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RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK D. RUSSELL,

Petitioner.

Washington State Supreme Court
Filed E

MAY 20 2015

Ronald R. Carpenter
Clerk b/h

BRIEF OF WASHINGTON ASSOCIATION
OF PROSECUTING ATTORNEYS
AS AMICUS CURIAE

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. The Prosecuting Attorneys have a strong interest in fair procedures that properly protect the public interests, including the public's constitutional right to the open administration of justice.

II. ISSUE

Can an alleged violation of the right to a public trial be raised for the first time on appeal?¹

III. ARGUMENT

A. UNDER ORDINARY STANDARDS FOR REVIEW, A CONSTITUTIONAL ISSUE CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL ABSENT A SHOWING OF ACTUAL PREJUDICE.

The briefs filed by the State address a narrow proposition: violations of Bone-Club requirements are not structural errors that can be raised for the first time on appeal. State v. Bone-Club, 128

¹ In posing this issue, amicus does not mean to suggest that the right to a public trial was violated in this case. With regard to that issue, amicus has nothing to add to the arguments in the State's briefs.

Wn.2d 254, 256, 906 P.2d 325 (1995). Amicus agrees with the State's arguments on this point. This court should, however, adopt a broader proposition: violations of the right to a public trial should not be considered for the first time on appeal, absent a showing of actual prejudice. Such a rule is followed by federal courts and an overwhelming majority of states.

The general rule governing issues raised for the first time on appeal is set out in RAP 2.5(a):

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time at the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5(a)(3) requires a showing of "manifest error." "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the error is "purely abstract and theoretical," it is not subject to review under RAP 2.5(a)(3). State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

Public trial claims are a prototypical example of an error that is purely abstract and theoretical. As this court has recognized, the impact of a public trial violation is "necessarily unquantifiable and indeterminate." State v. Wise, 176 Wn.2d 1, 19 ¶¶ 29, 288 P.3d 1113 (2012). Theoretically, it is possible that a different outcome might occur in a proceeding that is open to the public. As a practical matter, it is unlikely. Because the defendant cannot make a showing of actual prejudice, the ordinary application of RAP 2.5(a)(3) would preclude the issue from being raised for the first time on appeal.

B. THIS COURT'S REASONS FOR DEPARTING FROM THAT RULE DO NOT WITHSTAND CLOSE SCRUTINY.

This court has nevertheless allowed claims of a public trial violation to be raised for the first time on appeal. E.g., Wise; State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012); State v. Frawley, 181 Wn.2d 452, 465, 334 P.3d 1022 (2014). These different cases have set out different rationales for this rule.

1. Contrary To The Reasoning Of Wise, Issue Preservation Requirements Are Not Based On "Waiver."

In Wise, this court said that the issue could be raised for the first time on appeal because the defendant had not "waived" his

right to a public trial. Wise, 176 Wn.2d at 15-16 ¶ 22-23. This reasoning confuses the concepts of waiver and issue preservation.

As the U.S. Supreme Court has pointed out, waiver of a right eliminates any error. Failure to object does not eliminate the error, but it may prevent it from being raised on appeal.

Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right

United States v. Olano, 507 U.S. 725, 733-34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

This court as well has recognized the difference between forfeiting an issue and waiving it. For example, a defendant who requests a jury instruction cannot challenge that instruction on appeal. The court has applied this doctrine even when the defendant was unaware of the potential error. For example, the invited error doctrine was applied to deny review of an error that arose from subsequent case law. In re Griffith, 102 Wn.2d 100, 633 P.2d 194 (1984). Some members of this court have suggested the incorporation of waiver principles: for example, by applying the invited doctrine only when the defense had a tactical purpose for requesting the instruction. See, e.g., State v. Studd, 137 Wn.2d

533, 559, 973 P.2d 1049 (1999) (Sanders, J., dissenting). The court, however, has consistently rejected any such limitation. Id. at 547-48 (majority opinion). It is thus clear that appellate review of a constitutional issue can be forfeited even absent any "waiver."

