IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 09-8018

District of Wyoming
D.C. No. 07-cr-32B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHANIEL SOLON,

Defendant-Appellant.

PETITION FOR REHEARING *EN BANC*

Nathaniel Solon hereby petitions for rehearing *en banc* pursuant to Federal Rule of Appellate Procedure 35. In support of his petition, undersigned counsel states as follows:

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(b)(1)

This petition presents the following issue of exceptional importance that warrants consideration by the full Court:

1. *En banc* review is warranted to determine whether structural error results when a judge leaves the courtroom during a criminal trial. This case involves the shocking behavior of an Article III judge who, without recessing the trial proceedings, simply walked out of the courtroom during defense counsel's closing argument. In analogous circumstances, the Third Circuit Court of Appeals held that structural error resulted, requiring automatic reversal. Because of the exceptional circumstances presented by this case, *en banc* review is warranted to determine if the error here was structural.

INTRODUCTION

Mr. Solon was charged by indictment 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. His appointed counsel retained Tami Loehrs, an out-of-state expert with significant experience in computer forensic analysis. In her preliminary expert report, Ms. Loehrs opined that a "Trojan" had compromised Mr. Solon's hard drive and that Trojans have the ability to allow unauthorized access to a computer system by outside sources. (Vol. 1, p. 222).

Ms. Loehrs stopped her forensic analysis of Mr. Solon's hard drive before trial because the district court balked at the cost of her expert services. The district

court withdrew its original authorization of $20,000 for her services and ordered that all future requests should be supported by specific cost estimates and evidence of the need for and reasonableness of such services. The district court's contempt for Ms. Loehrs was palpable from the pre-trial record. For example, in explaining his reasons for striking the initial funding authorization, the district court described Ms. Loehrs as "abrasive," "outrageous in her charges," and as having "pretty exalted ideas of her worth." (Vol. 3, pp. 823-24, 901). The district court also stated that it would be a "cold day in hell before I ever authorize" a $15,000 payment to her (vol. 3, p. 823-24), and that he would not open the "gates of Fort Knox" to Ms. Loehrs. (Vol. 3, p. 895).

At Mr. Solon's trial, several criminal investigators testified for the government. Agent Randall Huff testified that using forensic computer software, he had located files that had been deleted from Mr. Solon's hard drive, but still resided in "unallocated" space on the hard drive. These deleted files contained images of child pornography that had been downloaded to Mr. Solon's computer on September 20, 2006.

Tami Loehrs testified regarding numerous security problems created by Mr. Solon's file-sharing software and opined that Mr. Solon's virus software had been infected with multiple viruses and Trojans during August and September of 2006. 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 her forensic examination had been "stopped," which prompted an objection 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.

(Vol. 3, p. 510:13-20).

The jury heard the parties' closing arguments at the end of the trial. When defense counsel began summarizing Ms. Loehrs' testimony, the presiding judge left the courtroom and instructed the attorneys to 'just go ahead.' (Vol. 3, p. 650). Obviously perplexed, the attorneys waited for the judge to return. Several 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 thereafter, the jury found Mr. Solon guilty of both counts of possessing child pornography.

The panel decision affirmed Mr. Solon's conviction. The panel concluded that the judge's brief absence from the bench did not constitute structural error. The panel also concluded that because Mr. Solon had not objected to the judge's departure from the bench during trial, plain error review was appropriate and that

Mr. Solon did not satisfy the third prong of plain-error review because he failed to show a reasonable probability that, but for the error claimed, the result of the proceeding would have been different. *United States v. Solon*, Slip. Op., p. 12.

The dissent agreed that structural error had not resulted but opined that Mr. Solon had demonstrated plain error because "the jury was unfairly prejudiced against Loehrs by the comments and actions of the district court." *Id.* pp. 4 and 6. The dissent further opined that Mr. Solon met the fourth prong of plain error review because the court's actions seriously affected the fairness integrity, or public reputation of judicial proceedings. The dissent found that the "district court went beyond what might simply be described as negative feelings toward a defense witness, actively impeaching Loehrs by word and deed in derogation of its duty of neutrality. When judges behave in such a manner, our entire judicial system suffers." *Id.* pp. 6-7.

ARGUMENT

Whether structural error results when a judge leaves the courtroom during a criminal trial is a question of exceptional importance. In similar circumstances, both the Third Circuit and Ninth Circuit Courts of Appeal have held that a judge's absence from the bench during a criminal trial constitutes structural error, requiring automatic reversal.

