

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**CALVIN ARTIE EAGLE, Appellant.**

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**MOTION TO STRIKE AND  
RESPONSE BRIEF OF RESPONDENT**

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**A. AUTHORITY OF RESTRAINT OF PETITIONER**

Petitioner Calvin Artie Eagle is under sentence pursuant to Judgment and Sentence entered in Whatcom County Superior Court cause number 08-1-00814-5. App. A.

**B. ISSUES**

1. Whether petitioner's "conditional" claims of error should be dismissed where he has presented no evidence to support it.
2. Whether petitioner invited his asserted right to public trial error when his counsel requested an in chambers conference to address a concern regarding a text message petitioner had received during trial.
3. Whether under the experience and logic test the right to public trial attaches to a hearing in which defendant was re-arraigned on a second amended information where the amendment was technical in nature and not substantive, and where defense's objections to the first amended information, upon which petitioner had not been arraigned, were placed on the record in open court, and it was clear from the proceedings that occurred in open court that petitioner would be pleading not guilty.
4. Whether under the experience and logic test the right to public trial attaches to an in chambers conference to discuss a text message photo of the victim petitioner had received during the trial but which message was never introduced at trial and it was never determined who sent it.
5. Whether the petitioner must show actual prejudice from his alleged violation of right to public trial or whether petitioner may rely on presumed prejudice in seeking a new trial where the in chambers re-

arraignment and the in chambers conference were separable from the trial and had no effect on the trial.

6. Whether any violation of the right to public trial was der minimis and thus does not warrant the remedy of a new trial.
7. Whether the petitioner has demonstrated ineffective assistance of counsel for failing to object to the court arraigning him on a technical amendment to an information and for requesting to go into chambers to discuss a text message petitioner had received during the course of trial where the right to public trial was not implicated by either circumstance and where no actual prejudice flowed from the in chambers hearing and conference.

**C. RELEVANT FACTS**

Eagle was originally charged with two counts of Rape of a Child in the Second Degree, one regarding victim S.M. alleging a date of offense between Oct. 14, 2002 and June 18, 2008; the other regarding B.B. alleging a date of Sept. 1, 2006 to June 18, 2008. App. B. Eagle was arraigned in open court on this information on June 27, 2008. App. C. On Feb. 17, 2009 the State filed an amended information that had headers indicating that four counts of Rape of a Child in the First Degree were alleged, but counts III and IV still alleged the elements for Rape of a Child in the Second Degree. App. D. On Feb. 19, 2009 the case was scheduled for arraignment on the amended information and for a defense motion to

continue. App. E; RP 24; 2/19/09 at 2.<sup>1</sup> The defense motion to continue was granted. Id. Eagle was not arraigned on the First Amended Information at that time despite the State's request. RP 24-26.

At pretrial motions on Dec. 1, 2009, defense counsel objected to the amended information. RP 25. It was clear from the discussion on the amendment that defense intended to go to trial on two counts of rape of a child in the first degree and two counts of rape of a child in the second degree. RP 24-25, 29-30, 33-36. During the discussion of the amendment issue, the prosecutor became aware of scrivener's errors as to the names of counts III and IV. RP 33-34. The court indicated it would grant the motion to amend the information, but declined to arraign him on the First Amended Information which contained those errors. RP 35-36. The court indicated that it would arraign Eagle on a corrected information before the jury was informed of the charges. RP 36. At the end of the motions in limine, the prosecutor indicated he would need a few minutes to prepare the amended information. RP 39. The court suggested doing the arraignment in chambers because the jury panel would be sitting in the courtroom. RP 39-40. Defense counsel did not object. RP 40.

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<sup>1</sup> RP 23-36 has been provided in App. F, as well as the transcript of the Feb. 19, 2009 hearing. The complete trial transcripts can be found in the appeal, COA No. 65098-0-I.

The prosecutor then prepared and filed a Second Amended Information that corrected the scrivener's errors and modified the dates of offenses for counts I and III. App. G. The court then arraigned Eagle on the Second Amended Information in chambers before jury selection began. RP 40, App. H at 1-2. Defense counsel waived reading of the information and Eagle entered a not guilty plea. RP 40.

Later at trial, during the course of one of the victim's testimony, defense counsel interrupted direct examination and said, "Excuse me, Your Honor. May we have a recess with you in chambers?" Pet. Ex. C, RP 81. The court directed the parties to approach for a sidebar first. Id. The court then indicated that a recess would be taken, and counsel could meet in chambers. Id. The discussion that took place in chambers was recorded. Apparently while the victim was testifying Eagle had received a text message with the victim's photo and a caption "Love you and miss you." Id. Defense indicated he didn't know what it meant, but just wanted to inform the trial court. RP 81-83. It was determined that the defendant didn't recognize the number. The court reminded the parties that cell phones should be off in the courtroom and informed defense counsel he could look into the issue and bring it up later if he wanted to, but the court didn't think it affected the trial at that time. RP 82-83.

#### **D. SUMMARY ARGUMENT**

Petitioner Eagle has conditionally asserted two claims regarding his right to public trial but has provided no evidentiary basis to support them. The State moves to strike those claims.

Eagle asserts that his federal and state constitutional rights to public trial were violated when the trial court briefly went into chambers to arraign him on an amended information and when his counsel requested that the court and counsel go into chambers to discuss a text message Eagle received during trial. Eagle invited any error regarding going into chambers to discuss the text message, thus precluding review. He also asserts that his attorney was ineffective for requesting the in chambers conference. Even assuming that the right to public trial is implicated by such a discussion and that counsel was ineffective for requesting the in chambers conference, Eagle has not demonstrated any prejudice from the in chambers discussion.

Assuming the alleged violations here were ones that Eagle did not invite or failed to preserve, the right to public trial didn't attach to either of the hearings Eagle asserts it did. Eagle has failed to demonstrate that the right attaches to either re-arraignment on an amended information or to an in chambers discussion regarding a text message he received during trial. Under the experience and logic test recently adopted by the Washington

Supreme Court, arraignment on a non-substantive amendment to an information is not the type of hearing that must be heard in open court because no arraignment has to occur at all. The nature of the charges had already been addressed in open court right before the in chambers re-arraignment and at the prior February hearing, and it was clear from both hearings that Eagle would be pleading not guilty and pursuing a trial on all the charges. Nor does the right attach to an in chambers discussion regarding the text message because that type of trial irregularity is not one traditionally, necessarily addressed in open court.

Even if the right attached under these circumstances, Eagle has failed to demonstrate actual prejudice to the trial from the alleged violations or from any alleged ineffective assistance of counsel. Structural error does not automatically apply in the context of a personal restraint petition, and the in chambers re-arraignment that occurred before trial and the in chambers discussion regarding the text message were separable from the trial itself. This is not the type of situation in which any prejudice to the trial cannot be measured, it can be, and there clearly is none from either the in chambers hearing or discussion. To award a new trial without any demonstration of actual prejudice under these

circumstances would be the type of windfall that the U.S. Supreme Court disapproved of in Waller.<sup>2</sup>

If this Court were to determine that prejudice to the trial can be presumed in this case pursuant to In re Morris,<sup>3</sup> thus resulting in an automatic new trial, the State asserts that In re Morris was wrongly decided and harmful and should be overturned.<sup>4</sup>

#### **E. ARGUMENT**

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error that inherently results in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petition must set forth the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. In re Personal Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). A personal restraint petition must be supported by competent, admissible evidence. In re Personal Restraint of Dyer, 143 Wn.2d 384, 397, 20 P.3d 907 (2001). A court must decline to review a

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<sup>2</sup> Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

<sup>3</sup> In Re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012).

<sup>4</sup> The State is aware that this is an issue that would need to be addressed by the Washington Supreme Court, but includes it here in order to preserve it in case of further review.

petition where it fails to meet the threshold burden of providing facts and evidence upon which to decide the issue. In re Cook, 114 Wn.2d at 814.

**1. Claims three and four should be stricken for failure to provide any evidentiary support for them.**

The State moves to strike claims three and four of Eagle's petition for failure to provide any evidentiary basis for the claims. Eagle's counsel asserted that he would submit additional exhibits to support these claims or that he would withdraw them. He has done neither. The Clerk's minutes do not show that the court went into chambers to voir dire any jurors.<sup>5</sup> App. H at 2. The Superior Court's docket doesn't show that the questionnaire was sealed. App. I at 6 (Sub Nom. 71A). Eagle has provided no evidentiary basis to support claims three and four and they should be stricken.

**2. Eagle invited any violation of his right to a public trial by requesting an in chambers conference to discuss the text message.**

Eagle asserts two other violations of his right to public trial: the in chambers arraignment on an amended information and an in chambers discussion of a text message that he received during trial. The invited

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<sup>5</sup> The Clerk's Minutes do indicate that the court went into chambers to arraign Eagle on the amended information. App. H at 1.

error doctrine precludes Eagle's claim regarding the in chambers discussion of the text message.

Even where constitutional issues are involved, the invited error doctrine precludes appellate review. State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990). The invited error doctrine "prohibits a party from setting up an error ... and then complaining about it on appeal." In re Personal Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). The doctrine requires some affirmative action on the part of the defendant. *Id.* at 724. Generally, where a defendant takes knowing and voluntary actions to set up the error, the invited error doctrine applies; where the defendant's actions are not voluntary, it does not. *Id.* No matter what kind of error, if the error was committed at the invitation of the defense, review is precluded. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

The discussion regarding the text message would not have happened in chambers but for defense counsel's specific request to go into chambers. Defense counsel requested the in chambers discussion, and the court initially attempted to address the issue via a sidebar. Nothing transpired in chambers that affected the trial in any manner. Defense counsel was understandably confused by the text message and felt a need

to inform the court, presumably because the message included a picture of the victim. Defense counsel's affirmative act in requesting that the discussion occur in chambers precludes Eagle from raising it on appeal or in a collateral attack.

**3. Neither the re-arraignment of Eagle on the second amended information in chambers nor the in chambers discussion about the text message implicated his right to a public trial.**

Eagle asserts his right to public trial was violated when the court arraigned him on the second amended information in chambers, as well as when the court discussed the text message in chambers at his request. It is Eagle's burden to demonstrate how the specific proceeding implicated his right to public trial, and he has failed to do so, asserting instead that it is "beyond serious debate" that the arraignment on the amended information satisfies the experience and logic test, and that anything that relates to a witness's testimony satisfies the test as well. Petition at 8-9. He cites no authority for either proposition. This is insufficient to meet his burden to demonstrate that the re-arraignment and in chambers conference implicated his right to public trial.

Eagle asserts that his rights to public trial under Art. I §22<sup>6</sup> and the Sixth Amendment were violated by the in chambers proceedings.<sup>7</sup> Washington cases have treated the constitutional provisions as co-extensive. See, In re Personal Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2005); State v. Bone-Club, 128 Wn.2d 254, 260, 906 P.2d 325 (1995) (“The Washington Constitution provides at a minimum the same protection of a defendant’s fair trial rights as the Sixth Amendment.”). A claim of a violation of the right to public trial is reviewed de novo. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

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<sup>6</sup> Art. I §22 states in relevant part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, *to have a speedy public trial* by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: ...

Washington State Const. Art. 1, §22 (emphasis added). The Sixth Amendment provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right *to a speedy and public trial*, by an impartial jury of the State and district wherein the crime shall have been committed ...

U.S. Const. Amendment VI.

<sup>7</sup> To the extent that Eagle asserts any issues regarding the public’s right to open proceedings, he does not have standing to do so. “The general rule is that a person does not have standing to vindicate the constitutional rights of a third party.” State v. Gutierrez, 50 Wn.App. 583, 591-592, 749 P.2d 213, *rev. den.* 110 Wn.2d 1032 (1988); *see also*, State v. Beskurt, 176 Wn.2d 441, 446, 239 P.3d 1159 (2013) (“Whenever a defendant raises a public trial right issue, the inquiry is whether his section 22 rights were violated. If there is no section 22 violation, then the new trial remedy in Strode does not apply.”)

“[N]ot every interaction between the court, counsel, defendants ... implicate[s] the right to public trial, or constitute[s] a closure to the public,” Sublett, 176 Wn.2d at 71. Therefore, the first question to resolve when a violation of right to public trial is alleged is whether the courts have previously determined that the particular proceeding implicates the right to public trial. *Id.* In Sublett, the court adopted the “experience and logic test” that arose out of First Amendment right of public access cases in federal court in order to determine whether a particular proceeding or hearing implicates a defendant’s right to public trial under Art. 1 §22. The label given to the proceeding, however, does not dictate whether the right to public trial attaches to particular proceeding. *Id.* at 72-73. If it has not been previously determined that the right attaches to the particular proceeding, then the court employs the experience and logic test to determine if the right to public trial attaches to the specific proceeding. State v. Wilson, \_\_\_ Wn. App. \_\_\_, 2013 WL1335162 at ¶12. The test is used to determine if the core values of the right to public trial are implicated. Sublett, 176 Wn.2d at 72-73.

Under the experience prong, the court inquires “whether the place and process have historically been open to the press and general public.” Sublett, 176 Wn.2d at 73. Under the logic prong, the court’s inquiry is “whether public access plays a significant positive role in the functioning

of the particular process in question.” *Id.* In applying the logic prong, the court should also consider the values served by the public trial right.<sup>8</sup> Wilson, *supra*, ¶19. The defendant must demonstrate that both prongs of the test are met or the right to public trial does not attach to the proceeding. In re Yates, \_\_\_ Wn.2d \_\_\_, 296 P.3d 872, 886 (2013); Wilson, ¶18.

In Sublett, the court determined that the judge’s in chambers discussion with counsel regarding how to respond to a jury question during deliberations, did not implicate the defendant’s right to public trial. In determining that the right to public trial did not attach to the trial court’s in chambers discussion, the Sublett court compared the discussion to in chambers discussions regarding jury instructions, which historically have not necessarily been conducted in an open courtroom. Sublett, 176 Wn.2d at 75-76. The court also noted that the court rules contemplate that the answer be in writing, which had been done in the case. *Id.* at 76. The court therefore concluded that the right to public trial did not attach to that in chambers discussion. *Id.* at 77. In doing so, it also noted that none of the values served by the right to public trial were affected by an in

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<sup>8</sup> The core values of the right to public trial are: 1) to ensure a fair trial; 2) to remind the prosecutor and the judge of their responsibility to the defendant and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury. Sublett, 176 Wn.2d at 722.

chambers discussion on the jury's question, no witnesses were involved, testimony had already been taken, and the jury's question and the judge's answer were in writing and in the record, available for public scrutiny. *Id.*

In Wilson, the court addressed whether jurors excused administratively due to illness, before voir dire, were hearings to which the public trial right attached. Wilson, 2013 WL 1335162. In applying the experience and logic test, the court distinguished jury selection from jury voir dire, noting that the fact that the right attached to voir dire did not mean it attached to the whole jury selection process, *i.e.*, excusals unrelated to the trial itself. *Id.* at ¶13-14, 21. The court noted that different court rules applied depending upon the part of jury selection involved, and that by statute the court has broad discretion to dismiss jurors for hardship and other reasons. *Id.* at ¶21-23. The court also noted that the administrative excusals exercised by the bailiff were not a "proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." *Id.* at ¶27 (*quoting Sublett*, 176 Wn.2d at 77). The court found that the defendant had failed to show that openness during the excusal proceedings would have enhanced the basic fairness of the trial and the appearance of fairness. *Id.*

Counsel for Respondent has not been able to find any cases in Washington that hold that the right to public trial under Art. 1 §22 or the 6<sup>th</sup> Amendment attaches to the type of re-arraignment hearing or in chambers discussion that occurred in this case. Therefore, under Sublett, this Court should apply the experience and logic test to determine if the right attaches to the specific “hearings” that occurred.

*a. re-arraignment proceeding*

In general, under English common law the public did not have a right to attend pretrial proceedings. *See, Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 388, 99 S.Ct. 2898, 2910-11, 61 L.Ed.2d 608 (1979) (the public did not have a right of public access to pretrial criminal hearings); U.S. v. Criden, 675 F.2d 550, 555 (3<sup>rd</sup> Cir. 1982). The State does, however, agree that the *initial* arraignment has historically been performed in open court. The object of arraignment is to inform the defendant of the charge against him and to obtain an answer from him. Garland v. Washington, 232 U.S. 642, 644, 34 S.Ct. 456, 58 L.Ed.2d 772 (1914). Former CrR 4.1(a) stated: “Promptly after the indictment or information has been filed, the defendant shall be arraigned thereon in open court. CrR 4.1 (1983). App. J. CrR 4.1 replaced RCW 10.40.010 which previously stated: “When the indictment or information has been filed, the defendant, if he has been arrested, or as soon thereafter as he may be, shall

be arraigned thereon before the court.” RCW 10.40.010 (1983). While a *guilty* plea must be done in open court by statute, there is no similar statutory requirement that a plea of not guilty be done in open court. *Cf.* RCW 10.40.170 and RCW 10.40.180.

However, the State does not agree that all arraignments on amended informations necessarily must be heard in open court. Informations can be amended to address minor errors in the information, and if the amendment is not a substantive one, a defendant does not even have a right to be re-arraigned on the information. “It is well-settled that a substantial amendment of an information requires that the accused be arraigned on the amended information. Where, however, the amendment is merely one of form, and not of substance, no rearraignment is necessary. State v. Hurd, 5 Wn.2d 308, 312, 105 P.2d 59 (1940); *accord*, State v. Emery, 161 Wn. App. 172, 253 P.3d 413 (2011) (“State may amend the information without arraignment if the substantial rights of the defendant are not prejudiced); *see also*, State v. O.P., 103 Wn. App. 889, 13 P.3d 1111 (2000) (no due process violation where defendant not arraigned on information that was amended to add a domestic violence allegation); State v. Pisauo, 14 Wn. App. 217, 540 P.2d 447 (1975) (no arraignment was necessary on amendment of information to remove burglary charge and delete serial numbers as amendment was not

substantive); State v. Perkerewicz, 4 Wn. App. 937, 486 P.2d 97 (1971) (no re-arraignment required because amended information that added words “willfully, unlawfully and feloniously” related to form and not substance); Garland v. Washington, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed.2d 772 (1914) (no due process violation for failure to arraign defendant on amended information where information was amended to allege theft of a check instead of currency). Moreover, no prejudice results from the mere failure to enter a guilty plea at arraignment. State v. Riley, 63 Wn.2d 243, 386 P.2d 628 (1963).