If a "waiver" standard is applied, RAP 2.5(a)(3) could not be applied to *any* constitutional right. In general, waiver of a constitutional right must be knowing, voluntary, and intelligent. Counsel's mere inaction is not sufficient to establish a waiver. See, e.g., State v. Tomal, 133 Wn.2d 985, 990, 948 P.2d 833 (1997) (waiver of right to appeal). In this regard, the right to a public trial is no different from any other constitutional right. If a constitutional right can be raised on appeal absent a showing of waiver, then a showing of "manifest error" is never required to raise such a right. The rationale of Wise mistakenly applies "waiver" analysis to a question of issue preservation.

2. The Rationales Set Out in Paumier are Unsound.

Paumier provides three different rationales for the court's holding:

- [1] A structural error affects the framework within which the trial proceeds and renders a criminal trial an improper vehicle for determining guilt or innocence.
- [2] The right to a public trial is a unique right that is important to both the defendant and the public.
- [3]

Moreover, assessing the effects of a violation of the public trial right is often difficult. Requiring a showing of prejudice would effectively create a wrong without a remedy. Therefore, we do not require a defendant to prove prejudice when his right to a public trial has been violated.

Paumier, 176 Wn.2d at 37 ¶ 13, 288 P.3d 1126 (2012) (citations omitted). None of these reasons withstands close examination.

a. Even When A Constitutional Right Can Potentially Impact A Determination Of Guilt, A Violation Of That Right Cannot Be Raised For The First Time On Appeal Absent A Showing Of Actual Prejudice.

The court's first reason was that the absence of the public renders the trial "an improper vehicle for determining guilt or innocence." The same, however, might be said of every constitutional right associated with a criminal trial – that is why these rights exist. Most other constitutional rights have a *greater* potential impact on the determination of guilt than the public trial right. Yet when violations of these rights are raised for the first time on appeal, the court requires a showing of actual prejudice.

For example, this court has recognized that confrontation of witnesses is necessary to protect "the ultimate integrity of [the] fact-finding process." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Nevertheless, a violation of the Confrontation Clause cannot be raised for the first time on appeal without a showing that

it had practical and identifiable consequences in the trial of the case. State v. Kronich, 160 Wn.2d 893, 899 ¶ 10, 161 P.3d 982 (2007), overruled on other grounds, State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

Similarly, impermissible opinion testimony can violate a defendant's constitutional right to a jury trial. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Opinion testimony from a law enforcement officer may be "especially prejudicial because an officer's testimony often carries a special aura of reliability." State v. Kirkman, 159 Wn.2d 918, 928 ¶ 28, 155 P.3d 125 (2007). Even so, an error in admitting such testimony cannot be raised for the first time on appeal absent a showing of actual prejudice. Id. at 926 ¶¶ 21-23.

There is no reason to believe that denial of a public trial has a greater impact on the outcome of a trial than the admission of evidence without cross-examination, or a police officer's testimony to his opinion of the defendant's guilt. It could be argued that either of these errors likewise makes a trial "an improper vehicle for determining guilt or innocence." Yet neither of these errors can be raised for the first time on appeal without a showing of actual prejudice. The same should be true of the right to a public trial.

b. The Public Interest In Public Trials Is Served By Requiring Objections So That The Right Can Be Protected, Not By Giving Defendants Incentives To Withhold Such Objections.

The court's second rationale in Paumier was that the right to a public trial is important both to the defendant and the public. This is a reason for *enforcing* a requirement of timely objection – not for abandoning that requirement.

The purpose underlying our insistence on issue preservation is to encourage the efficient use of judicial resources. Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.

State v. Robinson, 171 Wn.2d 292, 304-05 ¶ 22, 253 P.3d 84 (2011) (citation omitted).

The public's interest is to have trials open to the public. When a portion of the proceedings is improperly closed, that interest is harmed. This harm is *not* corrected by ordering a new trial – the closure of the first trial remains an unalterable fact. Rather, the harm is *compounded* by the costs of a new trial, with all of its impacts on the courts and crime victims. From the public's point of view, the only desirable procedure is doing it right the first time – an interest that is served by requiring a timely objection.

