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STATE OF WASHINGTON
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**IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, Petitioner,

v.

GREGORY PIERCE SHEARER, Respondent.

**PETITIONER'S ANSWER TO
BRIEF OF AMICI CURIAE**

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 **ORIGINAL**

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A. ANSWER TO AMICI

The Amici essentially assert that the public's right to open proceedings under Art. 1 §10 should supersede the defendant's right to public trial under Art. 1 §22. They further assert that a public trial right violation should result in reversal of a defendant's conviction because of the importance of Art. 1 §10, despite the fact that the defendant never raised below an Art. 1§10 or Art. 1 §22 violation below, and despite the fact that the record here demonstrates that the alleged violation did not affect the framework within which the trial proceeded. The State is not seeking to "dilute the open court safeguards established by this Court,"¹ but is asking this Court to apply its long held principle of error preservation under RAP 2.5 and not reverse convictions where no one, not the defendant nor a member of the public, alerted the trial court to an alleged violation of the constitutional right to public trial. The de minimis standard the State alternatively advocates is not a harmless error standard, but an assertion that the right to public trial was not implicated by the trivial closure. Finally, Amici's argument that all violations of the public's right to open proceedings, whether under Art. 1 §22 or §10, result in structural error ignores the rationale for the structural error doctrine.

¹ Amici Brief at 4.

Even if Shearer could assert the public's right to open proceedings under Art. 1 §10, the remedy would not be reversal of his conviction.

1. **RAP 2.5 addresses a defendant's failure to preserve an error and appropriately requires a party to object below or demonstrate an error of constitutional magnitude in order to assert the error on appeal.**

Amici asserts that the State's RAP 2.5 argument and de minimis argument undervalue the importance of jury selection. As acknowledged by Amici, the State does not dispute that a trial court should apply the Bone-Club² factors in determining whether a closure of proceedings that should be open to the public is warranted. However, the argument advanced by Amici elevates the public's right to open proceedings over a defendant's personal right to a public trial. Under their argument, no one would ever have to assert a violation of the public's right to open proceedings at the trial court in order to obtain reversal of the case, criminal or civil. In addition, a defendant would still be able to obtain a new trial without even having to assert an Art. 1 §10 violation on appeal or demonstrate standing to assert an Art. 1 §10 violation. This would be a dangerous precedent to set in appellate litigation.

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

As was noted by the U.S. Supreme Court in Presley v. Georgia, “there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has.” Presley v. Georgia, 558 U.S. 209, 213, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).^{3 4} However, Amici’s argument does just that by asserting that a defendant should not have to assert an Art. 1 §22 violation at trial in order to raise it on appeal due to the importance of the *public’s* right to open proceedings.

As asserted in its supplemental brief, the Court should follow traditional principles of appellate procedure and require an objection below or demonstration of a manifest error of constitutional magnitude in order to assert a public trial right violation on appeal. Amici’s position encourages defendants and civil litigants to wait to raise an issue regarding the public trial right instead of permitting a trial court to address the issue

³ The Court made this comment in determining whether it was well-settled that the right to public trial extends to jury voir dire, and reasoned that it was because the Court had already decided it did in the First Amendment case of Press Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Presley, 558 U.S. at 213. The court noted that it was an open question as to what extent the First and Sixth Amendments were coextensive. *Id.*

⁴ Amici reference Presley for the proposition that reversal of a criminal conviction is the appropriate remedy where no findings are made justifying a closure of the courtroom. While the Presley court reiterated the importance of trial court findings justifying a closure in order to enable review, the Court reversed because the trial court did not consider reasonable alternatives to closure. *Id.* at 214, 216. Moreover, the defendant in Presley had objected at trial to the exclusion of the public, specifically his uncle, from the entirety of jury selection. *Id.* at 210

and weigh the competing, asserted interests at the time of the alleged closure. Amici's position assumes that it will always be abundantly clear to a trial court when a court's interaction with parties will implicate the right to public trial. This is not necessarily the case, as this Court acknowledged in Sublett⁵ by "adopting the experience and logic test" in order to determine whether the right to public trial extends to a particular "proceeding."

Amici assumes the State is making a waiver argument in this case, it is not. The State is asserting that the defendant failed to preserve his Art. 1 §22 and Sixth Amendment claims by failing to assert them below. The State is alternatively arguing that the in chambers voir dire of one juror under the facts of this case does not implicate the *defendant's* right to public trial. There may have been a violation of the public's right to open proceedings, albeit one that no one ever asserted below, despite the court inquiry of the entire courtroom if anyone objected, and one that has not been raised by the defendant on appeal. If there had been an objection below, the trial court would have been placed on notice that it needed to address the Bone-Club factors, those very factors that Amici assert are critical to ensuring public confidence in the judicial system. The trial court

⁵ State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

then would have addressed those factors or not proceeded with in chambers questioning of the juror.

