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NO. 87946-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADONIJAH SYKES,

Petitioner.

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

The Honorable Gregory Canova, Judge

PETITIONER
BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining To Assignments Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. Drug Court.	1
2. Sykes's Involvement With Drug Court.	4
C. <u>ARGUMENT</u>	6
1. DRUG COURT STAFFINGS ARE PART OF THE ADMINISTRATION OF JUSTICE AND THEREFORE MUST BE PRESUMPTIVELY OPEN TO THE PUBLIC.....	6
a. <u>The Rights At Stake And The Values They Serve</u>	7
b. <u>Drug Court Staffings, Like All Judicial Proceedings, Are Presumptively Open To The Public And Must Remain Open Absent Consideration Of The Requisite Factors For Closure</u>	11
c. <u>The Error Is Structural And The Remedy Should Be Commensurate With The Scope Of The Violation</u>	29
D. <u>CONCLUSION</u>	33

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Allied Daily Newspapers of Wash. v. Eikenberry</u> , 121 Wn.2d 205, 848 P.2d 1258 (1993).....	10, 15, 16
<u>Bennett v. Smith Bundy Berman Britton, PS</u> , 176 Wn.2d 303, 291 P.3d 886 (2013).....	12, 26, 32
<u>Dreiling v. Jain</u> , 151 Wn.2d 900, 93 P.3d 861 (2004).....	9-11, 26
<u>Federated Publ'ns, Inc. v. Kurtz</u> , 94 Wn.2d 51, 615 P.2d 440 (1980).....	11
<u>In re Dependency of J.A.F.</u> , 168 Wn. App. 653, 662, 278 P.3d 673 (2012).....	19
<u>In re Detention of D.F.F.</u> , 144 Wn. App. 214, 183 P.3d 302 (2008), <u>aff'd</u> , 172 Wn.2d 37, 256 P.3d 357 (2011).....	7
<u>In re Detention of D.F.F.</u> , 172 Wn.2d 37, 256 P.3d 357 (2011).....	9, 11, 28, 30
<u>In Detention of Ticeson</u> , 159 Wn. App. 374, 246 P.3d 550 (2011).....	8, 9, 21
<u>Mills v. Western Washington University</u> , 170 Wn.2d 903, 246 P.3d 1254 (2011).....	11
<u>Rufer v. Abbott Labs.</u> , 154 Wn.2d 530, 114 P.3d 1182 (2005).....	25, 26
<u>Seattle Times Co. v. Ishikawa</u> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	14-18
<u>Seattle Times Co. v. Serko</u> , 170 Wn.2d 581, 243 P.3d 919 (2010).....	16

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

<u>State v. Beskurt</u> , 176 Wn.2d 441, 293 P.3d 1159 (2013).....	30
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	7, 11, 14, 15, 17, 18, 30
<u>State v. Chen</u> , ___ Wn.2d ___, 309 P.3d 410 (2013).....	15-17, 25
<u>State v. Drum</u> , 168 Wn.2d 23, 225 P.3d 237 (2010).....	21
<u>State v. Duckett</u> , 141 Wn. App. 797, 173 P.3d 948 (2007).....	18
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	6, 7, 11
<u>State v. Lormor</u> , 172 Wn.2d 85, 257 P.3d 624 (2011).....	14
<u>State v. Madsen</u> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	17
<u>State v. McEnroe</u> , 174 Wn.2d 795, 279 P.3d 861 (2012).....	26
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010).....	7, 13, 30
<u>State v. Paumier</u> , 155 Wn. App. 673, 230 P.3d 212 (2010), aff'd, 176 Wn.2d 29, 288 P.3d 1126 (2012).....	19

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Richardson</u> , 177 Wn.2d 351, 302 P.3d 156 (2013).....	16
<u>State v. Rivera</u> , 108 Wn. App. 645, 32 P.3d 292 (2001).....	21, 22
<u>State v. Sadler</u> , 147 Wn. App. 97, 168, 193 P.3d 1108 (2008).....	21, 22
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	8, 21, 22, 27, 28
<u>State v. Strobe</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	18
<u>State v. Wise</u> , 176 Wn.2d 1, 288 P.3d 1113 (2012).....	6, 8, 10, 12, 13, 15, 18, 29, 30
<u>Tacoma News, Inc. v. Cayce</u> , 172 Wn.2d 58, 256 P.3d 1179 (2011).....	25, 26
<u>Woods v. Rhay</u> , 68 Wn.2d 601, 414 P.2d 601 (1966).....	22
 <u>FEDERAL CASES</u>	
<u>Landmark Commc'ns, Inc. v. Virginia</u> , 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978).....	10
<u>Presley v. Georgia</u> , 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).....	6
<u>Press-Enterprise Co. v. Superior Court of California, Riverside County</u> , 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).....	10, 14, 28

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Press-Enterprise Co. v. Superior Court of California, Riverside County,
478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)..... 28

Waller v. Georgia,
467 U.S. 39, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984)..... 6, 13, 14, 30

RULES, STATUTES AND OTHER AUTHORITIES

Chapter 71.05 RCW..... 9

Chapter 71.09 RCW..... 9

Health Insurance Portability and Accountability Act..... 18, 19

Laws of 1999, ch. 197 § 9..... 29

RCW 2.28.170(1)..... 1

RCW 2.28.170(2)..... 2

U.S. Const. amend. VI 1, 6, 8, 27

Wash. Const. art. I, § 10 1, 3, 5-16, 19, 25, 26, 28-30, 32

Wash. Const. art. I, § 22 1, 6, 8, 12, 13, 15, 16, 27, 29, 30

A. ASSIGNMENTS OF ERROR

1. The private Drug Court proceedings violate article I, section 10 of the Washington Constitution, article I, section 22 of the Washington Constitution, and the Sixth Amendment of the United States Constitution.

