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STATE OF WASHINGTON COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON
BY
DEPUTY

IN RE PERSONAL RESTRAINT OF)	NO. 37217-7-II
)	
FELIX JOSEPH D'ALLESANDRO)	RESPONSE BY WAY OF
)	MOTION TO DISMISS
)	

1. IDENTITY OF MOVING PARTY

The State of Washington asks for the relief designated in Part II.

2. STATEMENT OF RELIEF SOUGHT

The State moves for dismissal pursuant to RAP 18.14, RCW 10.73.090 and RCW 10.73.140.

3. FACTS RELEVANT TO MOTION

Except as hereinafter noted in Argument, the State accepts as accurate for the purposes of this petition, D'Allesandro's recitation of facts. PB 1-10. Additionally, it is submitted that Judge Hunt's recitation of facts set out in the opinion rendered on direct appeal of this case is quite accurate. *State v. D'Allesandro*, 131 Wash. App. 1003, 2006 WL 14519. In that opinion, Judge Hunt quite correctly

notes that the private interviews of a limited number of jurors, conducted prior to general voir dire, were conducted "in camera."

4. GROUNDS FOR RELIEF AND ARGUMENT

In this petition, D'Allesandro raises three issues, the first of which was rejected on direct appeal.

A. PRP standards.

While Chapter 10.73 RCW sets out a number of procedural barriers to collateral attacks such as personal restraint petitions, courts have imposed limitations on collateral attacks purposely and for good reasons. "Personal restraint petitions are not a substitute for direct review." *In re Pers. Restraint of Dalluge*, 2008 Wash. LEXIS 49 (17 January 2008). Collateral attacks on convictions, whether based on constitutional or non-constitutional grounds, are limited, but not so limited as to prevent the consideration of serious and potentially valid claims. *In re Pers. Restraint of Cook*, 114 Wn.2d 802,809 (1990).

To be entitled to relief in a personal restraint petition, as opposed to a direct appeal, a petitioner must meet several special requirements. First, the petitioner can only obtain relief from restraint that is unlawful for the limited reasons set forth in the rules defining the procedure. RAP 16.4(c); *Cook*, 114 Wn.2d at 809. Second, a petitioner can not obtain relief by petition if he or she has other adequate remedies. RAP 16.4(c). Third, a petitioner cannot raise grounds previously decided on the merits, either in a prior petition or on appeal, without demonstrating good cause (prior petition) or that the interests of justice require re-litigation (prior appeal). RAP 16.4(d); *Cook*, 114 Wn.2d at 806-7, 813 (prior petition); *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 445 (2001) (prior appeal).

Although petitions raising constitutional or non-constitutional issues not raised at trial or on appeal are no longer absolutely barred, special restrictions still apply. *In re Pers. Restraint of*

Hews, 99 Wn.2d 80, 85-87 (1983). Thus a fourth limitation is that a petitioner claiming purported constitutional error must demonstrate actual prejudice from the error before a court will consider the merits. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328-30 (1992) (applying this threshold standard to deny relief for a constitutional error that would be per se prejudicial error on appeal). Fifth, a petitioner claiming purported non-constitutional error must "establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Fleming*, 129 Wn.2d 529, 5532-34 (1996) (applying this threshold standard to deny relief for an error that would require reversal on direct appeal).

Even meeting this threshold does not automatically entitle a petitioner to relief or a reference hearing, however. A personal restraint petitioner is required by the rules to provide both

"a statement of ... facts upon which the claim is ... based and the evidence to support the factual allegations. RAP 16.7(a)(2)(i). A sixth procedural prerequisite to consideration on the merits is that "the petitioner must state with particularity facts which, if proven, would entitle him (or her) to relief", "bald assertions" and "conclusory allegations" are not enough. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992). Seventh, "the petitioner must demonstrate that he (or she) has competent, admissible evidence to establish the facts that entitle him (or her) to relief", claims as to what other persons would say must be supported by "their affidavits or other corroborative evidence" consisting of competent and admissible evidence. *Cook*, 114 Wn.2d at 813-14. Both the factual basis and evidentiary support requirements are threshold procedural bars; the court must refuse to reach the merits of any petition that fails to comply. *Cook*, 114 Wn.2d at 814.

Finally, if a petition clears these procedural hurdles, the petitioner still must actually prove the error that makes his or her restraint unlawful by a preponderance of the evidence. *St. Pierre*, at 328.

B. The Voir Dire examination was conducted in the usual fashion: in open court and consistent with D'Allesandro's right to a public trial.

The voir dire examination of prospective jurors was conducted in the usual fashion, in open court. RP (Voir Dire) 7-25, 169-308. In short, the voir dire examination and jury selection was conducted publicly consistent with court rule and constitutional mandate. Article 1, Sec. 10, 20, CrR 6.2, 6.3, 6.4.