This case raises questions regarding a criminal defendant's right to foundational constitutional protections, such as a defendant's right to have an impartial Article III judge preside at trial. This Court reviews structural error claims based on the nature, context and significance of the violation. As demonstrated below, review for structural error merits this full Court's attention.

A structural error is a "defect[] in the constitution of the trial mechanism, which defies analysis by harmless error standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). According to the Supreme Court, "certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." *Rose v. Clark*, 478 U.S. 570, 587 (1986). Indeed, "some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error . . . ." *Chapman v. California*, 386 U.S. 18, 23 (1967), citing as examples *Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confession), *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel), and *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge). Structural errors, such as the absence of counsel for a criminal defendant, a partial judge, the unlawful exclusion of members of the defendant's race from a grand jury, or violations of the right to a public trial, affect the entire conduct of a trial and their impact cannot be quantitatively assessed in the context of other evidence presented at trial. *Fulminante*, 499 U.S. at 308.

Generally, structural errors are the exception rather than the rule, and if a "defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose,* 478 U.S. at 579. Whether errors are structural or subject to harmless error review "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). Thus, whether structural error results when a judge leaves the bench during trial requires a fair contextual and constitutional analysis of the right that was violated.

A criminal defendant is constitutionally entitled to have a judge preside over all critical stages of his trial. *See Gomez v. United States*, 490 U.S. 858, 876 (1989) (refusing to apply harmless error analysis where defendant was deprived of right to have all critical stages of his criminal trial conducted by the district court judge); *Riley v. Deeds*, 54 F.3d 1117, 1119 (9th Cir. 1995) (the "presence of a judge is at the 'very core' of the constitutional guarantee of trial by an impartial jury. 'This proposition has been so generously admitted, and so seldom contested, that there has been little occasion for its distinct assertion'"), quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1898) and *Peri v. State*, 426 So.2d 1021, 1023 (Fla. Dist. Ct. App. 1983). That judge also must be impartial. *Tumey v. Ohio*, 273 U.S.

510. Therefore, if a judge's conduct in leaving the courtroom during trial leaves an abiding impression on the jury of an appearance of partiality, then structural error can result.

A trial court judge who leaves the bench during a criminal trial, depending on the nature and context of the departure, is an error in magnitude and closely related to being deprived of an impartial adjudicator. For this reason and in analogous circumstances to Mr. Solon's trial, the Third Circuit held that structural error resulted when the trial judge left the bench during defense counsel's closing argument. In *United States v. Mortimer*, 161 F.3d 240 (3d Cir. 1998), the judge, who had been present during the prosecutor's argument, disappeared from the bench during defense counsel's closing, only to reappear in time to thank her for her remarks and request rebuttal from the prosecutor. 161 F.3d at 241. The court in *Mortimer* reasoned that "[w]hen the judge is absent at a 'critical stage' the forum is destroyed." *Id.* at 241, 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. at 309-10. The court reasoned that "[p]rejudice to the defendant from the jury inferring that the defense was not worth listening to may have occurred . . . ." The Court in *Mortimer* did not require the defendant to demonstrate prejudice because the "structural defect determines the result." *Id.*

The court in *Mortimer* distinguished several cases from other circuits where a defendant was required to show that prejudice resulted from the judge's absence, including *United States v. Love*, 134 F.3d 595 (4th Cir.), *cert. denied*, 118 S. Ct. 2332 (1998), and *Stirone v. United States*, 341 F.2d 253 (3d Cir.), *cert. denied*, 381 U.S. 902 (1965). According to the Third Circuit, in these cases, the parties' consent to the judge's absence "made the difference." 161 F.2d at 241-42. *See also United States v. Kone*, 307 F.3d 430 (6th Cir. 2002) (parties consented to judge's absence during jury deliberations to attend out-of-town conference).

The Ninth Circuit has also held that structural error resulted when a trial judge left the courtroom during a criminal trial. In *Riley v. Deeds*, the court determined that "[a] judge's absence during a criminal trial, including court proceedings after a jury begins deliberations, is error of constitutional magnitude." 56 F.3d 1117, 1119 (9th Cir. 1995), citation omitted. The court in *Riley* held that structural error resulted when the trial judge allowed his law clerk to grant the jury's request to have a witness's direct examination read back and presided during that proceeding, because "there was a complete abdication of judicial control over the process," resulting in a "structural vacuum." 56 F.3d at 1121. The court also found that the lack of a timely objection was excused because "[t]here was no opportunity to make any meaningful objection." *Id.*

