

FILED
JUL 11 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. 78970-3
Court of Appeals No. 55583-9-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK K. EATON,

Petitioner.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JUL -9 PM 4:54

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

CLERK

BY RONALD R. CARPENTER

07 JUL 11 AM 8:17

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF APPEAL..... 1

B. ISSUE PRESENTED 1

C. STATEMENT OF THE CASE 1

E. ARGUMENT 3

CONVICTION ON A CHARGE NOT CONTAINED IN THE
INFORMATION UPON WHICH THE ACCUSED WAS
ARRAIGNED REQUIRES REVERSAL AND DISMISSAL OF
THE CHARGE 3

1. There can be no valid conviction without a formal and
sufficient accusation 3

2. When the accused is arraigned on a charge, that is the only
charge that can sustain a trial and conviction 6

 a. Arraignment is a fundamental step in a criminal
 prosecution that provides the accused with
 constitutionally required forma notice of the charge 7

 b. Washington law recognizes the fundamental right to
 arraignment in criminal cases..... 10

 c. The State may prosecute a defendant only for the charge
 contained in the information upon which the defendant is
 arraigned 13

3. The charging procedure in this case was fatally defective .. 15

F. CONCLUSION 19

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. 1, § 22.....	3, 9
U.S. Const. amend. 14.....	3
U.S. Const. amend. 6.....	3, 9

Washington Supreme Court Cases

<u>In re Wakefield v. Rhay</u> , 57 Wn.2d 168, 356 P.2d 596 (1960).....	8
<u>State v. Ahluwalia</u> , 143 Wn.2d 527, 22 P.3d 1254 (2001).....	16
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 453, 6 P.3d 1150 (2000)	5
<u>State v. Frazier</u> , 76 Wn.2d 373, 456 P.2d 352 (1969).....	4
<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	6
<u>State v. Hurd</u> , 5 Wn.2d 308, 105 P.2d 59 (1940).....	13, 14
<u>State v. Jennen</u> , 58 Wn.2d 171, 361 P.2d 739 (1961).....	14
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991)	5
<u>State v. Markle</u> , 118 Wn.2d 424, 823 P.2d 1101 (1992).....	5
<u>State v. Navone</u> , 180 Wash. 121, 39 P.2d 384 (1934).....	14
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987)	5, 13, 15, 18, 19
<u>State v. Peterson</u> , 133 Wn.2d 885, 948 P.2d 381 (1997)	4

<u>State v. Royse</u> , 66 Wn.2d 552, 403 P.2d 838 (1965).....	4
<u>State v. Stentz</u> , 30 Wash. 134, 70 P. 241 (1902).....	4
<u>State v. Tatum</u> , 61 Wn.2d 576, 379 P.2d 372 (1963).....	12
<u>State v. Taylor</u> , 140 Wn.2d 229, 996 P.2d 571 (2000).....	5
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	5, 13, 15, 18, 19

Washington Court of Appeals Cases

<u>State v. Kinard</u> , 21 Wn. App. 587, 585 P.2d 836 (1978).....	14
<u>State v. Whelchel</u> , 97 Wn. App. 813, 988 P.2d 20 (1999).....	16

United States Supreme Court Cases

<u>Crain v. United States</u> , 162 U.S. 625, 16 S.Ct. 952, 40 L.Ed. 1097 (1896)	8
<u>Hamilton v. Alabama</u> , 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961)	8
<u>Kirby v. Illinois</u> , 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)	7
<u>Schmuck v. United States</u> , 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989).....	5

Statutes

RCW 10.37.015.....	3
RCW 10.40.060.....	10

Court Rules

CrR 3.4.....	12
CrR 4.1.....	10, 11

Other Authorities

4 <u>William Blackstone, Commentaries</u>	8, 9
<u>Ex parte Jeffcoat</u> , 109 Fla. 207, 146 So. 827 (1933).....	8
<u>Hayes v. State</u> , 58 Ga. 35 (1877).....	15
<u>State v. Cardwell</u> , 609 P.2d 1230, 187 Mont. 370 (1980).....	14

A. SUMMARY OF APPEAL

Mark Eaton's constitutional right to formal notice of the charge was violated when the State arraigned him for possession of amphetamine but tried and convicted him of possession of cocaine. This fundamental defect in the notice procedure requires reversal of the conviction.

B. ISSUE PRESENTED

Arraignment is a fundamental step in a criminal prosecution that provides the accused with formal notice of the charge as the federal and state constitutions require. Where a defendant is arraigned on a charge but is tried and convicted of a different charge, has a fatal defect occurred that requires reversal?

