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SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 65564-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

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**FILED**  
APR 13 2012  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

HENRY GRISBY III,

Respondent.

**FILED**  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 APR 11 PM 3:12

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL ANN SCHAPIRA

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**PETITION FOR REVIEW**

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A. ISSUES

1. Did Grisby fail to a public trial claim for appellate review where there was no contemporaneous objection?

2. Did Grisby have standing to assert an open courtroom claim under Article I, § 10?

3. Did Grisby receive a public trial where the entire trial was open to the public with the exception of a four minute conversation with a single juror regarding whether the juror had a prior felony conviction?

3. Is briefly questioning a single juror in chambers a *de minimis* closure that does not violate the constitution where counsel and the defendant were both present?

B. STATEMENT OF RELEVANT FACTS

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 10<sup>th</sup>), 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.<sup>1</sup> 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 11<sup>th</sup>, 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

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<sup>1</sup> Two reports of proceedings were prepared for March 10<sup>th</sup> and March 11<sup>th</sup>. 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."

\_\_\_\_ (Sub No. 31A Clerk's Minute Entries). He was excused by the exercise of a preemptory challenge by defense counsel. 3/11/10 Supp. RP 38.<sup>2</sup>

C. REVIEW IS WARRANTED

This case presents an "open courts" claim at the outer-fringes of the open courtroom doctrine. Grisby's trial was conducted entirely in the open; rulings on legal motions, *voir dire*, opening statements, the questioning of witnesses, and closing arguments were all conducted in a courtroom where everyone could listen and observe. The lone exception was a brief inquiry of a single juror that could not have lasted more than four minutes. Indeed, Grisby's lawyer did not object to the brief private inquiry, and the matter had nothing to do with the truth-seeking function of the trial. It simply strains credulity to say that the constitution was violated by this fleeting inquiry, and that an entire trial must be reenacted, presumably without alteration in substance or procedure.

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<sup>2</sup> 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.

This case highlights the injustice caused by applying an automatic reversal rule to claims raised for the first time on appeal. There is still conflict between appellate court decisions and this Court's decisions as to whether and when an open court claim may be raised for the first time on review, and whether a defendant has standing to assert the public's right when he has failed to assert his own right. Because several such cases are pending in this court, review should be granted. This case may then be stayed until this court has issued decisions in the pending cases of State v. Wise, No. 82802-4 and State v. Paumier, No. 84585-9, both argued in May, 2011. Many similar cases have been treated in this way. *See e.g.* State v. Lam, No. 86043-2; State v. Njonge, No. 86072-6.

Reversal was simply not warranted under these facts. Review is appropriate under RAP 13.4(b)(1)-(4).

1. THERE IS A CONFLICT IN COURT OF APPEALS DECISIONS AND BETWEEN COMPETING SUPREME COURT OPINIONS AS TO WHETHER ALL OPEN COURTS CLAIMS MAY BE RAISED ABSENT A TRIAL OBJECTION.

The Court of Appeals in this case rejected the State's argument that appellate claims had not preserved in the trial court, that Grisby lacked standing to raise these claims, and that any closure was *de minimis*.

State v. Grisby, No. 65564-7-I, slip op. at 5-6 (Wash. Ct. App., March 12,

2012). It held that this Court's decisions establish a rule that no contemporaneous objection is required to raise an open courts claim on appeal. Id. This holding conflicts with numerous Court of Appeals decisions and with previous decisions of this Court.

Ordinarily, an appellate court will consider a constitutional claim for the first time on appeal only if the claim is truly constitutional, and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1953); RAP 2.5(a)(3). "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

As pointed out in briefing filed in State v. Wise, et al., there is scant authority for abandoning RAP 2.5(a) and a contemporaneous objection rule as to open courtroom claims; this Court has considered serious constitutional errors when they were manifest and has refused to consider claims at the margins of the constitution, or where the effect of the violation was minimal. *See* Sutton v. Snohomish, 11 Wash. 24, 33, 39 Pac. 273 (1895) (claim that questioning of witness should not have been held at victim's home could not be raised on appeal where no object at trial); State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957) (closure of court to avoid disruption of closing argument could not be raised for the

first time on appeal), citing Keddington v. State, 19 Ariz. 457, 462, 172 P. 273 (1918) (public and press barred from rape trial).

