Tenth Circuit No. 09-8018

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff/Appellee,	)
	)
v.	)
	)
NATHANIEL SOLON,	)
	)
Defendant/Appellant.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

The Honorable Clarence A. Brimmer
United States District Court Judge

District Court No. 07-CR-0032-B

BRIEF OF APPELLEE

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PLAINTIFF-APPELLEE

August 17, 2009

ORAL ARGUMENT IS REQUESTED

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STATEMENT OF RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF CASE

On January 18, 2007, the Defendant/Appellant Nathaniel Solon ("Defendant") was charged by indictment with possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) (Vol. 1, Doc. 1).[1] On October 2, 2007, he entered a plea of guilty to that charge (Vol. 1, Doc. 44; Vol. 3, 10/3/07 COP hrg. at 6).

The Defendant was to be sentenced on January 22, 2008, but that hearing was continued three times, each time at his request (*Id.*, Docs. 55, 56, 57, 60, 61, 62, 67, and 68). On April 3, 2008, the Defendant filed a motion to withdraw his plea of guilty (*Id.*, Doc. 73). A hearing on that motion was held on April 16, 2008, after which the court took the matter under advisement (*Id.*, at 77; Vol. 3, 4/16/08 mot. hrg.

[1] All citations to documents and information contained in the record will be designated "Vol. 1" or "Vol. 2" followed by citation to the relevant docketing text or document, *e.g.*, "Vol. 1, Doc. 1" refers to Volume 1, Docketing Entry 1. Citations to the presentence report will be designated "Vol. 2, PSR, ¶ 1, at 1" which refers to the presentence report, paragraph number 1, found at page 1. All citations to transcripts will be designated either "Vol. 2" or "Vol. 3" followed by a reference to the date of the proceeding, type of proceeding,, and the page number assigned by the court reporter *e.g.*, "Vol. 3, Tr. Trans., 11/7/08, at 22" refers to Volume 3, the trial transcript from November 7, 2008, at page 22 (the number 22 being found in the upper right hand corner of the page).

at 3-21). On September 17, 2008, the court granted the Defendant's motion to withdraw his plea of guilty, and set his trial for November 3, 2008 (9/17/08 mot. hrg. at 8, 13).

On September 25, 2008, the Defendant was charged in a superseding indictment containing both the original "possession of child pornography" charge, along with an additional charge of attempted receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(1) (Vol. 1, Doc. 98). On October 1, 2008, the Defendant entered pleas of not guilty to both charges (*Id.*, at 102). A jury trial commenced on November 3, 2008, and on November 10, 2008, he was convicted on both counts (*Id.*, Doc. 131; and Vol. 3, 11/10/08 Tr. Trans. vol. VI at 2-3).

On January 21, 2009, the Defendant appeared for sentencing (Vol. 1, Doc. 140). He was sentenced to serve concurrent terms of 72 months imprisonment on each count of conviction, a fine of $400, 5 years of supervised release, and $200 in special assessments (Vol. 1, Doc. 141; Vol. 3, 1/21/09 sent. hrg. at 42-47). The criminal judgment was entered on January 26, 2009 (Vol. 1, Doc. 141). The Defendant filed a timely notice of appeal on February 5, 2009 (*Id.*, Doc. 142).

The Defendant is currently in federal custody serving his sentence.

STATEMENT OF FACTS

The Defendant received and possessed child pornography utilizing the Internet by installing and using a peer-to-peer file sharing software program known as Limewire.[2]

At trial, the evidence established that on four separate dates during the summer of 2006, a computer using an IP address assigned to the Defendant was observed offering files containing child pornography for download on a peer-to-peer file sharing network (Vol. 3, 11/04/08 Tr. Trans. at 18-86). On September 18, 2006, ICE Special Agent Nicole Balliett, a member of the Wyoming Internet Crimes Against

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[2] "Peer-to-peer (P2P) networking applications such as Limewire, BitTorrent, Gnutella, eDonkey, Grokster, Kazaa and sundry others, operate by directly connecting network participants to one another without the use of a centralized server. *See, e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-20 (2005); *United States v. Shaffer*, 472 F.3d 1219, 1221 n. 1 (10th Cir. 2007). In short, P2P applications allow millions of users to quickly and easily share files stored on their computers over the Internet. *Shaffer*, 472 F.3d at 1221. Although P2P applications have some appropriate and beneficial uses, they unfortunately have become a common tool for purveyors and voyeurs of child pornography." *United States v. Handy*, 2009 WL 151103, *1 (M.D. Fla. 2009) (unpublished, copy attached).

For a detailed description of how peer-to-peer file sharing software is installed and operated, see *United States v. Shaffer*, 472 F.3d at 1221-22. Also see Vol. 3, 11/05/08 Tr. Trans. at 1-53.

Children Task Force (ICAC)[3], obtained a federal search warrant to search the Defendant's residence for evidence relating to the possession, receipt, distribution, and production of child pornography (Vol. 3, 11/04/08, Tr. Trans. at 9-10, 14, 102-107).

On September 21, 2006, prior to going to the Defendant's residence to execute the search warrant, Agent Balliett and Wyoming Division of Criminal Investigation (DCI) Special Agent Randy Huff went to the Defendant's place of employment (*Id.* at 56). The Defendant told the agents that he owned a computer that was located at his residence and that Limewire software was installed on his machine. According to the Defendant, he used the Limewire software to download music, computer games, and adult pornography. The Defendant told the agents that he had used Limewire the previous evening, September 20, 2006, when he attempted to download a computer game, Grand Theft Auto, but his anti-virus software had prevented the download (*Id.* at 56-59, 61). The agents informed the Defendant they were going to search his residence and he agreed to accompany them (*Id.* at 59).

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[3] The Wyoming ICAC team is a joint task force that consists of Wyoming Criminal Investigation agents, an Immigration and Customs Enforcement Agent, and a Federal Bureau of Investigation agent. The task force's mission is to investigate cases involving the exploitation of children facilitated by the use of technology (Vol. 3, 11/04/08 Tr. Trans. at 14-16).

After the agents arrived at the Defendant's residence, Balliett continued to question him while Agent Huff and other agents conducted a search of the premises (*Id.* at 59-60). Huff located the Defendant's computer near the kitchen of the home. Huff observed that the computer was turned on and running. Initially, Huff determined that the system clock and other components of the system were functioning properly (Vol. 3, 11/5/08 Tr. Trans. at 69, 71, 83-84). Huff then used a forensic software tool to preview digital image files on the computer's hard drive. During this initial exam, Huff located files containing adult pornography but no child pornography. He was also able to confirm that the Defendant's computer was the same computer that had been observed by law enforcement personnel during the summer of 2006 offering files containing child pornography for download (*Id.* at 70-80). The software Agent Huff used to conduct his on-scene preview is not capable of locating and examining the contents of files that had been deleted, so he decided to seize the hard drive and conduct a more thorough exam of the hard drive at his office (*Id.* at 81-85).

