IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. 09-8018

NATHANIEL SOLON,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Wyoming

The Honorable Clarence A. Brimmer
District Court Judge

D.C. No. 07-cr-32B

NATHANIEL SOLON'S OPENING BRIEF

Megan L. Hayes
910 Kearney Street
Laramie, WY 82070
Tel: (307) 760-6258
E-mail: mlhayes@tribcsp.com
Attorney for Nathaniel Solon

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over the appeal of this case pursuant to 28 U.S.C. § 1291. This is an appeal of a final judgment of the district court entered against Nathaniel Solon on January 26, 2009. Mr. Solon filed a timely Notice of Appeal on February 5, 2009. By order of the Court, the deadline for filing this Opening Brief is June 11, 2009.

STATEMENT OF THE ISSUES

1. Whether the district court's failure to comply with the requirements of the Speedy Trial Act of 1974 requires dismissal of the criminal indictment.

2. Whether the district court infringed on Mr. Solon's right to present a complete defense when it stopped his court-appointed expert witness from completing her forensic investigation by striking her funding authorization.

3. Whether the presiding judge committed structural error when he left the courtroom during defense counsel's closing argument.

STATEMENT OF THE CASE

A grand jury sitting in the District of Wyoming returned an Indictment against Nathaniel Solon, charging him with violating 18 U.S.C. § 2252A(a)(5)(B) and (b)(2), by possessing a computer hard drive containing images of child pornography on September 20, 2006. (Vol. 1, Doc. 1, p. 21). Mr. Solon was

charged later by Superseding Indictment with one count of knowingly possessing a hard drive containing images of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) and one count of knowingly attempting to receive child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1). (Vol. 1, pp. 257-58).

Shortly before the commencement of trial, Mr. Solon entered a guilty plea. (Vol. 1, Doc. 44). After preparation of a Presentence Investigation Report, a sentencing hearing was held on January 3, 2008. Mr. Solon indicated that he was entering a guilty plea only because he felt forced economically to do so. (Vol. 3, pp. 720-721). The district court continued the proceeding and gave Mr. Solon time to decide whether to withdraw his guilty plea; the court appointed his retained counsel to represent him as a Criminal Justice Act panel attorney. (Vol. 3, p. 724).

Mr. Solon subsequently sought to withdraw his guilty plea. (Vol. 1, Doc. 73, p. 198). The matter proceeded to a hearing on April 16, 2008, at which time the district court took Mr. Solon's motion to withdraw his guilty plea under advisement. (Vol. 3, p. 835: 10-11). When the trial court failed to rule on this motion within 30 days, Mr. Solon waited an additional 70 days and then moved to dismiss the indictment for violation of his rights under the Speedy Trial Act, 18 U.S.C. §§ 3161 and 3162. (Vol. 1, Doc. 88, pp. 243-44).

At a September 17, 2008 motion hearing, the trial court allowed Mr. Solon

to withdraw his guilty plea and denied his motion to dismiss the indictment. (Vol. 3, pp. 842 and 853). The trial began on November 3, 2008, and concluded in a guilty verdict on both counts in the Superseding Indictment. (Vol. 4, p. 2).

After preparation of a presentence investigation report, the court sentenced Mr. Solon to 72 months imprisonment. (Vol. 1, Judgment and Commitment, p. 473). Mr. Solon moved for a new trial, asserting that the judge's departure from the courtroom during defense counsel's closing argument constituted structural error. (Vol. 1, p. 450-51). The trial court denied the motion. (Vol. 1, p. 478-88).

STATEMENT OF FACTS

A grand jury from the District of Wyoming returned an Indictment against Nathaniel Solon, charging him with violating 18 U.S.C. § 2252A(a)(5)(B) and (b)(2), by possessing a computer hard drive containing images of child pornography on September 20, 2006. (Vol. 1, Doc. 1). Although initially provided with a court-appointed lawyer, Mr. Solon later retained private counsel who moved to waive Mr. Solon's speedy trial rights and to continue his jury trial to allow the new attorney sufficient time to prepare. (Vol. 1, Docs. 10 and 13). The district court granted Mr. Solon's motion to continue his trial. (Vol. 1, Doc. 14).

Shortly before trial commenced, Mr. Solon entered a guilty plea. (Doc. 44). After preparation of a Presentence Investigation Report, a sentencing hearing was held on January 3, 2008. Mr. Solon stated that he was innocent and the only

reason he was entering a guilty plea was because he felt forced economically to do so. He explained that he lacked the financial resources to hire an expert witness to investigate his defense. (Vol. 3, pp. 720-721). The district court continued the proceeding to allow Mr. Solon time to decide whether to withdraw his guilty plea. The court appointed his private attorney, Thomas Smith, to represent him as a Criminal Justice Act panel attorney because of Mr. Solon's indigency. (Vol. 3, p. 724). The district court also stated that it would authorize payment for an expert witness to help Mr. Solon prepare his defense. (Vol. 3, pp. 721-22).

Through counsel, Mr. Solon filed an *ex parte* motion, pursuant to 18 U.S.C. § 3006A, for approval to retain expert witness Tami Loehrs, an out-of-state expert with significant experience in computer forensic analysis. Mr. Solon represented that Ms. Loehrs charged $250 per hour and that she would need three days in Cheyenne plus additional time in her Arizona office to complete her forensic evaluation. (Supp. RoA, Doc. 63, pp. 21-24). The district court approved the appointment of Ms. Loehrs as an expert witness, authorizing payment for a "total billing not to exceed $20,000 unless further ordered by the Court." (Supp. RoA, Doc. 64, p. 43).

