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NO. 89619-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

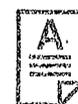
UNTERS L. LOVE, Petitioner.

BRIEF OF AMICUS CURIAE
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ORIGINAL

TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE. 1

II. ISSUES PRESENTED. 1

III. STATEMENT OF FACTS. 1

IV. ARGUMENT. 3

A. THE CONTEMPORANEOUS OBJECTION RULE SHOULD RARELY BE WAIVED. 3

B. A DEFENDANT WHO ASSERTS A VIOLATION OF HIS DUE PROCESS RIGHT TO BE PRESENT MUST DEMONSTRATE THAT HIS PRESENCE WOULD BE BENEFICIAL. 10

C. LOGIC AND EXPERIENCE ESTABLISH THAT A COURTROOM CLOSURE DOES NOT OCCUR SIMPLY BECAUSE MEMBERS OF THE GALLERY DO NOT SIMULTANEOUSLY HEAR AND SEE EVERY INTERACTION. 12

V. CONCLUSION. 19

TABLE OF AUTHORITIES

TABLE OF CASES

Adams v. State, 261 P.3d 758 (Alaska 2011)..... 8

Baker v. State, 906 A.2d 139 (Del. 2006). 6, 7

Bell v. State, 293 Ga. 683, 748 S.E.2d 382 (2013), *cert. denied*,
134 S. Ct. 1334 (2014)..... 7

Blumberg v. H. H. McNear & Co., 1 Wash. Terr. 141 (1861) 3

Commonwealth v. Colavita, 606 Pa. 1, 993 A.2d 874 (2010)..... 7

Commonwealth v. Letkowski, 469 Mass. 603,
15 N.E.3d 207 (2014) 7

Craft v. State, 90 So. 3d 197 (Ala. Crim. App. 2011). 7

Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348,
120 L. Ed. 2d 33 (1992)..... 17

Hale v. State, 343 Ark. 62, 31 S.W.3d 850 (2000). 7

Hogan v. State, 139 P.3d 907 (Ok. Cr. App. 2006), *cert. denied*,
549 U.S. 1139 (2007)..... 6

In re Pers. Restraint of Lord, 123 Wn.2d 296,
868 P.2d 835 (1994)..... 10

In re Pers. Restraint of Pirtle, 136 Wn.2d 467,
965 P. 2d 593 (1998). 10

Jewell v. State, 887 N.E.2d 939 (Ind. 2008) 7

Morgan v. State, 793 So. 2d 615 (Miss. 2001) 7

People v. Homick, 55 Cal. 4th 816, 150 Cal. Rptr. 3d 1,
289 P.3d 791 (2012) 7

<i>People v. Rivera</i> , 23 N.Y.3d 827, 993 N.Y.S.2d 656, 18 N.E.3d 367 (2014).....	8
<i>People v. Shafter</i> , 483 Mich. 205, 768 N.W.2d 305 (2009).	6
<i>People v. Skyes</i> , 362 Ill. Dec. 239, 972 N.E.2d 1272 (Ill. App. 2012)	7
<i>People v. Ujaama</i> , 302 P.3d 296 (Col. App. 2012)	6, 7
<i>Pope v. Commonwealth</i> , 60 Va. App. 486, 729 S.E.2d 751 (2012)	7
<i>Popoff v. Mott</i> , 14 Wn.2d 1, 126 P.2d 597 (1942).....	15
<i>Press-Enter. Co. v. Superior Court</i> , 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (<i>Press II</i>).	12
<i>Puckett v. United States</i> , ___ U.S. ___, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009).....	3
<i>Reed v. State</i> , 837 So. 2d 366 (Fla. 2002).	6, 7
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)	13
<i>Robinson v. State</i> , 410 Md. 91, 976 A.2d 1072 (2009)	7
<i>Rushen v. Spain</i> , 464 U. S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).	10
<i>Sanchez v. State</i> , 126 P.3d 897 (Wyo. 2006)	7
<i>Snyder v. Massachusetts</i> , 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934), <i>overruled in part on other grounds sub nom. Malloy v.</i> <i>Hogan</i> , 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).....	10
<i>State v. Anderson</i> , 294 Kan. 450, 276 P.3d 200 (2012).....	8
<i>State v. Banks</i> , 271 S.W.3d 90 (Tenn. 2008)	7
<i>State v. Bedell</i> , 322 P.3d 697 (Utah 2014)	7