2. The court erred in concluding the private Drug Court proceedings do not violate article I, section 10 of the Washington Constitution.

3. The court erred in denying petitioner's motion to rescind and vacate the Drug Court waiver and agreement on the basis that the closed Drug Court proceedings did not violate article I, section 10 of the Washington Constitution.

Issue Pertaining to Assignments of Error

Whether Drug Court team meetings known as "staffings" are subject to the constitutional requirement of open court proceedings and public trials?

B. STATEMENT OF THE CASE

a. Drug Court

The legislature authorizes jurisdictions to establish and operate drug courts. RCW 2.28.170(1). A "drug court" is "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).

The King County Superior Court is among those jurisdictions that operates a drug court and has adopted a manual to guide judges and practitioners. CP 67-86. The manual envisions the judge, the prosecutor, defense counsel, and the program manager to collaborate as a team to ensure a criminal defendant's successful completion of the program. CP 69, 71. Pre-court team meetings are held each morning to review cases and team meetings are also held once per week to discuss problematic cases. CP 71. The judge leads these meetings. CP 71. If consensus cannot be reached during these meetings, the judge makes the final decision. CP 71. It is undisputed that these meetings, referred to as "staffings," are closed to the public, including the defendant, as part of the ordinary course of Drug Court administration. CP 9, 56. These staffings take place in the judge's chambers or at a sidebar. CP 9. Periodic review hearings are held in open court. CP 70.

On March 7, 2011, the King County Prosecutor's Office (KCPO) submitted a memorandum advocating that Drug Court staffings be open to the public in order to comply with the open courts mandate of article I, section 10 of the Washington Constitution. CP 94-95. According to the KCPO, "Drug Court staffings are designed to assess the defendant's treatment compliance. Evidence regarding drug use, criminal law violations, attendance, and defendant's behavior is routinely presented and discussed. These discussions include the presentation of differing positions from the parties and case manager. The court participates in the discussions by sharing observations and asking questions. Additionally, the court will frequently notify the parties of its preliminary thoughts on changes to the defendant's treatment plan that will be ordered, or sanctions the court is considering. These staffings are adversarial, evidentiary, and subject to the open court provision of the constitution." CP 94.

The King County Superior Court, through a letter signed by the presiding judge and other judges, responded that the current practice complied with the law. CP 97-104. In August 2011, the KCPO again asked the King County Superior Court to consider changes to that practice. CP 106-08. On January 11, 2012, the Superior Court rejected this request. CP 110-11.

b. Sykes's Involvement With Drug Court

In 2010, the State charged Adonijah Sykes with possession with intent to deliver cocaine and possession of less than 40 grams of marijuana under cause number 10-1-04372-8 and possession with intent to deliver cocaine under cause number 10-1-06021-5. CP 1-2, 186-87. On February 28, 2011, Sykes opted into Drug Court under both cause numbers. CP 17, 23. As a prerequisite, Sykes signed identical drug court waivers and agreements in both cause numbers in which Sykes gave up her jury trial rights. CP 18-22, 24-28.

Under the agreement, participants are subject to the requirements and recommendations of Drug Court staff regarding treatment. CP 19. Participants are warned that sanction or termination may result for failure to comply with Drug Court requirements. CP 19. Criminal charges are dismissed if a participant completes all phases of treatment successfully and makes satisfactory progress through the Drug Court program. CP 22. In the event of termination from the Drug Court program, a bench trial is held on stipulated facts and, upon a finding of guilt, the defendant becomes subject to a criminal sentence. CP 18, 20-22.

A number of closed staffings in Sykes's case occurred throughout the course of her participation in Drug Court. CP 34-51. During these

staffings, reports were made of what Sykes had or had not done, allegations of noncompliance were set forth, recommendations about what to do were made, sanctions were discussed, warnings were given and instructions proffered. CP 34-51.

At the April 10, 2012 staffing, the case manager made allegations relating to Sykes's noncompliance and prior sanctions imposed. CP 10, 51-53. The case manager claimed Sykes forged her sober support slips, missed treatment sessions, missed urinalysis tests, and refused services. CP 10, 51-53. The case manager recommended that Sykes be terminated from Drug Court or that she be placed on Zero Tolerance until graduation. CP 10, 53. The prosecutor recommended termination. CP 10.