While Huff was conducting his search, the Defendant again told Agent Balliett that he had used Limewire the night before, September 20, 2006, in an attempt to download a computer game known as Grand Theft Auto (Vol. 3, 11/4/08 Tr. Trans.

at 61). He also admitted that he had used Limewire in the past to download several files containing adult pornography (*Id.*).

Consistent with the Defendant's statement to Agent Balliett, during his forensic exam of the hard drive, Agent Huff found that on the evening of September 20, 2006, shortly after 8:00 p.m., the Limewire program on the Defendant's computer was used to download two computer games - Grand Theft Auto and Madden[4] (Vol. 3, 11/5/08 Tr. Trans. at 118-19). According to Huff, neither of these downloads were unsuccessful and the anti-virus software on the Defendant's computer deleted at least one of these files (*Id.*, 121).[5]

The forensic exam revealed that between 8:51 p.m. and 9:11 p.m., the computer was used to play online poker at a web site known as "PartyPoker.com" by a user who used the screen name "solon40" (*Id.* at 123-24). During his trial testimony, the Defendant testified that he played poker at the PartyPoker.com web site using the

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[4] Madden is a computer football game named after former coach and commentator John Madden (Vol. 3, 11/5/08 Tr. Trans. at 119).

[5] Huff testified that his exam of the hard drive revealed that the Defendant had anti-virus software installed on his machine and that it was working properly. Huff found no active viruses on the hard drive (Vol. 3, 11/5/08 Tr. Trans. at 93-94).

screen name "solon40," but could not remember if he had done so on the night of September 20, 2006 (Vol. 3, 11/6/08 Tr. Trans. at 75-76, 99).

At 9:16 p.m., within five minutes of the time the last poker hand was played, video files with names highly consistent with child pornography began to download to a folder set up by the Limewire program known as the "incomplete folder."[6] According to Agent Huff, the incomplete folder is where files that are being downloaded are "assembled" (Vol. 3, 11/5/08 Tr. Trans. at 42, 106-07, 125). Agent Huff testified that from 9:16 p.m. until 10:01 p.m., a total of forty-six digital video files, all of which had names consistent with child pornography, were downloaded to the Defendant's computer (*Id.* at 125-127). Limewire has a function known as "preview" that allows a user to view the content of digital image files as they are in the process of being downloaded (*Id.* at 126). Huff observed that during the download of the forty-six files, twenty-nine of those files were previewed (*Id.* at 163).[7]

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[6] Agent Huff testified that while every file that downloaded on the night of September 20, 2006, had a name consistent with child pornography, several of the files he viewed actually contained adult pornography.

[7] Huff testified that utilizing the preview function does not always result in being able to view the content of a file that is being downloaded. Huff stated,

(continued...)

The government introduced seven digital videos that were recovered from the Defendant's hard drive, each depicting children engaged in sexually explicit activity (*Id.* at 133). Of those seven exhibits, all had been downloaded on September 20, 2006, between 9:15 p.m and 10:00 p.m., and were recovered from the unallocated space on the Defendant's hard drive (*Id.* at 111-12). Huff stated that it was apparent from his exam of the Defendant's hard drive that the Defendant would enter a search term consistent with child pornography, download files that were offered for download in response to the search term, view the downloaded files, and then delete the child pornography files from the hard drive (*Id.* at 125, 129, 11/05/08 Tr. Trans. at 49-50).

The Defendant testified on his own behalf. He claimed he did not remember his computer use of September 20, 2006, and denied that he had ever attempted to download or possess child pornography (Vol. 3, 11/07/08 Tr. Trans. at 69). Additionally, the Defendant called Tami Loehrs, a forensic examiner, who testified

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[7](...continued)
"Limewire notes that the preview function was hit or the button was pressed during the download process, but we can't always tell whether the actual content of the movie was viewable. Sometimes when the button was pressed there may be no file content to play. Sometimes there's a little bit of file content, but it still won't play" (Vol. 3, 11/05/08 Tr. Trans. at 130).

that she found no evidence that the Defendant viewed the child pornography found on his hard drive and that it was possible that the Defendant's computer was compromised by some type of malware that would allow a third party to access the computer (*Id.* 11/7/08 Tr. Trans. at 29, 59-61). On November 10, 2008, the jury found the Defendant guilty of possession and attempted receipt of child pornography (Vol. 2, Tr. Trans. Unpublished at 2-4).

The trial judge ordered that a presentence report (PSR) be prepared (*Id.* at 4-5). The author of the PSR found that the Defendant's final offense level was 34 and that his criminal history score of six points placed him in Criminal History Category III (Vol. 2, PSR, ¶ 19 at 6; ¶ 23-29 at 7-10). The advisory sentencing guideline range for the Defendant was 188 to 235 months imprisonment (*Id*. ¶ 53 at 14).

At the Defendant's sentencing, the district judge declined to follow the recommendations of the PSR in regards to at least one, two offense level enhancement (Vol. 3, 1/21/09 Sent. Trans. at 12). The judge also determined that the Defendant was entitled to a variance of seven offense levels so that his final offense level was 25, resulting in an advisory sentencing range of 70 to 87 months (Vol. 3, 01/21/09 Sent. Hrg. at 42). The court imposed a sentence of 72 months imprisonment

on each count, the sentences to run concurrently, a fine of $400, five years supervised release, and a $200 special assessment (*Id.* at 42-47; Vol. 1, Doc. 141).

This timely appeal followed.

Other facts pertinent to the issues raised within this appeal will be presented below.

SUMMARY OF ARGUMENT

The Defendant raises three issues which he contends entitle him to a reversal of his convictions: 1) the trial court violated the Speedy Trial Act by taking a motion to withdraw a plea of guilty under advisement for five months; 2) the trial court denied the Defendant the right to present a complete defense by "halting" the work of a defense expert; and 3) the trial court committed structural error by leaving the courtroom during the closing argument of the defense. Each of these arguments is without merit and the Defendant's conviction must be affirmed.

The trial court did not violate the Defendant's rights under the Speedy Trial Act for the simple reason that the Act does not apply to post guilty plea proceedings. By entering a guilty plea, a defendant waives his right to a speedy trial under the Act. In those instances when an individual withdraws a plea of guilty, the Act is very clear and specific - the right to a speedy trial attaches again only at the time the trial court

grants the defendant's motion to withdraw his guilty plea. The fact that the trial court had the Defendant's motion to withdraw his guilty plea under advisement for five months is simply not a violation of the Speedy Trial Act.

The trial court did not deny the Defendant the right to present a complete defense. After the Defendant hired a computer forensics expert, the trial court became concerned about the size of the fees the expert was charging. The trial court thus required that the Defendant obtain specific cost estimates of the expert's charges, justifying with specificity the need for and the reasonableness of such charges before such charges were incurred. In the seven months following the entry of this order, the Defendant made only one request that the expert be allowed to conduct additional work - and that request was granted by the court. The trial court did not abuse its discretion in monitoring the expenditures of the defense expert.