Eliminating the requirement of a timely objection creates perverse incentives to violate the public interest. From the

defendant's point of view, there is little advantage in objecting to a courtroom closure. It is highly unlikely that such an objection will alter the outcome of the case. There is, however, a great advantage to *withholding* such an objection. If the trial results in acquittal, the case is over. If it results in conviction, the defendant can raise the issue for the first time on appeal, thereby obtaining a second chance at acquittal.

In short, the public interest in the right to a public trial is not a valid reason for allowing the claim to be raised for the first time on appeal. Rather, it is a reason for requiring timely objections to closure. Such objections allow the court to correct the error before it occurs. For the public, that is the *only* desirable outcome.

c. When Courts Enforce Procedural Requirements For Exercising Remedies, This Does Not Lead To "A Wrong Without A Remedy."

The third reason in Paumier for dispensing with the "actual prejudice" requirement is that if this requirement were enforced, there would be a "wrong without a remedy." The court confused the *existence* of a remedy with procedural restrictions on the *exercise* of that remedy. In law, *every* remedy must be exercised in some prescribed manner. If a party does not follow the proper procedure,

the remedy will be lost. This does not mean, however, that the "wrong was without a remedy."

The law provides numerous examples of how valid and effective remedies may be lost. For example, in both civil and criminal cases, parties have the right to jury instructions that correctly inform the jury of applicable law. See Gammon v. Clark Equipment Co., 104 Wn.2d 613, 617, 707 P.2d 685 (1985); State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). The parties must, however, take timely exception to improper instructions. If they fail to do so, the issue may not be raised on appeal, absent manifest error affecting a constitutional right. State v. Dent, 123 Wn.2d 467, 477, 869 P.2d 392 (1994); Hamilton v. State Farm Ins. Co., 83 Wn.2d 787, 795, 523 P.2d 193 (1974). In other words, when parties fail to object to jury instructions, they lose their remedy for any non-constitutional error. Again, this does not result in a "wrong without a remedy."

When constitutional rights are involved, procedural requirements are relaxed. Although issues can often be raised for the first time on appeal, as discussed above this is subject to a requirement of "actual prejudice." Even if the issue is not raised on appeal at all, it can often be raised via personal restraint petition,

but this remedy as well requires proof of actual prejudice. In re Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). Furthermore, personal restraint petitions are generally subject to a statutory time limit. If no petition is filed within this time period, the remedy is lost. In re Coats, 173 Wn.2d 123, 131 ¶ 8, 267 P.3d 324 (2011) Once again, this does not result in a “wrong without a remedy.”

The right to a public trial is no different. Violations of that right have a prompt and efficient remedy – timely objection to the improper proceeding. Ordinarily, such an objection will result in the trial court correcting its own error, which is the most desirable outcome. If the court fails to do so, the issue can be raised on appeal. Since the issue was properly preserved, the limitations of RAP 2.5(a)(3) will be irrelevant. Instead, the State will have the burden of proving harmlessness beyond a reasonable doubt – a burden that will often be impossible to carry.

In short, the issue before this court is not whether the “wrong” of a non-public trial has a remedy. Clearly, it does have a remedy via timely objection. The issue is what happens if the defendant fails to take advantage of that remedy. The answer should be that absent of showing of actual prejudice, the remedy is lost.

3. Contrary to the Reasoning of Frawley, The Best Way To Prevent Judicial Errors Is By Requiring Parties To Warn Judges Of Those Errors, Not By Encouraging Parties To Remain Silent.

Frawley offers a different rationale for rejecting a contemporaneous objection requirement:

Under such a rule, a trial court could permit a closure whenever the defendant did not object, except for situations in which the closure was "manifest" error, as defined by a common law approach. In practice, such a rule would create a perception of trial proceedings that could be presumptively closed, with open proceedings serving as the exception to the rule.

Frawley, 181 Wn.2d at 465 ¶ 25 (plurality opinion).

