NO. 89465-5

**SUPREME COURT OF THE STATE OF WASHINGTON**

In re the Detention of:

ROLANDO REYES,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

# STATE'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

SARAH B. SAPPINGTON
Senior Counsel
WSBA #14514
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2019
OID# 91094

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

## Other Authorities



## Rules

## I. INTRODUCTION

Rolando Reyes seeks review of the September 19, 2013, decision of the Court of Appeals(*In re Reyes,* 2013 WL 6919773) affirming the trial court's Order of Commitment following a unanimous jury verdict. His Petition should be denied because he fails to establish any of the criteria for review by this Court, and the Court of Appeals properly affirmed Reyes' commitment. This is so for three reasons: Having waived this issue below, Reyes cannot raise it for the first time on appeal because he cannot show any possible prejudice resulting from the in-chambers proceeding. Nor can Reyes avoid the requirement that he show that any constitutional error is "manifest" by arguing that any error by the trial court was structural, in that structural error does not apply to civil cases. Finally, Reyes lacks standing to raise a violation of Article I, section 10 on behalf of the public.

## II. COUNTERSTATEMENT OF ISSUES

The State submits that there is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. If this Court were to accept review, the following issues would be presented:

A. **Where, with the knowledge of the court and defense counsel and without the knowledge of the prosecutor, the court held a hearing on a purely legal question in chambers to which Reyes did not object, and where Reyes neither alleges nor demonstrates any prejudice resulting from the closure, can he now raise this issue for the first time on appeal?**

**B. Where Reyes neither alleges nor demonstrates any prejudice resulted from the closure, and where no court has ever held that structural error applies to civil cases, does any error resulting from the closure constitute structural error such that reversal and a new trial is required under Art. I, Section 10?**

**C. Where Reyes waived objection to the in-chambers proceeding, does he now have standing to object to this proceeding on behalf of the public under Art. I, Section 10?**

## III. COUNTERSTATEMENT OF THE CASE

### A. Factual History

On May 22, 2009, the trial court heard argument on Reyes' "Motion to Dismiss Jurisdiction." CP at 58-78. Reyes' Note for Motion Docket indicates that the hearing is a special setting before the Honorable Craig Matheson, that it will be "brought on for hearing upon the 22nd day of May, 2009, in the above-entitled Court at the hour of 9:00 a.m." and requests that the clerk of the court note the hearing on the motion docket. *Id.* Briefs in support of the motion were all filed in the legal file, which is not sealed. CP at 58-78; Supp. CP at 312-36.

On the morning of the hearing, the parties convened. The record indicates that Reyes' attorney, Carl Sonderman, and his GAL, Robert Thompson, were both present. RP at 2. The hearing began with Mr. Thompson asking the court whether those present could go on the record. *Id.* He then introduced the case. While the verbatim record of proceedings indicates that the matter was "heard in chambers with Ms. Franklin appearing

by telephonic means" (RP at 2), there was no mention of the fact that the hearing was in chambers, and there is nothing in the record to suggest that the State's counsel was aware that the hearing was not in open court.

Three matters were discussed at the hearing: Case scheduling (RP at 2-3; 17-21), Mr. Thompson's status as GAL on the case (*Id.* at 3-8) and a motion that was captioned "Motion to Dismiss Jurisdiction." *Id.* at 8-17. The trial court summarily denied the motion, commenting that it did not believe that jurisdiction was a "big issue here." RP at 16. The transcript of the entire hearing is fewer than 21 pages; the portion related to the jurisdiction motion is only nine. RP at 8-17.

