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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; Arapahoe District Court; The Honorable Ben Leutwyler; Case Number 2016CR975	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant CHRISTOPHER N. CRUSE	
Megan A. Ring Colorado State Public Defender JESSICA A. PITTS 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #48932	Case Number: 2018CA34 Division Number: II JUDGMENT AFFIRMED OPINION BY JUDGE FOX Román and Gomez, JJ., concur
PETITION FOR REHEARING	

This Court determined that the trial court violated the constitutional right to a public trial. *See People v. Turner*, Case No. 17CA2294 (Colo. App. Dec. 24, 2020) (unpublished); U.S. Const. amends. VI; XIV; Colo. Const. art. II, § 16. The error was constitutional, structural, and resulted in a new trial for Mr. Turner, Mr. Cruse’s identically-situated co-defendant. *See Turner*, 17CA2294, ¶¶ 7, 12, 35. However, this Court denied Mr. Cruse relief because undersigned counsel failed to raise the public-trial issue. Opinion, ¶ 1, n.1. This Court can and should recognize that Mr. Cruse’s public-trial right was violated as well.

To begin, this Court may recognize errors that are not raised in a party’s brief. C.A.R. 1(d) (“The party will be limited to the grounds so stated [in the briefs] ***although the court may in its discretion notice any error appearing of record.***”) (emphasis added). A court may request supplemental briefing in this situation. *See, e.g., People v. Ehlebracht*, 2020COA132, ¶ 2.

In a criminal case, a court *should* address unraised errors appearing in the record in unique circumstances. “In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.” *Moody v. People*, 159 P.3d 611, 615 (Colo. 2007) (quoting

United States v. Atkinson, 297 U.S. 157, 160 (1936)); *see also Kansas v. Parry*, 390 P.3d 879, 882-83 (Kan. 2017) (affirming intermediate court’s *sua sponte* application of the law-of-the-case doctrine and dismissal of defendant’s case, noting that “preservation is a prudential rule, rather than a jurisdictional bar”).

Here, this Court determined that excluding Mr. Cruse’s wife from three and a half days of trial violated Mr. Turner’s right to public trial and remanded for a new trial. *Turner*, ¶¶ 13-16, 27, 35. This error was structural, belonging to a “limited class of error,” which “comprehends only those defects affecting the framework within which the trial proceeds—errors that infect the entire trial process and necessarily render a trial fundamentally unfair...” *People v. Novotny*, 2014CO18, ¶ 21. Of course, Mr. Cruse was in an identical situation to Mr. Turner with regard to this structural error, and this Court recognized that “the trial court’s actions may have violated Cruse’s public trial rights as well....” *Opinion*, ¶ 1, n.1. If anything, the violation was stronger as to Mr. Cruse because it was his wife who was excluded and his counsel who objected. *See People v. Jones*, 2020CO45, ¶¶ 16, 23, 41 (recognizing unique interest in having family members attend trial). Thus, the trial court violated Mr. Cruse’s right to public trial at least as much as it violated Mr. Turner’s. Mr. Turner is getting a new trial, but Mr. Cruse’s conviction remains. Failing to address this constitutional, structural error would

“seriously affect the fairness, integrity, or public reputation of judicial proceedings.” *See Moody*, 159 P.3d at 615.

Further, it is in the interest of judicial economy for this Court to decide the issue, since it is already familiar with the factual record and legal argument establishing that the trial court violated the public-trial right. It would be efficient for this Court to simply apply its analysis in *Turner* to Mr. Cruse’s case. *Cf. Hinojos-Mendoza v. People*, 169 P.3d 662, 667 (Colo. 2007) (exercising discretion to review unpreserved constitutional challenge “particularly in light of the fact that doing so will promote efficiency and judicial economy”), *abrogated in part by Reyna-Abarca v. People*, 2017CO15, ¶ 47 (holding that appellate courts should ordinarily review unpreserved constitutional claims for plain error).

Indeed, it would waste judicial resources to fail to address the constitutional violation now, since it would result in further litigation—a Crim. P. 35(c) ineffective assistance of counsel claim in the district court. *See People v. Baker*, 104 P.3d 893, 898 (Colo. 2005) (noting that the interests of judicial economy would be furthered by allowing direct appeal to proceed, where “remaining remedy would be to bring a Crim. P. 35(c) motion”); *Estep v. People*, 753 P.2d 1241, 1248 (Colo. 1988) (holding that it would not serve the “interests of substantial justice and judicial economy” to require the defendant to seek redress by means of a Crim.