Here, while Eagle had not been formally arraigned on the First Amended Information, the State had filed that information nine months before and requested he be arraigned at that time. The nature of the charges and Eagle’s intent to still pursue a trial were reflected in the record from both the February and December hearings. The Second Amended information was amended to correct the title of two of the charges, from Rape of a Child in the First Degree to Rape of Child in the Second Degree, and to modify the dates as to when the rapes occurred. Neither amendment was a substantive amendment. *See*, State v. DeBolt, 61 Wn. App. 58, 808 P.2d (1991) (amendment of dates on sex offenses was an amendment as to form and not substance); State v. Royster, 43 Wn. App. 613, 619-20, 719 P.2d 149 (1986) (no due process violation for

failure to arraign juvenile on amended information that added one count and reduced one count where juvenile was aware of State's intent to amend information); State v. Allyn, 40 Wn. App. 27, 696 P.2d 45 (1985) (amendment to change date of offense was amendment as to form where no alibi defense asserted). This second amended information was an amendment "as to form". While historically the initial arraignment has occurred in open court, it does not necessarily follow that all arraignments on amendments to informations must occur in open court, particularly since arraignments on non-substantive amendments don't have to occur at all.

Eagle has also failed to demonstrate that the logic prong has been met. It is hard to see how re-arraignment on a non-substantive amendment to an information would enhance the basic fairness of the trial and the appearance of fairness. Eagle's initial arraignment, including the entry of his not guilty plea, occurred in open court. The First Amended Information was originally discussed in open court nine months before the December re-arraignment. It was clear at that time that the State alleged four counts of rape of a child and that Eagle intended to pursue a trial. At the December hearing, Eagle again objected to the amendment of the information. All of the discussion regarding his objection occurred in open court. The only thing that occurred in chambers was defense

counsel's waiver of the reading of the information and entry of the not guilty plea. That was recorded in the clerk's minutes and the transcripts, both of which are available to the public. RP 40; App. K. This was not a proceeding that was similar to a trial, and none of the values served by the right to public trial are implicated by the in chambers proceeding here, particularly where the re-arraignment was recorded and reflected in the clerk's minutes. The court could have proceeded with the trial without even re-arraigning Eagle on the second amended information. While the initial arraignment should occur in public under the logic prong, re-arraignment on amended informations don't necessarily have to occur in open court, and Eagle's right to public trial was not implicated by the re-arraignment that occurred here.

The Ninth Circuit in Sweeney v. U.S., 408 F.2d 121, 122-23 (9<sup>th</sup> Cir. 1969) addressed a very similar situation and held that a defendant's right to public trial was not violated when re-arraignment occurred at a bench conference, *i.e.*, sidebar. In that case the trial judge noted right before trial that the defendant had not been arraigned on the superseding indictment and requested counsel to approach the bench. *Id.* at 122. On appeal defendant claimed he wasn't present at the bench when the superseding indictment was provided to his defense counsel, who waived the reading of it and entered a not guilty plea on defendant's behalf. *Id.*

No objection was made by defense counsel regarding the re-arraignment proceeding and the rest of trial occurred in open court. *Id.* The Ninth Circuit found no violation of the right to public trial because the arraignment occurred in open court, and while the arraignment procedure may have been irregular, it was harmless error. *Id.* at 123.

Like Sweeney, while the re-arraignment in chambers here was unusual, all that was required to be done in open court was. Eagle was informed of the charges in open court and he clearly was pursuing a trial, *i.e.*, pleading not guilty, on the charges. He didn't even need to be re-arraigned on the amendments contained in the second amended information. Even if he hadn't been arraigned on the amended information, any error would have been harmless. *See, Riley*, 63 Wn.2d at 243 (“... it cannot for a moment be maintained that the want of formal arraignment deprives the accused of any substantial right, or in any wise changed the course of trial to his disadvantage.”) (*quoting Garland v. Washington*, 232 U.S. 642 (1914)).

*b. In chambers discussion regarding text message*

Even if Eagle did not invite error in requesting the judge to go into chambers to discuss the text message he received during trial, Eagle has failed to demonstrate that the right to public trial extends to such

circumstances. Eagle cites no authority for his proposition that “anything that occurs during a witness’s testimony” satisfies the experience and logic test. Petition at 8-9. In fact, he provides no analysis aside from this declaratory statement. Eagle has failed to meet his burden.

Eagle exaggerates the import of the discussion when he asserts that the discussion regarding the text message he received during one of the victim’s testimony “directly relate[d] to that testimony.” Petition at 9. The judge actually implied the opposite of Eagle’s claim, that the message didn’t have anything to do with the victim’s testimony since she couldn’t have been the one to send it. RP 84.

At most the in chambers discussion concerned a trial irregularity. It had no more effect upon the trial than the sealed questionnaires in State v. Beskurt, 176 Wn. 2d 441, 239 P.3d 1159 (2013). While the issue arose during a witness’s testimony, it ultimately had nothing to do with the victim’s testimony and had no effect on the trial. *See*, Beskurt (juror questionnaires used in open court and sealed several days later had no effect on the trial process and right to public trial was not implicated). It also had no more effect on the trial than the discovery deposition taken in a closed courtroom, which was determined not to be a violation of the First Amendment right to public access in Tacoma News v. Cayce, 172 Wn.2d 58, 74, 256 P.3d 1179 (2011). There is “no traditional right of

access to pretrial discovery information or documents that are never introduced into the case.” *Id.*; *see also*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 603, 100 S. Ct. 2814, 2841, 65 L. Ed. 2d 973 (1980) (J. Brennan concurring) (trial judge does not need allow public access to bench conferences: “Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.”)

Eagle has cited no case that holds that an in chambers conference like the one here is either traditionally one to which the right to public trial attaches, or that public access to such a discussion would have a significant positive role in the actual functioning of the trial. His claim therefore fails.

**4. Eagle has failed to demonstrate any actual prejudice from the in chambers re-arraignment procedure and a new trial would not be an appropriate remedy.**

Even if Eagle were to prevail on his public trial violation claim regarding the in chambers re-arraignment<sup>9</sup>, Eagle has failed to demonstrate any prejudice from the alleged violation as is his burden in a personal restraint petition. Eagle asserts this Court need not address the appropriate

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<sup>9</sup> The State does not address the issue of prejudice and remedy regarding the text message in chambers conference because Eagle clearly invited that alleged error. That State does address the issue of prejudice in section six in the context of Eagle’s ineffective assistance of counsel claim.

prejudice standard for a claim of a violation of the right to public trial asserted in a personal restraint petition, a question not resolved by In re Morris<sup>10</sup>, because he has asserted a claim of ineffective assistance of appellate counsel. On the contrary, as is addressed below in the context of his ineffective assistance of counsel claim, In re Morris, is distinguishable because it concerned a violation of the right to public trial that occurred during voir dire, a violation which potentially affected the trial process. It did not concern a situation in which the alleged violation was separable from the trial process. As the violation Eagle asserts was separable from the trial, Eagle must demonstrate actual prejudice in order to prevail on his claim and warrant the requested remedy of a new trial. He has not attempted to do so, and cannot, therefore his petition should be denied. Moreover, any remedy, if necessary, would be limited to a “redo” of the re-arraignment hearing because the alleged violation of his right to public trial had no effect on the trial itself.

While violations of the right to public trial can result in structural error such that prejudice is presumed on direct appeal, in the personal restraint context a defendant is required to prove actual and substantial

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<sup>10</sup> The court in In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012), declined to address whether “a public trial violation is also presumed prejudicial on collateral review” because it resolved the defendant’s claim on ineffective assistance of counsel grounds. *Id.* at 166.

prejudice. Even if a constitutional error is per se prejudicial on direct appeal, the burden on a petitioner in a personal restraint petition to prove actual prejudice is waived only where the error results in a *conclusive* presumption of prejudice. In re Orange, 152 Wn.2d at 804 (emphasis added). As noted in Chief Justice Madsen’s and Justice Wiggins’ dissents in Morris, the Washington Supreme Court has “rejected the premise that error that is presumed prejudicial on direct appeal is also presumed prejudicial on collateral review.” Morris, 176 Wn.2d at 177 (Madsen, C.J. dissenting); Id. at 180-81 (Wiggins, J. dissenting).

Moreover, as was noted in the seminal case of Waller, “the remedy should fit the violation.” Waller, 467 U.S. at 50. Windfalls in the form of new trials do not serve the public interest. Id. “If ..., the court determines that the defendant’s right to public trial has been violated, it devises a remedy appropriate to the violation.” State v. Momah, 167 Wn.2d 140, 149, 217 P.3d 321 (2010). If the error is structural, automatic reversal and a new trial is warranted. Id. An error is only structural though if the error “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Id. (*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

Structural error is a special category of constitutional error that “affect[s] the framework *within which the trial proceeds*, rather than simply an error *in the trial process itself*.” *Fulminante*, 499 U.S. at 310, 111 S.Ct. 1246. Where there is structural error “ ‘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.’ ”

State v. Wise, 176 Wn. 2d 1, 13-14, 288 P.3d 1113 (2012) (emphasis added).

In Wise, the court indicated that if the public trial violation was separable from the trial itself, remand for a public hearing might be the appropriate remedy.

Where a public trial right violation occurs at a suppression hearing or some other easily separable part of a trial, remand for a public hearing may be appropriate. However, we cannot reasonably order a “redo” of voir dire to remedy the public trial right violation that occurred here. The jury would necessarily be differently composed and it is impossible to speculate as to the impact of that on Wise's trial.

Wise, 176 Wn. 2d at 19. Where the alleged violation does not “create defect[s] affecting the framework within which the trial proceeds,” the error is not structural and the remedy is not a new trial. State v. Coleman, 151 Wn. App. 614, 623-624, 214 P.3d 158 (2009); *see also*, U.S. v. Canady, 126 F.3d 352 (2<sup>nd</sup> Cir. 1997) (remand for court to enter its verdict in open court, and not a new trial, was remedy where judge in bench trial didn't announce his decision in open court, but mailed it); State v. Jones, 817 N.W.2d (Iowa 2011) (because the “reading of the verdict in open

court would not change the evidence produced at trial or the verdict rendered by the court,” court’s announcement of verdict in open court at sentencing remedied the violation); *see also*, Palm Beach Newspapers v. Nourse, 413 So.2d 467 (1982) (remedy for 1<sup>st</sup> Amendment violation of right to public access was remand for a hearing to determine whether the transcripts of the closed arraignment and sentencing hearings should be made available and the file unsealed).

Eagle has demonstrated no prejudice that flows from the re-arraignment that occurred in chambers. Eagle had already pleaded not guilty to the original charges and was pursuing a trial on the charges. Eagle had public notice of the First Amended Information back in February, and the second amended information did not substantively change the charges. The in chambers re-arraignment hearing occurred before the trial began. It had no effect on the trial process. The in chambers proceeding did not affect the evidence presented or the cross-examination of witnesses. Even if Eagle could demonstrate prejudice, the remedy should be limited to remand for a re-arraignment hearing on the amended information in open court. Any other remedy would provide the type of windfall that Waller discountenanced.

**5. Any violations of the right to public trial that occurred were de minimis and thus don't warrant a new trial.**

The State acknowledges that the Washington Supreme Court has not as of yet adopted a “de minimis” exception to the right to public trial. However, four cases that present this issue have just been accepted for review: State v. Shearer, No. 86216-8, State v. Grisby, No. 87259-7 and State v. Lam, No. 86043-2 and State v. Applegate, No. 86513-2<sup>11</sup>. The State therefore presents this argument in order to preserve it in case of further review.

Closures that have a de minimis effect on a proceeding do not necessarily violate the right to public trial. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). In this context, in order to determine whether the right to a public trial is implicated by the closure of a particular hearing, the court looks to whether the principles underlying the right to public trial are negatively impacted by the closure of the particular proceeding.

“...[W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether the closure has infringed the ‘values that the Supreme Court has said are advanced by the public trial guarantee...’ ... This analysis tends to safeguard the right at

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<sup>11</sup> In fact in Applegate, the Supreme Court added it as an issue to be addressed even though it had not been presented in the State’s argument below.

stake without requiring new trials where these values have not been infringed by a trivial closure.”

State v. Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring); *see also*, U.S. v. Norris, 780 F.2d 1207, 1210 (5<sup>th</sup> Cir. 1986) (Waller concerns are not implicated by non-public exchanges between counsel and the court in chambers and in bench conferences on technical legal issues and routine administrative matters because such exchanges do not hinder the objectives fostered by a public trial). Where a de minimis closure occurs, there is no violation of the right to a public trial. Easterling, 157 Wn.2d at 184 (J. Madsen, concurring).

The underlying objective of the right to public trial is so:

... the public may see [the defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Bone-Club, 128 Wn.2d at 259. The core values advanced by the public trial guarantee are: “(1) to ensure a fair trial; (2) to remind the prosecutor and the judge of their responsibility to the accused and the importance of their functions; (3) to encourage witnesses to come forward; and (4) to discourage perjury.” Sublett, 176 Wn.2d at 722; U.S. v. Ivester, 316 F.3d 955, 960 (9<sup>th</sup> Cir. 2003).

In addition to considering the values guaranteed by the public trial right in determining whether a closure is de minimis, courts have also

considered the duration of the closure. Ivester, 316 F.3d at 960; *see also*, Peterson v. Williams, 85 F.3d 39 (2<sup>nd</sup> Cir. 1996), *cert. den.*, 519 U.S. 878 (1996) (inadvertent closure of courtroom during defendant's testimony for 20 minutes met de minimis standard); Snyder v. Coiner, 510 F.2d 224, 230 (4<sup>th</sup> Cir. 1975) (short closure of courtroom during closing arguments was too trivial to implicate right to public trial). The de minimis standard has been applied in cases where closure was purposeful as well as unintentional. Easterling, 157 Wn.2d at 184-85 (J. Madsen concurring, listing cases where de minimis standard was applied to intentional closures as well as inadvertent ones).

Applying the values guaranteed by the right to a public trial to the in chambers proceedings in this case reveals that any effect upon Eagle's right to public trial was de minimis. All that occurred in chambers in the re-arraignment was defense counsel waiving the reading of the amended information and Eagle entering a not guilty plea. The "hearing" took less than a page of the transcript and was recorded. RP 40. Defense counsel's objections to the amended information all occurred in open court. RP 23-36.

Values number three and four, encouraging witnesses to come forward and discouraging perjury, are not implicated at all under either in chambers "hearing" where no testimony was actually given or heard.

Values one and two, regarding ensuring a fair trial and impressing upon the court and prosecutor their responsibility to the accused, are not negatively impacted by the in chambers re-arraignment where Eagle had already entered a not guilty plea and the second amended information did not substantively change the charges. Values one and two are also not implicated by the in chambers conference regarding the text message. It could not be determined who sent the text, and the message was not even attempted to be introduced as evidence at trial. In fact, discussing the matter in chambers given the odd circumstances in which it arose more likely promoted the fairness of the trial. Even if the re-arraignment hearing and the in chambers conference should have been heard in open court, any violation was de minimis and no relief is warranted.

**6. Defense counsel was not ineffective for failing to object to going into chambers to re-arraign Eagle on the amended information or in requesting an in chambers conference because neither “hearing” implicated the right to public trial to discuss the text message.**

Eagle alternatively asserts that defense counsel was ineffective for failing to object to going into chambers when he was re-arraigned and in requesting an in chambers conference to discuss the text message Eagle had received. Eagle has failed to demonstrate that defense counsel was ineffective in either circumstance because neither event implicated Eagle’s

right to public trial. Moreover, he has failed to demonstrate any prejudice from doing so. Eagle contends that under Morris, prejudice is presumed because appellate counsel failed to raise the issue on direct appeal. Morris is distinguishable, however, from the facts of this case. Therefore, Eagle still must demonstrate prejudice from his allegations of ineffective assistance.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *rev. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2w 112 (1992). "The defendant bears the burden of showing there were no 'legitimate strategic or tactical reasons' behind defense counsel's decision." State v. Rainey, 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *rev. den.*, 145 Wn.2d 1028 (2002). It is the defendant's burden to

overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15.

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 46. Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

Defense counsel wasn't ineffective for failing to object to the alleged unlawful closures because the public trial right didn't attach to those circumstances. Also, defense counsel was not ineffective for failing to object to the in chambers re-arraignment because he knew it was a mere formality of entering a not guilty plea to the amended information. He had placed all his objections on the record in open court, and Eagle had already entered a not guilty plea to the original information. He also wasn't ineffective for requesting the in chambers conference regarding the

text message because he understood that the issue was best handled discreetly as he wasn't sure of the implications of the text message.

