

65564-7

65564-7

NO. 65564-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
HENRY GRISBY III,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE CAROL ANN SCHAPIRA

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. WASHINGTON'S CURRENT APPROACH TO OPEN COURTS CLAIMS IS FLAWED	5
2. PUBLIC TRIAL RIGHTS IN THE CONSTITUTION....	7
3. THE WASHINGTON SUPREME COURT MUST RECONCILE ITS PRIOR DECISIONS RECOGNIZING WAIVER OF OPEN COURT CLAIMS WITH ITS MORE RECENT DECISIONS FORBIDDING WAIVER	10
a. The Contemporaneous Objection Rule Generally.....	10
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.....	12
c. An Express Waiver Is Not Required.....	22
4. 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.....	27

5. THIS COURT SHOULD HOLD THAT CERTAIN COURT CLOSURES ARE SO *DE MINIMIS* THAT THEY DO NOT RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION 30

D. CONCLUSION 31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Citizens United v. Federal Election Com'n, ___ U.S. ___,
130 S. Ct. 876, ___ L. Ed. 2d ___ (2010)..... 20

Johnson v. United States, 520 U.S. 461,
117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)..... 21

Johnson v. Zerbst, 304 U.S. 458,
58 S. Ct. 1019, 82 L. Ed. 1461,
146 A.L.R. 357 (1938) 24

Levine v. United States, 362 U.S. 610,
80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960)..... 20

Presley v. Georgia, ___ U.S. ___,
130 S. Ct. 721, 175 L. Ed. 2d 675 (2010)..... 20

Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501,
104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)..... 20, 21

Puckett v. United States, ___ U.S. ___,
129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)..... 11

Rakas v. Illinois, 439 U.S. 128,
99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)..... 27

United States v. Cotton, 535 U.S. 625,
122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) 21

United States v. Marcus, ___ U.S. ___,
130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010)..... 21

Waller v. Georgia, 467 U.S. 39,
104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)..... 20

Yakus v. United States, 321 U.S. 414,
64 S. Ct. 660, 88 L. Ed. 834 (1944)..... 10, 11

Washington State:

Blumberg v. H. H. McNear & Co.,
1 Wash. Terr. 141 (1861) 12

City of Bellevue v. Acrey, 103 Wn.2d 203,
691 P.2d 957 (1984)..... 23

In re Benn, 134 Wn.2d 868,
952 P.2d 116 (1998)..... 27

In re Isadore, 151 Wn.2d 294,
88 P.3d 390 (2004)..... 23

In re Rights to Waters of Stranger Creek,
77 Wn.2d 649, 466 P.2d 508 (1970)..... 17

Peterson v. Dillon, 27 Wash. 78,
67 P. 397 (1901)..... 13

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30,
640 P.2d 716 (1982)..... 6, 16, 17, 18

State v. Bone-Club, 128 Wn.2d 254,
906 P.2d 325 (1995)..... 6, 15, 16, 17, 18, 20

