No. 14-668

In the Supreme Court of the United States

JON HENRY SWEENEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 766 F.3d 857. The opinion of the district court (Pet. App. 11a-34a) is not published in the *Federal Supplement* but is available at 2013 WL 1346123. The opinion of the court of appeals affirming petitioner's convictions on direct appeal (Pet. App. 35a-68a) is reported at 611 F.3d 459.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2014. The petition for a writ of certiorari was filed on December 3, 2014. 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 District of Minnesota, petitioner was

convicted of manufacturing and distributing cable descramblers intended for unauthorized interception of cable signals, in violation of 47 U.S.C. 553; conspiracy to do so, in violation of 18 U.S.C. 371; and structuring currency transactions, in violation of 31 U.S.C. 5324. The district court sentenced petitioner to 70 months of imprisonment and a $150,000 fine. The court of appeals affirmed. Pet. App. 35a-68a.

Petitioner then filed a motion for post-conviction relief under 28 U.S.C. 2255. The district court denied the motion but granted a partial certificate of appealability. Pet. App. 11a-34a. The court of appeals affirmed. *Id.* at 1a-10a.

1. Cable television providers encrypt their transmissions and allow subscribers to decrypt only the specific channels and programs they have paid to receive. Pet. App. 36a. Devices that reverse the encryption of cable transmissions are known as "descramblers." *Ibid.* A descrambler is "nonaddressable" if it allows the user to circumvent the restrictions imposed by cable providers and decrypt all portions of a cable transmission. *Ibid.* Descramblers have lawful uses, but the only function of the nonaddressability feature is to allow a user to watch cable programs without paying for them. *Id.* at 37a, 45a.

From approximately 1995 until 2001, petitioner and his wife owned and operated a company called Micro-Star Technology. Pet. App. 36a. Through Micro-Star, petitioner and his wife conspired to make and sell nonaddressable descramblers intended to be used to view cable television programming without permission. *Id.* at 36a-37a, 44a-49a.

2. Petitioner and his wife were indicted and charged with manufacturing and distributing cable

descramblers intended for unauthorized interception of cable signals, in violation of 47 U.S.C. 553; conspiracy to do so, in violation of 18 U.S.C. 371; and structuring currency transactions, in violation of 31 U.S.C. 5324. Pet. App. 35a. The indictment also charged petitioner with bankruptcy fraud, in violation of 18 U.S.C. 152. Pet. App. 36a. A jury acquitted petitioner of bankruptcy fraud but convicted both petitioner and his wife on the remaining charges. *Id.* at 2a-3a, 36a. The district court sentenced petitioner to 70 months of imprisonment and a $150,000 fine, and sentenced his wife to 42 months of imprisonment and a $125,000 fine. *Id.* at 3a. The court of appeals affirmed the couple's convictions and sentences. *Id.* at 35a-68a.

3. Petitioner sought postconviction relief under 28 U.S.C. 2255. As relevant here, he argued that the brief absence of his attorney during a portion of his trial violated his Sixth Amendment right to counsel.

a. The district court held an evidentiary hearing at which petitioner, his wife, and both of their attorneys testified. Pet. App. 11a; 9/20/12 Hr'g Tr. 6, 26, 45, 89. The court found that petitioner's counsel had a medical condition that required him to make frequent trips to the restroom. Pet. App. 17a. Midway through the 13-day trial, during the direct examination of a co-conspirator testifying for the government pursuant to a plea agreement, counsel approached the bench and asked if he could leave the courtroom for a few minutes. *Ibid.*; *id.* at 69a. The judge asked whether the trial could continue in his absence, and counsel agreed. *Ibid.* Counsel then left the courtroom, used the restroom, and returned after "no more than 3 minutes." *Id.* at 18a. Counsel testified that he had a joint defense agreement with the attorney represent-

ing petitioner's wife, that the two lawyers worked together closely, and that he had expected that the attorney representing petitioner's wife would tell him if anything significant happened while he was out of the courtroom. *Id.* at 32a-33a.

b. The district court concluded that counsel's brief absence violated the Sixth Amendment but denied relief because it held that the error was harmless beyond a reasonable doubt. Pet. App. 17a-33a.

