No. 09-11513

IN THE SUPREME COURT OF THE UNITED STATES

NATHANIEL SOLON, PETITIONER

v.

UNITED STATES OF AMERICA

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

# BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

DEBORAH WATSON
Attorney

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

## QUESTION PRESENTED

Whether the trial judge's departure from the courtroom during closing argument by petitioner's counsel amounted to reversible plain error, where counsel did not object but waited for the judge's return six minutes later before continuing with his argument.

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 09-11513

NATHANIEL SOLON, PETITIONER

v.

UNITED STATES OF AMERICA

---

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

---

# BRIEF FOR THE UNITED STATES IN OPPOSITION

---

## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 596 F.3d 1206.

## JURISDICTION

The judgment of the court of appeals was entered on February 17, 2010. A petition for rehearing was denied on April 7, 2010 (Pet. App. B1). The petition for a writ of certiorari was filed on June 17, 2010. 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 Wyoming, petitioner was convicted of possession of

child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Count 1), and attempted receipt of child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) (Count 2). He was sentenced to 72 months of imprisonment, to be followed by five years of supervised release, and a fine of $400. Pet. App. A1-A2; Judgment 1-3, 7. The court of appeals affirmed. Pet. App. A1-A22.

1. On four separate occasions during the summer of 2006, a computer using an IP address assigned to petitioner offered files containing child pornography for download over a peer-to-peer file-sharing network. An Immigration and Customs Enforcement agent obtained a federal search warrant to search petitioner's residence for evidence relating to the possession, receipt, distribution, and production of child pornography. On September 21, 2006, before executing the warrant, agents spoke with petitioner at his place of employment. He admitted that he owned a computer at his residence, that he had installed Limewire file-sharing software, and that he used it to download music, computer games, and adult pornography. Gov't C.A. Br. 3-5.

Petitioner accompanied the agents to his home, where they executed the warrant, verified that petitioner's computer was the same computer that had been observed online offering files containing child pornography for download, and seized the computer's hard drive for forensic examination. During the search, petitioner admitted to having used the file-sharing software the

night before in an attempt to download a computer game, and again admitted to having previously used the software to download several files containing adult pornography. Gov't C.A. Br. 5-6.

A subsequent forensic examination of the hard drive revealed that on September 20, 2006, 46 digital video files had been downloaded onto petitioner's computer; all of the files had names consistent with child pornography (although some proved to contain adult pornography instead). The examination revealed that 29 of those files had been previewed (i.e., their content had been viewed) as they were being downloaded. Gov't C.A. Br. 6-7.

2. Petitioner originally pleaded guilty to one count of possession of child pornography. At his sentencing hearing, however, he claimed to be innocent, and stated that he had pleaded guilty only because he lacked the financial resources to hire an expert witness to investigate his defense. The district court continued the proceedings and stated it would provide funding for an expert witness to help prepare a defense. Pet. App. A2.

The district court thereafter approved petitioner's request to retain Tami Loehrs, an out-of-state expert with experience in computer forensic analysis, and authorized payment for "a total billing not to exceed $20,000 unless further ordered by the Court." Pet. App. A2. Petitioner subsequently sought payment of Loehrs's initial bill in the amount of $10,603.90, which covered travel, lodging, and compensation for three days of work. Although the

district court noted that the bill seemed "unusually high," it approved the payment. Ibid. Because of its concerns over the fees, however, the court withdrew its prior authorization of a $20,000 maximum for Loehrs's services and ordered that all future requests for authorization be supported by specific cost estimates and evidence of the need for, and reasonableness of, such services. Id. at A2-A3; see 18 U.S.C. 3006A(e)(3) (regulating maximum amounts to be paid for expert services for indigent defendants). Petitioner did not object to this order. Gov't C.A. Br. 24.

