across her chest and stomach while a man urinated on her." Pet. App. 10-11 (brackets in original) (quoting trial transcript).

2. A federal grand jury returned an indictment charging petitioner with one count of enticing or attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b), and four counts of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. 385-388. The possession charges corresponded to the child pornography found on the desktop computer (Count 2), laptop computer (Count 3), thumb drive (Count 4), and three compact discs (Count 5). Id. at 386-388; see id. at 3-4; Gov't C.A. Br. 1.

The government called witnesses over four days of a six-day jury trial. Pet. App. 4-13, 15. During the first two days of trial and for part of the morning of the third day, "with defense counsel present at all times, the government called 10 witnesses whose testimony focused on the attempted child enticement charge in Count 1," which concerned petitioner's conduct with "Denise" and "Torrie." Id. at 4-5.

On the third day, the government also began to call witnesses who offered testimony relevant to the child pornography charges. Pet. App. 5. The government called a witness who testified that L.B. was born on May 9, 1989. Ibid. It then called Deputy Sheriff Charlie Longson, a computer forensics expert. Id. at 6. Longson's testimony was interrupted at approximately 12:30 p.m. for an hour-long lunch break. Id. at 6, 14. The government's direct examination of Longson resumed at 1:29 p.m., but petitioner's

counsel did not return to the courtroom until 1:36 p.m. Ibid. The government asked Longson 18 questions during defense counsel's seven-minute absence. Id. at 6; see id. at 14-15 (counsel absent during "three of the 175 pages of Longson's total testimony"). Longson's answers to those questions "concerned only six of the numerous images of child pornography," which "were found in only one of the several file folders containing child pornography that were on [petitioner's] desktop computer." Id. at 6-7. Longson described the images and testified they were found in a folder labeled "2006-03-11," were taken with a Kodak digital camera on March 10, 2005, were initially uploaded onto a computer on March 11, 2006, and were transferred to petitioner's desktop computer on April 4, 2009. Id. at 391-392 (trial transcript); see id. at 7.[2]

When petitioner's counsel returned, government counsel asked for a moment to approach him. Pet. App. 8, 14. Thereafter, when direct examination of Longson resumed, "the testimony that Longson had given during counsel's brief absence was repeated." Id. at 7. Longson testified that the six images were found in a folder on petitioner's desktop computer labeled "2006-03-011," had been created on March 11, 2006, and were uploaded onto petitioner's

[2] Because L.B. was born on May 9, 1989, images of her created before May 9, 2007 could qualify as child pornography. Pet. App. 5 (citing 18 U.S.C. 2256(1), which defines "minor" as "any person under the age of eighteen years").

desktop computer on April 4, 2009. Id. at 9. The one exception was that during counsel's absence Longson testified that the images were created with the Kodak camera in March 2005, but when counsel returned he testified that the images had been created in March 2006. Id. at 7 n.1, 112-113. L.B. was under 18 and therefore a minor in both March 2005 and March 2006. Ibid.

Longson's testimony continued for the remainder of the third day of trial. Pet. App. 7-12. Longson gave further testimony about the six images of L.B. found on petitioner's desktop computer. Id. at 9. In addition, he testified about additional images of child pornography found on electronic devices belonging to petitioner, including other images of L.B. found on the desktop computer; images of L.B. found on the laptop computer, thumb drive, and compact discs; and images of other female minors found on the desktop computer, the laptop computer, the thumb drive, and the compact discs. Id. at 10-12. Petitioner's counsel did not object to any of the testimony. Ibid.

The jury found petitioner guilty on all counts. Gov't C.A. Br. 2. The district court imposed a sentence of life imprisonment on the enticement count and concurrent 120-month terms of imprisonment on the child pornography counts. Id. at 10. The court also imposed a lifetime term of supervised release. Ibid.

3. On appeal, a divided panel initially reversed petitioner's conviction and remanded the case for a new trial.

Pet. App. 284-312. The panel concluded that because petitioner's attorney was absent for seven minutes of the examination of Langson, petitioner was deprived of counsel during a critical stage of his trial, and it was required to reverse petitioner's conviction without any inquiry into prejudice under United States v. Cronic, 466 U.S. 648 (1984). Pet. App. 285.

