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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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KATZ, J., with whom, SULLIVAN, C. J., joins, dissenting. In reversing the judgments of conviction rendered against the defendant, Louis D'Antonio, and remanding the cases for a new trial, the Appellate Court reasoned that ''[t]he record discloses that during the plea negotiations, the [trial] court itself understood that it had participated actively in such a way as to make clear that a different judge would necessarily preside over the defendant's trial and sentencing. Although it seems unlikely, on the basis of the record, that at the time of the trial, the court recalled the nature of its previous involvement, we need not find, nor do we find, actual bias or prejudice on the part of the court. . . . Because the court presided over the trial and sentencing after having participated actively in plea negotiations, the appearance of a fair trial was lost.'' (Citations omitted.) *State* v. *D'Antonio*, 79 Conn. App. 696, 707–708, 830 A.2d 1196 (2003); accord *State* v. *D'Antonio*, 79 Conn. App. 683, 694, 830 A.2d 1187 (2003). The Appellate Court, therefore, concluded ''that the existence of impartiality might reasonably be questioned and the fairness and integrity of and public confidence in the judicial proceeding affected when a court presides over the trial and sentencing after participating actively in plea negotiations. In this case, the appearance of a fair trial has been lost and a new trial is warranted.'' *State* v. *D'Antonio*, supra, 79 Conn. App. 696; *State* v. *D'Antonio*, supra, 79 Conn. App. 710. I agree with the well reasoned decision by the Appellate Court concluding that the trial court committed plain error when it presided over the defendant's probation revocation hearing, his trial and his sentencing after having participated actively in plea negotiations with the defendant.[1]

In Connecticut, ''[i]t is a common practice . . . for the presiding criminal judge to conduct plea negotiations with the parties. If plea discussions ultimately do not result in a plea agreement, the trial of the case is assigned to a second judge who was not involved in the plea discussions and who is unaware of the terms of any plea bargain offered to the defendant. The judge responsible for trying the case also is responsible for sentencing the defendant in the event the defendant is convicted after trial.'' *State* v. *Revelo*, 256 Conn. 494, 508 n.25, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed. 2d 558 (2001). ''[A]s long as the defendant is free to reject the plea offer [made after negotiations conducted by one judge] and go to trial before a [second] judge who was not involved in or aware of those negotiations, [the defendant] is not subject to any undue pressure to agree to the plea agreement, and the impartiality of the judge who will sentence him in the event of conviction after trial is not compromised.''[2] (Internal quotation marks omitted.)

Id., 507–508, quoting *Safford* v. *Warden*, 223 Conn. 180, 194 n.16, 612 A.2d 1161 (1992); see, e.g., *State* v. *Falcon*, 68 Conn. App. 884, 889, 793 A.2d 274 (reversing judgment even absent prejudice), cert. denied, 260 Conn. 924, 797 A.2d 521(2002); *State* v. *Washington*, 39 Conn. App. 175, 182, 664 A.2d 1553 (1995) (same). Therefore, although we recognize that pretrial or plea negotiations play a critical role in the criminal justice system, and the disposition of charges after plea discussions is highly desirable; see *State* v. *Revelo*, supra, 505; we also recognize that the legitimacy of that process and the integrity of the trial immediately become suspect when both proceedings are conducted by the same judge.

Thus, this court previously has recognized that "[c]anon [3 (c) (1)] of the Code of Judicial Conduct *requires* a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. The reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Even in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Webb*, 238 Conn. 389, 460–61, 680 A.2d 147 (1996). The obligation of disqualification, therefore, rests in the first instance with the judge when his or her participation in a matter would violate canon 3 (c) or General Statutes § 51-39.[3] This obligation imposes a *per se* rule, which may be excused only upon the parties' consent.[4]

The majority recognizes that it was improper for the judge to preside over the trial and sentencing after having participated actively in plea negotiations, but it further concludes that the defendant must demonstrate that he was thereby harmed. I agree with the Appellate Court, however, that, in light of canon 3 (c), the trial court's conduct necessarily gives rise to a circumstance in which "the existence of impartiality might reasonably be questioned and the fairness and integrity of and public confidence in the judicial proceeding affected . . . ." *State* v. *D'Antonio*, supra, 79 Conn. App. 710; accord *State* v. *Falcon*, supra, 68 Conn. App. 889. Accordingly, I would conclude that harmless error analysis is inappropriate because the trial judge's failure to disqualify himself constituted a structural error.

"Structural [error] cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected . . . . These cases contain a defect affecting the framework within which the trial proceeds, rather than simply an

error in the trial process itself. . . . Such errors infect the entire trial process . . . and necessarily render a trial fundamentally unfair . . . . Put another way, these 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.'' (Internal quotation marks omitted.) *State* v. *Lopez*, 271 Conn. 724, 733–34, 859 A.2d 533 (2004).

