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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**Criminal No. 07-CR-32-B**
	)	
v.	)	
	)	
NATHANIEL SOLON,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO THE DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW, the United States, by and through its attorney, James C. Anderson, Assistant United States Attorney for the District of Wyoming, and respectfully submits the following response to the Motion for New Trial filed by the Defendant on November 19, 2008.

I. INTRODUCTION

The Defendant has filed a motion for new trial alleging that when the trial judge absented himself from the courtroom during the defense closing argument "structural error" occurred entitling him to a new trial. Specifically, the Defendant asserts, "the trial judge's absence during defense counsel's summation constitutes a 'structural error' because the Jury may have inferred that the

defense was not worth listening to, thereby prejudicing the Defendant." *Defendant's Motion for New Trial*, at 1-2. In support of this argument the Defendant primarily relies upon a Third Circuit decision, *United States v. Mortimer*, 161 F.3d 240 (3rd Cir. 1998).

The Defendant's motion is wholly lacking in merit and should be denied.

II. FACTS

On the final day of the Defendant's jury trial, wherein he was charged with possession and receipt of child pornography, the parties made their closing arguments. During the defense closing argument the trial judge left the bench to go to his chambers for a short period of time. The record reflects the following occurred:

> THE COURT: Just go right ahead.
>
> MR. ANDERSON: Thanks, Judge.
>
> (Judge Brimmer no longer present.) (10:57:44)
>
> MR. SMITH: Ladies and gentlemen, I think Mr. Anderson and I are both concerned that the Judge should be in the courtroom. And if you folks will allow me just to break here, I think that's appropriate, as well. I know the Judge told us to go ahead, but if I were to say something that caused Mr. Anderson to have some grief and he stood up and made an objection, there would be no one to rule.
>
> THE CLERK: He told me to call him if there's an objection. He will only be gone a minute.

MR. SMITH: I think it is pretty rare that Mr. Anderson and I don't do what the Judge tells us to.

MR. ANDERSON: It is a great opportunity to get up and stretch, relax. It is hard to listen to people talk at you for almost an hour -- over an hour.

(Judge Brimmer now present.) (11:03:18)

(Excerpt - 11/17/08 trial transcript). To clarify the record, when the trial judge stated, "Just go ahead," he was leaving the courtroom. However, as the record clearly reflects the parties elected not to proceed in his absence. Importantly, not one syllable of the defense's closing argument was uttered outside the presence of the trial judge.

After approximately 5 minutes and 34 seconds elapsed, the trial judge returned to the courtroom and explained that he left the courtroom to attend to some business in chambers. At that point defense counsel then resumed his argument. At no time did defense counsel request any type of curative instruction or object to the Judge's absence from the courtroom until the filing of the motion for new trial.

III. DISCUSSION

A. Introduction

The Defendant claims that structural error occurred in his trial when the trial judge left the courtroom during his attorney's closing argument even though the parties observed the judge leaving the courtroom and chose not to proceed in his absence. Additionally, although structural error analysis does not require a showing of prejudice, the Defendant does allege prejudice as he contends

the jury could imply from the Judge's absence that Defense Counsel's argument "was not worth listening to." *Defendant's Motion for New Trial,* at 1.

The Defendant's argument is deficient in several respects. First, there are factual differences between *United States v. Mortimer*, the only case he relies upon as authority for his position, and the case at bar. Those distinctions make it clear that no error occurred in the instant case. Secondly, even if error occurred here, such error simply does not rise to the level of structural error, regardless of the holding in the Third Circuit decision. Finally, and again assuming *arguendo* that error occurred here, applying the proper standard for analyzing this alleged trial error there is no question that any such error was harmless.

The Defendant's motion is wholly lacking in merit and should be denied.

B. *United States v. Mortimer* is Factually Distinguishable from the Instant Case

The Defendant's argument relies almost exclusively upon the holding in *United States v. Mortimer, supra,* as authority that error occurred in the instant case. However, the facts of that case are inapposite to the relevant facts present here. In *Mortimer*, the judge, who had been present during the prosecutor's summation, was absent from the defense's closing argument. The judge's absence was first noted when the prosecutor made an objection, only to withdraw it with the exclamation, "The judge is not here." *Id.*, 161 F.3d at 241. The judge gave no notice to counsel or the jury of his absence. He was back on the bench in time to thank defense counsel for her speech, 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.