At the following April 12, 2012 review hearing, the court granted the State's motion to terminate Sykes from the Drug Court program. CP 51, 298. In response, the defense moved to rescind and vacate the Drug Court waivers and agreements, arguing the closed staffings violated the open courts requirement of article I, section 10 of the Washington Constitution. CP 8-53. The defense further argued the appropriate remedy was the restoration of Sykes's rights to a jury trial in both cases and that she be allowed to proceed to trial as if she had never opted into Drug Court. RP 37, 58; CP 161.

The State agreed the closed Drug Court staffings violated article I, section 10. CP 54-65; RP 42-45. The State suggested an appropriate remedy would be to restore Sykes to the position she held upon initially entering the Drug Court program, essentially wiping the slate clean and giving her another opportunity to complete the program. RP 49.

Following argument, the court denied the defense motion to rescind and vacate the Drug Court waivers and agreements, finding the closed Drug Court staffings are not subject to the open court guarantee of article I, section 10. CP 163-76. Sykes sought direct discretionary review in the Supreme Court. Further trial proceedings were stayed. CP 376-77. This Court granted review.

C. ARGUMENT

1. DRUG COURT STAFFINGS ARE PART OF THE ADMINISTRATION OF JUSTICE AND THEREFORE MUST BE PRESUMPTIVELY OPEN TO THE PUBLIC.

Article I, section 10 expressly guarantees the right to open court proceedings in all cases. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The federal and state constitutions also guarantee the right to a public trial to every defendant in a criminal proceeding. Wash. Const. art I, § 22; U.S. Const. amend VI; State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012); Presley v. Georgia, 558 U.S. 209, 212, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Waller v. Georgia, 467 U.S. 39, 44-46, 104

S. Ct. 2210, 81 L.Ed.2d 31 (1984). "These provisions have a commonality: they protect the right to a *public* proceeding." State v. Momah, 167 Wn.2d 140, 147, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010).

The trial court here concluded the right to an open and public court proceeding does not apply to Drug Court staffings. CP 163-76. That determination is entitled to no deference on review. Whether a court has violated the defendant's right to an open court and a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173-74; In re Detention of D.F.F., 144 Wn. App. 214, 218, 183 P.3d 302 (2008), aff'd, 172 Wn.2d 37, 256 P.3d 357 (2011). The private Drug Court staffings in Sykes's case qualify as court proceedings and are not exempt from constitutional command. The court violated the open court and public trial provisions in holding the staffings in private without first considering the requisite factors to justify closure.

a. The Rights At Stake And The Values They Serve.

"Justice in all cases shall be administered openly." Wash. Const., article 1, section 10. "The section 10 guaranty of public access to proceedings and the section 22 public trial right 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). "It seems

clear that although they have somewhat different purposes, the two sections confer essentially the same rights and share a common concern of fairness." In Detention of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011).

The Supreme Court has "historically analyzed allegations of a court closure under either article I, section 10 or article I, section 22 analogously, although each is subject to different relief depending upon who asserts the violation." State v. Sublett, 176 Wn.2d 58, 71 n.6, 292 P.3d 715 (2012) (C. Johnson, J., lead opinion). Sykes claims a violation of her personal right to open court proceedings under article I, section 10 as well as her right to a public trial under article I, section 22 and the Sixth Amendment.¹

Drug Court proceedings are criminal proceedings. The State charged Sykes with crimes and, if terminated from Drug Court and found guilty, she will be subject to a criminal sentence. CP 1-2, 18, 20-22, 186-87. As a defendant in a criminal case, Sykes has a personal right to a public trial under article I, section 22 of the Washington Constitution and the Sixth Amendment. Wise, 176 Wn.2d at 9.

¹ The motion for discretionary review framed the issue as whether the closed staffings violate article I, section 10. In this brief, Sykes also claims a violation of article I, section 22 and the Sixth Amendment because she is a defendant in a criminal case where those rights are implicated.

Sykes also has a personal right to open court proceedings under article I, section 10. Article I, section 10, by its plain language, applies to *all* cases, both civil and criminal. Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). Civil litigants are able to assert a personal right to an open court proceeding under article I, section 10. In re Detention of D.F.F., 172 Wn.2d 37, 39-41 256 P.3d 357 (2011) (Sanders, J., lead opinion) (those subject to involuntary civil commitment proceeding under chapter 71.05 RCW); Ticeson, 159 Wn. App. at 381(those subject to involuntary civil commitment proceeding under chapter 71.09 RCW).

There is no sound reason why defendants in a criminal case cannot do the same. Sykes is a member of the public and as such is entitled to article I, section 10 protection. "Article I, section 10 provides for her right as a member of the public to attend the proceedings, but also her individual right to have the proceedings open to the observation and scrutiny of the general public." D.F.F., 172 Wn.2d at 40. The public monitors the fairness of the proceedings and the appropriateness of the result—and article I, section 10 grants Sykes the right to demand that protection. Id. Sykes also has a right to open proceedings to permit family, friends, and other interested individuals to be present at the proceedings. Id. Sykes therefore has standing to assert an open

administration of justice challenge under article I, section 10 based upon the exclusion of the general public from the staffings. Id. at 40-41.