Mr. Solon subsequently submitted an *ex parte* Motion for Interim Payment of Expert Services, asking that Tami Loehrs be paid for her work to date because she had incurred significant out-of-pocket expenses in traveling from Arizona to

Wyoming to examine the computer hard drive at the government's offices in Cheyenne. (Supp. RoA, Doc. 69, p. 44).[1] The motion requested payment for $10,603.90, which included travel, lodging and ground transportation expenses, in addition to compensation for three days work in Cheyenne. (Doc. 69, p. 45). In response, the district court concluded that the charges billed by Ms. Loehrs for her two days [sic] of work in Cheyenne were "unusually high" and that its previous order would be "hereby amended to strike the authorization of a total billing not to exceed $20,000.00." (Supp. RoA, Doc. 70, p. 51). The court further ordered that henceforth, Mr. Solon must obtain specific cost estimates for Ms. Loehrs' charges and submit the need for and reasonableness of such charges to the court before incurring any additional charges. The court authorized payment of the interim payment request. (Doc. 70, p. 51).

Mr. Solon then filed an *ex parte* Response to the court's Amended Ex Parte Order striking the payment authorization for Ms. Loehrs, asserting that prior to receiving the court's Order, Ms. Loehrs had completed a preliminary expert report. (Supp. RoA,, Doc. 72, pp. 52-53). Mr. Solon declared that since receiving notice of the Court's order, "Ms. Loehrs has now ceased her work." (Doc. 72, p. 53). He asked for payment of Ms. Loehrs' work performed prior to receiving the Court's

[1] Ms. Loehrs traveled to Wyoming because the Adam Walsh Act, 18 U.S.C. § 3509(m)(1), restricts defense access to property or material that constitutes child pornography and requires the government to maintain custody over such property.

Amended Order and requested permission to continue to consult with Ms. Loehrs as necessary. He also sought to clarify whether the trial court would authorize funds for her attendance at trial. (Doc. 72, p. 53).

Mr. Solon filed a notice of intent to withdraw his guilty plea, citing Ms. Loehrs' preliminary expert report as grounds for his motion. (Vol. 1, Doc. 73, p. 198). Ms. Loehrs had opined that she did not find any still images of child pornography on Mr. Solon's hard drive and that there were five video files in unallocated space in the "incomplete folder" on the hard drive that were created on September 20, 2006, between 9:18 and 10:10 p.m. (Vol. 1, Doc. 84, p. 221, attachment 1, Examination Report of Tami Loehrs). Each of these files had been deleted at 10:10 p.m., shortly after they failed to download for reasons that could not be determined. Ms. Loehrs found no evidence that any of these files were ever viewed, saved or copied to another location, such as a CD-rom. (Vol. 1, p. 221). Ms. Loehrs also concluded that a "Trojan" had compromised "Item 400" on the hard drive and that Trojans have the ability to allow unauthorized access to a computer system by outside sources. (Vol. 1, p. 222). Finally, she concluded that at this point in her forensic examination, she could not determine "to what extent these Trojans compromised the system, if any." (Vol. 1, p. 222).

At a hearing on April 16, 2008, Mr. Solon cited Ms. Loehrs' report as grounds for withdrawing his guilty plea. (Vol. 3, pp. 818-819). In response, the

court explained why he struck her funding authorization: "that woman is outrageous in her charges," and it will be a "cold day in hell before I ever authorize" a $15,000.00 payment to her. (Vol. 3, p. 821). The judge wanted to compare the amount of time she had spent on her analysis against that spent by the government's investigators. (Vol. 3, pp. 823-24).[2] The judge stated that he would hold a hearing on her request for payment for services rendered after his amended order was entered and that "[s]he can come up here at her own expense next time and testify to her bill, and we will let her do her best." (Vol. 3, p. 822).

Defense counsel urged that, before stopping payment, the court should consider the quality of her services and the fact that she had provided Mr. Solon with a viable defense. (Vol. 3, pp. 822-23). Defense counsel also sought to clarify whether the district court would authorize funds for Ms. Loehrs to attend trial. The court stated its need for additional information, such as her usual and customary charges, "how often she's been able to get somebody to pay those charges," and why she is entitled to a $250 fee. (Vol. 3, pp. 833-34). The court requested a "detailed analysis as to exactly what she did, what time it took her to do it, and on top of that what her future time might be for coming here and testifying." (Vol. 3,

[2] At trial, government witness Agent Huff testified that he spent "weeks" investigating the case and that one child pornography case analysis could take hundreds of hours. Two other government agents also worked on this case with Agent Huff. (Vol. 3, pp. 310-11).

p. 834).[3]

Defense counsel then summarized Ms. Loehrs' findings, to which the trial court responded "from what I know about the case is that I don't think that woman's argument will sway the jury much." (Vol. 3, p. 832). The court advised Mr. Solon that by withdrawing his plea, he was foregoing a 72 month recommended sentence and exposing himself to the full penalty of 121 to 151 months imprisonment. (Vol. 3, p. 832). Mr. Solon reiterated his desire to withdraw his guilty plea. (Vol. 3, p. 833, line 7). At the conclusion of the hearing, the court took the "matter of withdrawal of the plea under advisement . . . ." (Vol. 3, p. 835: 10-11).

On June 4, 2008, Mr. Solon filed a Motion for a Trial Setting, asking for a trial date because he had withdrawn his guilty plea on April 16, 2008. (Vol. 1, Doc. 85, p. 236). He again requested clarification regarding Ms. Loehrs' attendance at trial. (Vol. 1, Doc. 86, p. 238). He also moved for a *liminal* order prohibiting the government from showing child pornography videos at trial. (Vol. 1, Doc. 87, p. 240).

When the court failed to act on any of these motions or on Mr. Solon's motion to withdraw his guilty plea, which the court had taken under advisement on

[3] Mr. Solon subsequently filed a Declaration of Tami Loehrs, in which she described her fees, qualifications, the fees charged by other forensic computer experts, her education and training, and provided extensive information about her analysis of Mr. Solon's hard drive. (Vol. 1, pp. 230-235).

April 16, 2008, Mr. Solon filed a motion to dismiss the indictment for violation of his rights under the Speedy Trial Act, 18 U.S.C. §§ 3161 and 3162. (Vol. 1, Doc. 88, pp. 243-44, filed July 29, 2008). He argued that under 18 U.S.C. § 3161(c)(1)(H), the court had 30 days to rule on his motion to withdraw his guilty plea, which the court had failed to do. Once the 30 day period excludable under section 3161(c)(1)(H) had expired, the 70 day period for commencement of trial began to run and expired on July 24, 2008. As of July 29, 2008, Mr. Solon's trial had not even been scheduled.

