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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC WISE,

Petitioner.

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STATE OF WASHINGTON
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AMICUS CURIAE BRIEF WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS (WAPA)

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for WAPA

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

ORIGINAL

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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 who are legally responsible for the prosecution of all felonies and misdemeanors charged under state statutes. WAPA is interested in cases like this one which establish the circumstances under which an "open courts" claim may be raised for the first time on appeal, and which establish the remedies for a violation of open courts doctrine. This Court's decision in these cases will significantly affect practices and cases in the courts of Washington state.

B. ISSUES

1. Does the text or history of Washington's constitution demand that all open court claims be considered for the first time on appeal?

2. Do this Court's own precedents recognize a contemporaneous objection rule as to open courtroom claims?

3. Did this Court fail to sufficiently consider history and precedent before rejecting a contemporaneous objection rule for open court claims?

4. Is there a more effective and fair way to ensure to open justice by facilitating review of closure and sealing orders?

C. FACTS

The facts of this case were discussed in detail in the Court of Appeals opinion and will not be addressed here.

D. ARGUMENT

The Washington Association of Prosecuting Attorneys firmly embrace our state's constitutional guarantees of the open administration of justice and the defendant's right to a public trial. Art. I, § 10; art. I, § 22. Prosecutors frequently oppose motions to close proceedings and records and strive to ensure open courts.

The last several years have been marked, however, by a significant increase in the number of appeals raising open courtroom claims for the first time on appeal. Appendix A (Table of Cases). A great deal of conflict has resulted in the appellate courts over how to adjudicate these appeals because, on the one hand, the courts recognize the importance of the right, but on the other hand, they recognize the injustice of applying a harsh automatic reversal rule to a claim that was never brought to the attention of the trial court. The confusion was not alleviated by this Court's recent decisions in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), and State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), in which the several opinions (majority, plurality, concurring, and dissenting) suggested conflicting rules that might be applied. And, the results

continue to have harsh consequences for victims, witnesses and trial courts who must endure retrials based on errors never brought to their attention.

WAPA respectfully suggests that this confusion and unfairness originated in State v. Bone-Club[1] with this court's offhand rejection of a contemporaneous objection argument. This seemingly small portion of the Bone-Club opinion was flawed, and should be revisited. Nothing in the history or text of Washington's constitutional open courts provisions requires noticing errors for the first time on appeal. Nothing in Washington's common law requires creating this single exception to the Rules of Appellate procedure. In fact, this Court has previously held that open courtroom claims may be waived if not preserved. Moreover, the holding in Bone-Club misapplied the decision in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Unfortunately, these shortcomings have not been fully briefed before this Court so this Court's recent decisions have not delved into the question in sufficient detail; rather, this Court's decisions have simply cited to Bone-Club without further analysis. The result has been the creation of a super right that trumps one of the most fundamental principles of appellate litigation, that error will only be rarely noticed if not preserved.

[1] 128 Wn.2d 254, 906 P.2d 325 (1995).

WAPA argues here that, properly understood, Washington's constitutional provisions guaranteeing the open administration of justice and public trials can be waived by conduct for purposes of an appeal of a losing party's case. Open courts issues are not exempt under Washington law from the contemporaneous objection rule that applies to all other constitutional claims. Applying the usual rule will save judicial resources and avoid injustices in both civil and criminal litigation.

WAPA also suggests that a better way to ensure open courts is to provide a quick and efficient means for aggrieved persons to appeal closure or sealing orders entered in trial courts. That means can be provided by granting a right of expedited review or a modified discretionary review standard when a party wishes to challenge a closure or sealing order.

1. PUBLIC TRIAL RIGHTS IN THE CONSTITUTION.

Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. Article I, section 10 provides that "Justice in all cases shall be administered openly and without undue delay." This Court has said that these rights serve similar purposes. There are few historical records to define the scope and nature of these rights, or to indicate whether the

Framers intended these rights to be different than rights found in the federal constitution or in the constitutions of our sister states.

As for article I, section 22, "Washington, like the vast majority of relatively newer states, copied much of its Declaration of Rights from the constitutions of older states, rather than from the federal charter." Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L.Rev. 491, 496-97 (1984). There is very little historical evidence about the intentions of those who drafted the Washington Bill of Rights. See, e.g., State v. Foster, 135 Wn.2d 441, 460, 957 P.2d 712 (1998). Neither contemporary sources nor recent treatises provide much insight. See The Journal of the Washington State Constitutional Convention 510-12 (Beverly Paulik Rosenow ed., William S. Hein & Co. 1999) (1962); Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, 22-24, 35-37 (2002) (discussing rights of accused persons).