State v. Borland, 57 Wn. App. 7,
786 P.2d 810 (1990)..... 25

State v. Brightman, 155 Wn.2d 506,
122 P.3d 150 (2005)..... 30

State v. Claypool, 132 Wash. 374,
232 P. 351 (1925)..... 13

State v. Collins, 50 Wn.2d 740,
314 P.2d 660 (1957)..... 13, 14, 15, 17

State v. Davis, 41 Wn.2d 535,
250 P.2d 548 (1953)..... 10

State v. Dent, 123 Wn.2d 467,
869 P.2d 392 (1994)..... 25

<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	18, 20, 30
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	8
<u>State v. Garcia</u> , 92 Wn.2d 647, 600 P.2d 1010 (1979).....	25
<u>State v. Gutierrez</u> , 50 Wn. App. 583, 749 P.2d 213, <u>review denied</u> , 110 Wn.2d 1032 (1988).....	28
<u>State v. Jones</u> , 68 Wn. App. 843, 845 P.2d 1358 (1993).....	27
<u>State v. Kypreos</u> , 110 Wn. App. 612, 39 P.3d 371 (2002).....	28
<u>State v. Lam</u> , No. 60015-0-I, slip op. (Wash.Ct.App. Apr. 18, 2011)	3
<u>State v. Likakur</u> , 26 Wn. App. 297, 613 P.2d 156 (1980).....	24
<u>State v. Lormor</u> , No. 84319-8, <i>reviewing</i> 154 Wn. App. 386, 224 P.3d 857 (2010)	4
<u>State v. Louie</u> , 68 Wn.2d 304, 413 P.2d 7 (1966).....	12
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	11
<u>State v. Marsh</u> , 126 Wash. 142, 217 P. 705 (1923).....	15
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	5, 22, 31
<u>State v. Nelson</u> , 103 Wn.2d 760, 697 P.2d 579 (1985).....	25

<u>State v. Newman</u> , 63 Wn. App. 841, 822 P.2d 308 (1992).....	25
<u>State v. Paumier</u> , No. 84585-9, <i>reviewing</i> 155 Wn. App. 673, 236 P.3d 206 (2010)	4
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	11
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	5, 18, 20, 22, 23, 25, 31
<u>State v. Summers</u> , 60 Wn.2d 702, 375 P.2d 143 (1962).....	25
<u>State v. Walker</u> , 136 Wn.2d 678, 965 P.2d 1079 (1998).....	27
<u>State v. Williams</u> , 13 Wash. 335, 43 P. 15 (1895).....	12
<u>State v. Wise</u> , No. 82802-4, <i>reviewing</i> 148 Wn. App. 425, 200 P.3d 266 (2009)	4
<u>Sutton v. Snohomish</u> , 11 Wash. 24, 39 Pac. 273 (1895).....	13, 17
 <u>Other Jurisdictions:</u>	
<u>Commonwealth v. Wells</u> , 360 Mass. 846, 274 N.E.2d 452 (1971).....	21
<u>Dixon v. State</u> , 191 So.2d 94 (Fla. 2d DCA 1966).....	22
<u>Keddington v. State</u> , 19 Ariz. 457, 172 P. 273, L.R.A.1918D, 1093.....	14, 15
<u>People v. Bradford</u> , 14 Cal.4th 1005, 60 Cal.Rptr.2d 225, 929 P.2d 544 (1997).....	21

<u>People v. Ledesma</u> , 47 Cal.Rptr.3d 326, 140 P.3d 657, 39 Cal.4th 641 (2006).....	22
<u>People v. Marathon</u> , 97 A.D.2d 650, 469 N.Y.S.2d 178 (N.Y.App.Div.1983)	21, 22
<u>People v. Thompson</u> , 50 Cal.3d 134, 785 P.2d 857 (1990).....	22
<u>Purvis v. State</u> , 288 Ga. 865, 708 S.E.2d 283 (2011)	22
<u>Reid v. State</u> , 286 Ga. 484, 690 S.E.2d 177 (2010)	22
<u>State v. Butterfield</u> , 784 P.2d 153 (Utah 1989)	22
<u>Wright v. State</u> , 340 So.2d 74 (Ala.1976).....	21

Constitutional and Statutory Provisions

Federal:

U.S. Const. amend. IV	27, 28, 29
U.S. Const. amend. V	28

Washington State:

Code of 1881, § 1088.....	12
Code of 1881, § 1147.....	12
Const. of 1878 (not adopted), art. V, § 9	9
Const. of 1878 (not adopted), art. V, § 13	9
Const. art. I, § 10.....	5, 7, 8, 9, 10, 26, 27, 29

Const. art. I, § 22.....	5, 7, 8, 10, 24, 25, 27
Const. art. I, § 22 (amend. 10)	23
Const. art. IV, § 23	13

Other Jurisdictions:

A.R.S. Const. Art. 2 § 11	8
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Rules and Regulations

Washington State:

