

No. 83597-7

COA No. 62402-4-I

SUPREME COURT  
OF THE STATE OF WASHINGTON

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PERRY MILLS,

*Respondent,*

*PETITIONER*

v.

WESTERN WASHINGTON UNIVERSITY,

*Petitioner.*

*Respondent*

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*PETITIONER*  
SUPPLEMENTAL BRIEF OF RESPONDENT

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James E. Lobsenz  
Attorney for Respondent

Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
(206) 622-8020

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**TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES .....   | iii         |
| A. <u>INTRODUCTION</u> .....   | 1           |
| B. <u>ARGUMENT</u> .....   | 6           |
| 1. THE UNIVERSITY MISTAKENLY CONCLUDES THAT SUBSTANTIAL PREJUDICE ONLY EXISTS WHEN THE LITIGANT CAN SHOW THAT THE ERROR COMPLAINED OF CAUSED THE OUTCOME OF THE ADJUDICATIVE HEARING TO BE ADVERSE TO HIM. ....  | 6           |
| 2. SECRECY IS CONCLUSIVELY PRESUMED TO BE PREJUDICIAL BECAUSE IT ENCOURAGES PERJURY, PREVENTS WITNESSES WITH CONFLICTING TESTIMONY FROM COMING FORWARD; AND INDUCES A DIMINISHED SENSE OF RESPONSIBILITY IN THE DECISION MAKERS WHO NEED NOT BE CONCERNED WITH WHETHER THEIR DECISIONS WILL BE DEEMED FAIR BY THE OBSERVING PUBLIC. .... | 8           |
| 3. VIOLATION OF THE RIGHT TO A PUBLIC TRIAL OS CLASSIFIED AS “STRUCTIRAL ERROR” PRECISELY BECAUSE THE SPECIFIC EFFECTS OF THE VIOLATION ARE NOT DEMONSTRABLE .....   | 10          |
| 4. IF “OUTCOME” PREJUDICE MUST BE SHOWN TO WARRANT RELIEF, THEN THE “RIGHT” GRANTED BY RCW 34.05.449 IS VIRTUALLY UNENFORCEABLE. NO ONE WILL EVER BE ABLE TO SHOW THAT THE ADMINISTRATORS WOULD HAVE COME TO A DIFFERENT DECISION, OR THAT WITNESSES WOULD HAVE TESTIFIED DIFFERENTLY, IF THE PUBLIC HAD BEEN WATCHING THEM .....        | 11          |

|  | <u>Page</u> |
|--|-------------|
| 5. STATUTES SHOULD BE CONSTRUED SO AS TO AVOID ABSURD RESULTS.....   | 13          |
| 6. SECRECY FOSTERS MISTRUST AND A LOSS OF CONFIDENCE IN THE FAIRNESS OF THE ADMINISTRATION OF JUSTICE.....   | 14          |
| 7. A CONSTRUCTION OF RCW 34.05.570(1)(d) WHICH REQUIRES A SHOWING OF SPECIFIC PREJUDICE WILL FORCE THIS COURT TO DECIDE THE ARTICLE 1, SECTION 10 ISSUE.....                   | 16          |
| 8. HERE, AS IN OTHER STATES, THE ART. 1, § 10 RIGHT TO OPEN PROCEEDINGS SHOULD BE RECOGNIZED AS APPLICABLE TO QUASI-JUDICIAL ADMINISTRATIVE PROCEEDINGS LIKE THE ONE HERE..... | 16          |
| 9. A NEW UNLAWFUL PROVISION OF A NEW COLLECTIVE BARGAINING AGREEMENT ALSO CANNOT TRUMP RCW 34.05.449.....  | 19          |
| C. <u>CONCLUSION</u> .....   | 20          |

## TABLE OF AUTHORITIES

Page

### STATE CASES

|   |                 |
|---|-----------------|
| <i>Community Telecable v. City of Seattle</i> ,<br>164 Wn.2d 35, 186 P.3d 1032 (2008) .....   | 16              |
| <i>Deatherage v. State Examining Board of Psychology</i> ,<br>85 Wn. App. 434, 932 P.2d 1267 (1997), <i>rev'd on other grounds</i> ,<br>134 Wn.2d 131, 948 P.2d 828 (1997)..... | 8, 20           |
| <i>Densley v. Department of Retirement Systems</i> ,<br>162 Wn.2d 210, 173 P.3d 885 (2007).....   | 4               |
| <i>Dreiling v. Jain</i> ,<br>151 Wn.2d 900, 93 P.3d 861 (2005).....   | 15              |
| <i>In re Detention of Ambers</i> ,<br>160 Wn.2d 543, 158 P.3d 1144 (2007).....  | 14              |
| <i>In re Restraint of Lile</i> ,<br>100 Wn.2d 224, 668 P.2d 581 (1983).....   | 7               |
| <i>In re Restraint of Orange</i> ,<br>152 Wn.2d 795, 100 P.3d 291 (2004).....   | 6, 7            |
| <i>Mills v. Western Washington University</i> ,<br>150 Wn. App. 260, 208 P.3d 13 (2009).....  | 2, 4, 5, 19     |
| <i>State v. Bone-Club</i> ,<br>128 Wn.2d 254, 906 P.2d 325 (1995).....  | 5, 6, 9, 10, 12 |
| <i>State v. Brightman</i> ,<br>155 Wn.2d 506, 122 P.3d 150 (2005).....  | 10              |
| <i>State v. Delgado</i> ,<br>149 Wn.2d 444, 69 P.3d 318 (2003).....   | 14              |
| <i>State v. Donaghe</i> ,<br>152 Wn.2d 97, 215 P.3d 232 (2009).....   | 14              |
| <i>State v. Easterling</i> ,<br>157 Wn.2d 167, 137 P.3d 825 (2006).....   | 6               |

|  | <u>Page</u> |
|--|-------------|
| <i>State v. Keller</i> ,<br>143 Wn.2d 267, 19 P.3d 1030 (2001).....    | 14          |
| <i>State v. Momah</i> ,<br>167 Wn.2d 140, 217 P.3d 321 (2009).....     | 9           |
| <i>State v. Sadler</i> ,<br>147 Wn. App. 97, 193 P.3d 1108 (2008)..... | 6           |
| <i>State v. Strode</i> ,<br>167 Wn.2d 222, 217 P.3d 310 (2009).....    | 9           |