Based upon Loehrs's preliminary report, petitioner moved to withdraw his guilty plea. The district court granted the motion. Pet. App. A3. The court also agreed to authorize funding for Loehrs to provide four hours of pretrial consultation and (at a reduced rate) to attend and testify at trial and, "if necessary and documented," to review evidence and consult with counsel. Gov't C.A. Br. 24. The court thus granted the only funding request petitioner made, and ultimately authorized payments to Loehrs totaling nearly $23,000. Id. at 27; Pet. App. A5-A6.

3. a. At trial, the government introduced seven videos that had been recovered from the hard drive of petitioner's computer and were among the 46 video files downloaded on September 20, 2006. Each exhibit depicted children engaged in sexually explicit activity. The agent who had conducted the forensic examination of the hard drive testified that it was apparent from

the examination that petitioner 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 those files from the hard drive. The agent further testified that on September 20, 2006, between 8:51 p.m. and 9:11 p.m., the computer was used to play online poker at the website "PartyPoker.com" by a user who used the screen name "solon40," and that the pornographic video files began to download onto the computer at 9:16 p.m. Gov't C.A. Br. 6-8; Pet. App. A13. Finally, the agent testified that anti-virus software was installed on the computer and was working properly, and that there were no active viruses on the hard drive. Gov't C.A. Br. 6 n.5.

b. Petitioner testified that he had never attempted to download or possess child pornography. He admitted to playing poker at the PartyPoker.com website, using the screen name "solon40," but claimed not to remember if he had done so on the night of September 20, 2006. Gov't C.A. Br. 6-8.

Loehrs testified that she found no evidence that petitioner viewed the child pornography found on his hard drive, and that it was possible petitioner's computer had been compromised by some type of malicious software that would allow a third party to access the computer. Gov't C.A. Br. 8-9. On several occasions during her direct examination, Loehrs asserted that her work for petitioner had been "stopped" and that she "did not get to continue [her] exam

in its entirety." 4 Tr. 160; 5 Tr. 40; see 4 Tr. 158. After a second reference to her work having been "stopped," the government objected, and the district court instructed the jury to disregard Loehrs's statement. Pet. App. A12; Gov't C.A. Br. 25; 5 Tr. 40-42. The court instructed the jury as follows:

> Members of the jury, the witness just said that she was stopped and coupled with her testimony yesterday there is the implication that the Court stopped her from working. That is absolutely untrue. It is a falsity, and you are instructed to ignore it. And we will hear no more such testimony. I never did stop this witness from working. I did stop her from submitting excessive bills to the United States, and that's all I ever did.

Pet. App. A12 (quoting 5 Tr. 42). Thereafter, on cross-examination, when asked to specify what kind of malicious software she was claiming had infected petitioner's computer, Loehrs stated "I haven't gotten to investigate." 5 Tr. 96. When asked if a particular Trojan-horse program had ever resulted in the "mysterious download of child pornography," Loehrs testified: "Once again, I have not finished my investigation." Id. at 96-97. Still later, she testified that she had proved her theory in other cases and "give me about a hundred more hours and I may be able to prove it [in] this one as well." Id. at 98. At that point, the government requested another instruction that Loehrs had not been stopped from working, and the district court stated: "That is absolutely correct. 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.

4. During defense counsel's closing argument to the jury, the district judge excused himself from the bench, instructing the attorneys to "go right ahead." Pet. App. A3. Defense counsel did not object, but told the jury that he would wait for the judge's return before completing his closing argument. Ibid.; 6 Tr. 36.[1] Just under six minutes later, Pet. App. A3, the judge returned to the courtroom and apologized to the jury for his absence, explaining that it was his secretary's "afternoon to play canasta" and that he "had to get a couple letters out." 6 Tr. 36; see Pet. App. A3-A4. Defense counsel did not ask the district court to give any type of curative instruction, but simply stated that he had not continued his closing in the judge's absence because he "didn't feel comfortable with [the judge's] not being in the courtroom," and proceeded with his closing. 6 Tr. 37.

The jury found petitioner guilty. Pet. App. A4.