''When the error undermines the structural integrity of the tribunal, no review for harmless error or prejudice to the defendant need be made. Such an error can never be harmless and automatically calls for reversal and a new trial. See *Chapman* v. *California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). For example, an automatic reversal is required when the judge has a financial interest in the outcome of a trial despite the lack of any indication that his bias affected the outcome; *Tumey* v. *Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749 (1927); or when there is a systematic exclusion from a grand jury of blacks; *Vasquez* v. *Hillery*, 474 U.S. 254, 263–64, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); or when a defendant has been denied the assistance of counsel; *Glasser* v. *United States*, 315 U.S. 60, 76, 62 S. Ct. 457, 86 L. Ed. 680 (1942); or when inherently adverse publicity has tainted the trial; *Sheppard* v. *Maxwell*, 384 U.S. 333, 351–52, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); or when there exists purposeful discrimination in the selection of jurors. *Whitus* v. *Georgia*, 385 U.S. 545, 549–50, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967). These cases do not involve trial error occurring during the presentation of the case to the jury but involve extrinsic factors not occurring in the courtroom. Nor do they require any showing of prejudice to the defendant. These cases recognize that violation of some constitutional rights, such as the right to a trial by an impartial jury, may require reversal without regard to the evidence in the particular case. This type of structural error renders a trial fundamentally unfair and is not susceptible to a harmless error analysis; see *Rose* v. *Clark*, 478 U.S. 570, 577–78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986); or an analysis based on prejudice to a defendant. See *State* v. *Booth*, 250 Conn. 611, 649, 737 A.2d 404 (1999) [cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000)]. A harmless error analysis presupposes a trial at which a defendant is represented by counsel, and evidence and argument are presented in the courtroom before an impartial judge and jury. *Rose* v. *Clark*, supra, 578. When a structural error analysis is undertaken and such an error exists, the proceeding is vitiated. See *Arizona* v. *Fulminante*, [499 U.S. 279, 309–310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)]; *State* v. *Cruz*, 41 Conn. App. 809, 811, 678 A.2d 506, cert. denied, 239 Conn. 908, 682 A.2d 1008 (1996); *State* v. *Suplicki*, 33

Conn. App. 126, 130, 634 A.2d 1179 (1993), cert. denied, 229 Conn. 920, 642 A.2d 1216 (1994).'' *State* v. *Anderson*, 55 Conn. App. 60, 72–74, 738 A.2d 1116 (1999), rev'd, 255 Conn. 425, 773 A.2d 287 (2001); see *State* v. *Anderson*, supra, 255 Conn. 448 (concluding no structural defect existed under circumstances of particular case).

The majority does not dispute that, when we have addressed claims regarding the active participation in plea bargaining by the judge responsible for presiding over the case and for sentencing the defendant in the event of a conviction, we have underscored the inappropriateness of such conduct due to its inherent dangers. *State* v. *Revelo*, supra, 256 Conn. 494; *Safford* v. *Warden*, supra, 223 Conn. 194 n.16; *State* v. *Niblack*, 220 Conn. 270, 280, 596 A.2d 407 (1991); *State* v. *Gradzik*, 193 Conn. 35, 47, 475 A.2d 269 (1984). Among ''[t]hose dangers are that (1) the trial judge's impartiality may truly be compromised by his [or her] own perception of a personal stake in the agreement, resulting in resentment of the defendant who rejects [the judge's] suggested disposition, (2) the defendant may make incriminating concessions during the course of plea negotiations, and (3) the trial judge may become or appear to become an advocate for his [or her] suggested resolution.'' (Internal quotation marks omitted.) *State* v. *Revelo*, supra, 506 n.23.

In light of such dangers, when error calls into question the objectivity of those charged with bringing a defendant to judgment, we as a reviewing court can neither indulge a presumption of regularity nor necessarily evaluate the resulting harm. Although we have a record of the trial proceedings, pretrial proceedings usually are conducted off the record and in the defendant's absence, and plea bargains that are rejected generally are not made a part of the record. Therefore, in deciding whether the defendant can demonstrate the harm, only one side of the equation is open for inspection. In order to evaluate with any degree of confidence whether the concerns associated with the active participation in plea bargaining by the judge responsible for the trial have indeed materialized, the proceedings in their entirety would have to be open for inspection. Because they are not, the legitimacy of the process is called into question. Accordingly, this defect involves the framework of the proceedings, and I am not prepared to indulge in presumptions of fairness.

Finally, I recognize the weight of authority to the contrary, but I am not persuaded. I fear that the path those jurisdictions follow ultimately could lead to an absolute ban on judicial participation in plea negotiations that the federal courts impose to ensure the appearance of judicial impartiality. See footnote 2 of this dissenting opinion. In my view, the value of having trial judges participating in plea negotiations is too great to risk such a remedy.