#### FEDERAL CASES

|  |      |
|--|------|
| <i>In re Oliver</i> ,<br>333 U.S. 257 (1948).....  | 3, 9 |
| <i>Detroit Free Press v. Ashcroft</i> ,<br>303 F.3d 681 (6 <sup>th</sup> Cir. 2002).....                   | 18   |
| <i>Fitzgerald v. Hampton</i> ,<br>467 F.2d 755 (D.C. Cir. 1972).....                                       | 17   |
| <i>Gibbons v. Savage</i> ,<br>555 F.3d 112 (2d Cir. 2009).....   | 11   |
| <i>Morgan v. United States</i> ,<br>304 U.S. 1 (1938).....   | 17   |
| <i>Railroad Comm'n v. PG &amp; E</i> ,<br>302 U.S. 388 (1938).....   | 17   |
| <i>Richmond Newspapers v. Virginia</i> ,<br>448 U.S. 555 (1980).....                                       | 15   |
| <i>Society of Professional Journalists v. Secretary of Labor</i> ,<br>616 F. Supp. 569 (D. Utah 1985)..... | 18   |
| <i>United States ex rel. Bennett v. Rundle</i> ,<br>419 F.2d 599 (3 <sup>rd</sup> Cir. 1969).....          | 11   |

|   | <u>Page</u> |
|---|-------------|
| <i>Waller v. Georgia</i> ,<br>467 U.S. 39 (1984)..... | 9-11        |

### OTHER JURISDICTIONS

|   |       |
|---|-------|
| <i>Daily Gazette v. Committee on Legal Ethics</i> ,<br>174 W.Va. 359, 326 S.E.2d 705 (1985).....  | 17    |
| <i>Daily Gazette v. Bd. Of Medicine</i> ,<br>177 W.Va. 316, 352 S.E.2d 66 (1986).....   | 17    |
| <i>Freitas v. Administrative Director</i> ,<br>92 P.3d 993 (Haw. 2004).....   | 18    |
| <i>Herald Company v. Weisenberg</i> ,<br>89 A.D.2d 224, 455 N.Y.S.2d 413 (1982), <i>aff'd</i> , 59<br>N.Y.S.2d 378, 452 N.E.2d 1190 (1983)..... | 17    |
| <i>Mosher v. Hanley</i> ,<br>56 A.D.2d 141, 391 N.Y.S.2d 753 (1977).....  | 18    |
| <i>Randall v. Toll</i> ,<br>74 Misc.2d 315, 344 N.Y.S.2d 712 (1973).....  | 18-19 |
| <i>Adams v. Marshall</i> ,<br>212 Kan. 595, 512 P.2d 365 (1973).....  | 18    |

### STATUTES AND RULES

|                     |                               |
|---------------------|-------------------------------|
| RAP 13.7(b).....    | 3                             |
| RCW 34.05.449 ..... | 2,6-8, 11, 12, 14, 16, 19, 20 |
| RCW 34.05.570 ..... | 4, 5, 11, 14                  |
| RCW 70.09.090 ..... | 14                            |

## A. INTRODUCTION

In this case a University professor accused of several incidents of rude verbal misconduct was disciplined after a lengthy hearing was conducted entirely in secret. Over the professor's objection a newspaper reporter was excluded from the hearing room. As a result, the student body, the faculty at large, and the general public never had any opportunity to learn what evidence was produced either for, or against, the professor.

At the secret hearing, the professor (1) presented evidence that the overwhelming majority of his verbal misconduct had actually *ceased* several years before the disciplinary charges were ever brought against him;<sup>1</sup> (2) that the real reason he was being prosecuted on faculty disciplinary charges was that he had angered Prof. Kuntz, the chair of his department, by publicly stating that Kuntz had embezzled student course fees by spending them for unauthorized purchases;<sup>2</sup> and (3) that while a

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<sup>1</sup> "On and off" during the years 2001 to 2003 Mills made crude remarks to Prof. Currier. In 2003 she told him to stop doing this and he did. RP III, 32; FF 13. Similarly, "sometime in the fall of 1997" Mills called Professor Pulver a "faggot." RP III, 55; FF 16. Then, in either the spring or fall of 1998, Pulver told Mills that he could not tolerate being spoken to in this way; after that Mills stopped addressing him in that manner. RP III, 56; FF 16. Mills also referred to Pulver as "Precious" but he stopped doing this "several years" before any disciplinary charges were brought. RP III, 56, 59, 135.

In 2004, seven years after Mills' had ceased making verbally insulting remarks to Professor Pulver, and one year after he had stopped making demeaning remarks to Professor Currier, the University suddenly suspended Professor Mills from his teaching duties in the fall of 2004 and brought charges against him in the spring of 2005.

