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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADONIJAH SYKES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY CANOVA

BRIEF OF RESPONDENT

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A. ISSUE

Must staffings in King County Drug Diversion Court (DDC) be open pursuant to article I, section 10 of the Washington State Constitution?

B. FACTS

The facts are sufficiently developed in the Appellant's opening brief and will not be repeated here.

C. ARGUMENT

The King County Prosecutor's Office was instrumental in founding drug courts in the King County Superior Court and it continues to enthusiastically support those courts as an alternative to incarceration for a select group of offenders. However, the State agrees with the defendant that staffings in the King County Superior Court Drug Diversion Court (DDC) are sufficiently similar to other court proceedings in the relevant constitutional respects that they should be presumed open under article I, section 10 of the Washington Constitution. It is the State's belief that, with some adjustments to existing practices, and with the understanding that trial courts will have flexibility to grant limited closures to protect

unusual privacy concerns, DDC staffings can be opened without jeopardizing the effectiveness of drug courts and without violating federal health care laws.

The State will not repeat all of the arguments already presented by the defendant in her opening brief. Rather, this brief will focus on some more particular arguments and provide some additional authorities.

1. COURT PROCEEDINGS SHOULD BE OPEN;
EXCEPTIONS MUST BE RARE AND NARROWLY
TAILORED.

Article I, section 10 of the Washington Constitution guarantees that in all cases justice will be administered openly. The Sixth Amendment to the federal constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Whether public trial rights have been violated is a question of law, reviewed *de novo*. Id.¹

¹ Defendants who enter drug court sign a contract that undoubtedly waives their personal right to a public trial under article I, section 22. It is an open question, however, whether defendants in drug court waive rights under article I, section 10, or whether they have invited the court to err. The State is not asserting an invited error argument because the State seeks a holding by this Court on the merits of the open courts claim. Because most defendants will waive personal rights in order to enter drug court, this brief will focus on the applicability of article I, section 10.

This Court has repeatedly held that these constitutional provisions create a strong presumption that all court proceedings and documents are open to the public; only under rare circumstances should proceedings or documents be closed. The breadth and strength of the presumption of openness is illustrated by the categories of cases that have come before this Court, and by this Court's unwavering application of the principle.

In Cohen v. Everett City Coun., 85 Wn.2d 385, 388, 535 P.2d 801 (1975), this Court held that a superior court erred when it sealed the transcript of an appeal from an administrative license revocation of a sauna parlor operator, noting that the public and the press had a right to see the transcript, as it clearly informed the court's decision on the merits of the appeal. In Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), this Court held that a pretrial motion to dismiss in a criminal case must be open. In Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993), this Court held that criminal trials were presumptively open, even those portions that included testimony of a child sex abuse victim, and that a statute that purported to close such testimony violated the state constitution. In State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 324 (1995), this Court held that a

pretrial suppression hearing in a criminal case was presumptively open to the public. See also Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). In a series of cases, this Court has made clear that jury *voir dire* in criminal cases is presumed to be open, even if sensitive matters might be discussed in the process. See, e.g., In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). In In re Detention of D.F.F., 172 Wn.2d 37, 56 P.3d 357 (2011), this Court held that involuntary commitment proceedings are presumed open. In State v. Chen, 178 Wn.2d 350, 309 P.3d 410 (2013), this Court held that competency proceedings and the attendant mental health reports are presumed to be open. This wide range of decisions suggests that the presumption of openness applies to nearly all court proceedings.²

There have been a few narrowly drawn circumstances where this Court has held that the presumption of openness did not apply

² The presumption of openness can be rebutted under special circumstances, as outlined in this Court's decision in State v. Bone-Club. Before closing a proceeding to the public, a court must consider the following factors and enter specific findings on the record to justify an ensuing closure: (1) The proponent of closure must show a compelling interest, and if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests of the proponent and the public; and (5) the order must be no broader in application or duration than necessary. Bone-Club, 128 Wn.2d at 258-59.