This full Court should decide whether the district court's error in leaving the courtroom fundamentally undermined the fairness of Mr. Solon's trial and rose to a structural level, requiring automatic reversal. Here, the timing of the judge's departure from the bench during defense counsel's closing argument, coming after the judge had instructed the jury that Mr. Solon's expert witness was dishonest and had submitted excessive bills, may have signaled to the jury the judge's perception that the defendant's theory was not worth his time. The judge's explanation that his secretary's canasta game was more important than listening to defense counsel's summation of Ms. Loehrs' testimony also negatively reflected on the credibility of the entire defense case and signaled to the jury that the judge had no reasonable doubt as to Mr. Solon's guilt. The context for the district court's actions and the significance of the violation deprived Mr. Solon of his fundamental right to have an impartial adjudicator preside at all critical stages of the criminal proceedings. Because this error is necessarily unquantifiable and indeterminate in the context of other evidence presented at trial, it qualifies as structural error and warrants this Court's review.

The Panel's decision in this case concluded that plain error review applied because the judge was available if needed to rule on any objections, nothing happened during his absence and that, despite the parties' confusion, Mr. Solon did not object to the judge's absence. *United States v. Solon*, Slip Op., pp. 10-11. As

was the case in *Riley*, Mr. Solon's failure to object to the judge's departure from the bench should be excused, given the obvious confusion created by the judge's highly unorthodox conduct.

Even under the plain error standard of review, Mr. Solon can satisfy both the third and fourth prongs of the test set forth in *United States v. Olano*, 507 U.S. 725 (1993) (plain error occurs when (1) the district court errs, (2) the error is obvious, (3) the error affects a defendant's substantial rights and (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings). The Panel held that Mr. Solon did not satisfy the third prong on the plain error test. As the dissenting judge noted, to establish prejudice under the third prong of the plain error standard, there must be a reasonable probability "'sufficient to undermine confidence in the outcome.' Solon does not bear the burden of proving he is actually innocent; instead, 'the touchstone is simply whether the ultimate verdict is one worthy of confidence.'" *United States v. Solon*, Slip. Op, p. 6, Judge Lucero, dissenting (citations omitted).

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 and questionable billing practices, created a reasonable probability that the outcome of the trial was affected by the judge's undermining Ms. Loehrs' credibility. The full Tenth Circuit Court should determine whether

the verdict in this case is worthy of confidence, in light of the judge's conduct in leaving the courtroom.

Lastly, Mr. Solon can satisfy the fourth prong of the plain error test because the judge's departure from the courtroom and the reason given for his absence seriously undercut the dignity of these trial proceedings. Suggesting that your secretary's afternoon card game is more important than presiding at a criminal trial is a significant embarrassment to the public reputation of judicial proceedings in courts throughout this circuit. Mr. Solon requests that this full Court review the fairness of Mr. Solon's trial to determine, whether under either structural or plain error review, he is entitled to a new trial free from judicial conduct that undermines confidence in the verdict reached by the jury here.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing *en banc*.

Respectfully submitted this 10th day of March 2010.

_s/Megan L. Hayes_____
Megan L. Hayes
Corthell and King, P.C.
221 South 2nd Street
P.O. Box 1147
Laramie, WY 82073
Tel: (307) 742-3717
E-mail: mlhayes@wyoming.com

Attorney for Nathaniel Solon

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2010, I deposited a true and correct copy of the foregoing **NATHANIEL SOLON'S PETITION FOR REHEARING *EN BANC*** 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 with respect to the foregoing Petition for Rehearing *En Banc:*

(1) All required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

(2) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program McAfee version 9.15 (updated on February 17, 2010) and are free of viruses.

s/ Megan L. Hayes

FILED
United States Court of Appeals
Tenth Circuit

February 17, 2010

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. NATHANIEL SOLON, Defendant - Appellant.	No. 09-8018

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D. Ct. No. 2:07-CR-00032-CAB-1)

Megan L. Hayes, Laramie, Wyoming, appearing for Appellant.

James C. Anderson, Assistant United States Attorney (Kelly H. Rankin, United States Attorney, with him on the brief), Office of the United States Attorney for the District of Wyoming, Cheyenne, Wyoming, appearing for Appellee.

Before **TACHA**, **SEYMOUR**, and **LUCERO**, Circuit Judges.

TACHA, Circuit Judge.

Defendant-appellant Nathaniel Solon was convicted of possession and attempted receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(1), (a)(5)(B), and (b)(2). He was sentenced to concurrent terms of 72 months'

imprisonment. In this appeal, Mr. Solon argues that: (1) the government denied him the right to present a complete defense; (2) a six-minute absence by the trial judge constituted structural error; and (3) he was denied his right to a speedy trial. We have jurisdiction under 28 U.S.C. § 1291, and we AFFIRM.