Finally, the government agrees that the district judge committed error when he left the courtroom for a non-emergency purpose during the Defendant's closing argument without declaring a recess. However, because nothing occurred during the judge's absence, this was not structural error. Additionally, since the Defendant did not make a contemporaneous objection to the judge's interruption of his closing, this error must be analyzed under the plain error standard. Again, this was not an error

that was "clear or obvious under current, well-settled law." Nor can it be demonstrated that this error was of such magnitude that but for the error the Defendant would have been acquitted of the crimes of conviction.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS BASED UPON THE SPEEDY TRIAL ACT.

A. Standard of Review

This court reviews *de novo* a district court's interpretation and application of the Speedy Trial Act. *United States v. Toombs*, ___ F.3d ___ , 2009 WL 2357228 (10th Cir. August 3, 2009); *United States v. Thompson*, 524 F.3d 1126, 1131 (10th Cir. 2008).

B. Discussion

1. Relevant Facts

On October 2, 2007, the Defendant entered a plea of guilty to the crime of possession of child pornography (Vol. 1, Doc. 44; Vol. 3, 10/2/07 COP Hrg. at 6). The Defendant was to be sentenced on January 3, 2008, but that hearing was continued three times at the Defendant's behest so that a new defense expert, Ms. Loehrs, could review the government's evidence (Vol. 1, Docs. 54, 57, 59, 62,

68, 71). On April 3, 2008, based upon the findings of the new expert, the Defendant filed a motion to withdraw his plea of guilty (*Id.* Doc. 73).

On April 16, 2006, a hearing was held on the motion to withdraw the guilty plea (Vol. 1, Doc. 77). At the hearing, the defense argued that based upon the examination of the Defendant's hard drive by Ms. Loehrs, it believed it could present a viable defense to the charge and therefore wished to proceed to trial (Vol. 3, 4/16/08 mot. hrg. at 2, 4-5). At several junctures during the hearing, the trial court expressed concern at the amount Ms. Loehrs had billed for her initial exam of the Defendant's hard drive and what additional expense might be incurred if she were to continue to serve as a defense expert in the case (*Id.* at 6, 8-9, 19). At the conclusion of the hearing, the district judge informed the parties he was taking the Defendant's motion to withdraw his plea under advisement (*Id.* at 20). In that regard, the trial judge stated, "I will take the matter of withdrawal of the plea under advisement, and I will wait until I see what further data you get from this woman and including -- I want a specific estimate of what the additional costs are going to be for her coming here and testifying" (*Id.*).

Over the course of the next five months, the Defendant never provided the court with a specific cost estimate for Ms. Loehrs' anticipated future services. On

May 7, 2008, the defense did file a declaration from Ms. Loehrs setting forth the work she had performed up to that point, and her justification for the amounts she had charged for her services (Vol. 1, Doc. 84). However, the document did not contain any additional information about her anticipated future billings (*Id.*). Then, on June 11, 2008, the defense filed a document requesting the court inform the defense how much the court was willing to authorize for Ms. Loehrs' services (*Id.* Doc.86).

On June 4, 2008, the Defendant filed a motion asking the court to set his case for trial (*Id.,* Doc. 85). Then, on July 29, 2008, the Defendant filed a motion seeking dismissal of the indictment based upon a violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et. seq*. (*Id.*, Doc. 88). The court held a hearing on all motions then pending before the court on September 17, 2008. The first matter the court took up was the motion to withdraw the Defendant's guilty plea, which the court granted (Vol. 3, 9/17/08 Mot. Hrg. at 8). The trial court then denied the Defendant's Speedy Trial Act motion, ruling that by pleading guilty, the Defendant had waived his right to invoke the Speedy Trial Act (*Id.* at 12). The court then set the matter for trial to commence on November 3, 2008 (*Id.* at 13).

On September 25, 2008, the Defendant was charged by superseding indictment with the additional charge of attempted receipt of child pornography and on October

1, 2008, the Defendant entered not guilty pleas to both charges in the new indictment. Trial commenced as scheduled on November 3, 2008 (Vol. 1, Docs. 98, 102, 121).

2. Analysis

The Defendant claims "the district court violated [his] rights under the Speedy Trial Act by taking his motion to withdraw his guilty plea under advisement, failing to rule on that motion for 30 days, and allowing the speedy trial clock to expire before even scheduling a trial date." Aplt. Br. at 17. According to the Defendant, his right to a speedy trial under the Speedy Trial Act began to run thirty days after the trial court initially heard his motion to withdraw his plea of guilty on April 16, 2008. He argues it expired on July 24, 2008, the date he filed his motion to dismiss. *Id.* at 20-21. Importantly, at no time has the Defendant alleged or argued that his Sixth Amendment right to a speedy trial was violated by the delay occasioned by the trial court taking the motion to withdraw his guilty plea under advisement for approximately five months. Rather, the Defendant has relied solely upon the Speedy Trial Act, both before the district court and in this appeal. Because his claim is based on a fundamental misunderstanding of the Act, his argument must fail.

"The Speedy Trial Act is designed to protect a criminal defendant's constitutional right to a speedy trial and serve the public interest in bringing prompt

criminal proceedings." *United States v. Thompson,* 524 F.3d 1126, 1131 (10th Cir. 2008). The Act requires that a criminal trial commence within seventy days of the filing of an indictment or information or the defendant's appearance, whichever occurs last. 18 U.S.C. § 3161(c)(1). When trial is delayed because a previously entered guilty plea is withdrawn, the Act provides:

> If trial did not commence within the time limitation specified in section 3161 because defendant had entered a plea of guilty . . . subsequently withdrawn to any and all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

18 U.S.C. § 3161(i) (emphasis added).

As this court has repeatedly stated, "it is a cardinal principle of statutory construction that if the language [of a statute] is clear and unambiguous, the plain meaning of the statute controls." *United States v. Husted*, 545 F.3d 1240, 1243 (10th Cir. 2008), *quoting Vaughn v. Epworth Villa*, 537 F.3d 1147, 1152 (10th Cir. 2008). Giving the plain meaning to the clear and unambiguous words of the statute, § 3161(i), the Defendant was indicted as of September 17, 2008, the date the trial court granted his motion to withdraw his plea. Thus, the commencement of his trial on

November 3, 2008, was well within the seventy day time limit imposed by the Act. The Defendant's Speedy Trial Act claim is plainly without merit.

It is also worth noting that the Act provides, "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2). Here, the Defendant did not raise any objection relating to speedy trial prior to his guilty plea. His motion to dismiss concerning the alleged delay in the post change of plea proceedings simply invoked a statute that did not apply and whose rights he had waived when he pled guilty. Again, giving the statute its plain meaning, when the Defendant filed his motion to withdraw his plea of guilty the Speedy Trial Act did not apply to him as he had waived his rights under the statutes by virtue of his plea of guilty.

