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~~SUPREME~~ COURT OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

TONY L. STRODE,

Appellant.

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SUPREME COURT  
STATE OF WASHINGTON  
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**BRIEF OF AMICUS  
WASHINGTON ASSOCIATION OF PROSECUTING  
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**A. IDENTITY AND INTEREST OF AMICUS**

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 is interested in cases, such as this, which establish the procedures for selecting and questioning jurors in sensitive cases, and that may significantly alter common practices.

**B. ISSUES**

1. Does a defendant invite error or waive any claim that his right to a public trial was violated by private questioning of selected jurors in chambers regarding their personal experiences of sexual abuse, where the defendant acquiesced in the private inquiry, actively participated, and clearly benefitted from that inquiry?
2. Does the public maintain a right to the open administration of justice in spite of the defendant's waiver of his personal right?
3. Can a defendant assert the public's right to open courts, especially where he has invited error or waived his own right?
4. Are the fundamental purposes of the right to a public trial violated by private questioning of jurors such that a new trial is always

required when the trial court does not balance the competing interests on the record?

C. FACTS

Tony L. Strode was charged in Ferry County, Washington with rape of a child in the first degree, attempted rape of a child in the first degree, and child molestation in the first degree. RP (7/7/06) at 1-34.<sup>1</sup> Trial began on Friday, July 7, 2006, at the courthouse in Republic, Washington. Pretrial matters were discussed on the record in open court then the court adjourned until the following Monday. Id.

On Monday, July 10<sup>th</sup>, the court, on record, dealt with a series of "housekeeping" matters, including formalizing rulings on ER 404(b) evidence, learned treatises, and exclusions of testifying witnesses during trial. RP (7/10 & 11/06) at 1-29. It appears that these matters were also discussed informally in the judge's chambers.<sup>2</sup> At the conclusion of this hearing, the court signaled its intent to begin jury selection. (It's probably

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<sup>1</sup> This brief will cite to three volumes of the report of proceedings, distinguished by date. There is some overlap in the verbatim report of proceedings for the date of July 10, 2006. In this brief, "RP (7/10 & 11/06)" will designate the report that begins with "housekeeping" matters, omits the private inquiry with certain jurors, and then continues with voir dire and trial matters. "RP (7/10/06)" will designate the report of proceedings that includes the private inquiry with jurors.

<sup>2</sup> Strode has never claimed on appeal that the courtroom was impermissibly closed during this brief discussion of "housekeeping" matters.

about time to go out and start picking the jury. RP (7/10 & 11/06) at 28-29. Okay?)

About 50 jurors were summoned to appear for service in this case on Monday, July 10, 2006. RP (7/7/06) at 4. Given the nature of the charges, a written questionnaire was given to jurors. See Brief of Respondent (Appendix). Of the 50 jurors who were called to jury duty, ten apparently answered "yes" to the questionnaire because ten jurors were questioned in chambers.<sup>3</sup>

Before talking to each juror, the court made clear that the purpose of individual questioning was to spare the juror the embarrassment of public questioning on these sensitive subjects and to facilitate as full a response as needed by the lawyers. See RP (7/10/06 B) at 1, 5, 7, 10, 12, 17, 20 and 26. For example, the judge began the inquiry with one juror as follows:

[Juror No. 41, you] answered yes to both questions on the juror questionnaire, and, of course, the reason we ask these confidentially is so we don't have to broadcast it...to the whole rest of the jury panel. But its important that we know whether it might affect your-your fairness and impartiality on a case like this.

RP (7/10/06 B) at 29-30. The jurors responded by telling the court about some experience with sexual abuse.

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<sup>3</sup> Jurors 9, 15, 17, 24, 28, 34, 35, 41, 48 and 46 were questioned. Although some of these jurors are mentioned by name, their names are not repeated here.

Juror number nine described how she and her sister were abused by their step-father who threatened to kill them if they told. When they reported the abuse years later, authorities told them it was a "family matter" and nothing could be done. She concluded that she did not believe she could be fair on a case of this type. RP (7/10/06 B) at 1-3. She was excused for cause. Id.

Juror number 15 said that her daughter had been abused many years ago, but the juror had not learned of it until recently. Id. at 4-6. The defense attorney asked whether it was the juror's daughter who had been abused, and whether the perpetrator was the father. Id. at 6.