This analysis reflects assumptions that are opposite to those underlying this court's jurisprudence dealing with preservation of errors. This court has assumed that judges wish to apply the law correctly. When they err, it is normally the result of ignorance. Consequently, the best way to avoid error is by requiring the parties to advise the court of applicable law. See Robinson, 171 Wn.2d at 304 ¶ 22 (contemporaneous objection requirement "ensur[es] that the trial court has the opportunity to correct any errors").

Frawley applies an opposite assumption. It seems to assume that judges are not motivated by a desire to uphold legal requirements. Rather, they are motivated by a desire to avoid

appellate reversal. Consequently, the only way to get them to follow proper procedures is by reversing convictions resulting from trials over which they presided.

This cynical view of judicial behavior has little basis. In the present case, for example, there is no indication that the trial judge was unconcerned with constitutional requirements for public trials. Rather, the judge apparently believed that the procedure he adopted was consistent with those requirements. The lack of objection reinforced those beliefs. Had any party objected, the court could have recognized any error and corrected the problem. The lack of any requirement for an objection did not prevent error – it contributed to it.

If this court believes that trial judges are ignorant of public trial requirements, it can mandate judicial education on this topic. If it believes that the boundaries of the right are unclear, it can clarify them by judicial opinions or court rules. And if some judges are consistently ignoring legal requirements, those judges are subject to discipline. Cf. In re Hammermaster, 139 Wn.2d 211, 236-38, 985 P.2d 924 (1999) (suspension of judge for disregarding procedural requirements governing guilty pleas). The solution is not to punish the litigants who appeared before the judge, and the public that

they represent, by overturning convictions that were obtained after fair trials.

C. AN OVERWHELMING MAJORITY OF U.S. JURISDICTIONS DO NOT ALLOW ISSUES TO BE RAISED FOR THE FIRST TIME ON APPEAL, ABSENT A SHOWING OF ACTUAL PREJUDICE.

The doctrine announced in Wise, Paumier, and Frawley is out of step with the rules followed almost everywhere else in the United States. Contemporaneous objection requirements are universal. Many jurisdictions recognize exceptions for error that are particularly fundamental. Almost everywhere, however, these exceptions require a showing of prejudice.

To begin with, such a requirement is applied by federal courts. Under the "plain error" doctrine, courts will rarely consider issues raised for the first time on appeal. Under such circumstances, a court has the power to reverse a conviction only if three criteria are satisfied. First, there must be an "error." As discussed above, "error" exists if a legal rule was violated and the defendant did not affirmatively waive that rule. Second, the error must be "plain," which is synonymous with "clear" or "obvious." Third, the error must "affect substantial rights." This requirement places the burden on the defendant to show that the error was prejudicial. Olano, 507 U.S. at 732-35.

Even when these criteria are satisfied, the appellate court is not required to consider the error: it merely has discretion to do so. In exercising this discretion, the court should correct the error only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. at 735 36. As the Court explained in an earlier case:

[T]he plain error exception to the contemporaneous objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result. Any unwarranted extension of this exacting definition of plain error would skew the Rule's careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.

United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (citations omitted).

The existence of "structural error" does not change this analysis. A federal court will reserve a conviction based on an unpreserved structural error only if that error casts "serious doubt on the fairness, integrity, or public reputation of the judicial system." United States v. Marcus, 560 U.S. 258, 265, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010). The "plain error" standard has been specifically applied to alleged violations of the right to a public trial. See, e.g., United States v. Gomez, 705 F.3d 68, 74-75 (2nd Cir.)

cert. denied, 134 S.Ct. 61 (2013); United States v. Espinal-Almeida, 699 F.3d 588, 600 (1st Cir. 2012).

