

71949-1

71949-1

No. 71949-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FIRKO KELIFA,

Appellant.

FILED
APR 2 2014
CLERK OF COURT
COURT OF APPEALS
1000 4TH AVENUE
SEATTLE, WA 98101

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

BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

C. STATEMENT OF THE CASE 4

D. ARGUMENT 7

 1. Mr. Kelifa’s constitutional right to a public trial was violated when the drug court held a closed team meeting prior to the hearings in which the court (1) set a revocation hearing and (2) revoked Mr. Kelifa’s drug court agreement, found him guilty, and sentenced him to prison. 7

 a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings..... 8

 b. Mr. Kelifa’s constitutional right to a public trial and the public’s constitutional right to access to the courts were violated by the use of closed team meetings before the revocation of his drug court participation and resulting finding of guilt and sentencing 12

 c. Mr. Kelifa’s conviction must be reversed and his case remanded for a new termination hearing 17

 2. Mr. Kelifa’s constitutional right to be present was violated when the drug court team met to discuss his case without him..... 19

E. CONCLUSION 23

TABLE OF AUTHORITIES

Washington Supreme Court

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993)..... 10, 11

Cohen v. Everett City Council, 85 Wn.2d 385, 535 P.2d 801 (1975).... 8

Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980)..... 9

Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835, cert. denied, 513 U.S. 849 (1994)..... 19

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) 9

State v Koss, ___ Wn.2d ___, 334 P.3d 1042 (2014) 17

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). 9, 10, 11, 14, 18

State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010)..... 12

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 11, 14, 18

State v. Frawley, ___ Wn.2d ___, 334 P.3d 1022 (2014) 18

State v. Garza, 150 Wn.2d 360, 77 P.3d 347 (2003)..... 21

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011)..... 19, 20, 22

State v. Marsh, 126 Wash. 142, 217 Pac. 705 (1923) 14, 18

State v. Njonge, ___ Wn.2d ___, 334 P.3d 1068 (2014)..... 18

State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012)..... 18

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988). 21

<u>State v. Shearer</u> , ___ Wn.2d ___, 334 P.3d 1078 (2014)	17, 18
<u>State v. Shutzler</u> , 82 Wash. 365, 144 P. 284 (1914), <u>overruled on other grounds</u> , <u>State v. Caliguri</u> , 99 Wn.2d 501, 664 P.2d 466 (1983).....	20
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	18
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	10, 14
<u>State v. Sykes</u> , ___ Wn.2d ___ (No. 87946-0) (2012).....	8
<u>State v. Wise</u> , 176 Wn.2d 1, 288 P.3d 1113 (2012)	8, 10, 11, 17, 18

United States Supreme Court

<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	22
<u>Craig v. Harney</u> , 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947)	8
<u>Georgia v. Presley</u> , 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).....	11
<u>Globe Newspaper Co. v. Superior Court</u> , 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).....	8
<u>In re Oliver</u> , 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948).....	10
<u>Kentucky v. Stincer</u> , 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).....	19
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	18
<u>Press-Enterprise Co. v. Superior Court</u> , 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (Press-Enterprise I).....	10

<u>Press-Enterprise v. Superior Court</u> , 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (Press-Enterprise II)	14
<u>Richmond Newspapers, Inc. v. Virginia</u> , 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).....	8, 10
<u>Rushen v. Spain</u> , 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)	21, 22
<u>Smith v. Doe</u> , 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) .	14
<u>United States v. Gagnon</u> , 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).....	19
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)	18

Washington Constitution

Const. art. I, § 3	19
Const. art. 1, § 10.....	9, 14
Const. art. 1, § 22.....	17

United States Constitution

U.S. Const. amend. I.....	2, 17
U.S. Const. amend. VI.....	3, 8, 19
U.S. Const. amend. XIV	2, 17

Statutes

RCW 2.28.170	12, 13
--------------------	--------

Rules

CrR 3.4..... 20

RAP 2.5 17, 21

Other Authorities

Final B. Rep. on Engrossed Second Substitute H.B. 1006, 56th Leg.,
Reg. Sess. (Wash. 1999);..... 12

King County Drug Diversion Court Policy and Procedure Manual (May
2013)..... 4, 12, 13, 17

A. ASSIGNMENTS OF ERROR

1. The drug court's use of closed team meetings to review Firko Kelifa's case and decide it should be set for a revocation hearing violated his constitutional right to a public trial.