The district court acknowledged that a defendant ordinarily must demonstrate prejudice in order to establish that deficient performance by his attorney violated the Sixth Amendment. Pet. App. 21a (citing *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984)). But the court read *United States* v. *Cronic*, 466 U.S. 648 (1984), to establish a rule that "when a defendant's attorney is absent during a 'critical stage' of a criminal proceeding, the defendant's Sixth Amendment rights [are] violated whether or not the defendant can show actual prejudice." Pet. App. 21a. The court concluded that all portions of a trial qualify as "critical stages" for purposes of this rule, and therefore held that because petitioner's counsel was "absent (albeit very briefly) during trial," petitioner's Sixth Amendment rights were violated "whether or not he was actually prejudiced." *Id.* at 24a.

The district court next held that the Sixth Amendment violation was subject to harmless-error review. Pet. App. 24a-30a. The court observed that a constitutional error is a "structural defect" warranting automatic reversal only if it defies harmless-error analysis by "call[ing] into question the soundness of the entire proceeding." *Id.* at 28a. A "total denial of counsel" is a paradigmatic structural error because it "pervades

the entire proceeding and makes it impossible to gauge how the assistance of counsel might have made a difference" to the outcome. *Ibid.* But the court held that the "momentary absence" of petitioner's counsel did not "pervade or contaminate the entire trial" and was readily susceptible to harmless-error review because the absence "was so brief" and because "the record demonstrates precisely what [counsel] missed." *Id.* at 28a-29a.

Applying the harmless-error standard, the district court held that counsel's absence was "harmless beyond a reasonable doubt." Pet. App. 30a. The court explained that the evidence introduced while petitioner's counsel was out of the courtroom was not subject to objection, "was essentially undisputed," and "was known to defense counsel well before trial." *Id.* at 31a. The court noted that counsel conducted an "extensive and effective" cross-examination of the witness who had been testifying while he was absent and that petitioner had not identified any additional "area that [counsel] should have explored or any question that he should have asked." *Ibid.* And the court added that the presence of the attorney representing petitioner's wife reinforced the lack of prejudice. *Id.* at 32a-33a. That attorney was not serving as petitioner's lawyer, but he had "the incentive and the ability to aid [petitioner's] case" while petitioner's own counsel was absent and he could have "communicate[d] with [petitioner's counsel] about anything that happened during that absence." *Id.* at 33a.

c. The district court granted petitioner a certificate of appealability limited to the following question: "Is the actual absence of counsel from trial for a brief period of time during the direct testimony of a gov-

ernment witness subject to harmless-error analysis?" Pet. App. 34a.

d. The court of appeals affirmed, agreeing with the district court that the brief absence of petitioner's counsel did not warrant automatic reversal. Pet. App. 1a-10a. The court explained that, under *Cronic*, "prejudice may be presumed when the defendant experiences a '*complete* denial of counsel' at a critical stage of trial." *Id.* at 6a (quoting *Cronic*, 466 U.S. at 659). The court reasoned that although the absence in this case "occurred at a 'critical stage,'" it "was not a 'complete' absence" of the sort contemplated in *Cronic* "because it only lasted three minutes." *Id.* at 7a. The court also endorsed the district court's conclusion "that counsel's brief absence from the courtroom constituted trial error" subject to harmless-error review "and not a structural defect" requiring automatic reversal. *Id.* at 8a. In so doing, the court emphasized that "the brevity of the absence distinguishes the present case" from previous Eighth Circuit decisions treating more substantial absences as presumptively prejudicial. *Id.* at 9a (citing *Green* v. *United States*, 262 F.3d 715, 717-718 (2001), and *United States* v. *Turner*, 975 F.2d 490, 496 (1992), cert. denied, 506 U.S. 1082 (1993)).