The government recognizes that the Sixth Amendment right to a speedy trial extends to a speedy sentencing. *Perez v. Sullivan*, 793 F.2d 249, 252-53 (10th Cir. 1986). Certainly that basic constitutional right was not waived by the Defendant when he entered his guilty plea on October 2, 2007. But the constitutional right to a speedy sentencing is distinct and separate from a statutory right to a speedy trial. The Second Circuit has held that the Speedy Trial Act does not apply to proceedings

after a defendant has entered a guilty plea. In *United States v. Bryce*, 287 F.3d 249, 256 (2d Cir. 2002), that court rejected a defendant's claim that the Speedy Trial Act and the Sixth Amendment were violated by a twenty-three month delay between the defendant's first appeal and final sentencing hearing. The court specifically found that the Speedy Trial Act makes no mention of sentencing and creates no statutory right to a "speedy sentencing," and that although Sixth Amendment does apply to sentencing, the court found the delay of twenty-three months in imposing sentence was not unreasonable under the circumstances. *Id*.

In sum, the Defendant's Speedy Trial Act claim is wholly specious. Likewise, he has not established a violation of his Sixth Amendment right to speedy sentencing. His claims must accordingly be denied.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING THE DEFENSE TO SET FORTH WITH SPECIFICITY THE AMOUNT OF FUNDS THE DEFENSE REQUESTED TO EXPEND FOR THE SERVICES OF AN EXPERT WITNESS AND THE NECESSITY OF THOSE SERVICES.

A. Standard of Review

This court reviews a district court's decision to authorize funds for an expert witness for abuse of discretion. *United States v. Nichols,* 21 F.3d 1016, 1017 (10th Cir. 1994).

B. Discussion

1. Relevant Facts

When he was initially charged, the Defendant retained counsel and hired two experts to review the government's evidence gathered from his hard drive (Vol. 3, 4/16/08 Mot. Hrg. at 4, 7). On January 3, 2008, some three months after he had pled guilty, the Defendant appeared before the district court and requested that his attorney be appointed to represent him at government expense. The court granted this request (Vol. 3, 1/3/08 hrg. at 22-24). On January 22, 2008, the trial court entered an order allowing CJA funds to be expended for the services of a computer expert who had worked for the Defendant prior to his plea of guilty (Vol. 2, Docs. 58-59). Then, on

February 21, 2008, the trial court entered another order, this time allowing defense counsel to retain a second expert, Ms. Tami Loehrs, to review the government's digital evidence. That order indicated that, for her services, Ms. Loehrs could bill $250 an hour but her total billing could not exceed $20,000 unless further ordered by the court (*Id.*, Docs. 63, 64).

Ms. Loehrs traveled from Tucson, Arizona, to Cheyenne, Wyoming, and spent March 12, 13, and 14, 2008, reviewing the government's evidence, for which she submitted a bill on March 20, 2008, for an "interim" payment totaling $10,603.90 (Vol. 2, Doc. 69). On March 26, 2008, in response to the motion for an "interim" payment to Ms. Loehrs, the trial court, obviously concerned about the amount of the bill from Ms. Loehrs, entered an order paying her "interim" bill in full but struck its initial total authorization of $20,000 for Ms. Loehrs' services. The trial court further ordered that "the Defendant and his attorneys shall henceforth obtain specific cost estimates of their charges, justifying with specificity the need therefore and the reasonableness of such charges before such charges are incurred . . ." (*Id*., Doc 70).

On April 1, 2008, in response to the court's order of March 26, 2008, the defense filed a document entitled "Ex Parte Notice to the Court Regarding Specific Cost Estimate For Expert Services" (*Id.*, Doc. 72). In that document, defense counsel

asserted that Ms. Loehrs' evaluation of the evidence had been very helpful to the defense, she had stopped her work, and that the defense would be submitting additional bills from Ms. Loehrs (*Id.*). Two days after this communication, the Defendant filed a notice that he intended to withdraw his plea of guilty and proceed to trial (Vol. 1, Doc. 73).

The court scheduled a hearing on the Defendant's motion to withdraw his plea for April 16, 2008. At that hearing, defense counsel informed the court that the Defendant's decision to withdraw his plea of guilty was almost entirely based upon the work of Ms. Loehrs (Vol. 3, 4/16/08 Mot. Hrg. at 8). Indeed, defense counsel stated, "I think now that we have a proper evaluation of the evidence, we're ready to go to trial" (*Id*. at 8). Not once during the April 16, 2008, hearing did the defense inform the court that Ms. Loehrs needed additional time to conduct additional analysis of the hard drive. At the conclusion of the April 16th hearing, the trial judge stated,

> Well, while the Court has a duty to consider the expense to the United States which is, of course, paying the bill, and that's what I have been doing and yelping about Tami Loehrs' bill is because I think it is outrageously high, I also realize that Mr. Solon is entitled to a fair trial in which his defenses are adequately presented and that doesn't mean

> cheaply presented, necessarily, but I think we've got to have a handle on this and that's what I'm getting at.
>
> I will take the matter of withdrawal of the plea under advisement, and I will wait until I see what further data you get from this woman and including -- I want a specific estimate of what the additional costs are going to be for her coming here and testifying.

(Vol. 3, 4/16/08 mot. hrg. at 19-20).

In fact, just prior to the April 16, 2008, hearing, the Defendant filed a document entitled "Ex Parte Notice to the Court Regarding Specific Cost Estimate for Expert Services" (Vol. 2, Doc. 76). In that document, the defense informed the court that Ms. Loehrs had performed additional analysis after her trip to Wyoming, and that she was requesting an additional $5,375 in payment for those services (*Id.*). While the defense stated there was some uncertainty as to what, if any, additional work Ms. Loehrs might find necessary to perform prior to trial, the defense was requesting authorization for four hours of pre-trial consultation, ten hours of travel expenses to and from Cheyenne for trial, and eight hours a day trial time for the entirety of the Defendant's trial (*Id.*). On September 17, 2008, Ms. Loehrs appeared before the court via video conference to discuss her fees. During that hearing, Ms. Loehrs testified as follows:

Q. (By defense counsel): And do you have an estimate as to approximately how much time you would need to complete this case with the Court advising us that trial is set for early November?

A. (By Ms. Loehrs): Again, it depends on the issues that we go to look for. These exams -- I can never do all the work that needs to be done on these exams. I try to cut it down to the issues that we're dealing with. If the work I've done thus far is all we need to go to trial, and I'm sure that there will be other questions that I will need to answer, I -- you know, ten hours, maybe. It entirely depends.

Q. Miss Loehrs, you and I have discussed the possibility of remote access of Mr. Solon's computer; is that correct?

A. That's correct.

Q. For you to do a complete and full analysis to determine if someone had remotely accessed Mr. Solon's computer, do you have an estimate of the time that would be needed to do a full analysis?