<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	13
<i>State v. Bouffard</i> , 945 A.2d 305 (R.I. 2008).	7
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005)	13
<i>State v. Coward</i> , 292 Conn. 296, 972 A.2d 691 (2009)	6, 7
<i>State v. Dann</i> , 205 Ariz. 557, 74 P.3d 231 (2003)	9
<i>State v. Davenport</i> , 771 So.2d 837 (La. App. 2000)	9
<i>State v. Davis</i> , 41 Wn.2d 535, 250 P.2d 548 (1953).	3
<i>State v. Derby</i> , 800 N.W.2d 52 (Iowa 2011).	7
<i>State v. Dunn</i> , 180 Wn. App. 570, 321 P.3d 1283 (Div. II, 2014), <i>review denied</i> , 181 Wn.2d 1030 (2015).	17
<i>State v. Filitaula</i> , ____ Wn. App. ____, 339 P.3d 221 (Div. I, 2014)..	17, 19
<i>State v. Fitzgerald</i> , ____ Wn.2d ____, ____ P.3d ____, 2015 Wash. Lexis 29 (Jan. 7, 2015)	18
<i>State v. Hart</i> , 191 Mont. 375, 625 P.2d 21, <i>cert. denied</i> , 454 U.S. 827 (1981)	11
<i>State v. Hatton</i> , 985 So. 2d 709 (La. 2008).	7
<i>State v. Hayes</i> , 855 N.W.2d 668, 675 ¶ 25 (S.D. 2014)..	6
<i>State v. Henderson</i> , 210 Ariz. 561, 115 P.3d 601 (2005)	6
<i>State v. Hughes</i> , 261 P.3d 1067 (Nev. 2011).	8
<i>State v. Hunt</i> , ____ S.W.3d ____, 2014 WL 7335208 (Mo. 2014)	7
<i>State v. Irby</i> , 170 Wn.2d 874, 246 P.3d 796 (2011)	10
<i>State v. Jorgensen</i> , 310 Wis. 2d 138, 754 N.W.2d 77 (2008).	8

<i>State v. Koss</i> , 181 Wn.2d 493, 334 P.3d 1042 (2014)	14
<i>State v. Kruckenberg</i> , 758 N.W.2d 427 (N.D. 2008).....	8
<i>State v. Lawrence</i> , 365 N.C. 506, 723 S.E.2d 326 (2012)	7
<i>State v. Louie</i> , 68 Wn.2d 304, 413 P.2d 7 (1966)	3
<i>State v. Love</i> , 176 Wn. App. 911, 309 P.3d 1209 (Div. III, 2013), <i>petition for review granted in part</i> , 181 Wn.2d 1029 (2015).	17
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992).	4
<i>State v. Maloney</i> , 216 N.J. 91, 77 A.3d 1147 (2013)	7
<i>State v. Marks</i> , ___ Wn. App. ___, 339 P.3d 196 (Div. II, 2014).....	17
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	4
<i>State v. Miller</i> , 122 Haw. 92, 223 P.3d 157 (2010).	8
<i>State v. Panarello</i> , 157 N.H. 204, 207, 949 A.2d 732 (2008).	6
<i>State v. Ramey</i> , 721 N.W.2d 294 (Minn. 2006).....	6
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	4
<i>State v. Schiefelbein</i> , 230 S.W.3d 88 (Tenn. Crim. App. 2007), <i>rehearing granted on other grounds</i> , 2007 Tenn. Crim. App. Lexis 214 (Mar. 7, 2007).	14
<i>State v. Schmidt</i> , 9 N.E.3d 458 (Ohio. App.), <i>review denied</i> , 139 Ohio St. 3d 1430 (2014)	7
<i>State v. Sheppard</i> , 391 S.C. 415, 706 S.E.2d 16 (2011).	7
<i>State v. Simonsen</i> , 329 Ore. 288, 986 P.2d 566 (1999), <i>cert. denied</i> , 528 U.S. 1090 (2000).	7
<i>State v. Slert</i> , 181 Wn.2d 598, 334 P.3d 1088 (2014).	15