Chief Judge Carnes dissented. Pet. App. 313-384. He reasoned that an attorney's momentary absence from the courtroom "was not Cronic error" requiring automatic reversal. Id. at 375. He criticized the panel opinion to the contrary as "unprecedented," id. at 316, and wrote that it made the court "the only court of appeals to hold that any attorney absence during the presentation of any directly inculpatory evidence" required automatic reversal, id. at 347.

4. The court of appeals sua sponte ordered rehearing en banc. Pet. App. 282-283. The en banc court then affirmed petitioner's convictions. Id. at 1-281.

a. Chief Judge Carnes wrote the lead opinion for the en banc court, determining that counsel's seven-minute absence from trial did not require reversal of petitioner's convictions. Pet. App. 1-127.

At the outset, the court of appeals stated that it would "indulge[] the assumption" that "that the plain error rule does not apply even though there was no contemporaneous objection."

Pet. App. 17-18. The court explained that it would make that assumption to "simplify [its] analysis," because whether or not plain-error review was used, in this case "the result is the same." Ibid.

Next, the court of appeals concluded that a Sixth Amendment violation occurred at petitioner's trial. The court reasoned that "absent evidence of an attempt to deliberately inject error into the record and without a waiver from the defendant, it is a violation of the Sixth Amendment for inculpatory testimony to be taken from a government witness without the presence of at least one of the defendant's counsel, regardless of whether the judge or the [prosecutor] noticed that counsel was not there." Pet. App. 18. The court did not "treat[] this as an attorney error case" to be evaluated under the standard for ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), in part as a result of "the limited knowledge we have about the circumstances involving the absence of [petitioner's] counsel and what, if anything, he realized when he returned to the courtroom." Pet. App. 19 n.7.

The court of appeals determined that the brief absence of petitioner's counsel did not amount to a structural error requiring automatic reversal, but was instead the type of error subject to review for harmlessness. The court observed that "harmless error analysis is the rule, not, the exception," and that this court had

"applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." Pet. App. 20-21 (emphasis omitted). The court of appeals wrote that Cronic, supra, established that "prejudice is to be presumed, and therefore the harmless error rule does not apply, when a criminal defendant has been completely denied the right to counsel for a critical stage of the trial, which is an error that contaminates the entire proceeding." Pet. App. 22-23. But the court rejected petitioner's argument "that his counsel's brief absence from the courtroom" during a part of Deputy Longson's testimony constituted denial of counsel for a critical stage of the proceeding. Id. at 23.

The court of appeals observed that this Court's decisions had "confin[ed] the Cronic exception within narrow boundaries." Pet. App. 26. Further, the court stated, decisions demonstrated that what this Court "means when it does use the term 'stage' for Cronic purposes is a qualitatively distinct, discrete, and separate phase or step of a criminal proceeding where the defendant has a right to counsel, such as an arraignment, a post-indictment lineup, a preliminary hearing, a plea hearing, closing arguments as a whole, or a sentence proceeding as a whole." Id. at 30. That usage, the court observed, was also "consistent with the everyday definition of 'stage.'" Id. at 31.

The court of appeals then determined that "[t]he 18 questions and answers that [petitioner's] counsel missed do not fit any accepted definition of 'stage' or 'critical stage.'" Pet. App. 32. Indeed, the court wrote, they "are not even an identifiable stage of Deputy Longson's testimony." Ibid. Instead, they were "all questions and answers of the same type as those that preceded and followed them" -- and all eighteen of the questions were later "repeated after counsel returned to the courtroom." Ibid. The court added that "[t]he only defining characteristic of what took place in the trial during the seven minutes while [petitioner's] counsel was absent is that it occurred while [petitioner's] counsel was absent." Ibid. The court declined to adopt a "circular" definition under which "anything that happened in a trial during the absence of an attorney, however brief it was, would be a stage of the trial." Id. at 33. The court grounded its approach in decisions from this Court and the courts of appeals. Id. at 33-60.

