NO. 17-6110

In The
Supreme Court of the United States

ALEXANDER MICHAEL ROY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

The temporary absence of counsel during a critical stage of trial has recurred with disturbing frequency, despite the Court's admonition in *Cronic* that a trial is unfair if the accused is denied counsel at a critical stage of trial.[1] When it happens, reviewing courts have struggled with how to analyze the constitutional error and what constitutes a critical stage. In the past few Terms, this Court has been presented with no fewer than three such occurrences. *Woods v. Donald*, 575 U.S. ___, 135 S. Ct. 1372, 1378 (2015) (per curiam); *United States v. Sweeney,* 766 F.3d 857 (8th Cir. 2014), *cert. denied.* 575 U.S. ___, 135 S. Ct. 1841 (2015) (No. 14-668); and *United States v. Roy,* 855 F.3d 1133 (11th Cir. 2017) (en banc), petition for cert. filed herein. In *Woods*, the Court acknowledged that none its cases resolve those questions, but deferred on the substantive Sixth Amendment issue because the case was on federal habeas review. As discussed below*, Sweeney* apparently presented an inapt vehicle to resolve the substantive questions because it too was on collateral review. Yet, Mr. Roy's petition presents no such concern because his case is on direct appellate review.

1. Three Terms ago, the government opposed review of a temporary-absence-of counsel case in *Sweeney,* arguing that case was an

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[1] *United States v. Cronic,* 466 U.S. 648 (1984).

inappropriate vehicle because it was on collateral review.[2] The government's opposition specifically contrasted *Sweeney*'s collateral review from Mr. Roy's direct appeal case, which was at that time in the midst of *en banc* review: "[T]his case [*Sweeney*] would not be an appropriate vehicle in which to consider it. Unlike *Roy,* and some other decisions addressing the proper treatment of brief attorney absences during trial, this case arises out of petitioner's motion for post-conviction relief under 28 U.S.C. § 2255." Br. Opp. at 6-7, *Sweeney*. The government's opposition concluded that, "the collateral review posture and the resulting *Teague* problem would make this a very poor vehicle in which to address the question presented."[3] Br. Opp. at 16-17, *Sweeney*. One cannot escape the thrust of this argument: If the question presented is reviewed, it should be in a case on direct appeal, such as Mr. Roy's.

This Term, in response to Mr. Roy's petition raising the same issue on direct appeal, the government urges the Court to deny review, arguing that the Court "has previously denied certiorari in a similar question" in *Sweeney*, "and the same result is warranted here." Br. Opp. at 15. In doing so, the government now glosses over the vehicle rationale it used to oppose review in *Sweeney*. The *Roy* case, however, is unlike *Sweeney* in the critical respect the government itself previously highlighted:

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[2] Br. Opp. at 15, *Sweeney v. United States,* 2015 WL 1064750 (Mar. 15, 2015) (also available at https://www.justice.gov/sites/default/files/osg/briefs/2015/03/17/14-668_sweeney_v_us_2015-03-09_-_final.pdf)(last viewed Feb. 9, 2018).

[3] *Teague v. Lane*, 489 U.S. 288 (1989) (plurality) (restricting review of constitutional procedure rules on collateral review and applying a nonretroactivity principle).

Mr. Roy's case is not on collateral review. It is a direct appeal. As such, its vehicle has none of the complications and legal entanglements attendant to collateral review that arguably made *Sweeney* a poor choice for resolving the important constitutional question presented.

For the government to argue, as it does now, that "the same result is warranted here," Br. Opp. at 15, walks back the very argument it made to the Court in *Sweeney* three Terms ago. To the contrary, Mr. Roy's direct appeal is an ideal vehicle to address the substantive Sixth Amendment question involved.

2. The government's present opposition fails to acknowledge what *Woods*, *Sweeney, Roy* and the other cases expose, that the problem of temporary absence of counsel is a recurring one with which the courts of appeals have struggled. Seemingly, the government has blinders to the plaintive calls of the courts of appeals. The Sixth Circuit has openly questioned, "What is a critical stage?" and welcomed this Court's guidance. *Van v. Jones*, 475 F.3d 292, 312 (6th Cir. 2017).

The *en banc* opinions below repeat and reiterate this concern: "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). None exists, as that court recognized. *Id.*'" (App. 28).

Too, the government's brief in opposition fails to acknowledge or address the Ninth Circuit's recent decision in *United States v. Martinez,* 850 F.3d 1097, 1104 n.4 (9th Cir. 2017), which also expresses confusion over what constitutes a critical stage. *Id.* ("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.").

Tellingly, the very length of the government brief's description of the decision below demonstrates the courts of appeals' prevailing uncertainty. The government's "succinct" description of the *en banc* opinions below spans seven pages of its 25-page brief, Br. Opp. at 8-15. Indeed, the disagreement and confusion is self-evident in the 281 pages of *en banc* opinions below, which contain lengthy discussions of the divergent circuit decisions.