RAP 2.5.....	11, 12, 14, 15, 26
--------------	--------------------

Other Authorities

C.K. Wiggins, et al., <i>Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits</i> , 22 Gonzaga L.Rev. 193 (1986-87)	9
David Schuman, <i>The Right to a Remedy</i> , 65 Temp. L. Rev. 1197 (1992).....	8, 9
http://www.sos.wa.gov/_assets/history/1878constitution.pdf	9
J.S. Wang, <i>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</i> , 64 Wash. L.Rev. 2033 (1989).....	9, 10
Jonathan M. Hoffman, <i>By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions</i> , 74 Or. L.Rev. 1279 (1995).....	9
Karl B. Tegland, 2A Washington Practice: Rules Practice, RAP 2.5 (6th ed.2004).....	11

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 (1984)..... 8

Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution: A Reference Guide (2002)..... 8

The Journal of the Washington State Constitutional Convention (Beverly Paulik Rosenow ed., William S. Hein & Co. 1999) (1962)..... 8

A. ISSUES

1. Did Grisby fail to preserve an open courtrooms challenge to a single juror where he did not object to the private inquiry of that juror in chambers?

2. Does Grisby have standing to assert an open courtroom claim?

3. Was inquiry of this single juror a *de minimis* closure that does not violate the constitution?

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 (information). A jury convicted him of that charge. CP 17 (verdict). 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 appealed. CP 46. He argues on appeal that his conviction must be reversed because the trial judge questioned a juror in chambers. The State moved to stay this appeal until issuance of several cases pending in the Washington Supreme Court. A commissioner of this Court denied that motion.

The only facts relevant to this appeal are facts about *voir dire*. At the end of the first day of *voir dire* (March 10th), 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 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. Supp. CP ____ (Sub No. 31A Clerk's Minute

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."

Entries). He was excused by the exercise of a preemptory challenge by defense counsel. 3/11/10 Supp. RP 38.²

C. ARGUMENT

Grisby claims he is entitled to a new trial because the court questioned a juror in chambers instead of in open court. He does not claim the inquiry was improper or that the juror was inappropriately barred from sitting on the jury.

Under existing decisions of this Court, private inquiry of even a single juror is reversible error, even if nobody lodged a contemporaneous objection. State v. Lam, No. 60015-0-I, slip op. (Wash.Ct.App. Apr. 18, 2011). A petition for review has been filed in Lam. Although this Court is likely inclined to follow its decision in Lam, the State respectfully asks this Court to consider arguments that have been presented to the Washington Supreme Court, and to not follow its decision in Lam.

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.

Specifically, the State argues that a rule of automatic reversal where no contemporaneous trial objection was lodged is inconsistent with Washington or federal precedent, is not constitutionally required, and leads to unfair reversals of convictions that are otherwise untainted.³

Reversal of Grisby's conviction is particularly incongruous because Grisby personally accompanied his lawyer, the judge, and the juror in chambers, so the only right potentially at stake is the public's right to observe the trial. But, reversing Grisby's conviction will result in a windfall to the defendant who failed to complain about the chambers conference at trial, and it will penalize the public in the form of a needless second trial that will be exactly like the first trial. The State respectfully asks this Court to consider the arguments currently pending in the Washington Supreme Court. Those arguments are summarized below.

³ The Washington Supreme Court considered these arguments in three cases set for oral argument on May 3, 2011. State v. Lormor, No. 84319-8, *reviewing* 154 Wn. App. 386, 224 P.3d 857 (2010); State v. Paumier, No. 84585-9, *reviewing* 155 Wn. App. 673, 236 P.3d 206 (2010); and State v. Wise, No. 82802-4, *reviewing* 148 Wn. App. 425, 200 P.3d 266 (2009). The State moved this Court to stay these proceedings until decision in those cases but the request was denied. See Commissioner's Order, May 13, 2011.

1. WASHINGTON'S CURRENT APPROACH TO OPEN COURTS CLAIMS IS FLAWED.

The King County Prosecutor's Office embraces our state's constitutional guarantees to 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 they 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. 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 the Washington Supreme 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.

