

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I**

In re the Personal Restraint Petition of

No. 69593-2-1

CALVIN A. EAGLE,

PETITIONER'S SUPPLEMENTAL
BRIEF

Petitioner.

FILED
Sep 28, 2015
Court of Appeals

I. INTRODUCTION

Division I
State of Washington

As per this Court's order, this is a supplemental pleading "addressing the public trial issue with regard to the arraignment proceeding."

Both experience and logic compel the conclusion that an arraignment is a proceeding that should be held in open court. If the amendment of an information results in an arraignment on the amended information that hearing must also be held in open court.

The violation of the state and federal constitutional right to public and open proceedings is a structural error. On direct appeal, a structural error mandates automatic reversal. If Eagle's counsel had raised this issue on direct appeal, this court would have reversed and remanded for a new trial. As a result, Eagle has established ineffective assistance of appellate counsel.

II. ARGUMENT

A claim of ineffective assistance of appellate counsel asks whether appellate counsel's failure to assign error to a particular issue constituted deficient performance;

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1 and whether there is a reasonable probability of a different outcome if appellate counsel
2 had raised the issue. When a court finds there has been an improper courtroom closure
3 on direct appeal, reversal is automatic. When reviewing an IAC of appellate counsel
4 issue, the court uses the same “structural errors = automatic reversal” formula. *See In re*
5 *Morris*, 176 Wash.2d 157, 288 P.3d 1140 (2012); *In re Orange*, 152 Wash.2d 795, 100
6 P.3d 291 (2004).
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9 *Miller* makes the prejudice analysis plain:
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11 Here, there is little question that the second prong of this test is met.
12 In *Wise* and *Paumier*, we clearly state that a trial court's in-chambers questioning
13 of potential jurors is structural error. Had *Morris*'s appellate counsel raised this
14 issue on direct appeal, *Morris* would have received a new trial. *See Orange*, 152
15 Wash.2d at 814, 100 P.3d 291 (finding prejudice where appellate counsel failed to
16 raise a courtroom closure issue that would have been presumptively prejudicial
17 error on direct appeal). No clearer prejudice could be established.

18 176 Wn.2d at 166. *Miller* remains the law.

19 It is also clear from both experience and logic¹ that the right to a public trial
20 presumptively guarantees that arraignments are to be conducted in open court.

21 Arraignments have historically been held in open court. 22 C.J.S. Criminal Law § 483.
22 Washington caselaw dating back more than a century describes the arraignment as a
23 hearing held in open court. *State v. Nelson*, 39 Wash. 221 81 P. 721 (1905).
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25 Logic also compels the conclusion that arraignments must be held in open court.
26 There is often an intense media and public interest in arraignments. In fact, in many
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¹ *State v. Sublett*, 176 Wash.2d 58, 72, 292 P.3d 715 (2012).
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1 criminal cases the arraignment is the hearing that generates the most press attention.
2 Holding arraignments in secret would certainly greatly decrease confidence in the
3 criminal justice system.
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5 The State’s argument appears to concede this fact. Instead, the State argues that
6 an arraignment on an amended information is somehow different. Neither experience,
7 nor logic support the conclusion that a first arraignment must be held in open court, but a
8 second or subsequent arraignment can be held in a closed courtroom. The public interest
9 does not necessarily diminish when a defendant is arraigned on an amended information.
10 To the contrary, public interest could increase. Further, the State posits an unworkable
11 rule. Does the right to an open court attach only to the first arraignment? Does it attach
12 to some, but not all arraignments on an amended information? If so, which arraignments
13 are subject to the public trial/open court guarantee?
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18 The rule cannot be, as the State implicitly suggests, that hearings held in chambers
19 are not protected. That rule does not depend on the scope of the constitutional guarantee,
20 but instead focuses only on the practice adopted by the court in the particular case. The
21 State then suggests if due process does not require an arraignment, then the right to a
22 public trial does not attach when an arraignment is conducted. This rule assumes that due
23 process defines the scope of the public trial right. Due process and the right to a public
24 trial do not follow lockstep. Due process and the right to a public trial may overlap, but
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1 they are not coextensive. The reach of the public trial right is tied to experience and
2 logic, not the dictates of due process.
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4 The public trial right of the Sixth Amendment has long been viewed as “ ‘a
5 safeguard against any attempt to employ our courts as instruments of persecution.’
6 ” *United States v. Thunder*, 438 F.3d 866, 867 (8th Cir.2006) (quoting *In re Oliver*, 333
7 U.S. 257, 270 (1948)). In *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir.2012),
8 the Circuit Court held that the Sixth Amendment right to a public trial attaches to
9 sentencing proceedings regardless of what due process requires, in part, because the
10 judge and prosecutor continue to bear grave responsibilities, both to the accused and to
11 the broader community. Experience and logic support a simple, plain, and easy to follow
12 rule. Arraignments must presumptively be conducted in open court. If closure is
13 contemplated, then a *Bone-Club* hearing must precede closure. Because that did not
14 happen in this case, conducting arraignment in a closed courtroom was structural error.
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16 III. CONCLUSION

17 This Court should grant this petition; reverse and remand for a new trial.

18 DATED this 28th day of September, 2015.

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1 **CERTIFICATE OF SERVICE**

2 I, Jeffrey Ellis, certify that on today's date I served opposing counsel with a copy
3 of the attached supplemental brief by efileing it causing a copy to be sent to:

4 Appellate_Division@co.whatcom.wa.us

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6 September 28, 2015//Portland, OR

/s/Jeffrey Ellis