A. It depends on what I find. There -- there are log files that I would need to search through, again, data on the computer. I may find that remote -- that evidence of that remote access in two hours. I may go through thousands and thousands of computer files for two weeks and not find it. So, again, I'm not trying to be evasive, but analyzing computer data can be extremely long, tedious work. So, you know, if I'm given five hours to go in there and do that, I'll go in and find what I can. I may not have the answer. Could I spend another five hours and keep looking? Absolutely. But sometimes we have to cut our losses. So, again, whatever time we're given, I would go in and look for that data. I may find it in five hours. I may not.

THE COURT: Mr. Smith, is this a stopping point?

DEFENSE COUNSEL: Yes, Your Honor, I think I'm through as to her.

(Vol. 3, 9/17/08 mot. hrg. at 50-52).

On September 23, 2008, the court entered an order concerning the payment of fees to Ms. Loehrs. The court authorized the pretrial preparation time requested by the defense and stated that it would pay for Ms. Loehrs to attend and assist the defense at trial, but at a reduced rate (Vol. 1, Doc. 96). The defense followed up this order by submitting a document entitled "Filing of Affidavit Pursuant to Court's Order Ruling On Outstanding Motion and Request for Approval for Hourly Rate" on October 14, 2008 (Vol. 1, Doc. 106). In this filing, Ms. Loehrs agreed to provide all future services at $150 an hour. The filing also requested that, in addition to the previously authorized four hours for pre-trial preparation, the court authorize up to an additional four hours each day of trial "only if necessary and documented" for Ms. Loehrs to review evidence and consult with counsel (*Id.*). The court granted this request (*Id*., Doc. 111).

At no time did the defense object to any of the orders issued by the court relating to the payment of fees to Ms. Loehrs or to the requirement imposed by the court that any additional analysis undertaken by Loehrs be supported by "specific cost estimates of their charges, justifying with specificity the need therefore and the reasonableness of such charges before such charges are incurred" (Vol. 2, Doc. 70).

It was not until the third day of trial that the claim was made that Ms. Loehrs needed more time to complete her work. During defense's direct examination of her, in response to a question about her report, Ms. Loehrs stated, "When I got back to my lab to continue my work, I kind of—my work got stopped, so I did a report on what I had done to that point. So it was—it is a preliminary report because it is what I found up to this point, but I did not get to continue my exam in its entirety" (Vol. 3, 11/6/08 Tr. Trans. at 160).

The next day, after an exchange regarding an anti-virus warning log on the Defendant's hard drive, the following occurred between defense counsel and Ms. Loehrs:

> Q. (By defense counsel): All right. Have you looked at other logs to know or other scans to know if there were viruses present?
>
> A. (By Loehrs): Actually, this is about the point in my exam where I was stopped.

(Vol. 3, 11/7/08 Tr. Trans. at 40).

At this point, the United States objected and requested a sidebar (*Id.* at 40). After the sidebar, the court instructed the jury to disregard Ms. Loehrs' statement about being stopped (*Id*. at 42).

But on cross-examination, when asked to specify which virus she was claiming infected the Defendant's computer, Ms. Loerhs stated, "I haven't gotten to investigate" (*Id*. at 96). Then, when asked if a virus has ever resulted in the "mysterious download of child pornography," Ms. Loehrs lamented, "Once again, I have not finished my investigation" (*Id*. at 96–97). Still later on cross-examination, Ms. Loehrs finally gave some evidence of how much time she needed to finish her exam and prove her theory of the case: "And give me about a hundred more hours and I may be able to prove it . . . ." (*Id*. at 98).

The prosecution then asked for another instruction to the witness, to which the the district court responded to Ms. Loehrs, "Nobody, particularly this Court, stopped you. All I wanted was a program that was laid out on a budget. You never even asked for it. You never asked for any more authority to conduct further exploration" (*Id*. at 99). However, at the close of her direct testimony Ms. Loehrs also opined that she might need more than one hundred more hours for her analysis, when she stated, "I would say I would put in probably several hundred more hours on this case to get to the bottom of what really happened, but at this point I can't put anyone at this keyboard for these files" (*Id*. at 61).

All told, district court authorized total payments to Ms. Loehrs in the amount of $22,880.84 (Vol. 1, entries 5/19/08 and 1/30/09).

2. Analysis

The Defendant asserts that the district court "violated [the Defendant's] right to present a complete defense by halting the work of his expert witness and striking her funding authorization." Aplt. Br. at 18. His contention that the court "halted" or ordered that the work of the defense expert cease is not supported by the record. Rather, the trial court properly exercised its discretion in requiring the defense to provide "specific cost estimates of their charges, justifying with specificity the need therefore and the reasonableness of such charges" (*see* Vol. 1, Doc. 70).

The Constitution guarantees an individual due process under the law, an assurance of fundamental fairness. This Fifth Amendment guarantee "entitles indigent defendants to a fair opportunity to present their defense at trial." *United States v. Kennedy*, 64 F.3d 1465, 1473 (10th Cir. 1995). However, an indigent defendant is not entitled to "all the assistance that a wealthier counterpart might buy, but rather only to the basic and integral tools." *Id*.

In *Ake v. Oklahoma*, 470 U.S. 68, 83-84 (1985), the Supreme Court recognized that the Fifth Amendment guarantees a defendant the right not only to counsel, but

also to a psychiatric expert in a case where the defendant's sanity is a significant issue. In *United States v. Nichols*, this court refused to expand *Ake* to a case in which such expert testimony was found to be unnecessary by the trial court. 21 F.3d 1016, 1017–19 (10th Cir. 1994).

Beyond the constitutional protections afforded an indigent defendant, Congress has implemented a statutory plan, the Criminal Justice Act, 18 U.S.C. § 3006A, which provides the funding for the defense of indigent defendants. In addition to offering counsel to those in need, the CJA provides indigent defendants the opportunity to obtain investigative, expert, and other services. The defendant bears the burden of showing such services are "necessary" to present an adequate defense. 18 U.S.C. § 3006A(e)(1); *United States v. Greschner*, 802 F.2d 373, 376 (10th Cir. 1986). Such a showing requires more than a mere allegation that the services would be helpful. *United States v. Ready*, 574 F.2d 1009, 1015 (10th Cir. 1978). As one court recently stated in the context of the appointment of experts to assist an indigent defendant, "the government does not have to 'finance a fishing expedition.'" *United States v. Knox*, 540 F.3d 708, 717 (7th Cir. 2008), *citing United States v. King*, 356 F.3d 774, 778 (7th Cir. 2004).

For example, in *United States v. Kennedy*, the district court authorized court-appointed counsel to hire an investigator and two experts. 64 F.3d at 1473. However, the court in *Kennedy* did not authorize every request made by the defense, the defendant also requested expert accounting services and extra paralegal services that were denied by the trial court. *Id*. Upon review, this court held that the district court did not abuse its discretion in granting, limiting, or denying the services requested by the defendant. *Id*.