Juror number 17 told the court that her mother and aunt had been sexually abused as children, but that their abuse had no impact on her. Defense counsel confirmed that the juror could be fair, and no challenge was made to the juror. Id. at 7-9.

Juror number 24 reported that his girlfriend was sexually abused as a child and that he could not be fair for that reason. Id. at 10-11. Defense counsel asked that he be excused and that request was granted. Id. at 11.

Juror number 28 told the court that two family members had been sexually abused; her sister as child and her daughter about nine years ago. Strangers had been the assailants in both cases. Id. at 13-15. Defense

counsel asked her whether she would be able to fairly weigh the evidence and she responded that she was not sure, so she was excused for cause. Id. at 16.

Juror number 34 was raped at the age of sixteen by an acquaintance. She was excused for cause. She also described a medical condition that her husband currently suffered from and which required attention. Id. at 17-19.

Juror number 35 described how he and his wife were accused of abuse by a boy they had cared for. They temporarily lost their license as foster parents and had to battle to get it back. He believed he could be fair in this case. Id. at 20-24. The prosecutor pursued questioning on his fairness, and then defense counsel asked two questions confirming that he could be fair. Id. at 24. He was ultimately instructed to return to the jury room.

Juror number 38 had a step-granddaughter who was molested as a three year-old by a grandfather. Defense counsel asked him whether someone in Mr. Strode's shoes would believe he could be fair, and the juror responded in the affirmative. Id. at 25-28.

Juror number 41 told the court about the abuse of a minor girl in her great-niece's family, and the lasting difficulties the abuse caused.

After some extended discussion, she concluded that she could not be fair, and was excused. Id. at 30-34.

Juror number 48 told the court that his girlfriend's daughter had been sexually abused. He did not believe he could be fair, and was excused for cause. Id. at 34-36.<sup>4</sup>

It is not clear what time this private questioning began, but the record shows that at 12:16:03 p.m. the parties and the judge had completed the private questioning, and they returned to the courtroom and began the full voir dire with the entire panel. RP (7/10/06) at 38. After the court returned to open court, it addressed the whole group of jurors, conducted voir dire, and then proceeded to opening statements and the reception of evidence. It does not appear that any other portion of voir dire, or the trial, was conducted outside of the courtroom, or that the courtroom itself was ever closed.

**D. ARGUMENT**

Two issues were certified by the Court of Appeals in this case, and accepted for transfer by this Court, and a third more fundamental issue

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<sup>4</sup> At least one other juror was questioned, but the transcript inexplicably ends, so that colloquy is not available. See RP (7/10/06) at 36-37.

may also be presented. The two issues certified by the court of appeals are as follows:

- 1) Whether the defendant in a criminal case can impliedly waive a public trial by participating in and not objecting to an in-chambers voir dire of potential jurors.
- 2) Whether the defendant may also waive the right of the public to public court proceedings.

Order of Certification (signed 11/2/07).

The Washington Association of Prosecuting Attorneys respectfully suggests that the answer to the first question is "Yes." The defendant may not solicit, encourage, request, or acquiesce in closure of a courtroom, to his benefit, and then complain on appeal that his rights under either Article I, section 10 or 22 of the Washington Constitution, or the Sixth Amendment of the United States Constitution, were violated.

The answer to the second question is "no," a defendant may not waive the public's Article I, section 10 right to the open administration of justice, and thereby exclude a member of the public or the press, simply because the defendant desires closure. The public or the press is free to assert its right to an open courtroom, independent of the defendant's wishes, either by pursuing a writ of mandamus or by other motion to the court. The trial court must then balance the competing interests and rule.

The defendant may not, however, assert the rights of the public to achieve a reversal of his conviction, especially where he participated in the very process that violated those rights in the trial court.

A more fundamental third issue may also be presented in this case, as suggested by the issue statement on this Court's website: "Whether the trial court violated the right to a public trial by conducting voir dire of individual potential jurors in chambers..."<sup>5</sup> On this point, WAPA respectfully asks this Court to hold that, a brief *in camera* conference to privately question individual jurors about sensitive matters of sexual abuse, is not a closure of the courtroom under Supreme Court precedent, or under this Court's jurisprudence, that requires a new trial simply because the trial court failed to balance competing interests on the record.

