FILED

JUL 16 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

25822-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CLIFFORD M. MEYERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

PROCEDURAL STATEMENT 1

SUPPLEMENTAL STATEMENT OF THE CASE 1

ISSUE PRESENTED 3

ARGUMENT 4

THE *STATE V. WISE* DECISION DOES NOT APPLY TO THE CIRCUMSTANCES PRESENTED BY THIS CASE BECAUSE THE DEFENDANT ACTIVELY PARTICIPATED IN THE DESIGN AND EXECUTION OF THE INDIVIDUAL *VOIR DIRE* 4

CONCLUSION 8

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE ORANGE, 152 Wn.2d 795,
100 P.3d 291 (2004) 4

STATE V. MOMAH, 167 Wn.2d 140,
217 P.3d 321 (2009), *cert. denied*,
131 S. Ct. 160, 178 L. Ed. 2d 40 (2010) 4, 6, 7

STATE V. WISE, 176 Wn.2d 1,
288 P.3d 1113 (2012) 3, 4, 6, 7

CONSTITUTIONAL PROVISIONS

ARTICLE I, § 22 4

I.

PROCEDURAL STATEMENT

Respondent, State of Washington, respectfully submits this supplemental brief concerning the jury selection process and the applicability of the decision in *State v. Wise,* 176 Wn.2d 1, 288 P.3d 1113 (2012), as requested by the Court's letter dated June 26, 2013.

II.

SUPPLEMENTAL STATEMENT OF THE CASE

The record reflects that the case was highly publicized and the subject of numerous television and newspaper reports. As a result, the defense and the prosecutor agreed upon a three-part questionnaire that the trial court submitted to all potential jurors. RP 12-13. The questionnaire focused on the subjects of pre-trial publicity, experience with homicide or other violent crime, and the owning or possessing of a firearm. The record reflects that the trial court and counsel met in chambers to discuss excusing prospective juror number 2 based upon his articulated hatred for judges and lawyers as well as his being "mouthy and tightly wound." RP 12. The record also reflects that the trial court advised counsel that he would go to the jury room to swear-in the venire panel and distribute the questionnaire because the venire panel included sixty prospective jurors. RP 12. The trial court inquired of counsel whether the defendant wished to be present

when the venire panel was sworn. RP 12. Counsel inquired of defendant and advised the trial court that the defendant did not desire to be in the jury assembly room when the venire panel was sworn. RP 12.

In open court, the trial court advised counsel and the defendant that individual follow up questioning of the prospective jurors who answered "yes" on the questionnaire would be in the jury room. RP 37. The trial court advised that the individual questioning would be in the jury room because of the sensitive nature and/or potential for contamination of the venire panel if the questioning was conducted in the courtroom before the entire panel. RP 37. The trial court advised that the defendant had the right to be present during such questioning. RP 37. Both counsel thanked the trial court for the jury selection process outlined on the record. RP 38.

The Bailiff returned and advised the trial court and counsel that twenty-four of the sixty prospective jurors answered "yes" on the questionnaire. RP 38. The large number of "yes" answers to the questionnaire of the sixty individuals in the venire panel prompted the individual inquiry to ensure the seating of a fair and impartial jury to try defendant's case. The defense and State agreed with the Court on the procedure for questioning the individual jurors. RP 38. Nothing in the record reflects that anyone in the gallery observing the trial objected to the proposed method of conducting the individual *voir dire*. Nothing in the record indicates that the court entered an order closing the courtroom to the public.

Individual *voir dire* was conducted in the jury room with the full participation of the defendant and counsel. Nothing in the record reflects that defense counsel and defendant did not actively participate in the individual *voir dire* process. The record shows that the individual questioning of the twenty-four prospective jurors resulted in the identification of eleven jurors who were excused for cause. CP 89-92; RP 50. The wealth of additional information that the trial court and counsel acquired from the individual questioning most likely would not have been discovered absent the format utilized. RP 50.

This case was stayed pending the Supreme Court's decision in *State v. Wise,* 176 Wn.2d 1, 288 P.3d 1113 (2012). On June 24, 2013, the Court lifted the stay and requested supplemental briefing regarding the applicability of *State v. Wise*. This supplemental brief is in response to the Court's directive.

III.

ISSUE PRESENTED

Does the Supreme Court's *State v. Wise* decision apply to this case?

IV.

ARGUMENT

THE *STATE v. WISE* DECISION DOES NOT APPLY TO THE CIRCUMSTANCES PRESENTED BY THIS CASE BECAUSE THE DEFENDANT ACTIVELY PARTICIPATED IN THE DESIGN AND EXECUTION OF THE INDIVIDUAL *VOIR DIRE.*

As noted previously, defendant has based his claim on Article I, § 22 of the Washington Constitution entitled "Rights of the Accused." In pertinent part, it provides: "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury . . . ." Jury selection is part of the public trial. *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

In *State v. Wise,* the Court acknowledges that the right to a public trial is not an "inflexible right." *State v. Wise,* 176 Wn.2d at 5. The Court further acknowledges that the public trial right is not an "absolute right" as it held in *State v. Momah,* 167 Wn.2d 140, 152, 217 P.3d 321 (2009), *cert. denied,* 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010). *Id.,* 176 Wn.2d at 9. The *Wise* Court recognized that the public trial right can be subordinate to the right to a fair and impartial jury. *Id.,* 176 Wn.2d at 10 (*citing State v. Momah,* 167 Wn.2d at 152).

