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JAN 25 2005

FRESNO SUPERIOR COURT

By _____
DEPT. 53 - DEPUTY

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF FRESNO
12 CENTRAL DIVISION

13 The People of the State of California,
14 Plaintiff,

16 Marcus Delon Wesson,
17 Defendant

Case No.: F04901785-6

Defendant Wesson's

Motion for Selected

In Camera Voir Dire.

18
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12 **Introduction**

13 To the Honorable Judge of this Court and to the District Attorney of Fresno

14 County:

15 The Defendant, Marcus Wesson, having made a brief, oral, motion, without

16 advance notice, about this on Monday, and having been denied after a short hearing,

17 **hereby respectfully moves for:** (1) reconsideration of that motion, (2) this court to

18 provide notice and opportunity for the press and other interested parties to be heard, (3)

19 an order shortening so that this motion can be heard and decided at a formal hearing on

20 Monday, January 31, 2005, or before sequestered voir dire begins, and (4) for an order

21 that the sequestered voir dire be closed to the press and public, and the reporter's

22 transcripts thereof be sealed until after the jury, including all alternates, is seated and

23 sworn in.

25 **Grounds for this motion** are that (1) California law permits reconsideration of

26 this type of criminal law motion, (2) California law, which normally requires 10 days

1 notice of a written motion with points and authorities, also permits that time to be
2 shortened, and (3) the United States Constitution's 5th, 6th, and 14th Amendments (and
3 their California Constitution counterparts), encompassing the right to due process, to a
4 fair trial, to a trial by an impartial jury, and to the effective assistance of counsel, require
5 that Wesson be given an opportunity for reconsideration of this motion with full points
6 and authorities and a full hearing, and, also require that his motion for selectively-closed
7 voir dire be granted.

8
9
10 **I. Reconsideration.**

11
12 "In criminal cases there are few limits on a court's power to reconsider interim
13 rulings." *People v. Castillo* (1998) 65 Cal.App.4th 1242, 1246 (citing cases, including
14 exceptions not applicable here).

15 The civil rule on reconsideration, California Code of Civil Procedure, section
16 1008, does not apply to criminal cases. *People v. Castillo, supra*, 65 Cal.App.4th at 1246
17 – 1249.

18 " 'One of the powers which has always been recognized as inherent in courts ...
19 has been ... to so conduct [their order of business] that *the rights of all suitors before*
20 *them may be safeguarded....*' " *People v. Castillo, supra*, 65 Cal.App.4th at 1248
21 (citations omitted; italics in original).

22 Unlike Wesson's original motion of Monday, January 24, 2005, this motion is
23 being made in writing, upon notice (with a request to shorten time), with points and
24 authorities, and with discussion of the applicable law.

25 Mr. Wesson has the Constitutional right to the effective assistance of counsel, that
26 is, regarding this important motion, the right to have his attorney make this motion in a

1 proper manner, properly discussing the applicable law. This motion is still completely
2 timely. But Mr. Wesson will not receive effective assistance of counsel regarding it if
3 this court does not permit his attorney to properly so-move.
4
5

6 **II. Motion to Shorten Time**

7

8 Pretrial motions in writing with points and authorities normally require ten
9 calendar days notice. California Rules of Court, rule 4.111.

10 But rule 4.111 begins by stating that it only applies “[u]nless otherwise ordered
11” In other words, the Rule permits the court to shorten the ten day period.

12 Accordingly, Mr. Wesson respectfully requests this court to shorten the notice-
13 time to 5 calendar day’s notice, so that this motion can be heard on Monday, January 31,
14 2005, or, in any event, before sequestered voir dire commences.
15
16

17 **III. Why it is Necessary to Close the Courtroom During Sequestered Voir** 18 **Dire.**

19

20 This court previously granted Wesson’s motion for sequestered voir dire on the
21 issues of the death penalty and publicity, meaning that each prospective juror will be voir
22 dired on these subjects outside the presence of other prospective jurors.