The historical origins and purposes of article I, section 10 are even more murky. It appears that only Arizona has a provision identical to Washington's. A.R.S. Const. Art. 2 § 11 ("Justice in all cases shall be administered openly and without undue delay"). However, thirty-five states have some version of a constitutional "open courts" clause. David

Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1201 & n.25 (1992). History seems to suggest that open courts provisions were intended to guarantee general access to the judicial system, to thwart interference by the Crown in the business of the colonial judiciaries, and to guarantee citizens redress for injury. Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L.Rev. 1279 (1995). A great deal of scholarly debate has focused on whether the "remedies" language in many open courts clauses – language that does not appear in Washington's constitution – restricts tort reform legislation. *Compare* The Right to a Remedy, supra, with The Origins of the Open Courts Clause, supra.[2] See also C.K. Wiggins, et al., *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 Gonzaga L.Rev.193, 202 & 216 (1986-87); J.S. Wang, *State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies,* 64 Wash. L.Rev. 2033, 216 (1989).

[2] Washington's original constitution, approved by voters but not ratified by Congress, included both open courts and "remedies" language. Wash. Const. of 1878 (not adopted), art. V, §§ 9 ("Every person in the state shall be entitled to a certain remedy in the law") and ("all courts shall be open to the public"), 13 ("the accused shall have a right to ... a public trial"), http:// www. sos. wa. gov/_ assets/ history/ 1878 constitution. pdf.

In any event, as to both article I, section 10 and section 22, there is no historical evidence to suggest that these rights were intended to trump traditional, well-understood limits on raising claims for the first time on appellate review. And, as discussed below, however, the common law shows that contemporaneous objections were required as to open courtroom claims.

2. THIS COURT MUST RECONCILE ITS PRIOR DECISIONS RECOGNIZING WAIVER OF OPEN COURT CLAIMS WITH ITS MORE RECENT DECISIONS FORBIDDING WAIVER.

a. The Contemporaneous Objection Rule Generally.

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). "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 before a tribunal having jurisdiction to determine it." Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944). The 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. U.S., ___ U.S. ___, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266 (2009).

Beginning in 1976, these general principles were codified in the Rules of Appellate Procedure. 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). However, RAP 2.5(a)(3) does not afford a means for obtaining a new trial whenever an appellant can identify a constitutional issue not raised in the trial court. Scott, 110 Wn.2d at 688. Nothing in the rule suggests that some constitutional rights are always reviewed. Thus, whether public trial claims can always be raised for the first time on appeal – in spite of the common law contemporaneous objection rule and the language of RAP 2.5(a) – should turn on whether such a claim was traditionally allowed for the first time on appeal.[3]

[3] For additional historical context on preservation of error issue see the following: Code of 1881, § 1088 (on *appeal*, the Supreme Court was to review "all errors and mistakes excepted to at the time."); Id., § 1147 (on *writ of error*, the court was to "examine all errors assigned"). Even on a writ of error, however, the Court would not review instructions to which no error had been assigned. Blumberg v. H. H. McNear & Co., 1 Wash. Terr. 141, 141-42 (1861); State v. Williams, 13 Wash. 335, 43 P. 15 (1895); State v. Louie, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) ("We have, with almost monotonous continuity, ... adhered to the proposition that, absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to which no timely exception was taken." In support of this statement, Louie cited 34 cases.

b. Open Court Claims Were Subject To The Contemporaneous Objection Rule For The Majority Of Washington's History And They Should Continue To Be Subject To That Rule.

As discussed above, nothing in the language or history of the constitution demands that an open court claim be reviewed on appeal absent a contemporaneous objection. This Court has held, however, that an appellate court could refuse to review an open court claim if the claim was not preserved at trial. For instance, over a hundred years ago this Court refused to consider on appeal a claim that proceedings were erroneously held at a witness' residence rather than in court:

> The respondent was not able to go to the courthouse at the time of the trial, and his testimony was taken at his residence, in the presence of the judge, jury, and counsel for the respective parties; and the appellant now claims that the proceeding was contrary to law, and that the judgment ought to be reversed on account thereof. The proceeding was, no doubt, irregular, but it does not appear that it was objected to at the time, nor can we see that the appellant was in any wise injured or prejudiced thereby. Error without injury is not a sufficient ground of reversal.