The essential holding of *Mortimer* is 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. *Id.*, citing *Gomez v. United States*, 490 U.S. 858, 873 (1989); *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Here, the judge was not absent at a critical stage of the trial because absolutely nothing of consequence happened in the courtroom while he was gone. In effect, the trial was in recess until the judge's return. Under such circumstances there is no error, much less structural error as alleged by the Defendant. *Heflin v. United States*, 125 F.2d 700 (5th Cir. 1942).

C. The Trial Judge's Absence Did Not Constitute Structural Error

Assuming *arguendo* that error occurred in the instant case, the error was not of such magnitude as to be deemed a structural error. 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 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 these six restricted classes of cases, the Supreme Court has failed to find structural error in the wide range of errors presented to it.[1] 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 would be presiding 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, 119 S.Ct. 1827, 144 L.Ed.2d 35 (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

[1] The Tenth Circuit has noted that "the universe of [structural] errors is extremely small." *United States v. Garcia*, 78 F.3d 1457, 1464 n. 10 (10th Cir.1996).

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). As long as the error in the case did not affect the composition of the record, so that "a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Rose v. Clark*, 478 U.S. at 579, n. 7.

The Defendant simply cannot overcome the "strong presumption" that a structural error did not occur during the course of his trial. The trial judge's brief absence from the courtroom where the proceedings were, in effect, recessed during his absence, simply does not rise to the level of a fundamental error that undermines the entire framework of the defendant's trial. Additionally, the trial judge's brief absence from the courtroom did not deprive the defendant of any of the basic protections afforded every criminal defendant. While the Defendant relies on the *Mortimer* decision as authority for the proposition that structural error occurs when a closing argument is conducted without the trial judge present, the Fourth Circuit rejected such a notion in *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. The court went on to say that since the trial judge was in chambers, available to rule on objections no error whatsoever occurred. The Fourth Circuit reaffirmed its position that a judge's absence during closing argument does not constitute structural error in an unpublished decision, *United States v. Pleasants*, 71 Fed. Appx. 182 (4th Cir. 2003)(copy attached).

Other courts that have recently considered this issue have also rejected the notion that a trial judge's brief absence from the courtroom during trial proceedings constitutes structural error. In *State v. Langley*, 958 So.2d 1160 (La. 2007) the Louisiana Supreme Court reversed an appellate court decision based in part on *Mortimer* that found structural error occurred when a trial judge was absent from a courtroom for brief periods of time during voir dire and closing. In an extremely thorough review of the issue the Louisiana court rejected the notion that a structural error occurs whenever a trial judge is absent from a courtroom during a trial. Indeed, the court questioned if the *Mortimer* decision truly stands for such a proposition given the language contained within a footnote of the decision and the nature of the cases cited within the opinion. Regardless, the Louisiana court held that "a judge's absence from the bench for a few minutes would not necessarily, in the context of an entire trial, destroy the fundamental framework of the trial from beginning to end. Whether the conduct requires reversal would depend upon what occurred during the judge's absence." *Id.*, at 1168. The Supreme Court of Georgia reached the same conclusion in *Berry v. State*, 651 S.E.2d 1 (Ga. 2007). In *Berry* the court held the absence of the trial judge during voir dire, while error,

"without more, does not show a structural error." *Id.*, at 6.

The Fourth Circuit decision in *Love* and the above cited state court decisions certainly point out that it is not a forgone conclusion that structural error occurs whenever a judge is briefly absent from the courtroom during a trial. Given the facts of this case, and the strong presumption that exists that structural error was not committed, the United States would submit that the Defendant's argument concerning structural error is without merit.

C. Harmless Error Beyond a Reasonable Doubt

Again, assuming *arguendo* that the trial judge in this case committed constitutional error when he left the courtroom, it does not warrant a new trial. The test to determine when a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" *Chapman v. California*, 386 U.S. 18, 24 (1967). In the case at bar there is no doubt whatsoever, the trial judge's brief absence from the courtroom had absolutely no impact upon the verdict.

The evidence presented by the Government against the Defendant was strong - if not overwhelming. The Defendant was released from custody to federal supervised release on June 21, 2006. On June 23, 2006, the Defendant's computer was observed online offering a large number of images of child pornography for download. His computer was observed again on August 9, 10, and 11, 2006, offering child pornography for download. His computer's hard drive revealed that on September 20, 2006, forty-six files with names consistent with child pornography were downloaded using a file sharing program known as Limewire. On the following day, September 21,

2006, when law enforcement officers searched his house the Defendant admitted he used Limewire to download adult pornography and he confirmed he used his computer the previous evening. In fact, the forensic exam of the computer hard drive revealed that the Defendant attempted to download two computer games starting at approximately 8:00 pm. The exam of the hard drive further revealed that starting at 8:51 pm until approximately 9:12 pm the Defendant played in an online poker tournament at an Internet site known as PartyPoker.com. Then, just four minutes after the Defendant played his last hand of poker, he began to download child pornography files. While the Defendant claimed during his testimony he did not download the child pornography, the fact that the jury deliberated less than two hours and fifteen minutes speaks to the credibility of the Defendant's defense.