Nine days later, petitioner filed a motion for a new trial, claiming that the district judge's absence constituted structural error "because the Jury may have inferred that [the] defense was not worth listening to." Mot. for New Trial 1. The district court denied the motion. The court found that, in the absence of any

[1] The district court's clerk stated that the judge would "only be gone a minute" but that the clerk could "call him if there's an objection." 6 Tr. 36.

objection, and in light of the fact that nothing had occurred in the judge's brief absence, there was no structural error. Order Denying New Trial 3-6. The court further found that any error was harmless beyond a reasonable doubt: the evidence had established that petitioner was using the computer on the same night the pornographic images were downloaded, and the court was "satisfied that the jury determined [petitioner's] guilt based on the evidence, and not on the Judge's abbreviated absence from the courtroom." Id. at 7; see id. at 6-7, 10.

5. The court of appeals affirmed. Pet. App. A1-A15.

a. As relevant here, the court of appeals rejected petitioner's claim that the district court's brief absence from the courtroom constituted structural error requiring automatic reversal of petitioner's conviction. Pet. App. A7-A11. The court pointed to the relatively short time that the judge was absent, the fact that nothing occurred in the courtroom during the judge's absence, and the judge's subsequent explanation to the jury for his brief absence. Id. at A10. The court concluded that, given these circumstances, the trial judge's absence did not "affect[] the framework within which the trial proceeded from beginning to end," and thus was not structural error. Id. at A11. The court reserved the question whether some more significant absence might reflect a "complete abdication of judicial control" and thus constitute

structural error. Id. at A11 n.1 (quoting Riley v. Deeds, 56 F.3d 1117, 1118 (9th Cir. 1995)).

Because petitioner had not objected, the court concluded that the error was reviewable only for plain error, and it held that petitioner could not meet the four-part standard for establishing reversible plain error. Pet. App. A11-A14; see United States v. Olano, 507 U.S. 725, 732 (1993). The government conceded, and the court agreed, that the judge's departure from the bench was error. Pet. App. A11; see also id. at A13-A14 (reiterating the "serious" nature of the error and the alternative procedures that should be followed when a judge needs to leave the bench). The court also agreed that the error was "plain," i.e., "clear and obvious." Id. at A11-A12. But the court concluded that petitioner had not shown an effect on his substantial rights, i.e., "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." Id. at A12. The court rejected petitioner's claim that, in conjunction with the district court's prior comments about defense witness Loehrs, the judge's departure from the bench conveyed to the jury the judge's negative view of the defense case. The court explained that the judge had left the courtroom when defense counsel was comparing the testimony of defense and prosecution witnesses in general, not just addressing Loehrs's testimony, and that counsel had discussed Loehrs's testimony several times both before and after the judge left the

courtroom. Id. at A12-A13. Moreover, the court concluded that the judge had made only one disparaging comment in the presence of the jury about Loehrs and the rates she charged. Id. at A12. Therefore, "[e]ven in light of the judge's prior statement," the court "[could not] agree with [petitioner] that the district judge's absence could only be interpreted as discrediting Ms. Loehrs's testimony or [petitioner's] defense." Id. at A13.

The court of appeals also explained that the evidence against petitioner was strong, given the evidence that petitioner's computer was used to download child pornography less than five minutes after petitioner was playing online poker on that same computer. Pet. App. A13. The court therefore concluded that, "[i]n light of the brevity of the judge's absence as well as the strength of the government's case, [petitioner] ha[d] not established a reasonable probability that, but for the judge's absence, the jury would not have convicted him." Ibid. The court did not reach the fourth part of the plain-error standard, i.e., whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

b. Judge Lucero dissented in relevant part. Pet. App. A16-A22. Although he agreed that no structural error had occurred, id. at A19, Judge Lucero was of the view that the trial judge's abrupt departure from the bench was reversible plain error because it

signaled to the jury that Loehrs was not credible or worthy of the court's or the jury's unbiased consideration. Id. at A19-A22.