I. BACKGROUND

On January 18, 2007, Mr. Solon was charged by indictment with possession of child pornography. He entered a plea of guilty to that charge on October 2, 2007. During his sentencing hearing on January 3, 2008, Mr. Solon stated that he was innocent and the only reason he had pleaded guilty was because he did not have the financial resources to hire an expert witness to investigate his defense. The district court continued the proceeding, appointed Mr. Solon's private attorney to represent him, and indicated that it would provide funding for an expert witness to help Mr. Solon prepare a defense.

Mr. Solon requested the court's approval to retain Tami Loehrs, an out-of-state expert with experience in computer forensic analysis. The district court approved Ms. Loehrs as an expert witness, and authorized payment for "a total billing not to exceed $20,000 unless further ordered by the Court." Subsequently, Mr. Solon filed a motion requesting payment of Ms. Loehrs's initial bill of $10,603.90, which covered travel, lodging, and compensation for three days of work. Although the court noted that the bill seemed "unusually high," it paid the initial request. Because of the court's concern over Ms. Loehrs' fees, however, it

withdrew its prior authorization of a $20,000 maximum for her services and ordered that all future requests should be supported by specific cost estimates and evidence of the need for and reasonableness of such services prior to incurring additional costs.

At a hearing on April 16, 2008, Mr. Solon cited Ms. Loehrs's preliminary expert report as grounds for withdrawing his guilty plea. In her report, Ms. Loehrs opined that there was no evidence that the images of child pornography on Mr. Solon's computer were ever opened, viewed, or saved to another location. Furthermore, she believed that a virus may have compromised the system and allowed access to the computer by outside sources, although she had not yet determined to what extent, if any, that had actually occurred.

While the court considered Mr. Solon's motion to withdraw his guilty plea, he filed a motion to dismiss for violation of the Speedy Trial Act. The court allowed Mr. Solon to withdraw his guilty plea but denied his motion to dismiss. The court also agreed to pay for Ms. Loehrs to testify at the trial and for four hours of pretrial consultation.

Mr. Solon's trial commenced on November 3, 2008. During defense counsel's closing argument, the judge excused himself from the bench, instructing the attorneys to "go right ahead." Defense counsel did not object, but decided to wait for the judge's return before completing his closing argument. The judge returned just under six minutes later, apologized for his absence, and explained

that it was his secretary's afternoon to play canasta and he had to get a couple of letters out. The jury convicted Mr. Solon later that day, and the court sentenced him to 72 months' imprisonment.

Mr. Solon filed a motion for a new trial, asserting that the judge's absence constituted structural error because the jury may have inferred from his conduct that Mr. Solon's argument was not worth listening to. The trial court denied the motion, concluding that if there was any error it was harmless. This timely appeal followed.

II. DISCUSSION

A. Complete Defense

Mr. Solon first alleges the district court infringed on his Fifth Amendment right to present a complete defense and his rights under the Criminal Justice Act ("CJA") when it modified its prior approval of funding for his expert witness. He argues that the court's order effectively halted the expert's work and struck her funding, thereby impeding his ability to develop and put on a complete defense. The government contends that it was permissible for the district court to require Mr. Solon to provide documentation prior to obtaining additional funding and that the district court did not violate Mr. Solon's rights because it never denied a request for funding.

1. *Criminal Justice Act*

The CJA authorizes district courts to pay for indigent defendants' counsel

and "investigative, expert, and other services necessary for adequate representation." 18 U.S.C. § 3006A(e)(1). "In order to obtain services under this provision, the defendant must do more than allege that the services would be helpful." *United States v. Kennedy*, 64 F.3d 1465, 1470 (10th Cir. 1995). Rather, as the statute clearly states, the defendant must convince the court that the expert's services are "necessary to an adequate defense." *United States v. Greschner*, 802 F.2d 373, 376 (10th Cir. 1986). Under the CJA, if the cost of an expert exceeds $1,600, not taking into account actual expenses, it will not be paid unless "certified by the court . . . as necessary to provide fair compensation for services of an unusual character or duration . . . ." 18 U.S.C. § 3006A(e)(3). "Appointing an expert is within the discretion of the [c]ourt," *United States v. Ready*, 574 F.2d 1009, 1015 (10th Cir. 1978); therefore, we review the denial of a CJA funding request for an abuse of discretion. *Kennedy*, 64 F.3d at 1470.

