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SUPREME COURT NO. 87259-7
(consolidated under No. 86216-8)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

HENRY GRISBY III,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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

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A. ISSUES

1. Is reliance on State v. Marsh mistaken where Marsh involved a series of extraordinary errors that clearly resulted in prejudice, whereas the closure error here was sufficiently abbreviated such that it is clear that the closure was not manifest or prejudicial at all?

2. Does Grisby lack standing to assert the public's right to the open administration of justice?

3. Was the closure in this case *de minimis* such that it does not undercut the reasons for open courts?

B. STATEMENT OF THE CASE

Henry Grisby III was charged with a Violation of the Uniform Controlled Substances Act (delivery) after he was arrested in a Seattle Police Department buy-bust operation. CP 1-5. A jury convicted him of that charge. CP 17. He was sentenced to a prison-based Drug Offender Sentencing Alternative (DOSA) of 45 months incarceration and 45 months of community custody. CP 50. Grisby argued on appeal that his conviction must be reversed because the trial judge questioned a potential juror in chambers. The Court of Appeals agreed that this Court's precedents required reversal and a new trial. State v. Grisby III, No. 65564-7-I, slip op. (Wash.Ct.App. Mar. 12, 2012). The State petitioned

for review and that petition was granted. The only facts relevant to this Court's review are facts about *voir dire*.

At the end of the first day of *voir dire*, an issue arose as to whether a certain juror had a 1978 criminal conviction that disqualified him from jury service. 3/10/10 RP 54.¹ The juror's name was Mr. Lemmons. Id. The information available to the court was insufficient to determine whether Lemmons had a criminal conviction, so the court and the parties agreed to inquire of Mr. Lemmons on the next court day. Id. at 54-56. This was all discussed in open court. Id. The record is silent as to whether the parties discussed how the inquiry was to take place.

Immediately upon convening court the next day, March 11th, at 9:43 a.m., the trial court asked the parties and Mr. Grisby to come into chambers with juror number 18. 3/11/10 RP 3. The parties were in chambers for approximately five minutes, until 9:48 a.m. Id. No objections were lodged by Grisby or anyone in the courtroom. Ultimately, Mr. Lemmons did not sit on the jury that heard Grisby's case. CP 56-62

¹ Two reports of proceedings were prepared for March 10th and March 11th. The first reports for those dates did not include *voir dire*. See 3/10/10 RP 22 ("*voir dire* omitted by request") and 3/11/10 RP 25 ("*Voir dire* continues, omitted per request"). Subsequent volumes were produced that include the originally omitted material. Those volumes are cited herein as "3/10/10 Supp. RP" and "3/11/10 Supp. RP."

clerk's minute entries). He was excused by the exercise of a preemptory challenge by defense counsel. 3/11/10 Supp. RP 38.²

C. ARGUMENT

Legal arguments, *voir dire*, opening statements, the questioning of witnesses, and closing arguments in this trial were all conducted in an open courtroom where anyone could listen and observe the administration of justice. The lone exception was a five-minute inquiry in chambers with a single juror concerning whether that juror had a prior felony conviction. Grisby's lawyer did not object to the brief private inquiry, the matter was discussed in open court before the juror was questioned, it had nothing to do with the truth-seeking function of the trial, and the juror never served on the case due to defense counsel's challenge exercised in open court. The constitution does not demand a retrial in this case because Grisby failed to preserve error, he does not have standing to assert the public's right to open proceedings, and the chambers conference was an administrative matter that historically and logically does not fall within the

² The verbatim report of proceedings contains a typographical error that might be confusing. At 3/11/10 Supp. RP 38, the transcriber typed the juror number as "28" instead of "18." It is clear from the actual audio recording, however, that defense counsel says "eighteen," the judge confirms by saying, "one, eight?" and defense counsel then agrees with the judge. The judge then thanks and excuses "Mr. Lemmons." 3/11/10 Supp. RP 38. So, there can be no question that "28" in the VROP is a typographical error.

scope of rights protected by the constitution. The Court of Appeals decision should be reversed and Grisby's conviction should be affirmed.

1. GRISBY FAILED TO PRESERVE THE ERROR HE RAISES ON APPEAL AND HIS CLAIM DOES NOT DESCRIBE MANIFEST CONSTITUTIONAL ERROR; IT SHOULD NOT BE CONSIDERED.