At a motion hearing nearly two months later, the trial court allowed Mr. Solon to withdraw his guilty plea. (Vol. 3, p. 842). The district court agreed with the government's argument that Mr. Solon had waived his right to a speedy trial because he failed to move for dismissal prior to entry of his guilty plea in October of 2007, as supposedly required by 18 U.S.C. § 3162(a)(2), and because his guilty plea had not been withdrawn until moments ago. The district court denied the motion to dismiss on that legal basis. (Vol. 3, pp. 850 and 853). The district court then set a trial date. (Vol. 3, p. 853).

Mr. Solon next argued that the government should be prohibited from showing child pornography videos at trial because the deleted videos found on unallocated space were never viewable on his computer. (Vol. 3, p. 859). Ms.

Loehrs testified at the hearing in support of the motion.[4] When pressed on cross-examination about certain things she had failed to uncover during her forensic examination, Ms. Loehrs responded:

> Loehrs: Sir, I never got a chance to finish my exam, so I'm not done. I was cut off. I was told to do no more work.
>
> Govt.: By whom?
>
> Loehrs:. Because there was no fund -- by the Court. I was denied funding, so I stopped my exam. I never got a chance to finish.
>
> Govt.: Well, the Government -- the United States or the ICAC certainly never said you've got to vacate the premises, did they?
>
> THE COURT: Well, Mr. Smith, I told the defense to stop running up such a large bill. The bill, in my judgment, was absolutely outrageous.

(Vol. 3, p. 882: 7-17). When later asked about her failure to review certain settings on Mr. Solon's hard drive to determine whether the transfer of illegal files to unallocated space was done by the user or automatically by computer settings, Ms.

[4] Ms. Loehrs testified at the hearing via video conference from her office in Arizona. *See* Vol. 1, Docket Sheet, p. 10, No. 92, Order granting Motion to Allow Witness to Appear by Video Conference.

Loehrs responded that she did not check those settings because she never finished her examination. (Vol. 3, p. 885).

After concluding his argument on his motion *in limine*, defense counsel asked to argue his *ex parte* motion regarding Ms. Loehrs' fees, without the government's attorney present. The court responded that "[t]here's no such thing before me as an ex parte motion. A motion is a motion and everybody ought to know about it and hear about it." (Vol. 3, p. 889: 6-8). The trial court even elicited the government's position on Mr. Solon's *ex parte* motion which the government's attorney was disinclined to provide (but did anyway at the court's urging) because he did "not want to do anything to hinder the Defense preparation for this trial." (Vol. 3, p. 899). The district court then stated: "I will say this for the benefit of this witness, that she spent three full days here in Cheyenne examining matters, and I felt that her fee was -- I think it was over $10,000. I felt that was excessive for three days of work, and, therefore, I stopped further fees." (Vol. 3, p. 889: 11-15). The court offered that it had never heard a more "abrasive witness" than Ms. Loehrs and it would not "open the gates of Fort Knox to her." (Vol. 3, p. 895: 9-12).

The district court explained that any future payments to Ms. Loehrs would be as follows:

THE COURT: I will pay her plane fare and her per diem the same as we

> would pay any Government witness. And I will pay for four hours of pretrial consultation. And I will pay her the time that she spends here of necessity to testify.
>
> Now, as far as having her to sit by your side throughout the trial, I'm not going to do that unless she's willing to accept a lower fee. I think you can get somebody for a lot less per hour to hold your hand and advise you on these things. If I was in your position, I think I would have to do that, and I could find somebody. I don't have to find this woman with pretty exalted ideas of her worth.

(Vol. 3, p. 901: 5-15. *See also* Order on Outstanding Motions, Vol. 1, pp. 255-56). At no time did the district court indicate any willingness to authorize payment for Ms. Loehrs to complete her forensic analysis.

Trial commenced on November 3, 2008. Nicole Balliett, a special agent with the Department of Homeland Security, testified for the government. (Vol. 3, p. 15). While conducting an undercover operation, she noted that on June 23, 2006, a Wyoming "IP" address advertised or offered approximately 250 files to share with other internet users.[5] (Vol. 3, pp. 23-24). Many of the files offered had names consistent with child pornography files known to the government. (Vol. 3, p. 27). A subsequent investigation revealed that the IP address belonged to Nathaniel Solon, in Casper, Wyoming. (Vol. 3, pp. 34-35). Again on August 9, 2006, Ms. Balliett saw Mr. Solon's IP address indicating that it had files to share. (Vol. 3, p. 52). Many of the available files had "SHA" values that were known by

[5] An "IP" address is an internet protocol address, similar to a telephone number, and allows a specific computer to connect to the internet via that computer user's internet service provider. (Vol. 3, p. 24).

the government to contain images of child pornography. (Vol. 3, p. 53).[6] Agent Balliett sought and obtained a search warrant for Mr. Solon's computer, which she and two other agents executed at his Casper residence on September 21, 2006. (Vol. 3, pp. 57-58). Finding no images of child pornography on Mr. Solon's hard drive, the government's agents physically removed the hard drive from his computer tower and took it to their offices for forensic testing. (Vol. 3, pp. 68-69, 79).

Agent Randall Huff, a criminal investigator from the State of Wyoming, also testified for the government. (Vol. 3, pp. 105-106). Agent Huff had performed the forensic analysis of Mr. Solon's hard drive. (Vol. 3, p. 224). Agent Huff described the manner in which a computer user would use Limewire software to search for, obtain and share electronic files on the internet. (Vol. 3, pp. 146-48). When an internet file search is done using Limewire, a "GUID" indicates the specific computer that is associated with the search.[7] Agent Huff testified that the GUID associated with the file sharing offers from Mr. Solon's IP address on June 23 and in August of 2006, was identical to the GUID found on Mr. Solon's hard

[6] A "SHA" (secure hash algorithm) value is analogous to a digital fingerprint for the contents of an electronic file. The SHA value remains constant even if the file name is changed and is used to verify the content of electronic files. (Vol. 3, pp. 28-28, 127-128).