**1. THE RIGHTS TO PUBLIC TRIAL AND THE OPEN ADMINISTRATION OF JUSTICE.**

Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. Similarly, article I, section 10 provides that "[j]ustice in all cases shall be administered openly...." These rights include jury selection, an important

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<sup>5</sup> [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues.display&fileID=2008Jan#P64\\_4868](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2008Jan#P64_4868).

part of the criminal trial process. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

When a party requests closure of the courtroom, the trial court must weigh five factors to balance the competing constitutional interests. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006). To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. Orange, at 806 (citing Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)); Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The trial court must consider alternatives and balance the competing interests on the record. Orange, at 809-11.

**2. A DEFENDANT MAY NOT ACQUIESCE, BY WORDS OR CONDUCT, TO PRIVATE QUESTIONING OF JURORS, AND THEN CLAIM ON APPEAL THAT SUCH QUESTIONING VIOLATED HIS CONSTITUTIONAL RIGHTS.**

A defendant who invites error -- even constitutional error -- may not claim on appeal that he is entitled to a new trial on account of the

error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004). The doctrine of invited error applies regardless of whether counsel intentionally or inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error rule recognizes that "[t]o hold otherwise [i.e. to entertain an error that was invited] would put a premium on defendants misleading trial courts." State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

A defendant who is merely silent in face of manifest constitutional error does not "invite" the error. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). But, a defendant who "affirmatively assents" to error may invite it. For example, it has been suggested that, for purposes of applying the doctrine of invited error, there is a distinction between "whether defense counsel merely failed to object to the giving of the instruction, or whether he *affirmatively assented* to the instruction or proposed one with similar language." State v. LeFaber, 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J. dissenting -- italics added). See People v. Thompson, 50 Cal.3d 134, 785 P.2d 857 (1990) (failure to object to private voir dire not reviewable where procedure was for defendant's benefit and the defendant participated without objection). A

defendant need not expressly waive constitutional rights; a waiver can be inferred from conduct. State v. Thomas, 128 Wn.2d 553, 559, 910 P.2d 475 (1996) (court inferred waiver of right to testify by defendant's failure to take the witness stand at trial).

Under the facts of this case, Strode acquiesced in words and deeds to the *in camera* procedure used by the trial court. He acquiesced to the private questionnaire given to jurors, he subsequently took an active role in questioning those who desired privacy, and he clearly benefited from the *in camera* procedure, since it is highly unlikely that he would have received the same candor from jurors had they been required to answer such sensitive questions in front of members of their community. See discussion, *infra*, at § 4. Because he acquiesced, participated, and benefited, he should not now be able to claim error.

Strode argues that he can raise *any* public trial claim for the first time on appeal. Appellant's Opening Brief at 4. This argument should be rejected; State v. Bone-Club and this Court's other cases simply applied the general rule that manifest constitutional error *may* be considered for the first time on review. There is no rule stating that any "public trial" claim may be raised without objection below.

Under RAP 2.5(a), an error is waived if not preserved below. An exception exists for a "manifest error affecting a constitutional right."

RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised before the trial court. Scott, 110 Wn.2d at 688. The question, thus, is whether public trial claims are always "manifest."

In several recent cases, this Court has reviewed public trial claims for the first time on appeal. For example, in State v. Bone-Club, the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective in order to protect future investigations. Bone-Club, at 256-57. In Brightman, the trial court ordered -- sua sponte -- that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. Brightman, 155 Wn.2d at 511. Likewise, in Orange, the trial court summarily ordered the defendant's family and friends excluded from all voir dire proceedings. And, in Easterling, the trial court ordered the defendant and his attorney excluded from pretrial motions. Easterling, 157 Wn.2d at 172-73. In each of these cases, the constitutional violation was clear; it was "manifest." Yet, in none of these cases did the defendants benefit from the procedure utilized by the court. Thus, none of these cases precludes application of the invited error doctrine.

Additionally, these cases do not establish that *any* violation of the right to public trial is "manifest" error. In Bone-Club, this Court noted by a simple citation to State v. Marsh, 126 Wash. 142, 217 P. 705 (1923) and without further analysis, that the defendant's failure to object did not waive the public trial claim. Marsh does not, however, determine the waiver issue because Marsh involved the total deprivation of public trial rights, not a partial closure of some aspect of the case.