Here, the district court did not abuse its discretion, because, as the government points out, the district court never actually denied a funding request. Indeed, the district court granted the only funding request Mr. Solon made. Therefore, Mr. Solon's argument necessarily fails. Furthermore, § 3006A(e)(3) expressly provides a district court with the discretion to determine whether high costs are "fair compensation for services of unusual character or duration." In this case, the defense expert, Ms. Loehrs, submitted a bill of more than $10,000 for three days of work. The district court, understandably concerned by the high

costs, altered its earlier approval of expenses and required Ms. Loehrs to provide the court with an "affidavit itemizing expenses incurred on behalf of [Mr. Solon] prior to . . . preauthorization of expert expenses." This change was intended to provide the court with a chance to "scrutinize and approve reasonable expenses incurred," and is consistent with the district court's discretion to approve expert fees under § 3006A(e)(3).

Because the district court never denied a funding request and because the court's requirement of an affidavit from Mr. Solon and his expert finds implicit support in § 3006A(e)(3), we hold that the district court did not abuse its discretion with respect to its provision of defense expert fees under the CJA.

2. *Fifth Amendment Right to Due Process*

"The Fifth Amendment's guarantee of fundamental fairness entitles indigent defendants to a fair opportunity to present their defense at trial." *Kennedy*, 64 F.3d at 1473. "An indigent defendant is not entitled to all the assistance that a wealthier counterpart might buy, but rather only the basic and integral tools." *Id.* We determine what services constitute "basic tools" by considering three factors: (1) the effect on the defendant's interest in the accuracy of trial if the requested service is not provided; (2) the burden on the government's interest if the service is provided; and (3) the probable value of the additional service and the risk of error in the proceeding if the service is not offered. *Id.* Importantly, these factors are all based upon a request by the

defendant for additional services.

The fact that Mr. Solon failed to request additional funding is again dispositive. The district court granted all of Mr. Solon's requests for expert witness funding and provided him with the means to request further funding. Regardless of whether he believed the court was inclined to provide such funding, Mr. Solon's failure to make such requests negates any alleged constitutional violation by the court.

B. Structural Error

Mr. Solon also argues that the district judge's brief absence from the bench during defense counsel's closing argument constitutes structural error requiring automatic reversal. The government concedes that it was error for the judge to leave the bench, but maintains that it is trial error and thus subject to harmless-error review.

Although most constitutional errors can be harmless, some are so offensive to our judicial system that they require automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 306–09 (1991). "These violations, termed 'structural errors,' involve defects in the 'trial mechanism' and affect 'the framework within which the trial proceeds' 'from beginning to end.'" *United States v. Lott*, 433 F.3d 718, 722 (10th Cir. 2006) (quoting *Fulminante*, 499 U.S. at 309–10)). "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.'" *United States v. Gonzalez-Huerta*, 403 F.3d 727, 733 (10th Cir. 2005) (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)). "[A] defining feature of structural error is that the resulting unfairness or prejudice is necessarily unquantifiable and indeterminate, such that any inquiry into its effect on the outcome of the case would be purely speculative." *Id.* (internal quotations omitted). On the other hand, trial errors which are not deemed structural remain subject to harmless error review. *See Fulminante*, 499 U.S. at 306–07.

The Supreme Court has only deemed errors structural in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468–69 (1997). These include: a total deprivation of the right to counsel; the lack of an impartial trial judge; the unlawful exclusion of grand jurors of defendant's race; a deprivation of the right to self-representation at trial; the denial of the right to a public trial; and an erroneous reasonable-doubt jury instruction. *See id.* (citations omitted). Neither the Supreme Court nor this circuit has ever decided whether a judge's absence from the bench constitutes structural error. The Third, Fourth, Fifth, and Ninth Circuits, however, have considered the issue but have reached differing conclusions.

In support of his position, Mr. Solon cites *United States v. Mortimer*, 161 F.3d 240 (3d Cir. 1998) and *Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995). In *Mortimer*, the judge disappeared from the bench during defense counsel's closing

argument. 161 F.3d at 241. The judge did not announce his departure and nobody noticed his absence until the prosecutor made an objection. *Id.* The judge gave no reason for his disappearance and was back on the bench "in time to thank defense counsel for her speech and call the prosecutor for her rebuttal." *Id.*

The Third Circuit noted the importance of a judge's presence during trial and held that "[o]n the facts of this case . . . structural error occurred." *Id.*