I recognize that, in the vast majority of cases, we require defendants whose rights have been violated during the course of a trial to make a specific showing of harm or prejudice. To do that in this case, however, would undermine the very purpose and nature of the structural error doctrine because the defect, in and of itself, by virtue of canon 3 (c), renders the trial process suspect.[5] "The broad injunction against the 'appearance of impropriety' relates to the entire spectrum of judicial conduct. That no unethical or untoward act may occur is implicit in the canon's emphasis on 'appearance.' The conduct under scrutiny must therefore be evaluated from the perspective of the 'eye of the beholder.' *In the Matter of Lonschein*, 50 N.Y.2d 569, 572, 408 N.E.2d 901, 430 N.Y.S.2d 571 (1980). Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself." *In re Dean*, 246 Conn. 183, 198, 717 A.2d 176 (1998). For this reason, because structural errors are defects affecting the trial's entire framework, "[e]rrors of this magnitude are per se prejudicial and require that the underlying conviction be vacated." *Lainfiesta* v. *Artuz*, 253 F.3d 151, 157 (2d Cir. 2001), cert. denied sub nom. *Lainfiesta* v. *Grenier*, 535 U.S. 1019, 122 S. Ct. 1611, 152 L. Ed. 2d 625 (2002); see also *Sullivan* v. *Louisiana*, 508 U.S. 275, 280–81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (harm resulting from erroneous jury instruction on definition of reasonable doubt impossible to quantify because court can only speculate what properly charged jury might have done); *Vasquez* v. *Hillery*, supra, 474 U.S. 263–65 (harm resulting from racial discrimination in grand jury cannot be quantified because impossible to know whether decision to indict would have been assessed same way by properly constituted grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (harm resulting from denial of right to public trial unquantifiable because benefits of public trial are intangible, virtually impossible to prove); *State* v. *Murray*, 254 Conn. 472, 497–99, 757 A.2d 578 (2000) (harm resulting from improper substitution of alternate juror for excused juror after deliberations had begun impossible to quantify because court cannot ascertain whether jurors would be capable of disregarding prior deliberations and receiving potentially nonconforming views of alternate juror).

I agree with the Appellate Court that, "[b]ecause the court presided over the trial and sentencing after having participated actively in plea negotiations, the appearance of a fair trial was lost." *State* v. *D'Antonio*, supra, 79 Conn. App. 708. Accordingly, I respectfully dissent.

[1] I am somewhat confused by the majority opinion in this case, which essentially determines that the defendant's claim is subject to plain error review, but not reversal. "[T]he plain error doctrine, which is now codified at Practice Book § 60-5 . . . is not . . . a rule of reviewability. It is a rule of *reversibility*. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the

trial court's judgment, for reasons of policy.'' (Emphasis added; internal quotation marks omitted.) *State* v. *Cobb*, 251 Conn. 285, 343 n.34, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). In addition, the plain error doctrine ''is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Toccaline*, 258 Conn. 542, 552–53, 783 A.2d 450 (2001). ''Implicit in this very demanding standard is the notion, explained previously, that invocation of the plain error doctrine is reserved for occasions *requiring* the reversal of the judgment under review.'' (Emphasis added.) *State* v. *Kirk R.*, 271 Conn. 499, 507 n.14, 857 A.2d 908 (2004); id. (''because the defendant's claim does not mandate a reversal of the trial court's judgment, the present case is not an appropriate occasion in which to invoke the plain error doctrine''). As I state in this dissenting opinion, the defendant's unpreserved recusal claims not only should be reviewed, but the judgments also must be reversed.

Because I dissent to part I of the majority opinion and would affirm the judgment of the Appellate Court, I do not address the defendant's alternate grounds for affirming the judgment of the Appellate Court discussed in parts II and II of the majority opinion.

[2] In recognition of the potential for undue pressure, ''many jurisdictions bar judges from active participation in plea negotiations.'' *State* v. *Revelo*, supra, 256 Conn. 506; see id., 506 n.22 (citing Fed. R. Crim. P. 11 [e] [1]; Colo. Rev. Stat. § 16-7-302 [1] [2000]; Wash. Rev. Code Ann. § 9.94A.080 [West 1998]).

[3] General Statutes § 51-39 (c) provides: ''When any judge or family support magistrate is disqualified to act in any proceeding before him, he may act if the parties thereto consent in open court.''

[4] We have recognized that the disqualification can be waived, thereby allowing the judge to preside, when the judge obtains the parties' consent to his participation in open court pursuant to § 51-39 (c). By reaching the question of whether the trial court in this case committed ''per se plain error requiring reversal,'' the majority implicitly has concluded that the waiver provisions of § 51-39 are inapplicable.

[5] I further recognize that we treat structural error as constitutional error not subject to a harmless error analysis and that the error in this case is not constitutional. I nevertheless conclude that, because the nature of the defect involves consequences that are necessarily unquantifiable and indeterminate, the impropriety of presiding over the defendant's probation revocation hearing, his trial and his sentencing after having participated actively in plea negotiations with the defendant unquestionably qualifies as structural error.