Requiring an objection below encourages the balancing of the competing interests of those directly affected by the openness of the proceedings at the time when those interests are impacted. Requiring an objection to an Art. 1 §10 violation ensures a record for review. In re Detention of Reyes, ___ Wn. App. ___, ¶¶65, 2013 WL 5297338. Moreover, as noted in In re Reyes, the history of Art. 1 §10 litigation shows that “the press has regularly asserted its open administration of justice right in both criminal and civil cases,” and private citizens as well. *Id.* at ¶71. Requiring an objection to an alleged Art. 1§10 violation puts the trial court on notice of a real, threatened interest and ensures that a sufficient record is made of the asserted, competing interests by those most affected by the alleged closure.

Amici assert that a constitutional right cannot be waived unless there is an on-the-record colloquy in order to ensure that the waiver is valid. Again, in this case the State is not arguing that the defendant “affirmatively waived” his right to public trial, but that he has not shown that the alleged violation was a manifest error of constitutional magnitude such that he may assert it for the first time on appeal. Moreover, while

waivers of constitutional rights must in general be “knowing, voluntary and intelligent,” not all constitutional rights require an on-the-record colloquy in order to “waive” them. *See, e.g., State v. Pierce*, 134 Wn. App. 763, 771-72, 142 P.3d 610 (2006) (a full on-the-record colloquy is necessary only for entry of a guilty plea); *State v. Thomas*, 128 Wn.2d 553, 910 P.2d 475 (1996) (defendant’s waiver of the right to testify may be inferred from defendant’s conduct and is presumed from the defendant’s failure to testify); *see also, State v. Strobe*, 167 Wn.2d 222, 235, 217 P.3d 310 (2009) (J. Fairhurst concurring) (listing cases that hold certain constitutional rights don’t require an on-the-record colloquy).

While the court has an independent obligation to conduct a Bone-Club analysis when it closes a proceeding that implicates Art. 1 §10 or §22, Amici fail to address how a defendant has standing to assert the public’s right to open proceedings when he has an individual, personal right under Art. 1 §22 and the Sixth Amendment, particularly where the defendant has failed to assert his or her own personal right. *See, In re Reyes*, ____ Wn. App. at ¶¶68-75 (respondent did not have standing to assert public’s Art. 1 §10 open proceedings right to attend his hearing where respondent did not have an “injury in fact,” was not in close relation to the public, and where there was no impediment to the public asserting its own

rights and respondent failed to assert his own open proceedings right). “[T]hough related and often overlapping a defendant’s and the public’s rights are separate.” State v. Beskurt, 176 Wn.2d 441, 446, 293 P.3d 1159 (2013) (plurality opinion). Under federal law a defendant who waives his right to public trial under the Sixth Amendment cannot rely on the public’s right to open proceedings derived from the First Amendment in order to assert standing to raise a public trial claim. Hutchins v. Garrison, 724 F.2d 1425, 1431-32 (4th Cir. 1983); *see also*, State v. Williams, 328 S.W.3d 366, 373 (Mo. App. 2010), *cert. den.*, 132 S.Ct. 129 (2011) (defendant’s express advocacy for closure of courtroom foreclosed him from raising the public’s First Amendment open proceedings claim).

While Art. 1 §10 is essential to ensuring public confidence in the judicial system, that constitutional provision does not take precedence over a defendant’s personal, constitutional right to a public trial in a criminal case. Where a defendant has failed to preserve his alleged Art. 1 §22 public trial right, he should not be permitted to raise the issue on appeal due to concerns regarding the public’s right to open proceedings under Art. 1 §10 where he has no standing to assert the public’s right. Trial courts are *now* well aware of their obligation to conduct a Bone-Club analysis when they are alerted to an alleged unlawful closure. The public’s

right to open proceedings is best protected by those present at the time of a closure asserting their interests.

2. **Adoption of a de minimis standard would not employ harmless error review, but rather would hold that a defendant's right to public trial was not implicated by the limited in chambers questioning.**

Amici assert that in advocating for adoption of a de minimis standard, the State is seeking adoption of a harmless error review for violations of the right to public trial. This is not the case. A de minimis standard asks whether the right to public trial was even implicated by the trivial closure. *See, State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (closures that have a de minimis effect on a proceeding do not necessarily violate the right to public trial). In order to determine whether the right to a public trial is implicated by a closure, courts look to whether the principles underlying the right to public trial are negatively impacted by the closure.⁶ *State v. Easterling*, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring).

⁶ “[T]he right to public trial serves to ensure a fair trial, to remind prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *Sublett*, 176 Wn.2d at 72. In the context of a closure of voir dire, the public nature of the proceeding permits the defendant’s family to contribute their knowledge or insight to jury selection and permits the venire to see the interested individuals. *Brightman*, 155 Wn.2d at 515.