Prior to conducting voir dire, upon request of the defense, prospective jurors had been provided questionnaires exploring issues such as exposure to pretrial publicity, knowledge of the case, and possible personal privacy issues (e.g., having been a crime victim). RP (Voir Dire) 1, 4, 11. Upon the request of D'Allesandro, some jurors were interviewed privately prior to the voir dire, only on the issue's of

sensitivity (e.g. personal privacy) or exposure to pretrial publicity (so as to not possibly taint the entire pool). RP (Voir Dire) 1-4, 7-10. [These numbered approximately 20 out of the total venire of 90. RP(Voir Dire) 22, 23]. The co-defendant and the State concurred in this request. Trial Judge Hicks, noting the smallness of his chambers and the number of participants, decided to convert the courtroom into "chambers" so that brief in camera private interviews could be conducted without inconveniencing the parties. RP (Voir Dire) 25. Some of those jurors were excused. Those who were not rejoined the pool of prospective jurors for the voir dire examination. RP (Voir Dire) 160, 169.

In re Pers. Restraint of Orange, 152 Wn.2d 795 100 P.3d.291 (2004) and *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006) cited by D'Allesandro, are not directly applicable to the instant case. In *Easterling*, supra, the trial court, not only closed the courtroom at Easterling's co-defendant's request without seeking the State's or Easterling's input or agreement, but also excluded Easterling and his counsel from the courtroom to

consider co-defendant's pretrial motions. In *Orange*, supra, the proponent of the closure was the trial court who summarily ordered the defendant's family and friends excluded from all voir dire proceedings and the closure was "permanent and full". *Orange*, supra, at 802, 807. In this case, the voir dire was open to the public. Likewise, *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) is not directly applicable to the instant case. In *Bone-Club*, the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective in order to protect future investigations. *Bone-Club*, supra, at 256-57. And in *State v. Brightman*, 155 Wn.2d 506, 122 P3d 150 (2005), the trial court ordered -sua sponte - that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. *Brightman*, supra at 511.

The pattern of the foregoing cases is clear. In each the full courtroom was closed to the detriment of the defendants. In each of the cases, the constitutional violation is clear; it was manifest.

A case somewhat similar to the instant case is now pending in the Supreme Court with oral argument scheduled for 2 June 2008. *State v. Strode*, S.Ct. No. 80849-0. [There is no Court of Appeals decision, as the case was transferred by Division III to the Supreme Court for direct review]. In *Strode*, the trial court conducted pre-voir dire interviews of 10 of 50 jurors who responded to the juror summons. Because of the sensitive nature of the case, the prospective jurors, as in the instant case, were given a written questionnaire regarding pre-trial publicity and personal privacy issues. Before talking to each juror, the court made clear that the purpose of individual questioning was to spare the juror the embarrassment of public questioning on these sensitive subjects and to facilitate as full a response as needed by the lawyers. Unlike the instant case, the private interviews were not requested by the defendant. *Strode* did assent to the procedure and fully participated in the interviews to his benefit.

It is important to note that private interviewing of prospective jurors involving sensitive issues, has been

recommending by the American Bar Association [See ABA Principles for Juries and Jury Trials at 42-43; <http://www.abanet.org/jury>] and the Washington State Jury Commission in 2000 [<http://www.courts.wa.gov/committee>]. The stated purpose of these recommendations is to protect the prospective jurors "from unreasonable and unnecessary intrusions into their privacy during jury selection." *Id.*, Recommendation 20. The juror handbook appearing on the Washington Courts website clearly anticipates that questioning may occur in private: "... If you are uncomfortable answering them (counsel's questions), tell the judge and he/she may ask them in private." <http://www.courts.wa.gov/newsinfo/resources/>. Similarly, the court approved video shown to prospective jurors upon their arrival for service tells them to alert the court if they wish to answer certain questions in private. *Id.*

In the event the proceedings prior to voir dire may be deemed a "closure", the events that transpired comported with the "guidelines" established by the Supreme Court in *Bone-Club*, supra, at 258. The proponent (D'Allesandro) made a showing of "compelling interest"

(e.g. fair trial, and the need not to "taint" the pool, additionally, the court found that some jurors had requested to be questioned privately). It also comported with the stated reason for the recommendations previously mentioned. Persons who might object were given the opportunity to do so. RP (Voir Dire) 4-8, 22-26. The proposed method was the "least restrictive" method for protecting the "threatened interest" (e.g. juror privacy and fair trial). Prospective jurors who indicated concerns were questioned only with particularity and - if not excused - rejoined the pool for later voir dire. Obviously, the court did weigh the competing interests of the proponent (D'Allesandro) and the public. RE (Voir Dire) 3-8. Petitioner's suggestion that each juror could have been interviewed individually in open court hardly comports with the stated objective of protecting juror privacy. Essentially, the court - on the request of the defendant - was performing a "ministerial" act, in order that the voir dire proceed to the advantage of all concerns. State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001). While, as this court noted on direct

appeal, it would have been easier if the trial court had articulated *Bone-Club* findings, failure to list each step is not fatal where it is obvious from the record that the *Bone-Club* steps were considered.

