

**FILED**

**JUL 29 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 258220

IN THE COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD M. MEYERS,

Appellant.

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**APPELLANT'S SUPPLEMENTAL BRIEF**

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**Constitutional Provisions**

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**Washington Constitution**

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## I. SUPPLEMENTAL STATEMENT OF THE CASE

In this case, the trial court judge indicated that if there were any “yes” answers on questionnaire, that “... I would propose that we do those back in the jury room, individually.” Counsel then thanked the Judge, but there is no indication Mr. Meyers was asked if he was knowing waiving his right to a public trial, or informed of that right. RP 37, line 19 to RP 38, line 2. There were then 24 jurors with “yes” answers. RP 38, lines 5-9.

## II. SUPPLEMENTAL ARGUMENT

In *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), the Supreme Court of Washington handed down two rulings that are dispositive of this case; 1) that conducting voir dire in private constitutes a “closure” of the courtroom, and 2) that a failure to object by Defendant or his counsel does not constitute a waiver of the right to have proceedings conducted in public, unless the trial court has conducted the required procedure to justify closure.

A. Private Questioning of Jurors During Voir Dire is a Closure that Requires Bone-Club Analysis

In *Wise*, during voir dire, the trial court judge indicated to the jury panel members that:

[I]f there is anything that we're talking about or asking you that is sensitive and you don't want to speak about it in this group setting. Just let us know. I make a list on my notebook and we take those jurors back into chambers so that we can ask those questions more privately.

*Wise*, 288 P.3d at 1115.

There had been no prior discussion with counsel as to whether there was any objection to this procedure. In total, in *Wise*, 10 jurors were questioned in private. Two, because they requested it, and the other eight, apparently because the Court determined from their prior answers they should be questioned further in private. *Wise*, 228 P.3d at 1116.

What happened in *Wise* is nearly identical to what occurred in this case.

The subjects discussed with potential jurors in private in *Wise* included personal health matters, relationships with witnesses or other law enforcement officers, and criminal history. Of the 10

privately questioned in chambers, six were excused for cause. The private questioning was recorded and transcribed. *Id.*

In *Wise*, the trial court did not make reference to the defendant's right to a public trial, consider alternatives to closure, or address the factors from *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) on the record, or make a record of whether any members of the public were present in the courtroom besides the venire panel. *Id.*

In the case of Mr. Meyers, there is no indication the trial court conducted the *Bone-Club* test before deciding to conduct a portion of voir dire in private.

The Supreme Court of Washington in *Wise* reviewed whether there had been a closure of the courtroom in violation of the right of the accused to a public trial as guaranteed by Wash. Const. art 1, § 22 and U.S. Const. amend. VI. And discussed the public's right under Wash. Const. art 1, §10, that "Justice in all cases shall be administered openly." *Wise*, 288 P.3d 1116-17.

The Court had recently held in *State v Momah*, 167 Wn.2d 140 , 151-52, 217 P.3d 321 (2009), and *State v Strode*, 167 Wn.2d 222, 227, 232, 217 P.2d 310 (2009), that the public trial right in voir dire

proceedings extends to the questioning of individual prospective jurors. The Court had found a “closure” in *Strode* from the trial judge’s decision to allow questioning of prospective jurors in chambers, and a denial of the right to a public trial. 167 Wn.2d at 227. A “de facto” closure had been found in *Momah* when jurors were individually questioned outside the courtroom in a room not ordinarily accessed by the public, with the door closed. 167 Wn.2d at 146, 151.

The Court in *Wise* found there had been a “closure of the trial in *Wise’s* case” when the trial court questioned prospective jurors in chambers, a room not ordinarily accessible to the public. *Wise*, 288 P.3d 1118.

There is no doubt there was a closure in this case as well, since jurors were questioned in the jury room.

In *Wise*, the trial court’s complete failure to consider and apply *Bone-Club* was error. *Wise*, 288 P.3d at 1118-19.

Unlike the *Momah* case, there had been no “constructive consideration” of the *Bone-Club* factors, which had distinguished *Momah* from *Strode*. *Id.*

(Had the trial court conducted the *Bone-Club* analysis, then, absent an abuse of discretion, the closure would have been upheld. *Wise*, 288 P.3d at 1118-19.)