The State argued below that this Court should apply RAP 2.5(a) in the normal fashion to the error claimed in this appeal.³ Since that time, several justices of this Court have pointed out over the course of a number of concurring and dissenting opinions that this Court's current practice of noticing unpreserved public trial claims on appeal is erroneous and is harmful to the administration of justice. It has been noted that the current practice stems from a single case, State v. Marsh, 126 Wash. 142, 217 P. 705 (1923), cited in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).⁴ It has also been noted that no decision of this court has explained

³ See Brief of Respondent, at 3-22 for the State's full argument in support of a contemporaneous objection rule.

⁴ State v. Paumier, 176 Wn.2d 29, 54, 288 P.3d 1126 (2012) (Wiggins, J., dissenting) ("We have never justified our past failure to apply RAP 2.5 in public trial cases. I explain this in detail in my concurring opinion in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) (Wiggins, J., concurring). As I explain, we have never articulated a reasoned justification for ignoring RAP 2.5, simply relying on a 1923 case, State v. Marsh, 126 Wash. 142, 217 P. 705 (1923), for the proposition that no objection is required to preserve a public trial error. See Sublett, 176 Wn.2d at ____, 292 P.3d 715 (Wiggins, J., concurring). But Marsh predates RAP 2.5 and has a far more egregious set of facts than most public trial violations. Standing alone, Marsh simply does not justify ignoring the unambiguous parameters of our appellate rules. Subsequent cases have relied on Marsh with no principled explanation of why the right to a public trial must be treated differently than every other constitutional error in this regard.").

the modern reliance on Marsh, and that Marsh has been applied without discussion or analysis.⁵ Those justices have also noted that addressing unpreserved errors conflicts with numerous prior cases, including public trial cases, and with the rules of appellate practice promulgated 50 years after Marsh was decided. Id. The State urges this Court to consider those points as set forth in the concurring and dissenting opinions, and as set forth in the State's briefing below.

In this supplemental brief, however, the State asks this Court to focus its attention on the fundamentally different circumstances that gave rise to the holding in Marsh, and how those circumstances show that the holding did not establish a general rule that public trial claims could always be raised where there was no objection at trial. Rather, the rule in Marsh is remarkably similar to how RAP 2.5(a) would be applied today. There is no reason to interpret that case in a manner that conflicts with this Court's current rules of appellate procedure.

⁵ State v. Sublett, 176 Wn.2d 58, 153-55, 292 P.3d 715 (2012) (Madsen, J., concurring) (“Nor does Marsh justify disregarding our rules of appellate procedure. At the time Marsh was decided, RAP 2.5 did not exist Our failure to adhere to Rap 2.5(a)(3) leads to unjustifiable consequences. In many situations, the defendant and defense counsel might willingly consent to closing part of a trial or indeed might prefer it. Both the prosecution and the defense may benefit from a closure, but it provides an interesting win-win for the defense.”). *See also* State v. Beskurt, 176 Wn.2d 441, 450, 293 P.3d 1159 (2013) (Madsen, J., concurring) (“In continuing to follow Marsh, the court has ignored our own rules for appellate review of claimed constitutional errors, thus undermining the carefully crafted analysis that we otherwise apply to claimed constitutional errors that are just as important as the right to a public trial.”).

The errors in the trial and sentencing of Gerald Marsh were numerous and serious. He was tried in juvenile court even though he was an adult. He was convicted of a *crime* even though the judge only had authority to adjudicate *delinquencies* in juvenile court. He was never provided a lawyer. He was never offered or provided a jury. No verbatim or other record was made of the proceedings. The proceedings were intentionally kept private by the judge for no other reason than it was the “custom” of the court. Under these highly unusual and egregious circumstances, this Court understandably reversed the conviction even though Marsh had never objected to the private trial. Marsh, at 143-47.

This holding was wholly consistent with the practice at the time, which permitted review of unpreserved errors to correct a “fundamental injustice.” Washington State Bar Association, Washington Appellate Practice Handbook § 10-26 (1980). It would also be wholly consistent with RAP 2.5(a)(3), as several errors in Marsh’s trial were “manifest errors affecting a constitutional right.” State v. Scott, 110 Wn.2d 682, 687-89, 757 P.2d 492 (1988). Thus, the narrow holding of Marsh is consistent with RAP 2.5(a).