Here if there was error, it was clearly invited. A defendant who invites error - even constitutional error - may not claim on appeal that he is entitled to a new trial on account of the error. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); *State v. Smith*, 122 Wn.App. 294, 299, 93 P.3d 206 (2004). The invited error rule recognizes that "[t]o hold otherwise [i.e., to entertain an error that was invited] would put a premium on defendants misleading trial courts." *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). See *People v. Thompson*, 50 Cal.3d 134, 785 P.2d 857 (1990) (failure to object to private voir dire not reviewable where procedure was for the defendant's benefit and the defendant participated without objection)

While the State fully recognizes that *Easterling* discussed at length the violation of the public's right to an open trial, it is the State's position that

D'Allesandro can not rely on the violation of someone else's rights on appeal or by way of a personal restraint petition. First, a defendant does not have standing to assert the rights - constitutional or otherwise - of others. *State v. Walker*, 136 Wn.2d 678, 685, 965 P.2d 1079 (1998). More importantly, D'Allesandro waived his right to a public trial under Const. art. I, sec. 22. Nonetheless, he seeks a vacation of his facially valid conviction by claiming that the public's Const. art. I, sec. 10 right to have justice "administered openly" was violated. If such a claim were cognizable in a collateral attack, then every defendant who waived his or her Const. art. I, sec. 22 right to a speedy trial, could obtain relief based on a claim that the granting of his request violated the public's Const. art. I, sec. 10 right to have justice administered "without unnecessary delay." A personal restraint petition is a vehicle to vindicate personal rights, not someone else's rights.

D'Allesandro has identified no statute or constitutional provision that allows this Court to grant him relief based on the perceived violation of another's

constitutional right. No case has ever granted relief from a criminal judgment when the defendant's claim was based solely on a perceived violation of Const. art. I, sec 10.

C. Appellate and trial counsel were not ineffective by failing to cite to a case that was not applicable while review was pending and not seeking a cautionary instruction regarding co-defendant's counsel's questions.

D'Allesandro's last two claims are based on allegations of ineffective assistance of appellate and trial counsel. Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. To effectively challenge the effective assistance of counsel, D'Allesandro must show that "defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there

is a reasonable probability that, except for counsel's unprofessional errors, the result of the trial proceedings would have been different." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004), [citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]. To show ineffective assistance of appellate counsel, the petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's unprofessional error, appellant would have prevailed on appeal. "[T]o prevail on the appellate ineffectiveness claim, [petitioner] must show the merit of the underlying legal issues his appellate counsel failed to raise." *In re Pers. Restraint of Brown*, 143 W.2d 431, 452, 21 P.3d 687 (2001).

Scrutiny of counsel's performance is highly deferential, and there is a strong presumption of reasonableness. *State v. Day*, 51 Wn.App. 544, 553, 754 P.2d 1021, review denied, 111 Wn.2d 1016 (1988).

Under the prejudice prong, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177, cert. denied, 113 S.Ct 164 (1992). Moreover, because the defendant must prove both ineffective assistance and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *Id.*, at 884.

1. Ineffective Assistance - Appeal.

D'Allesandro claims that his appellate counsel was ineffective by failing to inform the Supreme Court of a case recently decided by that Court that was barely applicable to the instant case. For the reasons heretofore stated, D'Allesandro has not demonstrated the merit of the underlying public trial issue. It is submitted that citing to *Easterling* would not have resulted in a different result. As noted by D'Allesandro, this Court affirmed his conviction on 4 January 2006. A

Petition for Review was filed in a timely fashion. Review of that decision was denied on 10 October 2006 by Supreme Court Department I [consisting of Chief Justice Alexander and Justices C. Johnson, Sanders, Chambers and Fairhurst]. At the petition for review hearing Department I would have been aware that a "public trial" issue was involved. It is hard to imagine that the author of the majority opinion in *Easterling* - Chief Justice Alexander - or the author of a concurring opinion - Justice Chambers - would have denied review if either thought their barely 3 month old decisions in *Easterling* dictated a result different than that reached by this Court.