Similarly, in *Riley* the judge disappeared during jury deliberations. 56 F.3d at 1118. When the jury asked the court to read back part of the trial testimony, the judge could not be located. *Id.* In the judge's absence, his law clerk granted and presided over the readback proceeding. *Id.* The Ninth Circuit held that "the state trial judge's failure to rule on whether the victim's direct examination should have been read back, coupled with his absence and unavailability during the readback proceeding, resulted in structural error . . . ." *Id.*

In contrast, the government cites *Heflin v. United States*, 125 F.2d 700 (5th Cir. 1942) and *United States v. Love*, 134 F.3d 595 (4th Cir. 1998) for the position that the absence of a judge from the bench is not necessarily structural error. In *Heflin*, the Fifth Circuit held that the absence of a trial judge "for two or three minutes" during the defendant's closing argument did not result in prejudice. 125 F.2d at 701. Although the judge did not announce his departure, there were no objections or motions made during his absence, and thus no prejudice to the defendant. *Id.*

Likewise, in *Love* the Fourth Circuit held that a district judge's absence during portions of closing arguments was harmless error. 134 F.3d at 604–05. The judge told both parties that he would "on occasion be in his chambers, working on other matters," but he would be available to rule on objections should any be made. *Id.* at 604. Neither party objected to the judge's absence and the defendant could not point to any "specific comments made in the district judge's absence that affected the trial's fairness." *Id.* Nevertheless, the defendant alleged that the absence itself gave the jury the impression that the judge had made up his mind. *Id.* at 605. The Fourth Circuit refused to consider the absence structural error noting that unlike in *Riley*, there was no "complete abdication of judicial control over the process." *Id.* It further concluded that the error was harmless because the judge was absent "during both sides' closing arguments" and "explained to the jury why he would leave the courtroom." *Id.*

Here, the district judge left the bench for just under six minutes in the middle of defense counsel's closing argument and his clerk informed the parties that he was still available to rule on objections. Although the record conveys the parties' confusion, at no point did Mr. Solon object to the judge's absence. Furthermore, counsel were aware that the judge was leaving the bench, and despite his instruction to "go right ahead" nothing occurred during his absence. Finally, upon his return to the bench, the judge explained his brief absence to the court. Therefore, unlike in *Mortimer* and *Riley*, the judge in this case was

available if needed and there were no objections to rule on or decisions for him to make while he was away from the bench. Based on the record and the above-cited case law, we cannot conclude that the judge's absence in this case affected the framework within which the trial proceeded from beginning to end. Under these circumstances the absence of the judge did not constitute structural error.[1]

Accordingly, this trial error is subject to harmless error review. Generally, "[t]he government bears the burden of proving the error is harmless beyond a reasonable doubt." *United States v. Rogers*, 556 F.3d 1130, 1141 (10th Cir. 2009). When the defendant fails to timely object to an alleged error, however, we review only for plain error and "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993). Mr. Solon failed to object to the district judge's absence, therefore, he must show that "there is (1) error (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Gonzalez-Huerta*, 403 F.3d at 732.

The government has conceded and we strongly agree that the judge's departure from the bench was error. Furthermore, we hold that such error was

[1]We do not decide today whether a judge's absence from the bench might constitute structural error in a case where the facts indicate a "complete abdication of judicial control over the process." *See Riley*, 56 F.3d at 1118. We only decide that based on the facts of this case, the judge's absence did not rise to the level of structural error.

also clear and obvious. Nevertheless, Mr. Solon has not satisfied the third prong of plain-error review. In order to do so, he "must show a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *Id.* at 733.

Mr. Solon contends that the "context and timing of the judge's departure from the courtroom" resulted in sufficient prejudice to call into question the result of the proceeding. He argues that when combined with prior comments made about Ms. Loehrs, the judge's departure from the bench "reflected on the credibility of the entire defense case." The record does not support Mr. Solon's position. Although the judge made several disparaging comments about Ms. Loehrs and her rates, only one such comment was made in front of the jury. When Ms. Loehrs testified that her work had been "stopped," the judge gave the following instruction:

> 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.

The dissent recites other statements by the judge; however, because those statements were made outside the presence of the jury, they could not have affected the jury's perception of Ms. Loehrs or her testimony and therefore have no bearing on our analysis. Additionally, 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.

Additionally, the government's case was strong. Mr. Solon's computer was observed online offering child pornography for download on June 23 and August 9, 10, and 11, 2006. A search of Mr. Solon's computer's hard drive revealed that on September 20, 2006, forty-six files with names consistent with child pornography were downloaded using Limewire, a peer-to-peer file sharing program. Furthermore, Mr. Solon admitted to using Limewire on September 20 to attempt to download two computer games. Additionally, the government presented evidence that Mr. Solon was playing online poker on his computer less than five minutes before the child pornography files were downloaded. In light of the brevity of the judge's absence as well as the strength of the government's case, Mr. Solon has not established a reasonable probability that, but for the judge's absence, the jury would not have convicted him.