Here, the district court authorized the Defendant to retain two computer experts, Gregory J. Coffey and Tami Loehrs, to assist him. The court allowed Coffey to bill at $100 per hour for a total not to exceed $5,000, and Loehrs to bill at $250 per hour for a total not to exceed $20,000 - until the court modified its order (Vol. 2, Docs. 59, 64, 111). After receiving a motion for interim payment to Loehrs of $10,603.90 for three days work, the district court ordered approved payment but found that all future expenditures would be subject to pre-approval by the court and that any request for an expenditure be set forth with specificity (*Id.*, Doc. 70).

What the court required of the defense in this case was perfectly in line with circuit precedent. The March 26, 2008, order by the district court requiring the Defendant to "obtain specific cost estimates of their charges, justifying with

specificity the need therefore and the reasonableness of such charges before such charges are incurred . . .” was not an abuse of the court’s discretion. In fact, this court has “repeatedly emphasized that defendants must provide the district court with explicit detail showing why the requested services are ‘necessary’ to an adequate defense and what the defendant expected to find by using the services.” *United States v. Gonzales*, 150 F.3d 1246, 1252 n.4 (10th Cir. 1998), *citing United States v. Kennedy*, 64 F.3d 1465, 1470 (10th Cir. 1995); *United States v. Mundt*, 508 F.2d 904, 908 (10th Cir. 1974).

After the March 26, 2008, order of the court, the Defendant made one request that Ms. Loehrs be allowed to perform work that had not been previously approved by the court. That request was made on October 14, 2008, when the Defendant requested that she be allowed to work an additional four hours on each trial day. The court granted that request (*see* Vol. 1, Docs. 106, 111). Thus, the Defendant’s argument that the trial judge somehow limited or arbitrarily stopped Ms. Loehrs from performing her analysis simply finds no support in the record.

The government fails to discern how the district court could have prejudiced the Defendant for “denying” him expert services he never requested. Further, the testimony of Ms. Loehrs that she might need several hundred hours more to “to get

to the bottom of what really happened" smacks of a fishing expedition if ever there was one.

For all the foregoing reasons, the Defendant's claim that the district court somehow unfairly denied him sufficient access to expert witness services is plainly without merit.

III. THE TRIAL JUDGE DID NOT COMMIT PLAIN ERROR BY LEAVING THE COURTROOM FOR A BRIEF PERIOD.

A. Standard of Review

No objection or a request for a curative instruction was made when the trial judge interrupted the defense closing argument by leaving the courtroom for a brief period. Although the Defendant raised the issue below in a motion for a new trial, such a motion must be considered untimely as it was not made contemporaneously with the alleged error. *United States v. Poole*, 545 F.3d 916, 917 (10th Cir. 2008) (failure to contemporaneously object to ambiguous verdict that was later subject of motion for mistrial/new trial reviewed for plain error). An untimely objection is treated as no objection at all, and thus the alleged error is subject to plain error review. *See United States v. Olano*, 507 U.S. 725, 731 (1993) (a constitutional right "may be forfeited in criminal as well as civil cases by the failure to make timely

assertion of the right before a tribunal having jurisdiction to determine it") (*quoting Yakus v. United States*, 321 U.S. 414, 444 (1944)). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005). *See also United States v. Goode*, 483 F.3d 676, 681 (10th Cir. 2007) (absent plain error resulting in manifest injustice, the court on appeal will not consider issues raised for the first time on appeal). The elements in establishing plain error are conjunctive, and only "[i]f all four prongs are satisfied, ... may [this court] then exercise [its] discretion to notice the forfeited error." *United States v. Gonzalez Edeza*, 359 F.3d 1246, 1250 (10th Cir. 2004).

B. Discussion

1. Facts Relevant to Issue

During the defense counsel's closing argument, the trial judge left the bench to go to his chambers for a short period of time. The record reflects the following occurred:

THE COURT: Just go right ahead.

PROSECUTOR: Thanks, Judge.

(Judge Brimmer no longer present.) (10:57:44)

DEFENSE COUNSEL: Ladies and gentlemen, I think Mr. Anderson and I are both concerned that the Judge should be in the courtroom. And if you folks will allow me just to break here, I think that's appropriate, as well. I know the Judge told us to go ahead, but if I were to say something that caused Mr. Anderson to have some grief and he stood up and made an objection, there would be no one to rule.

THE CLERK: He told me to call him if there's an objection. He will only be gone a minute.

DEFENSE COUNSEL: I think it is pretty rare that Mr. Anderson and I don't do what the Judge tells us to.

PROSECUTOR: It is a great opportunity to get up and stretch, relax. It is hard to listen to people talk at you for almost an hour -- over an hour.

(Judge Brimmer now present.) (11:03:18)

THE COURT: Sorry for the interruption, but I did not intend for there to be one. But my secretary had announced just as I was leaving to start court that this was her afternoon to play canasta, and I had to get a couple letters out.

MR. SMITH: Your Honor, I know you told me to continue, but we just didn't feel comfortable with your not being in the courtroom.

THE COURT: Well, go right ahead now.

MR. SMITH: Thank you, sir.

(Vol. 3, 11/10/08 Tr. Trans. at 36-37).

To clarify the record, when the trial judge stated, "Just go ahead," he was leaving the courtroom. However, as the record reflects, the parties elected not to proceed in his absence. Defense counsel did not raise an objection to the judge leaving the courtroom nor did he request any type of curative instruction. It was only after the jury found the Defendant guilty and a week had passed that the defense raised the issue in a motion for new trial (Vol. 1, Doc. 135).

The trial court issued a written order denying the Defendant's motion for new trial (Vol. 1, Doc. 146). The court held that his brief absence from the courtroom during the Defendant's closing, particularly in light of the fact that no objection was made and nothing occurred in his absence, did not constitute structural error (*Id.* at 6). Further, the court found that any error that resulted from his absence was harmless, relying in part on the holding of *Heflin v. United States*, 125 F.2d 700 (5th Cir. 1942).

2. Analysis - Structural Error

Contrary to the assertions of the Defendant, structural error did not occur here. A "structural" error, as explained in *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Structural errors deprive defendants of

"basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-78 (1986). According to the Supreme Court, structural defects occur in a very limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997). These include (1) the total deprivation of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), or the right to retained counsel of one's choice, *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); (3) unlawful exclusion of grand jurors of defendant's race, *Vasquez v. Hillery*, 474 U.S. 254 (1986); (4) denial of self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168 (1984); (5) denial of a public trial, *Waller v. Georgia*, 467 U.S. 39 (1984); and (6) a defective reasonable doubt instruction, *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Other than in the six classes of cases set forth immediately above, the Supreme Court has failed to find structural error in any of the other wide range of errors presented to it. When the Supreme Court speaks of a structural defect, it means that "the entire conduct of the trial from beginning to end is obviously affected by the [error]." *Fulminante*, 499 U.S. at 309-110. The two examples used in *Fulminante*

to illustrate this point were the total deprivation of the right to counsel, for which a defendant would be affected by the absence of counsel from the beginning to the end of the trial, or a biased trial judge, who would be presiding over the entire trial.