**B. Court of Appeals' Decision**

The Court of Appeals affirmed Reyes' commitment. Rejecting his public trial argument, the court held that, while the trial court had erred in holding the hearing on a "dispositive motion" in chambers without having first conducted an *Ishikawa* inquiry,[1] reversal was not mandated. *Reyes,* 2013 WL 6919773 at *14. First, the court held that, because Reyes had not raised this issue below and could not demonstrate any possible prejudice resulting from the in-chambers proceeding, there was no manifest error affecting a constitutional right. *Id.* at 12. In doing so, the court rejected Reyes' structural error argument, holding that the structural error doctrine applies only to

[1] *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30, 640 P.2d 716 (1982).

criminal trials. *Id.* Finally, the court determined that Reyes lacked standing to assert the public's rights under Art. 1, Section 10. *Id.* at 14.[2]

Reyes now seeks review by this Court. The State has asked that consideration of his Petition be stayed pending disposition of the ten open-proceeding cases currently pending before this Court. By notation ruling dated December 17, the Supreme Court Deputy Clerk ruled that the State's motion for stay will be referred to the Department for consideration at the same time the Department considers the petition for review, and that any answer is due January 10, 2014.

## IV. REASONS WHY REVIEW SHOULD BE DENIED

Reyes seeks review under RAP 13.4(b)(4) and (5), arguing that the case presents significant questions under the State Constitution, and involves an issue of substantial public interest. App. Br. at 5, 8, 10. Because the issues presented in his Petition do not meet either of the specified criteria for review, this Court should deny review.

### A. Reyes, Having Not Objected To Closure Of The Hearing Below, Cannot Raise It For The First Time On Appeal

Reyes argues that Art. I, Section 10 of the Washington Constitution, which requires that justice "in all cases shall be administered openly,"

---

[2] The Court of Appeals also rejected Reyes' argument that the evidence presented at trial had been insufficient to commit him. That issue is not raised in Reyes' Petition before this Court.

mandates reversal in this case. The Court of Appeals properly rejected this argument. The Court of Appeals correctly determined that Reyes, having not objected below and having failed to show prejudice, could not now demonstrate that the error was "manifest," entitling him to raise an issue for the first time on appeal pursuant to RAP 2.5(a). *Reyes*, 2013 WL 6919773 at *13. This holding was correct and does not merit review.

Appellate courts may refuse to hear any claim of error not raised at trial, except for claims of "manifest error affecting a constitutional right." RAP 2.5(a). *State v. Lyskoski,* 47 Wn.2d 102, 108, 287 P.2d 114 (1955). "The underlying policy of the rule is to 'encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.'" *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756(2009) citing *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988). To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *Id.,* 167 Wn.2d at 98. That is, "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" *Id.,* citing *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

Reyes relies upon this Court's conclusion in *State v. Wise,* 176 Wn.2d 1, 15, 288 P.3d 1113 (2012) that a criminal defendant's right to a public trial under Art. I, Section 22 of the Washington Constitution is not waived by a failure to object to closure. But this issue is already presented in *In re Morgan,* WSSC No. 86234-6, currently pending before this Court.[3] It is therefore unnecessary for this Court to grant review in this case in order to consider that issue, and granting the State's pending motion for a stay would preserve the point.

Reyes offers no justification for applying the conclusion reached in a criminal context in *Wise* to a civil commitment hearing that does not implicate Art. I, Section 22. Even fundamental rights afforded criminal defendants can be lost through failure to object, such as double jeopardy and Fifth Amendment claims, as well as the right to be present at all proceedings. *See, e.g., Peretz v. United States,* 501 U.S. 923, 936-37, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991). As this Court has previously stated, allowing an appellant to raise a new objection on appeal encourages litigants to mislead the trial court. *State v. Henderson,* 114 Wn.2d 867, 868, 792 P.2d 514 (1990). This case illustrates the danger of such an approach.

Here, Reyes' counsel and GAL actively participated in closed hearing without objection, under circumstances where there is no evidence that the

[3] This Court heard argument in *Morgan* on September 17, 2013.