The public trial right is a core safeguard in our system of justice. Wise, 176 Wn.2d at 5. "Our founders did not countenance secret justice. '[O]perations of the courts and the judicial conduct of judges are matters of utmost public concern.'" Dreiling, 151 Wn.2d at 908 (quoting Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978)).

"Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity." Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993). "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The open administration of justice assures the structural fairness of the proceedings and affirms their legitimacy. D.F.F., 172 Wn.2d at 40. Conversely, "[p]roceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." Dreiling, 151 Wn.2d at 908.

- b. Drug Court Staffings, Like All Judicial Proceedings, Are Presumptively Open To The Public And Must Remain Open Absent Consideration Of The Requisite Factors For Closure.

Article I, section 10's directive that justice in all cases be administered openly "is not limited to trials but includes all judicial proceedings." Mills v. Western Washington University, 170 Wn.2d 903, 913, 246 P.3d 1254 (2011) (holding article I, section 10 does not apply to quasi-judicial proceedings conducted by administrative agencies) (quoting Federated Publ'ns, Inc. v. Kurtz, 94 Wn.2d 51, 60, 615 P.2d 440 (1980)). The Framers had "the courts within the judicial branch in mind when they spoke of the administration of 'justice in all cases.'" Mills, 170 Wn.2d at 914.

The right to a public trial under article I, section 22 similarly encompasses more than the actual criminal trial itself. It includes pre-trial proceedings, such as pre-trial motions and jury selection. See Bone-Club, 128 Wn.2d at 257 (public trial right extends to pretrial suppression hearing); Easterling, 157 Wn.2d at 179-80, 182 (right to public trial was

violated where the trial court entertained a co-defendant's motions for severance and dismissal in a closed courtroom without justifying the closure); Wise, 176 Wn.2d at 11 (right to public trial attaches to jury selection).

The Drug Court staffings at issue in the present case are judicial proceedings subject to the command of article I, section 10 and article I, section 22. A superior court judge presides over these staffings, during which allegations and evidence of a defendant's treatment compliance, criminal law violations and behavior are routinely presented and discussed. CP 34-53, 94. The parties and case manager may present different positions on these matters. CP 94. The judge is in charge of making a decision when consensus cannot be reached. CP 71. The judge will frequently notify the parties of its preliminary thoughts on changes to the defendant's treatment plan that will be ordered, or sanctions the court is considering. CP 94. The staffings form the basis for what is done at the review hearings and, ultimately, inform what happens in the event the case manager or the prosecutor requests a defendant be terminated from the Drug Court program.

"Scrutiny by the public is a check on the conduct of judges and of the power of the courts." Bennett v. Smith Bundy Berman Britton, PS, 176 Wn.2d 303, 310, 291 P.3d 886 (2013) (Chambers, J., lead opinion).

An open judicial process deters misconduct by participants and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6. "Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers, . . . will perform their respective functions more responsibly in an open court than in secret proceedings." Id. at 17 (quoting Waller, 467 U.S. at 46 n.4).

These concerns attach to the closed Drug Court proceedings. The model for Drug Court may be collaborative, but as the State points out, drug courts can go awry even with the best of intentions. CP 64 (citing Very Tough Love, <http://www.thisamericanlife.org/radio-archives/episode/430/very-tough-love>, for the account of a Georgia judge disciplined for the manner in which she ran drug court, which included the infliction of extremely punitive measures for relapses and other broken rules). A participant may be the subject of unfair or overly harsh sanctions that have their genesis in the closed staffings presided over by the judge where allegations and recommendations for noncompliance are made. Further, a participant may be treated differently from another, similarly situated participant, but in the absence of public scrutiny, there is no way to fairly assess whether unequal treatment has taken place.

There is a strong presumption that *all* court proceedings are open to the public under article I, sections 10 and 22. Momah, 167 Wn.2d at

148; State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011). This presumption applies to Drug Court proceedings, just as it does to all other judicial proceedings.

"The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Waller, 467 U.S. at 45 (quoting Press-Enterprise Co., 464 U.S. at 510). Before restricting public access to a judicial proceeding, five requirements must be met under what has been called the Ishikawa or Bone-Club analysis: (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than the right to a fair trial, a serious and imminent threat to that compelling interest; (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. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) (under article I, section 10, closure of pretrial hearing involving a motion to dismiss was improper); Bone-Club, 128 Wn.2d at 258-60 (employing same closure

standard for both article I, section 10 and article I, section 22). The trial court errs when it fails to conduct the Ishikawa/Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12.

There is no indication the court considered the Ishikawa/Bone-Club factors before conducting the private staffings at issue here. The reason is obvious. The court did not believe the staffings were subject to the open courts requirement. From the court's point of view, no Ishikawa/Bone-Club analysis was necessary to justify any closed staffing. The back and forth between the prosecutor's office and the superior court judges show this issue was on the court's radar during the course of Sykes's participation in Drug Court and well before Sykes made her motion to vacate the Drug Court waiver and agreement. CP 94-111. The court dug in its heels on the issue, believing the staffings were exempt from the open court requirement altogether.