Indeed, the Supreme Court has held that "[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are [not structural errors.]" *Neder v. United States*, 527 U.S. 1, 8 (1999); *United States v. Dowlin*, 408 F.3d 647, 668 (10th Cir. 2005). Structural error occurs when the entire trial framework or process is undermined by the error so that a defendant has been deprived of basic protections in determining guilt or innocence. *Walker v. Gibson*, 228 F.3d 1217, 1236 (10th Cir. 2000) (emphasis added), abrogated on other grounds, *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001). "[T]he determination of whether an error is structural depends on not only the right violated, but also the 'nature, context, and significance of the violation.'" *United States v. Pearson*, 203 F.3d 1243, 1261 (10th Cir. 2000), *quoting Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir.1996). As long as the error in the case did not affect the composition of the record, so that "a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the

interest in fairness has been satisfied and the judgment should be affirmed." *Rose v. Clark*, 478 U.S. at 579, n. 7.

The Defendant simply cannot overcome the "strong presumption" that a structural error did not occur during the course of his trial. The trial judge's brief absence from the courtroom where the proceedings were, in effect, recessed or suspended during his absence, simply does not rise to the level of a fundamental error that undermines the entire framework of the defendant's trial. Additionally, the trial judge did not deprive the Defendant of any of the basic protections afforded every criminal defendant.

The Defendant primarily relies upon two decisions, *United States v. Mortimer*, 161 F.3d 240 (3d Cir. 1998) and *Riley v. Deeds*, 56 F.3d 1117, 1119 (9th Cir. 1995), as authority for the proposition that structural error occurred in this matter. Both cases are distinguishable from the case at bar. In *United States v. Mortimer*, the trial judge, who had been present during the prosecutor's summation, left the courtroom during the defense's closing argument. The judge's absence was first noted when the prosecutor made an objection, only to withdraw it with the exclamation, "The judge is not here." *Id.*, 161 F.3d at 241. The judge gave no notice to counsel or the jury of his absence. He was back on the bench in time to thank defense counsel for her

argument, and to call on the prosecutor for rebuttal. *Id*. Thus, unlike the case at bar, in *Mortimer* it was unknown when and for how long the judge was absent from the courtroom. Secondly, and most importantly, the defense attorney in *Mortimer* continued his closing argument in the judge's absence - there was no suspension of the court proceedings in the Judge's absence.

In *Riley v. Deeds*, the trial judge left the courthouse during jury deliberations. The jury requested a "read back" of a critical witness' testimony, but the judge could not be located. In the judge's absence, his law clerk convened court, explained to the jury that the court reporter would read the witness testimony and instructed the foreman to raise his hand when the jury had heard enough of the testimony. 56 F.3d at 1119. The Ninth Circuit stated that the judge's absence in this instance constituted a "structural constitutional error" requiring reversal of the conviction. However, the facts of this case differ markedly from those present in *Deeds*. Here, nothing occurred in the absence of the judge, while in *Deeds* critical decisions concerning the Defendant's trial rights - whether to read back the testimony and how much should be read - were not made by the judge, but by his law clerk.

The essence of the holdings in *Mortimer* and *Deeds* is that when a judge is absent at a "critical stage" of the trial, the forum has been destroyed, there is no trial,

and there is no way of repairing the damage occasioned by the Judge's absence. Also see, *Gomez v. United States*, 490 U.S. 858, 873 (1989); *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

In this case, however, the trial judge was not absent at a critical stage of the trial, because absolutely nothing of consequence happened in his absence. In effect, the trial was in recess until the judge's return. Under such circumstances, there is no error, much less structural error as alleged by the Defendant. *Heflin v. United States*, 125 F.2d 700 (5th Cir. 1942). Support for this position is found in the Fourth Circuit decision, *United States v. Love*, 134 F.3d 595 (4th Cir. 1998). In *Love*, the trial judge told the jurors and counsel that he would not be in the courtroom for closing arguments but would be in his chambers working on other matters and would be available to rule on objections that might arise. Neither party objected to this procedure. *Id*. at 604. On appeal, the defendant argued that the trial judge's absence during closing argument was structural error and reversible *per se.* In rejecting this argument the Fourth Circuit stated, "[w]hile we do not condone the absence of the trial judge from any phase of the trial proceeding, we reject defendants' attempt to characterize the district judge's absence here as structural error." *Id*. at 604. The

court went on to say that since the trial judge was in chambers, available to rule on objections, no error whatsoever occurred.

Other courts that have recently considered this issue have also rejected the notion that a trial judge's brief absence from the courtroom during trial proceedings constitutes structural error. In *State v. Langley*, 958 So.2d 1160 (La. 2007), the Louisiana Supreme Court reversed an appellate court decision based in part on the holding in *Mortimer*, which found that structural error occurred when a trial judge was absent from a courtroom for brief periods of time during voir dire and closing. In an extremely thorough review of the issue, the Louisiana Supreme Court rejected the notion that a structural error occurs whenever a trial judge is absent from a courtroom during a trial. Indeed, the court questioned if the *Mortimer* decision even stands for such a proposition, given the language contained within a footnote of the decision and the nature of the cases cited within the opinion. The Louisiana court held that "a judge's absence from the bench for a few minutes would not necessarily, in the context of an entire trial, destroy the fundamental framework of the trial from beginning to end. Whether the conduct requires reversal would depend upon what occurred during the judge's absence." *Id.*, 958 So.2d at 1168.

The Supreme Court of Georgia reached the same conclusion in *Berry v. State*, 651 S.E.2d 1 (Ga. 2007). In *Berry*, the court held that the absence of the trial judge during voir dire, while error, "without more, does not show a structural error." *Id.*, at 6.

The Fourth Circuit decision in *Love* and the above cited state court decisions certainly point out that it is not a forgone conclusion that structural error occurs whenever a judge is briefly absent from the courtroom during a trial. Given the facts of this case, and the strong presumption that structural error was not committed, the United States would submit that the Defendant's argument concerning structural error is without merit.

3. Analysis - Plain Error

Rule 52(b) of the Federal Rules of Criminal Procedure provides that, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *United States v. Olano*, 507 U.S. 734, (1993), the Court concluded that the plain error provision of Rule 52(b) encompasses four requirements: (1) there must be error; (2) the error must be "plain," which means that it must be "clear," or "obvious;" (3) the error must affect substantial rights (*i.e.*, "[i]t must have affected the outcome of the district court proceedings;" and (4) the

error must " 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" *Id*., at 732 (*quoting United States v. Atkinson*, 297 U.S. 157, 160 (1936)). However, the plain error exception "'is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Young*, 470 U.S. 1, 15 (1985) (*quoting United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982)). The Defendant has not and cannot satisfy these four criteria.