It is important for the Court to address the ongoing uncertainty concerning appellate review of temporary absences of counsel. When the next temporary-absence-of-counsel case arises – as history teaches it certainly will – what cogent rule will that court of appeals follow? How will it determine if the incident involves a critical stage of trial? Will it invoke a rule of automatic prejudice under *Cronic,* as some circuits have done? Or will it use the plurality's New Rule below, which permits the totality of evidence at trial to negate the constitutional violation? Or will it review under a more general rule of harmless error, using one of the approaches adopted by a concurring opinion not joining the plurality opinion below? Or will it apply some other formulation? The Court should address and answer the question with the correct rule of review, so that the circuits do not continue to confuse appellate resolution of such cases.

3. The government argues that the presumption of prejudice required by the Court's decision in *United States v. Cronic,* arises only with a "complete denial of

counsel" or an "entire failure by counsel" to test the prosecution's case, not to a temporary absence of counsel during trial. Br. Opp. at 16-17. To this end, the government's brief truncates the holding in *Cronic* to screen out an important sentence, which applies the holding to a "critical stage" of trial, as well. *See* Br. Opp. at 16-17. The brief in opposition selectively quotes from *Cronic*, ignoring the holding's specific statement that "a trial is unfair if the accused is denied counsel *at a critical stage of his trial*." 466 U.S. at 659 & n.25 (emphasis supplied).

To be sure, *Cronic* identifies two circumstances in which the automatic reversal rule applies, either the complete denial of counsel, or denial of counsel during a critical stage of trial:

> Most obvious, of course, is the complete denial of counsel. 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.

Id. The reference in the first sentence to "complete denial of counsel" does not mean that *Cronic* only applies to cases in which a defendant is without counsel throughout all the stages of the trial. The Court's second sentence "negates such a limited interpretation: '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.'" *Siverson v. O'Leary*, 764 F.2d 1208, 1216 (7th Cir. 1985). The *Siverson* court supported its conclusion with a footnote from the *Cronic* decision:

> Moreover, in a footnote to this statement, the Court noted that its prior decisions had '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.'

Siverson, 764 F.2d at 1216 (internal citation and footnote omitted).

Despite the importance of the second sentence in the context of Mr. Roy's absence-of-counsel claim on appeal, the government neither cites nor discusses it in its brief in opposition. Yet, it is this very clause that has stumped reviewing courts of appeals. It is a sentence and phrase worthy of this Court's review.

4. The government's opposition rests, in part, on the myth that the testimony given in Mr. Roy's counsel's absence "was essentially recapitulated after counsel returned." Br. Opp. at 17. Although some of the *en banc* opinions state that all questions asked during counsel's absence were repeated at other times when he was present (App. 80, 81, 112, 125), this refrain misses the point that *the answers given were different*. Significantly, the government's expert only testified about the March 10, 2005 date while counsel was absent. This opinion testimony placed L.B.'s age at its youngest. This was the earliest date about which the expert ever opined. At no other time during trial was the March 10, 2005 date mentioned; the government expert testified to a different, later date at all other times. It is, thus, inaccurate to contend, as the government's opposition does here, that the evidence introduced in counsel's absence was recapitulated after counsel returned.

The impact of the unknown testimony is revealed by how defense counsel failed to address or rebut this important evidence. Defense counsel never confronted this critical date – not in cross-examination, not in the defense case, not in

argument. This is true, even though the defense expert's testimony of the camera-dating flaw could have easily applied to the March 10, 2005 date, and the date itself conflicts with all other evidence, since other evidence establishes that Mr. Roy never met and had no contact with L.B. until the following year. (App. 236). Indeed, due to the camera-dating flaw, the subject photographs could have been taken years later, when L.B. was an adult. Stated simply, the missed testimony was ripe for a strong defense challenge, but was left untouched because counsel never knew of the testimony. That is the natural result of the structural error of absent counsel – a missing lawyer "does not analyze, object, listen or in any way exercise judgment on behalf of a client" undermining the reliability of the proceeding. *Burdine v. Johnson*, 262 F.3d 336, 339 (5th Cir. 2001).

As a direct consequence of counsel's absence, Mr. Roy's jury had before it an unrebutted fact establishing an essential element of each of the charged offenses. Despite the government's unwillingness to acknowledge it now, the trial jury had a clear path to avoid the heavily contested battle over L.B.'s age by simply directing its attention to the expert's earliest age estimate, which was never contested at all – because missing counsel never knew of the testimony. Certainly, the prosecutor at trial exploited the uncontested evidence, deliberately and effectively linking proof of all counts together, relying on the child pornography counts to prove the enticement of a minor charge. App. 306-08. One cannot fairly conclude, as the government contends now, that the testimony taken in counsel's absence was remedied later, or that it did not impact each count of conviction.

5. The government attempts to smooth over the conflicting decisions of the courts of appeals, the uncertainty they express, and the fragmented plurality, concurring and dissenting opinions below. Its brief contends "the lower courts have generally concluded that although prejudice may be presumed when counsel is actually or constructively absent during a substantial portion of trial, the same rule does not apply to brief absences. . . ." Br. Opp. at 22. This contention, however, exposes the gravamen of the open questions: What constitutes a "substantial portion of trial" such that it is a "critical stage?" Is it determined by a stopwatch, as the government seemingly perceives it, or is a critical stage of proceedings based on the substance of what occurred in counsel's absence? As demonstrated in Mr. Roy's petition, even a single critical question and answer, or a brief string of questions and answers, may amount to a critical stage of trial. Pet. 27-28.