to certain documents or proceedings. There is no "closure" for public trial purposes if the proceeding at issue does not implicate the right to a public trial in the first place. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." Id. So, for instance, this Court has held that mere discovery is not subject to article I, section 10 unless the information obtained through discovery becomes part of the decision making process, even if that discovery was a videotaped deposition created in a courtroom in the presence of a judge. Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 69, 256 P.3d 1179 (2011). In Bennett v. Smith Bundy Berman Britton, PS, 176 Wn.2d 303, 310, 291 P.3d 886 (2013), this Court held that a document was not subject to the presumption of openness where the document had been withdrawn and was not used by the Court to inform a judicial decision. And, in State v. McEnroe, 174 Wn.2d 795, 279 P.3d 861 (2012), this Court held that a defendant facing capital murder charges could submit documents under seal and then retract those documents if the trial court refused to enter a sealing order. Each of these fact patterns is somewhat out of the mainstream, but the cases illustrate that a

proceeding may not be subject to article I, section 10 if it does not influence judicial decision-making.

This Court has now adopted the “experience and logic test” to determine whether the public trial right applies to a particular proceeding. Sublett, 176 Wn.2d at 73.

The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” ... The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” ... If the answer to both is yes, the public trial right attaches and the Waller or Bone-Club factors must be considered before the proceeding may be closed to the public.

Id. (internal citations omitted). In Sublett, the Court addressed whether a trial court’s response to jury questions regarding the jury instructions implicated the right to a public trial; the Court concluded that such proceedings do not satisfy the experience prong of the experience and logic test because courts have not traditionally considered jury questions in open court, and because the logic requiring openness did not apply to such proceedings. Id. at 76-77.

Applying the above cases and the experience and logic test to this situation suggests that drug court proceedings should be presumed open.

The experience prong of the test is somewhat awkward to apply to drug courts since they have existed in Washington for only twenty years, a short period of time by historical standards. It would not be sufficient to simply observe that DDC staffings have always been closed during this period; that would beg the constitutional question. Just as in D.F.F., the question presented is whether a certain procedure of relatively recent vintage comports with the standard of openness created by the constitutional provision adopted in 1889, even if the procedure was codified by court rule or promulgated by statute. Thus, it is necessary to examine comparable proceedings.

Two cases recently decided by this Court—D.F.F. and Chen—involved subject matter similar in relevant respects to the subject of litigation presented here. Both involved proceedings where the superior court was called upon to make decisions that would affect the rights and positions of parties. In both cases, the underlying proceedings and records would necessarily delve into ordinarily private health and mental health records. In each, the trial court was responsible for ensuring that a person with an arguable mental deficiency was treated fairly. Still, this Court held

that the public had a right to access the proceedings and records, despite the possibly private nature of the inquiry.

The situation here is similar in the relevant constitutional respects. As noted above, article I, section 10 provides that “[j]ustice in all cases shall be administered openly ...” A defendant enters DDC as part of adjudicating a criminal “case” filed in a superior court of the State of Washington. The DDC staffing is an integral part (perhaps *the* integral part) of drug court because it is the place and time where the greatest amount of information is shared between the parties, and with the judge. The judge is, and should be, intimately involved in this process, as the parties discuss a participant’s successes and failures as she navigates a difficult road to sobriety. The judge’s rulings can either reward success or attempt to correct the participant if she founders on some obstacle. In either case, the judge’s involvement is certainly the “administration” of justice in a “case” filed in a superior court. The judge’s participation is akin to the role played by the judges in D.F.F. and Chen. Thus, although there is no lengthy history of drug courts per se, Washington precedent suggests that similar proceedings must be open.

The "logic" prong of the test, likewise, suggests that these proceedings should be open. The public's interest in knowing how and why cases proceed through DDC is just as strong as its interest in knowing how cases move through the general criminal system, or through family court, or through the involuntary treatment process. Thus, public oversight is warranted.

For these reasons, DDC staffings satisfy the "experience and logic" test and should be presumptively open under article I, section 10.

2. THE TRIAL COURT'S RATIONALES FOR CLOSURE OF DRUG COURT STAFFINGS ARE NOT SUFFICIENT TO OVERCOME THE PRESUMPTION OF OPENNESS.

