No. 81687-5

J.M. JOHNSON, J. (concurring)—I concur only in the result of the lead opinion. I write separately to avoid blurring important distinctions between the rights protected by the provisions of article I, sections 10 and 22 of the state constitution.

Superior Court Mental Proceedings Rule (MPR) 1.3 violates article I, section 10 of the state constitution. Both the lead opinion and the dissenting opinion agree on this point. *See* lead opinion at 12 ("We hold MPR 1.3 is unconstitutional."); dissent at 1 ("I agree with the general proposition that [MPR] 1.3 runs afoul of article I, section 10 of the Washington State Constitution."). Like my colleagues, I too recognize the constitutional invalidity of MPR 1.3.

Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993) controls the present case. In *Eikenberry*, the

legislature passed a statute requiring courts to ensure that information identifying child victims of sexual assault was not disclosed to the public during the course of trial or in court records. *Id*. at 207. We held that the legislation at issue violated article I, section 10. *Id*. at 214. In doing so, we noted that our past precedents required case-by-case analysis pursuant to the five factors expanded and articulated in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). *Eikenberry*, 121 Wn.2d at 210-11.

MPR 1.3 presumes closure. However, we held in *Eikenberry* that legislation that "does not permit . . . individualized determinations, is not in accordance with the *Ishikawa* guidelines, and is therefore unconstitutional." *Id*. at 211. The constitutional presumption for courtroom proceedings is openness. Legislation that presumes closure violates the people's constitutional commitment that "[j]ustice in all cases shall be administered openly" in the Washington courts. Wash. Const. art. I, § 10.

Even though the lead opinion arrives at the right result, I cannot concur in its use of precedent. As the dissenting opinion correctly points out, the lead opinion frequently invokes *criminal* cases discussing the rights of *criminal defendants* pursuant to article I, section 22. These cases do not

involve interpretation of the same constitutional provision or the same interests. Our use of the same five factor analysis to review courtroom closures under article I, sections 10 and 22[1] does not suggest that these constitutional provisions are interchangeable.

Lastly, the lead opinion and the dissenting opinion disagree regarding the appropriate remedy. I agree with the dissent that "structural error" analysis does not apply to the civil context. However, D.F.F., as a respondent committed after a closed hearing, demonstrates sufficient prejudice to warrant relief. Further, I agree with the lead opinion that the release of a transcript to D.F.F. is clearly not a sufficient remedy. Reversal of the commitment order and remand for new proceedings is the appropriate remedy based on the record in this case.

Conclusion

Despite some flawed reasoning, the lead opinion correctly determines that MPR 1.3 is unconstitutional and reverses D.F.F.'s commitment order. I concur in this result alone.

[1] *See State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (importing five factor analysis from article I section 10 cases to the article I, section 22 context).

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Tom Chambers