Moreover, Eagle has made no attempt, relying upon Morris, to establish actual prejudice. Morris is distinguishable because in that case the right to public trial violation related to the voir dire of members of the venire. The Morris court indicated that the cases of Wise and Paumier<sup>12</sup>, “make it clear that failing to consider *Bone-Club* before *privately questioning potential jurors* violates a defendant’s right to a public trial,” thus warranting a new trial on review. Morris, 176 Wn.2d at 165-66 (emphasis added). In both Wise and Paumier, the court determined that the violation of the right to public trial was structural error and determined that a “redo” of voir dire was not a reasonable remedy, in part because assessing the effect of the public trial violation would be difficult. Wise, 176 Wn.2d at 14, 17; Paumier, 176 Wn.2d at 35-36. With scant analysis, and relying upon In re Orange, Morris determined that prejudice should be presumed in that case because if appellate counsel had raised the issue on direct appeal, the error would have been deemed to be structural and a new trial granted.

This case does not involve voir dire of the venire, nor any kind of hearing that had an effect on the trial. Both “hearings” were separable

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<sup>12</sup> State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012).

from the trial. Therefore, Eagle must demonstrate actual prejudice from the alleged ineffective assistance of counsel and he has not. It is difficult to perceive how Eagle could establish any actual prejudice from the in chambers re-arraignment and the in chambers discussion regarding the text message that could conceivably have had any effect on the trial itself. Moreover, there is nothing about the in chambers re-arraignment or conference that made the trial itself unreliable in determining guilt or innocence or fundamentally unfair.

7. **Morris is incorrect, harmful and should be overturned.**

If this Court were to decide Eagle is entitled to a new trial based on Morris, the State asserts that the Washington Supreme Court's decision in Morris was wrongly decided, incorrect and harmful. The Washington Supreme Court's decision in Morris was incorrect in that the authority it relied upon did not stand for the broad remedy that the majority in Morris indicated it did. Its analysis regarding the effectiveness of appellate counsel was flawed. It was incorrect in concluding that jurisprudence was clear at the time of the direct appeal that an in chambers voir dire process without an on-the-record Bone-Club analysis, a process that was not objected to and benefitted the defendant, constituted an unlawful closure such that an automatic new trial would be warranted. The opinion is

harmful in that numerous cases in which the defendant received a benefit from the allegedly unlawful closure will be overturned simply because the court failed to conduct a Bone-Club analysis on the record, and where no prejudice resulted from the failure to conduct the analysis.

Washington Supreme Court precedent should be overruled if it is shown to be incorrect and harmful. State v. Nuñez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012). A decision is incorrect if it is not supported by the authority upon which it relies or if it conflicts with other Washington Supreme Court precedent. *Id.*; *accord*, State v. Barber, 170 Wn.2d 854, 864, 248 P.3d 494 (2010). The Supreme Court clarified the meaning of “incorrect” in Barber:

The meaning of “incorrect” is not limited to any particular type of error. We have recognized, for example, that a decision may be considered incorrect based on inconsistency with this court's precedent; inconsistency with our state constitution or statutes; or inconsistency with public policy considerations. A decision may also be incorrect if it relies on authority to support a proposition that the authority itself does not actually support.

Barber, 170 Wn.2d at 864 (internal citations omitted). A decision may be harmful “for a variety of reasons.” *Id.* at 865. A decision is harmful if it undermines an important public policy or a fundamental legal principle. Nuñez, at 174 Wn.2d 716-19. A decision is also harmful where it has a

“detrimental impact on the public interest.” Barber, 170 Wn.2d at 865.

The decision in Morris is both incorrect and harmful under this test.

In Morris, five members of the Washington Supreme Court (the lead opinion, signed by four justices, and a concurrence by Justice Chambers) held that the defendant was entitled to a new trial based on the theory that he had received ineffective assistance of appellate counsel because appellate counsel had not raised a public trial violation issue on direct appeal. Morris, 176 Wn.2d at 166, 172 (Chambers, J., concurring). In reaching this decision, the five justices concluded that appellate counsel’s performance was deficient because Morris’s case was indistinguishable from In re Orange, *supra*, and that prejudice resulted because Morris would have been entitled to a new trial if the issue had been raised on direct appeal. *Id.* Both of these conclusions are deeply flawed.

*a. In re Morris was wrongly decided.*

First, In re Orange is plainly distinguishable from what occurred in Morris. In In re Orange, the defendant specifically objected to the exclusion of members of his family from the courtroom during voir dire, but the trial court excluded them anyway despite that specific objection. In re Orange, 152 Wn.2d at 801-02. Moreover, the trial court excluded Orange’s family from the courtroom simply due to concerns regarding

lack of seating for the large venire. *Id.* On review, the court specifically found that the defendant had been *harmed* by the permanent, full courtroom closure of voir dire<sup>13</sup>, due to “*the inability of the defendant’s family to contribute their knowledge or insight into the jury selection and the inability of the venirepersons to see the interested individuals.*” *Id.* 152 Wn.2d at 812 (*quoting Watters v. State*, 328 Md. 38, 48, 612 A.2d 1288 (1992)) (emphasis added by the Washington Supreme Court). Accordingly, the error in Orange was “conspicuous in the record” and thus, appellate counsel was ineffective for failing to raise it on direct appeal. Morris, 288 P.3d 1153 (Wiggins, J., dissenting). As the court in Momah explained, in Orange the trial was rendered fundamentally unfair because the closure excluded the defendant’s family and friends from being present during voir dire, despite the defendant’s repeated requests that they be present. Momah, 167 Wn.2d at 150-51.

In Morris, by contrast, the defendant did *not* object to conducting individual voir dire in chambers and was *not* harmed as a result of that procedure. To the contrary, the defendant waived his own right to be present for individual voir dire, and he received a benefit from the private questioning because the procedure promoted his right to an impartial jury

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<sup>13</sup> While the Orange court concluded that the trial court had ordered a permanent, full closure, it acknowledged the ruling may have only effected a temporary, full closure. *Id.* at 808.

and his right to a fair trial. Morris, 176 Wn.2d at 161-62. Accordingly, the purported public trial violation was *not* “conspicuous in the record,” as it had been in Orange.

In light of these obvious and legally significant differences between the two cases, the court’s conclusion that In re Orange and Morris are indistinguishable and that Morris’s appellate counsel was ineffective for failing to raise the issue on direct appeal is simply incorrect. The defendant’s objection to the courtroom closure and the harm that resulted from that closure were central to the Orange court’s finding of ineffective assistance of appellate counsel. But these key features are notably absent from Morris. In sum, Morris is incorrect because it is not supported by the authority upon which it relies.

The Morris opinion also ignores the fact that in the very opinion it cites to for its clarity on this issue, In re Orange, a partial in chambers voir dire of jurors occurred there and was never raised as an alleged unlawful courtroom closure, and the opinion never treated that aspect of the voir dire process as an unlawful courtroom closure.

At the opening of trial on April 26, 1995, the court discussed with counsel the method of conducting voir dire. Acknowledging that the prospective jurors had completed a lengthy questionnaire, the trial judge explained that they would be interviewed in chambers about past crimes, pretrial publicity, and familiarity with the Orange family’s

reputation. As the trial judge told counsel, “The rest of [voir dire] you can conduct in open court.”

In re Orange, 152 Wn.2d at 801. An appellate attorney reading the opinion could assume that in chambers voir dire of a limited number of prospective jurors was either an issue that could not be raised for the first time on appeal or did not constitute an unlawful courtroom closure.

The Morris opinion is devoid of any analysis regarding the effectiveness of appellate counsel. It relies entirely on a conclusory assumption that any effective attorney would have understood that its jurisprudence in Orange extended to all types of closures, no matter how brief or not, no matter whether the defendant objected or not, and no matter whether the alleged closure benefitted the defendant or not. At the time the Morris case went to trial in 2004 and at the time his appeal was decided in 2005<sup>14</sup>, neither Strode nor Momah had been published, the cases in which the Supreme Court first addressed the issue of in chambers voir dire and the remedy for such courtroom closures. Moreover, under Momah, a clear majority, as opposed to the plurality opinion in Strode, concluded that not all violations of the right to public trial result in structural error warranting a new trial. State v. Frawley,<sup>15</sup> the first state

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<sup>14</sup> State v. Patrick Morris, No. 54924-3-I, 130 Wn. App. 1036 (2005), *rev. den.*, 160 Wn.2d 1022 (2007).

<sup>15</sup> State v. Frawley, 140 Wn. App. 713, 167 P.3d 593 (2007).

case to address in chambers voir dire, was not decided until September of 2007. As noted in Justice Wiggins dissent in Morris:

Second, and perhaps more importantly, it was not at all clear at the time of Morris's appeal that the public trial issue would be a winning issue on appeal or that it should even be pursued. It may seem clear with the benefit of hindsight after *Strode*, 167 Wash. 2d 222, 217 P.3d 210, but before *Strode* this court had never held that partial chambers voir dire would violate the public trial right. Morris's appeal was decided four years before *Strode*, so it is unlikely that Morris's appellate counsel was constitutionally deficient for failing to raise and develop what may have been a novel legal argument at the time.

Morris, 288 P.3d at 1154 (Wiggins, J. dissenting). The Supreme Court's jurisprudence certainly was not clear regarding partial in chambers voir dire of jurors at the time Morris filed his appeal, still wasn't clear when it issued its plurality opinion in Strode, and arguably wasn't clear until the opinions issued in Wise and Paumier.

The court's conclusion that defendant Morris had established prejudice is also incorrect. With no analysis, other than citing to Orange, the court stated that defendant Morris had suffered prejudice because he would have been entitled to a new trial if the issue had been raised on direct appeal. Again, however, because Orange is fundamentally different from Morris in legally significant ways, *i.e.*, Orange objected while Morris did not, and Orange was harmed while Morris was not, the court's

conclusion is again not supported by the precedent it cites. The court's decision is incorrect in this respect as well.

Morris is also incorrect because it conflicts with other Washington Supreme Court precedent. As noted by both dissents, a wealth of precedent had rigorously adhered to the well-settled principle that a personal restraint petitioner is required to show actual and substantial prejudice in order to obtain relief. Morris, 288 P.3d at 1149 (Madsen, C.J., dissenting); *Id.* at 1151-52 (Wiggins, J., dissenting). Other than the conclusory and incorrect statement that Morris's case was the same as Orange's case, the 5-justice majority in Morris identified no prejudice whatsoever.

Moreover, as noted in both dissents, the majority's conclusory analysis in Morris also conflicts with In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992), wherein the court specifically held that a *higher* standard for prejudice applies on collateral attack:

We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders. *Therefore, we decline to adopt any rule which would categorically equate per se prejudice on collateral review with per se prejudice on direct review.* Although some errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack, the interests of finality of litigation demand that a *higher standard* be satisfied in a collateral proceeding.

In re St. Pierre, 118 Wn.2d at 329 (citation omitted) (emphasis supplied); *see also* Morris, at 1149 (Madsen, C.J., dissenting); *Id.* at 1151-52 (Wiggins, J., dissenting). But rather than apply this higher standard as required, the majority in Morris collapsed the rules for direct appeal and the rules for collateral attack into a single standard under the rubric of ineffective assistance of appellate counsel. As such, the decision is erroneous.

*b. Morris is harmful.*

Furthermore, the decision in Morris is harmful because it undermines the public policy considerations and fundamental legal principles inherent in collateral review. It permits a defendant a second direct appeal regarding any alleged closure of the courtroom without a Bone-Club analysis. In doing so, it seriously undermines precedent regarding the finality of review.

It is axiomatic that “[a] personal restraint petition is not to operate as a substitute for a direct appeal.” In re St. Pierre, 118 Wn.2d at 328. To the contrary, because collateral relief “undermines the principles of finality of litigation” and “degrades the prominence of the trial,”<sup>16</sup>

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<sup>16</sup>In re St. Pierre, 118 Wn.2d at 329.

collateral relief is reserved for cases in which the fundamental fairness of the proceedings has truly been compromised. Brecht v. Abrahamson, 507 U.S. 619, 633-34, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). It has long been the law in Washington that a personal restraint petitioner is entitled to relief only when the petitioner carries the burden of showing either constitutional error from which he has suffered actual and substantial prejudice, or non-constitutional error that constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

The court's decision in Morris undermines these fundamental principles. Rather than safeguard the finality of litigation and the prominence of the trial, the Morris decision grants the unjustified windfall of a new trial under circumstances where no prejudice has been shown. Indeed, the Morris decision grants the windfall of a new trial under circumstances where the defendant received a *benefit* from the procedure employed at trial. As Justice Wiggins stated in dissent,

The right to a public trial is not a magic wand granting new trials to all who would wield it. Openness is a crucially important value in our criminal justice system, but so is finality. It does not serve the interests of justice to reopen this long-decided case, requiring a young girl to relive old traumas, and granting a windfall new trial to a man convicted of sexually molesting his daughter. We require personal restraint petitioners to show actual and substantial prejudice because we value finality and seek to avoid

outcomes of this nature. Morris should be required to meet that burden just like every other personal restraint petitioner.

Morris, at 1154 (Wiggins, J., dissenting).

In short, Morris dispenses with the fundamental principle that a personal restraint petitioner is required to show actual and substantial prejudice in order to obtain relief. As such, the decision is harmful, because it undermines the public's interest in the finality of criminal convictions, and it will result in needless retrials for criminal defendants whose first trials were fundamentally fair.

#### **F. CONCLUSION**

Eagle has failed to show that his Art. 1 §22 or his Sixth Amendment right to public trial is implicated by either the re-arraignment on the amended information or the informal discussion regarding a text message that occurred in chambers. He has not asserted any specific prejudice to the trial that flowed from the in chambers events and relies solely upon presumed prejudice in seeking reversal and a new trial. As presumed prejudice is inapplicable in this case, his petition should be denied.



# **APPENDIX A**

SCANNED 13

FILED IN OPEN COURT  
03-15 2010  
WHATCOM COUNTY CLERK

By \_\_\_\_\_  
Deputy

*JDSWC*

SUPERIOR COURT OF WASHINGTON  
COUNTY OF WHATCOM

STATE OF WASHINGTON, Plaintiff,

vs.

CALVIN ARTIE EAGLE, Defendant.

DOB: April 29, 1970

No. 08-1-00814-5

JUDGMENT AND SENTENCE (~~FJS~~)

PRISON

[XX] RCW 9.94A.712 – PRISON CONFINEMENT  
[XX] CLERK'S ACTION REQUIRED-para 4.1 (LFO'S),  
4.3 (NCO)

I. HEARING

1.1 The court conducted a sentencing hearing March 15, 2010 and the defendant, Calvin Artie Eagle, the defendant's lawyer, Jeffrey A Lustick, and the Deputy Prosecuting Attorney, Eric J. Richey, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced in accordance with the proceedings in this case, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant is guilty of the following offenses based upon a JURY - VERDICT:

COUNT	CRIME	TYPE OF DRUG	RCW	DATE OF CRIME
II	RAPE OF A CHILD IN THE FIRST DEGREE	NOT APPLICABLE ON THIS COUNT	9A.44.073	October 14, 2003
III	RAPE OF A CHILD IN THE 2ND DEGREE	NOT APPLICABLE ON THIS COUNT	9A.44.076	September 13, 2007
IV	RAPE OF A CHILD IN THE SECOND DEGREE	NOT APPLICABLE ON THIS COUNT	9A.44.076	October 14, 2005

as charged in the Amended Information.

The jury returned a special verdict or the court made a special finding with regard to the following: [XX] The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.712.[XX] The victim was under 15 years of age at the time of the offense in Count II RCW 9.94A.837. [XX] The crime(s) charged in involve domestic violence.

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

Judgment and Sentence (JS) (Felony)  
(RCW 9.94A.500, .505) WPF CR 84.0400 (6/2002)  
CALVIN ARTIE EAGLE

*JIS/mw  
cc: weso/BRD  
cc: Jail*

*an*

*BB*

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	A or J	TYPE OF CRIME
<b>NO KNOWN FELONY HISTORY</b>				

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525
- The following prior offense require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570):
- The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

**2.3 SENTENCING DATA:**

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements *	TOTAL STANDARD RANGE (standard range including enhancements)	MAXIMUM TERM
II	6	XII	162 to 216 Months		162 to 216 Months	Life/\$50,000
III	6	XI	146 to 194 Months		146 to 194 Months	Life/\$50,000
IV	6	XI	146 to 194 Months		146 to 194 Months	Life/\$50,000

*\*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW.94A.533(9).*

- Additional current offense sentencing data is attached in Appendix 2.3.
- 2.4 [ ] EXCEPTIONAL SENTENCE.** The court finds substantial and compelling reasons that justify an exceptional sentence:
- 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

\_\_\_\_\_

\_\_\_\_\_

- 2.6** For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are as follows:

**III. JUDGMENT**

- 3.1** The defendant is **GUILTY** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
- 3.2 [XX]** The defendant is found **NOT GUILTY** of Count 1.

**IV. SENTENCE AND ORDER**

**IT IS ORDERED:**

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE

JASS CODE		Restitution to:	
RTN/RJN	\$	<i>(Name and Address--address may be withheld and provided confidentially to Clerk's Office).</i>	
PCV	<u>\$500.00</u> <u>\$100.00</u>	Victim Assessment Domestic Violence Assessment	RCW 7.68.035 RCW 10.99.080
CRC	<u>\$450.00</u>	Court costs, including:	RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
		Criminal filing fee	<u>\$200.00</u> FRC
		Witness costs	\$ WFR
		Sheriff service fees	\$ SFR/SFS/SFW/WRF
		Jury demand fee	<u>\$250.00</u> JFR
PUB		Fees for court appointed attorney	RCW 9.94A.760
WFR	\$	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM	\$	Fine	RCW 9A.20.021
LDI	\$	VUCSA Fine	<input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430
MTH	\$	Meth Lab Cleanup	<input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.401
CDF/LDI/ FCD/NTF/ SAD/SDI CLF	\$	Drug enforcement fund	RCW 9.94A.760
	\$	Crime lab fee	<input type="checkbox"/> Suspended due to indigency RCW 43.43.690
DN2	<u>\$100.00</u>	Felony DNA Collection Fee	<input type="checkbox"/> Not imposed due to hardship RCW 38.52.430
RTN/RJN	\$	Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum)	RCW 9.94A.760
	\$	<b>TOTAL</b>	RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

- shall be set by the prosecutor
- is scheduled for \_\_\_\_\_

All payments shall be made in accordance with the policies, procedures and schedules of the Whatcom County Clerk as supervision of legal financial obligations has been assumed by the Court. RCW 9.94A.760

PAYMENT IN FULL: Defendant agrees and is hereby ordered to make payment in full within \_\_\_\_\_ days after the imposition of sentence to the Whatcom County Clerk for the amount due and owing for legal financial obligations and restitution.