<i>State v. Stevens</i> , 323 P.3d 901 (N.M. 2014)	7
<i>State v. Strickland</i> , ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 25 (Jan. 7, 2015)	18
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012)	12, 13
<i>State v. Sykes</i> , ___ Wn.2d ___, 339 P.3d 972 (2014).	15
<i>State v. Thomas</i> , ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 59 (Jan. 7, 2015)	18
<i>State v. Thomas</i> , 16 Wn. App. 1, 553 P.2d 1357 (1976)	15, 17
<i>State v. Thompson</i> , 220 W. Va. 398, 647 S.E.2d 834 (2007).	6
<i>State v. Urquijo</i> , ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 16 (Jan. 7, 2015).....	18
<i>State v. Van Thrower</i> , ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 12 (Jan. 7, 2015)	18
<i>State v. W.A.</i> , 184 N.J. 45, 875 A.2d 882 (2005)	9
<i>State v. Watt</i> , 285 Neb. 647, 832 N.W.2d 459 (2013)	7
<i>State v. Webb</i> , 183 Wn. App. 242, 333 P.3d 470 (Div. II, 2014), <i>review denied</i> , ___ Wn.2d ___ (Feb. 4, 2015).....	17
<i>State v. Yoh</i> , 180 Vt. 317, 910 A.2d 853 (2006).	6
<i>United States v. Gagnon</i> , 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)	9
<i>United States v. Marcus</i> , 560 U.S. 258, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010).....	6
<i>United States v. Olano</i> , 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).....	5
<i>United States v. Reyes</i> , 764 F.3d 1184 (9th Cir. 2014)	11

<i>United States v. Sherwood</i> , 98 F.3d 402 (9th Cir. 1996)	9
<i>United States v. Thomas</i> , 724 F.3d 632 (5th Cir. 2013), <i>cert. denied</i> , 134 S. Ct. 1040 (2014).	12
<i>United States v. Young</i> , 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)	6
<i>Yakima County (W. Valley) Fire Protection Dist. No. 12 v.</i> <i>City of Yakima</i> , 122 Wn.2d 371, 858 P.2d 245 (1993)	16
<i>Yakus v. United States</i> , 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944)	3

STATUTES

Code 1881, § 219	16
Code of 1881, § 1088	3
Mt. Code § 46-20-701(2).	7
RCW 4.44.250.	16

RULES AND REGULATIONS

Asotin, Columbia and Garfield Counties Superior Court LCR 47(6) 2
Benton and Franklin Superior Court LCR 47(e)(9) 2
Cowlitz County Superior Court LCR 47(e)(9) 2
Grant County Superior Court LCR 47(c) 2
Kittitas Superior Court LCR 47 2
Klickitat and Skamania Superior Court Rule 9 (VI) 2
RAP 2.5(a)(3).. 1, 4
Spokane County Superior Court LCR 47.. . . . 2
Stevens, Pend Oreille and Ferry County Superior Courts LCR 47(e)(9)
. 2
Texas R. App. Pro 33.1. 7
Yakima County Superior Court LCR 47(e)(1) 2

OTHER AUTHORITIES

ABA Standards for Criminal Justice Discovery and Trial by Jury, stand. 15-2.7 commentary (3d ed. 1996) 16
Karl B. Tegland, *2A Washington Practice: Rules Practice*, RAP 2.5 (6th ed.2004). 3
Washington State Jury Commission, *Report to the Board for Judicial Administration* (July 2000). 16

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. WAPA has filed this brief at the request of the Court.

II. ISSUES PRESENTED

1. Whether a defendant’s failure to request permission from the trial court judge to attend sidebar conferences, where for cause challenges to perspective jurors were exercised, constitutes a waiver of the defendant’s due process right to be present?
2. Whether a defendant can demonstrate manifest error, as required by RAP 2.5(a)(3), when the defendant is represented by counsel at sidebar conferences?
3. Whether a defendant’s constitutional right to a public trial is violated whenever one or more gallery members cannot fully hear or see events as they occur in the courtroom?

III. STATEMENT OF FACTS

WAPA agrees with the facts as stated in the State’s Supplemental Brief of Respondent. WAPA, however, believes that the Court should be aware that the method of exercising peremptory challenges utilized in the

trial court was specifically authorized by Spokane County Superior Court LCR 47. This rule provides, in pertinent part, as follows:

(9) Peremptory Challenges. The exercise or waiver of peremptory challenges shall be noted secretly on the jury list.