[7] GUID (Global unique identification) is a random string of characters that a particular computer's Limewire software will assign to the computer. A GUID is similar to a unique digital signature for a specific computer. (Vol. 3, pp. 46, 148).

drive. (Vol. 3, p. 201). Using forensic computer software, Agent Huff was able to locate files that had been deleted from Mr. Solon's hard drive, but still resided in "unallocated" space on the hard drive.[8] (Vol. 3, p. 221). These deleted files contained images of child pornography that had been downloaded to Mr. Solon's computer on September 20, 2006, beginning at 9:16 p.m., and deleted at 10:10 p.m. (Vol. 3, p. 223-24). Agent Huff testified that there was no way to discern whether the deleted files had ever been opened or viewed. (Vol. 3, p. 266). The child pornography images contained in these deleted files were shown to the jury during trial. (*See* Vol. 3, p. 253).

Mr. Solon did not dispute that his hard drive contained images of child pornography that had been downloaded on September 20, 2006. However, he contended that he had not downloaded them himself and did not know how they had gotten onto his computer. (Vol. 3, Testimony of Nathaniel Solon, p. 376).

His expert witness, Tami Loehrs, testified regarding numerous security problems created by his Limewire file-sharing software and testified that Mr. Solon's virus software had been infected with multiple viruses and Trojans during August and September of 2006. (Vol. 3, pp. 492 and 511).[9] She also testified that

[8] Unallocated space is the place on the hard drive where deleted files can be overwritten and are no longer viewable, without forensic software. (Vol. 3, p. 220). Files cannot be stored in unallocated space for this reason.

[9] A "Trojan" is a program that appears to perform a certain action but in fact

there was an unusual unassigned "port" on Mr. Solon's computer that may have left him vulnerable to unauthorized access by remote computer hackers. (Vol. 3, p. 491). She testified that in the evening of September 20, 2006, files were being downloaded and previewed and that the downloading of the child pornography files had not been completed because the downloads were canceled by the user or had failed to download. (Vol. 3, pp. 497-98). These files were then all deleted at 10:10 p.m., which made no sense to her because it was such highly unusual user activity. (Vol. 3, p. 498). She further testified that these incomplete files had never been viewed. (Vol. 3, p. 501).

When asked by defense counsel if she had analyzed computer logs to determine the presence of viruses on September 20, 2006, Ms. Loehrs testified that "[a]ctually, this is about the point in my exam where I was stopped." (Vol. 3, p. 501). This prompted an objection from the government, a side-bar, and the following "curative" instruction from the presiding judge:

> 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.

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performs a very different function. Trojans can open up vulnerabilities in computers and "create holes that allow other things to get in." (Vol. 3, Testimony of Tami Loehrs, p. 517).

(Vol. 3, p. 510: 13-20). When asked her opinion as to whether Mr. Solon's computer had been subject to remote access on September 20, 2006, Ms. Loehrs testified that his

> computer had all of the symptoms, all of the things that you could need to have a vulnerable computer. He had Limewire. He had his IP address out there. He had no password. He had open ports. He had evidence of viruses and Trojans that further made his computer vulnerable.
>
> I have not done all of the investigation to prove that this computer was hacked into, but it looks really bad. It is very, very open and very, very unsecure.

(Vol. 3, p. 523: 7-16).

The jury heard the parties' closing arguments at the end of the trial. During defense counsel's closing argument, as he began to summarize Ms. Loehrs' investigation, the presiding judge left the courtroom and instructed the attorneys to 'just go ahead.' (Vol. 3, p. 650). Obviously perplexed, the two attorneys waited for the judge to return. About five minutes later, the judge returned to the bench and explained that he was absent because this was his secretary's afternoon to play canasta and he had a couple of letters to get out. (Vol. 3, p. 650: 21-25).

Shortly before the lunch recess, the district court told the jury that after they returned from lunch, they would be given the jury instructions until approximately 2:15 or 2:30 p.m., and that they then would deliberate and "probably ought to be able to reach a conclusion toward the end of the afternoon would be my guess."

(Vol. 3, p. 665). That afternoon, the jury found Mr. Solon guilty of both counts in the superseding indictment. (Vol. 4, p. 2).

After preparation of a presentence investigation report, the court sentenced Mr. Solon to 72 months imprisonment. (Vol. 1, Judgment and Commitment, p. 473). He filed a motion for a new trial, asserting that the judge's absence from the courtroom during closing arguments constituted structural error because the jury may have inferred from this conduct that the defense was not worth listening to. (Vol. 1, p. 450-51). The trial court denied the motion, concluding that there was no structural error and that, if there was any error at all, it was harmless. (Vol. 1, p. 478-88).

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court violated Mr. Solon's rights under the Speedy Trial Act by taking his motion to withdraw his guilty plea under advisement, failing to rule on that motion within 30 days, and allowing the speedy trial clock to expire before even scheduling a trial date. Under 18 U.S.C. § 3161(h)(1)(J), any period of delay, not to exceed thirty days during which a motion has been taken under advisement, is excluded from the 70 day statutory time limitation for commencing a defendant's trial, after that defendant's guilty plea has been withdraw. Because the

70 day speedy trial clock expired after the trial court's failure to make a timely decision on Mr. Solon's motion, this case should be remanded to the district court with directions to dismiss the indictment, with prejudice.

Indigent criminal defendants are guaranteed the constitutional right to a meaningful opportunity to present a complete defense. The trial court violated Mr. Solon's right to present a complete defense by halting the work of his expert witness and striking her funding authorization. The trial court's conduct in cutting Ms. Loehrs's funding impeded her ability to complete her forensic analysis and led to a partial presentation of the disputed factual issue of whether or not the images on Mr. Solon's computer were downloaded by him or by a remote computer hacker.