6. The court of appeals denied rehearing en banc with no judge calling for a poll. Pet. App. B1.

ARGUMENT

Petitioner contends (Pet. 6-16) that the trial judge's departure from the bench during defense counsel's closing argument constituted structural error requiring automatic reversal of his conviction, and further contends that the court of appeals' contrary decision conflicts with decisions of this Court and of other courts of appeals. Neither contention has merit.

1. As an initial matter, whether or not the error petitioner identifies is properly characterized as "structural," petitioner is limited to review for plain error because he did not object at trial. See Fed. R. Crim. P. 52(b). Even structural errors may be forfeited, and this Court has explained on several occasions that structural error, if not preserved, is not necessarily reversible plain error. See, e.g., United States v. Cotton, 535 U.S. 625, 632-633 (2002) (even assuming error to be structural, defendant did not establish reversible plain error); Johnson v. United States, 520 U.S. 461, 469-470 (1997) (same); see also Puckett v. United States, 129 S. Ct. 1423, 1432 (2009) (although breach of agreement would have entitled defendant to automatic reversal if he had preserved the error, defendant could not establish reversible plain

error). Thus, even if petitioner were to prevail on the question presented -- whether the judge's brief absence in this case was a "structural" error -- that would not entitle him to reversal unless he could establish all four elements of reversible plain error, including a serious effect on the fairness, integrity, or public reputation of judicial proceedings. United States v. Olano, 507 U.S. 725, 736-737 (1993). Indeed, this Court has repeatedly reserved the question whether establishing a forfeited structural error is enough to establish an effect on the defendant's substantial rights under the plain-error test. See, e.g., United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (citing cases).

By contrast, in each of the court of appeals cases on which petitioner relies, the error apparently was preserved. Accordingly, even if petitioner were correct that the reasoning of those cases should control on the facts presented here, that still would not suffice to establish reversible plain error in this case.

2. All three members of the court of appeals panel correctly concluded that the district judge's brief absence from the courtroom was not a structural error. Pet. App. A7-A11; id. at A19 (Lucero, J., concurring in part and dissenting in part). That decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

a. The Court has identified only a handful of "fundamental" errors that, upon proper objection, require reversal regardless of

their effect on the outcome of the trial. Neder v. United States, 527 U.S. 1, 7 (1999). It has described those errors as "structural," Arizona v. Fulminante, 499 U.S. 279, 309 (1991), explaining that they deprive the defendant of "basic protections," Rose v. Clark, 478 U.S. 570, 577 (1986), and generally "infect the entire trial process," Brecht v. Abrahamson, 507 U.S. 619, 630 (1993). See Rivera v. Illinois, 129 S. Ct. 1446, 1455 (2009) (structural errors "necessarily render[] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence") (citations omitted). See generally Marcus, 130 S. Ct. at 2164-2165 (listing errors this Court has concluded are structural).

The error at issue in this case -- the trial judge's brief departure from the bench during defense counsel's closing argument -- bears no relation to the pervasive and fundamental errors that the Court has held to be intrinsically harmful. Indeed, given that defense counsel immediately stopped his closing argument when the trial judge left the courtroom, and did not resume his argument until the trial judge returned less than six minutes later, the error did not even rise to the level of a constitutional error, much less a structural one. But even if characterized as a constitutional error, the judge's extremely short absence did not affect the entire conduct of the trial. The trial proceedings ceased while the trial judge was absent from the bench, and upon the judge's return less than six minutes later, the judge gave an

explanation for his absence. Thus, this is not a case in which the trial continued in the absence of the trial judge, such that the trial judge abdicated his Article III responsibility to rule on issues of law and otherwise ensure fundamental fairness.