State knew or could have known that the case was being conducted in chambers. Even now, Reyes does not attempt to argue that the closure had any bearing on his eventual trial or indeed even on the outcome of his motion and, as the Court of Appeals noted, he does not argue that the trial court erred in denying his motion. Reyes, 2013 WL 6919773 at *12 n.22.[4] Reyes simply seeks, post-hoc, to take advantage of a closure that his own attorney and GAL clearly knew about and in which they participated. In seeking a new trial by arguing that the public's rights have been violated, Reyes seeks to "righ[t] a wrong inflicted on the public by providing a new trial to an uninjured individual litigant." *In re D.F.F.*, 172 Wn.2d 37, 50, 256 P.3d 357 (2011) (Madsen, dissenting). Reyes, having not objected below, should not be permitted to raise this issue on appeal.

[4] The Court of Appeals characterized Reyes' motion as "a dispositive motion," *Reyes* 2013 WL 6919773 at *12. The motion was not truly dispositive because the remedy, had Reyes prevailed, would have been to refile the case in a different county, not to terminate proceedings against Reyes. Reyes based his motion on *In re Martin,* 163 Wn.2d 501,515, 182 P.2d 951 (2008), in which this Court concluded that the Thurston County Prosecutor lacked the authority to commence a civil commitment proceeding based upon an out-of-state conviction. *Id.*, 163 Wn.2d at 510. While the *Martin* Court reversed Martin's commitment and remanded the case to the trial court with instructions to dismiss the Thurston County petition, the Court explicitly declined to decide "[w]hich prosecutor could appropriately" file a sex predator petition in the case, (163 Wn. 2d at 506) thereby leaving the State the option—which it exercised—of filing in another county. *See In re Martin*, 2010 WL 928435; *rev. den.* 169 Wn.2d 1013, 236 P.3d 206 (2010). Given the fact that Reyes had in fact committed a sexually violent offense in Benton County, a victory on Reyes' part would at most have resulted in the case having been dismissed in Benton County only to be refiled in a different county, not dismissed in its entirety.

## B. Structural Error Does Not Apply To Civil Cases

Reyes seeks to circumvent the requirement that he show that the error was "manifest" by arguing that, because civil commitment cases can result in a significant deprivation of liberty, this Court should presume prejudice as it would in a case involving structural error under Art. 1, Section 22 and order reversal. Pet. at 5-8. It is well established, however, that structural error applies only to criminal cases, and Reyes is not entitled to relief based on that analysis.

Structural error is error that defies harmless error analysis and "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States,* 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). By its clear terms, then, "structural error" refers only to criminal cases.

Reyes' argument for review rests in large part on his characterization of SVP proceedings as "quasi-criminal" and as such deserving of the same procedural protections as defendants in criminal actions. Pet. at 7- 10. Contrary to Reyes' characterization, however, no court in this State has ever characterized the sex predator law as "quasi-criminal," nor has any court ever held that identical procedural protections apply. Both this Court and the appellate courts of this state have consistently held that the SVP statute is civil in nature. *In re Pers. Restr.*

*of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993); *In re Det. of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999); *In re Det. of Williams,* 147 Wn.2d 476, 488, 55 P.3d 597 (2002); *In re Det. of Stout*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009).

Washington courts have repeatedly refused to confer upon SVP respondents the same rights as criminal defendants. *In re Det. of Ticeson*, 159 Wn. App. 374, 380-81, 246 P.3d 550 (2011) (refusing to extend Art. 1, Section 22 rights to SVP respondents), *abrogated on other grounds by State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). Indeed, Washington courts have refused to confer numerous criminal protections upon SVP respondents, including the Fifth Amendment right against compulsory self-incrimination, the Sixth Amendment right to confront witnesses, the ex post facto and double jeopardy clauses, the rule of lenity and the presumption of innocence. *See, e.g., Peterson*, 138 Wn.2d at 91 (Fifth and Sixth Amendment rights do not attach to civil proceedings under RCW 71.09); *Stout,* 167 Wn.2d at 369 ("although SVP commitment proceedings include many of the same protections as a criminal trial, SVP proceedings are *not* criminal proceedings" and the Sixth Amendment right to confrontation is available only to criminal defendants); *In re Det. of Mathers*, 100 Wn. App. 336, 998 P.2d 336 (2000)(State entitled to summary judgment and pre-trial dismissal of conditional release petition