P. 35(c), rather than address his claim on direct appeal); *People v. Lacallo*, 2014COA78, ¶ 71 (Román, J., concurring in part and dissenting in part) (noting that it would impede judicial economy to fail to address claims of insufficient evidence on plain error review, since doing so would “create a new line of Crim. P. 35(c) ineffective assistance of counsel claims”), *overruled by McCoy v. People*, 2019CO44, ¶ 34. As noted by a division of this Court, “the specter of an ineffective assistance claim favors permitting flawed appeals to proceed in the interest of judicial economy.” *People v. Houser*, 2013COA11, ¶ 38, *abrogated in part by Reyna-Abarca*, 2017CO15, ¶ 47. Further, this is not a case requiring a remand for additional findings, as this Court already recognized. *Turner*, 17CA2294, ¶¶ 28-35. Consequently, judicial economy favors this Court exercising its discretion to notice the violation of the right to public trial in Mr. Cruse’s case.

Moreover, a Crim. P. 35(c) is not an adequate remedy, since it requires the postconviction court to consider more than the single issue before this Court, which is whether a constitutional, structural error occurred. The postconviction proceedings will potentially require years of additional litigation to resolve, even though this Court has already recognized that a structural error has occurred. Mr. Cruse will continue to serve his sentence during the pendency of the postconviction proceedings, despite his trial being fundamentally flawed. In

addition, postconviction proceedings impose additional procedural and substantive burdens upon Mr. Cruse in order to obtain any relief. *See, e.g.*, Crim. P. 35(c); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “These considerations suggest that judicial economy generally favors deciding on direct appeal that which would have to be resolved in a later Crim. P. 35(c) proceeding.” *Houser*, 2013COA11, ¶ 39. Under the rare circumstances of this case, it would not do justice to Mr. Cruse for this Court to fail to recognize the violation of his constitutional right to public trial and instead require him to undertake the additional burden of bringing a Crim. P. 35(c) motion due to counsel’s failure to raise the issue.

Finally, this Court’s party-presentation concern is not at issue here, where the State—through the same Assistant Attorney General—already fully briefed the issue in Mr. Turner’s case. Any remaining concerns could be addressed by requesting supplemental briefing.¹ *See Ehlebracht*, 2020COA132, ¶ 2 (ordering

¹ This Court cited to *Galvan v. People*, 2020CO82, ¶¶ 42-50, to support its conclusion that it could not decide the public-trial issue in Mr. Cruse’s case. Opinion, ¶ 1, n.1. The court in *Galvan* held that the Court of Appeals erred in deciding an issue on grounds not raised by the parties and where it did not request supplemental briefing. 2020CO82, ¶¶ 44-46. However, the court noted that the party presentation principle is a “‘supple’ rule, not an intransigent one....” *Id.* at ¶ 46; *see also United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (“The party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate.”). Thus,

parties to file supplemental briefs *nostra sponte*).

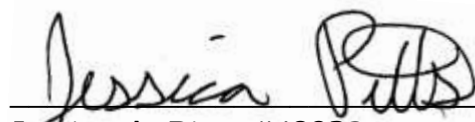
Consequently, under the truly unique circumstances here, this is the exceptional case where, under C.A.R. 1(d), this Court should recognize and address the error on its own motion since: (1) a structural error has occurred, which affected the entire framework of the trial and rendered the trial fundamentally unfair; (2) this Court has already recognized that such error occurred and required reversal based upon the identical record in the co-defendant's case; (3) the legal issue has already been briefed on appeal by the very same Assistant Attorney General on the identical record in the co-defendant's case; (4) if anything, the issue is even stronger in Mr. Cruse's case due to his relationship to the excluded person and his counsel's objection below; and (5) the interests of justice and judicial economy favor resolving the issue now, rather than requiring Mr. Cruse to engage in years of postconviction litigation, with additional burdens, in order to achieve the same result. This is the type of exceptional circumstance in a criminal case recognized in *Moody*, 159 P.3d at 615-16.

For these reasons, Mr. Cruse respectfully requests that this Court grant his petition for rehearing under C.A.R. 40 and exercise its discretion under C.A.R.

Galvan does not preclude an appellate court from exercising its discretion to reach an unraised issue in the interest of justice, particularly when it requests supplemental briefing.

1(d) to address whether the trial court violated his constitutional right to public trial when it excluded his wife from three and a half days of trial.

MEGAN A. RING
Colorado State Public Defender



Jessica A. Pitts, #48932
Deputy State Public Defender
Attorneys for Christopher Nicholas Cruse
1300 Broadway, Suite 300
Denver, CO 80203
303-764-1400

CERTIFICATE OF SERVICE

I certify that, on January 14, 2021, a copy of this Petition for Rehearing was electronically served through Colorado Courts E-Filing on Jacob R. Lofgren of the Attorney General's Office.