C. STATEMENT OF THE CASE

The State filed an information charging Mark Eaton with one count of possession of amphetamine. CP 1. Eaton was arraigned on the charge. 7/27/04RP 4.

Before trial, the prosecutor sought to amend the information orally to charge possession of cocaine and disorderly conduct. 5/3/04RP 5-6. Through counsel, Mr. Eaton indicated he was prepared to enter pleas of not guilty to the amended charges. Id. at 6. The trial court did not rule on the motion to amend, but

proceeded to trial which ended in a hung jury. CP 19. The amended information charging possession of cocaine was never filed.

Before the second trial, Mr. Eaton was arraigned again, this time using the first information charging possession of amphetamine. Eaton again entered a plea of not guilty to that charge. 5/18/04RP 3-4.

At the conclusion of the prosecution's evidence, Mr. Eaton moved to dismiss based upon the failure to prove he possessed amphetamine as charged. 11/30/04RP 2-4, 7-10. Mr. Eaton also objected to the trial court instructing the jury as to possession of cocaine, a charge that was not contained in the information upon which he was rearraigned. 11/30/04RP 17. The trial court denied the motion to dismiss and overruled Mr. Eaton's objection to the jury instructions. 11/30/04RP 12, 17.

The jury found Mr. Eaton guilty of possessing cocaine and the Court of Appeals affirmed. CP 41. Eaton petitioned this Court, arguing his constitutional right to notice of the charge was violated when he was rearraigned on the original written information charging possession of amphetamine but was retried and convicted of possession of cocaine. This Court granted review.

D. ARGUMENT

CONVICTION ON A CHARGE NOT CONTAINED IN THE INFORMATION UPON WHICH THE ACCUSED WAS ARRAIGNED REQUIRES REVERSAL AND DISMISSAL OF THE CHARGE

1. There can be no valid conviction without a formal and sufficient accusation. It is a fundamental principle of criminal procedure, embodied in the state and federal constitutions, that a formal accusation must precede prosecution and conviction for a crime. The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation.” Article 1, section 22 of the Washington Constitution guarantees that “In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof.” In addition, the Fourteenth Amendment provides “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

The Legislature has codified these constitutional rights, currently in RCW 10.37.015, which provides “[n]o person shall be held to answer in any court for an alleged crime or offense, unless upon an information filed by the prosecuting attorney.” This has

been the standard in Washington for more than 100 years. See State v. Stentz, 30 Wash. 134, 139, 70 P. 241 (1902), overruled on other grounds, State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001).

The practical effect of these provisions is to preserve a defendant's "right to be informed of the charges against him and to be tried only for offenses charged." State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997); see also State v. Frazier, 76 Wn.2d 373, 376, 456 P.2d 352 (1969) (defendant cannot be accused of one crime and convicted of another, as defendant must be informed of character of State's proof he will be compelled to meet at trial); State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965) ("The right of the accused to be apprised by the indictment or information with reasonable certainty of the nature of the accusation against him to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense is zealously guarded in all our cases."). This Court has reiterated more recently, that "[i]t is an 'ancient doctrine' that a criminal defendant may be held to answer for only those offenses contained in the indictment or information." State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000)

(citing Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989)).

The judicially approved means for ensuring constitutionally adequate notice is to require charging documents set forth the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000) (discussing constitutional origins of "essential elements rule" governing adequacy of charging documents). All essential elements must be included in the charging document in order to afford the accused notice of the allegations so that a defense can be properly prepared. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

Although a primary purpose of the information is to provide notice of the charge, actual or constructive notice cannot cure a defective charging instrument. This Court has repeatedly insisted that a charging document is constitutionally adequate only if all essential elements of a crime are included, regardless of whether the accused received actual notice of the charge. State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995); State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). In Pelkey, this Court explained trial and conviction on the basis of an information

that omits an element *necessarily prejudices* the defendant's substantial constitutional right to formal notice of the charge. Pelkey, 109 Wn.2d at 491. All the pretrial motions, voir dire of the jury, opening argument, questioning and cross-examination of witnesses are based on the precise nature of the charge alleged in the information. Id. Even if omission of an essential element is merely an oversight and the defendant cannot show prejudice in a particular case, because the likelihood of prejudice is so great, this Court has consistently adhered to a bright-line rule requiring reversal per se. Vangerpen, 125 Wn.2d at 790.

In a prosecution for possession of a controlled substance, the specific identity of the controlled substance is an essential element of the offense. State v. Goodman, 150 Wn.2d 774, 787, 83 P.3d 410 (2004). Mr. Eaton could not, therefore, be charged with possessing amphetamine and then convicted of possessing cocaine.