MONTHLY PAYMENT PLAN: The defendant agrees and is hereby ordered to enter into a monthly payment plan, with the Whatcom County Clerk for the amounts due and owing for legal financial obligations and restitution, immediately after sentencing. The Court hereby sets the defendant's monthly payment amount at \$100.00, which will remain in effect until such time as the defendant executes a payment plan negotiated

with the Collections Deputy. The first payment of \$100.00 is due immediately after imposition of sentence or release from confinement, whichever occurs last.

During the period of repayment, the Whatcom County Clerk's Collections Deputy may require the defendant to appear for financial review hearings regarding the appropriateness of the collection schedule. The defendant will respond truthfully and honestly to all questions concerning earning capabilities, the location and nature of all property or financial assets and provide all written documentation requested by the Collections Deputy in order to facilitate review of the payment schedule. RCW 9.94A. The defendant shall keep current all personal information provided on the financial statement provided to the Collections Deputy. Specifically, the defendant shall notify the Whatcom County Superior Court Clerk's Collection Deputy, or any subsequent designee, of any material change in circumstance, previously provided in the financial statement, i.e. address, telephone or employment within 48 hours of change.

**[XX] DEFENDANT MUST MEET WITH COLLECTIONS DEPUTY PRIOR TO RELEASE FROM CUSTODY.**

[XX] The defendant shall pay the cost of services to collect unpaid legal financial obligations, which include monitoring fees for a monthly time payment plan and/or collection agency fees if the account becomes delinquent. (RCW 36.18.190)

[ ] In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here: \_\_\_\_\_ . (JLR) RCW 9.94A.760

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

[XX] The defendant is ordered to reimburse \_\_\_\_\_ at \_\_\_\_\_ for the cost of pretrial electronic monitoring in the amount of \$.

4.2 [XX] **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

[XX] **HIV TESTING.** The defendant shall submit to HIV testing. RCW 70.24.340

4.3 **NO CONTACT ORDER/ORDER PROHIBITING CONTACT**

[XX] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence. **SEE ATTACHED APPENDIX F.**

[ ] **NO POST-CONVICTION ORDER PROHIBITING CONTACT IS BEING ENTERED OR EXTENDED. ANY PRIOR ORDER ENTERED, HAVING THIS CAUSE NUMBER, TERMINATES ON THE DATE THIS JUDGMENT IS SIGNED**

4.4 **OTHER:**

[ ] Defendant is to be released immediately to set up jail alternatives.

[ ] **DEPORTATION.** If the defendant is found to be a criminal alien eligible for release to and deportation by the United States Immigration and Naturalization Service, subject to arrest and reincarceration in accordance with law, then the undersigned Judge or Prosecutor consent to such release and deportation prior to the expiration of the sentence. RCW 9.94A.280

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

**See (b) below for terms of confinement pursuant to RCW 9.94A.712.**

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data above)

OTHER: \_\_\_\_\_

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA, in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above in section 2.3, and except for the following which shall be served CONSECUTIVELY:

The sentence herein shall run consecutively with the sentence in \_\_\_\_\_ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400

Confinement shall commence IMMEDIATELY unless otherwise set forth here: \_\_\_\_\_ (should be a Monday if possible) between 1:00 p.m. and 4:00 p.m.

(b) CONFINEMENT. RCW 9.94A.712: The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count II: minimum term 216 months maximum term Life; Count III: minimum term 194 months maximum term Life; Count IV: minimum term 194 months maximum term Life

(c) The defendant shall receive credit for time served prior to sentencing, including time spent in transport, if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

4.6 SUPERVISION: [XX]COMMUNITY CUSTODY for 36 to 48 months for counts II, III & IV, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence; or the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. [ Use paragraph 4.7 to impose community custody following work ethic camp.]

[On or after July 1, 2003, the court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or a felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime. For offenses committed on or after June 7, 2006, the court shall impose a term of community custody under RCW 9.94A.715 if the offender is guilty of failure to register (second or subsequent offense) under RCW 9A.44.130(1)(a).

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent Offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)	v) Residential burglary offense	
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) The defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC; and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

Defendant shall report to Department of Corrections, 1522 Cornwall Avenue, Bellingham, WA 98225, not later than 72 hours after release from custody; and the defendant shall perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. For sex offenses, defendant shall submit to electronic monitoring if imposed by DOC. Defendant shall comply with the instructions, rules and regulations of DOC for the conduct of the defendant during the period of community supervision or community custody and any other conditions of community supervision or community custody stated in this Judgment and Sentence. The defendant shall:

[XX] The defendant shall not consume any alcohol.

[XX] Defendant shall comply with the No Contact provisions stated above.

[ ] Defendant shall remain of a specified geographical boundary, to wit

[XX] The defendant shall undergo an evaluation for treatment for the concern noted below AND FULLY COMPLY with all recommended treatment.

[ ] Domestic Violence

[XX] Substance Abuse

[ ] Mental Health

[ ] Anger Management

[XX] The defendant shall participate in the following crime related treatment or counseling services:

**Defendant shall complete an alcohol and drug evaluation and comply with recommendations.** [

[XX] The defendant shall comply with the following crime-related prohibitions:

**Defendant shall not use any alcohol or drugs (except as prescribed by his physician).**

Other conditions may be imposed by the court or Department during community custody, or are set forth here:

[XX] For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

4.7  [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections:

## V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to

vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional ten years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5)
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606
- 5.4 **RESTITUTION HEARING.**

[XX] Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_

\_\_\_\_\_ Defendant refuses to waive any right to be present at any restitution hearing.

5.5 **COMMUNITY CUSTODY VIOLATION.**

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).

- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200**

1. **General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.
2. **Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Correction.
3. **Change of Residence Within State and Leaving the State:** If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county

where last registered within 10 days of moving. If you move out of Washington state, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

4. **Additional Requirements Upon Moving to Another State:** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.
5. **Notification Requirement When Enrolling in or Employed by a Public or Private Institution of High Education or Common School (K-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. If you are enrolled on September 1, 2006, you must notify the sheriff immediately. The sheriff shall promptly notify the principal of the school.
6. **Registration by a Person Who Does Not Have a Fixed Residence:** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours, excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.
7. **Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least 5 years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.
8. **Application for a name Change:** If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

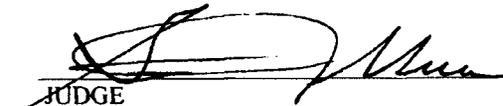
- 5.8 || The court finds that Count(s) is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately mark the person's Washington State Driver's license or permit to drive, if any in a manner authorized by the department. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER:

DONE in Open Court and in the presence of the defendant this date: **March 15, 2010.**

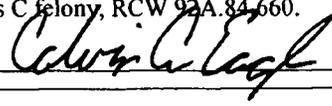
  
DEFENDANT  
Print name: CALVIN ARTIE EAGLE

  
JUDGE

  
Deputy Prosecuting Attorney  
WSBA # 22860  
Print name: ERIC J. RICHEY

  
Attorney for Defendant  
WSBA # 27072  
Print name: JEFFREY A LUSTICK

**Voting Rights Statement:** I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 9A.84.660.

Defendant's signature: 

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY**

THE STATE OF WASHINGTON,	)	No. <b>08-1-00814-5</b>
	)	
Plaintiff,	)	<b>APPENDIX F - SEXUAL ASSAULT PROTECTION</b>
	)	<b>ORDER</b>
vs.	)	<b>(Criminal/Felony)</b>
	)	<b>(ORSXP)</b>
CALVIN ARTIE EAGLE, DOB: April 29, 1970	)	<b>(JIS order code: SXP)</b>
	)	
Defendant.	)	<b>[XX] Post Conviction</b>
	)	<b>[XX] Clerk's Action required</b>

1. The court find that the defendant has been convicted of a sex offense as defined in RCW 9.94A.030, a violation of RCW 9A.44.096, a violation of RCW 9.68A.090, or a gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030. Additional findings on page two.

2. This Sexual Assault Protection Order is entered pursuant to Laws of 2006, ch. 138 § 16. This order protects:

**B.B. DOB 09/13/1995; S.M. DOB 10/14/1993**

**IT IS ORDERED:**

**This Post Conviction Sexual Assault Protection Order DOES NOT EXPIRE. This is a lifetime protection order.**

(A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence if imprisonment and subsequent period of community supervision, conditional release, probation or parole.)

Defendant is **RESTRAINED** from:

- A.  Having any contact with the protected person(s) directly, indirectly or through third parties regardless of whether those third parties know of the order.
- B.  Knowingly coming within or knowingly remaining with **500 feet** of the protected person(s)  residence,  school,  place of employment, [ ] other: \_\_\_\_\_
- C.  Obtaining, owning, possessing or controlling a firearm.

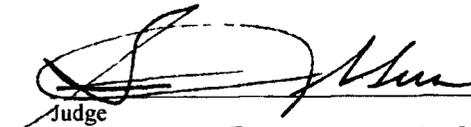
**WARNINGS TO THE DEFENDANT: Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.**

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to: **Blaine Police Department**, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

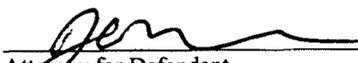
This order is issued in accordance with Full Faith and Credit provisions of VAWA: 18 U.S.C. § 2265. The court determines that the defendant's relationship to a person protected by this order is: N/A. Therefore, 18 U.S.C. §§ 2261 (federal violation penalties) may apply to this order.

Done in Open court in the presence of the defendant this date: **March 15, 2010**

  
Defendant  
Print name: CALVIN ARTIE EAGLE

  
Judge  
Print name: STEVEN J. MURA

  
Deputy Prosecuting Attorney  
WSBA# 22860  
Print name ERIC J. RICHEY

  
Attorney for Defendant  
WSBA # 27072  
Print name: JEFFREY A LUSTICK

**A Law Enforcement Information Sheet (LEIS) must be completed.**

SUPERIOR COURT OF WASHINGTON  
COUNTY OF WHATCOM

STATE OF WASHINGTON, Plaintiff,

vs.

CALVIN ARTIE EAGLE, Defendant.

DOB: April 29, 1970

No. 08-1-00814-5

WARRANT OF COMMITMENT

THE STATE OF WASHINGTON

TO: THE SHERIFF OF WHATCOM COUNTY

The defendant, CALVIN ARTIE EAGLE, has been convicted in the Superior Court of the State of Washington of the crime or crimes of RAPE OF A CHILD IN THE FIRST DEGREE, RAPE OF A CHILD IN THE FIRST DEGREE, RAPE OF A CHILD IN THE 2ND DEGREE and RAPE OF A CHILD IN THE SECOND DEGREE and the Court has ordered that the defendant be punished by serving the determined sentence of: Count II: minimum term 216 months maximum term Life; Count III: minimum term 194 months maximum term Life; Count IV: minimum term 194 months maximum term Life.

The defendant shall receive credit for time served prior to sentencing, as long as the time served was solely on that cause number, including time spent in transport, if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

By Direction of the HONORABLE

DATED: March 15, 2010

STEVEN J MURA  
JUDGE

N.F. JACKSON, JR., Clerk

By:

[Signature]  
Deputy Clerk

CALVIN ARTIE EAGLE  
CAUSE NUMBER of this case: 08-1-00814-5

I, \_\_\_\_\_, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: **March 15, 2010.**

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF DEFENDANT**

SID No. \_\_\_\_\_  
(If no SID take fingerprint card for State Patrol)

Date of Birth: 04/29/70

FBI No. \_\_\_\_\_

Local ID No. \_\_\_\_\_

PCN No. \_\_\_\_\_

Other \_\_\_\_\_

Alias name, SSN, DOB:

Race: Native American

Sex: Male

Defendant's Last Known Address: 636A C St; Blaine WA 98230

**FINGERPRINTS** I attest that I saw the same defendant who appeared in Court on this document affix his fingerprints and signature thereto.

Clerk of the Court: *Shirley R. [Signature]* Deputy Clerk. Dated: **March 15, 2010**

DEFENDANT'S SIGNATURE *(X) Calvin A. Eagle*

Left Thumb



Right Thumb



# **APPENDIX B**

SCANNED ✓

FILED  
COUNTY CLERK

2008 JUN 19 AM 8:41

WHATCOM COUNTY  
WASHINGTON

BY \_\_\_\_\_ aj

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,	)	No.:	08-1-00814-5
	)		
Plaintiff.	)		
	)	INFORMATION FOR:	
vs.	)		
	)	RAPE OF A CHILD IN THE SECOND	
CALVIN ARTIE EAGLE,	)	DEGREE , COUNT I and RAPE OF A	
	)	CHILD IN THE SECOND DEGREE,	
	)	COUNT II	
Defendant.	)		
	)		

I, ERIC J. RICHEY, Deputy Prosecuting Attorney in and for Whatcom County, State of Washington, comes now in the name and by the authority of the State of Washington and by this information do accuse CALVIN ARTIE EAGLE with the crime(s) of RAPE OF A CHILD IN THE SECOND DEGREE , COUNT I and RAPE OF A CHILD IN THE SECOND DEGREE, COUNT II, committed as follows:

then and there being in Whatcom County, Washington,

RAPE OF A CHILD IN THE SECOND DEGREE , COUNT I

That between the 14th day of October, 2002 and the 18th day of June 2008, the said defendant, CALVIN ARTIE EAGLE, then and there being in said county and state, did have sexual intercourse with S.M., who was at least twelve years old but less than fourteen years old and not married to the defendant and the defendant was at least thirty-six months older than S.M., in violation of RCW 9A.44.076, which violation is a Class A Felony;

RAPE OF A CHILD IN THE SECOND DEGREE, COUNT II

That Between the 1st day of September, 2006, and 18th day of June 2008, the said defendant, CALVIN ARTIE EAGLE, then and there being in said county and state, did have sexual intercourse with B.B., who was at least twelve years old but less than fourteen years old and not

INFORMATION - 1

Whatcom County Prosecuting Attorney  
311 Grand Avenue, Suite #201  
Bellingham, WA 98225  
(360) 676-6784  
(360) 738-2532 Fax

✓



# APPENDIX C

DOCKETED ①

SCOMIS CODES: MTHRG  HNTSTP  STAHRG  NCHRG   
HSTKIC  SCVHRG  PLMHRG   
ARRAIGN  DSMHRG  HSTKSTP  (Other)

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY**

STATE OF WASHINGTON, Plaintiff,  
vs.  
EAGLE, CALVIN ARTIE, Defendant

No. 08-1-00814-5  
JUDGE/COMM GROSS  
REPORTER/CD PORTER  
CLERK KIELE  
DATE 06/27/08 @ 9:30

This matter comes on for ARRAIGN/CASE SCHEDULING/NCO CC Interpreter appeared \_\_\_\_\_

State represented by DONA BRACKE Defendant represented by BAIRD LEVINE / CHALFIE Lustick

Defendant appeared: yes  no ; in custody: yes  no ; Name as charged  or \_\_\_\_\_

State requests BW  Court authorizes issuance of Bench Warrant

Defendant is served with true copy of Information  Read  Waived

PLEA: NOT GUILTY

Defendant acknowledged viewing/understanding advice of rights

Defendant acknowledged he/she was advised of basic civil & constitutional rights  and penalty

The following are called, sworn & testified on behalf of State: \_\_\_\_\_

Court finds probable cause  Probable Cause Found Over Weekend

Defendant requested counsel  Referred to Assigned Counsel Office  Court appoints PD

State makes recomm. re release  requests bail of \$ \_\_\_\_\_ Defense counsel responds

COURT SETS BAIL AT \$ \_\_\_\_\_ Court releases defendant on PR

Deft agrees to waive speedy trial rights  Waiver of Speedy Trial: FILED  TO BE FILED

Continued to: Thursday Calendar for plea  Next Status Calendar  Court 5 day bump

Friday Calendar for new trial date  Presence Waived  Presence waived if order signed

Strike Jury  Strike Trial Date  Maintain Trial Date

THE DEFENSE: Taken into custody just prior to hearing.