Sutton v. Snohomish, 11 Wash. 24, 33, 39 Pac. 273 (1895).[4]

[4] Courts have always had the power to act in open court or "at chambers." Art. IV, § 23. Not every act of the court must occur in public view. State v. Claypool, 132 Wash. 374, 232 P. 351 (1925); Peterson v. Dillon, 27 Wash. 78, 67 P. 397 (1901). Thus, it makes sense that a defendant must object when he believes the court has erred in failing to properly distinguish between what must be done in court and what can be dealt with outside of the public's view.

More than half a century later this Court again 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 and thereby denied access to some people. The defendant did not object at trial but raised the issue on appeal. Although this Court cautioned the trial court to avoid closures, it held that the issue could not be raised for the first time on appeal:

> 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.

Collins, at 748. Had RAP 2.5(a) existed at the time this case was decided, it would likely have resulted in the same decision, i.e., the appellate court would have evaluated whether Collins had shown manifest error resulting from the closure before it decided whether the claim was reviewable.

In Keddington, a defendant was tried for forcible rape of a teenager and the trial court barred public access to the courtroom but allowed family members and newspaper reporters to attend. Keddington, 19 Ariz.

at 458. Keddington failed to object but on appeal he argued that the closure violated the Arizona state constitution and the federal constitution. Id. The Arizona Supreme Court held that Keddington had waived the argument by his failure to object.

> One of the reasons for requiring a public trial is that the accused can have whatever protection it may afford him. It is, then, to a certain extent, for his personal benefit. If he expresses a desire to have the attendance of the public limited or entirely prohibited, or if he, by his conduct, leads the court to believe he is satisfied with the order in that regard and the court acts in good faith, and not arbitrarily, it would seem that, in all fairness and justice, he should be precluded, after conviction, from urging for reversal in order that he invited, or tacitly consented to, by remaining silent. Not having objected to the modified order, we conclude that it was satisfactory, and that his conduct constituted a waiver of any right of his involved in the order as modified. That this may be done has been determined by many courts. People v. Swafford, 65 Cal. 223, 3 Pac. 809; Dutton v. State, 123 Md. 373, 61 Atl. 417, Ann. Cas. 1916C, 89; Benedict v. People, 23 Colo. 126, 46 Pac. 637; State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487; Carter v. State, 99 Miss. 435, 54 South. 734.

Keddington, at 462. As noted above, Washington and Arizona have identical open court provisions. Thus, this Court's opinion in State v. Collins and its reliance on Keddington clearly illustrate that open court

claims, like other constitutional claims, should be preserved by a contemporaneous objection.[5]

However, nearly a half-century later in State v. Bone-Club, this Court appeared to deviate from these precedents. In a case regarding the closure of a suppression hearing, this Court held:

> We also dismiss the State's argument that Defendant's failure to object freed the trial court from the strictures of the closure requirements. To the contrary, this court has held an opportunity to object holds no "practical meaning" unless the court informs potential objectors of the nature of the asserted interests. Ishikawa, 97 Wn.2d at 39. The motion to close, not Defendant's objection, triggered the trial court's duty to perform the weighing procedure. The summary closure thus deprived Defendant of a meaningful opportunity to object. See Ishikawa, 97 Wn.2d at 39.

Bone-Club, at 261. This holding was flawed for a number of reasons.

First, reliance on Ishikawa was misplaced. Seattle Times v. Ishikawa was an original mandamus action brought by the Seattle Times to force the Honorable Richard Ishikawa to open proceedings and release records concerning a defendant's motion to dismiss a murder charge. The Seattle Times was told about the closure before the hearing and it

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[5] State v. Marsh, 126 Wash. 142, 217 P. 705 (1923) simply proves the wisdom of a flexible rule like RAP 2.5(a). In Marsh, a young adult was tried by a judge in a juvenile-style proceeding that was wholly closed, without a jury, without a lawyer, and without a court reporter to make a record. Not surprisingly, this Court found that the entire proceeding was illegal and reversed the conviction on appeal, even though objection was never made at trial. The same result would surely follow under RAP 2.5(a)(3) since constitutional error is unquestionable "manifest" under such circumstances.

immediately objected. Ishikawa, 97 Wn.2d at 33. This Court then observed that the

> . . . petitioning newspapers had no idea why the parties requested secrecy. They knew only that a motion to close the hearing had been made. Their lack of knowledge prevented them from making informed objections. For their right to object to have had practical meaning, the court should have informed petitioners of the interests sought to be protected by defendant's motion.