Similar approaches are followed by a majority of states. Seven states have adopted the U.S. Supreme Court's "plain error" doctrine.² Three other states call the doctrine by a different name but still apply the U.S. Supreme Court cases defining "plain error."³ Another 20 states have other standards that require a showing of prejudice to consider constitutional issues for the first time on appeal.⁴ There are many different formulations of the kind of prejudice that is required.⁵

² People v. Shafier, 483 Mich. 205, 219-20, 768 N.W.2d 305, 314 (2009); State v. Ramey, 721 N.W.2d 294, 298 (Minn. 2006); State v. Panarello, 157 N.H. 204, 207, 949 A.2d 732, 735 (2008); Hogan v. State, 139 P.3d 907, 923, ¶ 38 (Ok. Cr. App. 2006), cert. denied, 549 U.S. 1139 (2007); State v. Hayes, 855 N.W.2d 668, 675 ¶ 25 (S.D. 2014); State v. Yoh, 180 Vt. 317, 342 ¶ 39, 910 A.2d 853, 872 (2006); State v. Thompson, 220 W. Va. 398, 410, 647 S.E.2d 834, 846 (2007).

³ State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010) ("fundamental error"); Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006) ("palpable error"); State v. Pabon, 28 A.3d 1147, 1154 (Maine 2011) ("obvious error").

⁴ State v. Henderson, 210 Ariz. 561, 567 ¶¶19-20, 115 P.3d 601, 607 (2005) ("fundamental error"); People v. Ujaama, 302 P.3d 296, 305 ¶ 43 (Col. App. 2012) ("plain error"); State v. Coward, 292 Conn. 296, 307, 972 A.2d 691, 700 (2009) ("plain error"); Baker v. State, 906 A.2d 139, 150 (Del. 2006) ("plain error"); Reed v. State, 837 So. 2d 366, 370 (Fla. 2002) ("fundamental error"); People v. Skyes, 362 Ill. Dec. 239, 245, 972 N.E.2d 1272, 1278 (Ill. App. 2012) ("plain error"); Jewell v. State, 887 N.E.2d 939, 942 (Ind.

2008) ("fundamental error"); Robinson v. State, 410 Md. 91, 111, 976 A.2d 1072, 1084 (2009) ("plain error"); Commonwealth v. Letkowski, 469 Mass. 603, 617, 15 N.E.3d 207, 218 (2014) ("substantial likelihood of miscarriage of justice"); Morgan v. State, 793 So. 2d 615, 617 (Miss. 2001) ("plain error"); State v. Hunt, 451 S.W.3d 251 (Mo. 2014) ("plain error"); State v. Watt, 285 Neb. 647, 662, 832 N.W.2d 459, 476 (2013) ("plain error"); State v. Maloney, 216 N.J. 91, 104, 77 A.3d 1147, 1155 (2013) ("plain error"); State v. Stevens, 323 P.3d 901, 911 (N.M. 2014) ("fundamental error"); State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("plain error"); State v. Schmidt, 9 N.E.3d 458, 461 (Ohio. App.), review denied, 139 Ohio St. 3d 1430 (2014) ("plain error"); State v. Banks, 271 S.W.3d 90, 119 (Tenn. 2008) ("plain error"); State v. Bedell, 322 P.3d 697, 703 ¶ 20 (Utah 2014) ("plain error"); Pope v. Commonwealth, 60 Va. App. 486, 508, 729 S.E.2d 751, 762 (2012) ("ends of justice"); Sanchez v. State, 126 P.3d 897, 904 ¶ 19 (Wyo. 2006) ("plain error").

^b See, e.g., Ujaama, 302 P.3d at 305 ¶ 43 (error "cast[s] serious doubt on the reliability of the conviction"); Coward, 972 A.2d at 700 (consequences of error are "so grievous as to be fundamentally unfair or manifestly unjust"); Baker, 906 A.2d at 150 (error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process"); Reed, 837 So. 2d at 370 ("a verdict of guilty could not have been obtained without the assistance of the alleged error"); Jewell, 887 N.E.2d at 942 (error made a fair trial impossible); Letkowski, 15 N.E.3d at 218 (error is "sufficiently significant in the context of the trial to make plausible an inference that the jury's result might have been otherwise but for the error"); Hunt, 451 S.W.2d at 260 ("error actually did result in manifest injustice or a miscarriage of justice"); Stevens, 323 P.3d at 911 ("guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand"); Lawrence, 723 S.E.2d at 334 (error had a probable impact on the jury verdict); Schmidt, 9 N.E.3d at 461 ("but for the error, the outcome of the trial clearly would have been otherwise").