because the statute is civil); *In re Det. Of Cherry*, 166 Wn. App. 70, 74, 271 P.3d 259 (2011)(CR 41 governs voluntary dismissal because the statute is civil); *In re Det. of Coppin*, 157 Wn. App. 537, 238 P.3d 1192 (2010)(pursuant to CR 38, SVP respondent waives right to jury trial by failing to make timely jury demand); *Young*, 122 Wn.2d at 24-25 (because RCW 71.09 is civil, the ex post facto and double jeopardy clauses do not apply). As the *Ticeson* court indicated, "[t]he SVP statute is resolutely civil." *Id.* at 381.Reyes' argument that this Court should take review because of the question of the applicability of structural error to civil cases remains "unsettled" after *D.F.F.* (Pet. at 8) is not well taken. But the matter is not unsettled. In *D.F.F.*, this Court unanimously held that Superior Court Mental Proceeding Rule 1.3, which automatically closed involuntary confinement proceedings to the public, violated Art. 1, Section 10. 172 Wn.2d at 47. Only four members of the Court, however, agreed that this violation was structural in nature. *Id.* Less than 18 months after *D.F.F.* issued, this Court, rejecting application of a structural error analysis in another civil case, noted that "[f]ive justices of this court [in *D.F.F.*] ***explicitly rejected*** the proposition that the concept of structural error had a place outside of criminal law." *Saleemi v. Doctor's Associates, Inc.* 176 Wn.2d 368,385-86, 292 P.3d 108 (2013) (emphasis added). Nor is the question of whether "the same protections and remedies" (Pet. at 8)

apply to civil commitment and criminal trials in the event of a Sec. 10 violation "unsettled." Less than a year ago, this Court, noted the "related and often overlapping" rights afforded by Art. I, Section 10 and Art. 1, Section 22, and unambiguously concluded that, where there is no section 22 violation, the remedy is not a new trial. *State v. Beskurt,* 176 Wn.2d 441, 446, 293 P.3d 1159 (2013). That structural error does not apply in civil cases involving violations of Art. I, Section 10 requires no further clarification. This Court should deny review.

### C. Reyes Lacks Standing To Object To The In-Chambers Hearing

Even if this Court were to permit Reyes to raise his objection to the in-chambers proceeding for the first time on appeal, the Court of Appeals correctly determined Reyes lacks standing to raise this issue on behalf of the general public. Contrary to Petitioner's assertion, the test to be applied to determine whether an individual can assert standing on behalf of third parties is well established and was not affected by the plurality opinion in *D.F.F.* This issue does not merit review by this Court.

As noted by the Court of Appeals, this Court has long applied the standing test used by the United States Supreme Court in *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). *Reyes,* 2013 WL 6919773 at *13. That test requires that "[t]he litigant must have suffered

an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the dispute, ... the litigant must have a close relation to the third party, ... and there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers,* 499 U.S. at 410-11.

The Court of Appeals correctly determined that Reyes met none of these requirements (*Reyes,* 2013 WL 6919773 at *13) and Reyes concedes that this ruling "may comport with the general rule in civil matters[.]" Pet. at 10. Indeed, this case presents a good example of why the Court, as a policy matter, should not reach a constitutional claim raised on behalf of third parties. As discussed above, the fact that Reyes' motion was heard in chambers did not prejudice Reyes in any way. Nor is there reason to believe that, having foregone the opportunity to open his own proceedings, Reyes is appropriately situated to advocate the alleged rights of third parties to have such proceedings open. Reyes does not claim any close relationship with the third parties whose rights he would assert and suggests no hindrance to the ability of those parties to assert their own rights should they choose to do so. Nor has Reyes offered a concrete example of the interests of third parties or explained why those interests cannot be accommodated by a remedy short of reversal of the trial court's order of commitment, such as release of a transcript of the hearing. Finally, as pointed out by the Court of Appeals, where a litigant declines,

