No. 98-1404

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM OSCAR ROYSTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to collateral relief under 28 U.S.C. 2255 (1994 & Supp. III 1997) because the trial judge was absent from the bench during a portion of the prosecutor's closing argument at petitioner's trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29a-30a) is unpublished, but the judgment is noted at 165 F.3d 22 (Table). An earlier opinion of the court of appeals (Pet. App. 1a-8a) is also unpublished, and the judgment is noted at 61 F.3d 901 (Table). The opinion of the district court (Pet. App. 9a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1998. A petition for rehearing was denied on December 28, 1998. The petition for a writ of certiorari was filed on March 3, 1999. 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 Eastern District of North Carolina, petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; extortion, in violation of 18 U.S.C. 1951; witness tampering, in violation of 18 U.S.C. 1512(b)(3); and making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. He was sentenced to 293 months' imprisonment. The court of appeals affirmed on direct appeal. Pet. App. 1a-8a. Thereafter, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 (1994 & Supp. III 1997). The district court denied the motion, Pet. App. 9a-28a, and the court of appeals affirmed, Pet. App. 29a-30a.

1. While petitioner was a police officer in Oxford, North Carolina, he accepted more than $100,000 in payoffs from the leader of a local cocaine distribution operation in exchange for police protection and confidential police information. Petitioner told a co-conspirator, Jimmy Chavis, that he should lie to a grand jury about the cocaine distribution organization. Petitioner also made false statements in his own grand jury testimony concerning his contacts with Chavis and other members of the organization. Pet. App. 2a, 6a.

A federal grand jury returned an indictment charging petitioner with conspiracy to possess and distribute cocaine, extortion, witness tampering, and perjury before the grand jury. Pet. App. 2a. At petitioner's trial, before the prosecutor began his closing argument, the district court stated to the jury:

> Finally, let me say to you that during the course of the arguments I may not stay here at the bench. I may go back into chambers and work on other

> matters, my charge or other matters that I have to attend to. But if I leave the bench, I'll be in ear shot of what's going on. If one of the lawyers should object to something that the other said, why, they know to stop their arguments until I can come back into the courtroom and rule on whatever the objections might be.
>
> As you know, the lawyers are officers of the court, and they follow the rules of the court in every respect.

Id. at 11a. The judge left the bench during a portion of the prosecutor's argument, but returned to the courtroom at the end of the argument, and, after a recess, was present for the defense counsel's closing argument and the prosecutor's rebuttal argument. *Id.* at 13a-15a. The jury found petitioner guilty of all the charges against him, *id.* at 2a, and the court of appeals affirmed his convictions, *id.* at 1a-8a.

2. Petitioner then filed a motion under 28 U.S.C. 2255 (1994 & Supp. III 1997), claiming, among other things, that the trial judge's "selective absence from the bench" during part of the prosecutor's closing indicated to the jury that the prosecutor, but not defense counsel, could be trusted in his absence, and therefore amounted to "vouching" for the integrity of the prosecutor. Pet. App. 14a-15a. Petitioner also contended that his trial counsel was ineffective in failing to object to the judge's absence from the bench, and that his appellate counsel was likewise ineffective in failing to argue on direct appeal that the judge's absence required reversal of his convictions. *Id.* at 10a-11a.

The district court denied petitioner's motion. Pet. App. 9a-28a. As an initial matter, the court rejected petitioner's assertion that the trial judge's "selective

absence" from the bench amounted to "vouching" for the prosecutor's integrity. The court found that claim to be "purely speculative" and "unsupported by any evidence of record," noting that the judge had been in the courtroom during the prosecutor's rebuttal argument. *Id.* at 11a- 15a, 18a. The court also declined to adopt a "per se rule that a trial judge's absence from the courtroom at any stage of a criminal trial is reversible error," finding it more likely that the court of appeals would require a defendant seeking post-conviction relief "to demonstrate prejudice resulting from a trial judge's absence from the bench, * * * especially when there was no contemporaneous objection to the court's announced intention to step out of the courtroom during closing arguments." *Id.* at 17a-18a. In this case, the district court concluded, petitioner had not shown that he was prejudiced by the judge's absence from the bench during a portion of the prosecutor's closing argument. *Id.* at 18a.

3. The court of appeals affirmed. Pet. App. 29a-30a. Citing its prior decision in *United States* v. *Love*, 134 F.3d 595 (4th Cir.), cert. denied, 118 S. Ct. 2332 (1998), the court held that petitioner "did not demonstrate that the trial judge's absence from the bench during the [g]overnment's closing argument was prejudicial." Pet. App. 30a.

ARGUMENT

Petitioner contends (Pet. 8-15) that the trial judge's absence from the courtroom during a portion of the prosecutor's closing argument constituted "structural error" that is not subject to harmless-error analysis, and further contends that the court of appeals' contrary decision conflicts with the decisions of other courts. Neither contention has merit.