A majority of the remaining states (12 states) follow an even more restrictive doctrine. These states refuse to consider constitutional issues for the first time on appeal.⁶

There are four states that place the burden on the State to prove the harmlessness of a constitutional error raised for the first time on appeal. In three of these states, the issue will only be considered if the error was obvious.⁷ Only one state (Hawaii) does not appear to recognize that limitation. State v. Miller, 122 Haw. 92, 100, 223 P.3d 157, 165 (2010).

One state (New York) has a unique rule. If the trial court committed an error that goes to the “essential validity of the process,” the court will not consider whether that error was

⁶ Craft v. State, 90 So. 3d 197, 224 (Ala. Crim. App. 2011); Hale v. State, 343 Ark. 62, 81, 31 S.W.3d 850, 862 (2000); People v. Homick, 55 Cal. 4th 816, 856, n. 25, 150 Cal. Rptr. 3d 1, 289 P.3d 791 (2012) (issue considered only if applicable legal standard was argued to trial court); Bell v. State, 293 Ga. 683, 684, 748 S.E.2d 382, 383 (2013), cert. denied, 134 S. Ct. 1334 (2014); State v. Derby, 800 N.W.2d 52, 60 (Iowa 2011); State v. Hatton, 985 So. 2d 709, 718 (La. 2008); Mt. Code § 46-20-701(2); State v. Simonsen, 329 Ore. 288, 296, 986 P.2d 566, 571 (1999), cert. denied, 528 U.S. 1090 (2000); Commonwealth v. Colavita, 606 Pa. 1, 28, 993 A.2d 874, 891 (2010); State v. Bouffard, 945 A.2d 305, 312 (R.I. 2008); State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011); Texas R. App. Pro 33.1. Some of these states recognize exceptions under rare circumstances.

harmless. People v. Rivera, 23 N.Y.3d 827, 993 N.Y.S.2d 656, 18 N.E.3d 367 (2014). Violations of the right to public trial do not fall within this exception and cannot be raised for the first time on appeal. People v. Alvarez, 20 N.Y.3d 75, 81, 979 N.E.2d 1173, 1176 (2012).

In one state (Nevada), appellate courts have discretion to consider constitutional issues raised for the first time on appeal. Case law does not set out standards for exercise of that discretion. State v. Hughes, 261 P.3d 1067, 1070 n. 4 (Nev. 2011). Finally, there is one state (Kansas) that classifies the right to a public trial as a "fundamental right" that can be raised for the first time on appeal, without any showing of prejudice. State v. Barnes, 45 Kan. App. 2d 608, 612, 251 P.3d 96, 100 (2011).

In short, absent a showing of prejudice, the defendant's public trial claim would not be considered in federal courts if raised for the first time on appeal. It would likewise not be considered in the courts of 46 states. In one state (Nevada), it is doubtful that it would be considered, but the result is not clear. There appear to be

⁷ Adams v. State, 261 P.3d 758, 773 (Alaska 2011); State v. Kruckenberg, 758 N.W.2d 427, 431 ¶ 15 (N.D. 2008); State v. Jorgensen, 310 Wis.2d 138, 155, 754 N.W.2d 77, 85 (2008).

only two states (Hawaii and Kansas) that would consider an issue of this nature for the first time on appeal. This court should join the overwhelming majority of jurisdictions and hold public trial claims cannot be raised for the first time on appeal absent a showing of actual prejudice.

III. CONCLUSION

This court's willingness to consider public trial issues for the first time on appeal is harmful to the public and serves no legitimate purpose. It prevents trial courts from obtaining the information needed to prevent errors. It is contrary to the rule followed by almost every other U.S. jurisdiction. This court should abandon that rule and return to the "manifest error" standard in RAP 2.5(a)(3).

Respectfully submitted on May 11, 2015.

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Thanks.

Diane.

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