In its ruling denying Sykes's motion to rescind the drug court agreement, the trial court offered several rationales in support of closed staffings. The State respectfully suggests that none are sufficient to justify closure. Each will be discussed below.

a. DDC Staffings Are "Non-Adversarial" And Do Not Involve Resolution Of Disputed Facts.

The trial court reasoned that "[a] DDC staffing is not an 'adversarial proceeding,' i.e., it is not a hearing where disputed

facts are resolved[,]” so closure is permitted. CP 164. In the same vein, the trial court noted that “DDC staffings involve the discussion of issues relevant to the best course of individualized treatment for each drug court participant ... [and thus] are non-judicial in nature and are more akin to a staffing of health care professionals discussing and recommending the best medical treatment strategy for a particular patient.” Id.³

Although it was not apparent when the trial court issued its ruling in this case, this Court has now rejected the “non-adversarial” and “no disputed facts” rationales as a basis to close proceedings.

This Court held:

We decline to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other. The resolution of legal issues is quite often accomplished during an adversarial proceeding, and disputed facts are sometimes resolved by stipulation following informal conferencing between counsel. The distinction made by the Court of Appeals will not adequately serve to protect defendants’ and the public’s right to an open trial.

³ See Hon. Peggy Fulton Hora, Drug Treatment Courts in the Twenty-First Century: the Evolution of the Revolution in Problem-Solving Courts, 42 Ga. L.Rev. 717, 746 (2008) (comprehensive description of the drug court model).

Sublett, 176 Wn.2d at 72. Countless ordinary court hearings involve argument and resolution of legal questions that are based upon undisputed facts, yet the proceeding must be open to ensure that the public can fully understand the basis for the court's reasoning and its ruling. Thus, the fact that a proceeding does not involve disputed facts is not a reason, standing alone, to permit closure.

On a related point, the King County Superior Court in an earlier communication indicated its belief that DDC staffings need not be open because "guilt or innocence" was not determined in drug court. CP 169. But article I, section 10 is a provision designed to ensure open courts generally, not simply in criminal courts. The applicability of the provision cannot turn on a "guilt or innocence" test, or it would apply only to criminal cases. Moreover, there are many criminal proceedings that do not strictly pertain to guilt or innocence—like sentencings—but clearly the constitutional requirement applies to those proceedings. Thus, whether a proceeding relates directly to "guilt or innocence" cannot be of constitutional significance.

The trial court also seemed to say in its order that closure is tolerable because decisions made in staffings are preliminary, and

final decisions on treatment and sanctions will occur in open court.⁴ While this justification might be permissible for brief matters like side-bar conferences, it is not a sufficient basis on which to justify wholesale closure of important hearings. Staffings appear to be the “meat and potatoes” of the drug court process. The judge may pour over documents, ask questions, observe participants, consider factual representations and interpretations of facts from the parties (somewhat akin to an informal taking of testimony), and consider legal arguments. If such a full discussion of a participant’s situation is conducted in a closed hearing, and not resolved until a subsequent hearing, an interested observer would have missed the opportunity to hear and see the closed hearing. It is unlikely that discussion at the final hearing would be as detailed, as the parties are invited to “supplement” their presentations, rather than recreate the original hearing in full. The staffing would be an invisible tail wagging the dog. Thus, an observer would not be privy to the scope of information considered by the court.

⁴ “At a staffing, the Court hears recommendations from the case manager, the deputy prosecuting attorney and the attorney for the participant. The judge considers those recommendations for purposes of the next court hearing for that participant. At that hearing, the parties may modify or make their additional recommendations to the Court. After considering any additional input from the participant, the Court makes a decision on the course of treatment.” CP 164.

Moreover, although it is certainly true that a DDC judge endeavors to provide the best possible outcome for a participant, the analogy to medical practitioners is flawed in an important respect. Doctors fully inform and consult with their patients so the patient can consent to treatment. DDC judges are not, however, seeking informed consent. Rather, the judge tries to discern the best course of treatment, but he will impose that course of treatment on the participant, even if the participant objects. Doctors prescribe and provide treatment; judges impose orders and sanctions. Thus, even though the process is more cooperative and less confrontational than an ordinary adversarial proceeding, it is still an adjudicatory proceeding where the judge will rule, and that ruling may be adverse to the party's desires. And, of course, decisions made at staffings and at subsequent hearings can lay the groundwork for eventual termination of a defendant from drug court, as occurred here, followed by conviction and sentencing.

