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No. 86216-8

Consolidated with No. 87259-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

GREGORY PIERCE SHEARER AND
HENRY GRISBY III,

Respondents.

ANSWER TO BRIEF OF AMICI CURIAE

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

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

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ANSWER TO AMICI</u>	1
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Press-Enter. Co. v. Superior Court of California,
Riverside Cnty., 464 U.S. 501,
104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)..... 2

Washington State:

In re PRP of Matthews, No. 61845-8-I..... 6

State v. Marsh, 126 Wash. 142,
217 P. 705 (1923)..... 6

State v. Momah, 167 Wn.2d 140,
217 P.3d 321 (2009)..... 2, 5

State v. Strode, 167 Wn.2d 222,
217 P.3d 310 (2009)..... 2

Statutes

Washington State:

RCW 2.36.070 1

Rules and Regulations

Washington State:

GR 31 2

RAP 2.5..... 3

Other Authorities

Foley, Elizabeth Price & Filiatrault, Robert M., The Riddle of Harmless Error in Michigan, 46 Wayne L. Rev. (2000)..... 4

Hannaford, Paula L., Making the Case for Juror Privacy:
A New Framework for Court Policies and Procedures..... 3

The ABA Principles for Juries and Jury Trials (and Commentary)..... 3

Washington State Jury Comm., Report to the Board
for Judicial Administration, Recommendation 20 2

A. ANSWER TO AMICI

Much of the discussion in the amicus brief touches on material adequately covered by the State's briefing. This answer focuses on a few discrete points.

First, this case has nothing to do with detecting racial bias. Br. of Amici at 7-9. There is nothing in the record to suggest that the juror who was questioned as to his prior conviction was a member of any protected class, nor is there anything in the record to suggest that he was questioned on any matter other than the (undisputed) fact that he had *some* prior criminal conviction that *might* disqualify him from service under RCW 2.36.070. The State has simply asked this Court to recognize that, under these extraordinarily limited circumstances, a five-minute conversation between the court, the lawyers and the juror, outside of public earshot, does not violate the right to a public trial, especially where the rest of *voir dire* was conducted entirely in open court, and where defense counsel excused the juror in open court, so that this juror never sat on the jury that adjudicated Grisby's case. It is hyperbole to suggest that adopting a *de minimis* closure rule of such a limited nature would somehow encourage racial bias in *voir dire*.

Second, the State agrees with amici that trial courts have been quick to alter flawed practices to comport with the law.

It is worth noting that many of the cases currently before the Court involve trials that took place years ago, before this Court had fully articulated the requirements for closure, and the applicability of those rules to jury selection. As trial courts become familiar with these rulings, there is no reason to believe that trial courts will continue to close jury selection to the public without following *Bone-Club*.

Br. of Amici at 9-10.

This Court's decisions, especially in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), invalidated a practice that most trial courts had assumed was proper, to wit: the private questioning of jurors on sensitive subjects. After all, a number of sources strongly suggested that such limited questioning was both permissible and desirable. See GR 31(j); Press-Enter. Co. v. Superior Court of California, Riverside Cnty., 464 U.S. 501, 511, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press I) (although closure of six weeks of *voir dire* was improper, "[t]he 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."); Washington State Jury Comm., Report to the Board for Judicial

Administration, Recommendation 20 (“...the court should try to protect jurors from unreasonable and unnecessary intrusions into their privacy during jury selection.”); The ABA Principles for Juries and Jury Trials (and Commentary), at 42-3; http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf; Making the Case for Juror Privacy: A New Framework for Court Policies and Procedures, by Paula L. Hannaford; http://www.ncsconline.org/WC/Publications/Res_Juries_JurorPrivacyWhitePaperPub.pdf. The trial courts erred, however, in failing to correctly implement the principles by first expressly balancing interests on the record.

Amici’s observation proves that trial courts need not be strong-armed into following the law; once they are aware of their obligations under the law they will meet those obligations. Thus, there is no reason for this court to forgo the ordinary modes of appellate review – like application of rules for preservation of error – in an effort to coerce trial courts into conducting *voir dire* in the open. Trial courts have learned from this Court’s precedents and will abide by them without extraordinary measures.