Here, as argued in the State's supplemental brief, none of the values implicated by the right to public trial are negatively impacted by the in chambers voir dire of this one juror. The fairness of Shearer's trial was not negatively impacted. On the contrary, the fairness of the trial was enhanced by the in chambers questioning because the juror was able to be forthcoming about her bias against, and it was disclosed in such a manner that the rest of the panel was not tainted by hearing the details of her experience with domestic violence. The venire, including juror no. 7, were able to see the interested individuals during the rest of the voir dire. The juror was excused for cause so there was no need to consult Shearer's family, even assuming they were present, about this specific juror. Both the judge and prosecutor were aware the in chambers questioning was being transcribed, and nothing in the record indicates that either court officer was not carrying out their duties responsibly.

Amici argue, however, that the Court must ensure that Bone-Club findings are made contemporaneous with a closure in order to ensure that the parties and the court are not engaging in racial or other discriminatory practices. The State takes great exception to the implied allegation that the in chambers questioning of jurors that has occurred in these cases has permitted any racial or other discrimination to occur. There is absolutely

no evidence in this case, and Amici have pointed to no evidence in this or any other public trial right case, that there is any racial or other discriminatory practice occurring.

There was no lack of public oversight in this case, all but seven minutes of voir dire occurred in the open courtroom. The need for public oversight is met by permitting the public to assert their interest at the time of the alleged closure and to review transcripts of the proceedings upon request.

3. The in chambers questioning of one juror who was excused for cause did not result in structural error because structural error requires an effect on the framework of the trial and reversal is not the remedy for an Art. 1 §10 violation.

Amici assert that all open court violations, including those under Art. 1 §10, should result in structural error requiring reversal. While structural error does not require demonstration of an actual impact on the trial, it does require, at least, some showing of an effect on the framework of the trial. Moreover, reversal of a defendant's conviction is not the remedy for an Art. 1 §10 violation. Here, no *negative* effect upon the framework of Shearer's trial can be inferred from the in chambers questioning of the one juror because the juror was removed for cause at a

time and in a manner that did not affect the rest of voir dire or the trial itself or otherwise render the trial fundamentally unfair.

The U.S. Supreme Court emphasized in United States v. Marcus that “structural error” applies to a very limited class of errors, those that “*affect the framework* within which the trial proceeds.” U.S. v. Marcus, 560 U.S. 258, 130 S.Ct. 2159, 2164-65, 176 L.Ed2d 1012 (2010). (emphasis added). The structural error doctrine is intended to address errors that “deprive defendants of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.’” In re Reyes, ____ Wn. App. at ¶63 (quoting Neder v. United States, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). There is “no reason to believe that *all or almost all* such errors *always* ‘affect the framework in which the trial proceeds,’ ... or ‘necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence’.” Marcus, 130 S.Ct. at 2166 (internal citation omitted and emphasis in the original); *see also*, Gibbons v. Savage, 555 F.3d 112, 119-120, (2d Cir. 2009) (“It does not necessarily follow, however, that every deprivation in a category considered to be ‘structural’ constitutes a violation of the Constitution or requires reversal

of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation.”)

Furthermore, structural error does not apply to violations of Art. 1 §10 in criminal cases. “Whenever a defendant raises a public trial right issue, the inquiry is whether his section 22 rights were violated. If there is no section 22 violation, then the new trial remedy in *Strode* does not apply.” State v. Beskurt, 176 Wn. 2d 441, 446, 293 P.3d 1159 (2013) (plurality opinion); State v. Halverson, ___ Wn. App. ___, ¶9 (2013), 2013 WL5406449. If, as Amici contend, there was an Art. 1 §10 violation in this case, Shearer would not be entitled to a new trial, the only remedy Shearer seeks.

Contrary to Amici’s contention, the State is not advocating for a harmless error test. The State is asserting that in the context of the facts of this case, it is clear that the error did not affect the framework of the trial, and therefore, the structural error doctrine does not apply. The juror was excused for cause and would have been excused, either on peremptory or for cause, even if she had not been questioned in chambers. Moreover, a new trial would not be warranted due to an unasserted Art. 1 §10 violation.

B. CONCLUSION

Amici would have this Court place the public's right to open proceedings under Art. 1 §10 above that of Art. 1 §22. While the public's right to open proceedings is essential to ensuring the public's confidence in the judicial system, it should not take precedence over a defendant's personal right to a public trial in the context of a criminal case. Where a defendant fails to preserve a public trial violation under Art.1 §22, he should not be permitted to rely upon Art. 1§10 in seeking a new trial, a constitutional provision which he does not have standing to assert and which in this case he has even failed to assert.

Respectfully submitted this 3rd day of October, 2013.



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I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and all counsel, addressed as follows:

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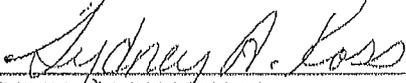
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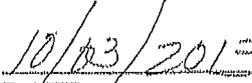
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State v. Shearer, Answer to Amici Curiae: Supreme Court No. 88556-7.
Attached please find the Petitioner, State of Washington's, Response Brief in the above referenced matter.

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