However, this Court’s recent broad interpretation of Marsh creates an apparent conflict between that case and this Court’s rule promulgated

fifty years later. But this Court in the Marsh decision itself carefully delineated the holding.

...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. That question is not here because the record shows that the trial 'was held in private,' 'per custom of the court'-not that there was any supposed necessity for such private hearing, but according to 'custom of the court.' Certainly there is not, nor can there be, any custom of the court for the trial of criminal cases in private.

Marsh, 126 Wn.2d at 145. In other words, this Court permitted Marsh to raise his claim because his entire trial was held in private, but this Court also recognized that there might be cases when a trial court exercises its discretion to hold portions of a trial in private. By recognizing this limit on the reach of its own decision, the Marsh court left for another day whether such a discretionary closure could be raised for the first time on appeal. The question left open by Marsh is answered now by RAP 2.5(a).

The Rules of Appellate Procedure were promulgated to bring more uniformity and predictability to appellate practice. Before the rules were promulgated, preservation of error practices were established by the common law and ran a broad gamut. See Washington State Bar Association, Washington Appellate Practice Handbook § 10-6 -- 10-28

(1980) (discussing the common law approaches to scope of review and errors raised for the first time on review). In 1950, the “Rules on Appeal” were promulgated, but those rules did not address preservation of error. Rules on Appeal, 34A Wn.2d 14-66.⁶ Thus, even after the Rules on Appeal, the common law continued to govern preservation of error.

RAP 2.5(a), promulgated in 1976, was intended to reduce common law practices to an actual rule that articulates distinctions in the common law and balances the interests in rectifying error while encouraging vigilance and judicial economy. As the court said in State v. Lynn:

Prohibiting all constitutional errors from being presented for the first time on appeal would denigrate our constitutional protections and result in unjust imprisonment. On the other hand, permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts. A judicious application of the “manifest” standard permits a reasonable method of balancing these competing values. Thus, it is important that “manifest” be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.

State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992). This Court has repeatedly and recently cited Lynn with approval. *See e.g.* State v. Nguyen, 165 Wn.2d 428, 433-34, 197 P.3d 673 (2008). Although some might say RAP 2.5(a) is applied imperfectly, it is still a vast improvement

⁶ This special volume of the Washington Reports is entitled “Washington Court Rules” and was published in 1951.

on the relatively free-form common law practices that existed before it. And, the rule was duly promulgated pursuant to this Court's procedures under GR 9, so that competing interests could be weighed and decided upon. This public balancing through the rule-making process should not be replaced on a case-by-case basis except under the most compelling circumstances, and only if the rule itself could not accommodate those compelling circumstances.

In response to an argument that substantial rather than actual compliance with the old Rules on Appeal was sufficient, this Court long ago responded as follows:

The arguments made are very appealing, but to accept and act upon them as requested would in effect either nullify the rule or make it necessary that we determine in each case of noncompliance whether it will be followed or waived. This would result in the exercise of a discretion and in discrimination. We must either enforce the rule or abandon it. Its necessity has a long background of experience, and it was promulgated in aid of expeditious and orderly appellate procedure.

Hill v. City of Tacoma, 40 Wn.2d 718, 719-20, 246 P.2d 458 (1952). The same can be said for the consistent and principled application of the modern Rules of Appellate Procedure.

Grisby has not put forth a claim that would merit review under either RAP 2.5(a) or Marsh. He and his lawyer were perfectly content to question a single juror in private to resolve a simple administrative matter

as to the juror's statutory qualifications for serving on a jury. The court reasonably chose to inquire in a manner that would not embarrass the potential juror in front of the entire courtroom by informing others that he had a criminal conviction in his past. The juror evidently was not disqualified by the inquiry, because he remained in the venire until he was excused by defense counsel's peremptory challenge.⁷ These facts look a lot like the discretionary decision for a limited closure that was provisionally excepted by the Marsh decision. Marsh, at 145 (not deciding the question whether "...there is power in the trial court, proceeding in the exercise of discretion, to exclude the public or any portion...").