For these reasons, the trial court was incorrect in believing that the character of DDC staffings takes them outside the ambit of article I, section 10. They are still adversarial proceedings.

b. Sensitive Information Is Shared.

The trial court seemed to believe that because drug courts necessarily gather sensitive information about the medical, psychological and personal history of participants, the traditional presumption of openness should not apply. CP 164. But, as discussed above, many court proceedings require consideration of highly sensitive matters, but those proceedings are still subject to the presumption of openness. For instance, a child victim's testimony as to sexual abuse must presumptively be presented in open court, despite the fact that the testimony can be highly embarrassing, and the child victim had no control whatsoever of the events that led to the testimony. Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d at 211-12. Similarly, as discussed above, this Court has held that involuntary treatment proceedings in mental health courts are presumed open, notwithstanding the fact that such litigation necessarily includes consideration of otherwise private medical and mental health records. In re Detention of D.F.F., 172 Wn.2d at 39-44. This Court has also held that mental health reports for competency proceedings are presumed to be open. State v. Chen, 178 Wn.2d at 354-58. And, divorce proceedings frequently include scandalous

(and sometimes spurious) allegations as to all manner of private misbehavior, yet litigation over such matters must generally be conducted in open court. Bennett v. Smith Bundy Berman Britton, PS, 176 Wn.2d at 310.⁵ Although drug courts, too, may require consideration of sensitive personal information, the subject matter of drug courts is not dissimilar from the subject matter of proceedings that this Court has clearly held must be open. Thus, drug courts should be open, too.⁶

⁵ The Bennett court held that open court principles were not violated when a particular document was not used by the Court to inform a decision. Bennett, at 312. However, it was clear that this document was an exception; the overarching presumption was that documents should be public.

⁶ Although not directly articulated by the trial court's order, much of the modern concern about open records is driven by the recognition that "openness" today means something different than "openness" meant twenty-five years ago. Records used to be "open" but relatively obscure because physical storage of paper in a clerk's office made casual browsing impractical. Now, as court records have become electronic, the possibility arises that ordinary citizens might have greater access to electronic records, and that such records can be easily and widely disseminated. See Peter A. Winn, Judicial Information Management in an Electronic Age: Old Standards, New Challenges, 3 Fed. Cts. L. Rev. 135 (2009). This concern has implications for witnesses, victims and jurors as well as for defendants. See, e.g., Rebecca Hulse, Privacy and Domestic Violence in Court, 16 Wm. & Mary J. Women & L. 237 (2010). No Washington cases have considered whether "open" court files in the modern age means "on the internet for all to see and broadcast" or whether "open" for constitutional purposes, is limited to a more general ability to review particular records. To the extent the King County Superior Court is concerned that drug court files will be freely available for browsing from any laptop, that concern is unwarranted at present because local systems are generally not as accessible as might be imagined. These considerations will come to the fore as systems improve and expand. See Judicial Information Management, supra, at 158-64 (discussing tiers of access to federal electronic filing systems).

c. Openness Will Chill Participation In Drug Courts.

The trial court ruled that openness would discourage people from participating in drug court. The court's concern seems to be driven by the view that every piece of personal data will necessarily be open in every case. That view is unfounded because it fails to factor in the trial court's discretion to close proceedings or to seal or redact documents that contain *particularly* sensitive information where the participant can show a serious and compelling threat to an important interest, and where the trial court makes appropriate findings. Bone-Club, at 258-59. This discretion ensures that damaging information can be kept private. See, e.g., Chen, at 358-59 ("The record reflects that the trial court properly considered the Ishikawa factors and redacted certain information."). Litigants in both civil and criminal cases often sacrifice some measure of privacy in litigation. If this concern were sufficient to justify closure, it would swallow the rule.