<sup>2</sup> See generally Brief of Appellant, pp. 14-17, and RP II, 152-156, 183-190, CP 1279 (Ex. 15)(Copy attached as Appendix A). Kuntz admitted that that in the spring of 2005 he wrote to the Dean of the College, Linda Smeins, and complained that Mills was still accusing him of embezzling funds. Kuntz wrote that Mills had been overheard "telling a group of community members how I embezzled \$20,000 of state funds." Ex. 16, (admitted RP II, 194). In his memo, Kuntz asked Dean Smeins: "I wonder how long we are going to allow this to happen." Ex. 16. When asked what he meant by this statement, he answered: "I was wondering how long the university is going to allow him to say these things out loud in front of public forums." RP II, 195. Roughly five months later, when

handful of students were very upset by the blunt way in which the professor sometimes expressed his view that they were lazy or stupid, a much larger group of students thought that he was one of the best, teachers they had ever had, and that thanks to him, some of them went on to win prizes in the field of play writing in which he had taught them.<sup>3</sup>

Professor Mills argued that by conducting his disciplinary hearing in secret, the University had violated *both* RCW 34.05.449(5) and Wash. Const., art. 1, § 10. Both guarantee the right to an open hearing. But the Court of Appeals held simply that a new hearing was required because the statute had been violated: “Having resolved this question on statutory grounds, we need not address Mills’ related contention that he had a state constitutional right to an open administrative hearing.” *Mills v. Western Washington University*, 150 Wn. App. 260, 280 n. 8, 208 P.3d 13 (2009). Under RAP 13.7(b), even if this Court were to hold that the violation of RCW 34.05.449(5) did not require that a new disciplinary hearing be conducted, the constitutional issue regarding the applicability of art. 1,

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a new Dean had taken over from interim Dean Smeins, Kuntz recommended to Dean Edwards that Professor Mills be fired. RP II, 196.

<sup>3</sup> See generally CP 1316 (2000 recipient of Graduate of the Year Award, no an award-winning playwright and assistant to Edward Albee attests that “none of these things would have happened if it wasn’t for the unparalleled support, encouragement and skills Perry Mills gave me during the years I spent at Western”); CP 1318-19 (“I can’t remember the last time I have been so delighted, stimulated, and affected by material in a college course . . . for every student that Perry Mills offends there are five more who he inspires”); CP 1320 (“the greatest thing about Perry is that he is honest and that he expects the same from his students”); CP 1322 (“you were the best professor I had at Western, the one I learned the most from both in and out of the classroom . . .”); CP 1326 (“I love coming to your class”); CP 1328 (“Every time I speak with him I know I am going to have to think harder than I ever have before . . . I am forever challenged by his classes . . .”). See also the student testimony reported at RP IV, 20-22, 46, 63-68, 73-78.

§ 10 would still remain to be decided, either by this Court, or by the Court of Appeal upon remand.<sup>4</sup>

Mills submits that the same reasons which have impelled all courts to hold that violation of a constitutional right to a public trial is presumptively prejudicial and never harmless, apply with equal force to a violation of the statutory right to a public hearing guaranteed by RCW 34.05.449(5). Secret proceedings provide fertile ground for arbitrary and oppressive governmental conduct, and prevent the citizen from having a fair hearing. They encourage perjury, prevent witnesses with contrary evidence from coming forward, and diminish the sense of responsibility that the presiding officers should feel for ensuring that the citizen receives a fair hearing. Finally, secret proceedings undermine confidence in the fairness of government. "The traditional Anglo-American distrust for secret trials" has deep roots, and the right to a public hearing "has always been recognized as a safeguard against any attempt to employ courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 269-270 (1948).

Since secrecy prejudiced his ability to get a fair hearing, Mills submits that he was "substantially prejudiced" by the closed hearing. The University contends that Mills cannot show such "prejudice" unless he can show that if the hearing had been open to the public the final result of the

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<sup>4</sup> "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues." RAP 13.7(b).

hearing would have been more favorable to him.<sup>5</sup> Mills submits that such a crabbed construction of the statutory prejudice requirement would totally eviscerate that right. As virtually all courts have consistently recognized, it is not possible for anyone to demonstrate a direct causal link between the denial of public access and the final result of a hearing. If such a showing is required, the right to a public hearing can be violated with impunity because no one will ever be able to make such a showing.

As the Court below noted, for purposes of the Administrative Procedures Act Mills has made the only showing of prejudice that is required: He has shown that the University followed an “unlawful procedure”<sup>6</sup> when it closed his hearing to the public and evicted a

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<sup>5</sup> The University has erroneously asserted that the Court of Appeals failed to address the prejudice requirement of RCW 34.05.570(1)(d) *Cross-Petition*, at 14. This is clearly incorrect since the opinion below discusses this issue at some length:

The University contends that Mills is not entitled to relief at all because the hearing closure did not “substantially prejudice[]” his case. It bases this assertion on RCW 34.05.570(1)(d)’s statement that “[g]enerally[,] . . . [t]he court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” But RCW 34.05.570(3) expressly specifies that which constitutes “prejudice” in adjudicative proceedings by enumerating actions from which the court *shall* grant relief, including orders that result from an “unlawful procedure or decision-making process.”

*Mills*, 150 Wn. App. At 279. Since engaging in an unlawful procedure is specified as the type of action for which a reviewing court shall grant relief, the Court below correctly held that the statute defines unlawful procedures – such as holding a closed hearing -- as substantially prejudicial by their very nature.