2. The drug court's use of a closed team meeting to discuss Mr. Kelifa's case prior to a hearing at which he was terminated from the drug diversion court, found guilty of burglary in the second degree, and sentenced to a prison term, violated his constitutional right to a public trial.

3. The drug court's exclusion of the public from a closed team meeting to review Mr. Kelifa's case and decide it should be set for a revocation hearing violated the public's constitutional right to the open administration of justice.

4. The drug court's use of a closed team meeting to review Mr. Kelifa's case and decide it should be set for a revocation hearing violated his constitutional right to be present.

5. The drug court's use of a closed team meeting to review Mr. Kelifa's case prior to a hearing at which he was terminated from the drug diversion court, found guilty of burglary in the second degree, and

sentenced to a prison term violated his constitutional right to be present.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant has the constitutional right to a public trial, and the public enjoys the right to open access to the courts. U.S. Const. amends. I, VI, XIV; Const. art. 1, §§ 5, 10, 22. The drug court held a team meeting to review Mr. Kelifa's case before all of his court hearings. At one meeting the team decided the case should be set for a revocation hearing, and another meeting was held before the hearing at which he was terminated from drug court, found guilty of burglary in the second degree, and sentenced to prison. The team consisted of the judge, prosecutor, defense counsel, drug diversion court services administrator and treatment staff, the police liaison, and treatment providers.

a. Where the public and Mr. Kelifa were excluded from the team meetings and the court did not conduct the required weighing process to evaluate a request to close a hearing, was Mr. Kelifa's right to a public trial violated?

b. Where the public was excluded from the team meetings and the court did not conduct the required weighing process

to evaluate a request to close a hearing, was the public's right to access to the courts violated?

2. A criminal defendant has the constitutional right to be present at all critical stages of the proceedings against him. U.S. Const. amends. VI, XIV; Const. art. 1 § 22. The trial court excluded Mr. Kelifa from a closed team meeting in which the team decided his case should be set for a revocation hearing and at a meeting before a hearing where the court revoked Mr. Kelifa's drug court agreement, found him guilty of burglary in the second degree, and sentenced him to a term of imprisonment.

a. Was Mr. Kelifa's Fourteenth Amendment right to be present violated by a closed team meeting at which the court and other team members discussed the relevant facts in order to produce consensus that his case was appropriate for revocation and at subsequent team meetings before his revocation hearing?

b. Was Mr. Kelifa's article I, section 22 right to appear and defend violated by closed team meetings at which the court and other team members discussed his case and decided his case was appropriate for revocation and at subsequent team meetings before his revocation hearing, thus affecting his constitutional rights?

C. STATEMENT OF THE CASE

Firko Kelifa was charged with burglary in the second degree, stemming from a theft from a Banana Republic store in Bellevue, from which he had received a prior no-trespass order. CP 1-7. As a result of this arrest, Mr. Kelifa was admitted into King County Superior Court's Drug Diversion Court (DDC) program. CP 8, 9-13.

The King County drug court is structured around a "team" comprised of the judge, prosecutor, public defender, DDC Services administrative and treatment staff, police liaison, and treatment providers who work "in a cooperative and non-adversarial manner" to help the drug court participants. King County Drug Diversion Court Policy and Procedure Manual (May 2013) at 5.¹ (Hereafter DDC Policy & Procedure Manual). The team meets every morning before the drug court calendar to review the cases to be heard that day, and meets weekly to discuss cases in depth. *Id*; *see, e.g.*, RP at 43; RP at 75-78, RP at 79.²

While participating in DDC, Mr. Kelifa was repeatedly commended for his excellent participation and commendable work in

¹ Available at www.kingcounty.gov/courts/DrugCourt/ParticipantsInfo.aspx (last viewed 11/26/14).

