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

GOVERNMENT'S RESPONSE TO EN BANC PETITION

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STATEMENT OF CASE

On September 25, 2008, the Defendant was charged by superseding indictment with attempted receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), and possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Vol. 1, Doc. 98)[1]. The Defendant pleaded not guilty, the matter was tried to a jury, and on November 10, 2008, he was found guilty of both counts charged in the indictment (*Id.,* Doc. 131).

Pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(e)(1), the trial court permitted the Defendant to hire Tami Loehrs, a forensic computer analyst from Tucson, Arizona, to review the digital evidence in this case. Ms. Loehrs was to bill $250 an hour for her services which were not to exceed $20,000 (*Id.*, Doc. 61). After Ms. Loehrs filed an "interim" invoice for $10,603.90 after three days work, the trial court modified its original order by striking its authorization for a total expenditure of $20,000 and ordered that from that time forward the defense would be required to

[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. All citations to transcripts will be designated "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).

submit specific cost estimates of any further work by Loehrs, justify the need therefore, and the reasonableness of the cost (Vol. 2, Docs. 69, 70). The trial court actually granted all further funding requests made by the defense for Loehrs to work on the case and ultimately paid her $22,880.84 for her services (Docs. 76, 96, 106, and 111).

At trial, Ms. Loehrs repeatedly claimed that her work had been "stopped" by the court and that she was unable to complete her analysis of the digital evidence seized by the government (Vol. 3, 11/6/08 Tr. Trans. at 160; Vol. 3, 11/7/08 Tr. Trans. at 40, 96, 97, 98). In response to a prosecution request to strike testimony from Ms. Loehrs that she had been stopped from working, the trial judge stated,

> Members of the jury, the witness just said that she was stopped and coupled with her testimony yesterday there is an 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.

(Vol. 3, 11/07/08 Tr. Trans. at 42).

At trial, during defense counsel's closing argument, the trial judge left the bench, without declaring a recess, to go to his chambers for a short period of time. As he was leaving the courtroom, the judge told defense counsel to proceed with his

argument, but defense counsel instead elected to suspend his argument until the judge returned. Upon his return to the courtroom, the judge declared that he had left to attend to some correspondence, as his judicial assistant would not be in chambers that afternoon due to an engagement to play canasta (Vol. 3, 11/10/08 Tr. Trans. at 36-37). Defense counsel did not raise an objection to the judge leaving the courtroom, nor did he request any type of curative instruction (*Id.*). 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, which the trial court denied (Vol. 1, Docs. 135, 146).

On appeal, the Defendant raised three issues: 1) his statutory right to a speedy trial had been violated; 2) the trial court denied him the right to present a complete defense by stopping Ms. Loehrs from completing her work; and 3) the trial court committed structural error, or at least plain error, by leaving the courtroom during defense counsel's closing argument. A unanimous panel rejected the first two arguments raised by the Defendant. Further, all three members of the panel, based upon the facts present here, found that the trial judge's brief absence from the courtroom did not constitute structural error. Further, a majority of the panel found that while the trial judge's absence from the courtroom constituted a clear and obvious error, reversal was not warranted as the Defendant did not establish by a reasonable probability that, but for the judge's brief absence from the courtroom

during the Defendant's closing argument, the jury would not have convicted him. *Id.* Judge Lucero dissented from this portion of the opinion, stating that he had " no confidence in the jury verdict." *United States v. Solon*, ___ F.3d ___, 2010 WL 537770, (10th Cir. 2008).

REASONS FOR DENYING THE PETITION

En banc review of the panel decision is not warranted. This court's rules make clear that en banc review is an "extraordinary" procedure that is "disfavored." Tenth Cir. R. 35.1(A). Such a review is "intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court." *Id*.

This case does not meet the "rigid standards" justifying en banc review. Fed. R. App. P. 35 advisory committee note (1998 Amendments). A petition for rehearing en banc must demonstrate that either "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Neither standard is met in the instant case. This case presents a very unique set of facts upon which the outcome of the case turns. There is simply no reason for the entire court to revisit the decision of the panel.