2. When the accused is arraigned on a charge, that is the only charge that can sustain a trial and conviction. Arraignment is a fundamental step in a criminal prosecution that gives effect to the essential elements rule. Arraignment is as ancient as the doctrine of a formal accusation. It is the process the State follows to

provide the accused with constitutionally adequate notice and must be held in all felony cases unless waived. The Court of Appeals ignored these principles when it concluded Mr. Eaton's arraignment on a charge of possession of amphetamine was an empty formality with no legal effect. This Court should hold Mr. Eaton was convicted through a fatally defective judicial process when the State tried and convicted him for a crime that is different from the accusation it formally made at arraignment.

a. Arraignment is a fundamental step in a criminal prosecution that provides the accused with constitutionally required formal notice of the charge. Arraignment is a fundamental element of criminal procedure that signifies the commencement of formal judicial proceedings against an accused. Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). It is only at that time "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." Id. (explaining that, for this reason, the right to counsel is guaranteed by the federal constitution at arraignment). Under federal law, the right to counsel is guaranteed at arraignment, because arraignment is a *sine qua non* to the trial itself -- the preliminary stage where the accused is informed of the

indictment and pleads to it, thereby formulating the issue to be tried. Hamilton v. Alabama, 368 U.S. 52, 54 n.4, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961). This is also the view in Washington, as an accused has a state constitutional and statutory right to the assistance of counsel at arraignment. See In re Wakefield v. Rhay, 57 Wn.2d 168, 169, 356 P.2d 596 (1960).

At common law, a formal accusation was an essential condition precedent to a valid prosecution for a criminal offense, and a criminal proceeding could not be brought until a formal charge was openly made. Crain v. United States, 162 U.S. 625, 637-39, 16 S.Ct. 952, 40 L.Ed. 1097 (1896), overruled on other grounds by Garland v. Washington, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772 (1914). "Arraign" means to call a prisoner to the bar of the court to answer the matters charged against him in an indictment. Ex parte Jeffcoat, 109 Fla. 207, 210, 146 So. 827 (1933). In English common law, due process required no person be convicted of a felony without being brought to answer the charge in court. 4 William Blackstone, Commentaries, *318.

Traditionally, arraignment involved formal procedures notifying the accused of the charge and directing him to answer. The accused was called upon by name and told to hold up his hand

in acknowledgement of his identity. Blackstone, supra, *323. The indictment was read to him in English so that he could understand it (all other proceedings being in Latin), "[a]fter which it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty." Id.

Carrying over from the common law, the state and federal constitutions guarantee a criminal defendant the right to appear in person and openly demand the nature and cause of the accusation. The Sixth Amendment guarantees the right to "be informed of the nature and cause of accusation." Article 1, section 22 explicitly guarantees the right "to appear and . . . demand the nature and cause of the accusation."

Thus, a legally effective criminal prosecution requires a formal charge be openly made against the accused. Arraignment is the formal and age-old proceeding by which the State provides the accused with constitutionally adequate notice of the charge. It is also the first time the accused is called upon to answer the charge and signifies the commencement of formal judicial proceedings. For these reasons, an arraignment can never be an empty proceeding with no legal significance. By openly notifying the accused of the charge at arraignment, the State commits itself

to prosecuting only that charge. Moreover, the constitutional right to be notified of the charge includes the right to be notified of the *correct* charge. Mr. Eaton was openly notified of the wrong charge when he was arraigned on possession of amphetamine prior to the second trial. His constitutional right to formal notice of the charge for which he was to be tried was therefore violated.

b. Washington law recognizes the fundamental right to arraignment in criminal cases. The fundamental right to arraignment in criminal cases is provided by statute in Washington. Defendants have a statutory right to be formally notified of the charge in the information, and are entitled to one day after arraignment in which to enter a plea. RCW 10.40.060.¹

Washington court rules establish the procedures for arraignment. The arraignment is the first step in the prosecution after the filing of the information, and is the first time the defendant is called upon to answer the charge. CrR 4.1(a).² The defendant

¹ RCW 10.40.060 provides: " In answer to the arraignment, the defendant may move to set aside the indictment or information, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it."

² CrR 4.1(a) provides:
(a) **Time.**

has a right to counsel, must be asked his name, and has the right to have the information read to him aloud. CrR 4.1(c),³ (e),⁴ (f).⁵ In addition, the defendant has a right to be present at the

(1) *Defendant detained in jail.* The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) *Defendant not detained in jail.* The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in CrR 3.3(a)(3)(iii).