In Marsh, an adult was illegally tried in juvenile court. At that time, private juvenile proceedings were expressly permitted under the law because juvenile proceedings were not punitive, they were to rehabilitate and assist the child. Marsh, at 144. Yet, the trial court in Marsh apparently was in the habit of trying *adults* in the manner of juveniles if the victim was a juvenile. Thus, Marsh was not provided with a jury or a lawyer, and the entire trial was held in the judge's chambers without a court reporter. It appears that he did not benefit in any way from this closure.

This Court reversed Marsh's conviction, holding "there is not, nor can there be, any custom of the court for the trial of criminal cases in private." Marsh, at 145. The Court expressly distinguished, however, cases involving more limited closures:

...[A]nd in our opinion this is not a case calling for a decision upon the important question of whether or not under our Constitution there is power in the trial court, proceeding in the exercise of discretion, to exclude the public or any portion of it during the trial of a criminal case, and, if so, to what extent and under what circumstances it may be done.

Id. at 145. The court went on to hold that a constitutional violation "may be reviewed on appeal, although no exception or objection was interposed at the time." Id. at 146 (citing State v. Crotts, 22 Wash. 245, 60 Pac. 403 (1900) (emphasis added)). The complete deprivation of Marsh's rights to trial, including the right to a public trial, certainly constituted manifest constitutional error, and could be reviewed absent objection below. Thus, Marsh simply applies the long-standing rule that an appellate court may exercise its discretion to review *manifest* constitutional errors for the first time on appeal. RAP 2.5(a).<sup>6</sup>

Moreover, Marsh was an unusual case and its holding does not stand for the general proposition that any public trial claim must be decided on appeal, even if not preserved. In fact, Marsh was distinguished

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<sup>6</sup> State v. Crotts, 22 Wash. 245, 60 P. 403 (1900), does not compel a different conclusion. In Crotts, this Court entertained for the first time on appeal an argument that the trial court had commented on the evidence. Review was proper because requiring an objection "would destroy the very object for which the objection is ordinarily made." In other words, it would be unfair to require trial counsel to object when the trial judge is commenting on the evidence because the objection would simply highlight the court's inappropriate comments and bring the lawyer into conflict with the judge in front of the jury concerning a factual matter. Such concerns are not present with regard to the right to a public trial.

four years after it was decided in a true public trial case, State v. Gaines, 144 Wash. 446, 258 P. 508 (1927). The court in Gaines distinguished

Marsh as follows:

The case of State v. Marsh, bears no relation to this case upon the facts. There the defendant was charged with contributing to the delinquency of a minor and was tried without a jury in private as are juvenile delinquents. *The question as to whether 'there is power in the trial court, proceeding in the exercise of discretion, to exclude the public or any portion of it during the trial of a criminal case, and if so to what extent and under what circumstances it may be done,' was not there involved.*

Gaines, at 463-64 (italics added).

Additionally, this Court has previously held that a defendant who fails to object to partial closure of the courtroom waives any claim that the trial court violated the state constitution. State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). In Collins, the trial court locked the courtroom door due to overcrowding. The defendant did not object, but raised the issue on appeal. This Court held:

Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the

suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.).

Collins, at 748. *In camera* screening of jurors is more like the highly discretionary decision in Collins, where failure to object was a bar to consideration of the issue on appeal. Thus, Marsh and Bone-Club simply illustrate that a violation of the right to public trial *can* be manifest error, not that any such violation *is always* manifest error.

The United States Supreme Court and a majority of other jurisdictions prohibit defendants from raising the public trial claim for the first time on appeal. See Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991), citing Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960)). See also e.g. Wright v. State, 340 So.2d 74, 79-80 (Ala.1976); People v. Bradford, 14 Cal.4th 1005, 60 Cal.Rptr.2d 225, 929 P.2d 544, 570 (1997); Commonwealth v. Wells, 360 Mass. 846, 274 N.E.2d 452, 453 (1971); People v. Marathon, 97 A.D.2d 650, 469 N.Y.S.2d 178, 179 (N.Y.App.Div.1983); Dixon v. State, 191 So.2d 94, 96 (Fla. 2d DCA 1966); State v. Butterfield, 784 P.2d 153, 157 (Utah 1989).

It is particularly important that defendants be encouraged to assert their rights to a public trial, and that they not lead the trial court astray, because the position taken by a defendant in a criminal case can also

impact the public's right to access in the trial courts. Thus, as argued below with regard to automatic standing, a defendant should not be rewarded with a new trial where he has participated in a hearing that is later characterized as an unconstitutional closure of the courtroom.