<sup>6</sup> The University’s reliance on *Densley v. Dept. Retirement Systems*, 162 Wn.2d 210, 173 P.3d 885 (2007) is misplaced. Although the agency in that case allegedly did not follow the normal procedure outlined in its own regulation, the procedure it did follow was not “unlawful” because it was not specifically prohibited by the Legislature.

After resolving the primary issue of statutory construction of the phrase “active federal service in the military,” this Court’s opinion turned to Densley’s other claims, which included what this Court called a contention that the officer who presided over the administrative review engaged in “certain alleged improprieties in the administrative review process.” *Id.* at 893. The opinion doesn’t say what these “alleged improprieties” were, but a review of the briefs on file shows that Densley alleged that the Petition

newspaper reporter over his objection.

Ultimately, whether Mills is entitled to a new hearing because the closing of the hearing was an “unlawful procedure” which was expressly prohibited by statute, or because the closure violated art. 1, § 10, is immaterial. Either way, Mills is entitled to a new hearing. But acceptance of the University’s construction of the statutory prejudice requirement would force this Court to address the constitutional question which the Court of Appeals found it unnecessary to address, in violation of the normal rule of constitutional avoidance. If this case is to be decided on constitutional grounds, then well established constitutional precedent (*see, e.g., State v. Bone-Club*, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995)) holds that a litigant such as Mills need *not* show such specific prejudice because the error committed when a trial or hearing is held in secret is a

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Examiner violated the provisions of an administrative regulation, WAC 415-40-040, which required the him to notify the Attorney General and the Department in *writing* of Densley’s petition, and to invite them to participate in the review as interested parties. Instead, the Petition Examiner notified them by telephone, and neither sought to participate in the review process. Not surprisingly, this Court held that although the WAC required written notice, giving notice by phone was simply “a failure to follow a prescribed procedure” for which a court “may” provide relief in the form of an order setting aside the administrative action. 162 Wn.2d at 226.

Thus, *Densley* is utterly unlike the present case. There was no statute that was violated in *Densley*, and while notice was not given in the usual way to the Department and the Attorney General, it was given. In the present case, the officer presiding over the administrative hearing violated the express statutory command of the Legislature that the hearing be open for public observation. This the procedure followed in this case was not simply different from the procedure normally followed. It was an “unlawful procedure” because it had been specifically prohibited by the Legislature.

As the Court below correctly noted, RCW 34.05.570 itself “expressly specifies that which constitutes ‘prejudice’ in adjudicative proceedings by enumerating actions from which the court *shall* grant relief, including orders that result from an ‘unlawful procedure or decision-making process.’” *Mills*, 150 Wn. App. at 279. While a person challenging an administrative agency decision characterized by “irregularities” may have to show some specific prejudice which that irregularity caused, a person challenging a decision resulting from an “unlawful procedure” need not make such a specific showing.

structural error which is *always* prejudicial.

## B. ARGUMENT

### 1. THE UNIVERSITY MISTAKENLY CONCLUDES THAT SUBSTANTIAL PREJUDICE ONLY EXISTS WHEN THE LITIGANT CAN SHOW THAT THE ERROR COMPLAINED OF CAUSED THE OUTCOME OF THE ADJUDICATIVE PROCEEDING TO BE ADVERSE TO HIM.

The University assumes that the only way that a person can be prejudiced by an administrative tribunal's unlawful closure of an adjudicative proceeding contrary to RCW 34.05.449, is if the closure *causes the outcome* of the proceeding to be affected. The University contends that unless a professor can show that the decision rendered at that hearing would have been more favorable to him if the hearing had been open, it is immaterial that the hearing was unlawfully closed.

This suggested approach to statutory violations of RCW 34.05.449(5) conflicts with this Court's approach to the analogous constitutional claim of a violation of article 1, § 10. In *Bone-Club* this Court held that when a case is on direct appeal, the remedy for any violation of the constitutional right is a new trial "because prejudice is presumed where a violation of the public trial right occurs." *Id.* at 261-62. *Accord State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006)("prejudice is necessarily presumed"; "the appropriate remedy . . . is reversal . . . and remands for a new trial"); *State v. Sadler*, 147 Wn. App. 97, 111, 193 P.3d 1108 (2008)("the defendant need not show prejudice . . .").

Thereafter, in *In re Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), the error in closing a courtroom was first raised in a PRP proceeding where ordinarily a defendant must show not only that an error was committed, but that it “worked to his actual and substantial prejudice.” *In re Restraint of Lile*, 100 Wn.2d 224, 225, 668 P.2d 581 (1983). Nevertheless, in *Orange* this Court did *not* require the petitioner to show that the exclusion of his family members and all public spectators from the courtroom (152 Wn.2d at 802) affected the *outcome* of his trial. Although Orange could *not* show that he would have been acquitted if the public had been allowed to attend the voir dire, this Court still granted his petition and ordered a new trial.

It would be particularly untenable to hold that (1) a litigant like Orange, who objects to a closed hearing for the first time in a collateral attack proceeding, need not demonstrate outcome prejudice in order to obtain a new hearing; and yet (a) a litigant like Mills, who not only has raised the closed hearing claim at every stage of his direct appeal, but also raised it in the trial tribunal at the very moment that it occurred (RP I, 10, 15<sup>7</sup>) cannot win relief unless he demonstrates outcome prejudice.

Other administrative agencies seem to have no difficulty holding disciplinary hearings which are open to the public. Indeed, the State

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<sup>7</sup> “She [University counsel] did not offer you a reason why this hearing should be closed except that the Faculty Senate thought that they would like it that way a lot of the time.