Federal courts, too, would almost never entertain an unpreserved open courts claim. Levine v. U.S., 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960); U.S. v. Marcus, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2159, 2164-66, 176 L. Ed. 2d 1012 (2010) (discussing structural error in relationship to "plain error" review of unpreserved claims); U.S. v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (open question whether structural errors always satisfy third prong of "plain error" test but still must meet fourth prong); Johnson v. U.S., 520 U.S. 461, 469, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (noting that even if error was "structural" such that it "affected substantial rights," the error had not been preserved because it failed the fourth prong of the "plain error" test, i.e., any error did not "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings").

Furthermore, as explained below, this case does not even involve a violation of article I, section 10 because it was not a closure of *voir dire*; the inquiry made in chambers was purely ministerial. The record is clear that Grisby personally was present for the chambers inquiry and nothing suggests that he or his lawyer objected.

Absent any record on the subject, the defendant cannot establish that he is entitled to automatic reversal of his conviction. Rather, the usual rule under RAP 2.5(a) should apply here. Under that rule, Grisby has failed to show that constitutional error occurred, or that such error had any implications, whatsoever, on the trial of his case. There was no objection, so there should be no review of this claim.

Because there is conflict in the case law over whether open courts claims must be preserved, this Court should grant review and stay this matter until the pending cases are decided.

2. GRISBY DOES NOT HAVE STANDING TO ASSERT THE PUBLIC'S RIGHT TO OPEN COURTS WHERE HE WAS PRESENT FOR THE CHAMBERS INQUIRY AND DID NOT ASSERT A RIGHT TO PUBLIC TRIAL.

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. These issues have been briefed in pending cases and this case should be stayed until a decision in those cases is filed.

3. ANY VIOLATION OF THE RIGHT TO OPEN COURTS  
WAS *DE MINIMIS*.

The Court of Appeals held that dicta from prior decisions proves there is no *de minimis* exception to the open courts doctrine in

Washington. That decision was premature. This 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). Several justices have said 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 of law under this court’s precedents.

The closure in this case presents a perfect opportunity for this Court to recognize that some closures are, indeed, *de minimis* and do not rise to the level of a constitutional violation. This issue, too, is pending a decision from this court.

D. CONCLUSION

For the foregoing reasons, this Court should grant review of the Court of Appeals decision reversing Grisby's conviction based on open courtroom challenges.

DATED this 11<sup>th</sup> day of April, 2012.

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 Petition for Review, 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.

U Brame

Name

Done in Seattle, Washington

4/11/12

Date 4/11/12

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 65564-7-I
	)	
v.	)	
	)	
HENRY GRISBY, III,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 12, 2012
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Dwyer, C.J. — Henry Grisby, III appeals from his conviction of delivery of a controlled substance in violation of the Uniform Controlled Substances Act.<sup>1</sup> During voir dire, the trial court interviewed in chambers a prospective juror without first conducting an analysis regarding closure of the pretrial proceeding. Absent such an analysis, the closure of criminal trial proceedings constitutes reversible error in all but the most exceptional circumstances. Accordingly, we reverse Grisby's conviction and remand for a new trial.

I

The facts relevant to Grisby's appeal are few and concern only the trial

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<sup>1</sup> Ch. 69.50 RCW.

court's in-chambers conference with a prospective juror.

The State charged Grisby with delivery of a controlled substance in violation of the Uniform Controlled Substances Act. Jury selection for Grisby's trial was held on March 10 and 11, 2010. At the end of the first day of voir dire, after the jury was excused, the trial court and parties' counsel discussed some confusion that had arisen regarding whether one of the potential jurors had a prior criminal conviction rendering him ineligible for jury service. The parties determined that the potential juror should be questioned regarding the possible conviction during voir dire the next day.

On the following morning, the trial court asked the potential juror to accompany counsel and Grisby into chambers "just for a moment." Report of Proceedings (RP) (March 11, 2010) at 3. The record then notes a four minute recess. The trial court thereafter stated on the record, "I apologize for the interruption," and voir dire continued. RP at 3. No record was made of the in-chambers proceeding, brief as it was.

The jury convicted Grisby as charged. He appeals.

II

Grisby contends that the trial court violated his article I, section 22 right to a public trial by conducting a portion of voir dire in chambers, thus temporarily restricting public access to the pretrial proceeding, without first conducting the required analysis for courtroom closure.<sup>2</sup> We agree.

