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Supreme Court No. 86072-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH NJONGE,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Laura Middaugh, Judge

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ANSWER TO STATE'S SUPPLEMENTAL PETITION FOR REVIEW

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CASEY GRANNIS  
Attorney for Respondent

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 ORIGINAL

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A. IDENTITY OF ANSWERING PARTY

Respondent Joseph Njonge, the appellant below, requests the relief stated in part B.

B. RELIEF REQUESTED

Njonge requests that this Court deny review.

C. STATEMENT OF THE CASE

The State charged Joseph Njonge with premeditated first degree murder. CP 1. On June 2, 2009, the prosecutor asked the court during pre-trial motions if a family member who was also a witness could be present during voir dire. 1RP<sup>1</sup> 45-46. The judge responded she was not going to allow it in part because "we are in very cramped quarters for jury selection, and I think about the only place for visitors to sit is going to be in the little anteroom out there, and I will tell you, with what we are going to do about trying to get enough just to do this in one meeting." 1RP 46.

The judge later described how voir dire would be conducted:

Here is how I handle the jury. We send the questionnaire down and they get to review the questionnaire, obviously, and the jury bios in advance. A lot of this is also for your benefit, Mr. Njonge, because you

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<sup>1</sup> Consistent with Njonge's briefing in the Court of Appeals, the verbatim report of proceedings is referenced as follows: 1RP - 6/2/09; 2RP - 6/3/09; 3RP - 6/4/09 (voir dire); 4RP - 6/4/09 (afternoon session); 5RP - 6/8/09; 6RP - 6/9/09; 7RP - 6/10/09; 8RP - 6/11/09; 9RP - 6/15/09; 10RP - 7/20/09.

have never been involved in a trial before; and it's important for you to understand what's going on, okay.

So then we call the entire jury panel up. *We have received permission to get more than the standard 50. I think we are getting 65. That necessitates a rearrangement of our courtroom,* and my Bailiff put out a map for you guys as to how we are going to get this number in. The first two benches must remain clear at all times.

So, we will have jurors seated in front of the jury box. The court reporter is going to move over here; we have a few jurors here. It's kind of a little awkward, but it's more of a jury selection in the round process that way.

1RP 90-91 (emphasis added).

At the close of day, the judge told courtroom observers:

Just let me say for the people who are observing. You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you. *What we are going to do to allow people to observe is check with the fire marshal -- we have a new fire marshal in Kent -- and make sure that we can keep those first swinging doors open. And if we can do that, then we will allow some people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that.*

But, otherwise, as you can see, we are already putting chairs up here to accommodate the jury. We may be able to have chairs out there, we may not. We may be able to have the doors open without the chairs. We are going to find out. The chance of all you being able to be here and observe are slim to none during the jury selection process.

And also for the observers, I understand that this is and can be potentially a very emotional case for all of you. Please do not let your emotions express themselves during the trial. If you do so, I will ask you to leave, and you will not be allowed back.

And, also, just to say this for the people who are here now, and if you are bringing any more family or

friends with you as the case goes on, cell phones must be turned off before you get into my courtroom.

IRP 105-06 (emphasis added).

Jury selection started the following day, June 3. 2RP. The court and counsel addressed the questionnaires filled out by prospective jurors. 2RP 2-3, 7. Some jurors expressed an inability to be fair while others had heard about Njonge's case. 2RP 2-3. After the judge and counsel addressed who would be questioned individually, the prospective jurors were brought into the courtroom. 2RP 2-3, 8. The judge talked about how voir dire would proceed, telling them the purpose of voir dire was to make sure that Njonge's case was tried before an impartial jury. 2RP 8-13.

The prospective jurors were then sworn in. 2RP 13. The judge talked some more about the selection process. 2RP 14-18. The prosecutor introduced herself and the detective sitting next to her. 2RP 18. Defense counsel introduced himself. 2RP 18-19. The judge then asked Njonge to stand up to make sure everyone could see him because, as she explained, "one of the questions later on is if anybody knows this gentleman." 2RP 19. The judge then read the charge against Njonge to the prospective jurors: premeditated murder committed against Jane Britt. 2RP 19.

The judge next talked about the burden of proof and the presumption of innocence. 2RP 20-21. The judge then told the

prospective jurors how long the trial would last. 2RP 21-22. The judge asked if anyone felt serving on a trial of that length would cause a hardship. 2RP 22. A number of prospective jurors raised their cards in response. 2RP 22-23.

The court questioned jurors on hardship during the morning session. 2RP 23-44. Near the outset of questioning, juror number 7 asked if they could talk about personal reasons. 2RP 25. The judge responded he could talk about anything that he thought was going to be a hardship and that he could talk about it outside of everyone's presence if he wanted to. 2RP 25. Juror 7 said "It is personal for me. It goes deeper than just work. I lived in Indonesia for a couple of years and that society in dealing with persecution and the suppression of women and this whole situation, this whole case is going to be very disturbing for me." 2RP 25. The judge said she was talking about hardship. 2RP 25. Juror 7 said he was just asking and said, "If I could just express that." 2RP 25. Juror 7 then claimed hardship based on "work and personal." 2RP 25. He was a manager of a business. 2RP 25-26.