“I have no doubt in this case the administration and some of the witnesses would like it closed because they would like to be able to testify, say their reasons why Professor Mills should be sanctioned in some way, dismissed, or suspended or something, and have it so that no one ever hears why.”

Examining Board of Psychology has ruled that RCW 34.05.449(5) compelled it to hold disciplinary hearings which are open to the public. See, e.g., *Deatherage v. State Examining Board of Psychology*, 85 Wn. App. 434, 446, 932 P.2d 1267 (1997),<sup>8</sup> reversed on other grounds, 134 Wn.2d 131, 948 P.2d 828 (1997). In the present case, because it did not want the true facts to be publicly known, the University conducted an entire disciplinary hearing in secret, and now seeks to retain the benefit of the disciplinary sanction it obtained by requiring Prof. Mills to demonstrate that he was harmed by the fact that no one was allowed to observe his hearing. Thus the University wishes to violate the statute against secret hearings with impunity.

**2. SECRECY IS CONCLUSIVELY PRESUMED TO BE PREJUDICIAL BECAUSE IT ENCOURAGES PERJURY, PREVENTS WITNESSES WITH CONFLICTING TESTIMONY FROM COMING FORWARD; AND INDUCES A DIMINISHED SENSE OF RESPONSIBILITY IN THE DECISION MAKERS WHO NEED NOT BE CONCERNED WITH WHETHER THEIR DECISIONS WILL BE DEEMED FAIR BY THE OBSERVING PUBLIC.**

This Court and the U.S. Supreme Court have both repeatedly noted that the constitutional guarantees of openness are *primarily* for the benefit

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<sup>8</sup> “Dr. Deatherage asked the Board to keep cameras and recording equipment out of the hearing room. The Board denied this request, citing RCW 34.05.449. That section of the APA provides that an administrative hearing “is open to public observation, except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered by the presiding officer pursuant to applicable rules.” RCW 34.05.449(5).” Rather than complaining about closure, Dr. Deatheridge was complaining that the hearing was too open because it was televised. The Court of Appeals held that he had not shown any prejudice from the fact that it was televised. Here the University seeks a ruling that is exactly the *reverse* by asking this Court to rule that Prof. Mills must demonstrate that he suffered specific prejudice from the closure of his disciplinary hearing.

of the individual whose case is being tried. Their observations are equally applicable to the *statutory* guarantee of openness which is enjoyed by every person appearing before an administrative agency:

[T]he requirement of a public trial is *primarily 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 the responsibility and to the importance of their functions*.

*State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009)(bold italics added).  
*Accord Bone-Club*, 128 Wn.2d at 259; *Oliver*, 333 U.S. at 270 n.25.

As this Court recently noted in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), when trials are held in secret, the due process rights to a fair trial and an impartial judge are threatened, it becomes easier for witnesses to lie, and the accused's ability to call witnesses to rebut the accusation is hindered. Witnesses against the accused know that their testimony is not going to be made known to the public, and thus they know that any lies they tell are not as likely to be exposed by persons who could give testimony contrary to their testimony if they only knew about the false testimony that had been given.

The public trial right protected by both our state and federal constitutions is *designed to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury."* [Citations omitted]. Consistent with those purposes, the United States Supreme Court has stated that public trials embody a "'view of human nature, true as a general rule, that *judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.*'"

*Strode*, 167 Wn.2d at 226, quoting *Waller v. Georgia*, 467 U.S. 39, 46 n.4,

104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)(bold italics added).<sup>9</sup> *Accord State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

**3. VIOLATION OF THE RIGHT TO A PUBLIC TRIAL IS CLASSIFIED AS “STRUCTURAL ERROR” PRECISELY BECAUSE THE SPECIFIC EFFECTS OF THE VIOLATION ARE NOT DEMONSTRABLE.**

In the constitutional context, courts have consistently recognized that denial of the right to a public trial is a “structural error” precisely because the negative effects of excluding the public are generally not demonstrable. In *Waller* the Supreme Court endorsed “the consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public trial guarantee.” *Waller*, 467 U.S. at 49. *Waller* specifically recognizes that although “the benefits of a public trial are frequently intangible, *difficult to prove*, or a matter of chance, the Framers plainly thought them *nonetheless real*.” *Id.* at 49 n.9 (bold italics added). Indeed, as the Court explained in later cases, it is precisely because the negative effects of the violation of certain important rights are hard to prove but “nonetheless real” that they have been classified as structural errors: “[W]e rest our conclusion of structural error upon the difficulty of assessing the effect of the error.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006), citing *Waller* as an example.

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<sup>9</sup> In *Bone-Club*, this Court held that the closure test applicable to art. 1, § 10 decisions “mirrors the United States Supreme Court’s decision in *Waller* . . .” 128 Wn.2d at 259. Thus, although *Waller* concerned the Sixth Amendment right to a public trial in criminal cases, this Court chose to apply the same type of analysis to an art. 1, § 10 claim because both constitutional provisions are designed to further the goal of ensuring fair trials.

In *Waller* the Court explicitly recognized that if a litigant were required to prove that the violation of one of these structural rights caused him to suffer specific prejudice, such a requirement would effectively deprive him of the right altogether:

The general view appears to be that of the Court of Appeals for the Third Circuit. It noted that a requirement that prejudice be shown “would in most cases deprive the defendant] of the [public trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.”