23 In addition, however, Wesson shows in this motion that it also necessary to close
24 the courtroom from the media and the public, for that sequestered voir dire, and not to
25 release the court reporter’s transcripts of that voir dire until the final jury, including
26

1 alternates, is seated and sworn to try the case. (Indeed, this motion is late because
2 defense counsel had assumed that was part of the meaning of “sequestered.”)

3 This is made necessary by the continued extensive and pervasive media coverage
4 in this case, the extremely high emotions occasioned by the charges and the incidents,
5 and the assurance that all these things will continue.

6 Even though jurors will be sequestered from each other during voir dire about the
7 death penalty and publicity, even though jurors will not be photographed or identified by
8 name in court, and even though the court instructed prospective jury members to avoid
9 reading, hearing, and viewing media accounts, despite all of that, if the press and public
10 are allowed in during sequestered voir dire, much damage will be done to process of
11 selecting a fair and impartial jury.

12 Prospective jurors will still know that their voir dire answers may be reported in
13 the media.

14 For each prospective juror, that person’ spouse, loved ones, friends, relatives, co-
15 workers, and others are likely to know, on the day it happens, that this was the day this
16 prospective juror was voir-dired. When those people read press accounts they are likely
17 to know, or likely to guess or speculate, that what is reported in the media are the words
18 of their spouse, loved one, co-worker, friend, etc. And prospective jurors are going to
19 know that their spouses, loved ones, co-workers, friends, etc. are going to do that.

20 The result will be that many prospective jurors will not give honest, candid
21 answers, but will, instead, give answers that they think will play well in the press, or will
22 be socially desirable, or will be the answers expected by their spouse, loved ones, co-
23 workers, friends, etc., or will otherwise be less than honest, candid responses.

24 Experience has shown this kind of thing to be true in high publicity cases.¹

26 ¹ See, for example, the discussion of *In re The South Carolina Press Association* (1991)
946 F.2d 1037, in this at the Motion, Part IV, Finding (ii), page 9 et seq.

1 Open voir dire on death penalty and publicity is also like to cause prospective
2 jurors, on this massive-publicity, extremely-high-emotion case, to be intimidated by
3 media and public presence, or to otherwise alter their answers to voir dire questions.

4 It is a sad fact, also, that there may be some members of the media who are not as
5 restrained in their reporting as the parties and this court may prefer. Members of the
6 public, most of whom will be less attuned to these considerations, are also likely to be
7 less restrained. It is even possible that an unscrupulous person, in this high-publicity,
8 high-emotion case, could misuse a prospective juror's voir dire. Prospective jurors
9 cannot be expected to be ignorant of, and cannot be expected to disregard, these
10 concerns.

11 Even if prospective jury members are able to avert their eyes and ears away from
12 all media coverage and even if they are able to not to talk about the case, still the court's
13 instruction cannot at all reach loved ones, friends, co-workers and acquaintances. These
14 people will remain free to, and sometimes surely will, talk with prospective jury
15 members. Even if the prospective jury member turns away from their loved ones and
16 acquaintances, to heed the court's order, still the pressure from the community at large,
17 and from the loved ones and acquaintances in particular, is still ever-present.

18 Also, if any prospective juror is unwilling or unable to do all of the above, the
19 adverse effects of not having a closed courtroom during death penalty and publicity
20 questioning will obviously be multiplied.

21 While many of these same things could also happen during trial, during the trial
22 the prospective jurors are not voicing their innermost thoughts as they are in voir dire.
23 Also, the public's interest in an open trial is far greater then the public's interest in open
24 voir dire.

25 In short, unless voir dire is closed during questioning about death penalty and
26 publicity, prospective jurors, worried about, or actually facing, an unwarranted invasion

1 of their privacy, will not be able to give the candid and honest answers necessary to
2 trying to select a fair and impartial jury and thus to a fair trial.