² The verbatim report of proceedings consists of one consecutively-paginated volume, containing 18 separate hearing dates; it is referred to herein as "RP."

recovery. RP 47 (Court: “I wish everyone was taking this recovery – their own recovery as seriously as you are – and working as hard as you are.”); RP 53 (Court: “Excellent. Mr. Kelifa, you’re continuing to do really strong work... I really appreciate the hard work you’re doing.”); RP 62 (Court: “You’re keeping great focus, working hard to get and keep your sobriety, doing everything you need to do. You’re in express today, and you are promoting to Phase 4 today.”); RP 69 (Court: “Mr. Kelifa, you’ve just done an excellent job so far in this program... you’ve stayed very focused on getting and keeping your sobriety. That’s why you’re looking at a March graduation date.”).³

On February 8th, Mr. Kelifa was arrested in Bellevue and charged with burglary in the second degree, for a shoplifting incident similar to the one for which he had been arrested at the beginning of DDC. RP 72. The DDC team met in order to discuss whether Mr. Kelifa’s case should be set for termination from the drug court program, or whether he should be restored to the program and required to start back at Phase 2 (he had achieved Phase 4). RP 74-76. The court scheduled a DDC team meeting without Mr. Kelifa present, and scheduled a revocation hearing for the following day. RP 75-78.

³ This excerpt was from January 14, 2014.

As a result of the closed DDC team meeting on March 5th, the court conducted a termination hearing on the following day. RP 79 (“I have apprised [Mr. Kelifa] of the discussions in staffing”). Following an evidentiary hearing, the prosecutor filed a petition to terminate Mr. Kelifa from drug court. CP 14-24.

At the hearing on March 6, 2014, Mr. Kelifa did not contest the alleged violations, and the court found they were proved. CP 61, 92, 190-91.⁴ Mr. Kelifa asked the court to permit him to continue in drug court based on his previous compliance and success, and because he still needed its support due to his compulsive gambling habit. RP 179-83; CP 25-60. Mr. Kelifa testified that he remained sober, which was undisputed, and was evidenced by his compliance with urinalysis testing and sober support groups. RP 151, 157. His testimony was also supported by his counselor at Coastal Treatment Services, who discussed her experience with gambling pathology, as well as her willingness to work with Mr. Kelifa. RP 93-111.

The court ultimately terminated Mr. Kelifa from drug court for non-compliance, concluding he had violated the regulations and there was nothing more drug court could offer him. RP 188; CP 61. The

⁴ The March 6th hearing was continued to April 11th, and then to April 24th. All proceedings are contained in the same volume.

court found Mr. Kelifa guilty of burglary in the second degree, based upon its review of the information, certificate of probable cause, and police reports. RP 190.

The court granted Mr. Kelifa's request to be sentenced to a prison-based Drug Offender Sentencing Alternative (DOSA). CP 82-90. Mr. Kelifa appeals. CP 91.

D. ARGUMENT

- 1. Mr. Kelifa's constitutional right to a public trial was violated when the drug court held a closed team meeting prior to the hearings in which the court (1) set a revocation hearing and (2) revoked Mr. Kelifa's drug court agreement, found him guilty, and sentenced him to prison.**

King County drug court policy mandated the use of team meetings before each of Mr. Kelifa's appearances in drug court, and in these closed meetings the judge, parties, treatment providers, and a police liaison discussed his case before his court appearances. Based upon a team meeting discussion, Mr. Kelifa's case was set for termination, and he was later terminated from drug court, found guilty of burglary in the second degree, and sentenced to prison at a hearing after a team meeting. The drug court practice of closed team meetings violated Mr. Kelifa's constitutional right to a public trial and the right

of the public to access to court proceedings.⁵ His conviction must be reversed and the case remanded to drug court for a new termination hearing.

a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings. Public criminal trials are a hallmark of the Anglo-American justice system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed. 2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed. 2d 973 (1980) (plurality); State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). “A trial is a public event. What transpires in the court room is public property.” Cohen v. Everett City Council, 85 Wn.2d 385, 387, 535 P.2d 801 (1975) (quoting Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 2d 1546 (1947)).

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” Article I, section 22 of the Washington Constitution

⁵ The constitutionality of this King County Drug Diversion Court’s policy is currently before the Washington Supreme Court in State v. Adonijah Leroy Sykes, No. 87946-0. Oral argument was heard on May 13, 2014.

guarantees “[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial.”

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. 1, § 10. This clear constitutional provision entitles the public and the press to openly administered justice. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. Kurtz, 94 Wn.2d at 58. In the federal constitution, the First Amendment’s guarantees of free speech and a free press also protect the right of the public to attend a trial. Globe Newspaper, 457 U.S. at 603-05; Richmond Newspapers, 448 U.S. at 580.

Although the defendant’s right to a public trial and the public’s right to open access to the court system are different, they serve “complementary and interdependent functions in assuring the fairness of our judicial system.” State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The 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.