The district court judge left the courtroom during defense counsel's closing argument. A judge's absence from the courtroom during a criminal trial is an error of constitutional magnitude and can amount to structural error. The judge's departure from the courtroom, just at the moment when defense counsel began to summarize expert Loehrs' testimony, constituted structural error requiring automatic reversal. This is because the timing of the judge's departure, when combined with his partisan comments during trial intended to undercut Mr. Loehrs' veracity, the reason given for his absence, and his instruction to the jury that it could reach a quick verdict, all suggested to the jury that defense counsel's

argument was not worth hearing and that the judge had already decided Mr. Solon's guilt. Therefore, Mr. Solon's judgment should be vacated and the case remanded for retrial with instructions to the district court to conduct the trial free from partisan comments and constitutional errors.

ARGUMENT

I. THE DISTRICT COURT'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE SPEEDY TRIAL ACT OF 1974, 18 U.S.C. § 3161 ET SEQ., REQUIRES DISMISSAL OF THE CRIMINAL INDICTMENT.

A. Issue raised and ruled on.

Mr. Solon moved to dismiss the indictment as a sanction for the district court's violation of his rights under the Speedy Trial Act. (Vol. 1, Doc. 88). The district court denied the motion. (Vol. 3, p. 853; Vol. 1, Doc. 96, Order Ruling on Outstanding Motions, p. 254).

B. Standard of review.

Compliance with the Speedy Trial Act's requirements presents an issue of law that this Court reviews *de novo*. *United States v. Williams*, 511 F.3d 1044, 1050 (10th Cir. 2007).

C. Discussion.

The Speedy Trial Act (the Act) generally "requires a federal criminal trial to begin within seventy days from the filing of an information or indictment, or from the date of the defendant's initial appearance, whichever occurs later." *Williams*, 511 F.3d at 1047, citing 18 U.S.C. § 3161(c)(1). The Act specifies that if a defendant's trial did not commence within the 70 day statutory time limitation because the defendant had entered a guilty plea that was subsequently withdrawn, then "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).

The Act also enumerates several exceptions to the rule by excluding specified periods of delay from the 70-day time calculation:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
>
> . . . .
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

18 U.S.C. 3161(h)(1)(J).

Mr. Solon moved to withdraw his guilty plea on April 3, 2008. At a hearing on April 16, 2008, the district court took the motion under advisement, thereby giving the court 30 excludable days to decide the motion under 18 U.S.C. §

3161(J), or until May 17, 2008. When the court failed to decide Mr. Solon's motion to withdraw his guilty plea within 30 days, the 70 day speedy trial clock began to run and expired on July 24, 2008.

At the September 17, 2008 hearing, the government argued that Mr. Solon's right to a speedy trial did not begin to run until September 17, 2008, when the district court finally and belatedly granted the motion to withdraw his guilty plea, which it had taken under advisement some four months earlier. (Vol. 3, p. 852). The government also argued that Mr. Solon waived his rights under the Act by failing to move for dismissal prior to first entering his guilty plea on October 2, 2007, which the government contended was required by 18 U.S.C. §3162(a)(2). (Vol. 3, p. 852). The district court relied on these arguments as the legal basis for denying Mr. Solon's motion to dismiss. (Vol. 3, p. 853, district court denied motion, noting that government's position is the "correct statement of the law").

Neither of the government's arguments is premised on sound construction of the Act and therefore the district court's ruling is erroneous as a matter of law. First, the government is correct in asserting that a defendant's right to a speedy trial after entry of a guilty plea that was subsequently withdrawn begins on the day the order permitting withdrawal of the plea becomes final under 18 U.S.C. § 3161(i). However, section 3161(i) must be read in conjunction with section 3161(h)(1)(J), which only excludes a period of thirty days from the speedy trial

clock after a defendant's motion to withdraw his guilty plea "is actually taken under advisement by the court." Therefore, when the district court failed to decide Mr. Solon's motion to withdraw his guilty plea within 30 days, the Act's speedy trial clock began to run on May 17, 2008.

The government's argument that Mr. Solon waived his rights under the Act by failing to assert those rights before entering a guilty plea in October of 2007 ignores the fact that he sought to withdraw that plea on April 16, 2008, thereby restarting the speedy trial clock under 18 U.S.C. § 3161(i) and giving the trial court 30 days to rule on his motion to withdraw his plea.

The government may argue here, for the first time on appeal, that the speedy trial clock was tolled by 18 U.S.C. § 3161(h)(1)(F) when Mr. Solon filed several pretrial motions in June of 2008. This provision of the Act excludes delay resulting from the filing of any pretrial motion through the "conclusion of the hearing on, or prompt disposition of, such motion . . . ." However, the district court did not consider or rely on section 3161(a)(1)(F), but decided, on a completely separate and incorrect legal basis, to deny Mr. Solon's motion to dismiss. Moreover, Mr. Solon's filing of pretrial motions did not appear to influence the district court's perception of whether the speedy trial clock was even ticking. This is evidenced by the fact that the district court failed to schedule a hearing on the pretrial motions until after the speedy trial clock had expired and

only did so it was prodded into action by the government's request for a scheduling conference, filed immediately after the motion to dismiss the indictment. (Vol. 1, p. 247).

The 70 day speedy trial clock expired on July 24, 2008, after the trial court failed to act on Mr. Solon's motion to withdraw his guilty plea, which the court took under advisement on April 16, 2008. Mr. Solon's conviction and sentence therefore must be reversed and the case dismissed. 18 U.S.C. § 3162(a)(2); *United States v. Mora*, 135 F.3d 1351, 1358 (10th Cir. 1998).

This Court must also decide whether dismissal will be with or without prejudice. *Mora*, 135 F.3d at 1358. In determining whether to dismiss with or without prejudice, this Court "shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." *Id.* quoting 18 U.S.C. §3162(a)(2).