³ CrR 4.1(c) provides:

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

⁴ CrR 4.1(e) provides:

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.

⁵ CrR 4.1(f) provides:

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

arraignment. CrR 3.4(a) ("The defendant shall be present at the arraignment").

Thus, Washington's court rules maintain the basic common law due process elements of an arraignment: the right to appear in person, to have the charge formally read aloud, and to enter a plea.

This Court also recognizes the fundamental nature of arraignment and requires the State prosecute the accused only for the offense in the information upon which the defendant is arraigned. In State v. Tatum, this Court reversed a conviction where the defendant had not been arraigned on an amended charge. 61 Wn.2d 576, 579, 379 P.2d 372 (1963). Thus, arraignment is necessary unless waived by the defendant. Id.

In this case, Mr. Eaton was formally arraigned on an information charging possession of amphetamine before the second trial. 5/18/04RP 3-4. The traditional formal procedures were followed: The prosecutor read the charge aloud and asked Mr. Eaton to identify himself, and Eaton entered a plea of not guilty. Id. The State never amended the information nor did it thereafter arraign Eaton on a different charge. The State's formal accusation signified the commencement of judicial proceedings on this charge,

and in that manner the State committed itself to prosecuting only that charge.

c. The State may prosecute a defendant only for the charge contained in the information upon which the defendant was arraigned. It is fundamental that a criminal prosecution depends upon a charge set forth in an information and that the defendant be given formal notice of the charge. If the State wishes to change course in a prosecution and try the defendant for a different crime, it must formally amend the information and arraign the defendant on the new charge. E.g., Vangerpen, 125 Wn.2d at 789; State v. Hurd, 5 Wn.2d 308, 312, 105 P.2d 59 (1940).

As discussed above, this Court has consistently and steadfastly maintained that a conviction based on a charge that is different from the charge in the information cannot stand. Vangerpen, 125 Wn.2d at 787 (and cases cited therein). If the State wishes to proceed on a charge different from the one in the information, it must formally amend the information before it rests its case. Vangerpen, 125 Wn.2d at 789; Pelkey, 109 Wn.2d at 491. Failure to comply with this rule requires reversal per se without a showing of prejudice. Vangerpen, 125 Wn.2d at 789; Pelkey, 109 Wn.2d at 491.

It is equally well-established that where the State amends an information to charge a different crime, it must provide the defendant with formal notice of the new charge by rearraigning him. Hurd, 5 Wn.2d at 312. More than 60 years ago, this Court recognized “[i]t is well settled that a substantial amendment of an information requires that the accused be arraigned on the amended information.” Id.; see also State v. Jennen, 58 Wn.2d 171, 175, 361 P.2d 739 (1961); State v. Cardwell, 609 P.2d 1230, 187 Mont. 370, 375-76 (1980).

Finally, once the State formally amends the information, the new information stands in lieu of the original, which is deemed quashed, abandoned or superseded. State v. Navone, 180 Wash. 121, 123-24, 39 P.2d 384 (1934); State v. Kinard, 21 Wn. App. 587, 585 P.2d 836 (1978). At that point, “[i]f the state should attempt to bring appellant to trial upon the first information, an appropriate remedy would doubtless be available to him.” Navone, 180 Wash. at 123-24.

In this case, the State arraigned Mr. Eaton on a charge of possession of amphetamine, which was set forth in the only information the State ever filed. Although the State earlier orally amended the charge to possession of cocaine, that charge was

superseded by the later charge and arraignment for a different crime. "When the prisoner has been arraigned and has pleaded not guilty, an issue is formed, and the same remains an issue until the plea is withdrawn, or until the indictment is disposed of." Hayes v. State, 58 Ga. 35, 45-46 (1877). Once Mr. Eaton was arraigned and entered a plea to possession of amphetamine, that was the issue in the case which was not superseded by any later arraignment and plea. Further, the jury was instructed on possession of cocaine and thus Eaton was convicted for a crime different from the one for which he was charged. CP 41. Because the State arraigned Mr. Eaton for possession of amphetamine, it was committed to prosecuting Eaton only for that charge or a lesser included offense, and only that charge could support Eaton's trial and conviction.

All of the authorities are in agreement that a defendant may not be convicted of an offense that was not charged in the information and the remedy for such a violation is reversal. Vangerpen, 125 Wn.2d at 789; Pelkey, 109 Wn. at 487.

