

STATE OF WASHINGTON COURT OF APPEALS
DIVISION II

COURT REPORTER
FILED - 1 APR 11 2009
STATE
BY [Signature]

IN RE PERSONAL RESTRAINT OF) No. 37217-7-II
)
) SUPPLEMENTAL RESPONSE
)
FELIX JOSEPH D'ALLESANDRO)
)
)

1. INTRODUCTION

The parties have been directed to analyze the affect on the instant case of the recent Supreme Court decisions of *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009).

These two cases are distinct from the instant case in at least two important ways. First, unlike the aforementioned cases, and for that matter all the previous "courtroom closure" cases, petitioner specifically requested that some jurors be voir dired privately, participated aggressively in the private voir dire and benefited from the process. And secondly, the

instant case is not a direct appeal, but rather a personal restraint petition.

That being said, if anything this case is closer to *Momah* than *Strode*. Contrary to petitioner's assertion, the court in *Momah*, did consider the "invited error" doctrine and the factors utilized by the courts in determining the appropriate remedy. *Momah*, at 153-55. The court specifically stated

In harmonizing the defendant's rights under article I, section 22, we consider *Momah's* tactical choices and apply the basic premise of the invited error doctrine to determine what, if any, relief should be granted.

Momah, at 154.

In the instant case rather than merely assenting to closure it was petitioner who requested closure to ensure an impartial jury untainted by pre-trial publicity. It is equally clear that an impartial jury untainted by pre-trial publicity was the desire of all the parties as well as court. I RP 4-8 and 22-174.

Prior to the temporary "closure," the trial court did conduct a hearing that was equivalent to a "Bone-Club" hearing. Resp.Br. 10-12. The court outlined his proposed method of granting D'Allesandro's request for private questioning and D'Allesandro's counsel said "That's fine with Mr. D'Allsendro." I RP 5. Petitioner can hardly argue that his rights were violated when he is the one who asked for the private voir dire.

2. ARGUMENT

A. Petitioner waived his right to a public trial by requesting private voir dire in order to obtain an impartial jury. As noted in *Momah*, both rights are protected by *Wash. Const. article I, section 22. Momah, at 152.* The central aim of a criminal proceeding is a fair trial. *Momah, at 153.* Which of course would include an impartial jury untainted by prejudices, prior experiences or pre-trial publicity. It is submitted that by requesting private voir dire of

selected jurors petitioner made a tactical choice to "advance his own interests."

B. This case does present a "classic case of invited error" and the court should apply this doctrine and the factors applying it. If there was error in the trial court failing to expressly set out *Bone-Club* findings, such error was not a "structural error." Petitioner fails to show that the private voir dire he requested rendered his trial fundamentally unfair or an unreliable vehicle for determining his guilt or innocence. *Momah*, at 155-56. As in *Momah*, the closure occurred to protect petitioner's rights and did not prejudice him. D'Allesandro requested the closure, "argued for expansion of it, actively participated in it, and sought benefit from it."

C. In *Strode* the defendant merely "failed to object" to the closure whereas D'Allesandro requested the private voir dire. The distinctions between *Stode* and *Momah* are notably set out by Justice Fairhurst in her concurring

opinion in *Strode*. The distinctions between the instant case and *Strode* are even greater.

Strode, at 232-36.

D. The brief closure of the courtroom to inquire of juror 11 after she told the bailiff she thought she knew the next witness was to facilitate a brief hearing for the benefit of all parties and defense counsel not only did not object but Ms. Stenberg actively participated in the questioning of the juror as the witness applied more to her client's case. When asked if he had any questions D'Allesandro's counsel had none. As noted in the response brief, the court was performing a "ministerial" act to ensure that both defendants received a fair trial by an impartial jury. *State v. Rivera*, 108 Wn.App 645, 653, 32 P.3d 292 (2001).

3. CONCLUSION

D'Allesandro has failed to demonstrate that the interests of justice require re-litigation of the issue of temporary closure for partial voir

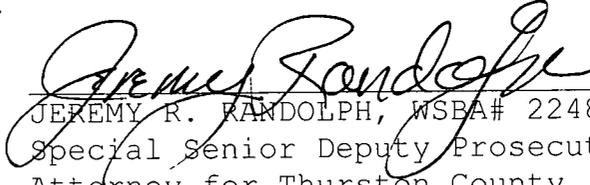
dire already decided in his direct appeal. In a personal restraint petition this is a threshold issue. *In re Personal Restrain of Brown*, 143 Wn.2d 431, 445, (2001). Additionally he has failed to demonstrate actual prejudice from the claimed error. *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 328-30.

What *Momah* does add to the equation is that the Supreme Court is willing to look beyond the failure of the trial court to formally "conduct a Bone-Club hearing." If anything the recent cases are more favorable to the respondent's position than at the time of the direct appeal.

D'Allesandro's petition should be denied.

Respondent respectfully requests that petitioner be required to pay all taxable costs of this PRP, including the costs of reproduction of the briefs, verbatim transcripts, clerks papers, filing fee, and statutory attorney fees, *State v. Blank*, 131 Wn,2d 230 (1997).

Respectfully submitted this 25th day of
January, 2010.

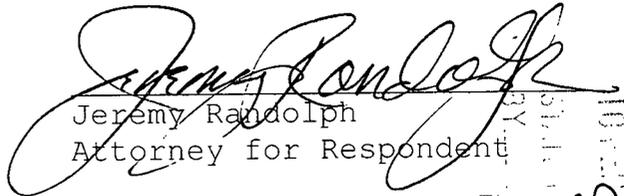

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CERTIFICATE

I certify that on this date I mailed copies
of the foregoing Supplemental Response by
depositing same in the United States Mail,
postage pre-paid, to the following parties at the
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DATED this 28th day of January, 2010.


Jeremy Randolph
Attorney for Respondent

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