ARGUMENT

A. The panel's finding that the trial judge's brief absence from the courtroom did not constitute structural error does not merit en banc review.

The Defendant insists that the trial judge committed structural error when he left the bench during defense counsel's closing. However, all three members of the *Solon* panel disagreed with that notion and found structural error did not occur. *United States v. Solon,* 2010 WL 537770, at *5 and *7. This issue does not merit rehearing en banc because the panel's holding clearly does not conflict with any prior decision of this court or the Supreme Court or involve an issue of "exceptional public importance."

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 presides 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).

In support of his structural error argument, the Defendant relies on two decisions from other circuits - *United States v. Mortimer*, 161 F.3d 240 (3d Cir. 1998) and *Riley v. Deeds*, 56 F.3d 1117, 1119 (9th Cir. 1995). 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 discover there was no judge to rule upon the matter. *Id*., 161 F.3d at 241. 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. The facts in this case were fundamentally different, because here, absolutely nothing of import occurred from the moment the trial judge left the bench until he returned to the bench a few minutes later.

In *Riley v. Deeds*, the trial judge left the courthouse during jury deliberations. The jury requested that a portion of a critical witness' testimony be read to them, 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. Again, the facts of the case at bar differ considerably from those present in *Deeds*. Here, as noted above, 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. This did not occur here - the trial judge was not absent at a critical stage of the trial, because absolutely nothing happened in his absence. In effect, the trial was recessed until the judge's return. Under such circumstances there is no basis to find 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. Two state supreme courts have also recently considered this issue and rejected the notion that a trial judge's brief absence from the courtroom during trial proceedings constitutes structural error. *State v. Langley*, 958 So.2d 1160, 1168 (La. 2007); *Berry v. State*, 651 S.E.2d 1, 6 (Ga. 2007).

As the panel majority noted, there is no question that it was error for the trial judge to leave the bench under the circumstances present here. However, in this case of first impression, the panel majority properly found that in light of the nature, context, and significance of the error, it simply could not be deemed structural. This holding was not in conflict with any prior decision of this court or of the Supreme Court. An examination of the handful of cases that have discussed this exceptionally rare happenstance reveal that the determination of structural error turned upon the facts present within each respective case. Given that this case presents an issue that rarely arises - indeed, it has never previously arisen in this circuit - and given that the outcome is principally driven by the facts and circumstances presented in each case, this case simply does not present a question of exceptional importance meriting the scrutiny of the entire court.

B. The panel's finding that the Defendant failed to demonstrate plain error because he did not establish by a reasonable probability that, but for the judge's brief absence from the courtroom, the outcome below would have been different does not merit en banc review.

The Defendant asserts that even if this court rejects his structural error contention, en banc review should still be granted because the panel wrongly decided that plain error did not occur in this case. Specifically, the Defendant contends that "the judge's departure from the courtroom just as defense counsel began discussing

Ms. Loehr's testimony, along with the judge's comments discrediting that expert's integrity and questionable billing practices, created a reasonable probability that the outcome of the trial was affected by the judge's undermining Ms. Loehr's credibility." Petition for Rehearing En Banc, at 11. The panel majority disagreed, finding that "the record does not support [the Defendant's] position." *United States v. Solon*, 2006 WL 537770, *9. Indeed, the record shows that the panel majority was correct in this regard. Clearly it was error for the trial judge to leave the courtroom in the fashion he did. But his exit, while clear and obvious error, was not of such magnitude to sway the jury to convict the Defendant.

The Defendant in this matter testified that he did not knowingly possess the child pornography placed on his computer (Vol. 3, 11/06/08 Tr. Trans. at 70). To bolster his testimony the defense called Ms. Loehrs who speculated that his computer might have been compromised by some type of virus that could have allowed a third party to access the computer and place the child pornography on it (*Id.,* 11/07/08 Tr. Trans. at 29, 59-61).