3
4
5 **IV. The Proper Procedures for Determination of this Question.**

6
7 In the choice between a fair trial and a the right of the public to be present at voir
8 dire, the U.S. Supreme Court teaches that although it is “difficult to separate [the primacy
9 of the defendant’s right to a fair trial] from the right of everyone in the community to
10 attend the *voir dire* which promotes fairness.” Still, “[n]o right ranks higher than the right
11 of the accused to a fair trial.” *Press-Enterprise Co. v. Superior Court of California,*
12 *Riverside County* (1984) 464 U.S. 501, 508.

13 Accordingly, the *Press-Enterprise* court held, 464 U.S. at 511 the following. “The
14 presumption of openness may be overcome only by an overriding interest based on
15 findings that closure is essential to preserve higher values and is narrowly tailored to
16 serve that interest.”

17 The 1984 *Press-Enterprise*, and other U.S. Supreme Court cases, were, in 1999,
18 explained by the California Supreme Court in the civil-trial case of *NBC Subsidiary v.*
19 *Superior Court*²:

20
21 “... [T]he United States Supreme Court ... ha[s] held that the First
22 Amendment ... generally precludes closure of substantive courtroom
23 proceedings in *criminal* [italics in original] cases unless a trial court
24 provides notice to the public on the question of closure and after a hearing

25
26 ² *NBC Subsidiary (KNBC), Inc. v. Superior Court of Los Angeles* (1999) 20 Cal.4th 1178, 1181.

1 finds that (i) there exists an overriding interest supporting closure; (ii) there
2 is a substantial probability that the interest will be prejudiced absent
3 closure; (iii) the proposed closure is narrowly tailored to serve that
4 overriding interest; and (iv) there is no less restrictive means of achieving
5 that overriding interest.”

6
7 Accordingly, that is the procedure that this court should follow here.
8
9

10 ***Notice to the Public.***
11

12
13 This Motion will be routinely placed on that portion of this court’s web site
14 devoted to “Notable Cases,”³ the only one at present being the Wesson case. If the court
15 grants a hearing, that will also be placed on the court’s web site. The court should also
16 direct the clerk to provide notice to those that have filed extended media requests.
17 Accordingly, shortening time in this case will still allow for proper notice to all, and be in
18 full accord with everybody’s due process rights.
19
20

21 ***Finding (i): the Overriding Interests Supporting Selective Closing.***
22
23
24
25

26 ³ < http://www.fresnosuperiorcourt.org/attorneys_press/notable_cases/ > (last accessed
January 26, 2005).

1 These interests are: the defendant's right to a fair trial,⁴ and the "privacy interests
2 of a prospective juror during individual voir"⁵ This has already been discussed in Part
3 III, above.

4
5
6 ***Finding (ii): A Substantial Probability that the Interests Will be***
7 ***Prejudiced Absent Closure.***
8

9
10 That has already been discussed in Part III, above. In short, Part III concluded,
11 unless voir dire is closed during questioning about death penalty and publicity,
12 prospective jurors, worried about, or actually facing, an unwarranted invasion of their
13 privacy, will not be able to give the candid and honest answers necessary to trying to
14 select a fair and impartial jury and thus to a fair trial.

15
16 An early post-*Press Enterprise*, but pre-*NBC Subsidiary* California case, *Ukiah*
17 *Daily Journal v. Superior Court* (1985), 165 Cal.App.3d 788, set up a near impossible
18 evidentiary standard that a party must meet to achieve voir dire-closure. But that case
19 was not cited by *NBC Subsidiary*, has never been cited substantively,⁶ and has been
20 superseded, in the real world, by subsequent events.

21
22 _____
23 ⁴ *Press-Enterprise Co. v. Superior Court, supra*, 464 U.S. at 508.

24 ⁵ *NBC Subsidiary, supra*, 20 Cal.4th at 1223, citing *Press-Enterprise v. Superior Court,*
25 *supra* 464 U.S. at 512.

26 ⁶ *Ukiah Daily Journal* has been cited, but distinguished, or not discussed in two voir-dire
closing cases, *People v. Edwards* (1991) 54 Cal.3d 787, 812; and *People v. Thompson*
(1990) 50 Cal.3d 134, 156. Those two cases are not apposite here because of their
different procedural postures.