Id. at 39. Thus, Ishikawa was not a case about failure to object, as the trial court was quite plainly put on notice that the newspapers objected; the primary purpose of the contemporary objection rule was met. Rather, the quote from Ishikawa simply says that a party cannot be faulted for making a *general* objection where it has been deprived of the information required to make a more specific objection. This is a very different observation. The Bone-Club court erred in treating this language from Ishikawa as an exception to the contemporaneous objection rule.

Second, this lone paragraph in Bone-Club cannot meet the standard for overturning long-standing precedent. There must be "a clear showing that an established rule is incorrect and harmful before it is abandoned." In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). There was simply no finding that the rule applied in Sutton v. Snohomish and in State v. Collins was incorrect *or* harmful; in fact, there was no discussion at all about precedent or the constitutional

underpinnings of the public trial provisions, except for the citation to Ishikawa.

Thus began this Court's slide to our present predicament, where numerous litigants have been able to remain silent at trial as they exploit a flawed procedure to advance their trial strategy. Then, they are permitted to invoke that flawed procedure as a basis for a new trial after they lose. This state of affairs is precisely the situation that the contemporaneous objection rule is designed to avoid.

In sum, this Court's refusal in Bone-Club to apply the normal contemporaneous objection rule can be squared with neither Ishikawa – where there *was* a contemporaneous objection – nor with long-standing precedent regarding the contemporaneous objection rule's application to open courts cases.

Moreover, it makes no difference that the language from Bone-Club has since been cited to reject waiver arguments. See e.g. State v. Easterling, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006) and State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) (plurality opinion). These cases simply cite Bone-Club without further analysis. If the waiver analysis in Bone-Club was flawed, then the flaws are not eliminated simply by repeated citation of the case. As the United States Supreme Court has observed, an appellate court is not required to blindly follow

faulty precedent, especially when justice, certainty and stability in the law are compromised.

> . . .if the precedent under consideration itself departed from the Court's jurisprudence, returning to the " 'intrinsically sounder' doctrine established in prior cases" may "better serv[e] the values of stare decisis than would following [the] more recently decided case inconsistent with the decisions that came before it." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); see also Helvering, supra, at 119, 60 S.Ct. 444; Randall, supra, at 274, 126 S.Ct. 2479 (STEVENS, J., dissenting). Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.
>
> Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its stare decisis effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake. See, e.g., Pearson v. Callahan, 555 U.S. ___, ___, 129 S.Ct. 808, 817, 172 L.Ed.2d 565 (2009); Montejo v. Louisiana, 556 U.S. ___, ___, 129 S.Ct. 2079, 2088-2089, 173 L.Ed.2d 955 (2009) (stare decisis does not control when adherence to the prior decision requires "fundamentally revising its theoretical basis").

Citizens United v. Federal Election Com'n, ___ U.S. ___, 130 S. Ct. 876, 921, ___ L. Ed. 2d ___ (2010). Because neither the majority opinion in

Easterling nor the plurality opinion in Strode add analytical heft to the Bone-Club holding, those cases are not independent support.

Application of a contemporaneous objection rule in this context is consistent with the approach taken by most courts. The Supreme Court prohibits defendants from raising the public trial claim for the first time on appeal. See Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960). In each of the important public trial cases decided by the Supreme Court, the aggrieved party objected to closure below. See e.g. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) ("Presley's counsel objected to the exclusion of the public from the courtroom"); Waller v. Georgia, 467 U.S. 39, 42 n.2, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (as to whether the error was preserved the Court observed, "The state courts may determine on remand whether [a defendant] is procedurally barred from seeking relief as a matter of state law"); Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 503-04, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (trial court rejected defense motion for open *voir dire*).

Moreover, simply because an error is "structural" does not mean that the error must be noticed on appeal, even absent a trial objection. See U.S. v. Marcus, ___ U.S. ___, 130 S. Ct. 2159, 2164-66, 176 L. Ed. 2d 1012 (2010) (discussing structural error in relationship to "plain error"

review of unpreserved claims); U.S. v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (open question whether structural errors always satisfy third prong of "plain error" test but still must meet fourth prong); Johnson v. U.S., 520 U.S. 461, 469, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (noting that even if error was "structural" such that it "affected substantial rights," the error had not been preserved because it failed the fourth prong of the "plain error" test, i.e., any error did not "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.").

Most states, too, require open court claims to have been preserved at trial. See 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); People v. Thompson, 50 Cal.3d 134, 785 P.2d 857 (1990) (claim that chambers *voir dire* on jurors' position on the death penalty violated open courts guarantee not reviewable on appeal absent objection); People v. Ledesma, 47 Cal.Rptr.3d 326, 353, 140 P.3d 657, 680, 39 Cal.4th 641, 667 (2006) (failure to object to sealing juror questionnaires barred review); Reid v.