ARGUMENT

Petitioner renews his contention (Pet. 8-31) that his counsel's three-minute absence during his trial requires the reversal of his convictions without any inquiry into prejudice. The court of appeals correctly rejected that argument, and its decision neither conflicts with any decision of this Court nor implicates any disagreement among the lower courts warranting this Court's review. In addition, this case would not

be an appropriate vehicle in which to take up the question presented because petitioner is seeking to establish a new constitutional rule of criminal procedure in a case on collateral review, and his claim is therefore barred by the nonretroactivity principle set forth in *Teague* v. *Lane*, 489 U.S. 288, 306-310 (1989) (plurality opinion).

1. The court of appeals correctly rejected petitioner's contention that his counsel's absence during three minutes of a lengthy trial required the automatic reversal of his convictions.

a. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant may demonstrate constitutionally ineffective assistance of counsel only by establishing both that his counsel's performance was deficient and that he was prejudiced by the deficiency. The performance prong requires the defendant to show that "counsel's representation fell below an objective standard of reasonableness," *id.* at 688, and the prejudice prong requires the defendant to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

In *United States* v. *Cronic*, 466 U.S. 648 (1984), 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. *Id.* at 659. That presumption of prejudice applies only where counsel has "failed to function in any meaningful sense as the Government's adversary." *Id.* at 666. In such cases, the Court reasoned that 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.

Petitioner contends (Pet. 30-31) that a presumption of prejudice should apply whenever defense counsel is absent during the presentation of inculpatory evidence—even when, as in this case, the absence lasted just a few minutes and occurred during the admission of undisputed and unobjectionable testimony. But this Court has emphasized that the exceptions to *Strickland*'s prejudice requirement are exceedingly narrow. 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). And in *Strickland*, the Court noted that "prejudice is presumed" only in cases involving "[a]ctual or constructive denial of the assistance of counsel altogether." 466 U.S. at 692.

The three-minute absence at issue here is not of the same "magnitude" as the complete denial of counsel or the other extreme situations contemplated in *Cronic*. Petitioner's counsel did not "fail[] to function in any meaningful sense as the Government's adversary." *Cronic*, 466 U.S. at 666. And a presumption of prejudice cannot be 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, a brief absence may often have had no ef-

fect on the outcome of the trial. *Cronic* therefore provides no support for the categorical exemption to the prejudice requirement that petitioner seeks.

b. Petitioner also relies (Pet. 26-30) on this Court's decisions characterizing 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 *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991)). 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, *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 (denial of the right to be represented by retained counsel of choice).

Petitioner contends that a brief absence of counsel during trial should be recognized as an additional category of structural error because of "'the difficulty of assessing the effect of the error'" and because "harm is simply an irrelevant consideration" in light of the nature of the right to counsel. Pet. 27 (quoting *Gonzalez-Lopez*, 548 U.S. at 149 n.4). Both contentions are unsound.

First, 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, "the record demonstrates precisely what [counsel] missed," Pet. App. 29a, a court can readily assess a claim that the defendant suffered prejudice from counsel's absence or failure to act. Indeed, the district court noted that it was "far better equipped to conduct a harmless-error analysis in this case than it is in other contexts, in which a substantial amount of speculation is unavoidable." *Ibid.*

Second, 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 *Gonzalez-Lopez*, 548 U.S. at 148-149. But the right to the effective assistance of counsel is not of the same character. That right "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: "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.

c. This case confirms that brief absences of counsel are readily susceptible to review for prejudice. Petitioner's counsel was absent "for no more than 3 minutes." Pet. App. 18a. The evidence received during that time was "essentially undisputed," and petitioner has not suggested that counsel should have or would have done anything differently if he had been present. *Id.* at 31a. Yet petitioner insists that counsel's three-minute absence during a 13-day trial requires automatic reversal. And he apparently would extend that remedy to all of his convictions—even though the testimony received during counsel's absence had no bearing on the currency-structuring charge, which involved different facts. Compare *id.* at 69a-75a (evidence received in counsel's absence), with *id.* at 39a-40a (facts underlying the conviction for currency structuring). Such a sweeping rule of automatic reversal cannot be reconciled with this Court's precedents.