However, the defense simply could not overcome the government's evidence, which the panel majority described as "strong." *United States v. Solon*, 2006 WL 537770, *6. As the panel majority noted, the Defendant's computer was observed by investigators offering child pornography for download on four separate occasions

during the summer of 2006 (*Id.*, 11/04/08 Tr. Trans. at 18-86). A forensic analysis of his computer revealed that on September 20, 2006, one day before his computer was seized pursuant to a search warrant, forty-six files with names consistent with child pornography were downloaded to the Defendant's computer using a peer-to-peer file sharing software program known as Limewire (*Id.*, 11/05/08 Tr. Trans. at 125-127). The Defendant admitted to using the Limewire program on September 20, 2006, for the purpose of downloading two computer games (*Id.*, 11/04/08 Tr. Trans. at 58-59). Additionally, the Defendant admitted that he often played online poker and the forensic exam of his computer revealed that on September 20, 2006, Mr. Solon was playing online poker approximately five minutes before the Limewire program was used to download child pornography files to his computer (*Id.* 11/06/08 Tr. Trans. at 99-100; 11/05/06 Tr. Trans. at 121-124). Further, the government's forensic analyst, Special Agent Randy Huff, testified that, unlike Ms. Loehrs, he had checked the Defendant's computer to determine if its anti-virus software was functioning properly (*Id.*, 11/05/08 Tr. Trans. at 93-94; 162; 169-170). According to Huff, not only was the anti-virus software functioning properly, it had properly detected and quarantined viruses that were introduced to the computer, that the computer was not infected with any type of virus or malware, and there was no indication it was compromised by a virus or other malware (*Id.*, 169-70). Huff testified that it was his

opinion that the computer had not been infected with any type of virus and that it had been used to intentionally download files containing child pornography (*Id.*, at 161-162).

It is also important to note that while the Defendant insists on linking the judge's exit from the courtroom with the beginning of defense counsel's summary of Ms. Loehr's testimony, that is not what the record reflects, as was noted by the panel majority. *See* Petition for En Banc Review, at 4, 12. As the panel majority stated,

> [a]dditionally, although the judge left the bench during defense counsel's closing argument, it was during a point at which counsel was comparing the testimony of defense and prosecution witnesses in general, not just Ms. Loehrs's. Defense counsel had already mentioned Ms. Loehrs's testimony several times during his argument and went on to address her testimony in further detail after the judge's return. Even in light of the judge's prior statement, we cannot agree with Mr. Solon that the district judge's absence could only be interpreted as discrediting Ms. Loehrs's testimony or Mr. Solon's defense.

United States v. Solon, 2010 WL 537770, *6 (*see* Vol. 3, 11/10/08 Tr. Trans. 33-40).

The Defendant cannot now argue in a petition for en banc review that the panel majority somehow got the facts wrong. The Defendant's suggestion that he did establish facts to show that the outcome of his trial would have been different but for the trial judge's brief absence from the courtroom is in reality an argument that the panel somehow misapprehended the facts in reaching its decision. But that is the stuff of a petition for panel rehearing, not en banc review. Fed. R. App. P. 40 (a)(2).

Having failed to properly bring before this court an argument that the panel got the facts wrong, the Defendant must accept the factual basis of the panel decision. As a determination of plain error in this case principally depends on assessing the weight and significance of the unique facts present here, this is simply not the kind of case warranting the attention of the court en banc.

CONCLUSION

For the reasons outlined above, this very unusual case was properly resolved by the panel majority, and it does not merit en banc review. The case presents no question of "exceptional importance." At best, it presents a continuing disagreement about the weight which should be accorded to various facts in the record under "plain error" analysis, and such purely fact-based questions are not the kind of matters requiring the attention of the court en banc. The court must accordingly deny the Defendant's request for en banc review.

DATED this 26th day of March, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing **Government's Response to En Banc Petition** 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 8.0, most recently updated 3/25/10, and, according to the program, is virus free.

s/ James C. Anderson
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 3,462 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/ James C. Anderson
JAMES C. ANDERSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that on this 26th day of March, 2010, I served a true and correct copy of the foregoing **Government's Response to En Banc Petition** upon the following by placing the same in the United States mail, duly enveloped and sufficient postage prepaid, upon:

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