Spokane County Superior Court LCR 47(9).¹

¹Numerous other local rules contain similar language. *See, e.g.*, Asotin, Columbia and Garfield Counties Superior Court LCR 47(6) (“When questioning by the court and counsel is completed, the Court will allow the private exercise of peremptory challenges by striking name of the first exercised challenge from the panel of the first 12 jurors remaining after the entire panel has been passed for cause.”); Benton and Franklin Superior Court LCR 47(e)(9) (“All peremptory challenges allowed by law shall be exercised in the following manner: The bailiff will deliver to counsel for the plaintiff and counsel for the defendant, in turn, a prepared form upon which each counsel shall endorse the name of the challenged juror in the space designated, or his acceptance of the jury as constituted. The bailiff will then exhibit this form after each challenge to the opposing counsel, and the Court. After all challenges have been exhausted, the Court will excuse those jurors who have been challenged and will seat the jury as finally selected. . . . The purpose of this rule is to preserve the secrecy of peremptory challenges and all parties and their counsel shall conduct themselves to that end. . . .”); Cowlitz County Superior Court LCR 47(e)(9) (same); Grant County Superior Court LCR 47(c) (“After examination of the panel, counsel will, in turn, exercise peremptory challenges by striking names from a roster of those panel members not previously dismissed.”); Kittitas Superior Court LCR 47 (“Unless good cause is show, all peremptory challenges shall be exercised in open Court at the side bar by marking the challenged juror’s name on a form to be provided by the Court.”); Klickitat and Skamania Superior Court Rule 9 (VI) (“A. In trial by jury cases, peremptory challenges shall be exercised secretly without disclosing the juror being challenged. The plaintiff first and then defendant alternately shall mark and initial such challenge upon a sheet furnished for that purpose by the bailiff who shall then exhibit such challenge to the opposite party, the Clerk and the Court with no disclosure to the jury as to the challenging party.”); Stevens, Pend Oreille and Ferry County Superior Courts LCR 47(e)(9) (“The exercise or waiver of peremptory challenges shall be noted silently.”); Yakima County Superior Court LCR 47(e)(1) (“All peremptory challenges allowed by law shall be exercised in writing. Each party shall in turn indicate the juror challenged by name and seat number or shall indicate whether a peremptory challenge for the existing panel is waived. The purpose of this rule is to preserve the secrecy of the peremptory challenge process and all parties and their counsel shall conduct themselves to that end.”).

IV. ARGUMENT

A. THE CONTEMPORANEOUS OBJECTION RULE SHOULD RARELY BE WAIVED

One of the most fundamental principles of appellate litigation is that a party may not assert on appeal a claim that was not presented at trial. *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953). This rule has been a part of Washington's legal landscape since territorial days.² In one case, this Court remarked that it had adhered to a contemporaneous objection requirement "with almost monotonous continuity." *State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) (citing 34 prior cases going back to 1895).

The contemporaneous objection rule is rooted in notions of fundamental fairness and judicial economy and has been applied across a whole range of issues, constitutional, non constitutional, civil and criminal. See Karl B. Tegland, *2A Washington Practice: Rules Practice*, RAP 2.5, at 190 et. seq. (6th ed.2004); *Puckett v. United States*, ___ U.S. ___, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266 (2009). This rule is also recognized by the United States Supreme Court. See, e.g. *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944) ("No procedural principle is more familiar to this Court than that a ... right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right

²See Code of 1881, § 1088 (provisions of the civil practice act with regard to taking exceptions would also govern in criminal cases); *Blumberg v. H. H. McNear & Co.*, 1 Wash. Terr. 141, 141-42 (1861) (court will not review claims to which error was not assigned).

before a tribunal having jurisdiction to determine it.”).

RAP 2.5(a)(3) provides notice to parties that this Court “may” consider a “manifest error affecting a constitutional right” for the first time on appeal. The rule does not, however, create an absolute right to have an otherwise unpreserved claim heard. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (“As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.”).³ Only constitutional errors that result in serious injustice to the accused, and thus adversely affect public perceptions of the fairness and integrity of judicial proceedings merit consideration. *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1998). An overly generous application of the RAP 2.5(a)(3) exception “generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *McFarland*, 127 Wn.2d at 333 (quoting *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992)).

Washington is not the first jurisdiction to consider whether a defendant may assert an absence from sidebar claim for the first time on

³A constitutional claim will also not be considered for the first time on appeal “where the facts necessary for its adjudication are not in the record.” *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). In a case in which sidebars are not recorded or otherwise memorialized, the appellate court would lack the facts necessary to adjudicate a defendant’s “presence” claim.

appeal. A review of both federal and state cases establish that the vast majority would decline to hear Mr. Love's sidebar claim for the first time on appeal.