**3. THE PUBLIC'S RIGHT TO OPEN JUSTICE SURVIVES A DEFENDANT'S WAIVER OF HIS PERSONAL RIGHT, BUT THE DEFENDANT MAY NOT OBTAIN A NEW TRIAL BASED ON THE PUBLIC'S RIGHT -- ESPECIALLY AFTER HE WAIVED HIS PERSONAL RIGHT -- BECAUSE HE DOES NOT HAVE STANDING TO ASSERT THE PUBLIC'S RIGHT.**

The Court of Appeals asked this Court to decide whether the defendant "may also waive the right of the public to public court proceedings." Order of Certification. This question could mean two things, and those two interpretations call for two different answers.

The question could be interpreted as asking whether a defendant who waives his personal right also waives the public's right such that the public may not assert the right. WAPA respectfully suggests that this cannot be true. A defendant's waiver of his personal right does not bar the press or public from asserting its rights, whether by motion, writ of mandamus, or other such procedure. In other words, the public or press

can assert Article I, section 10 rights even where the defendant asks for a closed proceeding.

More likely, the issue certified from the Court of Appeals asks whether the defendant's waiver of his personal right at the trial court level prevents him from asserting the public's right in an appellate court. This question should be answered, "Yes." There are at least two reasons a defendant should not be able to waive his personal right at trial, yet assert the public's right on appeal.

First, a defendant does not have standing to assert the rights – constitutional or otherwise – of others.<sup>7</sup> Rakas v. Illinois, 439 U.S. 128, 138, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978) (search and seizure); State v. Walker, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998) (failure of police officers to obtain husband's consent to search marital residence did not invalidate search as to wife); In re Benn, 134 Wn.2d 868, 909, 952 P.2d 116 (1998) (failure to challenge search of the jail cell of another inmate was not ineffective assistance of counsel); State v. Jones, 68 Wn. App. 843, 847, 845 P.2d 1358, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993) (one cannot assert the Fourth Amendment rights of another); State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213 (violation of Fifth

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<sup>7</sup> The defendants in Easterly, Orange, Brightman, and Bone-Club asserted on appeal their personal rights to a public trial and, thus, the issue of standing was not addressed.

Amendment rights may not be asserted by a co-defendant), review denied,  
110 Wn.2d 1032 (1988).

The defendant essentially requests automatic standing to assert the rights of the public. Automatic standing has been debated in the search and seizure context. See State v. Kypreos, 110 Wn. App. 612, 39 P.3d 371 (2002). Proponents of automatic standing claim that if the defendant cannot assert the rights of others, wrongful searches will not be addressed, police misconduct will not be curtailed, and illegal evidence will be admitted in courts.

But, even if persuasive in the search and seizure context, automatic standing would be counterproductive in the public trial context. If the defendant asserts his personal right to a public trial, he can vindicate that right on appeal. If he does not assert the right, and if he encourages the trial court to violate the public's right, as Strobe did, then he was an important cause in its violation.

In effect, automatic standing in the public trial context would provide an incentive for defendants to encourage trial judges to close courtrooms -- or to remain silent when the courtroom is closed -- in the hope that they could take advantage of the closure on appeal. Thus, automatic standing would lead to more violations of Article I, section 10 rather than fewer violations. By contrast, in the search and seizure

context, the defendant does not participate in, or control, the decision of police to conduct a search, so he cannot, in effect, *cause* a Fourth Amendment violation. So, whatever the merits of automatic standing in the search and seizure context, those merits will have the opposite effect as applied to the open administration of justice.

Second, as a matter of fundamental fairness, a defendant who leads the trial court to violate the public's right to the open administration of justice should not get a windfall on appeal by asserting the very rights he helped to violate in the trial court, especially where it served his interest in the trial court to violate the public's right.

For these reasons, an appellant should not be permitted to assert the public's rights under Article I, section 10.