2. Petitioner contends (Pet. 10-25) that the lower courts are divided over the circumstances in which the temporary absence of defense counsel requires automatic reversal of a conviction. But most of the decisions he cites did not address the question presented here because they involved absences during nontrial proceedings, such as arraignments or pretrial hear-

ings,[1] or during the formulation and delivery of supplemental jury instructions rather than the taking of evidence.[2]

Petitioner cites a handful of decisions addressing the circumstance at issue here: the temporary absence of counsel during the presentation of evidence at trial. But those cases do not reflect the existence of any disagreement warranting this Court's review. 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.*, *United States* v. *Kaid*, 502 F.3d 43, 45-47 (2d Cir. 2007) (per curiam) (declining to presume prejudice based on 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

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[1] See *Ditch* v. *Grace*, 479 F.3d 249, 252-256 (3d Cir.), cert. denied, 552 U.S. 949 (2007); *United States* v. *Lott*, 433 F.3d 718, 721-723 (10th Cir.), cert. denied, 549 U.S. 851 (2006); *United States* v. *Owen*, 407 F.3d 222, 225-229 (4th Cir. 2005), cert. denied, 546 U.S. 1098 (2006); *United States* v. *Hamilton*, 391 F.3d 1066, 1069-1071 (9th Cir. 2004); *Henderson* v. *Frank*, 155 F.3d 159, 165-167 (3d Cir. 1998)

[2] See *Musladin* v. *Lamarque*, 555 F.3d 830, 835-844 (9th Cir. 2009); *French* v. *Jones*, 332 F.3d 430, 436-439 (6th Cir.), cert. denied, 540 U.S. 1018 (2003); *Ellis* v. *United States*, 313 F.3d 636, 642-644 (1st Cir. 2002), cert. denied, 540 U.S. 839 (2003); *Curtis* v. *Duval*, 124 F.3d 1, 4-5 (1st Cir. 1997); *Siverson* v. *O'Leary*, 764 F.2d 1208, 1215-1217 (7th Cir. 1985); *Commonweath* v. *Johnson*, 828 A.2d 1009, 1013-1016 (Pa. 2003); see also *Hereford* v. *Warren*, 536 F.3d 523, 528-533 (6th Cir. 2008) (ex parte conference between prosecutor and trial judge); *Gregg* v. *United States*, 754 A.2d 265, 268-271 (D.C.) (voir dire), cert. denied, 531 U.S. 980 (2000).

counsel during cross-examination of prosecution witnesses by counsel for co-defendants), cert. denied, 506 U.S. 1039 (1992).

Petitioner contends (Pet. 11-18, 23-24) that the decision below is inconsistent with decisions by the Fifth, Sixth, and Eleventh Circuits and by the South Carolina Supreme Court. But with one exception, the decisions on which he relies involved actual or constructive absences significantly 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, 568-569 (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"); *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); *McKnight* v. *State*, 465 S.E.2d 352, 353 (S.C. 1995) (counsel missed the entire direct examination of a prosecution witness and the defendant was forced to start the cross-examination himself). Each of those courts, moreover, has 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.").[3]

The one exception is *United States* v. *Roy*, 761 F.3d 1285 (2014), in which a divided panel of the Eleventh Circuit held that a defense lawyer's seven-minute absence during the direct examination of a prosecution witness was presumptively prejudicial. *Id.* at 1286-1287. Although the absence in *Roy* was more than twice as long, the circumstances of that case were arguably comparable to those present here. But as petitioner recognizes (Pet. 16 & n.1), *Roy* does not create a circuit conflict because the Eleventh Circuit has now sua sponte granted rehearing en banc. *United States* v. *Roy*, 580 Fed. Appx. 715, 716 (2014). And the dissent in *Roy* confirmed the absence of a conflict among the lower courts, emphasizing that the now-vacated panel opinion was "an outlier," putting the Eleventh Circuit "way out there" as "the only court of appeals to hold that any attorney absence during the presentation of any directly inculpatory evidence" is presumptively prejudicial under *Cronic*. 761 F.3d at 1313 (Carnes, J., dissenting); see *id.* at 1315 ("The circuits that have applied *Cronic*'s presumption to