2. Ineffective assistance - trial.

D'Allesandro claims his trial counsel was deficient in failing to seek a curative instruction regarding the co-defendant's attorney's line of questioning while cross-examining him. As noted heretofore, to prevail on a deficient representation claim a defendant must demonstrate that "there is a

reasonable probability that, except for counsel's unprofessional errors, the result of the trial proceedings would have been different." *Davis*, supra at 672-73. In analyzing the complained of cross-examination by the co-defendant's counsel, it is important to note that each of the defendant's defense was that the other one did it. In 29 pages of transcript [RP 1739-67], there were 32 objections to Ms. Stenberg's questions by D'Allesandro's counsel and 2 objections by SDPA Bruneau. Of those objections, 24 were sustained, many as to the form of the question asked. Only 4 questions involved other witnesses credibility. Less than half-way into Stenberg's cross, both D'allesandro's counsel and SDPA Bruneau asked for a discussion outside the presence of the jury. Dixon objected to the repeated argumentative and improper questions of Stenberg. SDPA Bruneau emphasized his concerns regarding the line of questions "asking this witness about the credibility of other witnesses" by opining what would happen to a prosecuting attorney if he or

she engaged in a similar line of questioning. The trial judge instructed Stenberg to stay within the bounds of acceptable cross-examination.

While D'Allesandro seems to attach great importance to SDPA Bruneau's characterization of what would happen to a prosecuting attorney who asked improper questions regarding other witness credibility, he misses the point that prosecuting attorneys have always been held to a higher standard than defense counsel. As this Court most recently reminded: "Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial." *State v. Jones*, COA # 34471-8-II (filed 04.29.08) quoting *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). What may be viewed as prosecutorial misconduct does not necessarily apply to defense counsel who are expected to zealously advocate for their client.

Over the course of a rather lengthy cross-examination, Ms. Stenberg questioned D'Allesandro 4

questions that asked him, in one fashion or the other, to comment on the credibility of other witnesses. Objections to those 4 questions by D'Allesandro's attorney were quickly sustained.

While admitting that cases regarding this issue that are cited are prosecution misconduct cases, D'Allesandro cites but one co-defendant counsel misconduct case which involved a direct comment on the defendant's failure to testify on his own behalf. In *State v. Dickerson*, 69 Wn.App. 744, 850 P.2d 1366 (1993), the Court ultimately found that the comment regarding the well protected right of a defendant to remain silent was harmless error.

D'Allesandro fails to demonstrate that, but for the objected to and sustained questions by Ms. Stenberg, the results of the trial would have been different. To all the complained-of-questions, timely objections were interposed by D'Allesandro's counsel. D'Allesandro further fails to demonstrate that the performance of his attorney fell below an

objective standard of reasonableness based on consideration of all circumstances.

D'Allesandro points to numerous questions that were designed to undermine his credibility. Of course Ms. Stenberg attempted to undermine D'Allesandro's credibility - he was claiming that her client was the killer. That fact that the cross-examination was less than artful did not result in D'Allesandro's conviction. A review of the record clearly indicates overwhelming evidence of D'Allesandro's guilt.

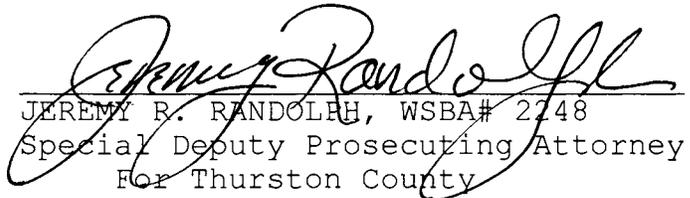
It did not occur to D'Allesandro's trial counsel to request a "curative instruction" because Ms. Stenberg's conduct of cross-examination was hardly as harmful as now asserted on appeal by D'Allesandro. His suggested curative instruction fails to take into consideration that the trial court already instructs the jury that they should not consider questions and answers stricken by the court and that the jury is the sole and exclusive judges of the credibility of the evidence. The

remaining suggestions by D'Allesandro would have placed the judge in the position of commenting on the evidence.

D. CONCLUSION

D'Allesandro fails to demonstrate that his restraint is unlawful. This petition should be dismissed. Pursuant to RCW 10.73.160, the State respectfully requests that petitioner be required to pay all taxable costs of this PRP, including the cost of the reproduction of briefs, verbatim transcripts, clerk's papers, filing fee, and statutory attorney fees. *State v. Blank*, 131 Wn. 2d 230, 930 P.2d 1213 (1997).

Respectfully submitted this 30th day of April, 2008.


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CERTIFICATE

I certify that on 1st day of May 2008 I mailed a copy of the foregoing Response by Way of Motion to Dismiss by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

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DATED this 1st day May, 2008.


Jeremy Randolph, WSB# 2248