In a portion of his opinion that garnered support from a plurality of the en banc court, Chief Judge Carnes concluded that a presumption of prejudice would be warranted "if [counsel were] absent for a substantial portion of the trial," even if counsel's absence did not warrant a presumption of prejudice under Cronic because counsel was "not absent throughout an entire critical stage." Pet. App. 62. Chief Judge Carnes wrote that this

substantial-portion inquiry paralleled the manner in which other courts of appeals had addressed circumstances in which a defense attorney had fallen asleep during trial. Id. at 62-69. Chief Judge Carnes had "no trouble concluding," however, that petitioner was not entitled to a presumption of prejudice under that analysis because petitioner's "counsel did not miss a substantial portion of the trial." Id. at 73.

In a portion of the opinion joined by a majority of the en banc court, Chief Judge Carnes next found harmless the Sixth Amendment violation that resulted from the seven-minute absence of petitioner's counsel. Pet. App. 102—125. The court found the absence harmless with respect to Count 1, which charged attempted child enticement, because "the testimony that occurred during counsel's absence was not about the Count 1 charge" at all, but was instead "solely about the Count 2-5 charges of knowingly possessing 'any visual depiction' of child pornography." Id. at 102. It observed that the child enticement charge in Count 1 and the child pornography charges in Counts 2 to 5 were both legally and factually distinct. Ibid. The court further determined that the error in this case was harmless beyond a reasonable doubt as to the child-pornography counts, because of "overwhelming evidence, all of which came in while counsel was present," and because "the testimony that Deputy Longson gave during the seven

minutes that [petitioner's] counsel was absent was repeated after he returned to the courtroom." Id. at 106.

b. Judge Tjoflat filed a specially concurring opinion. Pet. App. 128-168. Judge Tjoflat would have held that a Sixth Amendment claim based on the absence of counsel from a court proceeding should be analyzed under the framework of Strickland when, as in this case, "counsel's absence was entirely self-imposed." Id. at 151; see id. at 130 n.5 ("Under my view, Strickland should govern this claim, and therefore [petitioner] would bear the burden of establishing both deficient performance and resulting prejudice to such an extent that there is reasonable probability of a different result absent counsel's errors."). Judge Tjoflat explained that his proposed standard was more restrictive of relief than the en banc court's, because under harmless-error review, the government "bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt," whereas under Strickland, petitioner would bear the burden of demonstrating prejudice. Id. at 130 n.5, 151.

c. Judge William Pryor filed a concurring opinion. Pet. App. 169-172. He agreed that an error occurred in this case, that the error was not structural but was instead subject to harmless-error review, and that the error had been harmless. Id. at 169-170. He argued that the lead opinion "unnecessarily complicated

this appeal" by putting forward tests for identifying structural defects and prejudice. Id. at 169.

d. Judge Jordan also filed a concurring opinion. Pet. App. 173-175. He wrote that, for him, "the record drives the resolution of this case and renders largely academic the debate about what constitutes a 'critical stage.'" Id. at 173. Accordingly, he joined the portions of the court's decision concluding that a Sixth Amendment violation had occurred and that the error was harmless, but not the additional sections on the critical-stage question. Ibid.

e. Judge Rosenbaum filed an opinion concurring in part and concurring in the result. Pet. App. 176-219. She agreed with the majority that the error in this case was "subject to harmless-error review" and "was, in fact, harmless beyond a reasonable doubt." Id. at 176. She would have held that "counsel's absence in a single-defendant trial is structural error under Cronic when it renders a trial presumptively unreliable because of a breakdown of the adversarial process -- a rule that correlates with counsel's absence for more than ten minutes or 1% of the trial." Id. at 180.

f. Judges Wilson, Martin, and Jill Pryor each dissented separately, concluding that counsel's absence during inculpatory testimony in this case was structural error that automatically

requires reversal of petitioner's convictions, without regard to prejudice. Pet. App. 220-281.

ARGUMENT

Petitioner renews his contention (Pet. 11-31) that his counsel's seven-minute absence during his six-day trial requires the reversal of his convictions without any inquiry into prejudice. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. In addition, this case would be an unsuitable vehicle for review of the question presented because petitioner's claim was not raised in the district court and is therefore subject to review only for plain error. This Court has previously denied certiorari on a similar question, see Sweeney v. United States, 135 S. Ct. 1841 (2015) (No. 14-668), and the same result is warranted here.