The Drug Court has a de facto policy of conducting closed staffings in every case. This Court's "public-trial-rights jurisprudence, however, requires case-by-case analysis." State v. Chen, ___ Wn.2d ___, 309 P.3d 410, 414 (2013) (holding once a competency evaluation becomes a court record, it also becomes subject to the constitutional presumption of openness). Blanket exemptions from constitutional requirements are inappropriate. Chen, 309 P.3d at 414; see Eikenberry, 121 Wn.2d at 207,

211 (striking down statute that prohibited the courts from disclosing the identities of child victims of sexual assault to the public because although the asserted interests of protecting child victims from further trauma and harm and ensuring their constitutionally-guaranteed privacy "on an individualized basis may be sufficient to warrant court closure," the statute precluded the trial court from engaging in constitutionally-mandated individualized determinations).

The Drug Court's de facto, automatic limitation on the right to open courts improperly precludes the case-specific analysis mandated by article I, section 10 and article I, section 22. Legislation that "does not permit . . . individualized determinations, is not in accordance with the Ishikawa guidelines, and is therefore unconstitutional." Eikenberry, 121 Wn.2d at 211. A court practice that does not allow for individualized determination of whether a closure is warranted suffers from the same defect. "[A] statute cannot mandate privacy where the constitution requires openness." Chen, 309 P.3d at 413. Court rules concerning access to court records and proceedings must likewise be construed consistent with constitutional guaranties of openness. See State v. Richardson, 177 Wn.2d 351, 363, 302 P.3d 156 (2013) (trial court erred in failing to apply Ishikawa analysis for continued sealing of court file on the record); Seattle Times Co. v. Serko, 170 Wn.2d 581, 598, 243 P.3d 919 (2010) (vacating

sealing order of documents marked as exhibits or admitted into open court for failure to conduct constitutional analysis). If legislation and court rules do not trump constitutional requirements, there is no reason why a Drug Court's de facto policy of closing the proceedings should be treated any differently.

The trial court expressed skepticism that it would be possible to do a Bone-Club analysis to "selectively open and close proceedings on any given day" because of the large number of Drug Court cases calendared. RP 15, 26-27. That concern withers in light of the fact that all court proceedings are presumptively open. The only time there would be a need to do a Bone-Club analysis is if there was a request for closure. So it is not the case that a Bone-Club analysis would need to be done as a matter of routine in a large number of cases. Furthermore, to the extent a court's calendaring practice gets in the way of honoring constitutional requirements, then it is the practice that must change, not the constitution. Efficiency in the administration of justice has never been exalted over constitutional requirements. See State v. Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010) (courts "must not sacrifice constitutional rights on the altar of efficiency.").

The trial court believed Drug Court staffings should remain private because personal health-related information is disclosed. CP 164-65.

Sensitive information is often revealed during the course of all sorts of judicial proceedings. That is not a reason to create a blanket exemption from the open courts mandate. Although privacy interests related to disclosure of sensitive information are important considerations, such interests are contemplated by the Ishikawa/Bone-Club factors and can be considered in whether to close a proceeding or seal a record. Chen, 309 P.3d at 414.

The trial court referenced the privacy protections of the federal Health Insurance Portability and Accountability Act (HIPAA) as a reason to resist an open court. CP 165. But again, the privacy interest in one's medical information is one of the competing interests a court must weigh before conducting a closed proceeding. State v. Strode, 167 Wn.2d 222, 235-36, 217 P.3d 310 (2009) (Fairhurst, J., concurring) (addressing juror privacy); State v. Duckett, 141 Wn. App. 797, 808, 173 P.3d 948 (2007) (same). The factor is taken into account. The Ishikawa/Bone-Club test incorporates privacy concerns and provides a way to protect them in the least restrictive manner. "To balance the public trial right and other competing rights and interests, this court and the United States Supreme Court have developed a specific analytic framework." Wise, 176 Wn.2d at 10. Privacy in one's health information is an interest that a trial court may consider when determining whether to close part of a trial, though it

must be weighed against the defendant's and public's interests in an open proceeding. Id. at 10 n.3; see State v. Paumier, 155 Wn. App. 673, 685-86, 230 P.3d 212 (2010) (juror's right to keep medical conditions and treatment private under HIPAA subject to requirement that court consider reasonable alternatives to closure), aff'd, 176 Wn.2d 29, 288 P.3d 1126 (2012); see also In re Dependency of J.A.F., 168 Wn. App. 653, 659, 662, 278 P.3d 673 (2012) (trial court relied on HIPAA as basis to close portion of parental right termination trial; Court of Appeals concluded the closure violated article I, section 10).

The trial court believed subjecting Drug Court staffings to the open court requirement would have a chilling effect on the willingness of "many" individuals to choose to participate in Drug Court because their sensitive, personal information would be open to the public. CP 164-65; RP 16-17, 35. This claim is worthy of comment for two reasons. First, the court in this manner acknowledges information presented and discussed during closed staffings is not presented and discussed in open court. Review hearings held in open court are not simply reproductions of what occurred in closed staffings.