Because Mr. Solon has failed to satisfy plain-error review, he is not entitled to relief on this claim. Nevertheless, we note that it is serious error for a judge to

leave the bench without safeguards. Ordinarily, when a judge needs to leave the bench, the court should take a recess. If for some reason the court does not take a recess, the judge should, at a minimum, provide notice to counsel and an admonition to the members of the jury concerning the nature of his absence and the fact that they should make no inference from his departure. These safeguards help to prevent prejudice to either party and to maintain the integrity of the judicial system.

C. Speedy Trial Act

Finally, Mr. Solon claims he was denied his statutory right to a speedy trial under 18 U.S.C. § 3161. Specifically, he argues that the speedy trial clock began running thirty days after the district court took his motion to withdraw his guilty plea under advisement. The government argues that pursuant to § 3161(i), the clock did not begin to run until Mr. Solon's motion was granted. We review the district court's compliance with the Act de novo. *United States v. Dirden*, 38 F.3d 1131, 1135 (10th Cir. 1994).

"The Speedy Trial Act is designed to protect a criminal defendant's constitutional right to a speedy trial and serve the public interest in bringing prompt criminal proceedings." *United States v. Thompson*, 524 F.3d 1126, 1131 (10th Cir. 2008). It generally requires that the trial of a defendant commence within seventy days from the later of the filing date of the information or indictment or the defendant's initial appearance. 18 U.S.C. § 3161(c)(1). That

time period only applies, however, "[i]n any case in which a plea of not guilty is entered." *Id.* When, as in this case, a plea of guilty is entered but later withdrawn, "the defendant shall be deemed indicted . . . on the day the order permitting withdrawal of the plea becomes final," thereby starting the seventy-day clock. *Id.* § 3161(i).

Accordingly, under the plain language of the Act, the speedy trial clock began running on September 17, 2008, the date on which the district court granted Mr. Solon's motion. Trial commenced on November 3, 2008, well within the seventy-day time limit. Therefore, the district court properly denied Mr. Solon's motion to dismiss based a violation of the Act.

III. CONCLUSION

For the foregoing reasons, we AFFIRM Mr. Solon's conviction.

09-8018, United States v. Solon

LUCERO, J., concurring in part and dissenting in part).

Were this case simply about an innocent game of canasta, I would readily join the opinion of my majority colleagues outright. However, the abrupt departure of the trial judge from the bench while defense counsel was discussing the testimony of defendant's star witness, when coupled with the court's earlier admonitions to the jury that the same witness's testimony was "absolutely untrue" and a "falsity," can only be interpreted as a clear message to the jury that the witness was not credible or worthy of the court and jury's unbiased consideration. Although I agree with the majority's disposition of Solon's speedy trial and complete defense claims, I would hold that the judge's actions were a clear violation of Solon's due process rights and constituted reversible plain error. Thus, I respectfully dissent.

I

To understand the district court's actions in this case, some context is necessary. As the majority notes, the district court approved payment of up to $20,000 for Tami Loehrs' expert services. (Majority Op. 2.) Following submission of Loehrs' initial bill, the court stated "that woman is outrageous in her charges for what she did to travel from Arizona up to Casper." Although the trial judge acknowledged he had authorized payment of up to $20,000, the judge

continued that "it is going to be a cold day in hell before I ever authorize" payment to Loehrs of $15,000. In a later hearing, the court again commented on Loehrs, claiming to "have never heard a more abrasive witness than that." It then advised defense counsel that he did not need to use "this woman with pretty exalted ideas of her worth."

The court's derision of Loehrs continued into trial. When asked if she had reviewed certain virus logs, Loehrs responded, "Actually, this is about the point in my exam where I was stopped." The government objected and requested that the comment be stricken, but the district court went well beyond the government's request. Sua sponte, the court instructed the jury:

> 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.