Federal courts will refuse to consider issues raised for the first time on appeal unless they constitute "plain error." Under the "plain error" doctrine, an appellate court has the power to reverse the conviction only if three criteria are satisfied. First, there must be an "error." "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. *United States v. Olano*, 507 U.S. 725, 732-35, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

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).

Similar approaches are followed by a majority of states. Seven states have adopted the U.S. Supreme Court’s “plain error” doctrine.⁴ Three other states call the doctrine by a different name but still apply the U.S. Supreme Court cases defining “plain error.”⁵ Another 20 states have other standards that require a showing of prejudice to consider constitutional issues for the first time on appeal.⁶ There are many different formulations of the kind of

⁴*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).

⁵*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”).

⁶*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)

prejudice that is required.⁷

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.⁸ There are four states that place the burden on the

("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*, ___ S.W.3d ___, 2014 WL 7335208 (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").

⁷See, 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*, 2014 WL 7335208 (error resulted in manifest injustice or 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").

⁸*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.

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.⁹ Only one state does not appear to recognize that limitation.¹⁰ In one state, 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 harmless. *People v. Rivera*, 23 N.Y.3d 827, 993 N.Y.S.2d 656, 18 N.E.3d 367 (2014).

Finally, there are two states in which the standard for considered unpreserved issues is vague or unclear. In Kansas, constitutional issues will be considered for the first time on appeal only if they involve “fundamental rights.” The courts have not explained the difference between “constitutional rights” and “fundamental rights.” *State v. Anderson*, 294 Kan. 450, 464, 276 P.3d 200, 211 (2012). In Nevada, appellate courts have discretion to consider constitutional issues raised for the first time on appeal. The case law does not set out standards for exercise of that discretion. *State v. Hughes*, 261 P.3d 1067, 1070 n. 4 (Nev. 2011).

In short, Mr. Love’s absence from sidebar claim would clearly not be

⁹ *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).

¹⁰ *State v. Miller*, 122 Haw. 92, 100, 223 P.3d 157, 165 (2010).

considered in federal courts if raised for the first time on appeal.¹¹ It would likewise clearly not be considered in the courts of 45 states.¹² In two of the remaining states (Kansas and Nevada), it is doubtful that it would be considered, but the result is not clear. There appears to be only two states (Hawaii and New York) that would probably consider an issue of this nature for the first time on appeal. This Court should join the overwhelming majority of jurisdictions and hold that a defendant may only claim error based on his or her absence from a sidebar when the defendant affirmatively asked the trial court to allow the defendant to join the discussion and the defendant can demonstrate prejudice from his absence.¹³

¹¹*See, e.g., United States v. Gagnon*, 470 U.S. 522, 529, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (defendant's failure to assert his right to attend an in-chambers conference with the jury constituted a waiver of his right to be present); *United States v. Sherwood*, 98 F.3d 402, 407 (9th Cir. 1996) ("[a]lthough a defendant charged with a felony has a fundamental right to be present during voir dire, this right may be waived...by failing to indicate to the district court that [defendant] wished to be present at sidebar").

¹²*See, e.g., State v. Dann*, 205 Ariz. 557, 74 P.3d 231, 248 (2003) (when a defendant is present in the courtroom and knows that a sidebar conference is taking place, the defendant waives his presence at the sidebar by not asking to join the discussion); *State v. Davenport*, 771 So.2d 837, 844 (La. App. 2000) (the right to be present at a sidebar is waived by defendant's voluntary absence or his failure to assert an objection to a discussion held in his absence); *State v. W.A.*, 184 N.J. 45, 875 A.2d 882, 893-94 (2005) (adopting the majority rule and holding that "a defendant who does not affirmatively request the right to participate in voir dire sidebars should be considered to have waived the right");

¹³In the instant case, Mr. Love demonstrated his willingness to address the trial court judge directly. *See, e.g.,* RP 6-15 (Mr. Love's presentation of his motion to proceed pro se); RP 135 (Mr. Love's request to approach the bench in order to renew his demand that current defense counsel cease to represent him).