A careful reading of the Court's reasoning in *Wise* reveals that the Court cited to its *State v. Momah* decision frequently as authority to support its holding in *Wise*. Nevertheless, the Court factually distinguished the circumstances in *Wise* from those presented in *Momah.* The *Wise* Court clearly did not overrule its

analysis in *Momah* despite having the opportunity. Instead, the *Wise* Court focused upon the fact that the trial court therein did not afford either the State or the defendant the opportunity to object to the individual *voir dire* of venire members.

The *Wise* Court was so confident in the uniqueness of the facts of *Momah* that it provided the following insightful and distinguishing analysis:

> While this court stated in *Momah* that not all closures are fundamentally unfair and thus not all closures are structural errors, *Momah* presented a unique set of facts. [FN7] 167 Wash.2d at 50–52, 217 P.3d 321. This court distinguished the public trial right violation in *Momah* from the public trial right violations in *Easterling, Brightman, Orange,* ***and*** *Bone–Club,* which all involved structural error. *Id.* *Momah* was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the *Bone–Club* factors. *Id.* at 151–52, 217 P.3d 321; *Strode,* 167 Wash.2d at 234, 217 P.3d 310 (Fairhurst, J., concurring). At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone–Club,* the record made clear—without the need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.
>
> > FN7. In *Momah,* we implied that "fundamental unfairness" was the test for structural error. However, the United States Supreme Court has clearly stated that "fundamental unfairness" is not the sole criterion of structural error and that there are other relevant considerations, including "the difficulty of assessing the effect of the error" and "the irrelevance of harmlessness." *Gonzalez–Lopez...*

> ...The unique facts of *Momah* are not present in Wise's case. We emphasize that it is unlikely that we will ever again see a case like *Momah* where there is effective, but not express, compliance with *Bone–Club.*

State v. Wise, 176 Wn.2d at 14-15 (citations omitted & emphasis added).

Here, as in *Momah*, the trial court faced the situation where the defendant was very much a participant and beneficiary of the individual *voir dire* process to ensure that a fair and impartial jury was empaneled to try his case. Here, the benefit defendant gained through the very process that he now contends deprived him of a constitutionally guaranteed fair and impartial jury to try his case far exceeded the prejudice claimed. The individual *voir dire* only occurred with the agreement of the defendant and the participation of the defense counsel. The record reflects that the individual *voir dire* inured to the benefit of the defendant because eleven prospective jurors were identified with a potential bias or prejudice that might render them inappropriate to sit on his case. CP 89-92; RP 50.

Experience in trials involving sensitive issues like graphic evidence and publicity has demonstrated the value of conducting individual *voir dire* as a means of protecting the venire panel from being poisoned by those same problems identified by the completed questionnaire. It takes only one prospective juror to articulate some prejudicial perspective and the entire venire panel can be poisoned to the point of necessitating the calling in an entirely new panel. The defendant's

ability to utilize the individual *voir dire* process to strike eleven of sixty prospective jurors enabled him to effectively eliminate at least seventeen prospective jurors or almost one-third of the panel to thereby ensure his trial by a fair and impartial jury.

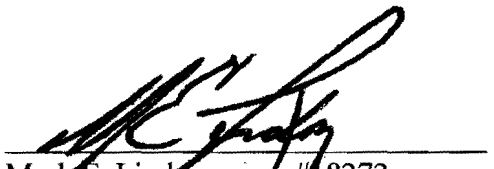
As noted, the record demonstrates that this case is more properly resolved under the reasoning set forth in *State v. Momah* rather than that of *State v. Wise.* In *State v. Momah,* the Court recognized that conducting individual questioning at defendant's request and with defense counsel's active participation is acceptable to ensure that defendant receives a trial by a fair and impartial jury. *State v. Momah,* 167 Wn.2d at 152. Such is precisely what occurred herein because the defendant took advantage of the individual questioning to thereby discover sufficient evidence of bias and prejudice to convince the trial court to strike "for cause" eleven prospective jurors before the need to exercise one peremptory challenge arose. Defendant's failure to object to the individual questioning of the prospective jurors clearly removed this case from the control of *State v. Wise* and placed it under the analysis of *State v. Momah.*

V.

CONCLUSION

For the reasons stated herein, the State maintains that the circumstances of this case make it properly resolved under the holding in *State v. Momah* as distinguished from *State v. Wise*.

Respectfully submitted this 16th day of July, 2013.



Mark E. Lindsey #18272
Senior Deputy Prosecuting Attorney
Attorney for Respondent