1. This Court's cases establish a "strong presumption" that constitutional errors are subject to harmless-error inquiry. See *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). Nonetheless, the Court has recognized a narrow class of fundamental constitutional errors—sometimes referred to as "structural errors"—that are intrinsically harmful and thus require reversal without inquiry into their effect on the trial's outcome. See *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991). Unlike ordinary trial errors, structural errors generally affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." *Ibid.*; see also *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993) (constitutional errors are intrinsically harmful only where they "infect the entire trial process"). The Court has found such error "only in a very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997). See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge).

The error at issue in this case—the trial judge's absence from the bench during a portion of the prosecutor's closing argument—bears no relation to the pervasive and fundamental errors that the Court has held to be intrinsically harmful. To the contrary, the judge's temporary absence did not affect the entire conduct of the trial, and is amenable to traditional methods of harmless-error review. This is not a case in which the trial judge abdicated his Article III

responsibility to rule on issues of law and otherwise ensure fundamental fairness. Instead, the judge simply announced that, rather than monitoring some portions of closing arguments from the bench, he would do so from nearby—remaining within "ear shot" and available to rule on any objections raised by counsel. Pet. App. 11a. Petitioner did not object to the judge's proposal that he monitor proceedings from a location other than the bench; and petitioner does not suggest that he was prejudiced by any statement made by the prosecutor while the judge was so doing. Indeed, no issues requiring the judge's decision were raised during the judge's absence. As a result, any error was plainly harmless.

2. Although petitioner argues that state and federal courts are in conflict on whether a trial judge's absence from the bench during a portion of trial is "reversible error *per se*" that can never be harmless, Pet. 10-12, no such conflict exists. In fact, petitioner cites no decision adopting the per se rule he proposes.

In the first case relied upon by petitioner, *Riley* v. *Deeds*, 56 F.3d 1117 (9th Cir. 1995), see Pet. 11, the trial judge had left the courthouse during the jury's deliberations, and the judge's law clerk granted the jury's request to have portions of the trial testimony read back by the court reporter. 56 F.3d at 1118-1122. Finding a "complete abdication of judicial control over the process," *id.* at 1121, the court of appeals invalidated the conviction. The court of appeals, however, specifically declined to decide "whether a judge's absence during the course of a trial, regardless of the nature of the proceeding from which he is absent and the duration of his absence, amounts to structural error which is reversible per se." *Id.* at 1120.

The court of appeals in *Riley*, moreover, specifically noted that, where there is an "express or implied waiver of the right to the judge's presence," or where "the judge, while technically absent, remained in 'effective control' of the proceedings," courts have refused to reverse convictions absent a showing of prejudice. 56 F.3d at 1121 (citing cases). Both of those conditions were present here. The judge here did not cede control over contested proceedings. Rather, he monitored the trial and exercised control from within "ear shot" rather than from the bench. See Pet. App. 11a (trial judge would "be in ear shot of what's going on" and would "rule on whatever * * * objections might be" raised). And, even though the judge announced his intention to monitor the trial and exercise control from nearby rather than from the bench, no party objected, and no legal issue requiring the judge's decision arose. Since petitioner did not resist the judge's proposal that he monitor proceedings from nearby, and the judge retained effective control over the proceedings in any event, *Riley* actually supports the court of appeals' decision to require a showing of prejudice in this case.

Petitioner's claim that the decision below also conflicts with *United States* v. *Mortimer*, 161 F.3d 240 (3d Cir. 1998), see Pet. 11, is similarly without basis. There, the court of appeals concluded that the district court's wholly unexplained "disappear[ance]" from the bench during the defense attorney's closing argument, with "no notice to counsel or the jury that he was about to depart," was structural error "[o]n the facts of this case." 161 F.3d at 241. There, unlike here, the trial court judge was not within earshot and was not able to maintain control over the proceedings. (Indeed, the prosecutor made an objection during the judge's

absence, "only to withdraw it with the exclamation '[t]he judge is not here.'" *Ibid.*) The court of appeals, moreover, expressly distinguished cases like this one, in which the parties expressly or impliedly consented to the judge's absence, explaining that the trial "structure normally stands if the parties consent to excuse the presence of a judge." *Ibid.*

Indeed, the court of appeals in *Mortimer* expressly distinguished *United States* v. *Love*, 134 F.3d 595 (4th Cir.), cert. denied, 118 S. Ct. 2332 (1998), the decision on which the court of appeals relied here. In *Love*, as in this case, the trial judge told the jury immediately before closing arguments that he would at times "be in his chambers, working on other matters," but that he would be available to rule on objections, and neither the government nor the defendant objected to the judge's absence from the bench. 134 F.3d at 604-605. Given that *Mortimer* expressly and reasonably distinguishes cases like this one and *Love*, the claim of conflict between this case and *Mortimer* is incorrect.