Third, the State notes that amici have committed an error of analysis that was discussed in the State’s supplemental brief. Supp. Br. of Pet. at 11-12. They have conflated the doctrine of “preservation of error”

with the doctrine of “harmless error.” Br. of Amici at 10-11 (application of the RAP 2.5(a) standard is “essentially an argument for adoption of a ‘harmless error’ standard”). In truth, as discussed in the State’s brief, the two doctrines are quite different. *See also* Elizabeth Price Foley & Robert M. Filiastrault, The Riddle of Harmless Error in Michigan, 46 Wayne L. Rev. 423, 430-33 (2000). It is entirely fair to bar appellate review where an error was never brought to the court’s attention, especially “where this Court had [not] fully articulated the requirements for closure.” Br. of Amici at 10. Where there has not been an objection, it is fair to ask whether the error had practical and identifiable consequences on the case. It is quite another matter, and also fair, to hold the court and the parties to an unforgiving standard (structural error) where the error was brought to the court’s attention and ignored. In any event, amici are mistaken to equate the two doctrines simply because each considers “prejudice” in the analysis.

Also, it is not correct that every instance of structural error necessarily results in prejudice. Prejudice is presumed as to structural error because the nature of error is such that it is often difficult to quantify. When, for example, *voir dire*, an evidentiary hearing, or a trial is closed, this presumption is warranted because it may be impossible to tease out the effects of the closure. But sometimes the *lack* of prejudice is quite

apparent. Where a trial lawyer has failed to object to a very brief closure because private inquiry of a juror is clearly to his benefit, or inconsequential, and where the lawyer later excuses the juror from the case, the effect of the error is plainly not harmful.¹ It makes sense that any *presumption* of prejudice is, under such circumstances, rebutted. This is why many states and the federal courts routinely demand that an error be preserved to be noticed on appeal, even if such an error would be reversible if objected to at trial. The State has not argued, and does not argue in these cases, that a structural error can be harmless where an objection was lodged at trial. Amici are incorrect when they argue that the State is pursuing a harmless error argument. Br. of Amici at 14-15.

Finally, amici mention in passing that reversal is warranted “even if a defendant waives the right to a public trial *or invites* closure....” Br. of Amici at 19. This court has not ruled upon a classic case of “invited error” and it should not in this case address the question of whether a truly invited open courts error must be considered on appeal. The rule has always been quite to the contrary; invited error will not be noticed on appeal. The State argued in Momah that the error should not be noticed at

¹ That is to say, the error is not harmful vis-a-vis the defendant. It goes without saying that any improper closure affects the public perception of the courts, and is to be avoided. But, as to the proper manner for adjudicating the case or controversy before the court, the issue is whether the defendant was treated fairly, not whether his trial was perfect. And, as noted above, failing to consider unpreserved errors will not encourage judges to neglect their duties.

all because trial counsel had invited it. This Court found that trial counsel's actions had fallen short of a "classic case of invited error" and so refused to apply the traditional doctrine to entirely bar review. Momah, 167 Wn.2d at 154. However, cases that raise a "classic case of invited error" are pending in the appellate courts,² so the State respectfully asks this Court not to foreclose application of the invited error doctrine in such cases.

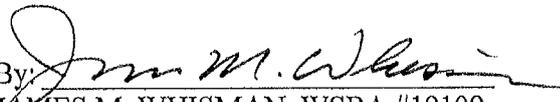
B. CONCLUSION

For these reasons, and because Amici fail to address the State's arguments distinguishing State v. Marsh, 126 Wash. 142, 217 P. 705 (1923), amici's arguments are unpersuasive and should be rejected.

DATED this 3rd day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

² In re PRP of Matthews, No. 61845-8-I. The defendant claims an open courts violation during a trial for aggravated murder for shooting a police officer. The defendant repeatedly insisted on closure to prevent jurors from hearing about prejudicial evidence. The personal restraint petition is pending in the Court of Appeals, Division One.

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Please let me know if you should have problems opening the attachment.

Thank you,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-296-9489
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Jim Whisman
Senior Deputy Prosecuting Attorney
Attorney for Petitioner

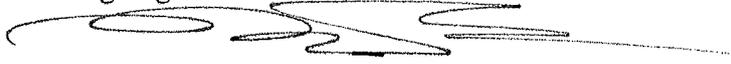
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attorney of record for petitioner, containing a copy of the Answer to Brief of Amici Curiae in STATE V. GREFORY PIERCE SHEARER and HENRY GRISBY, III, Cause No. 86216-8 in the Supreme Court of the State of Washington.

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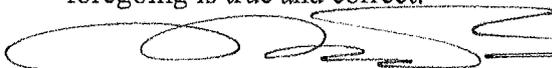
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