No. 81687-5

MADSEN, C.J. (dissenting)—I agree with the general proposition that Superior Court Mental Proceedings Rule (MPR) 1.3 runs afoul of article I, section 10 of the Washington State Constitution. However, I do not believe the appropriate remedy in this case is a new trial.

The harm resulting from the closure of D.F.F.'s commitment hearing fell not to D.F.F. but to the absent public. Because D.F.F. declined to exercise her explicit right under MPR 1.3 to request an open trial, she cannot demand a new trial on grounds that the ensuing closure violated her own article I, section 10 rights.

Nor can she seek a new trial on behalf of the public. Assuming D.F.F. had standing to assert the rights of excluded members of the public, the appropriate remedy for aggrieved members of the public following an article I, section 10 violation is the release of transcripts—not a new trial.

The lead opinion provides no legal basis for righting a wrong inflicted on the public by providing a new trial to an uninjured individual litigant. Instead, the lead

opinion obscures this incongruity by unapologetically importing criminal law to the civil context and conflating two distinct provisions of the Washington Constitution: article I, section 10, which ensures the open administration of justice, and article I, section 22, which protects a criminal defendant's right to a public trial. In so doing, the lead opinion misinterprets our case law and sets dangerous precedent. Because it is incumbent on this court to provide guidance to trial courts by clarifying our increasingly muddled section 10 and section 22 jurisprudence, I respectfully dissent.

Discussion

MPR 1.3 posed no hindrance to D.F.F.'s ability to obtain an open hearing; under the terms of this rule, she had every opportunity to request one. *See* MPR 1.3. ("Proceedings had pursuant to RCW 71.05 shall not be open to the public, unless the person who is the subject of the proceedings or his attorney files with the court a written request that the proceedings be public."). Presumably, had the actual closure been detrimental to D.F.F.'s interests, she or her attorney would have requested an open hearing. In short, D.F.F. may not have it both ways; having elected a closed commitment hearing, she may not challenge this closure on appeal in hopes of obtaining a more favorable result. In holding otherwise, the lead opinion departs from long-standing principles of fairness and finality by permitting a litigant two bites of the proverbial apple.

In contrast, members of the public who were excluded from D.F.F.'s commitment hearing suffered a veritable constitutional injury; MPR 1.3 provides no means for

members of the public to request an open courtroom. However, assuming D.F.F. has standing to assert the section 10 rights of absent members of the public, I would hold that the public is entitled only to the release of transcripts from the closed commitment hearing—not a new trial.

The public's interest in the open administration of justice is by no means insignificant. "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). However, the lead opinion misconceives the nature of this harm. The public interest in open courts lies not in the outcome but rather in the transparency of commitment hearings. A member of the general public has no legally cognizable interest in the outcome of a suit to which she is not a party and therefore no grounds to seek reversal and a new trial. Accordingly, a new commitment hearing would do no more to advance the public interest in "freely observ[ing] the administration of . . . justice" than the release of transcripts from the closed proceedings. *Id.*

Providing a transcript of closed proceedings fully vindicates the public interest in open courts. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 512-13, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (requiring release of transcripts to remedy unlawful closure and holding that where limited closure is necessary, "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of

the closed proceedings available within a reasonable time"); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 45-46, 640 P.2d 716 (1982) (remanding to trial court with instructions to reconsider the denial of a motion by two daily newspapers to release the transcripts of a closed hearing); *Cohen v. Everett City Council*, 85 Wn.2d 385, 390, 535 P.2d 801 (1975) (requiring release of transcripts where newspaper challenged closed proceedings). Such a remedy gives teeth to section 10 by serving as a deterrent. When courts are aware that the public is entitled to the transcripts of closed proceedings, any incentive to conduct such proceedings behind closed doors disappears. Similarly, it is difficult to imagine a scenario in which a court that is compelled to release transcripts could conceal them nevertheless. Thus, for these purposes, reading a transcript is the functional equivalent of attending a court proceeding in person.

In concluding that the closure of D.F.F.'s commitment hearing amounted to structural error and, consequently, that D.F.F. is entitled to a new trial, the lead opinion relies without explanation on criminal cases and on article I, section 22. *See* lead opinion at 3-9 (citing *State v. Momah*, 167 Wn.2d 140, 270 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010); *In re. Pers. Restraint Petition of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2005); *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995); *Easterling*, 157 Wn.2d 167; *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005); *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). Perhaps attempting to blur these critical distinctions, the lead opinion highlights the parallels between civil commitment

proceedings and criminal proceedings. Lead opinion at 3 n.2 ("'[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil'" (alteration in original)) (quoting *Application of Gault*, 387 U.S. 1, 50, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)). However, these similarities do not render civil commitment proceedings criminal in nature, nor do they render section 22 applicable in the civil context. In short, because it rests exclusively on inapplicable case law, the lead opinion's remedy analysis is fundamentally flawed.