In this case, the trial court erred because it imposed a closure with no *Bone-Club* analysis.

B. Silence is Not a Waiver

In *Wise*: “Neither the State nor the defense objected to conducting a portion of voir dire questioning in the judge’s chambers.” 228 P.3d at 1116.

That is true in the case of Mr. Meyers as well.

While *Wise* did not object when the trial court moved a portion of voir dire into chambers, “[h]is silence alone is not sufficient to be considered a waiver of his right to a public trial.” *Wise*, 288 P.3d at 1120. The Court had long held a defendant does not waive his right to a public trial by failing to object to a closure at trial. *State v. Marsh*, 126 Wash. 142, 145-47, 217 P. 705 (1923). (In contrast, in *Momah*, the defendant had “actively participated” in effecting the courtroom closure during voir dire. 167 Wn.2d at 146. *Wise*, 288 P.3d at 1120.)

In *Momah*, the trial court proposed questioning certain jurors in private, but defense counsel asked that all individual voir dire be in private. 141 Wn.2d at 710.

So the fact that neither Mr. Meyers or his counsel affirmatively objected is not a waive in this case anymore than in was in *Wise*. There was no active participation.

C. Violation of the Public Trial Right is Structural Error, Requiring Reversal

Wrongful deprivation of the right to a public trial has been repeatedly characterized as structural error by the United States Supreme Court. *United States v. Marcus*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2159, 2164-65, 176 L. Ed. 2d 1012 (2010); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) ...

*Wise*, 288 P.3d 1119.

Structural error is a special category of constitutional error that “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminate*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), *Wise*, *Id.*

Where there is structural error "a criminal trial cannot reliably serve its function as a vehicle for determination of

guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Id. [*Fulminate*, 499 U.S. at 310.] (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (citation omitted)).

*Wise*, 288 P.3d 1119.

"Stability in the law and policy reasons demand that we maintain our rule: a violation of public trial right is per se prejudicial, even where the defendant failed to object at trial." *Wise*, 288 P.3d at 1121.

D. *Wise* Requires Reversal and a New Trial in this Case

The only difference between this case and the facts in *Wise* are that Mr. Meyers was present during the privately conducted voir dire, while in *Wise*, the defendant's counsel, but not the defendant, was present. That is not a material difference. The following statement from *Wise* holds true regardless of whether a defendant is present, or not present, during the violation: "Since *Wise* did not waive his right to a public trial by not objecting, and prejudice is presumed, a new trial is warranted." *Wise*, 288 P.3d at 1120. Substitute "Meyers" for "Wise" and the occurrence of the violation is the same, and the result should be the same.

Since *Wise* indicates that a failure to object to the closure is not a waiver of the right to a public trial, the presence of Mr. Meyers cannot

add anything to, or detract from, the lack of a waiver of the right to a public trial. The *Wise* opinion does not state or even suggest that the absence of Mr. Wise was the problem. With or without Mr. Meyers present, there was no waiver here of the right to a public trial.

The rule maintained by *Wise* should be applied here to hold that the error was prejudicial: “ ... a violation of public trial right is per se prejudicial, even where the defendant failed to object at trial.” *Wise*, 288 P.3d at 1121.

### III. CONCLUSION

The same result as in *Wise* should be afforded in this case, the conviction should be reversed and vacated, and the case remanded “for a new trial that is open to the public, except as the trial court may direct a closure upon full scrutiny and consideration of the public trial right under *Bone-Club*.” *Wise*, 288 P.3d at 1122.

Respectfully submitted,

Dated July 26<sup>th</sup>, 2013



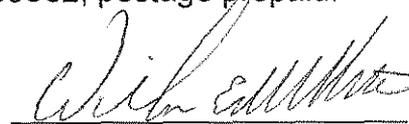
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Certificate of Mailing

I hereby certify that on the 26<sup>th</sup> day of July, 2013, I mailed true and accurate copies of the foregoing Supplemental Brief of Appellant to Mark Lindsey, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington, 99260, and to Appellant Clifford Meyers, at 1313 N. 13<sup>th</sup> Ave, Walla Walla WA 99362, postage prepaid.



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