1. The court of appeals correctly rejected petitioner's contention that his counsel's absence during seven minutes of a six-day trial required automatic reversal of his convictions.

The Sixth Amendment protects the right to be represented by an attorney whose performance is "within the range of competence demanded of attorneys in criminal cases." United States v. Cronic, 466 U.S. 648, 655 (1984). Ordinarily, a defendant may demonstrate a violation of this right only by establishing both that his counsel's performance was deficient and that he was prejudiced by

the deficiency. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Cronic, 466 U.S. at 658 ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."). And while defendants may establish violations of many other constitutional rights without showing prejudice, this Court has explained that constitutional errors can ordinarily be reviewed for harmlessness. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

In asserting that his convictions should be reversed without any inquiry into prejudice, petitioner principally relies on Cronic, supra (Pet. 11-39), but that case does not support his position. In Cronic, this Court stated that in some extreme circumstances, such as a "complete denial of counsel" or an "entire[]" failure by counsel "to subject the prosecution's case to meaningful adversarial testing," a court may presume prejudice to the defendant without further inquiry. 466 U.S. at 659. It made clear, however, that the presumption applies only where counsel has "failed to function in any meaningful sense as the Government's adversary." Id. at 666. The Court reasoned that in such cases, the circumstances "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. at 658. The Court in Cronic found no such circumstances in the case before it. Id. at 662-667.

Cronic does not support application of an automatic-reversal rule to a seven-minute absence from a six-day trial when the testimony that occurred in counsel's absence was essentially recapitulated after counsel returned. In Cronic itself, the Court cautioned that "[a]part from circumstances of th[e] magnitude" of those identified in the Court's opinion, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." 466 U.S. at 659 n.26; see Mickens v. Taylor, 535 U.S. 162, 166 (2002) (same). Strickland similarly stated that "prejudice is presumed" only in cases involving "[a]ctual or constructive denial of the assistance of counsel altogether." 466 U.S. at 692. A seven-minute absence during a six-day trial is not of the same "magnitude" as the complete denial of counsel or the other extreme situations contemplated in Cronic. 466 U.S. at 659. Petitioner's counsel did not "fail[] to function in any meaningful sense as the Government's adversary." Id. at 666. Nor is a presumption of prejudice justified on the ground that "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." Mickens, 535 U.S. at 166. As this case and other decisions readily illustrate, when counsel is absent from trial only briefly, it is often the case that a relatively simple assessment of what occurred in counsel's absence, in the context of the entire trial, will establish that

the absence had no effect. Cronic therefore provides no support for the categorical exemption that petitioner seeks to the prejudice requirement.

Petitioner also relies (Pet. 13-16) on this Court's decisions treating certain constitutional errors as structural defects warranting automatic reversal. A structural defect is one that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." Johnson v. United States, 520 U.S. 461, 468 (1997) (quoting Fulminante, 499 U.S. at 310). The Court "ha[s] found structural errors only in a very limited class of cases," ibid., where it is "difficult to assess the effect of the error," United States v. Marcus, 560 U.S. 258, 263 (2010) (brackets and internal quotation marks omitted) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006)).

In Johnson, Marcus, and Neder v. United States, 527 U.S. 1, 8-11 (1999), the Court identified a handful of defects that rise to the level of structural error: a total deprivation of counsel, see Gideon v. Wainwright, 372 U.S. 335 (1963); a biased trial judge, see Tumey v. Ohio, 273 U.S. 510 (1927); the denial of a defendant's right to represent himself at trial, see McKaskle v. Wiggins, 465 U.S. 168 (1984); a violation of a defendant's right to a public trial, see Waller v. Georgia, 467 U.S. 39 (1984); racial discrimination in the selection of the grand jury, see

Vasquez v. Hillery, 474 U.S. 254 (1986); and an erroneous instruction on reasonable doubt that affected all of a jury's findings, see Sullivan v. Louisiana, 508 U.S. 275 (1993). See also Gonzalez-Lopez, 548 U.S. at 150 (identifying denial of the right to be represented by retained counsel of choice as structural error).