THE STATE: \_\_\_\_\_

Arraign/Trial Setting/Fugitive Hearing set for \_\_\_\_\_

SET FOR TRIAL: 9/18/08 and/or STATUS 8/27/08

THE COURT: GRANTED / DENIED / SIGNED THE STATE'S / DEFENSE'S MOTION / ORDER

PREPARED ORDERS SIGNED: DEFT'S ACK/ADVICE OF RIGHTS  ORDER/WARRANT FUGITIVE COMPLAINT

ORDER ON FIRST APPEARANCE OF DEFT  WAIVER OF EXTRADITION  (4: Jail=2, PA=1, CRT=1)

ORDER FOR PRE-TRIAL RELEASE  ORDER TO RELEASE  NO CONTACT ORDER

AGREED ORDER SETTING TRIAL DATE  ORDER FOR BENCH WARRANT  ORDER: QUASH WARRANT

ORDER OF CONTINUANCE  CONTINUED BY COURT  TO 3:00pm FOR TUE APP. after arrest

DATE: JUNE 27, 2008

# **APPENDIX D**

SCANNED 2

FILED  
COUNTY CLERK

2009 FEB 17 PM 1:42

WHATCOM COUNTY  
WASHINGTON

BY SA

11 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
13 FOR WHATCOM COUNTY

15	THE STATE OF WASHINGTON,	)	No.: 08-1-00814-5
17		)	
17	Plaintiff.	)	FIRST AMENDED
19		)	INFORMATION FOR:
19	vs.	)	
21		)	RAPE OF A CHILD IN THE FIRST
21	CALVIN ARTIE EAGLE,	)	DEGREE, COUNTS I-IV
23		)	
23	Defendant.	)	
25		)	

27 I, ERIC J. RICHEY, Deputy Prosecuting Attorney in and for Whatcom County, State of  
29 Washington, comes now in the name and by the authority of the State of Washington and by this  
information do accuse CALVIN ARTIE EAGLE with the crimes of RAPE OF A CHILD IN  
31 THE FIRST DEGREE, COUNTS I-IV, committed as follows:

33 then and there being in Whatcom County, Washington,

35 RAPE OF A CHILD IN THE FIRST DEGREE, COUNT I

37 That during the time intervening between the 1st day of January, 2005, and the 12<sup>th</sup> day of  
September, 2005, the said defendant, CALVIN ARTIE EAGLE, then and there being in said  
county and state, did have sexual intercourse with B.B., who was less than twelve years old and  
not married to the defendant and the defendant was at least twenty-four months older than B.B.;  
39 in violation of RCW 9A.44.073, which violation is a Class A Felony;

41 RAPE OF A CHILD IN THE FIRST DEGREE, COUNT II

43 That during the time intervening between the 14th day of October, 2003, and the 13<sup>th</sup> day of  
October, 2005, the said defendant, CALVIN ARTIE EAGLE, then and there being in said county  
and state, did have sexual intercourse with S.M., who was less than twelve years old and not  
45 married to the defendant and the defendant was at least twenty-four months older than S.M.; in  
violation of RCW 9A.44.073, which violation is a Class A Felony;

47 INFORMATION - 1

38  
Whatcom County Prosecuting Attorney  
311 Grand Avenue, Suite #201  
Bellingham, WA 98225  
(360) 676-6784  
(360) 738-2532 Fax



# APPENDIX E

DOCKETED

M

SCOMIS CODES:

MTHRG     HCNTSTP     STAHRG     NCHRG  
 HSTKIC     SCVHRG     PLMHRG  
 ARRAIGN     DSMHRG     HSTKSTP    (Other)

SCANNED 1

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY**

STATE OF WASHINGTON, Plaintiff,  
vs.  
EAGLE, CALVIN ARTIE, Defendant

No. 08-1-00814-8  
 JUDGE/COMM MURA  
 REPORTER/CD QUINN  
 CLERK MILLER  
 DATE 2-19-09 @ 8:30

This matter comes on for ARRAIGN/AMENDINFO/MT CONTINUANCE CC Interpreter appeared \_\_\_\_\_

State represented by ERIC J. RICHEY Defendant represented by JEFFREY A. LUSTICK

Defendant appeared: yes  no ; in custody: yes  no ; Name as charged  or \_\_\_\_\_

State requests BW  Court authorizes issuance of Bench Warrant

Defendant is served with true copy of information  Read  Waived  PLEA: NOT GUILTY

Defendant acknowledged viewing/understanding advice of rights

Defendant acknowledged he/she was advised of basic civil & constitutional rights  and penalty

The following are called, sworn & testified on behalf of State: \_\_\_\_\_

Court finds probable cause  Probable cause found over weekend  Probable cause previously found

Defendant requested counsel  Referred to Assigned Counsel Office  Court appoints PD

State makes recomm. re release  requests bail of \$ \_\_\_\_\_ Defense counsel responds

COURT SETS BAIL AT \$ \_\_\_\_\_ Court releases defendant on PR

Deft agrees to waive speedy trial rights  Waiver of Speedy Trial: FILED  TO BE FILED

Continued to: Thursday Calendar for plea  \_\_\_\_\_ Next Status Calendar  Court 5 day bump

Friday Calendar for new trial date  \_\_\_\_\_ Presence Waived  Presence waived if order signed

Strike Jury  Strike Trial Date  Maintain Trial Date  State/Defense moved to continue

THE DEFENSE: Needs time to interview witnesses

THE STATE: No objection

Arraign/Trial Setting/Fugitive Hearing set for \_\_\_\_\_

SET FOR TRIAL: 514 09 and/or STATUS 4 122 109

THE COURT: GRANTED / DENIED / SIGNED THE STATE'S / DEFENSE'S / MOTION / ORDER

Defense must have interview of witnesses done

PREPARED ORDERS SIGNED: DEFT'S ACK/ADVICE RIGHTS  ORDER/WARRANT FUGITIVE COMPLAINT

ORDER ON FIRST APPEARANCE OF DEFT  WAIVER OF EXTRADITION  (4: Jail=2, PA=1, CRT=1)

ORDER FOR PRE-TRIAL RELEASE  ORDER TO RELEASE  NO CONTACT ORDER

AGREED ORDER SETTING TRIAL DATE  ORDER FOR BENCH WARRANT  ORDER: QUASH WARRANT

ORDER OF CONTINUANCE  CONTINUED BY COURT  TO \_\_\_\_\_ FOR \_\_\_\_\_

STRICKEN PRIOR TO COURT  ORDER FORFEITING BOND

MISCELLANEOUS CRIMINAL MARGIE SC Miscellaneous Criminal Minutes Merge]

2-19-2009 41

# **APPENDIX F**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

---

STATE OF WASHINGTON, )  
 )  
Plaintiff, )  
 )  
vs. ) NO. 08-1-00814-5  
 ) COA NO. 65098-0-I  
CALVIN ARTIE EAGLE, )  
 )  
Defendant. )

---

**VERBATIM REPORT OF PROCEEDINGS**

December 1st and 2nd, 2009

Pages 1 through 254

**JURY TRIAL**

KENNETH E. QUINN  
Official Court Reporter  
Courthouse  
Bellingham, Washington 98225  
(360) 676-6748

RECEIVED  
JUN 21 2010  
Nelsen Broman & Koch, P.L.L.C.

1 that. I think that would be, if that happened, and I  
2 never received anything in writing as is customarily  
3 done in some courts, to indicate there's no material.

4 THE COURT: We are talking about exculpatory  
5 evidence, not mitigating evidence.

6 MR. LUSTICK: I am.

7 THE COURT: You're talking about exculpatory.

8 MR. LUSTICK: Well, if it tends to mitigate the  
9 culpability, it is by definition exculpatory.

10 THE COURT: Is the State aware of any exculpatory  
11 evidence?

12 MR. RICHEY: No.

13 THE COURT: They've answered that, then.

14 MR. LUSTICK: I have one other motion that I'd  
15 like to bring which is not written and that is it's a  
16 motion to challenge the First Amended Information in  
17 this case. I'm going to hand forward a transcript  
18 regarding --

19 THE COURT: I have a First Amended, it looks  
20 different. So this is the affidavit.

21 MR. RICHEY: Yes, Your Honor. I think that's the  
22 problem.

23 MR. LUSTICK: It doesn't indicate here this has  
24 been previously filed but it looks like he is  
25 attempting to file it today. Yes, December 1st.

1           Here's the issue I have, Your Honor. First of  
2 all, back in February, February 19th, 2009, we were  
3 before the court and it was at that time Mr. Richey  
4 said he wanted to amend the charges from two counts of  
5 rape of a child second degree to four counts of rape of  
6 a child in the first degree. The court was asked to  
7 arraign the defendant.

8           THE COURT: Excuse me. That was from two rapes  
9 second to four rapes first?

10          MR. LUSTICK: Yes. The defendant was asked to be  
11 arraigned. Then you said to Mr. Richey where's the  
12 probable cause affidavit? Has probable cause been  
13 found? And he said I will provide that and we'll do  
14 that. And then the court said the existing affidavit  
15 may not cover it. Mr. Richey said I understand. The  
16 court said go ahead. If there's probable cause found  
17 on the amended affidavit, then note it up for  
18 arraignment on the regular calendar. Thank you.

19          We are now in December, eight months have passed.  
20 Mr. Richey has not, until just a few seconds ago, filed  
21 the Amended Affidavit of Probable Cause for the First  
22 Amended Information. So I have really been unable to  
23 fully prepare for the charges we are facing here today,  
24 we are facing two counts of a rape child first degree  
25 and two counts of second degree, because I don't think

1           that the prerequisite has been given.

2           First of all, under State versus Alvarado and  
3           State versus Lainier, and State versus Powell, it's  
4           clear from these cases that the prosecution needs  
5           permission of the court to amend the Information. They  
6           can't do it sua sponte.

7           Secondly, when the Amended Information was done in  
8           February, there was no showing that there was  
9           permission or leave of the court granted to make the  
10          amendment.

11          Thirdly, it was not properly done because the  
12          charge was not supported by probable cause sufficient  
13          to give the defendant information from which to draw  
14          any reason why he would be guilty of these offenses as  
15          amended.

16          The original Information and the original Probable  
17          Cause Statement has remained in place throughout this  
18          time and I'm arguing to the court that there would be  
19          extreme prejudice to allow the prosecution to amend  
20          these charges now. The remedy, since we are here, the  
21          jury is ready to come in, we are ready to argue and  
22          already had the motion, is to disallow the amendment  
23          and allow the original Information that was filed in  
24          2008 stand.

25          THE COURT: Was the defendant arraigned on the

1 First Amended Information yet?

2 MR. LUSTICK: No.

3 MR. RICHEY: Your Honor, we are asking the court  
4 to arraign him at this time. If I may respond to this  
5 briefly?

6 THE COURT: Uh-huh.

7 MR. RICHEY: This is a notice issue to begin with  
8 and counsel has been put on notice long ago. In fact,  
9 we talked about it long ago and the information was, I  
10 believe, provided to the defendant long ago. In fact,  
11 we asked that the court arraign him long ago but what  
12 we didn't do was provide an Affidavit of Probable Cause  
13 that would support it. However, as the court is  
14 well-aware, the State has a right to amend an  
15 Information up until the time we close, and I think  
16 that the courts have limited that generally speaking to  
17 amend the Information up until the time we finish our  
18 case in chief and that's what the limiting has been.

19 Anyway, at this point there's no prejudice to the  
20 defendant. The defendant has had every opportunity  
21 through counsel to talk to the witnesses. The  
22 defendant has talked to the witnesses a number of  
23 times, and the defendant was aware that this was the  
24 State's intention.

25 At this point, yes, the State should have and made

1 an error by not providing an affidavit earlier but this  
2 is no surprise. There is no surprise to the defense  
3 and there's no prejudice. The State's asking that the  
4 court allow the Amended Information and to arraign the  
5 defendant at this time. I mean, if there was a  
6 question of notice, I think we would be talking about  
7 something different.

8 MR. LUSTICK: Your Honor, it's like this.  
9 Mr. Richey was cited by the court for violating court  
10 procedures and orders with respect to procedure of  
11 discovery and timeliness and you could not have been  
12 any clearer when you said in February to Mr. Richey you  
13 need to file an affidavit supporting the charges. For  
14 probable cause did he lined as to at this point a rain  
15 the defendant. We can file anything we want. If we  
16 file a motion it doesn't mean it was properly served.  
17 It doesn't mean it's properly noted. In order to make  
18 something work in the court system you have to follow  
19 court procedure, fundamental fairness, due process,  
20 respect for the system that we operate under.

21 Mr. Richey has never requested permission of this  
22 court to amend the Information. And under State versus  
23 Alvarado, at 73. Wn.App. 874, a 1994 decision --

24 THE COURT: What page?

25 MR. LUSTICK: I don't have the exact page, Your

1 Honor, but it's a very short case.

2 THE COURT: I should have had all of this before  
3 the jury comes in rather than laying in wait and  
4 dumping on the court and I have no time to read the  
5 cases.

6 MR. LUSTICK: I apologize for that, but under the  
7 circumstances I'm not going to do the prosecutor's job  
8 for him. I am going to wait to see if he does his job  
9 and I will bring this motion up because I could call  
10 the prosecutor all day and say, hey, you haven't filed  
11 a P.C. affidavit. But that's not my job.

12 Under the circumstances here, we have a culture in  
13 the Whatcom County Superior Court where prosecutors  
14 file first, second, third, and fourth amended  
15 informations and never get leave of the court to do so.  
16 The law requires them to get leave of the court. That  
17 was not done in this case.

18 Number two, Mr. Richey was on notice from you  
19 personally on February the 19th, as reflected in the  
20 transcript, that he needed to file an Affidavit of  
21 Probable Cause. He has not done so.

22 THE COURT: This is the original? You're asking  
23 the court to file this?

24 MR. RICHEY: Yes, Your Honor. Your Honor, the  
25 issues really are notice and prejudice. There really

1 is no notice problem and there's no prejudice and I'm  
2 asking the court to allow us to amend the Information.

3 THE COURT: Let me read the affidavit.

4 MR. RICHEY: If I may, I would like to address the  
5 notice issue. Back when this case was originally  
6 filed, the detective did not hammer down exactly when  
7 these things started and what we have done is we asked  
8 the detective to go back and talk to the victims, find  
9 out when it had started, and there was a report that  
10 was filed and provided to the defense within a month  
11 after the original charges were filed. And, again, we  
12 had talked about filing the Amended Information. In  
13 fact, I tried to amend the Information, asked the court  
14 to amend the Information back in February, as counsel  
15 has pointed out. So there is not a notice issue. The  
16 facts were always with the defense as well.

17 MR. LUSTICK: But, Your Honor, any time the  
18 charges are amended and a new P.C. affidavit is given,  
19 we have the opportunity to request a bill of  
20 particulars, to ask that the charges be further  
21 clarified, to ask that more discovery be conducted.  
22 Again, I can't do Mr. Richey's job for him. Sure, I  
23 can read a police report and find things that he might  
24 be charged with, but we have to know the venue and have  
25 to know the charges.

1 THE COURT: I'm looking at an Affidavit of  
2 Probable Cause that was filed in June 2008 and it  
3 covers at least two incidents of alleged rape.

4 MR. RICHEY: Excuse me?

5 THE COURT: June 2008. I have read that affidavit  
6 filed a year-and-a-half ago and it contains at least  
7 two incidents of rape in the first degree against both  
8 victims.

9 MR. LUSTICK: But it wasn't responding to the two  
10 charges. Now they're telling you on the morning of  
11 trial we want to convict the defendant of four counts  
12 which I think the prejudice occurs in the amount of  
13 time the defendant is now facing.

14 THE COURT: That's not time-dependent.

15 MR. LUSTICK: I think it is under New Jersey  
16 versus Apprendi. Any charges in the elements that  
17 results in more jail time is prejudicial to the  
18 defendant, certain elements of the crime that weren't  
19 pled properly at the time and under the circumstances  
20 the court disallowed the amendment and found prejudice  
21 to the defendant.

22 THE COURT: I just reduced a sentence by a year  
23 because of that. This is a question of them making the  
24 amendment before the trial starts and whether or not  
25 there's prejudice to the defendant in permitting that

1 amendment. That's what I'm faced with here.

2 MR. LUSTICK: I think there is prejudice, Your  
3 Honor, in this case because of the repeated breaches of  
4 court procedure that have happened with respect to  
5 discovery, noncompliance with court orders. You could  
6 not have been clearer in telling Mr. Richey that he  
7 needed to file the affidavit back in February and he's  
8 just not done so. So, to cure that breach the only  
9 equitable thing to do now is to say the First Amended  
10 Information is not accepted and therefore cannot be  
11 made within moments before we start jury selection.

12 MR. RICHEY: Your Honor, I have reviewed the  
13 transcript because Mr. Quinn has given me a copy and I  
14 will just tell the court you did tell me to amend the  
15 affidavit and --

16 THE COURT: Did I review the affidavit at the  
17 time? I don't know that I even reviewed the affidavit.

18 MR. RICHEY: I don't recall you doing so.

19 MR. LUSTICK: It didn't exist.

20 THE COURT: I'm looking at one here in the file  
21 and it was filed -- I didn't read an affidavit. I just  
22 said before you file one that you have to file one that  
23 covers the allegations. Now I'm looking at an  
24 affidavit that was filed back in June 2008 and in that  
25 affidavit it's pretty much the same as the First

1 Amended Affidavit.

2 MR. LUSTICK: The transcript says you don't know  
3 if it's sufficient because it had not been filed  
4 contemporaneously with the charges.

5 THE COURT: I don't know what I said, but I  
6 probably didn't even look at the affidavit.

7 MR. LUSTICK: You can tell what you said by  
8 reading the transcript.

9 THE COURT: I was not asked at that point in time  
10 of the hearing to make a finding of probable cause.

11 MR. LUSTICK: That's right, Your Honor, you were  
12 not.

13 THE COURT: I don't think I even looked at it. I  
14 probably just told the State you better have an  
15 affidavit that covers it.

16 MR. RICHEY: You did.

17 THE COURT: I'm looking at this 2008 affidavit  
18 and, at least on the surface without having more than  
19 just shooting from the hip here from the bench and at  
20 this late moment, it looks to me like it covers it,  
21 Mr. Lustick.

22 MR. RICHEY: I'm asking the court to amend the  
23 Information.

24 MR. LUSTICK: I'm not saying it doesn't cover it.  
25 You can file an Affidavit of Probable Cause on just

1 about anything and that's first year law student stuff.  
2 Anybody can write an Affidavit of Probable Cause to  
3 cover the offenses.