Id. (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948)). “Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the judicial system.” Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed. 2d 629 (1984) (Press-Enterprise I). Open public access provides a check on the judicial system that is necessary for a healthy democracy and promotes public understanding of the judicial system. Globe Newspaper, 457 U.S. at 606; Richmond Newspapers, 448 U.S. at 572-73; Wise, 176 Wn.2d at 5; State v. Sublett, 176 Wn.2d 58, 142 n.3, 292 P.3d 715 (2012) (Stephens, J., concurring); Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The court may restrict the right to a public trial only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. To protect this constitutional right, Washington courts have consistently held that a trial court may not conduct secret or closed proceedings

“without first, applying and weighing five requirements set forth in Bone-Club and, second, entering specific findings justifying the closure order.”⁶ State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006); accord Wise, 176 Wn.2d at 14; see Georgia v. Presley, 558 U.S. 209, 216, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether a trial court has violated a defendant’s constitutional right to a public trial is a matter of law that this Court reviews de novo. Wise, 176 Wn.2d at 9; Easterling, 157 Wn.2d at 173-74.

⁶ The requirements are:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
4. The court must weigh the competing interests of the proponent of closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting Eikenberry, 121 Wn.2d at 210-11).

b. Mr. Kelifa's constitutional right to a public trial and the public's constitutional right to access to the courts were violated by the use of closed team meetings before the revocation of his drug court participation and resulting finding of guilt and sentencing. Drug courts are designed to divert non-violent drug-related offenders into an intensive treatment program in order to encourage drug-free and productive life-styles. State v. Drum, 168 Wn.2d 23, 31-32, 225 P.3d 237 (2010) (citing Final B. Rep. on Engrossed Second Substitute H.B. 1006, at 3, 56th Leg., Reg. Sess. (Wash. 1999)); RCW 2.28.170(2). The King County Superior Court's Drug Diversion Court's stated mission is:

to combine the resources of the criminal justice system, drug and alcohol treatment and other community service providers to compel the substance-abusing offender to address his or her substance abuse problem by providing an opportunity for treatment and holding the offender strictly accountable.

Policy and Procedure Manual at 3. If a participant successfully completes drug court, his charge is dismissed. RP 9.

A drug court is defined by statute as:

a court that has special calendars or dockets designed to achieve a reduction in recidivism and substance abuse among nonviolent, substance abusing felony and nonfelony offenders, whether adult or juvenile, by increasing their likelihood for successful rehabilitation through early, continuous, and intense judicially

supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services.

RCW 2.28.170(2) (emphasis added). Drug court is thus entitled to the presumption of openness.

In the King County DDC, a team consisting of the judge, prosecutor, public defender, DDC Services administrative and treatment staff, police liaison, and treatment providers, meets every morning before court to review the cases to be heard that day. The team also meets regularly to discuss cases in depth. Policy and Procedure Manual at 5; see, e.g., RP 43; RP 75-78; RP 79. The team members try to reach a consensus on how each case should proceed:

During the team meetings, the DDC team strives to reach consensus regarding next steps while also providing information and proposals to the court. The court then hears from the defendant at their next scheduled hearing and renders a decision.

Id.

Mr. Kelifa's revocation hearing was conducted in a courtroom open to the public, but only after the court was involved in a private team meeting with counsel, drug court staff, and treatment providers. RP 75-78, 79. The public was excluded. Even Mr. Kelifa was not allowed to attend the meeting. RP 79.

“[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence.” Smith v. Doe, 538 U.S. 84, 98-99, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). Article I section 10 also mandates open access to “the administration of justice.” Const. art. 1, § 10. The right to a public trial thus applies to all judicial proceedings. State v. Marsh, 126 Wash. 142, 142-45, 217 Pac. 705 (1923) (public trial was violated when adult found guilty and sentenced to a year in jail at a juvenile court proceeding that was closed to the public); Easterling, 157 Wn.2d at 179-80 (pre-trial motion was part of trial); Bone-Club, 128 Wn.2d at 256 (suppression hearing). In fact, the absence of a jury “makes the importance of public access” to court hearings “even more significant” because the jury serves as a check against the abuse of power or corruption on the part of the prosecutor or court. Press-Enterprise v. Superior Court, 478 U.S. 1, 12-13, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (Press-Enterprise II).