State, 286 Ga. 484, 690 S.E.2d 177 (2010) (objection to closure required or issue is not presented for appeal); Purvis v. State, ___ S.E.2d ___, 2011 WL 977588 (Ga. Mar. 18, 2011) (no objection required where defendant did not know until later that his brother had been excluded from trial by jail personnel).

These authorities show that federal and state courts do not generally exempt open court claims from the contemporaneous objection rules.

c. An Express Waiver Is Not Required.

The several opinions in Momah and Strode take very different approaches as to what constitutes a waiver of a legal right. Consistent with the argument above, WAPA urges this Court to reject the position that a waiver of public trial rights must meet the standards in City of Bellevue v. Acrey, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984), as argued by a plurality of justices of this Court. Strode, 167 Wn.2d at 229 n.3.[6] The plurality says that because the public trial right appears in the same provision as the right to trial, the same waiver standard must apply. This reasoning is flawed.

[6] "A plurality opinion has limited precedential value and is not binding on the courts." In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004).

Const. art. I, § 22 (amend. 10) lists thirteen rights belonging to an accused including the rights: (1) to appear; (2) to defend in person; (3) to defend by counsel; (4) to demand the nature and cause of the accusation against him; (5) to have a copy of the accusation; (6) to testify in his own behalf; (7) to meet the witnesses against him face to face; (8) to have compulsory process to compel the attendance of witnesses in his own behalf; (9) to have a speedy trial; (10) to have a public trial; (11) to an impartial jury; (12) to be tried in the county in which the offense is charged to have been committed; and (13) to appeal. Because these rights are not all equal in weight so they require different procedures to waive. Some require personal waivers by the defendant, some can be waived by defense counsel, some can only be waived in writing, some can be waived orally. Finally, some waivers require a colloquy, while others do not.

The various rights are accorded different procedural safeguards depending on the nature of the right itself and the circumstances of each case. For instance, a guilty plea amounts to a waiver of the entire arsenal of the accused's constitutional rights, so acceptance of such a plea must be preceded by safeguards to determine that the plea is made intelligently and freely. The right to counsel is also a right to be guarded carefully since the ordinary layman would effectively be denied his right to a fair trial, which right embodies many other constitutional rights, without the assistance of

counsel. Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A.L.R. 357 (1938). At a different level are the rights to jury trial, to remain silent, and to confront witnesses. The trial strategy of any particular case may perhaps dictate the waiver of one or more of these rights while still preserving to the accused the right to a fair trial. State v. Likakur, 26 Wn. App. 297, 302-03, 613 P.2d 156 (1980).

Washington precedent reveals that many of the rights contained in Const. art. 1, § 22 merit lesser procedural protections and may be waived by an accused's failure to assert the right. See Strode, 167 Wn.2d at 235 (Madsen, J. concurring) (listing rights that can be waived without a formal colloquy). In addition to those listed in Justice Madsen's concurring opinion, it may be observed that an accused waives his or her right to be tried in the county where the crime was committed by not asserting this right prior to trial. State v. Dent, 123 Wn.2d 467, 479-80, 869 P.2d 392 (1994). The right to confront witnesses can be waived without a colloquy. State v. Borland, 57 Wn. App. 7, 12, 786 P.2d 810 (1990). The right to compulsory service can be waived by the accused's failure to assert and maintain the right. State v. Summers, 60 Wn.2d 702, 706, 375 P.2d 143 (1962). The right to appear pro se can be waived without a colloquy simply by a failure to timely assert the right. State v. Garcia, 92 Wn.2d 647, 655, 600 P.2d 1010 (1979). The right to be provided with a written

charging document can also be waived simply by not making a timely request. State v. Newman, 63 Wn. App. 841, 847-49, 822 P.2d 308 (1992). Due process rights can be waived by failure to object. State v. Nelson, 103 Wn.2d 760, 766-67, 697 P.2d 579 (1985). Thus, the plurality justices are mistaken that all rights appearing in article I, section 22 must be subject to the same standard of waiver.

Moreover, although the right to a public trial is undoubtedly of great importance, it cannot be said that the right is so much more critical that it cannot be waived by conduct. This should be especially true as to conduct that evinces a strategy beneficial to the defense. And, as discussed above, the origins of the article I, section 10 are not well-understood. It strains constitutional jurisprudence to say that such a constitutional provision *mandates* a rule that trumps the usual contemporaneous objection rules, especially where there is no such tradition in Washington, the federal courts, or in other states.