Defense counsel calls upon the court to speculate that by leaving the courtroom the trial judge was implying to the jury that defense counsel's argument was not worth listening to, but there is simply nothing within the record to support such speculation. Further, the Defendant does not suggest that the six minute break in some way effected or detracted from his attorney's closing argument.

There is simply nothing to suggest that the trial judge's absence from the courtroom for just under six minutes, when absolutely nothing occurred during his absence, in some way resulted in the jury deciding to tip the balance beam of guilt versus innocence towards guilt - particularly in light of the record developed at trial which clearly established the Defendant's guilt beyond a reasonable doubt.

IV. CONCLUSION

Based upon the authority and argument set forth above the United States would submit that the Defendant's Motion for New Trial should be denied.

Respectfully submitted this 25th day of November, 2008.

KELLY RANKIN
United States Attorney

By: /s/ James C. Anderson
JAMES C. ANDERSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2008, I served a true and correct copy of the foregoing **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL** by hand delivery, to the following:

Mr. Thomas Smith
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P.O. Box 2710
Casper, Wyoming 82602
Attorneys for the Defendant

/s/ Vicki Powell
For the United States

ATTACHMENT

Westlaw

71 Fed.Appx. 182
71 Fed.Appx. 182, 2003 WL 21711387 (C.A.4 (N.C.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 71 Fed.Appx. 182, 2003 WL 21711387 (C.A.4 (N.C.)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Fleming Macon PLEASANTS, Defendant-Appellant.

No. 02-6277.

Argued April 1, 2003.
Decided July 24, 2003.

Defendant convicted of conspiracy to possess with intent to distribute cocaine and marijuana petitioned for vacation of sentence. The United States District Court for the Eastern District of North Carolina, James C. Fox, J., denied relief. Defendant timely filed a motion for a Certificate of Appealability (COA) and a notice of appeal. The Court of Appeals, Per Curiam, held that counsel was not ineffective in failing to object to trial judge's absence during closing arguments.

Affirmed.

West Headnotes

Criminal Law 110 ⚿1942

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1941 Argument and Conduct of Defense Counsel
110k1942 k. In General. Most Cited Cases
(Formerly 110k641.13(2.1))

Defendant was not denied effective assistance of counsel when his counsel failed to object to trial judge's absence during closing arguments, despite his claim that the trial judge's absence during a critical stage of the trial may have permitted the jury to infer partiality against the defendant that may have affected the jury's verdict; counsel was aware that it was common practice for this trial judge to leave the bench during closing arguments, and counsel determined that an objection would likely be futile and could potentially damage their client, and therefore, counsel made the tactical decision not to object. U.S.C.A. Const.Amend. 6.

***183** Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, Senior District Judge. (CR-96-21, CA-98-917).

ARGUED: Joshua D. Rogaczewski, Student, Appellate Litigation Clinic, Georgetown University Law Center, Washington, D.C., for Appellant. Anne Margaret Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Steven H. Goldblatt, Director, Abigail V. Carter, Supervising Attorney, Martha R. Mora, Student, Appellate Litigation Clinic, Georgetown University Law Center, Washington, D.C., for Appellant. Frank D. Whitney, United States Attorney, Raleigh, North Carolina, for Appellee.

Before MICHAEL and KING, Circuit Judges, and TERRY L. WOOTEN, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.

****1** Fleming Macon Pleasants seeks a Certificate of Appealability (COA) to challenge the district court's order denying his motion for federal habeas relief. Specifically, Pleasants argues he was denied

his Sixth Amendment right to effective assistance of counsel and requests that this Court set aside his conviction and remand for a new trial. As explained below, we grant Pleasants' COA but determine that the District Court committed no reversible error. Accordingly, we affirm the District Court's dismissal.

I.

On July 9, 1996, following a jury trial in the United States District Court for the Eastern District of North Carolina, Pleasants was convicted of conspiracy to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. § 846 (2000). On October 7, 1996, the District Court sentenced Pleasants to life in prison. Pleasants filed a timely notice of appeal. The Fourth Circuit Court of Appeals affirmed the judgment of the District Court in an unpublished opinion on December 8, 1997.[FN1]

FN1. *United States v. Pleasants,* 131 F.3d 138 (4th Cir.1997) (Unpublished).