Petitioner suggests that a brief absence of counsel during trial similarly "def[ies] analysis by harmless error standards" and "results in fundamental unfairness." Pet. 15 (quoting Weaver v. Massachusetts, 137 S. Ct. 1899, 1907-1908 (2017)) (brackets in original). But the brief absence of counsel "differs markedly from the constitutional violations [this Court] ha[s] found to defy harmless-error review," Neder, 527 U.S. at 8. Those errors "infect the entire trial process" and "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Id. at 8-9 (citation omitted). A brief absence of counsel, in contrast, affects a discrete portion of the trial. And where, as here, "[w]e know * * * from the record," Pet. App. 15, precisely what counsel missed, a court can assess whether in the context of the entire trial the defendant suffered prejudice from what occurred during the brief absence. Indeed, the court below observed that conducting harmlessness analysis in this case was "not difficult." Id. at 125; see id. at 173 (Jordan, J., concurring) ("Because there was, in practical

terms, a do-over after counsel returned to the courtroom, * * * [w]e can, without much difficulty, assess the impact (or lack thereof) of counsel's absence.").

This Court has also recognized that some rights -- such as the right to self-representation -- are not susceptible to harmless error analysis in part because they protect values that are distinct from increasing the likelihood of a favorable trial outcome. See Weaver, 137 S. Ct. at 1908; Gonzalez-Lopez, 548 U.S. at 148-149 & n.4; Wiggins, 465 U.S. at 177 n.8. But the right to an attorney who provides competent assistance is not of that character, because it "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." Cronic, 466 U.S. at 658. Precisely for that reason, prejudice is ordinarily an essential component of a Sixth Amendment violation itself: "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." Ibid.; accord Mickens, 535 U.S. at 166.

This case confirms that brief absences of counsel are readily susceptible to review for prejudice. Petitioner's counsel was absent for "18 answers from one of 13 government witnesses" during "seven minutes of a six day trial." Pet. App. 28. When counsel returned to the courtroom, the government repeated the same set of questions and elicited materially identical responses. Id. at 7;

see id. at 110 (any error harmless because "the facts covered in the testimony that Deputy Longson gave while [petitioner's] counsel was out of the courtroom were covered again soon after [petitioner's] counsel returned"); see also id. at 110-114. The testimony during counsel's absence concerned only the date-stamp on several computer files, and defense counsel did not raise any objection to the date-stamp testimony when it was repeated. Finally, even if the testimony about those particular computer files was struck from the record, undisputed evidence established that petitioner possessed child pornography depicting other minor females on each of his electronic devices, which would by itself suffice for conviction on each of the child-pornography counts. Id. at 107-109. Yet petitioner insists that counsel's seven-minute absence during a six-day trial requires automatic reversal. And he apparently would extend that remedy to all of his convictions -- even though the testimony during counsel's absence had no bearing on the enticement charge in Count 1. Id. at 102-106. Such a sweeping rule of automatic reversal cannot be reconciled with this Court's precedents.

2. Petitioner contends (Pet. 16-25) that this Court should grant certiorari to resolve "[c]ircuit confusion over what constitutes a critical stage" of trial. Pet. 20. But the courts of appeals do not disagree about whether the absence of defense counsel from seven minutes of a six-day trial constitutes an

absence for a critical stage of trial, thereby requiring the defendant's convictions to be reversed without any analysis of harmlessness. To the contrary, the lower courts have generally concluded that although prejudice may be presumed when counsel is actually or constructively absent during a substantial portion of the trial, the same rule does not apply to brief absences like the one at issue here. See, e.g., Sweeney v. United States, 766 F.3d 857, 860-862 (8th Cir. 2014), cert. denied, 135 S. Ct. 1841 (2015) (declining to presume prejudice based on counsel's three-minute absence during the government's direct examination of a co-conspirator); United States v. Kaid, 502 F.3d 43, 47 (2d Cir. 2007) (per curiam) (same for a "discrete and brief attorney absence" during 20 minutes of the direct examination of a government witness); United States v. Morrison, 946 F.2d 484, 502-503 (7th Cir. 1991) (same for the absence of counsel during cross-examination of prosecution witnesses by counsel for co-defendants), cert. denied, 506 U.S. 1039 (1992).