b. Petitioner argues (Pet. 6-8) that the decision below conflicts with decisions by the Third and Ninth Circuits that a trial judge's absence from the bench constitutes structural error requiring automatic reversal of the defendant's conviction. As noted above, petitioner's failure to preserve the error means that this case does not squarely present the question whether the error is structural, but even if it did, no such conflict exists. In United States v. Mortimer, 161 F.3d 240 (3d Cir. 1998), a divided panel of the court of appeals concluded that the district court's wholly unexplained disappearance from the bench during the defense attorney's closing argument was structural error "[o]n the facts of this case." Id. at 241. (One judge disagreed and would have reviewed for harmless error. See id. at 241 n.1.) There, following the trial judge's departure from the bench, defense counsel continued her closing argument. The prosecutor objected during the judge's absence, "only to withdraw [the objection] with the exclamation '[t]he judge is not here.'" Id. at 241. Moreover, no explanation was ever given for the judge's absence. Ibid. Here, by contrast, defense counsel stopped his closing argument and awaited the judge's return before continuing his argument -- a

scenario the Third Circuit thought unlikely to occur and so did not address, see ibid. -- and the trial judge explained the reason for his absence upon his return less than five minutes later.

Similarly, in Riley v. Deeds, 56 F.3d 1117 (9th Cir. 1995), the trial judge left the courthouse during the jury's deliberations, and when the jury asked to have portions of the trial testimony read back by the court reporter, the judge's law clerk granted the jury's request and allowed the readback to continue until the jury signaled it was content. Id. at 1119, 1120. The court of appeals held that the error was structural not only because of the judge's absence, but because of the "complete abdication of judicial control over the process." Id. at 1121. The court emphasized that the judge had "exercised no discretion in the decision whether to permit [the] testimony to be read back, or how much of it should be read or whether other testimony also should be read." Id. at 1120. The court of appeals thus declined to decide the question petitioner presents here, i.e., "whether a judge's absence during the course of a trial, regardless of the nature of the proceeding from which he is absent and the duration of his absence, amounts to structural error which is reversible per se." Ibid.; see also id. at 1121 (reserving the question whether the judge's absence from the readback proceeding would have been permissible if the judge had first decided whether and how much testimony should be read back).

In short, petitioner cites no case holding that a trial judge's brief absence from the bench constitutes structural error when the trial proceedings stopped during the judge's absence. Accord, e.g., United States v. Love, 134 F.3d 595, 604-605 (4th Cir.) (holding judge's absence not structural error and distinguishing Riley), cert. denied, 524 U.S. 932 (1998).[2]

3. Petitioner also contends (Pet. 9) that the error was structural in this case because it was "combined with the judge's overt hostility" to Loehrs, petitioner's witness. Petitioner urges (Pet. 7, 9, 14-15) that, in conjunction with the district judge's earlier comments about defense witness Loehrs, the district judge's departure from the courtroom "just as defense counsel began discussing Ms. Loehrs' testimony" reflected the district judge's view that the defense case was not credible. Pet. 14. That fact-bound contention lacks merit.

As the court below correctly explained, Pet. App. A12, the trial judge had made only one comment about Loehrs in front of the jury: After Loehrs repeatedly testified that her examination had been "stopped," the trial court accurately instructed the jury that the court had not stopped Loehrs from working, but had only prevented her from submitting excessive bills.

---

[2] Contrary to petitioner's contention (Pet. 7), as well as the Third Circuit's statement in Mortimer, 161 F.3d at 242, the Fourth Circuit in Love did not hold that the parties had consented to the judge's absence. Rather, the court applied plain-error review based on the defendant's failure to object. 134 F.3d at 605.

