

89619-4

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

UNTERS L. LOVE,

Appellant.

ANSWER TO AMICUS CURIAE BRIEF OF
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Deputy Prosecuting Attorney
Attorneys for Respondent

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

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I. IDENTITY OF THE ANSWERING PARTY

Respondent, State of Washington, provides the following answer to the amicus brief filed by the Washington Association of Prosecuting Attorneys (WAPA).

II. ARGUMENT

Amicus WAPA provides thoughtful argument regarding the due process right to be present at a critical stage of the proceeding as articulated in *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). WAPA amicus brief, pp. 10-12. However, in addressing the requirement of prejudice, Respondent would add that under the circumstances that exist in the present case, where the defendant is in court, has listened to the voir dire, and has had the opportunity to communicate with his counsel regarding any challenges, any subsequent for-cause challenges proffered by defendant's attorney at a sidebar, without his client at his side, could not result in prejudice under a right to be present argument. This is so because the final choice to proffer a challenge is a choice managed and controlled by the attorney for the defendant.

As a general matter, the defendant has control over the decision to plead guilty, to waive the right to a jury, to testify on his own behalf, and

to take an appeal.¹ *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 2509 n. 1, 53 L.Ed.2d 594 (1977) (BURGER, C.J., concurring)); and citing with approval the ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980).

Conversely, the lawyer has control over those decisions relating to strategy or tactics. The selection of particular jurors falls within the category of tactical decisions entrusted to counsel. A defendant does not retain a personal veto power over counsel's exercise of professional judgments, including the decision of what jurors to strike. See ABA Standards for Criminal Justice, Defense Function, Standard 4-5.2[b] [3d ed 1993]).² These ABA *standards* have been cited

¹ It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, see *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 2509 n. 1, 53 L.Ed.2d 594 (1977) (BURGER, C.J., concurring); ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980). In addition, we have held that, with some limitations, a defendant may elect to act as his or her own advocate, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.

Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983)

² Standard 4- 5.2 Control and Direction of the Case

with approval in Washington. *See State v. Humphries*, 181 Wn.2d 708, 723-24, 336 P.3d 1121, 1128 (2014) (Stevens, J. dissenting in part) (defense attorney has wide latitude in choice of trial psychology and tactics, as it is necessary and well-established that for the adversary process to function effectively the defense attorney must make tactical decisions.); *State v. Grier*, 171 Wn.2d 17, at 30-31, 246 P.3d 1260 (2011) (noting that the 1993 ABA *standards* provide a nonexhaustive list of decisions that rest solely with the defendant “as well as a nonexhaustive list of ‘strategic and tactical’ decisions that should be made by defense counsel upon consultation with the defendant (selecting witnesses,

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

conducting cross-examination, selecting jurors, making trial motions, introducing evidence.” *Id.*; *In re Stenson*, 142 Wn.2d 710, 740, 16 P.3d 1 (2001) (“The RPC are consistent with the ABA Standards for Criminal Justice, which indicate that the kinds of decisions complained of here are ‘the exclusive province of the lawyer after consultation with his client.’ 1 ABA, standards for Criminal Justice at 4–5.2. Contrary authority provided by Petitioner has been stricken.”).

Because the choice of jurors, after discussion with defendant, rests with counsel, Petitioner’s accompaniment to the sidebar would serve no purpose – his “presence would be useless, or the benefit but a shadow.” *Irby*, 170 Wn.2d at 881, *citing Snyder v. Com. of Mass.*, 291 U.S. 97, 107, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934).

Amicus WAPA additionally cites to a recent federal case, *United States v. Thomas*, 724 F.3d 632, 646 (5th Cir. 2013), *cert. denied*, 134 S.Ct. 1040 (2014). Amicus WAPA at pp. 11-12. The *Thomas* case is both new and instructive. There Defendant Ms. Thomas was present throughout the trial, including *voir dire*, except for an in-chambers conference where the attorneys exercised peremptory challenges and challenges for cause. *Id.* at 639. On appeal, the defendant contended she would have used a peremptory challenge against a juror who had previously worked with federal authorities to investigate mail theft, and that she was not able to

provide meaningful assistance in jury selection because she would have used a peremptory challenge to strike Juror No. 17, whom her attorney allowed to remain on the jury.