**4. A NEW TRIAL SHOULD NOT AUTOMATICALLY BE REQUIRED WHEN A TRIAL COURT CONDUCTS *IN CAMERA* SCREENING OF JURORS ON SENSITIVE ISSUES WITHOUT FIRST WEIGHING THE COMPETING INTERESTS ON THE RECORD.**

As noted above, the Sixth Amendment of the United States Constitution and Article I, section 22, of the Washington Constitution guarantee a "public trial." In addition, Article I, section 10 provides that justice shall be "administered openly." A defendant who asserts a

violation of these rights has no burden to show prejudice, but he does have a burden to show that a violation occurred. State v. Momah, \_\_\_ Wn. App. \_\_\_, 171 P.3d 1064 (2007).<sup>8</sup> Thus, he must show that his trial was not "public" and that justice was not administered "openly." Although an inquiry conducted in private is certainly not public, the limited and targeted questioning in this case was clearly designed to protect juror privacy and did not violate the core concerns of the public trial guarantee. Under such circumstances, a new trial should not automatically be ordered.

In Press Enterp. Co, *supra*, a capital rape-murder case, the trial court authorized closure of the courtroom for six full weeks of voir dire, and refused requests from the press to relinquish even a partial transcript of those proceedings. Press Enterp. Co, 464 U.S. 503-04. The trial court justified this total closure based on a concern for the defendant's right to a fair trial and on stated concerns for juror privacy. *Id.* at 510.<sup>9</sup> Still, the trial judge closed "an incredible six weeks of voir dire" without tailoring the closure to the asserted interests. *Id.* at 513. Because the closure was

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<sup>8</sup> The Momah decision was based on the record of that case showing that the proceedings had not been closed. In this case, however, the judge expressly told the jurors that the *in camera* screening was private. Other cases may better present the "closure" issue.

<sup>9</sup> The trial court observed, "Most of them are of little moment. There were a few, however, in which some personal problems were discussed which could be somewhat sensitive as far as publication of those particular individual's situations are concerned." *Id.* at 504.

so seriously out of balance with the asserted interests, the Supreme Court reversed the conviction. Id. at 510-11.

The Supreme Court went to great pains to observe, however, that privacy rights of jurors are different, and may justify a private inquiry without violating the right to a public trial.

The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. The trial involved testimony concerning an alleged rape of a teenage girl. Some questions may have been appropriate to prospective jurors that would give rise to legitimate privacy interests of those persons. For example a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode. The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.

Press Enterp. Co., 464 U.S. at 511-12. The Court recommended that a trial judge should "ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy" in order to minimize the breadth of any closure order.

This is the general approach that has been recommended and followed in Washington. For example, GR 31(j) provides that "individual

juror information, other than name, is presumed to be private." The juror handbook appearing on the Washington Courts website clearly anticipates that questioning may occur in private:

After you're sworn in, the judge and the lawyers will question you and other members of the panel to find out if you have any knowledge about the case, any personal interest in it, or any feelings that might make it hard for you to be impartial. This questioning process is called *voir dire*, which means "to speak the truth." ... Though some of the questions may seem personal, you should answer them completely and honestly. ... If you are uncomfortable answering them, tell the judge and he/she may ask them privately.<sup>10</sup>

Similarly, the video shown to prospective jurors upon their arrival for service tells them to alert the court if they wish to answer certain questions in private.<sup>11</sup>

And, in July 2000, the Washington State Jury Commission issued its Report to the Board for Judicial Administration and recommended that jurors be given an opportunity to discuss sensitive matters in private.<sup>12</sup>

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<sup>10</sup> [http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo\\_jury.jury\\_guide#A3](http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.jury_guide#A3).

<sup>11</sup> <http://www.courts.wa.gov/newsinfo/resources/>

<sup>12</sup> "Recommendation 20 ... The court should try to protect jurors from unreasonable and unnecessary intrusions into their privacy during jury selection. In appropriate cases, the trial court should submit written questionnaires to potential jurors regarding information that they may be embarrassed to disclose before other jurors. ..."  
[http://www.courts.wa.gov/committee/?fa=committee\\_display&item\\_id=277&committee\\_id=101](http://www.courts.wa.gov/committee/?fa=committee_display&item_id=277&committee_id=101).

The American Bar Association likewise recommends private inquiry into sensitive matters.<sup>13</sup> Studies have shown that jurors will respond more frankly if sensitive questions are asked privately.<sup>14</sup>

No case in Washington has questioned the propriety of this sensible approach, and no case has suggested that such limited questioning might violate the constitution. For these reasons, it appears that many Washington trial courts have followed the recommendations made by the Supreme Court in Press Enterp. Co. See Appendix A (list of cases pending on appeal where the "public trial" issue has been raised).