4 Here's the issue. The issue is whether the State  
5 ought to be permitted to come in eight months after the  
6 fact and support it's First Amended Information with an  
7 affidavit on the morning of trial under these  
8 circumstances and I don't think they should be allowed  
9 to do it. They never asked for permission and never  
10 had permission granted.

11 THE COURT: That's what they're asking for now.

12 MR. LUSTICK: I'm asking you to deny it based on  
13 the situation we are in here.

14 MR. RICHEY: Your Honor, it's not fair. There's  
15 no justice to be reached by what counsel is suggesting.  
16 Again, there's no notice issues; there's no prejudice.

17 THE COURT: The first Information involved --

18 MR. RICHEY: Two counts of a rape of a child  
19 second.

20 THE COURT: Against whom?

21 MR. RICHEY: Each victim.

22 THE COURT: One of each.

23 MR. RICHEY: Yes. I don't have my Information  
24 here, I wasn't really aware that this was going to be  
25 something that was going to be addressed today. I got

1 hint of it when Mr. Quinn provided me a transcript of  
2 this issue because he was asked to get the transcript  
3 by Mr. Lustick. But my recollection is the current  
4 Information is one count of rape of a child first, one  
5 count of rape of a child second for each victim.  
6 That's my recollection anyway. Is that incorrect?

7 THE COURT: Let me look here.

8 MR. RICHEY: At least that's the Information that  
9 we were asking the court to arraign the defendant on  
10 back in February.

11 THE COURT: Well, it looks to me like the original  
12 Information alleges a rape in the first degree, a rape  
13 of a child when the child was at least 12 and less than  
14 14.

15 MR. RICHEY: That would be second degree, Your  
16 Honor. Again, I don't have a copy of my Information.

17 THE COURT: At least 12 and less than 14. In the  
18 Amended Information you're charging rape in the first  
19 degree. You've got four counts of rape in the first  
20 degree. And the first two counts when she's less than  
21 12, which is the rape in the first degree, the second  
22 two counts at least 12 and less than 14, which you're  
23 alleging is first degree but it's second degree.

24 MR. RICHEY: It is.

25 MR. LUSTICK: Your Honor, I don't want to take

1 advantage of my colleague but if he is confused about  
2 this it just proves why this amendment should not be  
3 permitted.

4 MR. RICHEY: The State is not confused. Counsel  
5 is not confused. What we provided was notice that we  
6 intend to charge rape of a child in the first degree  
7 and that's the issue. The rapes of a child in the  
8 second degree were already set out there.

9 Again, I was just apprised of this this morning  
10 that there was a hint we might be dealing with  
11 something like this. If there's a scrivener's error in  
12 my Information, we are certainly allowed to fix that  
13 and I'm asking the court to do that.

14 THE COURT: If this was a military court I'd grant  
15 your motion. But it's not, it's a civilian court, and  
16 they're looser at the Court of Appeals as to what the  
17 State can or can't do.

18 The standard in this is whether or not there's any  
19 prejudice to the defense and there isn't any prejudice  
20 to the defense. The original Affidavit in Support of  
21 Probable Cause covers these offenses. The defense was  
22 put on notice last year that the State intended to  
23 proceed with an Amended Information. The State  
24 provided discovery with regard to that. But I'm not  
25 going to do an arraignment on an Amended Information

1 that is in error. If you want to correct it and come  
2 up with a corrected Information --

3 MR. RICHEY: We will.

4 THE COURT: You can do that.

5 MR. RICHEY: I will do that just before -- well,  
6 we can do that after we select a jury.

7 MR. LUSTICK: We'll just note it as an exception  
8 for the record.

9 THE COURT: That's noted. Mr. Richey, you need to  
10 be more precise in the work that you're doing.

11 MR. RICHEY: I know.

12 THE COURT: If you were coming in at the last  
13 minute like this, if the defense didn't know long ago  
14 what the State intended to do I wouldn't permit it.  
15 But I don't see any prejudice.

16 MR. RICHEY: Thank you.

17 THE COURT: So you need to get an Information and  
18 he needs to be arraigned before I inform the jury what  
19 he is charged with.

20 MR. RICHEY: Okay. I have a couple motions in  
21 limine as well.

22 THE COURT: Let's go to that.

23 MR. RICHEY: During jury selection I'm going to  
24 ask that the defense not talk about his military  
25 background. I would tell the court it's my belief that

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

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STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. ) NO. 08-1-00814-5  
 )  
 CALVIN ARTIE EAGLE, )  
 )  
 Defendant. )

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VERBATIM REPORT OF PROCEEDINGS

February 19, 2009

KENNETH E. QUINN  
Official Court Reporter  
Courthouse  
Bellingham, Washington 98225  
(360) 676-6748

1 MR. LUSTICK: This matter comes before the court  
2 with short notice to the State but I think the State is  
3 not objecting to that --

4 MR. RICHEY: I'm not.

5 MR. LUSTICK: -- to ask the court for a  
6 continuance. The basis for this is the court might  
7 recall you set this court date in the first part of  
8 February. At the time we were here we did not have,  
9 mutual lists were not available. I had to go on  
10 vacation that was scheduled between the 10th and the  
11 17th, and I did receive a witness list from the State  
12 that had about four people on it on or about the 8th of  
13 February or so and I reciprocated and gave my witness  
14 list. I returned from vacation on the 18th and it  
15 appears that while I was gone the prosecutor filed a  
16 new witness list that now has about 15 or 16 people on  
17 it. Some people are identified on the witness list  
18 just by their name, no address, no phone number, and  
19 there are people I have never heard of. They're not in  
20 the police report and I don't know what they're going  
21 to say.

22 Also on the 17th the prosecutor amended the  
23 charges. We went from two counts of rape of a child  
24 second degree to now four counts of rape of a child  
25 first degree. There is not an amended P.C. so I don't

1 know with specificity what the allegations are against  
2 my client.

3 We don't want to have this delayed but I think  
4 it's important that it is delayed in the interest of  
5 justice to give the defense more time to examine the  
6 new charges, to interview the new witnesses, who,  
7 again, have never been proffered or identified to us so  
8 we don't really know who they are.

9 So we are here before you today to ask for a  
10 continuance. We understand the court does not like to  
11 continue these matters unless there's good cause and we  
12 believe there is adequate good cause for you to issue a  
13 continuance. I see you're looking at your screen; do  
14 you want me to hand up some documents?

15 THE COURT: No. We have two alleged victims?

16 MR. RICHEY: That's correct, Your Honor. What we  
17 have is different time frames and we have separated the  
18 time frames by age.

19 THE COURT: How do you get 16 witnesses?

20 MR. RICHEY: I don't know that there's 16.

21 THE COURT: What are those witnesses going to say?

22 MR. RICHEY: Your Honor, when I developed the  
23 witness list for Mr. Lustick I didn't have all the  
24 information that I wanted. I wanted to let Mr. Lustick  
25 know right away that I had additional witnesses but I

1           didn't have phone numbers and addresses for these  
2           people.

3           Essentially, I had been speaking with the victims'  
4           mother in depth and I learned that there would be  
5           corroboration witnesses that would have information  
6           about disclosures, witnesses that have information  
7           about the demeanor, witnesses that may have seen some  
8           closeness that both victims shared with the defendant.  
9           I believe all of that would be, of course, important  
10          information to present.

11          Now, I understand that counsel has the motion to  
12          continue and it's hard for me to stand here and say  
13          this needs to go forward right now. I will tell the  
14          court the victims would like to see this case happen  
15          and happen soon just to get it behind them, but, again,  
16          I understand counsel's position.

17          MR. LUSTICK: The other thing to consider, Your  
18          Honor, I don't make this a primary argument but it is  
19          important to the court for you to understand, I don't  
20          know that this matter is even going to be able to go to  
21          trial on Monday when it is set; it may need a five-day  
22          bump. My client's witnesses, if you look on our  
23          witness list, are from Colorado, the vast majority of  
24          them. So we need a date certain. They are going to be  
25          burning airline tickets at this point. I don't know if

1           they will be able to cash them in and get the refund or  
2           not.

3           We would benefit greatly with the continuance just  
4           to go through the new charges and interview witnesses  
5           and give our witnesses time to buy new tickets.

6           MR. RICHEY: I have not interviewed -- there's one  
7           witness that I haven't reached yet. I just got his  
8           phone number yesterday.

9           THE COURT: I just hope for purposes of this  
10          matter going forward that we don't have a situation as  
11          we do, usually it's the reverse where the defense comes  
12          in with twenty witnesses and then two are called.

13          MR. RICHEY: I understand that.

14          THE COURT: Because otherwise that's nothing more  
15          than either the defense trying to put pressure on the  
16          prosecution or the prosecution trying to put pressure  
17          on the defense to get matters resolved and I don't want  
18          to see that because then we delay cases.

19          MR. RICHEY: I will tell the court there is no  
20          gamesmanship going on here, and I don't think there is  
21          from defense counsel either.

22          THE COURT: Certainly the defense is entitled to a  
23          continuance with the circumstances as they are. How  
24          much time do you need, Mr. Lustick?

25          MR. LUSTICK: I was just looking at my schedule

1 and I am literally booked every week until about the  
2 middle of April with trials, some of which the court is  
3 aware will not go.

4 THE COURT: Ninety-five percent of them won't.

5 MR. LUSTICK: Then I've got National Guard duty a  
6 week in April. So if we can get the first part of, I  
7 hate to ask for this, the first part of May. I see the  
8 judicial conference is sitting in there.

9 THE COURT: May 4th.

10 MR. RICHEY: I think counsel has just told you he  
11 has a trial set and we all do. We have a lot of cases  
12 stacked. I'd like to set it shorter than that if  
13 possible. I'd like to set it in late March.

14 THE COURT: Not with 16 witnesses he hasn't  
15 interviewed yet.

16 MR. LUSTICK: I interviewed some of them but there  
17 are some on the witness list --

18 THE COURT: How many more do you have to  
19 interview?

20 MR. LUSTICK: Well, as of today, eight. I mean,  
21 that's a lot. This is our motion and we are asking for  
22 relief until May. I think that's appropriate under the  
23 circumstances.

24 I agree with the State, I don't think there's any  
25 gamesmanship going on here. He's been very straight

1 with me and we appreciate that. But there's a good  
2 reason to continue it out that far.

3 THE COURT: I will schedule it for May 4th.  
4 However, I want the defense to get your interviews out  
5 of the way because I don't want the matter to come back  
6 and say, three weeks before the trial or a month  
7 before, I've interviewed these witnesses and now I've  
8 got to go out and find other witnesses.

9 MR. LUSTICK: We would ask for a status on April  
10 22nd.

11 THE COURT: April 22nd. Like I say, this case is  
12 going to go. Interview early, and if you have any  
13 additional witnesses that pop up notify the State  
14 immediately so everybody can be prepared for the 4th.

15 MR. RICHEY: Counsel talked about flying witnesses  
16 in and this is an older case; can the court give us  
17 some sort of priority at the top of the list?

18 THE COURT: If the State is willing to let cases  
19 go on speedy trial I'm more than happy. I can't give  
20 priorities over an in-custody or the in-custody gets  
21 dismissed.

22 MR. RICHEY: Finally, Your Honor, I'd ask the  
23 court to arraign the defendant on the Amended  
24 Information.

25 THE COURT: Has probable cause been found on the

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amended?

MR. RICHEY: I will provide that and we'll do that.

THE COURT: The existing affidavit may not cover it.

MR. RICHEY: I understand.

THE COURT: Go ahead. And if there's probable cause found on it with an Amended Affidavit, then note it up for arraignment on the regular arraignment calendar.

MR. RICHEY: Thank you, Your Honor.



# **APPENDIX G**

SCANNED 2

FILED IN OPEN COURT  
12/1 20 09  
WHATCOM COUNTY CLERK  
By [Signature]  
Deputy

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,	)	No.: 08-1-00814-5
	)	
Plaintiff.	)	SECOND AMENDED
	)	INFORMATION FOR:
vs.	)	
	)	RAPE OF A CHILD IN THE FIRST
CALVIN ARTIE EAGLE,	)	DEGREE, COUNTS I-II
	)	RAPE OF A CHILD IN THE SECOND
Defendant.	)	DEGREE, COUNTS III-IV
	)	

I, ERIC J. RICHEY, Deputy Prosecuting Attorney in and for Whatcom County, State of Washington, comes now in the name and by the authority of the State of Washington and by this information do accuse CALVIN ARTIE EAGLE with the crimes of RAPE OF A CHILD IN THE FIRST DEGREE, COUNTS I-II and RAPE OF A CHILD IN THE SECOND DEGREE, COUNTS III-IV, committed as follows:

then and there being in Whatcom County, Washington,

RAPE OF A CHILD IN THE FIRST DEGREE, COUNT I

That during the time intervening between the 5<sup>th</sup> day of July, 2004, and the 12<sup>th</sup> day of September, 2007, the said defendant, CALVIN ARTIE EAGLE, then and there being in said county and state, did have sexual intercourse with B.B., who was less than twelve years old and not married to the defendant and the defendant was at least twenty-four months older than B.B.; in violation of RCW 9A.44.073, which violation is a Class A Felony;

RAPE OF A CHILD IN THE FIRST DEGREE, COUNT II

That during the time intervening between the 14th day of October, 2003, and the 13<sup>th</sup> day of October, 2005, the said defendant, CALVIN ARTIE EAGLE, then and there being in said county and state, did have sexual intercourse with S.M., who was less than twelve years old and not married to the defendant and the defendant was at least twenty-four months older than S.M.; in violation of RCW 9A.44.073, which violation is a Class A Felony;

70  
Whatcom County Prosecuting Attorney  
311 Grand Avenue, Suite #201  
Bellingham, WA 98225  
(360) 676-6784  
(360) 738-2532 Fax

1 **RAPE OF A CHILD IN THE SECOND DEGREE, COUNT III**

3 That during the time intervening between the 13th day of September, 2007, and the 18th day of  
5 June, 2008, the said defendant, CALVIN ARTIE EAGLE, then and there being in said county  
7 and state, did have sexual intercourse with B.B. who was at least twelve years old but less than  
fourteen years old and not married to the defendant and the defendant was at least thirty-six  
months older than B.B.; in violation of RCW 9A.44.076, which violation is a Class A Felony;

9 **RAPE OF A CHILD IN THE SECOND DEGREE, COUNT IV**

11 That during the time intervening between the 14th day of October, 2005, and the 14th day of  
13 June, 2008, the said defendant, CALVIN ARTIE EAGLE, then and there being in said county  
and state, did have sexual intercourse with S.M., who was at least twelve years old but less than  
fourteen years old and not married to the defendant and the defendant was at least thirty-six  
months older than S.M.; in violation of RCW 9A.44.076, which violation is a Class A Felony;

15 contrary to the form of the Statute in such cases made and provided and against the peace and  
17 dignity of the State of Washington.

19 DATED THIS 1<sup>ST</sup> day of December, 2009.

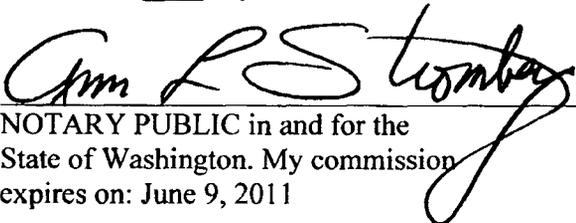
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23 \_\_\_\_\_  
ERIC J. RICHEY, WSBA #22860, Deputy Prosecuting Attorney  
in and for Whatcom County, State of Washington

25 STATE OF WASHINGTON )  
27 ) ss.  
29 COUNTY OF WHATCOM )

31 I, Eric J. Richey, being first duly sworn on oath, depose and say: that I am a duly  
33 appointed and acting Deputy Prosecuting Attorney in and for Whatcom County, State of  
Washington. I have read the foregoing information; know the contents thereof and the same is  
35 true as I verily believe.

37 \_\_\_\_\_  
ERIC J. RICHEY, #22860  
Deputy Prosecuting Attorney

39 SUBSCRIBED AND SWORN to before me this 1<sup>ST</sup> day of December, 2009.

41 \_\_\_\_\_  
43   
45 NOTARY PUBLIC in and for the  
47 State of Washington. My commission  
expires on: June 9, 2011

# APPENDIX H

SCANNED 11

DOCKETED WDM SCOMIS CODES  
NJTRIAL \_\_\_\_\_ JTRIAL X MODHRG \_\_\_\_\_ (OTHER) \_\_\_\_\_

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOMB COUNTY**

ST of WA	NO.	08-1-00814-5
vs.	JUDGE	Mura
Calvin Eagle	REPORTER	Quinn
	CLERK	O'Brien Campau
	DATE	12/1/09
	BAILIFF	Martin
	PANEL	M 9

**Eric Richey**  
Attorney for Plaintiff

**Jeffrey Lustick**  
Attorney for Defendant

This cause came on for Trial By Jury this 1<sup>st</sup> day of December 2009 in Dept. 2 with Judge Mura presiding. Court convened @ 9:32.

State present by and through Eric Richey. Defendant present in person, out of custody, and with Jeffrey Lustick.