Second, the court offers no empirical support for its bald assertion that many individuals would be deterred from entering Drug Court if staffings took place in an open courtroom. The State, for its part, believed

there would be no chilling effect in most cases. RP 45. It seems a stretch to conclude an appreciable number of people will refuse to enter Drug Court — and thereby pass up the opportunity to avoid a criminal sentence by having criminal charges dismissed — simply because personal information may be presented in open court.²

It may further be pointed out that Pierce County has a Drug Court but does not have closed staffings. RP 6. There is more than one way to do things. In any event, constitutional requirements do not yield to unconstitutional practices, even if the latter arguably serve some abstract benefit.

The trial court and the superior court judges emphasized the collaborative model of Drug Court in resisting the argument that the staffings must be open to the public to comply with article I, section 10. CP 165, 167-68. No explanation is given for the unstated premise that holding the staffings in open court would destroy the collaborative nature of Drug Court. Collaboration can take place in open court just as it does in a private setting. The collaborative nature of these proceedings does not defeat the open court requirement.

² Sykes's counsel represented the majority of her private information ended up being discussed in open court. RP 35.

The superior court judges complained Drug Court would be less effective and become "more adversarial" if a judge does not participate in the staffings. CP 167-68. Sykes does not advocate for the removal of judges from the staffings. RP 28. Judges should be a part of those proceedings as they presumptively take place in open court. See State v. Drum, 168 Wn.2d 23, 32, 225 P.3d 237 (2010) ("Personal involvement by the drug court judge, prosecutor, defense attorney, and treatment providers is cited as the key to the success of drug courts.").

The trial court claimed a Drug Court staffing is not subject to the open court requirement because it is not an "adversarial proceeding." CP 164. The superior court judges, relying on a line of decisions from the Court of Appeals, attempted to draw a line between purely ministerial or legal issues that do not require the resolution of disputed facts, as opposed to adversarial or evidentiary proceedings. CP 168 (citing State v. Rivera, 108 Wn. App. 645, 652-53, 32 P.3d 292 (2001); State v. Sadler, 147 Wn. App. 97, 109-10, 168, 193 P.3d 1108 (2008); Ticeson, 159 Wn. App. at 383-84).

This Court repudiated that analytical approach in Sublett: "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." Sublett, 176 Wn.2d at 72 (C. Johnson, J., lead opinion).³ The crooked line drawing used in cases like Rivera and Sadler is the result of an improper conflation of the right to public trial and the defendant's right to be present at critical stages of the proceeding. Sublett, 176 Wn.2d at 137-40 (Stephens, J, concurring).

Whether the Drug Court staffings are subject to the open court requirement does not turn on whether the proceedings are "adversarial" or whether disputed facts are resolved during those staffings. That being said, discussion regarding the best course of treatment that occurs during the Drug Court staffings includes evidentiary allegations (i.e., criminal activity, a failed urinalysis, a missed treatment meeting, a forged sober slip, a poor attitude) and sanction recommendations for noncompliance.

³ For example, the court's acceptance of a guilty plea could be characterized as a non-adversarial event where no disputed facts are resolved, yet it is inconceivable that such a proceeding is not entitled to a presumption of openness. See Woods v. Rhay, 68 Wn.2d 601, 604, 414 P.2d 601 (1966) (a guilty plea must be "freely, unequivocally, intelligently and understandingly made in open court by the accused person with full knowledge of his legal and constitutional rights and of the consequences of his act.").

Sanctions may include jail time and termination from the Drug Court program. CP 79-80. The grounds for termination are numerous and include noncompliance behaviors presented and discussed during the staffings. CP 81-82. As pointed out by the State, "[s]taffings in drug court involve fact-gathering, discussion of factual matters, debate over the best courses of action and, ultimately, a judicial decision based on that exchange of information and ideas." CP 60.

While the model for Drug Court is a collaborative approach, the manual itself recognizes there will be times when the parties do not reach consensus during these staffings. CP 71. At such times, the judge makes a final decision on what to do, but "[i]n the courtroom the team presents a united front." CP 71. In other words, as envisioned by the manual, adversarial conflict is dealt with during the closed staffings when the defendant is absent but subsequently suppressed in open court when the defendant is present. What takes place in open court is different from what actually occurs in the closed staffings.

The superior court judges claimed the open court requirement is not implicated because the staffings "have nothing whatsoever to do with the question of guilt or innocence in the underlying criminal case" and the staffings "do not relate to the adjudication of the underlying charge." CP 169. The right to open justice has never been confined only to

proceedings involving questions of guilt or innocence. In any event, the staffings do relate to the adjudication of the underlying criminal charge. What is discussed at those staffings forms the basis for court decisions on what to do with a defendant in terms of reward and sanction. The ultimate reward is dismissal of criminal charges upon successful completion of the program. The ultimate sanction is termination from the Drug Court program, followed by a stipulated facts trial that inevitably results in a finding of guilt and a criminal sentence. The State recognizes "although these proceedings are decidedly more collaborative than many criminal proceedings, they still occur in the context of the adjudication of a criminal case, where the parties are adverse in that treatment is coerced under threat of prosecution, and if the defendant fails to meet program requirements, he will be tried and sentenced for crimes." CP 60.