The “experience and logic” test is useful in determining if the core values of the public trial right are implicated. Sublett, 176 Wn.2d at 73 (lead opinion) (citing Press-Enterprise II, 478 U.S. at 8-10), 176 Wn.2d at 141 (Stephens, J., concurring). The test requires the court to look at (1) whether the proceeding has historically been open to the

public and the press, and (2) whether public access plays an important role in the functioning of the particular proceeding. Id. If both parts of the test are met, the public trial right is implicated and the Bone-Club factors must be considered before the proceeding may be closed to the public. Id.

At Mr. Kelifa's revocation hearing, he was terminated from drug court because of admitted violations, found guilty by the court, and sentenced. The hearing thus included a trial and sentencing that have been historically open to the public, and experience shows the hearing before Mr. Kelifa's termination hearing should have been open to the public. Logic also demonstrates that the team meetings should have been open because the public has a legitimate interest in the workings of drug diversion courts. The experience and logic test thus demonstrates, therefore, that the closed team meeting held before Mr. Kelifa's revocation hearing should have been open to the public.

The drug court did not apply the five-part Bone-Club test before reviewing Mr. Kelifa's case in closed meetings with the DDC team. These meetings occurred before each of Mr. Kelifa's drug court appearances. There was a meeting before the hearing at which the court decided his case should be set for a revocation hearing. RP 72.

On that day, defense counsel informed the court that Mr. Kelifa had a new arrest with an appearance date of March 6th in Bellevue. RP 72. Defense counsel stated, “I have shared with [Mr. Kelifa] the recommendation, first of all, that it will be set for staffing so that we can discuss next steps.” Id. The reference to a “recommendation” implies that the case had been staffed already, and the reference to a future staffing indicates the staffing meeting to follow in the coming week.

The trial court then set a closed staffing meeting for the day prior to the March 6th revocation hearing itself. RP 75. The court stated, “We’re going to set your case on for a staffing next week, staff it on March 5th to determine what the next steps are going to be.” RP 75. The court continued:

And I’ll hear recommendations from your attorney, the Prosecutor, and your case manager about what the next steps should be for you in this program, whether you should be set for a termination hearing, whether you should remain in the program, and if you remain in the program, under what circumstances will you remain in the program.

RP 75.

Mr. Kelifa was not permitted to attend this March 5th staffing meeting, where it was determined that he would be terminated from DDC, nor were any members of his family or members of the public.⁷

DDC policy does not exclude the revocation hearing from the team meeting procedure. Policy and Procedure Manual at 16.

Accordingly, Mr. Kelifa's right to a public trial and the public's right to access to the courts were violated. U.S. Const. amends. I, VI, XIV; Const. art. 1, §§ 10, 22.

c. Mr. Kelifa's conviction must be reversed and his case remanded for a new termination hearing. A public trial is a "core safeguard" in the justice system. Wise, 176 Wn.2d at 5. "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." Id.

Mr. Kelifa did not object to the team meetings occurring before his drug court appearances. Violations of the right to a public trial, however, are issues that may be raised for the first time on appeal. RAP 2.5(a); State v Koss, ___ Wn.2d ___, 334 P.3d 1042, 1047 (2014); State v. Shearer, ___ Wn.2d ___, 334 P.3d 1078, 1082-83 (2014); State

⁷ Mr. Kelifa's sister testified at the revocation hearing on April 11, 2014. RP 143-49.

v. Frawley, ___ Wn.2d ___, 334 P.3d 1022, 1029 (2014); State v. Njonge, 334 P.3d 1068, 1073-74 (2014) (“We decline the State’s invitation to disturb settled law.”); see also State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 173 n.2; Bone-Club, 128 Wn.2d at 257. The use of secret meetings prior to Mr. Kelifa’s hearing is a manifest constitutional error that this Court should address.

A violation of the right to a public trial infects the entire process, rendering the proceedings fundamentally unfair. The denial of the constitutional right to a public trial is thus one of the limited class of fundamental constitutional rights not subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)); Shearer, 334 P.3d at 1082-83; Frawley, 334 P.3d at 1029; Wise, 176 Wn.2d at 18; State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012); Easterling, 157 Wn.2d at 181; Bone-Club, 128 Wn.2d at 261-62; Marsh, 126 Wash. at 146-47. Mr. Kelifa’s conviction and his termination from drug court must be reversed and his case remanded for a new revocation hearing that is not preceded by a private team meeting.

2. Mr. Kelifa's constitutional right to be present was violated when the drug court team met to discuss his case without him.