This case is typical of sexual assault cases where intensely private questions must be asked of jurors. Two jurors in this case had been sexually abused or raped. Seven jurors had close friends or family

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<sup>13</sup> See The ABA Principles for Juries and Jury Trials (and Commentary), at 42-43; [http://www.abanet.org/jury/pdf/final%20commentary\\_july\\_1205.pdf](http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf)

<sup>14</sup> "A number of empirical studies have found that prospective jurors often fail to disclose sensitive information when directed to do so in open court as part of the jury selection process. A 1991 study of juror honesty during voir found that 25% of jurors questioned during voir dire failed to disclose prior criminal victimization by themselves or their family members. In a more recent study of the effectiveness of individual voir dire, Judge Gregory Mize (D.C. Superior Court) found that 28% of prospective jurors failed to disclose requested information during questioning directed to the entire jury panel. During individual voir dire, a number of those jurors revealed information that Judge Mize believed was relevant to their ability to serve fairly and impartially. Thus, failure to protect juror privacy can actually undermine the primary objective of voir dire – namely, to elicit sufficient information about prospective jurors to determine if they can serve fairly and impartially." Making the Case for Juror Privacy: A New Framework for Court Policies and Procedures, by Paula L. Hannaford (footnotes omitted). [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_JurorPrivacyWhitePaperPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_JurorPrivacyWhitePaperPub.pdf).

members who had been sexually assaulted. One juror had been accused of misconduct against a boy and lost his foster care license. At least some of these facts were likely hidden from the general community. Even if a juror tells about abuse of another person, it can be easy to link the juror's answers to the actual victim.

A juror should not be forced to disclose such information to the general public simply because he or she received a jury summons and was called upon to sit on this case. Response rates to juror summons are notoriously low. If jurors are not offered the modicum of privacy granted by this *in camera* screening process, that rate is not likely to improve, and it could drop further.

These concerns exist whenever a juror is called to serve and must answer questions in a room of strangers. The concerns are even more acute, however, when the juror is called to answer such questions in public in a small community. According to the United States Census Bureau, the population of Ferry County is approximately 7,260. <http://factfinder.census.gov>. The county seat, Republic, Washington, has a population of approximately 954 people. *Id.* In such a small community, a juror who is required to answer private questions will necessarily expose

sensitive information to neighbors, friends, acquaintances, co-workers, and fellow parishioners.<sup>15</sup> The right to a public trial may be protected without requiring such a high price be paid by jurors performing their civic duty.

And, perhaps most importantly for the questions presented, jurors who respond to questionnaires in sexual assault cases are self-selecting, and probably have a higher chance of being excused than does the rest of the pool. Thus, public scrutiny of their private answers is less likely to reveal perjury than might be true of jurors *trying* to be seated on a case.

The Supreme Court has made it clear that reversal of a conviction is not required each time the public trial right was violated. In Waller v. Georgia, supra, the Court ordered a new suppression hearing rather than a new trial. The Court observed that "the remedy should be appropriate to the violation" and that there is no need to provide the defendant with a windfall to vindicate the interests of the public. Waller, 467 U.S. at 50.

In fact, granting a new trial in this context would defeat rather than vindicate the public interest. Several groups are protected by the right to

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<sup>15</sup> For example, five people knew the victim in this case. RP (7/10/06 B at 50). Multiple jurors knew other witnesses. Id. at 52-54. In fact, at one point in voir dire, juror number seventeen expressed incredulity that he would have to refrain from speaking to one of the witnesses for the whole trial and deliberations, because he knew that witness quite well. See Id. at 69-70.

open public trial. Press Enterp. Co. 464 U.S. at 505-10. The defendant, the public, the press, and the prosecution all have vested interests in open courts. But, when the defendant acquiesces to *in camera* hearings, he is acquiescing that his interests are better-served than they would be if he insisted on public questioning of the jurors. He has chosen between two rights. And when there is no press coverage, and apparently no member of the public who wished to attend, the interests of the press and public have not been directly violated.

That leaves the more general interest of the public. But, who will be punished by reversal and remand for retrial of a criminal defendant who was fairly tried and convicted? The public will be punished. It will be punished by incurring the additional expense of a retrial, and it may be punished by failure to secure conviction on retrial if circumstances of proof have changed. In the end, the defendant is rewarded (for joining in a violation of the public's right to access) and the public is punished (by an order requiring a new trial). This is illogical, especially where, as here, there is no evidence to suggest that a single member of the public was *actually* excluded from the trial.