*Waller*, 467 U.S. at 49 n.9, quoting *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3<sup>rd</sup> Cir. 1969).<sup>10</sup>

By urging this Court to construe RCW 34.05.570(1)(d) as demanding proof of specific prejudice before relief can be granted for a violation of RCW 34.05.449(5), the University seeks to have this Court attribute to the Legislature an intention to demand what courts have generally recognized is not possible. If adopted, the University’s position would deprive litigants appearing before administrative agencies of the very right which the Legislature granted them. To say that litigants can enforce their right to a hearing “open to public observation” only if they can prove they suffered specific prejudice when the hearing was closed is to say that the statutory right is virtually unenforceable.

**4. IF “OUTCOME” PREJUDICE MUST BE SHOWN TO WARRANT RELIEF, THEN THE “RIGHT” GRANTED BY RCW 34.05.449 IS VIRTUALLY UNENFORCEABLE. NO**

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<sup>10</sup> *Accord Gibbons v. Savage*, 555 F.3d 112, 119 (2d Cir. 2009) (“If it were [subject to harmless error] little or nothing would remain of the right, because the presence of absence of public spectators rarely, if ever, will affect the result of a trial, at least in a manner that is perceptible.”).

**ONE WILL EVER BE ABLE TO SHOW THAT THE ADMINISTRATORS WOULD HAVE COME TO A DIFFERENT DECISION, OR THAT WITNESSES WOULD HAVE TESTIFIED DIFFERENTLY, IF THE PUBLIC HAD BEEN WATCHING THEM.**

Similarly, this Court has *not* required a litigant to show that the outcome of his hearing or trial would have been different in order to obtain relief. The mere fact that witness testimony or judicial behavior *might* have been different has been held sufficient to require a new hearing. For example, in *Bone-Club* this Court held that Detective Frakes' testimony at a closed pretrial suppression hearing on the admissibility of the defendant's statements should have been given in public. The prosecution argued that the remedy for the art. 1, § 10 violation should be merely a remand for a new suppression hearing at which Frakes testified in public. The prosecution argued that if the new suppression hearing resulted in another ruling that the defendant's statements were admissible, then a new trial would not be required. But this Court disagreed, noting that an open suppression hearing might lead Detective Frakes to testify somewhat differently than he did in the prior closed hearing. Such inconsistencies in his testimony might be of value to *Bone-Club* at trial, and therefore "even if the new suppression hearing again results in the admission of Frakes' testimony, Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial." *Bone-Club*, 128 Wn.2d at 262.

Similarly, in the present case if witnesses against Mills, such as Prof. Mark Kuntz, or some of the students whom he asked to spy on Mills, had

been required to testify publicly, their testimony –

- (1) their testimony might have been different and more truthful;
- (2) their testimony might have been heard by other faculty members who knew that Prof. Kuntz was motivated to seek Prof. Mills' discharge or suspension because he was angry at Mills for publicizing Kuntz's misappropriation of student course fees, and they might have come forward to testify;
- (3) their testimony might have induced other students, whom Kuntz had tried unsuccessfully to recruit to give testimony against Mills, might have come forward to testify;
- (4) their testimony might have led other professors, with knowledge that the complaints against Mills were merely pretexts used to try and get rid of him, to step forward to testify for Mills; and
- (5) and since the demeanor of University witnesses testifying against Mills would have been exposed to the public, the faculty members of the Hearing Committee might have been slower to find their testimony credible.

The University would have this Court rule that in order to obtain a new disciplinary hearing, Mills is required to prove that such things would have happened had the hearing been open to the public. But there is no sound reason to believe that the Legislature had such a draconian prejudice requirement in mind. Men and women of common sense can easily understand the wisdom of the holding of *Waller* that although such things are "difficult to prove," they are "nonetheless real." 467 U.S. at 49 n. 9. Accordingly, it would be as illogical to assume that Washington Legislators meant to demand such proof, when the framers who constitutionally guaranteed the same identical right did not require it.

**5. STATUTES SHOULD BE CONSTRUED SO AS TO AVOID ABSURD RESULTS.**

It is axiomatic that courts will not interpret statutes in such a manner

as to render a portion of a statute meaningless, *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001), or in a manner that leads to absurd results. *State v. Donaghe*, 152 Wn.2d 97, 106, 215 P.3d 232 (2009); *State v. Delgado*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). In the present case, the University would have this court read RCW 34.05.570(1)(d) in such a manner as to effectively deny litigants before administrative agencies the ability to enforce the right granted in RCW 34.05.449(5). In essence, the University says, “If you can prove that our refusal to hold a hearing ‘open to public observation’ caused you to suffer specific prejudice in that the closure of the hearing caused you to lose the hearing, then you can get a court to enforce the statutory guarantee of an open hearing.” The University would have this Court rule that what the Legislature gave with one hand, it took back with the other.<sup>11</sup> Since virtually no one could ever make the type of outcome prejudice showing which the University claims is statutorily required, the right supposedly guaranteed by RCW 34.05.449(5) would be completely unenforceable and totally meaningless. This Court should avoid a construction of RCW 34.05.570(1)(d) that leads to such an absurd result.

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<sup>11</sup> This Court refused a similar invitation to absurd statutory construction in *In re Detention of Ambers*, 160 Wn.2d 543, 158 P.3d 1144 (2007). There this Court considered a committed individual’s statutory right granted by RCW 70.09.090(2), to a trial on the issue of conditional release, once he made a prima facie showing that he was no longer a sexually violent predator. The State argued that by enacting RCW 70.09.090(4) requiring proof that a committed individual was now “safe to be at large,” the Legislature imposed a stricter requirement than the prima facie requirement of RCW 70.09.090(2). This Court disagreed, holding that to read the amendment as establishing a different standard would render it directly in conflict with the other portion of the statute.