Whether potential drug court candidates will refuse in large numbers to participate is ultimately an empirical question, but it seems unlikely. Drug court participants enroll in the program because they have been charged with a felony offense; many have

long criminal histories. The ordinary litigation of criminal drug cases often involves disclosure of personal and perhaps unflattering information, especially at sentencing if treatment options are sought. The quantum of information revealed through drug court may sometimes be higher, but the quality of that information is unlikely to have a different effect on the defendant in a drug court proceeding than the criminal litigation itself. In other words, it seems likely that drug court participants will decide that the benefits of the program outweigh the modest additional disclosure of information that might occur.

d. HIPAA.

The trial court ruled that open drug court proceedings will violate federal law limiting dissemination of health records.⁷ This ruling is incorrect. The Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936

⁷ "The disclosure of such mental and physical health information in open court would also clearly violate the privacy protections of the Health Insurance Portability and Accountability Act (HIPAA). Participants in Drug Court are asked to sign specific confidentiality waivers under the Act, but only to allow drug court team members to discuss health and treatment records with treatment providers and other DDC team members. The secondary disclosure of such information is not permitted under HIPAA and that restriction may not be waived by the patient. The disclosure of this information is limited to those in the criminal justice system who are working to monitor the patient/participant's progress. 42 C.F.R. § 2.35(a). See also the disclosure restrictions set forth in 42 U.S.C. § 290dd." CP 165.

(codified as amended in scattered sections of 42 U.S.C.) and its implementing regulations (the Privacy Rule, 45 C.F.R. parts 160 and 164), do not apply to the King County Superior Court because a court is not a "covered entity." HIPAA applies only to health plans, health care clearinghouses, and health care providers that transmit health information electronically. 42 U.S.C. § 1320d-1(a). The Privacy Rule, promulgated by the Department of Health and Human Services (HHS) pursuant to HIPAA, likewise applies only to health plans, health care clearinghouses, and health care providers that transmit health information electronically, defined as "covered entities." See 45 C.F.R. §§ 160.102(a), 164.104(a).

The plain language of HIPAA and the Privacy Rule demonstrate that a court is not subject to this federal law. Moreover, HHS stated in its commentary to the Privacy Rule that it did not "believe that there would be any situations in which a covered entity would also be a judicial or administrative tribunal" and that the Privacy Rule "does not regulate the behavior of law enforcement officials or the courts." Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82524, 82680 (Dec. 28, 2000). Thus, HIPAA does not place limits

on this Court's interpretation of state constitutional provisions that are designed to ensure full public access to the courts.

3. THE REMEDY FOR AN IMPROPER CLOSURE OF DRUG COURT STAFFINGS IS TO VACATE THE DRUG COURT AGREEMENT.

Sykes asks this Court to nullify her drug court contract and restore her full trial rights. This remedy seems counterintuitive, as Sykes's request—to opt-in to drug court—was exactly what she was given. However, because the State has not asked that this Court apply the invited error doctrine, that is likely the appropriate remedy. Sykes is correct that during the approximately month-long period where she and the trial court were testing her suitability for drug court, a number of closed staffings occurred. These staffings influenced the court's decision to accept Sykes into drug court. Thus, the staffings were part of the court's decision. The remedy that matches the violation is to restore Sykes to the position she was in before the violation occurred—leaving for another day whether the same result would apply if error was invited.

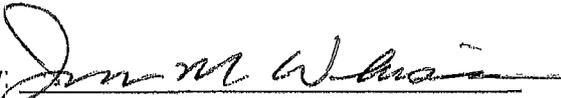
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to hold that DDC staffings should be presumed open, and to reverse the order of the trial court, and remand for further proceedings consistent with this Court's opinion.

DATED this 13th day of January, 2014.

Respectfully submitted,

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Today I directed electronic mail addressed to the attorneys for the petitioner, Eric Nielsen @ nielsene@nwattorney.net and Casey Grannis @ grannisc@nwattorney.net, containing a copy of the Brief of Respondent, in STATE V. ADONIJAH LACROY SYKES, Cause No. 87946-0, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Subject: State v. Andonijah Lacroy Sykes, Supreme Court No. 87946-0

Please accept for filing the attached documents (Brief of Respondent) in State of Washington v. Andonijah Lacroy Sykes, No. 87946-0.

Thank you.

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