Respect for *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it will be abandoned. State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). The decision in Bone-Club was clearly incorrect because the holding in Marsh was limited to its unique facts. To interpret the case more broadly is error. To do so when the broader interpretation creates conflict with a rule promulgated fifty years later is to replace the rulemaking procedures of GR 9 with an ad hoc common law amendment. That narrow portion of State v. Bone-Club is harmful because failure to apply the modern rule

⁷ In other words, whatever criminal history the juror had, he did not have a felony conviction or he would have been disqualified from service under RCW 2.36.070.

undercuts the basic principles of fairness and judicial economy that gave rise to the rule, and diminishes the stature of the rules themselves. For these reasons, the State respectfully asks this Court to recognize the limited scope of Marsh so as to avoid conflict with RAP 2.5(a).⁸

This Court has recently opined that courtroom closures must always result in reversal because such errors are “structural” and thus are presumed prejudicial. State v. Wise, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012). This Court has also said that a failure to object does not “magically transform” a structural error into a non-structural one. State v. Id., at 13 n.6. The State respectfully suggests that these two rationales confuse the two independent doctrines of *structural error* and *preservation of error*.⁹ The effect of an error may be difficult to quantify,

⁸ See Tory A. Weigand, Esq., RAISE OR LOSE: APPELLATE DISCRETION AND PRINCIPLED DECISION-MAKING, 17 Suffolk J. Trial & App. Advoc. 179 (2012) (“Exceptional circumstances” discretion, apart from plain error, is unruly. Pocked with diverse factors, many of which are removed from the underpinnings to the raise or lose rule, the exceptional circumstances exception suffers from lack of true consensus, the lack of any means of consistent or predictable application, and, too often, is severed from the fundamental error correcting function of the appellate court. The use of two seemingly separate lines of discretionary exception can dilute the error correction and dispute resolution function of appellate courts and otherwise further a lack of consistency and equal treatment. “[A] legal system which tolerates needless dis-uniformity and incoherence is not keeping faith with those who are subject to its dominion, for it has forsaken commitment to even handed decision-making.”).

⁹ The Court of Appeals recently addressed a similar confusion arising from a failure to adequately distinguish between preservation of error and harmless error. State v. Grimes, 165 Wn. App. 172, 187 n.16, 267 P.3d 454 (2011), review denied, 175 Wn.2d 1010 (2012) (“This ‘actual prejudice’ language has frustrated and confused many lawyers, clerks, and judges because the term of art, ‘actual prejudice,’ differs from a harmless error analysis, which determines whether reversal is warranted.”). The confusion

but that does not mean that the traditional reasons for requiring an objection are irrelevant. In fact, one might reason that *because* the error is difficult to quantify on appeal, it is even more important that the error be objected to below, so that it can be dealt with and avoided, if possible.

This reasoning is clearly recognized under federal case law, as even structural errors must be preserved in federal court. United States v. Marcus, 560 U.S. 258, 130 S. Ct. 2159, 2164-66, 176 L. Ed. 2d 1012 (2010) (discussing structural error in relationship to “plain error” review of unpreserved claims); United States 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. United States, 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.”).¹⁰

described in Grimes and the confusion displayed in the rationale in Wise arise from the failure to distinguish between preservation of error and harmless error.

¹⁰ There is no independent Washington State law on structural error. The term first appeared in a Washington case in 1998, citing federal law. Matter of Personal Restraint of Benn, 134 Wn.2d 868, 952 P.2d 1166 (1998). Thus, it cannot be said that Washington courts have any tradition of applying a different preservation of error rule to structural errors.

Moreover, this Court's rationale for refusing to require preservation of error turns on a flawed premise. From the fact that a type of error is *sometimes* difficult to quantify for harmless error analysis, it does not follow that that type of error is *always* unquantifiable for preservation of error analysis. In a case like this, where a juror was briefly questioned on a quasi-administrative matter for five minutes with the complete cooperation of defense counsel, and the juror never sat on the case, one can quite comfortably say that no prejudice at all flowed from the brief closure, so no error was "manifest."

Finally, this Court has seemingly been influenced by the belief that courts will invariably be closed unless all violations, preserved or not, are punished. The State respectfully suggests that outcome is unlikely. A brief closure of the kind that occurred in this case will not undercut the public trial right. Interested parties, the public, or the press can certainly object when material matters are handled behind closed doors.