B. A DEFENDANT WHO ASSERTS A VIOLATION OF HIS DUE PROCESS RIGHT TO BE PRESENT MUST DEMONSTRATE THAT HIS PRESENCE WOULD BE BENEFICIAL

“A criminal defendant has a fundamental right to be present at all critical stages of a trial.” *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citing *Rushen v. Spain*, 464 U. S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)). This right exists when a defendant’s “‘presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’” *Irby*, 170 Wn.2d at 881 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 -06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

But “because the relationship between the defendant's presence and his ‘opportunity to defend’ must be ‘reasonably substantial,’ a defendant does not have a right to be present when his or her ‘presence would be useless, or the benefit but a shadow.’” *Irby*, 170 Wn.2d at 881 (quoting *Snyder*, 291 U.S. at 106 -07). For instance, a defendant does not have the right to be present during an in-chambers conference between the court and counsel on legal or ministerial matters, at least to the extent these matters do not require a resolution of disputed facts. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 484, 965 P. 2d 593 (1998); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). In other words, to obtain relief due

to an absence, the defendant must demonstrate that his presence could have proven beneficial.

In the instant case, Mr. Love was absent from a brief sidebar conference between the judge and his attorneys. During the sidebar a discussion occurred as to which jurors should be dismissed for cause. This brief exchange fell squarely within the “hearing on question of law” or “administrative” discussion wherein a defendant’s absence creates no prejudice or harm. *See, e.g. United States v. Reyes*, 764 F.3d 1184, 1190-91 (9th Cir. 2014) (“We now hold that meetings between counsel and the court at which the participants discuss whether jurors should be excused for cause, exercise peremptory challenges, or decide whether to proceed in the absence of prospective jurors are all examples of ‘a conference or hearing on a question of law’ from which the defendant may be excluded at the district court’s discretion.”); *State v. Hart*, 191 Mont. 375, 392, 625 P.2d 21, 30, *cert. denied*, 454 U.S. 827 (1981) (“the act of peremptorily challenging the jury is a wholly legal exercise and defendant’s absence from that stage of the proceedings is in no way violative of defendant’s rights”). Even courts that have found it error to allow attorneys to exercise challenges to jurors, require a defendant to make a specific showing of prejudice. A burden that is not met solely upon a showing that the makeup of the jury panel could have been different if the defendant had participated more fully in exercising challenges

to prospective jurors. Rather, the defendant must demonstrate that there would have been a prejudicial impact on jury deliberations. *United States v. Thomas*, 724 F.3d 632, 646 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1040 (2014). In the instant case, Mr. Love has provided no argument that either the makeup of the jury or the jury's deliberations would have been different if he attended the sidebar where the "for cause" challenges were made.

C. LOGIC AND EXPERIENCE ESTABLISH THAT A COURTROOM CLOSURE DOES NOT OCCUR SIMPLY BECAUSE MEMBERS OF THE GALLERY DO NOT SIMULTANEOUSLY HEAR AND SEE EVERY INTERACTION

The United States Supreme Court originally developed the experience and logic test to determine whether the public's right to access trials attaches under the First Amendment. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press II*). The experience prong of the test "asks 'whether the place and process have historically been open to the press and general public.'" *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012) (lead opinion) (quoting *Press II*, 478 U.S. at 8). In other words, the court engages in an historical inquiry to determine whether the type of procedure is one that has traditionally been open to the public. "The logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Sublett*, 176 Wn.2d at 73 (quoting *Press II*, 478 U.S. at 8). Relevant to logic inquiry are the

overarching policy objectives of having an open trial, such as fairness to the accused ensured by permitting public scrutiny of proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (“The public trial right serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.”). If both prongs of the experience and logic test are implicated, the public trial right attaches, and the “*Bone-Club*”¹⁴ factors must be considered before the proceeding may be closed to the public.” *Sublett*, 176 Wn.2d at 73.

Experience teaches us that courthouses and courtrooms come in a wide variety of shapes and configurations. Some courtrooms are small and intimate, allowing every word uttered from the bench or witness box to be heard by everyone who is present. Some courtrooms are large and spacious,¹⁵ rendering it difficult for audience members to hear the testimony of soft-spoken witnesses. No case, however, stands for the proposition that

¹⁴*State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

¹⁵Numerous factors, other than size, can render testimony inaudible to one or more spectators. Mechanical noises from fans, heat systems, or air conditioners can drown out low voices for those spectators unlucky enough to be seated near vents. Police sirens and other traffic noises can overpower a child witness's reedy and scared voice for those spectators seated near open windows.

a courtroom is “closed” whenever any member of the public gallery cannot clearly discern what a trial participant is saying.