Against this backdrop, the court's actions during closing take on added significance. Defense counsel began to discuss what he viewed as a "double standard in this courtroom with regard to what people say and then holding them to it," implying that the prosecutor unfairly took Loehrs to task for inconsistencies in her testimony although the testimony of several government witnesses contained similar inconsistencies. Counsel then identified "a couple of

mistakes" Loehrs had made in her testimony, which he deemed "inconsequential." At that point, the judge left the courtroom, telling counsel to "just go right ahead." Defense counsel declined the court's invitation, explaining to the jury that if he "were to say something that caused [the prosecutor] to have some grief, and [the prosecutor] stood up and made an objection, there would be no one to rule." The prosecutor took control of the courtroom, suggesting the jury use the break "to get up and stretch, relax." A little more than five minutes later, the judge returned. He stated:

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

The judge's contempt for Loehrs is patent from the cold transcript. After instructing the jury that Loehrs was lying on the stand and had attempted to raid the federal treasury by submitting "excessive bills," the court simply could not bear to listen to defense counsel's discussion of her reliability. The judge's comments upon return only compounded the error, in that they were likely taken and understood by the jury as implying that a secretary's canasta game was more important than Solon's defense theory. Although I am not unsympathetic to the trial judge's frustration regarding the high cost of litigation and experts fees, the matter of Loehrs' fees should not have been handled in such an unorthodox manner.

II

Because Solon's counsel, likely flummoxed by the incredible events he witnessed, failed to object to the judge's absence, I agree with the majority that we review only for plain error. Further, I agree that Solon has failed to demonstrate that the judge's actions constituted structural error. See United States v. Gonzalez-Huerta, 403 F.3d 727, 734 (10th Cir. 2005) (en banc). The judge's actions did not "affect the composition of the record," Rose v. Clark, 478 U.S. 570, 580 n.7 (1986), and we are "capable of finding that the error caused prejudice upon reviewing the record," Gonzalez-Huerta, 403 F.3d at 734. This case is unlike those upon which Solon relies for his structural error arguments, United States v. Mortimer, 161 F.3d 240 (3d Cir. 1998), and Riley v. Deeds, 56 F.3d 1117 (9th Cir. 1995). The harm here was not the judge's absence at a critical stage in trial, but his unspoken commentary to the jury.

Although the majority holds that the district court's actions constituted clear and obvious error, it concludes that Solon failed to demonstrate prejudice. (Majority Op. 11-13.) I must disagree. There is no denying that the government's case was strong. As the majority accurately recounts, child pornography was found on Solon's computer, and Solon admits to being online the night that pornography was downloaded. (Majority Op. 12-13.)

Nonetheless, Solon mounted a defense that a jury could have credited. He

argued that the child pornography was placed on his computer as a result of a computer virus or Trojan. Loehrs testified:

> [Solon's] 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 [sic].

This defense theory has been successfully employed in other cases, and has been the subject of some media attention. See Laurel J. Sweet, Probe Shows Kiddie Porn Rap Was Bogus, Boston Herald, June 16, 2008, at 5; John Schwartz, Acquitted Man Says Virus Put Pornography on Computer, N.Y. Times, Aug. 11, 2003, at C1.

The majority holds that Solon has not established "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." (Majority Op. 12 (quoting Gonzalez-Huerta, 403 F.3d at 733).) Although it is treacherous for appellate judges to attempt to predict the votes of jurors, I would hold that Solon has met his burden under the third prong of our plain error analysis. That is, he has shown that the error "affect[ed] substantial rights." United States v. Olano, 507 U.S. 725, 734 (1993) (quoting Fed. R. Crim. P. 52(b)). The inquiry is whether Solon has shown that, but for the court's error,

there was a reasonable probability of acquittal. See United States v. Hasan, 526 F.3d 653, 665 (10th Cir. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quotation omitted). Solon does not bear the burden of proving he is actually innocent; instead, "the touchstone is simply whether the ultimate verdict is one worthy of confidence." United States v. Robinson, 583 F.3d 1265, 1270-71 (10th Cir. 2009) (quotation omitted).

I have no confidence in the jury verdict under review. Had at least one juror credited Loehrs' testimony, Solon's jury may well have found reasonable doubt. But the jury was unfairly prejudiced against Loehrs by the comments and actions of the district court. In our adversarial system, a criminal defendant is entitled to stage a credibility contest refereed by a jury of his peers. Solon was not given this opportunity. Instead, the district court instructed the jury that Solon's primary witness was dishonest and that Solon's theory was unworthy of the court's time. It may as well have directed a verdict of guilty.

Because the majority decides this case on the third prong of plain error review, it does not address whether the court's actions "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Gonzalez-Huerta, 403 F.3d at 732 (quotation omitted). I would hold that Solon has satisfied this prong as well. The district court went beyond what might simply be

described as negative feelings toward a defense witness, actively impeaching Loehrs by word and deed in derogation of its duty of neutrality. When judges behave in such a manner, our entire judicial system suffers. Neutrality in judges:

> preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (quotation omitted).

III

For the foregoing reasons, I respectfully dissent.