A person accused of a crime has the fundamental constitutional right to be present for all critical stages of the proceedings. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); State v. Irby, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011). Under the Fourteenth Amendment, the defendant's right to be present applies to hearings where the defendant's presence would contribute to the fairness of the proceedings. Stincer, 482 U.S. at 745; United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835, cert. denied, 513 U.S. 849 (1994). Thus, the defendant does not have the right to be present at in-chambers conference between the court and the attorneys on legal issues "at least where those issues do not involve the resolution of disputed facts." Lord, 123 Wn.2d at 306.

The Washington Constitution specifically provides the right to "appear and defend in person." Const. art. I, § 22. Under the Washington Constitution, the defendant's right to appear in person extends to "every stage of the trial when his substantial rights may be

affected.” Irby, 170 Wn.2d at 885 (emphasis deleted) (quoting State v. Shutzler, 82 Wash. 365, 367, 144 Pac. 284 (1914), overruled on other grounds, State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983)). The right to be present is also protected by court rule. CrR 3.4(a).

Mr. Kelifa’s right to be present under both constitutions was violated by his exclusion from the DDC’s team meetings. At the team meetings, the parties and staff discussed Mr. Kelifa’s case in order to reach consensus on “next steps” in order to help him succeed. RP 72, 75; Policy and Procedures Manual at 5. Such a discussion would necessary involve resolution of facts, especially when Mr. Kelifa was asserted to have violated program rules and was facing termination from drug court. His Fourteenth Amendment right to be present was thus violated.

In addition, the DDC team meetings occurred regularly in compliance with drug court policy. Policy and Procedures Manual at 5. The team meeting was thus an established part of the drug court proceedings, and equivalent to a stage of a trial. Mr. Kelifa’s rights could certainly be affected when the team discussed whether he should be terminated from the drug court program. Thus, his right to be present under Article I, section 22 was also violated.

The State may argue that Mr. Kelifa may not raise this issue because he did not object in the trial court. Appellate courts do not normally review issues not brought to the attention of the trial court, but the court rules provide an exception for constitutional issues because constitutional violations may result in a serious injustice to the accused. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). In determining whether to review a purported constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. Scott, 110 Wn.2d at 688.

The right to be present is a fundamental constitutional right which cannot be objected to at the time, by definition. Rushen v. Spain, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). The violation here affected Mr. Kelifa's right to be present when the judge, prosecution, drug court and treatment personal, and a police liaison offered their opinions as to the progress of his case, which included his sobriety, honesty, and his alleged violation of drug court rules by reportedly committing a criminal offense. Mr. Kelifa had no opportunity to

object, as he was not present. Given the fundamental nature of the right to be present and the crucial nature of the team meetings to the drug court process, the error was manifest and may be raised in this appeal.

The denial of the right to be present is analyzed under the constitutional harmless error standard. Spain, 464 U.S. at 117-19; Irby, 170 Wn.2d at 885-86. The State must demonstrate beyond a reasonable doubt the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Irby, 170 Wn.2d at 886. The State cannot meet its burden here.

Mr. Kelifa was excluded from a closed meeting where his progress and rule violations in drug court were discussed by the judge, prosecutor, his lawyer, drug court and treatment staff, a police liaison and treatment providers. Mr. Kelifa thus could not observe the team's reasoning process or contribute as the team reached consensus on how to address his case at the upcoming revocation hearing.

The State cannot demonstrate that the team meeting's conclusions and impact upon the court might not have been different if Mr. Kelifa had been present. His conviction and revocation must be reversed.

E. CONCLUSION

King County Drug Court policy excluded Mr. Kelifa from team meetings where his case was discussed with an emphasis on reaching consensus on how the case should proceed before each of his drug court appearances. This included meetings where the court decided to set his case for termination and the hearing at which he was terminated from drug court, found guilty of burglary in the second degree, and sentenced to prison.

The public's right to access to court proceedings, Mr. Kelifa's constitutional right to a public trial, and his constitutional right to be present at critical stages of his own trial were all violated. Mr. Kelifa respectfully requests this Court reverse his conviction and the revocation of his drug court participation.

Respectfully submitted this 1st day of December, 2014.



JAN TRASEN – WSBA # 41177
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71949-1-I
v.)	
)	
FIKRO KELIFA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] FIKRO KELIFA 808268 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF DECEMBER, 2014.

X _____ *grm*

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710