The *Thomas* Court found that claim based on her absence from jury impanelment satisfied the first prong of the plain error test³ because it involved a deviation from her legal rights under the Constitution relating to her right to be present, a right she had not waived. 742 F.3d at 644. Thereafter, the *Thomas* Court found the existence of clear error was also warranted: “The legal error of denying Thomas her constitutional right to be present, when the district court acknowledged that she had not waived that right, cannot be said to be ‘reasonably in dispute.’ Therefore, a finding of clear error is warranted.” 742 F.3d at 645.

The *Thomas* Court discusses at length the standard of review regarding the third prong of the clear error test; whether the clear error in the jury selection process affected Thomas’ substantial rights. 742 F.3d 645-646. *Thomas* notes that the Supreme Court has set forth the burden of production and the burden of persuasion regarding the prejudice requirement – that “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Thomas*, citing *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d

³ Fed.R.Crim.P 52(b)

508 (1993).⁴ The Thomas court then found that the prejudice prong had not been met, stating:

Undoubtedly, if Juror No. 17 had been struck using a peremptory challenge, the makeup of the jury panel would have been different. Thomas has met the burden to prove that there would have been *an impact* on jury deliberations if she had been allowed to participate in peremptory challenges—but her burden is to prove *a prejudicial impact*. Considering the record as a whole, as the Supreme Court mandates, she has failed to show that the impact would necessarily have been prejudicial.

Thomas, 724 F.3d at 646, (Emphasis the court's).

⁴ The Supreme Court's analysis in *Olano* is as follows:

When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called “harmless error” inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. See *Young*, 470 U.S. 1, at 17, n. 14, 105 S.Ct. 1038, at 1047 n. 14 (1985) (“[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error ... had [a] prejudicial impact on the jury's deliberations”). This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error “does *not* affect substantial rights” (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* “affec[t] substantial rights.” See also Note, Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved, 23 Miss.L.J. 42, 57 (1951) (summarizing existing law) (“The error must be real and such that it probably influenced the verdict ...”).

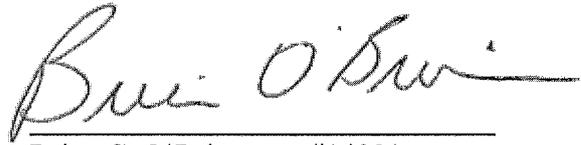
United States v. Olano, 507 U.S. 725, 734-35, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993)

III. CONCLUSION

Respondent would request that the Supreme Court's analysis of appellate review articulated in *Olano* should be implemented in this case.

Dated this 26th day of February, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

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v.

UNTERS L. LOVE,

Appellant,

NO. 89619-4

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 26, 2015, I e-mailed a copy of the Answer to Amicus Curiae Brief of Washington Association of Prosecuting Attorneys in this matter, pursuant to the parties' agreement, to:

Suzanne Elliott
Suzanne-elliott@msn.com

and to:

Pamela Loginsky
pamloginsky@waprosecutors.org

and to:

Dana Nelson
nelsond@nwattorney.net

and mailed a copy to:

Unters Lewis Love
6117 N. Atlantic St, #4
Spokane, WA 99205

2/26/2015

(Date)

Spokane, WA

(Place)

Crystal McNees

(Signature)

OFFICE RECEPTIONIST, CLERK

To: McNees, Crystal M.
Cc: Suzanne-elliott@msn.com; pamloginsky@waprosecutors.org; nelsond@nwattorney.net
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From: McNees, Crystal M. [mailto:CMCNEES@spokanecounty.org]
Sent: Thursday, February 26, 2015 1:50 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Suzanne-elliott@msn.com; pamloginsky@waprosecutors.org; nelsond@nwattorney.net
Subject: Unters Love 896194 Answer to Amicus Curiae Br

Attached please find the State's answer to Amicus Curiae Brief of Washington Association of Prosecuting Attorneys.
Thank you!

Crystal McNees
Legal Secretary
Spokane County Prosecutor's Office, Appeals Division
cmcnees@spokanecounty.org
(509)477-2873