Court and counsel discuss seating arrangement

Court and counsel work on defense motions in limine

Court recessed @ 10:26

In chambers, defendant is arraigned on amended information

See NGPH 12/1/09

Court convened @ 10:57

Defendant is present

Jurors were registered prior to Court convening

12/1/09  
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Court welcomed jurors and asked general questions

Having found panel qualified, clerk swore in jurors for term and cause 10:59

Court informed jurors of the case to be heard and had parties introduce themselves

Court questioned jurors on knowledge of witnesses and trial schedule

Jurors are questioned on voir dire

Court recessed @ 12:02

Reconvened @ 1:31

Defendant is present

Voir dire continued

The following jurors were sworn to try the case 3:22

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|--------|---------|
| 1. 203 | 7. 81   |
| 2. 18  | 8. 84   |
| 3. 54  | 9. 118  |
| 4. 56  | 10. 123 |
| 5. 59  | 11. 125 |
| 6. 78  | 12. 126 |

13. 145

The balance of panel was thanked and excused with instructions to call in for further service

Jury left

Court put the following on the record

State had no challenges for cause

Defense challenges for cause on jurors 46 and 120 were denied, on juror 138 was granted and on jurors 53 and 209 were moot as there was no need to go that deep in the panel

Court, with agreement of the parties, excused jurors 117, 22, 44, 117, 207

State's peremptory challenges were used on jurors 34, 37, 36, 85, 112, 9

Defense's peremptory challenges were used on jurors 7, 46, 51, 120, 87, 96, 49

Court recessed @ 2:56

Reconvened @ 3:21

Defendant is present

Court and counsel discuss contents of opening statements

Jury returned

Court preliminarily instructed jurors

Dep Richey made opening statement 3:43

Atty Lustick makes opening statement 4:02

Court recessed @ 4:16

\*\*\*\*\*Wednesday December 2, 2009\*\*\*\*\*

State present by and through Eric Richey.

Defendant present in person, out of custody, and with Jeffrey Lustick.

Court convened @ 9:34

Jury returned

The following were called, sworn, and testified on behalf of the State

**1.) Shilair Mallek**

Pla Exh #1 M, O -Adm

Pla Exh #2 M, O – Adm

Jury left

Parties go in chambers to discuss photo of victim that defendant received on his phone

Court recessed @ 10:27 Reconvened @ 10:48

Defendant is present

Dep Richey addressed the Court regarding the defendant's brother and wanting the

Court to admonish him regarding discussing the testimony

Court does so

Atty Lustik addressed the Court regarding the opening of the door regarding semen on the bedding

Court and counsel discuss

Jury returned

Direct continued

Pla Exh #3 M, O - Adm

Pla Exh #4 M, O - Adm

Pla Exh #5 M, O - Adm

Pla Exh #6 M, O -Adm

Pla Exh #7 M, withdrawn

Pla Exh #8 M, withdrawn

Pla Exh #9 M, O -Adm

Pla Exh #10 M *arked Only*

Court recessed @ 12:02

Reconvened @ 1:31

Defendant is present

Direct continued

Atty Lustick cross examined

Court recessed @ 2:46

Reconvened @ 3:04

Defendant is present

Jury returned

Cross continued

2.) Amber Johnson

3.) Betty Johnson

4.) Kathleen Saunders

Atty Lustick cross examined

5.) Jeffrey Baker

Atty Lustick cross examined

Dep Richey examined on re direct

Atty Lustick examined on re cross

Court recessed @ 4:25

\*\*\*\*\*Thursday December 3, 2009\*\*\*\*\*

State present by and through Eric Richey.

Defendant present in person, out of custody, and with Jeffrey Lustick.

Court convened @ 9:35

Court and counsel discuss witnesses and admissibility of prior convictions.

Lustick addressed the court regarding upcoming officer testimony

Dep Richey responded

Court won't allow in State's case in chief

Court and counsel continue to discuss

Jury returned

**6.) Brianne Baker**

Atty Lustick cross examined

Court recessed @ 10:55

Reconvened @ 11:15

Defendant is present

Jury returned

Cross continued

Dep Richey examined on re direct

Atty Lustick examined on re cross

**7.) Korinne Megard**

Atty Lustick cross examined

Dep Richey examined on re direct

Atty Lustick examined on re cross

Dep Richey questioned again

Jury left

Atty Lustick inquires about audio tape of witnesses

Dep Richey responded

Court recessed @ 11:46

Reconvened @ 1:29

Defendant is present

Atty Lustick moves for subpoenas to be signed

Court signed two (2) "Subpoena for Trial"

Dep Richey moves for reconsideration of ruling regarding "flight"

Court denied

Atty Lustick discusses officer availability and serving her with a subpoena

Dep Richey responds

Court won't hold witness over until Monday

Jury returned

**8.) Collen Baker**

Before direct began jury left

Dep Richey questioned witness

Atty Lustick questioned witness  
Jury returned  
Dep Richey questioned on direct examination  
Atty Lustick cross examined

**9.) Debra Hertz**

Court recessed @ 3:02

Reconvened @ 3:19

Defendant is present  
Jury returned  
Atty Lustick cross examined  
Dep Richey examined on re direct  
Atty Lustick examined on re cross

**10.) Jamal Mallak**

Atty Lustick cross examined

Court recessed @ 4:27

\*\*\*\*\*Monday December 7, 2009\*\*\*\*\*

State present by and through Eric Richey.  
Defendant present in person, out of custody, and with Jeffrey Lustick.  
Case called @ 9:37  
Court and counsel discuss defendant's amended witness list  
Jurors returned  
Court informs jurors of witnesses not previously mentioned

**11.) Assad Mallak**

Atty Lustick cross examined

Def Exh # 11 M, O - Adm

Dep Richey examined on re direct  
Atty Lustick examined on re cross  
Dep Richey questioned again  
Atty Lustick questioned again

Pla Exh #12 Marked Only

Pla Exh # 13 Marked Only

**12.) Sheila Rowe**

Court recessed @ 10:52

Reconvened @ 11:11

Defendant is present

Atty Lustick wants the State to have the parents of the young witnesses bring the children back to testify

Dep Richey responds

Court and counsel discuss

Court will not order the State to bring in witnesses

Jury returned

Direct continued

Pla Exh #14 M, O – Adm

Pla Exh #15 M, O – Adm

Pla Exh #16 *Marked only*

Court recessed @ 11:59

Reconvened @ 1:30

Defendant is present

Jury returned

Direct continued

Atty Lustick cross examined

Def Exh #17 M, O - Adm

Dep Richey examined on re direct

Atty Lustick examined on re cross

The state rests

2:33

Court recessed @ 2:33

Reconvened @ 2:52

Defendant is present

Jury returned

The following are called, sworn, and testified on behalf of the defendant

**1.) Dan Sartain, Blaine PD**

Dep Richey cross examined

**2.) Greg Frank, WSP**

Def Exh #18 M, O -Adm

Dep Richey cross examined

**3.) Robert Grine**

Jury left

Court and counsel discuss objection

Dep Richey voir dres the witness

Court and counsel discuss witness testimony

Jury returned

Direct continued

Dep Richey cross examined

**4.) Tom Solin**

Def Exh #19 M, O -Adm

Def Exh #20 M, O -Adm

Def Exh #21 M, O -Adm

Def Exh #22 M, O -Adm

Def Exh #23 M, O -Adm

Def Exh #24 M, O -Adm

Def EXh #25 M, O -Adm

Dep Richey voir dres the witness

PI a Exh #26 M, O -Adm

Direct continued

Dep Richey cross examined

Atty Lustick examined on re direct

Dep Richey examined on re cross

Court recessed @ 4:18

\*\*\*\*\*Tuesday December 8, 2009\*\*\*\*\*

State present by and through Eric Richey.

Defendant present in person, out of custody, and with Jeffrey Lustick.

Case called @ 9:32

Dep Richey asked that the defendant not be allowed to testify about call he got while in Court. Defense counsel states they are not planning on it.

Jury returned

**5.) Calvin Eagle**

Court recessed @ 10:45

Reconvened @ 11:05

Defendant is present

Jury returned

Direct continued

Court recessed @ 11:58

Reconvened @ 1:31

Defendant is present

Jury returned

Direct continued

Dep Richey cross examined

Jury left

Dep Richey addressed the Court regarding a ruling on "beyond the scope of direct" objection

Dep Richey will provide case law

Court recessed @ 2:45

Reconvened @ 3:30

Defendant is present

Dep Richey provides case law to Court

Court does not revise ruling

Jury returned

Cross continued

Atty Lustick examined on re direct

Dep Richey examined on re cross

**6.) Josue Trejo**

Dep Richey cross examined

Atty Lustick examined on re direct

**7.) Judy Eagle**

Jury left

Court and counsel discuss objection

Court recessed @ 4:30

\*\*\*\*\*Wednesday December 9, 2009\*\*\*\*\*

State present by and through Eric Richey.

Defendant present in person, out of custody, and with Jeffrey Lustick.

Court convened @ 9:31

Jury returned

The direct examination of Judy Eagle continued

Dep Richey cross examined

Defense rests

10:13

The following were called, sworn if needed, and testified in rebuttal on behalf of the State

Sheila Rowe

Atty Lustick cross examined

Court recessed @ 10:22

Reconvened @ 11:03

Defendant is present

Court and counsel discuss jury instructions objections and exceptions

Court reads instructions to jurors

Dep Richey made closing argument

11:32

Court recessed @ 11:57

Reconvened @ 1:02

Defendant is present

Atty Lustick moves to dismiss Count I

Dep Richey responds

Court will deal with issue post trial

Jury returned

Atty Lustick made closing argument

1:05

Dep Richey made rebuttal argument

2:08

*Bailliff, Chisty Martin, is sworn in charge of jury*

2:43

Court released alternate juror #145

Court recessed @ 2:46

Jurors deliberated until 4:30

\*\*\*\*\*Thursday December 10, 2009\*\*\*\*\*

Jury reached a verdict @ 3:50

Court convened @ 4:27

State present by and through Eric Richey

Defendant present in person, out of custody, and with Jeffrey Lustick

Jury returned

The verdict was found in proper form by the Court and read by the clerks as follows

Defendant is found Not Guilty on Count I and Guilty on Counts II, III, and IV (see VRD 12/10/09) signed by presiding juror 59

Jury is polled by the clerk and found to be unanimous

Court thanked jurors and released them from service and from earlier admonition

Court signed "Order Remanding To Custody" and the defendant is immediately taken into custody

Sentencing to be scheduled

Court adjourned @ 4:31

# APPENDIX I

CASE#: 08-1-00814-5 JUDGMENT# 10-9-00926-6 JUDGE ID:  
TITLE: STATE OF WASHINGTON VS EAGLE, CALVIN ARTIE  
FILED: 06/19/2008 APPEAL FROM LOWER COURT? NO

RESOLUTION: CVJV DATE: 12/10/2009 CONVICTED BY JURY  
COMPLETION: JODF DATE: 03/15/2010 JUDGMENT/ORDER/DECREE FILED  
CASE STATUS: APP DATE: 03/15/2010 ON APPEAL  
ARCHIVED:  
CONSOLIDT:  
NOTE1:EXHIBITS IN CE 4 JUROR QUESTIONNAIRES IN BOX 13  
NOTE2:

----- PARTIES -----

CONN.	LAST NAME, FIRST MI TITLE	LITIGANTS	ARRAIGNED
PLA01	STATE OF WASHINGTON		
DEF01	EAGLE, CALVIN ARTIE		
DPA01	RICHEY, ERIC JOHN		
BAR#	22860		
WTD01	LUSTICK, JEFFREY ALAN		
BAR#	27072		

----- SENTENCE INFORMATION -----

DEF01 EAGLE, CALVIN ARTIE

DEF. RESOLUTION CODE: DATE:  
TRIAL JUDGE:  
SENTENCE DATE : 03/15/2010 SENTENCED BY MURA  
SENTENCING DEFERRED : NO APPEALED TO : DIVISION I DATE APPEALED : 03/15/2010

PRISON SERVED.....	X		
PRISON SUSPENDED.....		FINE.....	\$
JAIL SERVED.....		RESTITUTION.....	\$
JAIL SUSPENDED.....		COURT COSTS.....	\$
PROB/COMM. SUPERVISION.....	X	ATTORNEY FEES.....	\$
		DUE DATE :	PAID : NO

----- SENTENCE DESCRIPTION -----

216 MOS TO LIFE CT II, 194 MOS TO LIFE CTS III & IV AT DOC WCFTS/36-48 MOS CTS II, III, IV COMM CUSTODY/\*\*SEE JASS FOR LFOS\

----- CHARGE INFORMATION -----

DEF01 EAGLE, CALVIN ARTIE

RS CNT	RCW/CODE	CHARGE DESCRIPTION	DV INFO/VIOL.	RESULT
			---DATE---	---DATE---
----- ORIGINAL INFORMATION -----				06/19/2008
1	9A.44.076	RAPE OF A CHILD-2	N	10/14/2002
2	9A.44.076	RAPE OF A CHILD-2	N	09/01/2006
----- FIRST AMENDED INFORMATION -----				02/17/2009
1	9A.44.073	RAPE OF A CHILD 1ST DEGREE	N	01/01/2005

## ----- CHARGE INFORMATION -----

DEF01 EAGLE, CALVIN ARTIE

RS	CNT	RCW/CODE	CHARGE DESCRIPTION	DV INFO/VIOL.	RESULT
				---DATE---	---DATE---
	2	9A.44.073	RAPE OF A CHILD 1ST DEGREE	N 10/14/2003	
	3	9A.44.073	RAPE OF A CHILD 1ST DEGREE	N 09/13/2007	
	4	9A.44.073	RAPE OF A CHILD 1ST DEGREE	N 10/14/2005	
----- 2ND AMENDED INFORMATION					12/01/2009
NG	1	9A.44.073	RAPE OF A CHILD 1ST DEGREE	N 07/05/2004	12/10/09
G	2	9A.44.073	RAPE OF A CHILD 1ST DEGREE	N 10/14/2003	12/10/09
G	3	9A.44.076	RAPE OF A CHILD-2	N 09/13/2007	12/10/09
G	4	9A.44.076	RAPE OF A CHILD-2	N 10/14/2005	12/10/09

## ----- APPEARANCE DOCKET -----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
1	06/19/2008	AKAR	ACKNWLDGMT OF ADVICE OF RIGHTS	
2	06/19/2008	OFAD	ORD ON FIRST APPEARANCE OF DEFENDNT	
3	06/19/2008	ORPRL	ORDER FOR PRETRIAL RELEASE - 9:30 \$35,000	06-27-2008
4	06/19/2008	ORSXP	ORDER FOR SEXUAL ASSAULT PROTECTION	
5	06/19/2008	PLMHRG COM06	PRELIMINARY APPEARANCE COMMISSIONER BARTEK	
	06/19/2008	CDSOP	CD RECORD OF PROCEEDINGS 08-119	
6	06/19/2008	INFO	INFORMATION	
7	06/19/2008	ADPC	AFFIDAVIT/DECLARATION PROB CAUSE	
8	06/19/2008	ORDPCA COM03	ORD DETERMIN PROBABLE CAUSE COMMISSIONER DAVID M. THORN	
9	06/23/2008	MTAF	MOTION AND AFFIDAVIT REQUESTING ORDER FOR ARREST WARRANT	
10	06/23/2008	ORIBW JDG02	ORDER DIR ISSUANCE OF BENCH WARRANT JUDGE STEVEN J. MURA, DEPT 2	
	06/23/2008	BWICF	BENCH WARRANT ISSUED - COPY FILED	
10A	06/26/2008	NTAPR ATD01	NOTICE OF APPEARANCE LUSTICK, JEFFREY ALAN	
11	06/27/2008	BLB COM03	BAIL BOND/ALL CITY/S5001285202/ \$35,000 COMMISSIONER DAVID M. THORN	
12	06/27/2008	ARRAIGN COM05	INITIAL ARRAIGNMENT COMMISSIONER MARTHA V GROSS	
	06/27/2008	CTRN CTR01	COURT REPORTER NOTES COURT REPORTER LAURA PORTER	
13	06/27/2008	ORSXP COM05	ORDER FOR SEXUAL ASSAULT PROTECTION COMMISSIONER MARTHA V GROSS	
14	06/27/2008	MTHRG COM08	MOTION HEARING COMMISSIONER LEON F. HENLEY, JR.	
	06/27/2008	CDSOP	CD RECORD OF PROCEEDINGS 08-125	
15	06/27/2008	ORPRL	ORDER FOR PRETRIAL RELEASE - 9:30 REINSTATE BAIL ALREADY POSTED (\$35,000)	06-27-2008
16	06/27/2008	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE STATUS 08-27-2008	09-08-2008