**6. SECRECY FOSTERS MISTRUST AND A LOSS OF CONFIDENCE IN THE FAIRNESS OF THE ADMINISTRATION OF JUSTICE.**

This Court has repeatedly stressed the important role that public openness plays in maintaining confidence in the fairness of government. “Open access to government institutions is fundamental to a free and democratic society.” *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2005). The opposite of openness is secrecy, and “[s]ecrecy fosters mistrust.” *Id.* at 904. “People in an open society do not demand infallibility for their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980).<sup>12</sup>

RCW 34.05.570(1) does *not* say that relief shall not be granted unless it can be shown that the error complained of prejudicially impacted the *outcome* of the agency proceeding. It says only that relief shall not be granted if the person was not substantially prejudiced. By forcing a person Professor Mills to defend himself in a secret proceeding, the University was able to say the following to the world at large:

- (1) We brought charges of serious misconduct against Mills;
- (2) We proved those charges;

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<sup>12</sup> Conducting hearings in secret also undermines the appearance of fairness to the individual whose case is being heard. It is highly unlikely that an individual who is being punished by an administrative agency will think that his punishment was justly imposed if the entire proceeding against him was conducted in secret. The individual’s logical response to secrecy is to ask of the administrative tribunal, “If you are so fair, how come you have to hold the entire proceeding against me in secret?”

The University simply ignores the value to someone in the professor’s position of being able to have the public’s opinion as to whether the punishment imposed upon him was fair.

(3) We won't tell you what the evidence against him was;

(4) But you can trust us, it was really convincing.

Not surprisingly, the public is unlikely to accept such a claim, and thus along with Mills, the entire citizen body suffers prejudice in the form of reduced confidence in government.

**7. A CONSTRUCTION OF RCW 34.05.570(1) WHICH REQUIRES A SHOWING OF SPECIFIC PREJUDICE WILL FORCE THIS COURT TO DECIDE THE ART. 1, § 10 ISSUE.**

Courts will avoid deciding constitutional questions where a case may be fairly resolved on nonconstitutional grounds. *Community Telecable v. City of Seattle*, 164 Wn. 2d 35, 41, 186 P.3d 1032 (2008). Thus, this Court can avoid resolving the question of whether the "open administration of justice" guarantee of art. 1, § 10 applies to cases litigated before administrative agencies if it affirms the ruling below that Mills is entitled to a new hearing because RCW 34.05.449(5) was violated. If this Court decides that Mills is not entitled to relief under the Administrative Procedures Act, then the art. 1, § 10 question must be resolved.

**8. HERE, AS IN OTHER STATES, THE ART. 1, § 10 RIGHT TO OPEN PROCEEDINGS SHOULD BE RECOGNIZED AS APPLICABLE TO QUASI-JUDICIAL ADMINISTRATIVE PROCEEDINGS LIKE THE ONE HERE.**

As he noted in his opening brief in the Court of Appeals, courts in other jurisdictions have specifically held that various state and federal constitutional provisions require that proceedings before administrative agencies be open to the public. The West Virginia Supreme Court has

held that its state constitutional "open courts"<sup>13</sup> guarantee (art. III, § 17) applies to disciplinary hearings before administrative agencies. *Daily Gazette v. Committee on Legal Ethics*, 174 W.Va. 359, 326 S.E.2d 705, 710 (1985)(lawyer discipline); *Daily Gazette v. Bd. Of Medicine*, 177 W.Va. 316, 352 S.E.2d 66, 69 (1986)(doctor discipline). See *Brief of Appellant*, pp. 18-19. Courts in other states have reached similar conclusions in cases involving other types of administrative hearings.<sup>14</sup>

Some courts, including the U.S. Supreme Court, have relied upon the Due Process Clause as the basis for their conclusion that quasi-judicial administrative proceedings must be open to the public:

[I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. ***These demand 'a fair and open hearing' essential to the legal validity of the administrative regulation and to the maintenance of public confidence*** in the value and soundness of this important governmental process.

*Morgan v. United States*, 304 U.S. 1, 14 (1938)(bold italics added).<sup>15</sup> In

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<sup>13</sup> Despite the fact that West Virginia's state constitutional provision was textually phrased as an "open courts" guarantee, the West Virginia Supreme Court refused to limit the constitutional guarantee of openness to formal courts. While 26 states have "open courts" provisions in their state constitutions, (see Mills' Reply Brief, p. 4, n. 3), only Washington and Arizona have state constitutional provisions which employ the broader language of mandating that "Justice ***in all cases*** shall be administered openly." (Bold italics added).

<sup>14</sup> See, e.g., *Herald Company v. Weisenberg*, 89 A.D.2d 224, 227, 455 N.Y.S.2d 413 (1982), *aff'd*, 59 N.Y.S.2d 378, 452 N.E.2d 1190 (1983)(held administrative law judge erred when he excluded the public and a news reporter from an unemployment compensation hearing; principles requiring openness in criminal cases "should be applied with equal force to quasi-judicial proceedings where the process of government is similarly at work and the integrity of the decision making process is equally essential to citizen confidence in government.")

<sup>15</sup> *Accord Railroad Comm'n v. PG & E*, 302 U.S. 388, 393 (1938) "The right to a fair and open hearing is one of the rudiments of fair play"; *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C.Cir. 1972)("since "administrative hearings are of a quasi-judicial character . . . due

the employment context, one state court held:

[W]hen the State or a subdivision thereof conducts a hearing which may result in deprivation of employment, or the imposition of a fine or other monetary penalty, the affected employee is entitled to procedural due process. ***Due process requires that, when requested by an employee, the hearing be open to the press and the public.*** This accords not only with the Federal judicial tradition but also to general practice in administrative proceedings.