On December 4, 1998, Pleasants filed a petition for habeas corpus under 28 U.S.C. § 2255 in the District Court, claiming that he received ineffective assistance of counsel. In particular, Pleasants argued his trial counsel was ineffective by failing to object at trial to the judge's absence during closing argument and in failing to raise this issue on direct appeal. The government filed a Motion to Dismiss or for Summary Judgment on February 26, 1999. The District Court granted the government's summary judgment motion on November 27, 2001, denying Pleasants' request for habeas relief. Pleasants timely filed a motion for a COA pursuant to 28 U.S.C. § 2253(c) and a notice of appeal from the District Court's order. On February 19, 2002, the District Court denied Pleasants a COA.

II.

Pleasants requests that this Court issue a COA under 28 U.S.C. § 2253(c). An appeal may not be taken from the final ***184** order in a § 2255 proceeding unless a circuit justice or judge issues a COA. 28 U.S.C. § 2253(c)(1)(2000). A COA will not issue for claims addressed by a district court absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that "reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003) (internal quotations omitted). Further, a claim can be debatable even though "every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 1040. After reviewing the record, we conclude that reasonable jurists could debate Pleasants' Sixth Amendment claim. Therefore, we grant Pleasants a COA and address his claims on the merits.

III.

To prevail on an ineffective assistance of counsel claim, a habeas corpus petitioner must satisfy the two-pronged test of *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, he must show "that counsel's performance was deficient," meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, he must show "that the deficient performance prejudiced the defense." *Id.*

****2** Under the *Strickland* analysis, an attorney's performance is to be measured by "reasonableness under prevailing professional norms." *Id.* at 688. In applying the professional norms standard, the courts' scrutiny of the performance of counsel must be "highly deferential," and courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional as-

sistance." *Id.* at 689. Additionally, counsel's perspective at the time of the representation must be considered. *Id.* If a defendant is able to establish deficient performance, the prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Ineffective assistance of counsel claims present mixed questions of law and fact and are reviewed de novo. *United States v. DeTemple,* 162 F.3d 279, 289 (4th Cir.1998).

IV.

At Pleasants' trial, the government presented evidence supporting the charges alleged in the indictment. Following the presentation of the government's case, Pleasants rested without offering any additional evidence. Prior to closing arguments by either the government or defense counsel, the judge instructed the jury as follows:

> Finally, let me say to you that during the course of the arguments, I may not be here at the bench. I may go into my chambers and work on my charge, that is, instructions, or I may work on or just tend to other matters. But if I leave the bench, I will be in earshot, and if one of the lawyers should object to something that the other one says, they know to stop until I can come back into the courtroom and rule on whatever the objections might be.

(Suppl. J.A. at 497) According to the transcript, the Court then referred to the assistant United States attorney for her closing argument. At some point after recognizing government's counsel, the ***185** judge left the courtroom. At the conclusion of her closing argument, Pleasants' counsel began his closing argument. At the conclusion of Pleasants' closing argument, the transcript reflects that the Court called a fifteen minute recess. After the recess, the Court introduced counsel for Pleasants' co-defendant. At the conclusion of his argument, the Court again recognized the assistant United States attorney for her rebuttal argument.[FN2] The record on appeal indicates that no objections were made by any party either prior to, during, or after closing arguments were delivered.

> FN2. Pleasants submitted affidavits indicating that the trial judge left the courtroom after introducing the assistant United States attorney and did not return until the government was close to concluding its rebuttal argument.

Pleasants argues that he was not afforded effective assistance because his counsel failed to object to the trial judge's absence during closing arguments. To prevail on an ineffective assistance of counsel claim, petitioner must first show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. In support of his claim, Pleasants primarily argues that the trial judge's absence during a critical stage of the trial may have permitted the jury to infer partiality against Pleasants that may have affected the jury's verdict. We find this argument unpersuasive. Pleasants' counsel was aware that it was common practice for this trial judge to leave the bench during closing arguments. Counsel determined that an objection would likely be futile and could potentially damage their client. Therefore, counsel made the tactical decision not to object. We cannot conclude that counsel made an error so serious that he was not functioning as the counsel required by the Sixth Amendment.