## -----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
17	06/30/2008	COM05 RL	COMMISSIONER MARTHA V GROSS BOND RELEASE	
18	06/30/2008	\$SHRTBW	SHERIFF'S RETURN ON BENCH WARRANT	
19	07/18/2008	00R	AGREED OMNIBUS APPLICATION & ORDER	
20	08/27/2008	COM03 STAHRG JDG02	COMMISSIONER DAVID M. THORN STATUS CONFERENCE / HEARING JUDGE STEVEN J. MURA, DEPT 2	
	08/27/2008	CTRN CTR02	COURT REPORTER NOTES COURT REPORTER KENNETH QUINN	
21	08/27/2008	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE STATUS 10-29-08	11-10-2008
22	09/15/2008	JDG02 NTMTDK	JUDGE STEVEN J. MURA, DEPT 2 NOTE FOR MOTION DOCKET / 8:30	09-18-2008
		ACTION	REVIEW RELEASE CONDITIONS	
23	09/18/2008	HSTKPA	CANCELLED: PLAINTIFF/PROS REQUESTED	
24	09/18/2008	NTMTDK	NOTE FOR MOTION DOCKET 8:45	09-30-2008
		ACTION	SPECIAL SET JUDGE MURA	
		ACTION	BAIL REVIEW	
25	09/30/2008	NTMTDK	NOTE FOR MOTION DOCKET / 9:15	10-09-2008
		ACTION	SPECIAL SET - JUDGE UHRIG BAIL REVIEW	
26	10/09/2008	MTHRG JDG01	MOTION HEARING JUDGE IRA UHRIG, DEPT 1	
	10/09/2008	CTRN CTR01	COURT REPORTER NOTES COURT REPORTER LAURA PORTER	
27	10/09/2008	ORPRL	ORDER FOR PRETRIAL RELEASE	10-29-2008
			\$45,000 (\$35,000 ALREADY POSTED)	
28	10/09/2008	BLB	BAIL BOND/ALL CITY/S10 01386746 \$10,000	
29	10/29/2008	STAHRG JDG03	STATUS CONFERENCE / HEARING JUDGE CHARLES R. SNYDER, DEPT. 3	
	10/29/2008	CTRN CTR03	COURT REPORTER NOTES COURT REPORTER RHONDA JENSEN	
30	10/29/2008	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE STATUS 01-07-2009	01-20-2009
		JDG03	JUDGE CHARLES R. SNYDER, DEPT. 3	
31	01/07/2009	STAHRG JDG02	STATUS CONFERENCE / HEARING JUDGE STEVEN J. MURA, DEPT 2	
	01/07/2009	CTRN CTR02	COURT REPORTER NOTES COURT REPORTER KENNETH QUINN	
32	01/14/2009	CRT	CERTIFICATE OF CONSULTATION ON DEFS MOTION FOR BAIL REDUCTION	
33	01/14/2009	NTC	NOTE FOR CALENDAR / 8:30 MOTION TO CONTINUE TRIAL DATE	01-15-2009
34	01/15/2009	MTHRG JDG02	MOTION HEARING JUDGE STEVEN J. MURA, DEPT 2	
	01/15/2009	CTRN CTR02	COURT REPORTER NOTES COURT REPORTER KENNETH QUINN	
35	02/05/2009	STLW	STATE'S LIST OF WITNESSES	
36	02/09/2009	MTL	DEFENDANT'S MOTION IN LIMINE	
37	02/10/2009	DFLW	DEFENDANT'S LIST OF WITNESSES	
38	02/17/2009	AMINF	FIRST AMENDED INFORMATION	
39	02/17/2009	STLW	FIRST AMENDED STATE'S LIST OF	

## -----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			WITNESSES	
40	02/18/2009	NTC	NOTE FOR CRIMINAL CALENDAR / 8:30	02-19-2009
		ACTION	MOTION TO CONTINUE TRIAL DATE	
41	02/19/2009	HCNTSTP	HEARING CONTINUED: STIPULATED	
		JDG02	JUDGE STEVEN J. MURA, DEPT 2	
	02/19/2009	CTRN	COURT REPORTER NOTES	
		CTR02	COURT REPORTER KENNETH QUINN	
42	02/19/2009	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE	05-04-2009
			STATUS 04-22-09	
		JDG02	JUDGE STEVEN J. MURA, DEPT 2	
43	04/22/2009	STHRG	STATUS CONFERENCE / HEARING	
		JDG03	JUDGE CHARLES R. SNYDER, DEPT. 3	
	04/22/2009	CTRN	COURT REPORTER NOTES	
		CTR01	COURT REPORTER LAURA PEACH	
44	04/29/2009	STHRG	STATUS CONFERENCE / HEARING	
		JDG03	JUDGE CHARLES R. SNYDER, DEPT. 3	
	04/29/2009	CTRN	COURT REPORTER NOTES	
		CTR03	COURT REPORTER RHONDA JENSEN	
45	05/01/2009	HSTKDA	HEARING CANCELLED:DEF/RESP REQUEST	
46	05/01/2009	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE	06-08-2009
			STATUS 05-27-09	
		COM05	COMMISSIONER MARTHA V GROSS	
47	05/27/2009	STHRG	STATUS CONFERENCE / HEARING	
		JDG01	JUDGE IRA UHRIG, DEPT 1	
	05/27/2009	CTRN	COURT REPORTER NOTES	
		CTR01	COURT REPORTER LAURA PEACH	
48	05/27/2009	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE	08-03-2009
			STATUS 07-22-09	
		JDG01	JUDGE IRA UHRIG, DEPT 1	
49	07/22/2009	STHRG	STATUS CONFERENCE / HEARING	
		JDG03	JUDGE CHARLES R. SNYDER, DEPT. 3	
	07/22/2009	CTRN	COURT REPORTER NOTES	
		CTR03	COURT REPORTER RHONDA JENSEN	
50	07/22/2009	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE	10-19-2009
			STATUS 10-07-09	
		JDG03	JUDGE CHARLES R. SNYDER, DEPT. 3	
51	10/07/2009	STHRG	STATUS CONFERENCE / HEARING	
		JDG02	JUDGE STEVEN J. MURA, DEPT 2	
	10/07/2009	CTRN	COURT REPORTER NOTES	
		CTR02	COURT REPORTER KENNETH QUINN	
52	10/13/2009	WL	DEFENDANT'S AMENDED WITNESS LIST	
53	10/13/2009	DMF	DEFENDANT'S SECOND DEMAND FOR DISCOVERY	
54	10/19/2009	STHRG	STATUS CONFERENCE / HEARING	
		JDG02	JUDGE STEVEN J. MURA, DEPT 2	
	10/19/2009	CTRN	COURT REPORTER NOTES	
		CTR02	COURT REPORTER KENNETH QUINN	
55	10/27/2009	DMF	DEFENDANT'S THIRD DEMAND FOR DISCOVERY	
56	11/10/2009	MT	MOTION SHORTENING TIME SETTING	
			STATUS HEARING DATE	
57	11/10/2009	ORS6T	ORDER SHORTENING TIME FOR SETTING	11-16-2009
			MOTION HEARING DATE	

## -----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
58	11/16/2009	JDG02 MTHRG	JUDGE STEVEN J. MURA, DEPT 2 MOTION HEARING	
	11/16/2009	JDG02 CTRM	JUDGE STEVEN J. MURA, DEPT 2 COURT REPORTER NOTES	
59	11/16/2009	CTR02 MM	COURT REPORTER KENNETH QUINN STATES MEMORANDUM RE DISCOVERY VIOLATION	
60	11/16/2009	AF	AFFIDAVIT OF ERIC J RICHEY	
61	11/13/2009	MTDSM	MOTION TO DISMISS, DECLARATION OF COUNSEL & MEMORANDUM	
62	11/13/2009	AF	AFFIDAVIT OF JENNIFER BONSTEIN	
63	11/16/2009	ORDYMT	ORDER DENYING MOTION TO DISMISS AND GRANTING OTHER RELIEF	
64	11/30/2009	JDG02 STAHRG	JUDGE STEVEN J. MURA, DEPT 2 STATUS CONFERENCE / HEARING	
	11/30/2009	JDG03 CTRM	JUDGE CHARLES R. SNYDER, DEPT. 3 COURT REPORTER NOTES	
		CTR03	COURT REPORTER RHONDA JENSEN	
65	11/30/2009	MT	MOTION TO EXCLUDE EVIDENCE	
66	11/30/2009	AF	AFFIDAVIT OF ERIC J RICHEY	
67	12/01/2009	JTRIAL	JURY TRIAL	
	12/01/2009	JDG02 CTRM	JUDGE STEVEN J. MURA, DEPT 2 COURT REPORTER NOTES	
		CTR02	COURT REPORTER KENNETH QUINN	
68	12/01/2009	NGPH	NOT GUILTY PLEA HEARING	
69	12/02/2009	EXLST	EXHIBIT LIST	
	12/02/2009	EXR	EXHIBITS RECEIVED P#1- PHOTO LIVING ROOM -ADM P#2- PHOTO KITCHEN -ADM P#3- PHOTO BEDROOM -ADM P#4- PHOTO BEDROOM -ADM P#5- PHOTO VICTIM AND DEFENDANT-ADM P#6- PHOTO COMPUTER DESK -ADM P#7- PHOTO BATHROOM -WITHDRAWN P#8- PHOTO BATHROOM -WITHDRAWN P#9- PHOTO BATHROOM -ADM P#10-DRAWING -M 0	
	12/07/2009	NOTE	D#11-PHOTO SHOES -ADM P#12-DIAGRAM -M 0 P#13-DIAGRAM -M 0 P#14-PHOTO LIVING ROOM -ADM P#15-PHOTO KITCHEN -ADM P#16-DIAGRAM -M 0 D#17-PHOTO BUNK BED -ADM D#18-CURRICULUM VITAE -ADM	
	12/07/2009	NOTE	D#19-PHOTO VEHICLE -ADM D#20-PHOTO VEHICLE -ADM D#21-PHOTO VEHICLE -ADM D#22-PHOTO VEHICLE -ADM D#23-PHOTO VEHICLE -ADM D#24-PHOTO VEHICLE -ADM D#25-PHOTO VEHICLE -ADM P#26-PHOTO DEFENDANT -ADM	

## -----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
70	12/01/2009	AMINF	2ND AMENDED INFORMATION	
71	12/01/2009	ADPC	1ST AFFIDAVIT/DECLARATION PROB CAUSE	
71A	12/01/2009	OTHER	JURY QUESTIONNAIRE	
72	12/03/2009	SB	SUBPOENA FOR TRIAL - JOSE TREJO	
73	12/03/2009	SB	SUBPOENA FOR TRIAL - ROBERT GRINE	
74	12/03/2009	MM	STATES MEMORANDUM	
75	12/07/2009	WL	DEFENDANTS 2ND AMENDED WITNESS LIST	
76	12/07/2009	DFPIN	DEFENDANT'S PROPOSED INSTRUCTIONS	
77	12/07/2009	PLPIN	PLAINTIFF'S PROPOSED INSTRUCTIONS	
77A	12/09/2009	WL	WITNESS LIST	
78	12/09/2009	CTINJY JDGO2	COURT'S INSTRUCTIONS TO JURY JUDGE STEVEN J. MURA, DEPT 2	
79	12/09/2009	STPORE JDGO2	STIP&OR RET EXHIBTS UNOPND DEPOSTNS JUDGE STEVEN J. MURA, DEPT 2	
80	12/10/2009	VRD	VERDICT REACHED @ 3:50	
81	12/10/2009	OR JDGO2	ORDER REMANDING TO CUSTODY JUDGE STEVEN J. MURA, DEPT 2	
82	12/17/2009	PRSI0 JDGO2	PRESENTENCE INVESTIGATION ORDER JUDGE STEVEN J. MURA, DEPT 2	
83	01/14/2010	NTMTDK ACTION ACTION	NOTE FOR MOTION DOCKET / 8:30 SPECIAL SET - JUDGE MURA SENTENCING	02-02-2010
84	02/23/2010	CB JDGO2	COST BILL JUDGE STEVEN J. MURA, DEPT 2	
85	02/23/2010	NTMTDK ACTION ACTION	NOTE FOR MOTION DOCKET - 9:00 SPECIAL SET/MURA SENTENCING	03-15-2010
86	03/08/2010	PSI	PRE-SENTENCING INVESTIGATION REPORT	
87	03/15/2010	SNTHRG JDGO2	SENTENCING HEARING JUDGE STEVEN J. MURA, DEPT 2	
	03/15/2010	CTRN CTRO2	COURT REPORTER NOTES COURT REPORTER KENNETH QUINN	
88	03/15/2010	NOTE	SYLLABUS OF DEFENSE SENTENCING EXHIBITS	
89	03/15/2010	OR JDGO2	ORDER CLARIFYING JUDGMENT AND SENTENCE RE: DEFENDANT'S CONTACT WITH HIS MINOR CHILDREN JUDGE STEVEN J. MURA, DEPT 2	
90	03/15/2010	CRTC JDGO2	CERTIFICATE OF COMPLIANCE JUDGE STEVEN J. MURA, DEPT 2	
91	03/15/2010	NTWDA WTD01	NOTICE OF WITHDRAWAL OF ATTORNEY LUSTICK, JEFFREY ALAN	
92	03/15/2010	JDSWC JDGO2	JDGMT & SENT & WARRANT OF COMMITMT JUDGE STEVEN J. MURA, DEPT 2	
	03/15/2010	\$PACV	PENALTY ASSESSED - CRIME VICTIMS	500.00
93	03/15/2010	MTAF	MOTION AND DECLARATION FOR ORDER AUTHORIZING THE DEFENDANT TO SEEK REVIEW AT PUBLIC EXPENSE AND PROVIDING FOR APPOINTMENT OF ATTORNEY ON APPEAL	
94	03/15/2010	ORIND	ORDER AUTHORIZING THE DEFENDANT TO SEEK REVIEW AT PUBLIC EXPENSE AND	

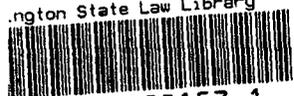
## -----APPEARANCE DOCKET-----

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			PROVIDING FOR APPOINTMENT OF ATTORNEY ON APPEAL	
		JD602	JUDGE STEVEN J. MURA, DEPT 2	
	03/15/2010	\$FW	FEE WAIVED	
95	03/15/2010	NACA	NOTICE OF APPEAL TO COURT OF APPEAL DIVISION I	
96	03/16/2010	DCLRM	DECLARATION OF MAILING NOTICE OF APPEAL	

=====END=====

# **APPENDIX J**

Washington State Law Library



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# WASHINGTON COURT RULES

1984

With Amendments Effective  
September 1, 1983

ST. PAUL, MINN.  
WEST PUBLISHING CO.

1983

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Wash. Court Rules 1983 Pamph.

# **SUPERIOR COURT CRIMINAL RULES (CrR)**

**Originally Effective July 1, 1973**

**Including Amendments Received Through September 1, 1983**

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**4. PROCEDURES PRIOR TO TRIAL**

**RULE 4.1 ARRAIGNMENT**

(a) **Time.** Promptly after the indictment or information has been filed, the defendant shall be arraigned thereon in open court.

(b) **Counsel.** If the defendant appears without counsel, the court shall inform him of his right to have counsel before being arraigned. The court shall inquire if he has counsel. If he is not represented and is unable to obtain counsel, counsel shall be assigned to him by the court, unless otherwise provided.

(c) **Waiver of Counsel.** If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming his right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(d) **Name.** Defendant shall be asked his true name. If he alleges that his true name is one other than that by which he is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had against him by that name or other names relevant to the proceedings.

(e) **Reading.** The indictment or information shall be read to defendant, unless the reading is waived, and a copy shall be given to defendant.

**Comment**

Supersedes RCW 10.40.010, .030, .040; RCW 10.46.030 in part, .040.

**RULE 4.2 PLEAS**

(a) **Types.** A defendant may plead not guilty, not guilty by reason of insanity or guilty.

(b) **Multiple Offenses.** Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

# APPENDIX K

SCANNED 1

SCOMIS CODES

NGPH

DOCKETED WOB Tape # \_\_\_\_\_

PLMHRG \_\_\_\_\_ ARRAIGN \_\_\_\_\_ SCVHRG \_\_\_\_\_ MTHRG \_\_\_\_\_ (other) \_\_\_\_\_

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY**

STATE OF WASHINGTON, Plaintiff,  
vs Calvin Eagle  
Defendant.

No. 08-1-00814-5  
JUDGE Mura  
REPORTER Quinn  
CLERK D'Brien Campau  
DATE 12/1/09 9 AM

This matter comes on for ARRANGEMENT/CASE SCHEDULING X BAIL REVIEW \_\_\_\_\_ DETENTION HRG \_\_\_\_\_  
FIRST APPEARANCE \_\_\_\_\_ PRELIMINARY APPEARANCE \_\_\_\_\_ PROBATION VIOLATION \_\_\_\_\_  
OTHER \_\_\_\_\_ State represented by Richey

Defendant appeared: (Yes) No; In Custody: (No) Represented by Lustick  
Defendant answers to true name as charged \_\_\_\_\_ D.O.B. \_\_\_\_\_

Defendant acknowledged viewing/understanding advice of rights \_\_\_\_\_  
Defendant acknowledged he/she was advised of basic civil & constitutional rights \_\_\_\_\_ & penalty \_\_\_\_\_

The following are sworn & testified on behalf of State: \_\_\_\_\_

Court finds probable cause \_\_\_\_\_ Court finds violation \_\_\_\_\_

Defendant is served with a true copy of the Information \_\_\_\_\_ Read \_\_\_\_\_ Waived \_\_\_\_\_

Defendant requested counsel \_\_\_\_\_ Referred to Assigned Counsel Office \_\_\_\_\_

State makes recommendations re release \_\_\_\_\_ /requests bail \_\_\_\_\_ Defense counsel responds \_\_\_\_\_

COURT SETS BAIL AT \_\_\_\_\_ Court releases defendant on PR \_\_\_\_\_

PLEA: NOT GUILTY X Arraign/Trial Setting/Omnibus Hearing \_\_\_\_\_  
Violation/Fugitive Return Date \_\_\_\_\_

3.3/3.5/Suppression/Motion Hearing \_\_\_\_\_

Set for Trial: \_\_\_\_\_ Dept. No. \_\_\_\_\_ Set \_\_\_\_\_  
\_\_\_\_\_ Dept. No. \_\_\_\_\_ Set \_\_\_\_\_

PREPARED ORDERS SIGNED:  
Deft's Ack/Advice of Rights \_\_\_\_\_ Order/Warrant re Fugitive Complaint \_\_\_\_\_  
Order on First Appearance of Deft \_\_\_\_\_ Waiver of Extradition \_\_\_\_\_  
Order for Pre-Trial Release \_\_\_\_\_ Stipulation Re Violation of J & S \_\_\_\_\_  
Agreed Order Setting Trial Date \_\_\_\_\_ Order on Custody \_\_\_\_\_ Order on Arraignment \_\_\_\_\_  
Order of Continuance \_\_\_\_\_ Order Re Review Hearing \_\_\_\_\_

STRICKEN BY \_\_\_\_\_ CONTINUED TO \_\_\_\_\_  
(FIRST APPEARANCE/ARRAIGNMENT/OMNIBUS HEARING) (ARRAIGN.MIN) DATE 12/1/09

WOB