1 In *Ukiah Daily Journal*, the trial court granted the parties' joint motion in a death-
2 penalty case to close the death-qualifying portions of voir dire. The "Ukiah Daily
3 Journal" sought writ-relief, which the court of appeal granted. The problems complained
4 of in that case, that prospective jurors would be tainted by news coverage, and that
5 prospective jurors are more likely to be less candid, are only two of the many problems
6 that, as discussed in Part III, above, will occur in our case if voir dire is not selectively
7 closed. Of those two problems, however, the *Ukiah Daily Journal* said, at 165
8 Cal.App.3d at 792 – 793, the following: As to media coverage: "[t]here are no findings in
9 the record sufficient to support this assumption....," and, as to holding back, "[t]here are
10 no factual findings in this record to support this contention...."

11 Of course, there could be no direct evidence of this in the case at bar unless we
12 were to turn our courtroom into an experiment, trying different methods of open and
13 closed voir dire, with exit and other surveys, and with the attendant risk of mistrial and
14 reversal on appeal. So *Ukiah Daily Journal*, if it is read to mean that there must be
15 evidence from that very case, has set up an impossible standard.

16 Subsequent developments, nationwide, have provided sufficient material for this
17 court to make the findings required by *NBC*. *NBC* does not require evidence in the very
18 case at bar, and, indeed, does not require the hearing to be an evidentiary at all to support
19 the required four findings.

20 An example of these subsequent developments is found in *In re South Carolina*
21 *Press Association* (4th Cir. 1991) 946 F.2d 1037. That case considered some of the same
22 concerns voiced here, and discussed the evidence supporting them, including that jurist's
23 personal observations. True, that case occurred in another part of the country, but the
24 experiences it describes are All-American, and this court can fully apply that court's
25 lessons to our case.
26

1 In *In re South Carolina Press Association*, three trials of allegedly corrupt former
2 state legislators were held, one after the other, in which the District Court ordered closed
3 voir dire. The Press Association sought appellate relief in the second and third ones
4 (*Blading/Gordon* and *Derrick*).

5 In approving the closing orders, the circuit court of appeal quoted extensively
6 from the district court's findings. The District Court relied heavily, for its findings, on its
7 experience in the first of the three cases (*Taylor*). The quote is found at 946 F.2d at 1042:
8

9 "These questions [about possible racial prejudice during the *Taylor* trial]
10 elicited very personal and emotional responses from potential jurors....
11 [T]here is no doubt ... that their responses would not have been as candid
12 had they believed that the press would report the contents of the
13 proceedings. Although we have only questioned nine potential jurors [in
14 the current trial], similar questions have already been asked [by prospective
15 jurors as in the *Taylor* trial].... Therefore, this court feels that the presence
16 of the press and others creates a substantial probability that the candor of
17 the venire would be impaired and would impinge on the sixth amendment
18 rights of the defendant.

19

20 "[The court now considers the] alternatives, which were to handle sensitive
21 matters in side bar conferences or assign the prospective jurors numbers to
22 address privacy concerns. These solutions do not seem to address the
23 problem. The juror is still faced with answering very personal and
24 private questions before a gallery full of press. It would be difficult, if not
25 impossible, for this court to anticipate what questions the potential juror
26 might feel justifies a side bar. Thus, the juror would have to request the

1 side bar after the question has already been posed, which arguably chills the
2 witness' response. Alternatively, even if the juror is assigned a number,
3 they are aware of the presence of the press in the courtroom.

4

5 Using a side bar in these situations [might] only ... attract[] more
6 attention to a situation with which these veniremen clearly [do] not feel
7 comfortable discussing. Further, assigning a number to a juror instead of
8 referring to them by name would not appear to lessen the juror's concern
9 over confidentiality.”