The superior court judges acknowledged staffings focus on treatment issues, including incentives and sanctions for compliance, but described sanction recommendations as merely "preliminary" in nature to sanctions imposed in open court. CP 168-69. The asserted distinction between preliminary determinations made in a closed setting and the decisions formally made in open court does not save the closed staffings from constitutional infirmity. A proceeding is subject to the open court

requirement if a judge relies on information produced in that proceeding to reach a later decision on the matter.

This Court's jurisprudence regarding when documents may be sealed from the public is instructive because this Court "has treated court records and court proceedings similarly" in deciding whether an article I, section 10 violation has occurred. Chen, 309 P.3d at 413. Both "court records and courtrooms are presumptively open and can be closed only when a trial court makes an individualized finding that closure is justified." Id.

Under article I, section 10, "the public must — absent any overriding interest — be afforded the ability to witness *the complete judicial proceeding*, including all records the court has considered in making *any* ruling, whether 'dispositive' or not." Rufer v. Abbott Labs., 154 Wn.2d 530, 549, 114 P.3d 1182 (2005) (first emphasis added). "This principle emerges from the constitutional mandate in article I, section 10 and its purpose to ensure that the 'public's trust and confidence in our entire judicial system may be strengthened and maintained.'" Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 67, 256 P.3d 1179 (2011) (article I, section 10 inapplicable to deposition not introduced at trial and which did not become part of the court's decision making process) (quoting Rufer, 154 Wn.2d at 549).

Thus, "material relevant to a decision or other conduct of a judge or the judiciary is subject to a presumption of public access under article I, section 10." Bennett, 176 Wn.2d at 312 (Chambers, J., lead opinion)⁴ (documents submitted in anticipation of a court ruling that was never made are not subject to article I, section 10). A document is open to the public if it becomes "part of the court's decision making process." Id. at 310 (quoting Dreiling, 151 Wn.2d at 909-10). Conversely, documents that are irrelevant to a court's decision making process do not implicate article I, section 10. Id. at 310-12; see Cayce, 172 Wn.2d at 69 ("mere discovery is not subject to article I, section 10 unless the information or documents obtained through discovery becomes part of the decision making process."). Documents considered by the court in reaching its decision must be open in order to assure the public that courts are operating fairly and appropriately. State v. McEnroe, 174 Wn.2d 795, 807, 279 P.3d 861 (2012) (citing Dreiling, 151 Wn.2d at 908-09; Rufer, 154 Wn.2d at 549).

The superior court judges recognize Drug Court judges, acting as "team leaders," "derive considerable benefit from being involved in staffing" by listening to "the give and take of the far-ranging discussion held in staffings." CP 98. In other words, the judge digests the

⁴ The concurring opinion signed by two justices concurred on this point. Bennett, 176 Wn.2d at 317 (Madsen, C.J., concurring).

information and arguments presented during the closed staffings as the precursor to making formal rulings in open court. The judge relies on what he or she has learned in the closed staffings as a basis to make a decision in open court regarding how a participant will be treated. Carrots (rewards) and sticks (sanctions) are officially doled out in the review hearings, but they originate in the closed staffings.

The Drug Court judge administers justice as a "team leader" during the closed staffings. The staffings are part of the administration of justice. They must be presumptively open to the public. The State points out staffings "frequently involve *factual* presentations and disputes, and are not subsequently made a part of the public record either by filing of documentation or discussion in open court." CP 61. The judge makes an official ruling or imposes formal sanctions in open court, but "the factual basis for that judicial ruling is not shared with the public, the staffing notes are not filed, and the various parties do not express the same thoughts and concerns as were expressed at the staffings." CP 61.

This Court in Sublett employed the "experience and logic" test to address whether a trial court violated the right to a public trial under article I, section 22 and the Sixth Amendment by considering a jury question in camera. Sublett, 176 Wn.2d at 70-74. It held there was no public trial violation because "resolution of the jury's question did not

implicate the core values the public trial right serves." Id. at 72. 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." Id. at 73 (quoting Press-Enterprise Co. v. Superior Court of California, Riverside County, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73.

This Court recognizes "the failure of any test to identify a closure with accuracy." Id. at 75. The experience and logic test is a "useful tool" for determining whether the public trial right attaches to a particular process. Id. However, its utility is questionable when the proceeding at issue implicates the values of the open courts and public trial right, regardless of whether the experience prong is met.

For example, this Court in D.F.F. concluded an involuntary commitment proceeding closed pursuant to a court rule violated the open court mandate of article I, section 10. D.F.F., 172 Wn.2d at 47. If the "experience and logic" test had been applied in D.F.F., there would have been no constitutional violation because the experience prong would have been unmet. Involuntary commitment proceedings were closed pursuant to the court rule as a matter of practice. There was no experience in

having those proceedings open to the public during the many years that rule was in effect.