For these reasons, WAPA respectfully recommends that, as to *in camera* screenings of jurors with a history of sexual abuse, as indicated by

their answers to juror questionnaires, the *in camera* screening procedure results in, at most, a *de minimis* violation of the right to open justice, and a new trial should not be ordered unless the matter was properly brought to the trial court's attention and the trial court thereafter failed to apply the Bone-Club factors. See Orange, at 822-27 (Madsen, J. concurring); Easterling, at 182-85 (Madsen, J. concurring). This type of case simply does not, as a general matter, raise the same concerns as does the wholesale closures that occurred in the Washington cases -- Easterling, Orange, Brightman and Bone-Club -- decided recently by this Court, or by the cases decided by the United States Supreme Court.

E. CONCLUSION

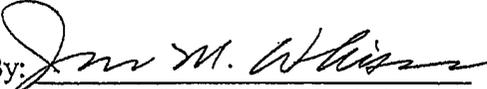
~~WAPA respectfully asks this Court to hold that a defendant may~~  
not raise a "public trial" claim on appeal where he acquiesced in an *in camera* examination of jurors, actively participated in that examination, and benefited from the procedure. WAPA also requests that this Court hold that a defendant may not waive the public's right to open justice, but nor may he assert the public's right for the first time on appeal. Finally, if this Court rejects the above arguments, the State respectfully asks this

Court to hold that Strode has not demonstrated a violation of his public trial rights under the facts of this case.

DATED this 14<sup>th</sup> day of January, 2008.

Respectfully submitted,

Washington Association of Prosecuting Attorneys

By:   
JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorney for Amicus

FILED AS ATTACHMENT  
TO E-MAIL

## Appendix A

Counsel understands that an Article I, section 10 claim has been filed in the following cases.

County (alphabetical)	Case Name & Number	Status
<b>King</b>		
	<u>Momah</u> Nos. 58004-3-I /	Petition for Review pending
<b>Kittitas</b>		
	<u>Cruz</u> Nos. 25421-6III / 80946-1	PRV filed
	<u>Klein</u> 25382-1-III	briefed / stayed
<b>Klickitat</b>		
	<u>Cruz</u> No. 80946-1	PRV filed
<b>Lincoln</b>		
	<u>Kramer</u> No. 25006-7-III	Briefed / stayed
<b>Mason</b>		
	<u>Paumier</u> No. 36346-1-II	Briefing stage
	<u>Wise</u> No. 36625-8-II	Briefing stage
<b>Okanogan</b>		
	<u>Devon, Jon</u>	Briefed / Awaiting Argument
	<u>Devon, Yolanda</u>	Briefed/Awaiting Argument
<b>Spokane</b>		
	<u>Frawley</u> No. 80727-2	PRV filed
	<u>Duckett</u> No. 80965-8	PRV filed
	<u>Williams-Walker</u> (PRP)	Briefed/Stayed

	No. 26229-4-III	
	<u>Meyers</u> No. 25822-0-III	Briefed/Stayed
	<u>Vega</u> No. 24889-5-III	Briefed/Stayed
	<u>Burkey</u> No. 24215-3 III	Briefing in progress
	<u>Durfee (PRP)</u> No. 26427-1-III	Briefed
	<u>Livingston</u> No. 25850-5-III	Briefed
	<u>Lipinski</u> No. 25178-1-III	Briefed
<b>Whatcom</b>		
	<u>In re Speight</u> No. 59995-0-I	Motion to transfer
	<u>In re Coggin</u> No. 59960-7-I	Stayed pending Strode
<b>Whitman</b>		
	<u>Herron</u> No. 26354-1	Briefing stage

## Appendix A

Certificate of Service by Mail

Today this office sent by electronic mail, and I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of the Brief of Amicus Washington Association of Prosecuting Attorneys, in STATE V. TONY L. STRODE, Cause No. 80849-0, in the Supreme Court, for the State of Washington, directed to:

- David Gasch, the attorney for the appellant, at Gasch Law Office, PO Box 30339, Spokane, Washington, 99223-3005; and

- Michael Sandona, Prosecuting Attorney for Ferry County, at Ferry County Prosecuting Attorneys Office, 350 E Delaware Ave #11, Republic, Washington 99166-9747.

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

W Brame  
Name Wynne Brame  
Done in Seattle, Washington

1/14/08  
Date 1/14/08