For these reasons, WAPA respectfully asks this Court to hold that open courtroom claims, like all other constitutional claims, are subject to RAP 2.5. An unpreserved constitutional error should not be reviewed on appeal unless the defendant can show that the error was manifest, i.e., that it resulted in clear, obvious deprivation of the defendant's rights. Such a holding would bring Washington into line with the federal courts and with

most state courts. Imposing Washington's usual contemporaneous objection rule on open court claims is also consistent with judicial economy and fundamental fairness. It encourages litigants to bring an issue to the trial court's attention when the error can be corrected, it saves judicial resources by avoiding costly retrials, and it discourages litigants from sandbagging.

3. A DEFENDANT WHO WAIVES HIS RIGHT TO A PUBLIC TRIAL UNDER ARTICLE I, § 22 SHOULD NOT HAVE STANDING TO ASSERT A VIOLATION UNDER ARTICLE I, § 10.

As outlined above, this court should hold that open trial rights are forfeited by criminal defendants if those rights are not asserted in the trial court. In addition, this Court should hold that, having waived his own right to a public trial, he cannot simply assert the rights of the general public on appeal.

First, a defendant does not have standing to assert the rights – constitutional or otherwise – of others. Rakas v. Illinois, 439 U.S. 128, 138, 99 S. Ct. 421, 58 L. Ed. 2d 387 (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 (1993) (one cannot assert the Fourth Amendment rights of another); State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213 (violation of Fifth Amendment rights may not be asserted by a co-defendant), review denied, 110 Wn.2d 1032 (1988).

The defendants here essentially request 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 these defendants 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. THIS COURT SHOULD AUTHORIZE EXPEDITED REVIEW TO CORRECT ORDERS IMPROPERLY CLOSING COURTS OR SEALING RECORDS.

This Court's recent open courts jurisprudence appears to have arisen, at least in part, from a view that trial courts have been insufficiently attentive to the importance of open courts and records, and that it is thus necessary to abolish the ordinary preservation of error rules

to penalize or coerce trial courts that stray from open courtroom principles. WAPA respectfully suggests that there is a more effective and fairer way to focus the trial court's attention on these important principles. This Court could facilitate challenges to closed courtrooms or sealed documents by recognizing a right to expedited review of an order closing a court or sealing a document. Currently, appellate courts treat open court claims as subject to discretionary review. Discretionary review is expensive and time consuming and a litigant faces the significant hurdles of RAP 2.3(b). If, however, this Court were to authorize a right to expedited review, perhaps with a lower standard for granting review under RAP 2.3(b), a party or an aggrieved member of the press or public could quickly and efficiently bring inappropriate closure orders to the attention of the appellate courts. This change would provide an immediate and direct challenge to faulty orders while avoiding the waste and injustice of attempting to correct trial court practices through reversals where the issue was never raised.[7]

Allowing defendants to raise objections for the first time on appeal is contrary to the public interest in open courts. The public gains nothing

[7] Alternatively, this Court also retains supervisory authority through the Code of Judicial Conduct and the Rules of Professional Conduct over recalcitrant judges or lawyers who repeatedly thwart open courts principles. In unusual circumstances, resort to these tools might serve as an additional means to enforce the open administration of justice.

when cases are reversed for failure to comply with open courts requirements.[8] The original closed hearing is a historical fact that can't be altered. The harm resulting from the original closed hearing is simply compounded by the expense and delay incident to granting a second trial for defendants who already had a fair trial. Rather, what serves the public interest is doing it right the first time. The best way to get it right the first time is to give both parties an incentive to raise objections and inform the trial judge of the appropriate law, so that the judge can make proper decisions on closure. The current system gives defendants every incentive NOT to raise objections. Whatever marginal advantage they might gain from preventing closed hearings is far outweighed by the potential benefit of being able to re-do the trial years later. Not only do they get "a second bite," but the second opportunity will occur years later, when witness memories are likely to have faded.

In contrast, an expedited appellate process for closure orders would cut straight to the heart of the problem and allow for immediate correction if the trial court has erred. See e.g. In re Recall of Lee, 122 Wn.2d 613, 614-15, 859 P.2d 1244 (1993) ("On September 2, 1993, this court

[8] It should be noted that this issue is not unique to criminal law. Art. I, § 10 applies equally to civil and criminal cases. Under this Court existing case law, a civil litigant disappointed by an adverse $10 million judgment could seek a new trial based on a brief closure of court even if that litigant never raised the issue at trial.

considered the appeal on an expedited basis and issued an order affirming the judgment. This opinion sets forth the reasons for the court's decision.")