Petitioner's claim that the decision in this case conflicts with various state court decisions is likewise unsound. The cases on which petitioner relies (Pet. 12) all involved a trial judge's decision to relinquish control over the proceedings entirely, often without counsel's consent. See, *e.g.*, *People* v. *Ahmed*, 487 N.E.2d 894, 895-897 (N.Y. 1985) (judge absent from courtroom during jury deliberations; judge's law secretary answered jury's questions in his absence); *Brown* v. *State*, 538 So. 2d 833, 834-836 (Fla. 1989) (judge not present when communication from jury during deliberations was received and answered); *People* v. *Cook*, 659 N.Y.S.2d 510, 511 (N.Y. App. Div. 1997); *People* v. *Toliver*, 675 N.E.2d 463, 464 (N.Y. 1996); *People* v. *Vargas*, 673 N.E.2d 1037, 1044-1045 (Ill. 1996); *Glee* v. *State*, 639 So.

2d 1092, 1093 (Fla. Dist. Ct. App. 1994). None of those cases addresses a situation where, as here, the judge was within earshot and available to exercise judicial control over the proceedings at all times, the judge announced and explained where he would be without objection from counsel, and no issues for the judge's decision were raised in his absence in any event.[1]

3. Finally, there is no merit to petitioner's suggestion (Pet. 13-14) that the court of appeals' decision "conflicts in principle" with *Tumey* v. *Ohio*, 273 U.S. 510 (1927). In *Tumey*, this Court held that trial before

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[1] For example, in *Vargas*, the Illinois Supreme Court distinguished an earlier decision in which it held that the trial judge's absence during closing argument was "harmless error because '[t]he judge was within hearing and no questions were raised to be passed upon by the judge.'" 673 N.E.2d at 1044 (quoting *Schintz* v. *People*, 52 N.E. 903, 905 (Ill. 1899)). The court reasoned that "[t]he harmless error approach of *Schintz* may be understood as a practical concession to the reality that a trial judge is not truly absent, and may in fact be constructively present, when he or she is off the bench but able to listen and participate in proceedings from a nearby anteroom." 673 N.E.2d at 1044. Similarly, *Slaughter* v. *United States*, 82 S.W. 732, 737-738 (Ct. App. Indian Terr. 1904), and *Graves* v. *People*, 75 P. 412, 413-415 (Colo. 1904), cited Pet. 12, rest in part on the fact that the judge was unavailable to rule on contested motions, and in any event pre-date *Chapman* v. *California*, 386 U.S. 18 (1967), the case in which this Court made it clear that even constitutional errors are subject to harmless-error review. See *id.* at 42 (Stewart, J., concurring) (until *Chapman*, Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'"). And *Turbeville* v. *State*, 56 Miss. 793 (1879), cited Pet. 12, does not support petitioner's claim of conflict at all. The court there, like the courts here, held that the trial judge's absence from bench during closing argument was not reversible error where the judge "remain[ed] within hearing of counsel" and "able * * * to assert his authority." 56 Miss. at 799.

a village official who has both a "direct personal pecuniary interest in convicting the defendant" (because he would be paid only in the event of a conviction) and a political interest as mayor in the financial condition of the village (which received a portion of any fine collected) violates due process. *Id.* at 523-534; see *Arizona* v. *Fulminante*, 499 U.S. at 309 (citing lack of judicial impartiality in *Tumey* as an example of a "structural defect[] in the constitution of the trial mechanism"). Petitioner does not suggest that the trial court had any pecuniary or personal interest in the outcome of his case. Instead he argues (Pet. 13) that "[t]he judge's actions indicated * * * that he trusted the government enough to refrain from doing anything wrong during his absence—but he did not trust the defense that much." Even setting aside the fact that jurors are highly unlikely to draw such an inference as a general matter,[2] the trial judge was present during the prosecutor's rebuttal argument, making that inference exceedingly unlikely in this case, as the district court held below. Pet. App. 15a. The trial judge, moreover, eliminated the possibility of such speculation concerning the "meaning" of his absence when he instructed the jurors as to where he would be and why, noted that he would still be able to rule on objections, and advised the jurors that both "lawyers are officers of the court, and" that both "follow the rules of the court in every respect." *Id.* at 11a. The district court therefore cor-

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[2] Indeed, prior defendants have generally argued the opposite —*i.e.*, not that the judge's absence implies that the closing is trustworthy, but rather that it implies that the closing is not worthy of attention. In *United States* v. *Mortimer*, for example, the defendant claimed that the judge's absence during defense counsel's closing may have caused the jury to "infer[] that the defense was not worth listening to." 161 F.3d at 242.

rectly concluded that petitioner's claim was "unsupported by any evidence of record" and "purely speculative." *Id.* at 14a, 18a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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