"perhaps for tactical reasons," to assert his own right to a public hearing, it makes little sense to allow that litigant to assert someone else's right to attend. *Reyes,* 2013 WL 6919773 at *14. "This essentially gives a litigant the ability to try the case in his preferred manner (without public scrutiny) but obtain a new trial if things do not go in his favor." *Id.*

While conceding that the Supreme Court's standing test in *Powers* "may comport with the general rule in civil matters," Reyes argues that the court failed to consider the "quasi-criminal" nature of sex predator proceedings. Pet. at 10. As discussed above, however, sex predator proceedings are civil, and must be analyzed as such. Nor does the plurality decision of this Court in *D.F.F.* change this result. First, as correctly noted by Division III, the appellant in *D.F.F.* did not argue, and the court did not address, whether the appellant independently could assert the public's own right to attend the hearing. *Reyes,* 2013 WL 6919773 at *14. Moreover, to the extent the standing issue was addressed, the lead opinion in that case "spoke only for four members of the court." *Id.* The concurrence, which did not address the standing issue, cannot be read to "imply" an opinion on an issue it did not address. *See D.F.F.,* 172 Wn.2d at 47-49. Nor can the dissent be said to "merely assume" D.F.F.'s standing to make the challenge on behalf of the general public. Pet. at 9. In the context of the overall dissent, it is obvious that this "assumption" was made not because the dissenting members

of the Court believed it to be true, but because, *even if* true, it did not affect the dissent's ultimate conclusion, which was that "the appropriate remedy for aggrieved members of the public following an Art. I, Section 10 violation is the release of transcripts—not a new trial." 172 Wn. 2d at 49.

The Court of Appeals, applying the well-established test for standing set forth in *Powers,* correctly held that Reyes lacks standing to challenge the constitutionality of the in-chambers hearing on behalf of the public. This holding is consistent with well-established law, is unaffected by this Court's decision in *D.F.F.,* and does not merit review by this Court.

## V. CONCLUSION

For the reasons set forth in its stay motion, this Court should stay consideration of Reyes' petition until final resolution of the 10 open courtroom cases currently pending before this Court. If that motion is denied, this Court, for the reasons set forth above, should deny review.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

ROBERT W. FERGUSON
Attorney General

SARAH B. SAPPINGTON, WSBA # 14514
Senior Counsel
OID #91094

NO. 89465-5

**WASHINGTON STATE SUPREME COURT**

| | |
|---|---|
| In re the Detention of:<br><br>ROLANDO REYES,<br><br>Appellant. | DECLARATION OF SERVICE |

I, Allison Martin, declare as follows:

On January 10, 2014, I sent vial electronic mail and United States mail true and correct cop(ies) of State's Answer to Petition for Review and Declaration of Service, postage affixed, addressed as follows:

Christopher Gibson
Nielsen Broman & Koch, PLLC
1908 E Madison St
Seattle, WA 98122
gibsonc@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of January, 2014, at Seattle, Washington.

Allison Martin
ALLISON MARTIN

## OFFICE RECEPTIONIST, CLERK

**From:** Martin, Allison (ATG) <AllisonM1@ATG.WA.GOV>
**Sent:** Friday, January 10, 2014 2:57 PM
**To:** OFFICE RECEPTIONIST, CLERK
**Cc:** gibsonc@nwattorney.net; Sappington, Sarah (ATG)
**Subject:** In re Detention of Reyes 89465-5
**Attachments:** Reyes-States_Response_PFR.pdf

Attached, please find State's Answer to Petition for Review

In re the Detention of Rolando Reyes, Petitioner, WSSC# 89465-5

Filed on behalf of:

Sarah Sappington, WSBA# 14514
OID# 91094
SarahS@atg.wa.gov

Allison Martin | Legal Assistant to
Sarah Sappington | Katharine Hemann

Washington State Attorney General's Office | Criminal Justice Division | Sexually Violent Predator Unit
800 5th Ave | Ste. 2000 | Seattle WA 98104
206.389.3916 | allisonm1@atg.wa.gov