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[3] 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"); *Vines* v. *United States*, 28 F.3d 1123, 1129 (11th Cir. 1994) ("[T]he *temporary* absence of a defendant's trial counsel during a *portion* of the actual trial does not necessarily affect the conduct of the entire trial."); *Green*, 809 F.2d at 1261 (recognizing that "some absences by a criminal defendant's attorney might be so de minimis that there would be no constitutional significance"); *McKnight*, 465 S.E.2d at 354 n.2 (same).

attorney trial absences have done so only when those absences were substantial.").[4]

3. Even if the question presented otherwise warranted review, this case 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. It is therefore subject to the nonretroactivity rule enunciated in *Teague* v. *Lane*, 489 U.S. 288 (1989), which provides that a new constitutional rule of criminal procedure may not be announced or applied on collateral review unless it satisfies *Teague*'s narrow exception for "watershed rules of criminal procedure." *Id.* at 311-314 (plurality opinion); see *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004).[5]

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[4] Petitioner also cites (Pet. 14, 19, 22-23) a Sixth Circuit decision in which a divided panel found that counsel's 17-minute absence during the direct examination of a prosecution witness was presumptively prejudicial. See *Donald* v. *Rapelje*, 580 Fed. Appx. 277, 280, 284-285 (2014), petition for cert. pending, No. 14-618 (filed Nov. 24, 2014). But the court emphasized that in that case, unlike this one, "[t]he absence was not for a minute or two." *Id.* at 285. And in any event, the Sixth Circuit's nonprecedential decision could not create a conflict warranting this Court's review in this case, even if, as the warden contends in his petition, review were warranted in *Donald* to address whether the Sixth Circuit's extension of *Cronic* to the facts of that case on habeas review violated 28 U.S.C. 2254(d)(1).

[5] *Teague* also does not apply to substantive rules, see *Schriro*, 542 U.S. at 351-352, but a rule concerning whether a procedural error can be reviewed for harmlessness does not involve substantive law. In addition, while this Court has not squarely considered whether "*Teague*'s bar on retroactivity" applies when a defendant "challenges a federal conviction" under Section 2255, *Chaidez* v.

A rule is "new" for *Teague* purposes unless it was so "*dictated*" by the precedent in effect when the defendant's conviction became final that "*no other* interpretation was reasonable." *Lambrix* v. *Singletary*, 520 U.S. 518, 538 (1997). The rule must be so clearly compelled that a court considering the defendant's claim at the time his conviction became final "would have acted objectively unreasonably"—not merely erroneously—in declining to grant relief. *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997).

Petitioner's contention that a brief absence by defense counsel is presumptively prejudicial under *Cronic* seeks to establish a new rule within the meaning of *Teague*. Petitioner cannot argue that such a rule is "dictated" by precedent—to the contrary, he correctly acknowledges that "[t]his Court has never addressed the question." Pet. 10; accord Pet. 2. Nor could petitioner maintain that the correctness of the rule he seeks should be "apparent to all reasonable jurists." *Lambrix*, 520 U.S. at 527-528. No court has adopted the per se rule that petitioner advocates, and even under petitioner's rendering the lower courts are divided. Cf. *Chaidez* v. *United States*, 133 S. Ct. 1103, 1110 (2013) (a ruling that "altered the law of most jurisdictions" unquestionably qualified as a new rule under *Teague*). Accordingly, petitioner's claim is barred by *Teague*. And at a minimum, the collateral-review posture and the resulting *Teague* problem

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United States, 133 S. Ct. 1103, 1113 n.16 (2013), the courts of appeals have uniformly applied *Teague* to Section 2255 motions. See *Danforth* v. *Minnesota*, 552 U.S. 264, 281 n.16 (2008); see also, *e.g.*, *United States* v. *Sanchez-Cervantes*, 282 F.3d 664, 667-668 & n.9 (9th Cir.) (collecting cases), cert. denied, 537 U.S. 939 (2002).

would make this case a very poor vehicle in which to address the question presented.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

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[6] Although it did not "raise the *Teague* argument in the lower courts," the government, "as respondent, is entitled to rely on any legal argument in support of the judgment below. *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994); see *id.* at 229 (declining to consider *Teague* only because "the State failed to argue *Teague* in its brief in opposition to the petition for a writ of certiorari").