*Mosher v. Hanley*, 56 A.D.2d 141, 142, 391 N.Y.S.2d 753 (1977)(bold italics added).

Still other courts have found that a constitutional requirement that administrative proceedings be open to the public is rooted in the First Amendment. See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694-96 (6<sup>th</sup> Cir. 2002)(holding that constitution requires that deportation hearing be open to the public);<sup>16</sup> *Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569, 575 (D. Utah 1985)(exclusion of public from hearings of Mine Safety and Health Administration unconstitutional because “the press and the public have a first amendment right of access to administrative fact-finding hearings.”)

At least one court has held that employees of state universities are constitutionally entitled to open disciplinary hearings. In *Randall v. Toll*, 74 Misc.2d 315, 344 N.Y.S.2d 712 (1973), an employee of a New York

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process requires that the Fitzgerald hearing be open to the press and the public”); *Adams v. Marshall*, 212 Kan. 595, 512 P.2d 365 (1973)(civil service commission ruling that hearing be closed to public violated due process); *Freitas v. Administrative Director*, 92 P.3d 993, 999 (Haw. 2004)(“inasmuch as [driver’s license revocation] hearings are quasi-judicial in nature, due process requires that the hearings be public”).

<sup>16</sup> “We reject the Government’s assertion that a line has been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not the latter. . .”

state university, like Prof. Mills in this case, faced charges that could result in his removal from employment. The administrative officer presiding over his hearing ordered it closed to the public. The employee sought judicial relief, however, and a New York court held that “Due process requires that the . . . hearing be open to the press and the public,” and enjoined the administrative hearing officer from conducting a closed hearing. *Id.* at 315-16.

**9. A NEW UNLAWFUL PROVISION OF A NEW COLLECTIVE BARGAINING AGREEMENT ALSO CANNOT TRUMP RCW 34.05.449.**

The University now contends that it would be “impractical” to remand for a new disciplinary hearing because a new collective bargaining agreement went into effect in June of 2008 which provides that all disciplinary hearings “shall be private.” *Cross-Petition for Review*, at 16.

At the time it issued its decision the Court of Appeals commented that:

Presumably, the University does not contend that it may avoid the Administrative Procedures Act’s open hearing provisions by contracting to do so. A “contract that is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.” *Tanner Electric Co-op v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 669, 911 P.2d 1301 (1996).

*Mills v. WWU*, 150 Wn. App. at 278 n. 6.

Inexplicably, the University now makes the very argument which the Court of Appeals noted was fallacious. The University cannot contract its way to being exempt from the mandate of RCW 34.05.449(5). The current collective bargaining agreement provision that appears to mandate closed faculty disciplinary hearings is simply void and unenforceable.

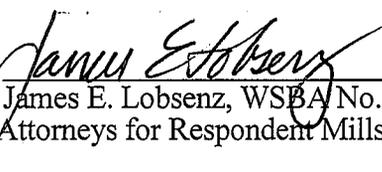
Just as the Washington State Board of Psychology has done (*see Deatherage, supra*, 85 Wn. App. at 446), Western Washington University is required by law to make sure that its faculty disciplinary hearings are “open to public observation.”

**C. CONCLUSION**

For the reasons stated above, respondent asks the Court to affirm that part of the Court of Appeals’ decision which found that the University violated the open meeting command of RCW 34.05.449(5) and that Mills was entitled to a new disciplinary hearing. In the alternative, Mills asks this Court to affirm the ruling below on the ground that the closure of his hearing violated art. 1, § 10 of the Washington Constitution, and/or the Due Process Clause of the Fourteenth Amendment.

DATED this 8th day of March, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSPA No. 8787  
Of Attorneys for Respondent Mills

## APPENDIX A

05/34

Date: May 28, 2004

To: Linda Smeins

From: Mark Kuntz

Subject: Perry Mills

Last night was the retirement party for Lee Taylor held at the Bellingham Theatre Guild.

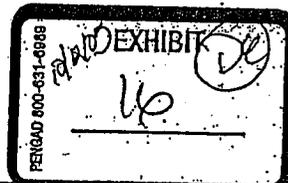
Perry was in attendance.

Perry was overheard telling a group of community members how I had embezzled \$20,000 of state funds, and how he had "called the cops on me".

Later, when he was speaking at the retirement in front of a large crowd, he had mouthed a former theatre department faculty member who had died in 1974. Perry did not know that that faculty member's wife was in the audience.

Perry continues to be an embarrassment to the university. While we continue to protect his right to speak freely under the protection of tenure, he continues to be a considerable liability to the university.

I wonder how long we are going to allow this to happen.



No. 83597-7

COA No. 62402-4-I

SUPREME COURT  
OF THE STATE OF WASHINGTON

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PERRY MILLS,

*Respondent,*

v.

WESTERN WASHINGTON UNIVERSITY,

*Petitioner.*

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CERTIFICATE OF SERVICE

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The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing addresses are both 701 Fifth Avenue, Suite 3600, Seattle, WA 98104.

3. On March 8, 2010, I served the following document via legal messenger on:

Wendy Bohlke  
Washington State Attorney General's Office  
103 E. Holly Street #310  
Bellingham, WA 98225

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
10 MAR -8 AM 10:57  
BY RONALD R. CARPENTER  
CLERK

Entitled exactly:

**SUPPLEMENTAL BRIEF OF RESPONDENT**



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Lily T. Laemmle