3. The charging procedure in this case was fatally defective. The Court of Appeals held Eaton's arraignment on the possession of amphetamine charge prior to second trial had no legal effect

because an arraignment following a mistrial is not necessary. Although generally a defendant need not be arraigned following a mistrial if the State proceeds on the original information, case law suggests arraignment might be the better practice. Moreover, to say the defendant need not be arraigned is not to say he *may not* be. If arraignment occurs, the defendant must receive notice of the *correct* charge. Even if the defect in the charging document is inadvertent, the State must be held to the accusation it makes.

Generally, the accused need not be arraigned, or plead, more than once to the same charge. Thus, after there has been an arraignment, or waiver thereof, and plea, it is not necessary that there be another arraignment at a subsequent trial after a mistrial. State v. Whelchel, 97 Wn. App. 813, 819, 988 P.2d 20 (1999) (holding re-arraignment not necessary when a case is remanded for new trial).

This Court has stated, however, that another arraignment may be the better practice following a mistrial. In State v. Ahluwalia, Ahluwalia was charged with first degree murder and the trial court instructed the jury on first degree murder and second degree murder as a lesser included offense. 143 Wn.2d 527, 529, 22 P.3d 1254 (2001). The jury found Ahluwalia not guilty of first

degree murder, but was unable to agree on the second degree murder charge. Id. Following the mistrial, the prosecutor elected to proceed against Ahluwalia on the charge of murder in the second degree, as a continuation of the first trial, without another information and without arraignment. Ahluwalia was convicted of that charge. Id. at 540. Although the issue presented was whether double jeopardy precluded the second trial, this Court noted the lack of formal accusation and arraignment prior to the second trial. The Court observed, "[t]he trial would normally not have proceeded to a jury trial in the second case without some reference to an information and without arraignment." Id.

Even if a second arraignment is not required prior to a second trial following a mistrial, it may nonetheless be warranted because it can reduce any uncertainty that might arise regarding the charge currently in play. Moreover, where, as here, the defendant is rearraigned but on the *wrong* charge, the potential for confusion is significantly increased. The trial court readily agreed Eaton's arraignment on the amphetamine charge "certainly could have been misleading." 11/30/04RP 14.

Further, under the unique facts of Mr. Eaton's case, notice of the formal substance alleged was critical. Eaton was initially

charged with possession of amphetamine based apparently upon a field test of the substance he was alleged to have possessed.

5/3/04RP 6. Other tests indicated the substance in question may have been cocaine. CP 2. Having failed to convince the jury Mr. Eaton possessed cocaine it would be reasonably likely the prosecution might alter either its theory or proof at the second trial.

The State having orally amended the information prior to the first trial, the later arraignment on the only formal written charge ever filed was consistent with the practice and evidence known to the parties. 5/18/04RP 3-4. While trial on an allegation of possessing cocaine could also be supported by the evidence this simply demonstrates the importance of strictly adhering to the requirement of a written information, filed in open court, and a formal arraignment on that properly filed information.

As discussed above, in Vangerpen, this Court reaffirmed the well-established rule that trial and conviction on an information that omits an essential element of the crime is a fundamental defect. 125 Wn.2d at 792-93. Because the potential for prejudice is so great, the remedy is reversal per se without a showing of prejudice. Id. at 790; Pelkey, 109 Wn.2d at 491. Even if the omission is merely an oversight, "for sound policy reasons founded in our state

and federal constitutions, this court has nonetheless consistently adhered to the essential elements rule." Id.

Just such a fundamental defect as occurred in Vangerpen occurred in this case. Mr. Eaton was openly and formally charged and arraigned for one crime but tried and convicted of another. Eaton's federal and constitutional right to receive formal notice of the charge was therefore violated. The potential for prejudice is the same as in Vangerpen and Pelkey and similar cases, for in each case the defendant was formally notified of the State's intention to prosecute one crime, but then tried and convicted of a different crime. The remedy is to reverse the conviction and remand for further proceedings. Vangerpen, 125 Wn.2d at 791.

E. CONCLUSION

Because Mr. Eaton was tried and convicted for an offense not charged, the conviction must be reversed and the charge dismissed without prejudice to the State's ability to refile an information.

Respectfully submitted this 9th day of July, 2007.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
RESPONDENT,) NO. 78970-3
)
v.)
)
MARK EATON,)
)
PETITIONER.)

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 9TH DAY OF JULY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S SUPPLEMENTAL BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

- JULIE ANNE KAYS
KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104
- MARL EATON
3520 - 156TH ST. SW, APT. A-1
LYNNWOOD, WA 98087

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF JULY, 2007.

x _____ 

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JUL -9 PM 4:54