Some courtrooms provide unobstructed views from every seat in the gallery. Some courtrooms contain pillars, posts, or columns that will obscure the view of some spectators. Regardless of courtroom configuration, gallery members often are disadvantaged in viewing trial exhibits as they are offered and introduced.¹⁶ Even when a court purposefully arranges a courtroom to screen the media and public from viewing videotapes of a child victim’s private parts, a partial or complete closure of the courtroom does not occur. *See, e.g., State v. Schiefelbein*, 230 S.W.3d 88, 114-16 (Tenn. Crim. App. 2007), *rehearing granted on other grounds*, 2007 Tenn. Crim. App. Lexis 214 (Mar. 7, 2007).

Judges and attorneys regularly deal with legal issues in view of the courtroom audience, but in a manner that prevents the audience from simultaneously hearing the argument. These private exchanges do not violate the public trial right. *See generally State v. Koss*, 181 Wn.2d 493, 499, 334 P.3d 1042 (2014) (the public trial presumption is not incompatible with private exchanges at the bench and conferences in chambers).

¹⁶For instance, a photograph may be viewed by a witness, the defendant, the defense counsel, and the judge prior to its admission into evidence. The photograph may be immediately published to the jury – in which case the exhibit will be handed to a juror to view and pass along to other members of the jury. If the photograph is not immediately published, the jurors may not view the image until deliberations. Members of the public may not gain access to an admitted photograph until after a verdict is returned.

Logically, public access would have little role—positive or negative—on these questions of law. *State v. Sliert*, 181 Wn.2d 598, 607, 334 P.3d 1088 (2014). With respect to challenges for cause, this Court has previously stated that logic does not suggest the public would play a significant positive role when the parties and the court all agree that a potential juror is disqualified from a case. *Id.*

Experience with respect to the “experience and logic” test is also a relative and elastic test. A practice that extends for a quarter century is sufficient to satisfy the history portion of the experience prong. *See State v. Sykes*, ___ Wn.2d ___, 339 P.3d 972, 976 ¶ 17 (2014) (closure of drug court staffings supported by history extending back to 1989). A practice that is present in at a majority of counties will similarly fulfill the ubiquitous factor of the experience prong. *See Sykes*, 339 P.3d at 975 ¶ 12 (23 counties operate adult drug courts). Silent, written, or sidebar exercise of peremptory challenges has existed in Washington for more than 25 years and is present in more than one-half of Washington’s 39 counties.

The specific practice of silent or written peremptory jury challenges has existed in Washington state since at least 1976. *See State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) (stating that secret-written – peremptory challenges are utilized in several counties in this state). *See also Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d 597 (1942) (allowing a challenge for

cause to be heard at sidebar). The Legislature has authorized silent or written peremptory challenges to prospective jurors since 1881. *See* Code 1881, § 219 (“The challenge, the exception, and the denial *may be made orally.*” [Emphasis added.]).¹⁷

The practice of silent exercise of peremptory challenges was identified as a “best practice” by the Washington State Jury Commission. *See* Washington State Jury Commission, *Report to the Board for Judicial Administration*, at 41 (July 2000)¹⁸ (“BEST PRACTICES SHOULD INCLUDE: . . . TAKING PEREMPTORY CHALLENGES OUT OF THE HEARING OF JURORS, WITH THE COURT ANNOUNCING THE FINAL SELECTIONS TO THE PANEL”). The American Bar Association strongly encourages peremptory strikes to be conducted outside the presence of the jurors. *ABA Standards for Criminal Justice Discovery and Trial by Jury stand.* 15-2.7 commentary (3d ed. 1996) (“[peremptory] challenges [should] be presented at the bench, [or] at side-bar” in order “to avoid the prejudicial effect of exercising challenges in open court.”). The United States Supreme Court has recognized that “[i]t is common practice not to reveal the identity

¹⁷This language has remained unchanged to this very day. *See* RCW 4.44.250. The statute's express use of the term “may” is permissive and does not create a duty to make all challenges orally. *See Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381, 858 P.2d 245 (1993) (the term “may” in a statute has a permissive or discretionary meaning).