Nor could the trial judge's departure be construed as a reflection on Loehrs's testimony. Petitioner is incorrect in asserting that the trial judge left the courtroom "just as defense counsel began discussing Ms. Loehrs' testimony." Pet. 14; see Pet. 4. Counsel had mentioned Loehrs's testimony several times before the point at which the trial judge left the courtroom (see 6 Tr. 28, 29, 31, 33), and he continued to discuss Loehrs's testimony in detail following the judge's return (see id. at 38-46). Moreover, following his return, the trial judge apologized for his absence, explaining that he had returned to his office to perform some business before his secretary left. Thus, as the court of appeals correctly concluded (Pet. App. A13), even in light of the trial judge's earlier instruction concerning Loehrs, it simply was not the case that the trial judge's absence "could only be interpreted as discrediting Ms. Loehrs's testimony or [petitioner's] defense."

4. Even if petitioner could persuade this Court that a trial judge's absence from the courtroom should be deemed structural error, petitioner still could not obtain reversal. The foregoing facts make clear that petitioner cannot establish reversible plain error because he cannot show that the judge's absence from the bench, during which the trial proceedings stopped, "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Olano, 507 U.S. at 732, 736 (citation omitted). Unlike the situation in Riley, in which the judge abdicated control

of a portion of the trial to his law clerk, this case simply involved a six-minute pause in closing arguments, which the district court later explained and which could not reasonably have been interpreted to send any message about petitioner, his evidence, or anything else.

Not only did nothing happen during the judge's absence, and not only was there no real danger that the jury would draw the negative inference about Loehrs that petitioner suggests, the case against petitioner was strong, and Loehrs's speculation did not detract from that evidence. See Pet. App. A13. Petitioner's computer had previously offered child pornography for download four separate times. The day before the search, 46 digital video files with names consistent with child pornography were downloaded onto petitioner's computer; 29 of these files were previewed as they were downloaded. Petitioner admitted to having installed file-sharing software that would enable such downloads, and to having used that software the day before the search to attempt to download two computer games. Moreover, petitioner had been playing online poker on his computer less than five minutes before the child pornography files were downloaded. Finally, anti-virus software had been installed on petitioner's computer and was working properly, and there were no active viruses on the hard drive.

Under those circumstances, petitioner cannot satisfy the fourth element of the plain-error test. See, e.g., Johnson, 520

U.S. at 470 (in light of "overwhelming" evidence that the jury would have found a missing element had it been so instructed, "[n]o 'miscarriage of justice' will result here if [the Court does] not notice the error") (quoting Olano, 507 U.S. at 736). Thus, whether or not the the error was structural, petitioner cannot establish reversible plain error. See, e.g., Cotton, 535 U.S. at 632-633; Johnson, 520 U.S. at 469-470. This case therefore presents no occasion to resolve the question that petitioner presents.[3]

---

[3] Although petitioner's question presented (Pet. iv) is limited to the question of structural error, petitioner also contends in the body of the petition (Pet. 14-15) that he can establish reversible plain error. That contention is not properly before the Court because it is not fairly included within the question presented. See Sup. Ct. R. 14.1(a); Wood v. Allen, 130 S. Ct. 841, 851 (2009). In any event, that fact-bound contention lacks merit. First, as discussed above, petitioner cannot show that the error affected the fairness, integrity, or public reputation of his proceedings. Second, petitioner acknowledges that to show an effect on his substantial rights (the third element of the plain-error test), he would have to demonstrate "a reasonable probability 'sufficient to undermine confidence in the outcome.'" Pet. 14 (quoting Pet. App. A21 (Lucero, J., concurring in part and dissenting in part)); see, e.g., United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004) ("a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different") (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)) (brackets in original); Pet. App. A12, A13 (same). For the reasons already discussed, the court of appeals correctly held that petitioner did not show a reasonable probability that, on the facts of this case, the district judge's six-minute absence prompted the jury to convict when it otherwise would have acquitted. And to prevail without such a showing, on the theory that a structural error always affects substantial rights, petitioner would have to persuade this Court to resolve a question that it has repeatedly reserved, see p. 12, supra, and that is not fairly included in the question presented.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
*Acting Solicitor General*

LANNY A. BREUER
*Assistant Attorney General*

DEBORAH WATSON
*Attorney*

AUGUST 2010