Moreover, the plurality decision below actually departs from the government's summary statement, for it questions whether prejudice is presumed even when counsel is absent from a critical stage of trial: "[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]." (App. 70).

The answers to these questions vary among the circuits, as is set forth in detail by both Mr. Roy's petition and the government's brief. *See* Pet. at 16-18, 20-25; Br. Opp. at 22-24. These varying analytical formulations form the crux of the circuit disparity on the enforcement of the vital Sixth Amendment right to counsel.

It is striking that more than a half-century after the Court extended the Sixth

Amendment right to counsel to all criminal trials, trial courts continue to deny the right to counsel – here, because the trial judge resumed trial *early*, with no defense lawyer, then allowed it to continue in counsel's absence – and that such cases continue to populate appellate dockets. The Court should step in to determine with clarity the standard for properly resolving such appeals, which would also provide a clear rule for trial courts to apply to their own proceedings.

6. In the end, the government advances a faulty vehicle argument, that Mr. Roy's case is complicated by plain error review under Fed. R. Crim. P. 52(b). Br. Opp. at 24-25. The case comes to this Court with no such complication. To the contrary, the plurality opinion below, and its concurring and dissenting opinions, assumed that plain error review should not apply in this case because there is nothing in the record to explain what, if anything, counsel may have realized when he entered the courtroom or what may have occurred in his absence. (App. 17). Counsel's lack of awareness was especially likely since the trial judge resumed trial *early*, before the time designated for the resumption of trial; when he returned, the courtroom was silent during a break between questions and answers. As such, plain error review does not apply here due to the no-meaningful-opportunity-to-object exception contained in Fed. R. Crim. P. 51(b).

Rule 51(b) provides an exception to plain error review under Rule 52(b), protecting a party where there has been no opportunity to object: "If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice the party." *Id.*; *see United States v. Warden*, 291 F.3d 363, 365 n.1

(5th Cir. 2002) (declining to apply plain error review, due to Rule 51(b), because contested issue was not revealed to defense until after court proceeding); *United States v. Sepulveda-Contreras*, 466 F.3d 166, 172 (1st Cir. 2006) (same); *United States v. Mojica-Rivera*, 435 F.3d 28, 35 (1st Cir. 2006) (same, because defendant "had no opportunity to object" to order of which he had no knowledge until after entry of written judgment); *United States v. Burrell*, 622 F.3d 961, 965-66 (8th Cir. 2010) (refusing to apply plain error review because "if a party does not have an opportunity to object . . . Rule 51(b) states that the absence of an objection does not later prejudice the party."); *United States v. Carpenter*, 702 F.3d 882, 884 (6th Cir. 2012) (same).

The government's opposition on this ground overlooks the inherent nature of absent counsel, who often is unaware of what transpired or even that any proceeding occurred in counsel's absence. By definition, such an unknowingly absent lawyer lacks information to object and has "no opportunity to object," the very circumstance Rule 51(b) protects. Since Mr. Roy's petition comes to this Court from a decision below recognizing this reality in the context of his trial, this case provides a valuable vehicle for addressing the Sixth Amendment question without the complication if plain error review.[4]

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[4] Mr. Roy never waived counsel and was not obliged to represent himself during his counsel's absence, or to make objections for himself. *See Carnley v. Cochran*, 369 U.S. 506, 516 (1962) ("Presuming waiver from a silent record is impermissible. The record must show . . . that an accused was offered counsel but

The government correctly observes that the Court requires strict adherence to court rules governing plain error review. Br. Opp. at 16 (citing *Johnson v. United States*, 520 U.S. 461, 468 (1997)). To the same extent that *Johnson* requires courts of appeals to adhere to Rule 52(b), it also requires those courts to faithfully follow Rule 51(b)'s exception to plain error review.

In keeping with the rule-based exception to plain error review, Mr. Roy's petition comes to the Court with the lower court's conclusion that plain error review should not apply because there is no record defense counsel knew he was absent from any proceeding at all. This effectively removes the vehicle concern expressed by the government.

CONCLUSION

The question presented is important. The courts of appeals are divided and confused about how to decide it. This case provides a clean vehicle for its resolution. Based upon the petition and forgoing reply, this Court should grant a writ of certiorari to review the *en banc* decision of the Court of Appeals for the Eleventh Circuit.

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intelligently and understandingly rejected the offer. Anything less is not waiver."), quoted in *United States v. Olden*, 224 F.3d 561, 569 (6th Cir. 2000) (refusing to find waiver of Sixth Amendment right in absent-counsel case because the record did not establish that criminal defendant knowingly, intelligently, and voluntarily agreed to surrender his right to counsel); *cf., McMann v. Richardson*, 397 U.S. 759, 766-67 & n. 12 (1970) (recognizing that "uncounseled" defendants are not held to same rules of waiver as are "counseled" defendants).

Respectfully submitted,

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