This case should be dismissed with prejudice. The charged offense here is serious, namely possession of child pornography. However, Mr. Solon was never accused of creating or distributing the illegal images and he maintained that he did not download those images onto his computer. In the realm of serious charges, this alleged offense did not have a wide impact and was limited to the alleged

downloading of illegal images that are now widely and permanently available on the Internet.

The facts and circumstances leading to the dismissal of this case are based almost entirely on the district court's inattentiveness to motions it has taken under advisement or to Mr. Solon's right to a speedy trial. To ensure that this Circuit's trial court's are sensitive to the time constraints imposed by criminal proceedings, this Court should dismiss this case with prejudice to deter untimely and overdue decisions on pending motions. Private attorneys who miss deadlines can be held liable by their clients and face the prospect of higher malpractice premiums or no coverage for their practice. Dismissing this case with prejudice would be an appropriate sanction for the excessive delay in deciding pending motions.

Finally, the impact of reprosecuting this case almost four years after the alleged illegal conduct was committed will undermine the essential principles of the Speedy Trial Act and the administration of justice. The Act "serves two distinct interests: (1) to protect a defendant's right to a speedy indictment and trial, and (2) to serve the public interest in ensuring prompt criminal prosecutions." *United States v. Williams*, 511 F.3d at 1047, citing *Zedner v. United States*, 547 U.S. 489 (2006). The offense charged Mr. Solon with possessing illegal images of child pornography on September 20, 2006. By the time this appeal is decided and the case remanded to the district court, a trial is unlikely to commence before 2010.

The original trial did not commence until more than two years after the alleged illegal conduct; a retrial after remand will not commence until nearly four years later. This significant delay is contrary to Mr. Solon's right to a speedy indictment and trial and has not served the public's interest in ensuring a prompt criminal prosecution in this matter. Therefore, this case should be remanded with directions to dismiss the indictment, with prejudice.

For the foregoing reasons, this case should be remanded with instructions to dismiss the indictment, with prejudice.

II. THE DISTRICT COURT INFRINGED ON MR. SOLON'S RIGHT TO PRESENT A COMPLETE DEFENSE WHEN IT STOPPED HIS COURT-APPOINTED EXPERT WITNESS FROM COMPLETING HER FORENSIC INVESTIGATION BY STRIKING HER FUNDING AUTHORIZATION.

A. Issue raised and ruled on.

Although Mr. Solon did not raise this specific issue before the district court, he repeatedly sought to clarify whether or not the district court would pay expert witness Loehrs for work already performed after the district court struck her funding authorization or would authorize funding to allow her to attend trial. (Supp. RoA, *Ex-Parte* Response to Order Amending *Ex Parte*

Order, pp. 52-53; Vol. 1, First Motion for Expert Services Clarification of Court's Order, p. 238).

B. Standard of review.

If a defendant asserts that a trial court's ruling violated his constitutional rights, then the ruling is subject to *de novo* review. *See United States v. Nash*, 482 F.3d 1209, 1216 (10th Cir. 2007).

C. Discussion.

The federal constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *United States v. Scheffer*, 523 U.S. 303, 329 n.16 (1998), quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984) and citing *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984) (the Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment). *See also Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). A "defendant's right to testify, present witnesses in his own defense, and to cross-examine witnesses against him—often collectively referred to as the right to present a defense—is rooted in the Sixth Amendment's confrontation and compulsory process clauses, *see Rock v. Arkansas*, 483 U.S. 44, 52 [ ] (1977), and the Fifth Amendment's guarantee of due

process and privilege against self-incrimination, *see id*. at 52-53 [ ]." *United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004).

The Supreme Court has repeatedly held that "at a minimum, . . . criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988), citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). This is because the "need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." 484 U.S. at 409. The "right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.* citing *Washington v. Texas*, 388 U.S. 14, 19 (1967).

Due process protections obviously apply to indigent defendants. The Criminal Justice Act, 18 U.S.C. § 3006A, "creates a plan for furnishing

representation to those who lack the financial ability to obtain it on their own. In relevant part, it provides that counsel for a person who is financially unable to obtain investigative, expert, or other services *necessary for adequate* representation may request them in an ex parte application." *United States v. Kennedy*, 64 F.3d 1465, 1470 (10th Cir. 1995) (emphasis in the original). Thus, both the courts and Congress have ensured that an indigent criminal defendant has "the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'" *Medina v. California*, 505 US 437, 444-45 (1992) quoting *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). Finally, due process requires "that indigent defendants receive the 'basic tools' and the 'raw materials integral to' the presentation of an adequate defense." *Kennedy*, 64 F.3d at 1473, quoting *Ake*, 470 U.S. at 77.

It is now widely accepted that extensive computer analysis is a fundamental requirement of any defense effort in a child pornography case.

> Computer-based child pornography and obscenity cases require expert witnesses. This is true because of how investigators recover evidence in such cases. . . . Investigators do not just open a seized computer to find illegal images stashed in the case, they must use a scientific process to recover the evidence that is otherwise undetectable to the unaided human eye. The reports yield a list of files found on a seized computer, the date those files were created, accessed and modified and often include a description of the software and procedures used to extract evidence from the system. Finally, the reports include copies of the evidence investigators discovered in their analysis.

Cox, David, Litigating Child Pornography and Obsecnity Cases in the Internet Age, Summer 1999 Journal of Technology, Law and Policy, 4-SUM J. Tech. L. and Poly., p. 27. An expert witness in a child pornography case must analyze voluminous information found on a seized computer to determine the source of the images found through forensic reconstruction. For indigent defendants, those experts are funded through the CJA.

In *Kennedy*, this Court affirmed the district court's denial of an indigent defendant's requests for additional accounting and paralegal services because the defendant had not demonstrated the need for those services to his defense. 64 F.3d at 1470-73. There, the district court had already authorized CJA funding for an investigator, a financial expert witness, an expert witness on the metal industry, and an expert witness on Ponzi schemes. The district court even appointed a second attorney to work on the defendant's case. *Id.* at 1469. However, the district court denied requests for additional paralegal and accounting assistance. On appeal, this Court concluded that the defendant's general allegations of need without a more specific showing of why these services were necessary or what the defendant expected to find were insufficient to show an abuse of discretion. *Id.* at 1470-73.