Some prospective jurors were excused from the panel for hardship. 2RP 44-53. Some were not. 2RP 44-53. The prosecutor asked about juror 7: "Your honor, about No. 7, I don't know if we need to, he talked about some problems about hearing a case like this. He is the one who

referred about Muslim." 2RP 48-49. The judge responded, "I didn't quite get that. He may get excused for cause but not for hardship. So, we can add him to our individual list if you would like." 2RP 49. Defense counsel said that would be good. 2RP 49.

At the start of the afternoon session, the following exchange occurred:

[Prosecutor]: Some family members who are not witnesses stuck around this morning, hoping there might be some seats later, and your bailiff informed them at lunch since some people were excused there were some. So I don't know if the Court has any problem with that. They are not witnesses. We tried to figure out a spot that would be in a row that basically has no jurors. So that second row over there only has Juror 30."

The Court: Actually, that seemed to be a better idea. *We checked with fire department. They wouldn't let us leave the doors open for visitors to come in.* Let's move No. 30 over next to 34, and then we can have visitors sitting in the second row there.

2RP 54-55 (emphasis added).

Jury selection proceeded until the end of the day. 2RP 55-145. Following up on what was said earlier in the day, juror 7 was further questioned and then excused for cause. 2RP 56-66.

A jury found Njonge guilty of second degree murder as a lesser offense to premeditated first degree murder. CP 65. On appeal, Njonge argued the trial court violated his constitutional right to a public trial during

the jury selection process. Slip op. at 1. The Court of Appeals agreed and reversed the conviction. Id.

D. ARGUMENT

REVIEW OF THE PUBLIC TRIAL ISSUE IS UNWARRANTED.

The State claims the right to public trial does not attach under the "experience and logic" test announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). The State is wrong.

In State v. Wise, the Court determined it was unnecessary to engage in a complete "experience and logic test" because "it is well settled that the right to a public trial also extends to jury selection" and the private questioning of individual jurors was part of jury selection. State v. Wise, 176 Wn.2d 1, 12 n.4, 288 P.3d 1113 (2012) (quoting State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005)).

The question, then, is whether the courtroom was closed to the public during a portion of jury selection in Njonge's case. The jury selection process begins when jurors are sworn and complete their questionnaires. State v. Irby, 170 Wn.2d 874, 883-84, 246 P.3d 796 (2011). In Njonge's case, jurors completed their questionnaires, entered the courtroom, and were sworn in on Njonge's case. 2RP 2-3, 7, 13. At that point, the jury selection process began. Njonge was displayed to the

jurors for the purpose of determining whether anyone knew him. 2RP 19. Jurors were read the charge against Njonge. 2RP 19. Jurors were then questioned on hardship, during the course of which one of the jurors expressed a case-specific reason why he did not want to serve on this particular trial. 2RP 25.

All of this took place in a courtroom closed to the public. Slip op. at 10-11. There is no need to apply the experience and logic test because the right to a public trial attaches to the jury selection process and a portion of the jury selection process in Njonge's case took place in a closed courtroom.

Contrary to the State's suggestion, hardship questioning and for-cause questioning are not hermetically sealed phases of the jury selection process. Questions on whether a prospective juror can try a specific case impartially can and do arise during hardship questioning. Often times what is said during hardship questioning is used as the basis for challenging a juror for cause at a later time.

Njonge's case illustrates this fact. During hardship questioning, juror 7 voiced a personal reason for not wanting to sit on the jury that tried Njonge's case based on past experience with women being badly treated, unmistakably raising a red flag that he was not a juror that could fairly decide Njonge's case. 2RP 25. That is precisely the kind of event that

implicates the core values served by the right to public trial. See Wise, 176 Wn.2d at 5-6 (open and public judicial process helps assure fair trials); State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) ("[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.") (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)); In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (right to public trial protects ability "of the defendant's family to contribute their knowledge or insight to the jury selection.").

The hardship and for-cause phases of jury selection are not hermetically sealed. The two phases are fluid and often intermingle. The State's rigidly drawn distinction between hardship and other phases of the jury selection process does not comport with reality. The Court of Appeals correctly decided exclusion of the public from the courtroom during the jury selection process violated Njonge's right to a public trial.

E. CONCLUSION

Njonge respectfully requests that this Court deny review.

DATED THIS 21<sup>st</sup> day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
Petitioner,	)	
v.	)	NO. 86072-6
JOSEPH NJONGE,	)	
Respondent.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF MARCH, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE ANSWER TO STATE'S SUPPLEMENTAL PETITION FOR REVIEW TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH NJOONGE  
DOC NO. 332783  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF MARCH, 2013.

X Patrick Mayovsky

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Attached for filing today is an answer to state's supplemental petition for review and letter to the court in the case referenced below.

State v. Joseph Njonge,

No. 86072-6

Answer to State's Supplemental Petition for Review,  
Letter to the court

Filed By:  
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