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Court of Appeals  
Division III  
State of Washington

NO. 26404-1-III

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

RESPONDENT,

v.

AMEL W. DALLUGE,

APPELLANT.

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RESPONDENT'S SUPPLEMENTAL BRIEF  
REGARDING THE APPLICABILITY OF  
*STATE v. WISE*

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A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court and is the Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this court to affirm the decisions of the Superior Court and uphold the conviction of the Appellant.

C. STATEMENT OF FACTS

The State reiterates its arguments made in its briefing previously submitted May 1, 2008, but would like to re-emphasize the following facts unique to this particular appellant's matter. On the first day of trial, March 22, 2006, the Appellant, Amel Dalluge requested to proceed *pro se*. RP 4, 6. The Court then engaged the Appellant in a colloquy to determine if Mr. Dalluge understood the circumstances and consequences of proceeding *pro se*. RP 7-15. After having granted Mr. Dalluge's motion, Appellant indicated that he was also willing to have his former attorney, Michael Haas, participate in the trial as standby counsel. RP 15.

During *voir dire*, Juror number one indicated that she was familiar with the incident having heard about it from her daughter. RP 36. It was Juror number one's belief that it would be difficult for

her to set aside what she knew. Id. The Court asked if either side wanted to be heard in regard to number one being excused. After brief consideration, it was Mr. Dalluge who stated "Your Honor, I'd like to inquire outside the presence." RP 37. The attorneys, judge, appellant and court reporter then moved into a side room accompanied by Juror number one in order to make inquiry. Id.

The parties then returned to the courtroom informing the other jurors that what Juror number one had been referring to had no direct bearing on the current matter. RP 39. This is contrary to appellant's assertion that the remaining jurors were left to speculate upon the parties' return. Supplemental Brief of Appellant 7.

Later in the course of *voir dire*, Juror number 27 told the court that he was in law enforcement and preferred to speak privately. RP 50. The Court then asked Juror number 27 if his "law enforcement experience had led him to some information or knowledge or experience that would be particular to the current case?" RP 50. Juror number 27 said "yes." Id. The Court then indicated that Juror number 27 would need to answer privately, and the attorneys, judge, appellant and court reporter again moved to the side room accompanied by Juror number 27. RP 50.

Although it was the Court that made this latter decision, neither party rendered either an opinion or an objection to the Court's suggestion.

D. SUPPLEMENTAL BRIEFING IN RESPONSE TO STATE v. WISE

After reading *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), the State would still argue that the facts in Mr. Dalluge's case are different from those of *Wise*. In the case at hand, the jurors were not taken to the Judge's chambers as they were in *Wise*. Judge's chambers have a long history of being confidential, discreet, and exclusive, open only to those specifically invited by the judge or one who has the judge's authority to do so. A judge's chambers is an environment that is not accessible to the public without explicit permission.

As stated in the brief submitted to the court in this case, the two jurors were taken to a side room that is sometimes used as a jury room during trials. During the times when there is not an empaneled jury using the room, it is open to the public. It is only when there is a deliberating jury that a sign is placed on the door prohibiting entry. The room is located within the courtroom itself and is outside the hearing of the larger pool of potential jurors.

There is no record that the public was prohibited from going into the room and listening to the questioning of jurors. There is a door on the other side of the room which leads to the clerk's office. On that door there is no sign on the door prohibiting entrance as there is when a jury is in deliberation. In fact, during court docket days, the room is used by all attorneys for numerous reasons, including counseling with clients, filling out paperwork with clients, plea bargaining, as well as other matters.

The State would also like to point out that there is nothing in the record indicating that the jury room was closed to any persons, other than the other potential jurors, who may have wanted to enter and listen to the questioning of the two jurors. There is no evidence that there were others in the courtroom besides the jury panel, judge, defendant, standby counsel and the prosecutors. The trial judge made it clear, on the record, why the questioning was going to take place in the jury room. The court instructed that its concern was to avoid the potential of tainting the panel by the possible information provided by the two potential jurors. The jury room was and is open to the public unless otherwise stated.

In *Wise* there was absolutely no access available to anyone to go into the Judge's chambers without the Judge's permission.

The chambers were being used as an extension of the courtroom which was closed off to the public, thus closing the courtroom to the public.

Those are not the facts in this matter. The court took all involved parties and questioned only two jurors in a room that is open to the public when juries are not deliberating. The questioning was done in order to have a fair and untainted jury. There is absolutely no record that this room was closed to anyone other than the other potential jurors for the case.

The State argues that to find that court violated the Appellant's public trial right that the court in fact must be closed. But that is not the case here. The fundamental idea of a fair and open trial was not violated, thus there was no structural error. This would be no different than if the court took the jury to view a crime scene inside a house, at a bank, or in a school, as that scene is still open to the court. The difference is that the courtroom has moved. Just because it has moved does not meet the court's rigid doctrine that the public trial right has been violated.

The majority in *Wise* refuses to consider or permit any after-the-fact inquiry as to whether "closure" was justified. This rigid

approach blinds others to what may have actually occurred at jury trial.

This rigid ruling in *Wise* that the failure to engage in a *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) inquiry, itself is transformed into the most serious type of constitutional error, for which there is no remedy except a new trial, takes away all authority to the trial court itself. A judge, during trial, has the best first-hand information to analyze the facts of the case. In the case at hand, the trial court judge knew his courtroom, and rather than having the parties proceed in judge's chambers, a private and somewhat sacrosanct area, had the parties engage in brief enquiry in a room just off the side of the courtroom. The court did not do a *Bone-Club* analysis because the court was not closing the courtroom.

#### E. CONCLUSION

Moving a juror to a room within the court was not a closure of the trial and thus would not and should not be considered a structural error.

Again, it was Mr. Dalluge and only Mr. Dalluge who asked that Juror number one be inquired of outside the presence of the other jurors. Having requested such a procedure himself, Mr.

Dalluge cannot now be heard to object to the procedure.

Furthermore, having previously made such a request indicating an awareness of the sensitivity of potential juror knowledge and information, his failure to object to the subsequent questioning of Juror number 27 can reasonably be interpreted as his continuing acquiescence to such a procedure.

To allow Appellant to benefit from his invited error and continued acquiescence to such would be unfair to our judicial process of fairness. For the foregoing reasons, Appellant's conviction should be upheld.

Respectfully submitted this 12<sup>th</sup> day of February, 2013.

D. ANGUS LEE  
Prosecuting Attorney

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Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 26404-1-III
	)	
vs.	)	
	)	
AMEL W. DALLUGE,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
_____	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Respondent's Supplemental Brief Regarding the Applicability of *State v. Wise* in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Janet G. Gemberling  
[admin@gemberlaw.com](mailto:admin@gemberlaw.com)

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Respondent's Supplemental Brief Regarding the Applicability of *State v. Wise* in the above-entitled matter.

Amel W. Dalluge #779283  
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1313 N. 13<sup>th</sup> Street  
Walla Walla WA 99362

Dated: February 12, 2013

  
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Kaye Burns