By contrast here, there is ample evidence in the record to justify why Ms. Loehrs' continued forensic work was necessary and what she expected to find had

the district court not struck her funding authorization. First, her services were necessary for Mr. Solon to prepare his defense, which the district court acknowledged by authorizing funds to retain her. This authorization was made with full knowledge of her hourly rate and of the fact that the Walsh Act required her presence in Wyoming. However, the district court impeded Ms. Loehrs' ability to complete her work when it concluded, without any basis for comparison, that her charges were "outrageous" and "unusually high." As shown by her Declaration, Ms. Loehrs' hourly rate was reasonable when compared to other private forensic computer experts. Additionally, she spent only a short amount of time on her analysis, as compared with the time spent by three other government investigators. Finally, having authorized funds for this expert, the trial court should have permitted her to complete the job for which she had been retained, namely to thoroughly analyze Mr. Solon's hard drive.

Ms. Loehrs opined, based on her partial investigation, that a virus or Trojan had compromised Mr. Solon's computer system and may have allowed remote users to gain access to his hard drive. However, because the trial court struck her funding authorization, Ms. Loehrs was not able to determine whether or not unauthorized computer users had been able to remotely download the child pornography images onto his computer. Thus, the jury's verdict was based on a

partial presentation of the facts and many questions posed by Ms. Loehrs were left unanswered.

The trial court also required defense counsel to explain his need for this expert with the government's attorney present, in violation of 18 U.S.C. § 3006A(e)(1), which requires that requests for expert services be made in ex parte proceedings. Not only was opposing counsel present, but he was also asked to opine on the need for her continued funding authorization. Defense counsel then submitted the Declaration of Expert Tami Loehrs which was provided to opposing counsel after the district court demanded a detailed accounting of her time and justification for her hourly rate.

The government may contend that the presiding judge never stopped Ms. Loehrs from completing her work but only required preauthorization before funding would be allocated. Having the district court scrutinize a defense expert's proposed work plan in a non-ex parte application conflicts with the requirements of 18 U.S.C. § 3006A(e) and would require Mr. Solon to prematurely reveal his defense prior to trial. Additionally, the district court never remotely suggested <u>any</u> inclination to authorize funding to allow Ms. Loehrs to complete her work. Instead, defense counsel repeatedly sought to ensure, at a minimum, that the district court would authorize funding for her to attend trial. The trial court did authorize funds for her trial attendance and four hours of pretrial preparation.

A defendant's right to present evidence in his defense is a fundamental right guaranteed by the Fifth and Sixth Amendments. The district court denied Mr. Solon the opportunity to present a complete defense when it struck Ms. Loehrs' funding authorization, thereby preventing her from completing her analysis or formulating a conclusion about the source of the pornographic images on Mr. Solon's computer. Accordingly, this Court should vacate Mr. Solon's judgment and conviction and remand this case for retrial with directions to provide sufficient funding to allow the defendant's expert to complete her work.

III. THE PRESIDING JUDGE COMMITTED STRUCTURAL ERROR WHEN HE LEFT THE COURTROOM DURING DEFENSE COUNSEL'S CLOSING ARGUMENT.

A. Issue raised and ruled on.

The presiding judge left the bench during defense counsel's closing argument. (Vol. 3, p. 650). Although he did not make a contemporaneous objection, perhaps because there was no presiding judge to whom to object, Mr. Solon filed a motion for a new trial in which he argued that the judge's absence from the bench during a critical stage of the trial constituted structural error. (Vol. 1, pp. 450-51). The trial court denied the motion. (Vol. 1, pp. 478-88).

B. Standard of review.

A judge's absence from the bench during a criminal trial is error of constitutional magnitude subject to *de novo* review. *United States v. Mortimer*, 161 F.3d 240, 241 (3d Cir. 1998), citing *Lesko v. Owens*, 881 F.2d 44, 50 (3d. Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *Riley v. Deeds*, 54 F.3d 1117, 1119 (9th Cir. 1995). A judge's absence from the courtroom during defense counsel's closing argument can constitute structural error which is reversible *per se*. *Riley*, 56 F.3d at 1119, *Mortimer*, 161 F.3d at 241.

C. Discussion.

A judge's presence during a criminal trial "is at the 'very core' of the constitutional guarantee of a trial by an impartial jury." *Riley*, 56 F.3d at 1119, quoting *Peri v.* State, 426 So.2d 1021, 1023 (Fla. Dist. Ct. App. 1983). "When the judge is absent at a 'critical stage' the forum is destroyed." *Mortimer*, 161 F.3d , 162, citing *Gomez v. United States*, 490 U.S. 858, 873 (1989). This is because the framework "'within which the trial proceeds' has been destroyed.'" *Id.* citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Errors that fundamentally undermine the fairness of a trial can rise to a structural level, requiring automatic reversal. *Fulminante*, 499 U.S. at 310 (1991); *Riley*, 56 F.3d at 1120 (structural

error is a defect in the constitution of the trial mechanism which defies analysis by harmless error standards).

In *Riley*, the court found structural error when the trial court left the bench during jury deliberations and could not be located. In the judge's absence, his law clerk reconvened the court, granted the jury's request to have the victim's direct examination read back to the jury, and presided during the rereading of that testimony. 56 F.3d at 1119. This constituted structural error because a there was a breakdown in the trial proceedings, "a structural collapse so severe that its effect on the trial cannot be 'quantitatively assessed in the context of the other evidence presented.'" *Id.* at 1120, citing *Hays v. Arave*, 977 F.2d 475, 481 (9th Cir. 1992).

Structural error was also found in *Mortimer*, where the judge was absent from the bench during defense counsel's closing argument. "No good reason or indeed any reason was given for his disappearance." 161 F.3d at 241. Distinguishing cases from the "era when structural error was not the criterion," the court concluded that structural error occurred because "[p]rejudice to the defendant from the jury inferring that the defense was not worth listening to may have occurred . . . ." 161 F.3d at 242.