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<sup>2</sup> Grisby also contends that the public's article I, section 10 right to open courtroom

We review de novo whether a trial court procedure violates a criminal defendant's right to a public trial. State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006). That right is secured by article I, section 22 of our state's constitution, which provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial." "While the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances." State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citing Easterling, 157 Wn.2d at 174-75). Moreover, the right to a public trial is not implicated solely by proceedings occurring after the commencement of trial; rather, the right "extends in criminal cases to '[t]he process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" Strode, 167 Wn.2d at 226 (alteration in original) (internal quotation marks omitted) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004)); see also State v. Tinh Trinh Lam, 161 Wn. App. 299, 254 P.3d 891 (2011).

The presumption of openness of criminal trial proceedings may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

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proceedings was violated by the in-chambers voir dire. Because we resolve this case based upon Grisby's right to a public trial, we do not address this separate contention.

State v. Bone-Club, 128 Wn.2d 254, 260, 906 P.2d 325 (1995) (internal quotation marks omitted) (quoting Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Accordingly, in Bone-Club, our Supreme Court held that “the five criteria a trial court must obey to protect the public’s right of access before granting a motion to close are likewise mandated to protect a defendant’s right to public trial.” 128 Wn.2d at 259.<sup>3</sup> The trial court must also enter specific findings justifying its closure order. Easterling, 157 Wn.2d at 175 (citing Bone-Club, 128 Wn.2d at 258-59). Where a defendant is denied the constitutional right to a public trial, prejudice is necessarily presumed. Bone-Club, 128 Wn.2d at 261-62.

Pursuant to our Supreme Court’s mandate that the public trial right be “strictly guarded,” we recently held that a temporary closure of a trial proceeding required reversal of the defendant’s conviction because the trial court had not conducted the required Bone-Club analysis. Lam, 161 Wn. App. at 301. There, a juror was briefly questioned in chambers after expressing safety concerns to the bailiff; although the record did not indicate whether the defendant was present during the in-chambers meeting, it did indicate that defense counsel was

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<sup>3</sup> The five criteria that must be considered by the trial court are: (1) The proponent of closure must make some showing for the need for closure. Where the need for closure is based upon any right other than an accused’s right to a fair trial, a “serious and imminent threat” to that right must be demonstrated. (2) Anyone present when the closure motion is made must be given an opportunity to object. (3) The method of closure must be the least restrictive means available to protect the interest at issue. (4) The court must weigh the competing interests of the proponent of closure and the public. (5) The order must be no broader than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

present. Lam, 161 Wn. App. at 301-02. The State asserted that Lam had failed to preserve the public trial issue for appellate review because he had not raised the issue before the trial court. Lam, 161 Wn. App. at 304. We disagreed, observing that “[i]n three recent cases, our Supreme Court has allowed a party to assert the denial of a public trial right for the first time on appeal.” Lam, 161 Wn. App. at 304. Noting that our Supreme Court has strongly suggested that a de minimis standard is inapplicable to public trial right violations, we also rejected the State’s contention that such a standard should be applied in order to uphold Lam’s conviction. Lam, 161 Wn. App. at 305-06.

Similarly, here, in order to protect Grisby’s right to a public trial, the trial court was required to conduct a Bone-Club analysis prior to the temporary closure of voir dire effected by the in-chambers conference with a prospective juror. The fact that Grisby did not object at trial to this temporary closure is of no consequence to his ability to challenge the closure on appeal. See Strode, 167 Wn.2d at 229 (“[T]he public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal.”). “Because the record in this case lacks any hint that the trial court considered [Grisby’s] public trial right as required by Bone-Club, we cannot determine whether the closure was warranted.” State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005). Where a defendant’s right to a public trial is violated, the proper remedy is a new trial. Lam, 161 Wn. App. at 307. Thus, Grisby is

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entitled to this remedy.<sup>4</sup>

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<sup>4</sup> The State concedes that our decision in Lam controls the disposition of this case. However, the State contends that our Supreme Court's current approach to open courts claims is flawed. Specifically, the State contends that a defendant should be required to assert his right to a public trial in the trial court in order to preserve that issue for appeal. The State additionally asserts that a defendant does not have standing to assert the article I, section 10 right of the public to open courtrooms and that a de minimis standard should apply when evaluating courtroom closures. To the extent that the State must raise these issues in this court in order to preserve them for review by our Supreme Court, we note that the State has done so.

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Reversed and remanded for a new trial.

Dupe, C. S.

We concur:

Leach, A. C. J.

Becker, J.