Petitioner contends (Pet. 21-25) that the decision below is inconsistent with decisions by the Fifth and Sixth Circuits that applied a rule of automatic-reversal to particular attorney absences. But the decisions on which petitioner relies involved actual or constructive absences that were much more substantial than the one at issue here. See Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir. 2001) (counsel was "repeatedly unconscious through

not insubstantial portions of the defendant's capital murder trial"), cert. denied, 535 U.S. 1120 (2002); Olden v. United States, 224 F.3d 561, 568 (6th Cir. 2000) (counsel "was absent on numerous occasions during trial"); United States v. Russell, 205 F.3d 768, 772 (5th Cir. 2000) ("two day absence"); United States v. Minsky, 963 F.2d 870, 874 (6th Cir. 1992) (counsel was absent for the entirety of a bench conference on whether the government was required to turn over documents that "would have allowed the defense to undermine the credibility of * * * a key government witness"); Green v. Arn, 809 F.2d 1257, 1261 (6th Cir. 1987) (counsel was absent for a "critical part of [one] afternoon"), vacated on other grounds, 484 U.S. 806 (1987), reinstated, 839 F.2d 300 (1988), cert. denied, 488 U.S. 1034 (1989).

Both of those courts, moreover, have expressly declined to adopt a per se rule of presumed prejudice like the one petitioner seeks. In Russell, for example, the Fifth Circuit rejected "a bright line rule that the taking of any evidence at trial in the absence of counsel is prejudicial per se under [Cronic]." 205 F.3d at 771; see ibid. ("Cronic does not so hold and we decline to fashion such a rule."); see also Burdine, 262 F.3d at 349 (emphasizing that the court's application of a presumption of prejudice was "limited to the egregious facts" of that case, and "declin[ing] to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice"). The

Sixth Circuit has similarly recognized that "some absences by a criminal defendant's attorney might be so de minimis that there would be no constitutional significance." Green, 809 F.2d at 1261.

3. In any event, this case would not be a suitable vehicle in which to consider the question presented. Petitioner raised no Sixth Amendment objection below. Because even errors that are deemed structural can be forfeited and subject to plain-error review, see, e.g., United States v. Cotton, 535 U.S. 625, 632-633 (2002) (even assuming error to be structural, defendant did not establish reversible plain error); Johnson, 520 U.S. at 469-470 (same), petitioner's claim is accordingly subject to review only for plain error. See Fed. R. Crim. P. 52(b).

Petitioner could not establish reversible plain error even if he were correct on the merits of the question presented. On plain-error review, a litigant is only entitled to relief if he can show (1) "an error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Marcus, 560 U.S. at 262 (citation and internal quotation marks omitted). This Court has reserved determination of whether a defendant automatically establishes an effect on his substantial rights by demonstrating a structural error. See, e.g., id. at 263-264. But it has determined that a defendant must demonstrate a serious

effect on the fairness, integrity, or public reputation of judicial proceedings in order to obtain relief even when a structural error is alleged. Cotton, 535 U.S. at 632-633; Johnson, 520 U.S. at 469-470.

Petitioner cannot demonstrate that his counsel's absence for seven minutes of trial had the requisite serious effect. On the contrary, as the court of appeals emphasized, the evidence strongly indicates that counsel's seven-minute absence had no meaningful effect on the proceedings: "there was, in practical terms, a do-over after counsel returned to the courtroom," Pet. App. 173 (Jordan, J., concurring), and there was also "overwhelming" other evidence to support conviction on the counts to which the seven minutes of testimony pertained, id. at 106. Under these circumstances, petitioner cannot make the showing required for plain-error relief. Cf. Cotton, 535 U.S. at 633 (no serious effect on the fairness, integrity, or public reputation of judicial proceedings when indictment did not charge an element but the evidence on that element was "overwhelming" and "essentially uncontroverted") (citation omitted); Johnson, 520 U.S. at 470 (no serious effect on the fairness, integrity, or public reputation of judicial proceedings when the district court failed to submit an element to the jury but the evidence on that element was "overwhelming" and "essentially uncontroverted"). And because this Court could affirm the decision below solely on the ground

that petitioner did not establish reversible plain error, this case would be a poor vehicle for considering the constitutional issue that petitioner raises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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