The United States would concede that it is error for a trial judge to leave a courtroom unannounced for a non-emergency during a trial without declaring a recess. *United States v. Love*, 134 F.3d at 604 (" . . . we do not condone the absence of the trial judge from any phase of the trial proceeding . . ."). However, this was not an error that was "plain." For an error to be plain, it must be "clear or obvious under current, well-settled law." *United States v. Dazey*, 403 F.3d 1147, 1174 (10th Cir. 2005). In general, for an error to be clear or obvious under current, well-settled law, "either the Supreme Court or this court must have addressed the issue. [Though], [t]he absence of such precedent will not . . . prevent a finding of plain error if the district court's interpretation was clearly erroneous." *United States v. Ruiz-Gea*, 340 F.3d 1181, 1187 (10th Cir. 2003).

There is no circuit or Supreme Court authority on this point. While some courts have held that a judge leaving a courtroom is error, the issue certainly is not well settled or clear - particularly when nothing occurs in the judge's absence. As noted by the trial court in its order denying the Defendant's motion for new trial, the Fifth Circuit held that there was no error when a judge left the courtroom during a closing argument (Vol. 1, Doc. 146, *citing Heflin v. United States*, 125 F.2d 700 (5th Cir. 1942)).

The United States would submit that any error committed by the district court in leaving the courtroom for a brief period resulting in the interruption of the defense closing argument is not an error that is "clear or obvious under current, well-settled law." *Dazey*, 403 F.3d at 1174 (internal quotation marks omitted); *see United States v. Johnson*, 183 F.3d 1175, 1179 (10th Cir. 1999) ("Because only one court has addressed this issue and reached a result contrary to defendant's position on appeal, he fails to make the necessary [plain error] showing [that the error was clear and obvious]"). The Defendant, therefore, cannot establish the second prong of the plain error test and his appellate challenge must fail.

Assuming *arguendo* that this court finds the error committed by the district court was clear and obvious under well settled law, the Defendant must still satisfy

the third and fourth prongs of the plain error test. To satisfy the third prong of the plain-error test, the Defendant "bears the burden of establishing the error impacted his substantial rights by demonstrating the outcome of the trial would have been different but for the error." *United States v. Harlow*, 444 F.3d 1255, 1261 (10th Cir. 2006). Accordingly, the Defendant must show there is a reasonable probability that, but for the judge leaving during his attorney's closing argument, the jury would have found him not guilty of possession and attempted receipt of child pornography. "In determining whether the misconduct affected the outcome, [this court] considers: 'the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case as a whole.' " *United States v. Lonedog*, 929 F.2d 568, 572 (10th Cir. 1991), *quoting United States v. Martinez-Nava*, 838 F.2d 411, 416 (10th Cir. 1988).

When the court returned to the courtroom he apologized for delaying the proceeding and explained that he left the courtroom to ensure that some correspondence would be sent out before his secretary left the office. Neither the government nor the Defendant asked for any additional curative measure and, in the overall scheme of the trial, this certainly was not an event that could be considered outcome determinative.

The evidence presented by the government against the Defendant was strong - indeed it was overwhelming. The Defendant was released from custody to federal supervised release on June 21, 2006. On June 23, 2006, the Defendant's computer was observed online offering images of child pornography for download. His computer was observed again on August 9, 10, and 11, 2006, offering child pornography for download. His computer's hard drive revealed that on September 20, 2006, forty-six files with names consistent with child pornography were downloaded using a file sharing program known as Limewire. On the following day, September 21, 2006, when law enforcement officers searched his house, the Defendant admitted he used Limewire to download adult pornography and he confirmed he used his computer the previous evening. In fact, the forensic exam of the computer hard drive revealed that the Defendant attempted to download two computer games starting at approximately 8:00 p.m. The exam of the hard drive further revealed that starting at 8:51 p.m. until approximately 9:12 p.m., the Defendant played in an online poker tournament at an Internet site known as PartyPoker.com. Then, just five minutes after the Defendant played his last hand of poker, he began to download child pornography files. While the Defendant claimed during his testimony he did not download the child pornography, the fact that the jury

deliberated less than two hours and fifteen minutes speaks to the credibility of the Defendant's defense.

The Defendant invites this court to speculate that by leaving the courtroom the trial judge was implying to the jury that defense counsel's argument was not worth listening to, but there is simply nothing within the record to support such speculation. Further, the Defendant does not suggest that the six minute break in some way effected or detracted from his attorney's closing argument.

There is simply nothing to suggest that the trial judge's absence from the courtroom for just under six minutes, when absolutely nothing occurred during his absence, in some way resulted in the jury deciding to tip the balance beam of guilt versus innocence towards guilt - particularly in light of the record developed at trial which clearly established the Defendant's guilt beyond any reasonable doubt.

The Defendant cannot satisfy the plain error test. This argument must be rejected by the court.[8]

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[8] Even assuming "plain error" review was not appropriate here, it is in any event clear that any error associated with the judge leaving the courtroom was harmless under any standard. As noted, the court's absence was brief, and counsel for both the government and the Defendant immediately and jointly decided to cease further proceedings until the judge was back on the bench. The court explained the reason for his brief absence, and then simply invited the parties to proceed, which

(continued...)

CONCLUSION

On the basis of all the foregoing, the Appellant's conviction must be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would materially assist the court in resolving the issue presented on appeal.

DATED this 17th day of August, 2009.

Respectfully submitted,

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(...continued)
they did, with no clear affect on the proceedings. Given the very brief period of the judge's absence, and the fact that absolutely nothing happened in his absence, any claim that this event had any meaningful affect on the jury's verdict is purely speculative at best. Because of that, and because the evidence of the Defendant's guilt was plainly overwhelming, the error here was clearly harmless beyond any doubt.

CERTIFICATION OF DIGITAL SUBMISSION

I I hereby certify that the foregoing **Brief of Appellee** was digitally submitted to the Tenth Circuit Court of Appeals via ECF, that there were no required privacy redactions to be made, that it is an exact copy of the written document filed with the clerk, and the digital submission has been scanned for viruses with Trend Micro OfficeScan Client for Windows 2003/XP/2000/NT, Version 7.3, most recently updated 8/17/09, and, according to the program, is virus free.

s/ Vicki L. Powell
UNITED STATES ATTORNEY'S OFFICE

CERTIFICATE OF COMPLIANCE

As required by Rule 32(a)(7)(C), Fed. R. App. P., I certify that this brief is proportionally spaced and contains 10,748 words. I relied on my word processor and WordPerfect software to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ L. Robert Murray for
James C. Anderson
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that on this 17th day of August, 2009, I served a true and correct copy of the foregoing **Brief of Appellee** upon the following by placing the same in the United States mail, duly enveloped and sufficient postage prepaid, upon:

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s/ Vicki L. Powell
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