In Mr. Solon's case, no good reason was given by the judge for his absence. In fact, the reason he provided, that his secretary had a regular afternoon card game to attend and therefore his attention to several letters was required, implied that his

secretary's canasta game was more important than presiding at Mr. Solon's trial. Moreover, the judge left the bench just as defense counsel began to summarize Ms. Loehrs' testimony, a witness the judge had accused of testifying "falsely" and submitting "excessive bills" to the government. The timing of the judge's departure from the bench, in conjunction with his highly partisan comments impugning the truthfulness of Ms. Loehrs' testimony and undercutting the value of her services, affected the fairness of the trial. The judge's absence from the bench, in light of his deprecatory comments toward the defendant's expert, gave the jury the impression that he had already made up his own mind. Finally, the judge's statement to the jury, following closing arguments, that they would likely reach a verdict quickly, again left the impression that the judge had already made up his mind about Mr. Solon's guilt.

This case is readily distinguishable from *United States v. Love*, 134 F.3d 595, 605 (4th Cir. 1998), in which the court held that any error in the judge's absence from the courtroom during closing arguments constituted plain error that did not result in any prejudice to the defendant. In *Love*, the judge was absent during closing arguments for both the government and the defense and explained that he would be available to rule on any objections should they arise. *Id.* at 604. The court in *Love* found that any prejudice that may have occurred was speculative at best because the judge was absent for both parties' closing arguments and the

defendant could not cite any specific comments made by the judge that might have affected the fairness of the trial. *Id.* at 605.

By contrast here, the presiding judge remained in the courtroom for the entirety of the government's closing argument but left the courtroom during defense counsel's closing. This left the impression that the presiding judge had already been persuaded by the government's case and did not believe defense counsel's argument merited his attention. When combined with the judge's overt hostility to Ms. Loehrs during her trial testimony[10] (specifically his attempts to discredit her integrity by accusing her of testifying "falsely" and submitting 'excessive bills'), his suggestion that his secretary's card game was more important than listening to defense counsel's closing argument, and his statement that the jury could quickly reach a verdict, the judge's absence from the bench during defense counsel's closing argument left the distinct impression that the judge had already decided Mr. Solon's guilt. These multiple instances of partiality fundamentally undermined the fairness of Mr. Solon's trial and constituted structural error requiring automatic reversal.

[10] That the judge was hostile toward Ms. Loehrs is evident from his disparaging comments regarding her abrasiveness and 'overexalted ideas of her own worth' during pretrial proceedings.

The government is likely to argue that without a timely objection, this issue must be reviewed for plain error. In both *Riley* and *Mortimer*, the courts concluded that the lack of a contemporaneous objection did not preclude the court from *de novo* review of the error. *Riley*, 56 F.3d at 1121 (no contemporaneous objection required); *Mortimer* (same). The lack of a contemporaneous objection should be excused because having a judge leave the courtroom in mid-sentence is such a bizarre situation for trial attorneys to confront. Moreover, it is unclear to whom to object, when to lodge the objection or the basis for the objection.

Should this Court review this issue under a plain error standard, Mr. Solon can demonstrate, as set forth above, that the constitutional error here is plain, on the record and affected his right to a fair trial. *United States v. Taylor*, 514 F.3d 1092, 1100 (10th Cir. 2008). In the context of an error of constitutional magnitude, it is the government's burden to show an absence of prejudice resulting from the judge's failure to stay in the courtroom. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995), citing *Chapman v. California*, 386 U.S. 18, 24 (1967) (in the context of a *constitutional* trial error, that error is harmless only if "harmless beyond a reasonable doubt" and "constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless").

The error here was plain, on the record and affected Mr. Solon's substantial right to a fair trial. The judge's departure from the courtroom and the reason given for his absence seriously undercut the dignity of the trial proceeding. Moreover, the judge's departure from the courtroom just as defense counsel began discussing Ms. Loehrs' testimony, along with the judge's comments discrediting that expert's integrity, affected the outcome of the trial by undermining her credibility. The government cannot demonstrate that these errors were harmless because Ms. Loerhs' testimony raised significant questions regarding the source of the images on Mr. Solon's computer that were not refuted by the government, other than by showing that she had not been able to complete her analysis.

This case should be remanded for retrial. Mr. Solon is entitled to a trial free of structural errors of constitutional magnitude. Mr. Solon is entitled to a fair trial where issues of credibility and guilt are determined solely by the jury, without influence by the unconstitutional conduct or partisan statements of the presiding judge.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the unusual issues presented in this appeal, counsel believes oral argument may be helpful to this Court.

CONCLUSION

WHEREFORE, Mr. Solon respectfully requests the Court to vacate his conviction and sentence and remand this case to the district court for further proceedings consistent with its opinion in this case.

Respectfully submitted this 4th day of June 2009.

s/ Megan L. Hayes

Megan L. Hayes
910 Kearney Street
Laramie, WY 82070
Tel: (307) 760-6258
E-mail: mlhayes@tribcsp.com

Attorney for Nathaniel Solon

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 8,898 words. I relied upon Microsoft® Office Word 2008 SP2 to calculate the word 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/ Megan L. Hayes

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June 2009, I deposited a true and correct copy of the foregoing **NATHANIEL SOLON'S OPENING BRIEF** by e-mail and by United States mail, postage prepaid, addressed to:

James C. Anderson
Assistant U.S. Attorney
2120 Capitol Avenue, Suite 4000
P.O. Box 668
Cheyenne, WY 82003-0668
James.anderson@usdoj.gov

/s Megan L. Hayes

CERTIFICATE OF DIGITAL SUBMISSIONS

I hereby certify that pursuant to this Court's General Order dated August 10, 2007 that there are no required privacy redactions to be made to this document or its attachments, and that this document and its attachments have been scanned for viruses with Norton AntiVirus (Symantec Corporation) version 14.2.0.29 (updated on March 31, 2009) and are free of viruses.

s/ Megan L. Hayes