¹⁸ This report is available at http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf (Last visited Feb. 13, 2015).

of the challenging party to the jurors and potential jurors.” *Georgia v. McCollum*, 505 U.S. 42, 53 n. 8, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

The practice of sidebar or written or silent exercise of peremptory challenges have been approved by all three divisions of the Court of Appeals. See *State v. Filitaula*, ___ Wn. App. ___, 339 P.3d 221 (Div. I, 2014); *State v. Marks*, ___ Wn. App. ___, 339 P.3d 196 (Div. II, 2014); *State v. Thomas*, *supra* (Div. II); *State v. Webb*, 183 Wn. App. 242, 246-47, 333 P.3d 470 (Div. II, 2014), *review denied*, ___ Wn.2d ___ (Feb. 4, 2015); *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (Div. II, 2014), *review denied*, 181 Wn.2d 1030 (2015); *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (Div. III, 2013), *petition for review granted in part*, 181 Wn.2d 1029 (2015).

Many Washington jurisdictions utilize silent or written peremptory jury challenges. Fifteen counties have local court rules that codify the practice. See footnote 1. An additional five counties, including the most populous,¹⁹ utilize the practice in at least some cases. See, e.g., *State v. Filitaula*, *supra* (Pierce County Superior Court procedure of written peremptory challenges while members of the public and potential jurors remained in the courtroom); *State v. Webb*, *supra* (same); *State v. Marks*, *supra* (same); *State v. Dunn*, *supra* (affirming Clark County case in which

¹⁹The six most populous counties are King, Pierce, Clark, Thurston, Snohomish, and Spokane. See Washington County Profiles, available at <http://mrsc.org/Home/Research-Tools/Washington-County-Profiles.aspx> (Last visited Feb. 13, 2015).

the exercise of a peremptory challenge to a prospective juror occurred at the clerk's station); *State v. Strickland*, ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 25 (Jan. 7, 2015) (deferring consideration of Grays Harbor case "pending a final decision in Supreme Court No. 89619-4 - State of Washington v. Unters Lewis Love")²⁰; *State v. Urquijo*, ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 16 (Jan. 7, 2015) (same); *State v. Van Thrower*, ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 12 (Jan. 7, 2015) (deferring consideration of King County case); *State v. Thomas*, ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 59 (Jan. 7, 2015) (deferring consideration of Pierce County case); *State v. Fitzgerald*, ___ Wn.2d ___, ___ P.3d ___, 2015 Wash. Lexis 29 (Jan. 7, 2015) (deferring consideration of Thurston County case).

Logic does not suggest that the public would play a significant positive role when neither the court nor opposing counsel identifies an improper basis for the exercise of an individual peremptory challenge. While the simultaneous transmission to the public of which attorney exercised which peremptory challenges does not further the public interest, a written record of information of how peremptory challenges are exercised, such as the one generated in this case, can provide a basis for identifying

²⁰The petitions for review in these cases may be found at http://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.petitions (Last visited Feb. 13, 2015).

patterns of race-based peremptory challenges by the prosecution or the defense. *See Filitaula*, 339 P.3d at 224. In reality, the form generated in this case is more accessible to the public than the oral exercise of peremptory challenges which may never be transcribed.

V. CONCLUSION

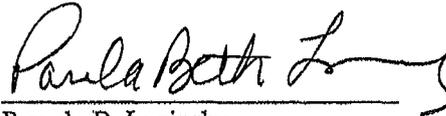
Mr. Love's convictions must be affirmed.

Respectfully submitted this 13th day of February, 2015.

Mark K. Roe
Prosecuting Attorney



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PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On February 13, 2015, I deposited in the mails of the United States of America, postage prepaid, an envelop containing a copy of the Brief of Amicus Curiae Washington Association of Prosecuting Attorneys addressed to:

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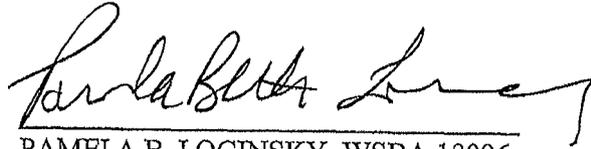
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Signed under the penalty of perjury under the laws of the state of
Washington this 13th day of February, 2015, at Olympia, Washington.


PAMELA B. LOGINSKY, WSBA 18096

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Dear Clerk and Counsel:

Attached for filing is the amicus brief prepared by the Washington Association of Prosecuting Attorneys.

Please notify me if you should experience any difficulties in opening this document.

Sincerely,

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