The State respectfully suggests that this confusion and unfairness originated in State v. Bone-Club⁴ with the Washington Supreme Court's offhand rejection of a contemporaneous objection argument. This seemingly small portion of the Bone-Club opinion was flawed. Nothing in the history or text of Washington's constitution requires noticing open courtroom errors for the first time on appeal. Nothing in Washington's common law requires this single exception to the Rules of Appellate Procedure. In fact, the Washington Supreme 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 only recently been fully briefed before the Washington Supreme Court so the court's recent decisions have not delved into the question in sufficient detail; rather, the court's decisions have simply cited to Bone-Club without further analysis. The result has been the creation of a

⁴ 128 Wn.2d 254, 906 P.2d 325 (1995).

super-right that trumps one of the most fundamental principles of appellate litigation, that unpreserved errors will only be rarely noticed on appeal, and only if those errors actually affected the trial.

The State argues here that, properly understood, Washington's constitutional provisions guaranteeing the open administration of justice and public trials can be forfeited by conduct. 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.

2. 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." The Washington Supreme 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*.⁵ 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*

⁵ 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/1878constitution.pdf.

Greater Judicial Protection of Established Tort Causes of Action and Remedies, 64 Wash. L.Rev. 2033, 216 (1989).

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, the common law shows that contemporaneous objections were required as to open courtroom claims.

3. THE WASHINGTON SUPREME 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 the Washington Supreme 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. United States, ___ 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.⁶

- 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. The Washington Supreme 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 the Washington Supreme Court refused to consider on appeal a claim that proceedings were erroneously held at a witness' residence rather than in court:

⁶ 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.

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).⁷

More than half a century later the Washington Supreme 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 the Washington Supreme Court cautioned the trial court to avoid closures, it held that the issue could not be raised for the first time on appeal:

⁷ 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.

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, the Washington Supreme 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.⁸

However, nearly a half-century later in State v. Bone-Club, the Washington Supreme Court appeared to deviate from these

⁸ 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, the Washington Supreme 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.

precedents. In a case regarding the closure of a suppression hearing, the Washington Supreme 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, the Washington Supreme 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 immediately objected. Ishikawa, 97 Wn.2d at 33. The Washington Supreme 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 the Washington Supreme 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, the Washington Supreme 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 United States 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); 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.").

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, 288 Ga. 865, 708 S.E.2d 283 (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, the State 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 the Washington Supreme Court. Strode, 167 Wn.2d at 229 n.3.⁹ 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.

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

⁹ "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).

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, 58 S. Ct. 1019, 82 L. Ed. 1461, 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. I, § 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, the State 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.

4. 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, Grisby 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).

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

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

5. THIS COURT SHOULD HOLD THAT CERTAIN COURT CLOSURES ARE SO *DE MINIMIS* THAT THEY DO NOT RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION.

The Washington Supreme Court has observed that “a trivial [courtroom] closure does not necessarily violate a defendant's public trial right.” State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). However, several justices have cautioned in dicta that the Court has never actually found such a closure to be trivial. State v. Easterling, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006). Justice Madsen has argued that Washington should recognize the *de minimis* closure standard, which “applies when a trial closure is too trivial to implicate the constitutional right to a public trial. . . i.e., no violation of the right to a public trial occurred at all.” Easterling, 157 Wn.2d at 183-84 (Madsen, J. concurring). The standard can apply to either inadvertent or deliberate closures. Id. Other justices have argued that “the people deserve a new trial” each and every time a courtroom is closed, no matter how insignificant. Id. at 185 (Chambers, J. concurring). Thus, whether a closure can be *de minimis* under Washington law is an open question. This issue was not decided by a majority of justices in

Momah or by the plurality opinion in Strode. This court should hold that the brief closure of proceedings in this case was *de minimis*.

D. CONCLUSION

For the reasons set forth above, the State respectfully asks this Court to hold Grisby failed to preserve the error he alleges on appeal, that a defendant who has waived his own right to a public trial cannot invoke the public's right, and that any closure was *de minimis*.

DATED this 9th day of June, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HENRY GRISBY III, Cause No. 65564-7-I, in the Court of Appeals, Division I, 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.

W Brame
Name
Done in Seattle, Washington

6/10/11
Date 6/10/11