10
11
12 The Appellate Court also quoted some of the District Court's specific examples of
13 why closed voir dire was necessary. The District Court was writing in the third of the
14 three trials, *Derrick*, and referred to its experiences in the first two trials. The court
15 wrote, 946 F.2d at 1043:

16
17 “I have had [prospective jurors in previous trials] ... say, ‘I will tell you
18 right now, Your Honor, there is no way I can give that defendant a fair
19 trial. He is guilty as far as I am concerned, and there is no way I am going
20 to change that if I am on the jury room and find him not guilty.’ [The
21 prospective juror explained] ‘Because I have to go back to work Monday
22 and face these fellow workers and they think this or that and I just can't do
23 it, so you are going to have to excuse me from this jury.’ I [the district
24 court] have never had a juror stand up in open court and say, ‘Oh, no, sir, I
25 can't give him a fair trial because I have to go back to work Monday and
26 discuss this with my working people.’

1
2 [One mother said] 'My son is being charged with either
3 manslaughter or murder and my husband says I shouldn't even be here but I
4 think it is my duty to be here.' She wouldn't do that in this open court. I
5 had mothers tell about children who [have] drug [problems] They are
6 not going to expose their whole lives and the family's lives because they
7 know for sure what the press will do with their lives when they bare it out
8 because it is news and it makes stories."
9

10
11 Thus, in *In re South Carolina Press Association, supra*, experience in previous
12 similar cases was used to find that voir dire should be closed in the current case.

13 This court should, and can, rely on those experiences. To be sure there are myriad
14 differences between the Wesson case and those cases. But the human experience seems
15 universal!

16 This court should not hold Wesson to the impossible burden of producing
17 evidence from his own case that does not yet exist. This court should also not turn voir
18 dire into an experiment to see what happens, changing it to try different methods, with all
19 the attendant risks of mistrial, and reversal already mentioned.
20
21

22 ***Finding (iii): The Proposed Closure is Narrowly Tailored to Serve the***
23 ***Overriding Interests.***
24

25
26 Finding (iii), is that the proposed closure is narrowly tailored to serve those
overriding interests: Wesson is only seeking closure of those portions of jury selection

1 for which the court has already ordered sequestered voir dire. He is only asking for the
2 transcripts to be withheld for the time needed to insure fulfillment of the purposes of
3 closure.

4
5
6 ***Finding (iv): There is No Less Restrictive Means of Achieving the***
7 ***Overriding Interests.***
8

9
10 Wesson is not aware of any less restrictive means of achieving these overriding
11 interests.

12
13
14 **V. Conclusion**

15
16 1. This court should reconsider Wesson's request for partially closed voir dire.

17 2. This court should shorten time for notice of this motion, and set it for
18 hearing on Monday, January 31, 2005, or before sequestered voir dire begins.

19 3. This court should provide notice by posting this Motion, and the court's
20 grant of a hearing on that portion of the Court's web site devoted to notable cases, as well
21 as this court's Minute Order setting that hearing. The court should also direct the clerk to
22 provide notice to those that have filed extended media requests.

23 4. At the hearing, after the court hears from all interest parties and persons, the
24 court should make the four findings discussed in Part IV above.

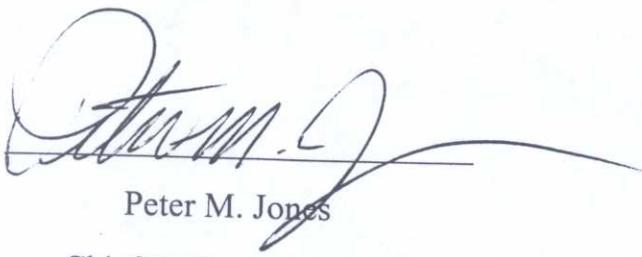
25 5. The court should grant Wesson's motion for the courtroom to be closed to
26 the public and the media during the sequestered portions concerning death penalty and

1 publicity, with transcripts withheld until the final jury, including all alternates, is selected
2 and sworn in.

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6 Respectfully Submitted,
7 George Cajiga, Fresno County Public Defender
8 by

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10 JAN. 26, 2005

11 Date

12
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14
15 Peter M. Jones
16 Chief Defense Attorney

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18 Garrick Byers
19 Senior Defense Attorney
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