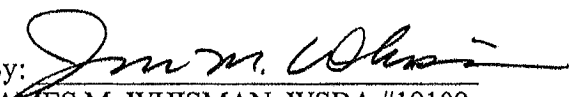
E. CONCLUSION

For the reasons set forth above, WAPA respectfully asks this Court to revisit State v. Bone-Club and the assertion that contemporaneous objections are not required to preserve an appeal of open court claims. WAPA also asks this Court to hold that a defendant who has waived his own right to a public trial cannot invoke the public's right. Finally, WAPA asks this Court to consider whether a change to the rules of appellate procedure might better ensure open courts without the current practice of reversing judgments where no error was noted at trial.

DATED this 4th day of April, 2011.

Respectfully submitted,

Washington Association of Prosecuting Attorneys



By:
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
Attorney for Amicus

APPENDIX A

OPEN COURTS AND DEFENDANT'S RIGHT TO PRESENCE
PUBLISHED COA CASES AS OF 4/4/11

Case	Issue	Holding	Const.	Error preserved?
Benito Michael Rodriguez, No. 64158-1-I Slip op. (Apr. 4, 2011)	Private *voir dire*	Questioning of single juror during *voir dire.* Reversed.	Art. I § 10 Art. I § 22	No.
PRP of Stockwell 2011 WL 589991 Div. 2, 2011	Jury Questionnaires	- not entitled to relief, more like Momah than Strode - Concurrence by Van Deren (based on Leyerle) but no violation here because questioning was done in open court	Art. I § 10	No
Tarhan, 246 P.3d 580 Wash.App. Div. 1, February 07, 2011	Jury Questionnaires Rape	- JQ should not be sealed without analysis - not "structural" error - remand for hearing on whether to seal	Art. I § 10 Art. I § 22	No
Lee 2011 WL 383930 (Div I, Feb. 7, 2011) Cox, Elling. & Leach	Jury Questionnaires Murder case	- failure to conduct Bone-Club analysis did not violate §22 - failure to conduct Bone-Club analysis did violate §10 - error was not "structural" so remand appropriate	Art. I § 10 Art. I § 22	No
Beskrut 2011 WL 383927 (Div. I Feb. 7, 2011) Cox, Elling. & Leach	Jury Questionnaires Rape	- failure to conduct Bone-Club analysis did not violate §22; failure to conduct Bone-Club violated §10, but - error not structural, so remand = appropriate remedy	Art. I § 10 Art. I § 22	No
Ticeson 2011 WL 167476 Div. I, Jan. 18, 2011 Elling., Leach & Cox	Chambers conferences: - lunch break of first day and a.m. of second day re: dep. tx	- SVP had standing to raise public's right to open courts - No right under Art. I, § 22 - RAP 2.5 barred claim in civil action - no const. viol. - ministerial matters are not "adversarial proceedings"	Art. I §10	No

Case	Issue	Holding	Const.	Error preserved?
Castro 159 Wn. App. 340, 246 P.3d 228 Div. 3, 2011.	- Chambers conference pretrial	- ministerial matters and legal rulings don't violate public trial rights. Four motions in *limine* were simple legal matters; judge discussed rulings on the record	Art. I § 10 Art. I § 22	No
Leyerle 158 Wn. App. 474, 242 P.3d 921 Div. 2, Nov. 10, 2010	Questioning of juror in hallway with court reporter	- Presley has "eclipsed" Momah and Strode - questioning of juror in hallway was improper - no waiver - no *de minimis* standard in WA. Hunt dissents.		No
Koss 158 Wn. App. 8, 241 P.3d 415 Div. 3, Aug. 9, 2010, pub. Oct.12, 2010	- Chambers conference - Jury questions	- Chambers conference on an instruction change was ministerial legal matter - no violation of Δ's right to public trial. - Written responses to jury questions did not violate right to public trial -- no resolution of facts, without hearing (or notice to parties) . They are part of jury deliberations & not historically part of trial.		No
Bennett v. Smith Bunday Berman Britton, PS 156 Wn. App. 293, 234 P.3d 236 Div. 1, May 24, 2010 Rev. granted 245 P.3d 774 Jan 05, 2011	- Discovery in civil case	- Right of access to judicial records did not extend to documents filed in support of motion for summary judgment, where case settled before the trial court began to consider the pending summary judgment motion and the sealed documents filed in support of it	Art. I, § 10	Unclear
Sublet, 156 Wn.App. 160, 231 P.3d 231 Div. 2 May 18, 2010	Jury inquiry answered in chambers murder case	- Chambers conference re "purely legal" issue of how to respond to inquiry from deliberating jury was not a critical stage; def. need not be present - public trial right not implicated	Art. I § 10 Art. I § 22	No