Until now, our section 22 jurisprudence has been relatively settled as to the proper remedy for an unlawful closure in the criminal context. Where closure amounts to a structural error—an error that "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence'"—a criminal defendant is entitled to automatic reversal and a new trial. *Momah*, 167 Wn.2d at 149 (internal quotation marks omitted) (alteration in original) (quoting *Recuenco*, 548 U.S. at 218-19). Less settled, however, is the proper remedy for open courts violations in the civil context, where section 22 does not apply. Without explanation, the lead opinion extrapolates from the criminal context to conclude that structural error analysis governs civil commitment proceedings. However, both precedent and common sense suggest that structural error analysis is ill suited for the section 10 context.

First, structural error analysis has no place in the civil arena. In fact, structural error is defined with reference to criminal trials. According to the United States Supreme Court, structural errors "deprive defendants of 'basic protections' without which 'a

criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (alteration in original) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)).[1]

Not surprisingly, in *M.L. v. Federal Way School District*, 394 F.3d 634 (9th Cir. 2005), a majority of the three-judge panel held that structural error analysis was inapplicable in the civil context. In particular, Judge Gould, who was joined by Judge Clifton in rejecting the use of structural error analysis, criticized Judge Alarcon for "extrapolat[ing] from the criminal context" in applying structural error analysis. *Id*. at 653 (Gould, J., concurring); *see id*. at 658 (Clifton, J., dissenting). He went on to "find this structural error analysis strikingly inapplicable in our civil case context" and noted that Judge Alarcon "cite[d] no precedent applying structural error in civil cases in our circuit." *Id.* at 653-54 (Gould, J., concurring).[2]

[1] Indeed, the lead opinion expressly acknowledges that the definition of structural error on which it relies is limited to the criminal context. Lead opinion at 6 ("*in the context of a criminal trial*, '[a]n error is structural when it necessarily render[s] a *criminal trial* fundamentally unfair or an unreliable vehicle for determining guilt or innocence'" (emphasis added) (alterations in original) (internal quotations omitted) (quoting *Recuenco*, 548 U.S. at 218-19)). The lead opinion fails to explain when and why structural error analysis applies outside the context of a criminal trial in Washington State.

[2] The lead opinion notes that on occasion, state courts have engaged in structural error analysis in the civil context. Lead opinion at 8 n.6. However, among the long list of cases the lead opinion cites in support of this proposition, few provide clear examples of structural error analysis. Furthermore, none of these cases explains or attempts to explain why structural error analysis, premised on the constitutional right of a criminal defendant to a fair trial, applies in the civil context.

Because article I, section 22 is inapplicable in the civil context, and because the harm resulting from the closure of D.F.F.'s commitment hearing fell not to D.F.F. but to the public at large, I would look to our article I, section 10 jurisprudence—not our section 22 jurisprudence—to determine the appropriate remedy in this case. While we have not yet addressed the remedy for a section 10 violation in the context of a civil commitment proceeding, our case law is instructive nevertheless.

In *Ishikawa*, 97 Wn.2d at 32-33, the trial court ordered the closure of a pretrial hearing in a murder case upon the joint motion of the defendant and the prosecuting attorney. Relying on section 10 and the First Amendment, the Seattle Times newspaper objected, but the hearing was conducted in closed session and the transcripts from the hearing sealed. *Id*. at 33. After the hearing, the Seattle Times moved to have the transcripts released, but the court denied the motion. *Id.* Trial proceeded, and the defendant was convicted of murder in the first degree. *Id*. Following the verdict, the Seattle Times renewed its motion for release of the transcripts, which was again denied. *Id*. After setting forth the standard to be followed in restricting access to the public, this court remanded to the trial court to reconsider the request to unseal the transcript of the closed hearing. *Id.* at 37-46. Notably, the court did not order a new hearing. *Id*.