On the other hand, granting a windfall to a defendant who fails to object may create incentives for counsel to tolerate closures if a client may later take advantage of the error on appeal. As the Court of Appeals observed many years ago:

Limiting the constitutional claims that may be raised for the first time on appeal places responsibility on trial counsel to properly prepare their cases and will reduce

claims that are discovered solely for purposes of appeal. An expansive reading of manifest sends a message to trial counsel not to worry about overlooking constitutional claims, since such claims can always be asserted on appeal. Indeed, sophisticated defense counsel may deliberately avoid raising issues which have little or no significance to the jury verdict but may be a basis for a successful appeal.

The current case presents a paradigm of this scenario. Defense counsel, being aware of the unavailability requirement as a prerequisite for admission of statements against penal interest, knowing that as a practical matter Mosby was unavailable, could very logically argue that reliability was not established but deliberately not argue the unavailability requirement. Thus, he would save an issue for appeal that would be quickly resolved if presented to the trial court.

State v. Lynn, 67 Wn. App. at 343-44. In this way, this Court's current approach of granting new trials for unpreserved court closures may harm rather than protect the basic public trial right.

Additionally, the value judgment implicit in this Court's recent holdings – that it is better policy to grant a windfall to defendants who never raised a closure issue at trial, regardless of the actual impact on a case, than it is to tolerate minor closures that were never objected to – is precisely the type of policy consideration that underlies the value judgment already made when RAP 2.5(a) was crafted. RAP 2.5(a) and the process by which it was created should be respected unless precedent unquestionably requires otherwise.

For these reasons, and for the reasons previously articulated by the State and by several justices of this Court, the State respectfully asks this Court to hold that State v. Marsh never demanded that a new trial be granted in a case like this one. This narrow aspect of the Bone-Club decision should be repudiated. Devin, 158 Wn.2d at 168 (respect for *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it will be abandoned). Bone-Club was clearly incorrect because Marsh should be limited to its unique facts and context where error and the resultant harm are manifest. This interpretation of Marsh would be wholly consistent with the result in that case, and it would comport with rather than usurp the modern rules. Bone-Club is harmful because failure to apply the modern rule undercuts the basic principles of fairness and judicial economy that gave rise to the rule, diminishes the stature of the rules themselves, and has triggered unnecessary retrials.

2. GRISBY DOES NOT HAVE STANDING TO ASSERT THE PUBLIC'S RIGHT TO OPENNESS.

The State argued below that Grisby did not have standing to invoke the public's right to openness under article I, section 10 of the Washington Constitution. Br. of Resp. at 27-29. The Court of Appeals did not address this argument except to note that the State had preserved it for review by this Court. State v. Grisby, No. 65564-7-I, slip op. at 5 n.4.

Grisby appears to have abandoned any reliance on article I, section 10 in his answer to the petition for review, as he suggests the issue is no longer relevant to the case. Answer to Petition for Review, at 6 n.1. If this Court decides that Grisby failed to preserve his public trial claim for review, then it need not address the standing argument. If, however, this Court deems Grisby's claims reviewable, then the State incorporates by reference the arguments it made below.

In sum, the State argued that the defendant does not have standing to assert the constitutional rights of others. Br. of Resp. at 27-28. Grisby is essentially asking for automatic standing to assert the rights of others on appeal, but there is no doctrine of automatic standing outside the search and seizure context. *Id.* at 28. The reasons for recognizing automatic standing as to searches and seizures do not apply in this context, since an automatic standing rule would not curtail trial court error where the court is unaware that it is committing error. *Id.* Grisby should not be allowed to invoke the rights of others on appeal where he was in a position to protect those rights at his trial, but failed to do so.

3. THE CLOSURE IN THIS TRIAL WAS *DE MINIMIS*.

This Court has been consistently vigilant in safeguarding the right to a public trial. Still, this Court has also recognized that some courtroom closures do not undermine the values secured by public trials. In State v.

Momah, this Court acknowledged “that not all courtroom closure errors are fundamentally unfair.” 167 Wn.2d 140, 150, 217 P.3d 321 (2009). In State v. Sublett, this Court reiterated this principle: “not all courtroom closures violate the right to a public trial.” 176 Wn.2d at 102. This court left open the possibility of finding a closure *de minimis* where experience or logic indicated that the closure left a defendant’s right to a public trial intact. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (“a trivial closure does not necessarily violate a defendant’s public trial right.”). It has been noted that “it is important to bear in mind that the *de minimis* or trivial trial closure standard may be applied in a future case and permit avoidance of a constitutionally unnecessary retrial when a defendant’s right to a public trial has not been violated.” State v. Easterling, 157 Wn.2d 167, 182-83, 137 P.3d 825 (2006) (Madsen, J., concurring). This Court has recognized that it “has occasionally suggested that a closure might be trivial or *de minimis*,” but has “not yet been presented with a case or facts that warrant the adoption of this rule.” State v. Lormor, 172 Wn.2d 85, 96, 257 P.3d 624 (2011).