****3** This Court addressed a similar occurrence in *United States v. Love,* 134 F.3d 595 (4th Cir.1998). In *Love,* the appellant argued that under *Riley v. Deeds,* 56 F.3d 1117 (9th Cir.1995), the trial judge's absence from the courtroom constituted structural error and was, therefore, reversible *per se.* The *Love* Court distinguished *Riley*[FN3] and held that the trial judge's absence from the courtroom was not structural error because there

was not a complete abdication of judicial control over the process. In *Love,* as in this case, the judge instructed the jury that he would be in his chambers and available to respond to any objections. Therefore, the *Love* Court found that the judge's absence from the courtroom during closing arguments was not structural error when there was not a complete abdication of control over the proceedings. Further, while the *Love* Court noted that it did "not condone the absence of the trial judge from any phase of the trial proceeding," *Love,* 134 F.3d at 604, it concluded that any error was harmless.

> FN3. In *Riley,* a case factually distinguishable from this one, the trial judge was absent and could not be located when the jury requested that they be allowed to rehear certain parts of the testimony given at trial. The judge's law clerk presided over the proceedings and made the decision to allow testimony to be read back to the jury and decided what portions of that testimony should be presented. The Ninth Circuit Court of Appeals held that there was a complete abdication of judicial control over the process that resulted in a structural constitutional error requiring reversal of the defendant's conviction.

Pleasants attempts to distinguish the *Love* decision on the grounds that the judge in that case was intermittently absent from the courtroom during argument, whereas in this case, the judge was absent during his counsel's entire argument. ***186** Pleasants contends that because the judge was absent for his entire closing argument, the judge may have given the impression to the jury that the defendant's case had less merit than or lacked the import of the government's case. We find this argument unpersuasive. This Court cannot conclude that there is a factual distinction between the *Love* case and this case sufficient to warrant relief.

Pleasants also argues that his case is less like *Love* and more like *United States v. Mortimer*[FN4] where the Third Circuit held that under the facts of that case, a trial judge's absence from the bench during closing arguments was structural error. In *Mortimer,* the defense counsel had just begun her closing argument when the prosecutor made an objection only to discover that the judge was no longer present. The judge did not give any notice to the parties or the jury that he was about to depart. The judge returned to the bench in time to thank the defense counsel and call on the prosecutor for her rebuttal, but he gave no explanation for his departure. The Third Circuit held that the judge's absence from the courtroom in that case was structural error and remanded for a new trial.

> FN4. *United States v. Mortimer,* 161 F.3d 240 (3d Cir.1998).

In the *Mortimer* opinion, the Court cited *Love* with approval for the proposition that "structure normally stands if the parties consent to excuse the presence of a judge." *Mortimer,* 161 F.3d at 241. In Pleasants' case, as in *Love,* the judge instructed the jury that he may not remain at the bench during closing arguments, but he would be available to rule on any objections. In *Mortimer,* the judge left without notice to the parties. He was not present to rule on an objection made by counsel for the government. Further, in Pleasants' case, like *Love,* the parties did not object to the judge's instruction to the jury or to his leaving the bench. The judge's jury instruction and the opportunity given to the parties to object in the case at bar is more consistent with *Love* and distinguishes it from *Mortimer.* For that reason, we conclude that Pleasants' case is more like *Love* where the court determined the judge's absence from the courtroom was not structural error.

****4** While we do not conclude that counsel was deficient in failing to object to the judge's absence, assuming counsel was deficient, Pleasants is unable to show that the deficient performance prejudiced his defense. Pleasants has "not pointed to any specific comments made in the district judge's absence that affected the trial's fairness," nor has he specified any part of the government's closing argu-

ment that was properly subject to objection.[FN5] *Love,* 134 F.3d at 605. Pleasants has not made a sufficient showing that but for his counsel's alleged unprofessional errors, the result of the proceedings would have been different. Further, Pleasants has failed to put forth sufficient evidence to show that appellate counsel's failure to raise this issue on appeal was so deficient that it fell below the standard set forth in *Strickland.* Therefore, the district court properly denied Pleasants' § 2255 motion.

> FN5. Pleasants also raised a claim of juror inattentiveness. Prior to exiting, the trial judge admonished the jurors to pay attention during closing arguments. Pleasants has failed to put forth sufficient evidence to show that the judge's absence prejudiced the defendant on this claim.

V.

In conclusion, we grant a COA as to Pleasants' claim that his Sixth Amendment right to effective counsel was violated. ***187** However, we conclude that the District Court did not commit reversible error in dismissing Pleasants' § 2255 claim. Accordingly, we affirm.

AFFIRMED

C.A.4 (N.C.),2003.
U.S. v. Pleasants
71 Fed.Appx. 182, 2003 WL 21711387 (C.A.4 (N.C.))

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