Drug Court, meanwhile, is a recent creature of statute, first authorized on a statewide basis by the legislature in 1999. Laws of 1999, ch. 197 § 9. The King County Drug Court was implemented in 1994. CP 69. The "experience and logic" test is a poor tool for determining whether a given proceeding is subject to the constitutional requirements of an open court and public trial where the proceeding at issue is new. For most of this state's history, there was no such thing as Drug Court. However, judicial proceedings have existed from the beginning. The Drug Court staffings are judicial proceedings. As such, they are not exempt from the requirements of article I, section 10 and article I, section 22. Moreover, it would make poor precedent to allow the practice of trial judges who refuse to recognize application of the right to dictate whether the right exists.

c. The Error Is Structural And The Remedy Should Be Commensurate With The Scope Of The Violation.

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16.

A majority of this Court has previously concluded structural error does not apply to civil cases. D.F.F., 172 Wn.2d at 48 (Johnson, J., concurring), 172 Wn.2d at 52-53 (Madsen, C.J., dissenting). Sykes's case is a criminal case. Structural error therefore applies. Sykes claims a violation of her personal right under both article I, section 22 and article I, section 10. She seeks a remedy based on the structural nature of the error in her criminal case under both provisions. Cf. State v. Beskurt, 176 Wn.2d 441, 446, 293 P.3d 1159 (2013) (C. Johnson, J., lead opinion) (where appellant seeks a new trial to remedy an alleged violation of the public's article I, section 10 rights to open records, without also demonstrating an article I, section 22 violation, the error does not warrant a retrial).

"The remedy should be appropriate to the violation." Bone-Club, 128 Wn.2d at 262 (quoting Waller, 467 U.S. at 50); accord Momah, 167 Wn.2d at 149-50. This is not the usual criminal proceeding, where a defendant is found guilty after a trial. In that circumstance, the remedy for a public trial violation is a new trial. Wise, 176 Wn.2d at 19. But here, Sykes has not had a trial. The trial court granted the State's motion to

terminate Sykes from the Drug Court program, but what is referred to as a "termination hearing" has not yet been held. CP 51, 298.⁵

Defense counsel argued below that the remedy is to rescind and vacate the Drug Court agreements and restore Sykes's full trial rights. RP 37, 58; CP 161. There is a basis for this argument. Closed Drug Court staffings take place during "Phase I," otherwise known as the "status phase," before a defendant officially opts into Drug Court. CP 76; RP 22-23, 49-50. This happened in Sykes's case. CP 30-34. During "Phase I," the Drug Court candidate is given a chance to see what Drug Court will be like and is evaluated to determine whether he or she is a good fit for the program. CP 76; RP 22-23, 49-50. Phase I requirements include assessment, participation in counseling sessions, attendance at sober support groups, compliance with pre-trial release conditions, and attendance at all court-ordered obligations and status hearings. CP 77. One of the purposes of these pre-opt in Phase I staffings is to evaluate whether a candidate will meet the "rigorous requirements" of Drug Court. CP 76. Sykes was monitored for compliance with treatment and expectations during this phase. CP 30-34.

⁵ According to the Drug Court manual, "[i]f the motion for termination is granted, a stipulated trial and sentencing if appropriate will follow." CP 81.

Sykes entered the Drug Court agreements and officially opted into the program in open court on February 28, 2011. CP 229. But the court's discretionary decision to accept the agreements and allow Sykes to participate in Drug Court was informed by what happened during the preceding Phase I staffings closed to the public. CP 30-34. The court's decision to accept the agreements is a product of the closed staffings. Those proceedings were conducted in violation of the open court requirement because they formed part of the court's decision-making process. See Bennett, 176 Wn.2d at 312 ("material relevant to a decision or other conduct of a judge or the judiciary is subject to a presumption of public access under article I, section 10."). The agreements should therefore be vacated and Sykes's full jury trial rights restored.

In the event this Court declines to allow the agreements to be vacated, then the alternative remedy would be to return Sykes to "Phase II" of the Drug Court program — the same position she was in when she first opted into Drug Court. The trial court suggested this was the appropriate remedy in the event a constitutional violation was found. RP 22-23, 49-50. The State endorsed this remedy as acceptable. RP 49.

The closed staffings that occur following formal entry into Drug Court taint the subsequent proceedings because what happens in those closed staffings informs the court's decisions about whether and how to

reward or sanction the defendant. In Sykes's case, the staffings paved the way for termination from Drug Court. What happens in those closed staffings is part of the decision making process of the court as it deals with a defendant during the course of Drug Court proceedings and, ultimately, how it treats a defendant when a request for termination from Drug Court is made. The closed proceedings cannot be used as a basis to terminate Sykes from Drug Court. Sykes should be allowed to start over in Drug Court with a clean slate.

D. CONCLUSION

Sykes respectfully requests that this Court hold the Drug Court staffings violated her right to open and public court proceedings and grant her the appropriate remedy.

DATED this 29th day of October 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

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From: OFFICE RECEPTIONIST, CLERK
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Rec'd 10-29-13

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Attached for filing today is the brief of appellant for the case referenced below.

State v. Adonijah Sykes

No. 87946-0

Brief of Appellant

Filed By:
Casey Grannis
206.623.2373
WSBA No. 37301
grannisc@nwattorney.net