This Court recently applied the “experience and logic test” to determine whether a courtroom closure “implicate[s] the core values the public trial right serves.” Sublett, 176 Wn.2d at 72. According to the experience and logic test, a courtroom closure implicates the right to a

public trial only if two separate criteria are satisfied: “the place and process have historically been open to the press and general public” and “public access plays a significant positive role in the functioning of the particular process in question.” Id. at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II)).

A *de minimis* closure can be seen as a specialized application of the experience and logic test, because *de minimis* closures will fail both prongs that test. In other words, *de minimis* closures involve matters that were likely not historically open, and that logically do not relate to the core values that the public trial right serves. Courts that have found a closure to be *de minimis* have weighed the closure against the values advanced by the right. The public trial guarantee: 1) ensures a fair trial; 2) reminds the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) encourages witnesses to come forward; and 4) discourages perjury. Easterling, 157 Wn.2d at 183-84 (Madsen, J., concurring).

Courts hold that the nature of the closed proceeding and the brevity of the closure can influence whether the closure is *de minimis*. In United States v. Ivester, jurors feared for their safety because of intimidating-looking spectators. 316 F.3d 955 (9th Cir. 2003). Mid-way through trial,

the judge asked all spectators to leave and questioned the jury about their safety concerns. The Ninth Circuit held that this court closure occurred during “an administrative jury problem” and was thus “so trivial as to not implicate [the defendant’s] Sixth Amendment rights.” Id. at 960.

The facts of this case show a ministerial or administrative matter briefly discussed in private but also discussed on the record. A juror may not serve if he has a prior felony conviction and has not had his civil rights restored. RCW 2.36.070(5). Vetting jurors based on their qualifications to serve is a matter that may be delegated to administrative personnel. RCW 2.36.072. The superior court may delegate jury screening functions to administrative personnel. GR 28.

Grisby’s counsel, the prosecutor, the trial judge, and the juror met briefly in chambers to discuss the potential juror’s criminal history. The conference lasted no more than five minutes and involved only an administrative problem. Grisby’s counsel did not object to the conference. The combination of these three factors—the brevity, the administrative nature, and defense counsel’s lack of objection—show that the closure in this case fails the experience and logic test and is *de minimis*. Had Lemmons raised the issue of criminal convictions with the jury administrator after he received his summons, and had he been excused on this basis, the entire matter could have been handled by the administrator.

Vetting the juror's qualifications in open court is not required simply because the issue arose during *voir dire* as opposed to months before trial. Public access does not play a significant positive role in the functioning of brief, administrative, unobjected-to processes like the one in question. The *de minimis* closure in Grisby's trial is too insignificant to have violated the defendant's public trial right.

For these reasons, the State respectfully asks this Court to reverse the decision of the Court of Appeals and to reinstate Grisby's conviction.

DATED this 28th day of June, 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

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Marla Zink @ marla@washapp.org and Andrew Zinner @ zinnera@nwattorney.net , and to Hilary Thomas @ hthomas@co.whatcom.wa.us , containing a copy of the Supplemental Brief of Petitioner, in State v. Henry Grisby III, Cause No. 87529-7 consolidated under 86216-8, 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.

U Brame

Name

Done in Seattle, Washington

6/28/13

Date 6/28/13

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To: Brame, Wynne
Cc: Whisman, Jim; hthomas@co.whatcom.wa.us; marla@washapp.org; zinnera@nwattorney.net
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Rec'd 6-28-13

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From: Brame, Wynne [<mailto:Wynne.Brame@kingcounty.gov>]
Sent: Friday, June 28, 2013 4:03 PM
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Please accept for filing the attached documents (Supplemental Brief of Petitioner) in State of Washington v. Henry Grisby, III, No. 87259-7 consolidated under No. 86216-8.

Thank you.

James M. Whisman
Senior Deputy Prosecuting Attorney
WSBA #19109
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
206-296-9660
E-mail: jim.whisman@kingcounty.gov

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Jim Whisman's direction.

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