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In The District Court

For the District of Wyoming

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
NATHANIEL SOLON)
)
Defendant.)

Case No. 07-CR-32-B

MOTION FOR NEW TRIAL

COMES NOW the Defendant, Nathaniel Solon, by and through his undersigned counsel, moves the Court to grant a new trial under Federal Rule of Criminal Procedure 33(a) and (b)(2). This motion is timely filed, being filed within seven (7) days after the verdict returned November 10, 2008 (excluding the holiday and weekends).

The basis of the motion is the Honorable Judge Brimmer’s absence from the Courtroom during a portion of defense counsel’s closing argument. Defendant respectfully asserts that in this instance, the trial judge’s absence during defense counsel’s summation constitutes a “structural error” because the Jury may have inferred that defense was not worth listening to, thereby prejudicing the

Defendant. That was the essential holding in *United States v. Mortimer*, 161 F.3d 240 (3rd Cir. 1998).

Undersigned counsel has not located any authority in the Tenth Circuit on this issue. Counsel would note some discussion of a judge's absence in a case not reported in the Federal Supplement, *Lovacco v. Kelly*, 2005 WL 2482518 (S.D.N.Y.). The facts of that case are not particularly applicable to the present case. *Lovacco* is a state court case being heard in Federal Court on a writ of *habeas corpus*. The court held in that case that the judge's absence is not *per se* error, if it involves a short period of time during a portion of the trial not involving the judge's supervisory role. *Lovacco* also discusses two types of federal constitutional errors that occur in a criminal trial. 1) Structural errors which are *per se* error necessitating reversal; and, 2) trial errors which are subject to harmless error review. Structural errors are so serious that they are not subject to a harmless error analysis because they affect the framework within which the trial proceeds rather than simply an error in the trial process itself. (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991)). Undersigned counsel respectfully submits that the judge's absence during the defense counsel closing argument constitutes a structural error necessitating reversal.

In *United States v. Love*, 134 F.3d 595 (4th Cir. 1998), it was determined that it was speculative whether there was any prejudice to a defendant when the judge left the courtroom during **both sides'** closing arguments. Speculation that the judge may have already made up his own mind did not constitute a showing of prejudice because it was impossible for the jury to discern which side the judge may have prematurely favored.

Undersigned respectfully asserts that in the present case the facts are more closely analogous with the decision in *Mortimer*, *supra*. In that case, the judge had been present at all of the prosecutor's argument and then simply left with no notice to counsel or to jury that he was leaving.

No good reason or any reason was given for his disappearance. He was back on the bench in time to thank defense counsel for her closing and to call on the prosecutor for rebuttal. The court held in that situation that when the judge is absent at a critical stage of a trial, the form is destroyed. There is effectively no trial and there is no way of repairing it. The verdict is a nullity. In that case, the court held that defense counsel had not consented to the judge's absence, even though defense counsel continued her summation. The court further held that the defense did not have to provide a showing of prejudice. The court held that "Prejudice to the defendant from the jury inferring that the defense was not worth listening to may have occurred; it is not necessary on this appeal for the defendant to demonstrate it. The structural defect determines the result." *Mortimer, supra*, 161 F.3 at 242.

Undersigned counsel respectfully asserts that there is very little to distinguish this case from the holding in *Mortimer*. While the Court did advise defense counsel to continue with his closing, and it was decided to not continue but to instead wait for the Judge to return, potential prejudice still occurred. Undersigned counsel cannot remember at the present time the reasons the Court provided the jury for leaving the courtroom. To the best of present memory, the reasons were ministerial, and not of so great import as to require the judge to be absent from the courtroom.

The jury obviously respects the Judge's opinion. The jury had been told earlier in the day that the Judge anticipated they could reach a decision by the end of the day and then with the Judge leaving the courtroom during defense counsel's closing, it would seem that a clear message was likely given to the jury, and that message being prejudicial to the Defendant.

For the above reason, Defendant respectfully requests that he be granted a new trial under Rule 33.

RESPECTFULLY SUBMITTED this 19th day of November, 2008.

By: _____ /S/
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document (with proposed Order) was served this 19th day of November, 2008, by electronic mail, addressed to:

Jim Anderson
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PO Box 668
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Honorable Clarence A. Brimmer
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Cheyenne, WY 82001

_____/S/
Cheryl Deere