Cohen is similar. There, the Everett City Council initiated a proceeding to revoke a city license of a sauna parlor operator. *Cohen*, 85 Wn.2d at 386. The licensee sought judicial review of the council decision, and a transcript of the city council proceedings was filed in superior court. *Id*. The licensee obtained an order of confidentiality, which

sealed the record pending a hearing on the merits. *Id*. The Everett Herald intervened to address whether the "trial" on the merits would be open or in camera and whether the evidence, including the transcript, would continue to be sealed. *Id.* After the trial court reviewed the sealed transcript and issued a decision on the merits against the licensee, it continued to withhold the transcript from the public, and the Everett Herald moved to set aside the continuing confidentiality order. *Id*. at 387. Citing to section 10, this court reversed the trial court's confidentiality order and ordered the release of the transcript. In so doing, we noted that

> [t]he trial court's review of the proceedings of the city council's actions was a review of the transcript of those proceedings. . . . [I]n essence that record was the equivalent of testimony. . . . In the usual case, testimony cannot be taken in or kept secret. Once the court reached the merits of the controversy, the testimony—transcript—had to be part of the public record.

Id. at 389. Importantly, we did not reverse the trial court's decision on the merits, despite the confidentiality order that had shrouded the decision-making process in secrecy. *Id*. at 390. Instead, the sole remedy we provided to the "public" was the release of the transcript well after the fact. *Id*.

In each of these cases, we held that the proper remedy for a section 10 violation was the release of transcripts, not a new trial or reconsideration on the merits. Indeed, I have found no case in which this court has ordered a new trial to remedy an open courts violation in the civil context.[3] D.F.F. provides no basis for departing from precedent

[3] Once again conflating section 10 and section 22, the lead opinion contends that "[t]his is not the first case where this court has granted a new trial when a trial court closed proceedings without first considering the five requirements to permit an exception to the open administration of justice

here.

While a new commitment hearing will not advance the section 10 interests of the public, it may prove highly advantageous to D.F.F.—and consequently, prejudicial to the State—by allowing D.F.F. to proceed under an entirely different set of circumstances.[4] More broadly, today's holding will allow civil litigants who suffer no harm from closure—and indeed, who may have benefited from closure—to seek new trials nevertheless, by asserting the rights of the public at large. *Cf. State v. Strode*, 167 Wn.2d 222, 236, 217 P.3d 310 (2009) (Fairhurst, J., concurring) ("I do not agree with [the lead opinion's] conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.").

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right under article I, section 10 or the right to a public trial under article I, section 22." Lead opinion at 8-9. However, the lead opinion then goes on to cite two criminal cases, *Easterling* and *Brightman*, both of which rest, at least in part, on the right to a public trial guaranteed in section 22. Lead opinion at 9 (citing *Easterling*, 157 Wn.2d at 171; *Brightman*, 155 Wn.2d at 509). The lead opinion cites no case in which a court has granted a new trial on the basis of a section 10 violation without a concomitant section 22 claim.

[4] While D.F.F. already has completed 90 days of civil commitment pursuant to the original commitment order, a new hearing at this time would allow her to challenge both the initial determination that gave rise to the civil commitment order and the collateral consequences that stemmed from that order, such as her continuing inability to possess a firearm. *See In re Det. of D.F.F.*, 144 Wn. App. 214, 219 n.2, 183 P.3d 302 (2008). Because a civil commitment hearing is highly fact-intensive and based on frequently shifting factual circumstances, a new commitment hearing conducted years after the initial hearing may have serious accuracy problems. In particular, it may be impossible for one or both parties to present the same evidence that existed at the time of the initial hearing. To the extent that the resulting inaccuracies will benefit D.F.F., they will prejudice the State, which must overcome a heavy burden to prevail in a commitment hearing and which relies on civil commitment and its collateral consequences to protect mental health consumers and the public. *See generally* RCW 71.05.010 et seq.

By the same token, today's opinion raises the specter of nonparties rejecting final judgments and demanding new trials pursuant to section 10, even where the actual litigants have no objection to closure and no desire to relitigate their claims and defenses. Here, the lead opinion held that an individual challenging the closure of her own commitment hearing was entitled to a new trial. However, by failing to distinguish between remedies available to individual litigants and those available to members of the public, the lead opinion implies that the appropriate remedy for *all* section 10 violations is a new trial. Under the lead opinion's reasoning, anyone challenging the closure of D.F.F.'s commitment hearing would be entitled a new trial. Thus, carried to its logical conclusion, today's holding offends basic principles of fairness and runs counter to deeply held interests in finality and judicial economy.

In sum, granting a new commitment hearing to D.F.F. to remedy an injury to the public at large comports neither with case law nor common sense, and it sets dangerous precedent. I respectfully dissent.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:
Justice Mary E. Fairhurst

Justice Charles W. Johnson