Case	Issue	Holding	Const.	Error preserved?
Bowen, 157 Wn. App. 821, 239 P.3d 1114 Div. 2, Sept. 21, 2010	*Voir dire*	- Private questioning of jurors violated defendant's right to public trial; case was more similar to Strode than Momah.	Art. I § 22	No
Coleman, 151 Wn. App. 614, 214 P.3d 158 Div I 2009 (Elling, Leach, Applw.)	Jury Questionnaire rape case	- no showing that public was deprived of JQ - remand for hearing to consider Bone-Club factors	Art. 1 § 10 Art. 1 § 22	No
Paumier 155 Wn. App. 673, 230 P.3d 212 Div. 2, Apr. 27, 2010 Rev. Granted, 169 Wn.2d 1017	*Voir dire*	- closing a portion of *voir dire* without first considering alternatives to closure and making appropriate findings violated defendant's and the public's right to an open proceeding, requiring reversal of defendant's convictions	Art. 1 § 10 Art. 1 § 22	No
Price, 154 Wn. App. 480, 228 P.3d 1276 Div. 1, Oct 12, 2009 Grosse, Leach, Applewick (Pierce Co. case)	*Voir dire* of single juror on sensitive matter	- no courtroom closure where prosecutor asked victim's mother to leave for questioning of an individual juror during *voir dire*. Court did not order closure.	Art. I, § 10	No
Heath 150 Wn. App. 121, 206 P.3d 712 Div. II, May, 2009 (State's Petition for Review stayed and then withdrawn after Heath's death)	*Voir dire* -- private questioning in law library & chambers	- private *voir dire* to avoid tainting jury w/ biased juror was a courtroom closure -- case reversed	Art. I, § 10	No

Case	Issue	Holding	Const.	Error preserved?
In re Det. of D.F.F. 144 Wn. App. 214, 183 P.3d 302 (2008), Review granted,164 Wn.2d 1034 argued 9/15/09, no decision yet	Mental Health Proceedings	Superior Court Mental Proceedings Rule that provided that mental illness commitment proceedings shall not be open to the public, unless the person who is subject of the proceedings or his attorney files with the court a written request that the proceedings be public, violated mandate of state constitutional provision that cases shall be administered openly, and thus rule was unconstitutional on its face.	Art. I, § 10	No
Sadler, 147 Wn. App. 97, 193 P.3d 1108 (II - Oct. 2008)	*Voir dire* -- Batson questioning	Holding: the proceeding was closed to the public because the trial court moved it into the jury room and did not invite the public to attend the hearing; the trial court violated Sadler's constitutional right to an open public trial when it held the Batson hearing in the jury room -- eight counts of sexual exploitation of a minor reversed.	Art. 1, § 10 Art. 1, § 22	No
Erickson, 146 Wn. App. 200, 189 P.3d 245 (II - July, 2008)	*Voir dire* -- private questioning	Four jurors questioned in jury room rather than courtroom; the issue was not waived; defendant had standing to raise Art. I, § 10 claim; closure not trivial. Reversed convictions.	Art. 1, § 10 Art. 1, § 22	No
Duckett, 141 Wn. App. 797, 173 P.3d 948 Div. 3, Nov, 2007)	*Voir dire* -- private questioning	defendant only waived his right to be present during individual questioning of selected jurors; defendant did not waive his right to a public trial because the court did not advised the defendant of his public trial right or asked him to waive it; questioning of individual jurors regarding their experiences with sexual abuse in the jury room was a courtroom closure; Defendant has standing to assert the public's right under const. art. I, sec. 10; questions whether the defendant can waive the public's right to open proceedings Second degree rape conviction reversed	Art. 1, § 10 Art. 1, § 22	No

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, **Andrew Zinner** @ zinnera@nwattorney.net, and to **Edward Lombard** @ edwardl@co.mason.wa.us and **Timothy Higgs** @ timh@co.mason.wa.us, attorneys for the respondent, containing a copy of the Amicus Curiae Brief Washington Association of Prosecuting Attorneys (WAPA), in STATE V. ERIC D. WISE, Cause No. 82802-4, in the Supreme Court, for the State of Washington.

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

Name James M. Whisman
Done in Seattle, Washington

Date 4/4/11