CHAPTER ONE
Information/Indictment
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CHAPTER ONE

INFORMATION/INDICTMENT

I. IN GENERAL

A. DISMISSING CHARGING DOCUMENT

1. STATUTORY GROUNDS FOR DISMISSAL

Ind. Code § 35-34-1-4(a) permits the defendant to move to dismiss indictment or information on the following grounds:

(1) defective under Ind. Code § 35-34-1-6 (listing of various defects);
(2) misjoinder of offenses or parties defendant, or duplicity of allegation in counts;
(3) the grand jury proceeding was defective;
(4) the indictment or information does not state the offense with sufficient certainty;
(5) the facts stated do not constitute an offense;
(6) the defendant has immunity with respect to the offense charged;
(7) the prosecution is barred by reason of a previous prosecution;
(8) the prosecution is untimely brought.
(9) the defendant has been denied the right to a speedy trial.
(10) there exists some jurisdictional impediment to conviction of the defendant for the offense charged.
(11) any other ground that is a basis for dismissal as a matter of law.

a. Defective Probable Cause Not Grounds to Dismiss

Hicks v. State, 544 N.E.2d 500 (Ind. 1989) (lack of probable cause for the arrest is not grounds to dismiss the information).

Schweitzer v. State, 531 N.E.2d 1386 (Ind. 1989) (an information which is not the basis for an arrest warrant is not affected by deficiency in the probable cause affidavit; such affidavit relates to the pretrial detention of defendant, not to the charging instrument; same is true for probable cause testimony given in lieu of an affidavit).

State ex rel. French v. Hendricks Superior Court, 252 Ind. 213, 247 N.E.2d 519 (Ind. 1969) (no need for a hearing to determine probable cause for issuance of arrest warrant when a grand jury has returned an indictment).

Frierson v. State, 572 N.E.2d 536 (Ind. Ct. App. 1991) (any deficiencies in probable cause affidavit did not warrant dismissal of information).

State v. King, 502 N.E.2d 1366 (Ind. Ct. App. 1987) (deficiency of probable cause affidavit not ground for dismissal of information, as probable cause affidavit serves to justify pretrial detention of defendant based on alleged facts reasonably believed to show defendant committed crime; it is not manner by which defendant is charged with crime).

b. Information Defective if Filed after Grand Jury Refused to Indict

Ind. Code § 35-34-1-6 provides in pertinent part:

(a) An information is defective if:

(1) the defendant was a grand jury target identified under Ind. Code § 35-34-2-12(a)(1);

(2) the offense alleged was identified on the record under Ind. Code § 35-34-2-12(a)(2) as an offense that the defendant allegedly committed; and

(3) the grand jury proceeded to deliberate on whether to issue an indictment and voted not to indict the defendant for the offense identified on the record under Ind. Code § 35-34-2-12(a)(2).

However, if the prosecuting attorney shows that there is newly discovered material evidence that was not presented to the grand jury before the grand jury's failure to indict, then the information is not defective.

(b) Except as provided in section 5 of this chapter, an indictment or information or a count thereof shall be dismissed upon motion when it is defective.

State v. Peters, 637 N.E.2d 145 (Ind. Ct. App. 1994) (when defendant has been granted immunity and testifies before a grand jury, the grand jury that heard defendant's testimony may not subsequently issue an indictment against defendant. Prosecutor may seek indictment of a defendant who has received immunity but must establish that indictment rests upon evidence independent from immunized testimony of defendant). See also Kastigar v. United States, 406 U.S. 441 (1972).

Brown v. State, 725 N.E.2d 823 (Ind. 2000) (State's required showing that an indictment rests upon independent evidence may require an evidentiary hearing in some cases, but not when the defendant's immunized testimony is already in the public domain).

See Mounts v. State, 496 N.E.2d 37 (Ind. 1986).

c. Include All Known Grounds

Motion shall be in writing, and if based upon the existence or occurrence of facts, shall be accompanied by sworn affidavits. Motion shall be accompanied by memorandum if based upon question of law. Ind. Code § 35-34-1-8(a).

Every ground upon which defendant intends to challenge indictment or information must be included in motion to dismiss. Ind. Code § 35-34-1-4(c).

PRACTICE POINTER: Indiana cases have held that pretrial motions to dismiss based on insufficiency of the evidence are improper, and that sufficiency of evidence is to be decided at trial. State v. Nesius, 548 N.E.2d 1201 (Ind. Ct. App. 1990); State v. Houser, 622 N.E.2d 987 (Ind. Ct. App. 1993). However, trial courts have the same responsibility as prosecutors "to make certain that a person is not erroneously charged." State v. D.M.Z., 674 N.E.2d 585, 587 (Ind. Ct. App. 1996). Thus, a trial court considering a motion to dismiss need not rely entirely on the text of the charging information but can hear and consider evidence in determining whether a defendant can be charged with the crime alleged. Id; Ind. Code § 35-34-1-8; See also State v. Fettig, 884 N.E.2d 341 (Ind. Ct. App. 2008) (trial court did not abuse its discretion in dismissing battery charge against defendant, whom trial court found acted within bounds of her authority to physically discipline her student).

d. Time to File

Generally, a motion to dismiss under Ind. Code § 35-34-1-4 must be filed 20 days prior to omnibus date for felonies, and 10 days prior to omnibus date if charged only with misdemeanors. Ind. Code § 35-34-1-4(b) (1) and (2).

Ind. Code § 35-34-1-4 allows motions to dismiss based upon the following grounds to be made or renewed at any time before or during trial:

- immunity with respect to the offense charged, Ind. Code § 35-34-1-4(a) (6);
- the prosecution is barred by reason of a previous prosecution, Ind. Code § 35-34-1-4(a) (7);
- the prosecution is untimely brought, Ind. Code § 35-34-1-4(a) (8);
- the defendant has been denied the right to a speedy trial, Ind. Code § 35-34-1-4(a) (9) (but see Fink v. State, 471 N.E.2d 1161 (Ind. Ct. App. 1984) (defendant must object at the earliest opportunity to a trial date set outside 70-day CR4(B) deadline or waive issue); Diederich v. State, 702 N.E.2d 1074 (Ind. 1998) (defendant must object at the earliest opportunity to a trial date set outside the one-year CR4(C) deadline or waive issue);
- jurisdictional impediment to conviction of defendant for offense charged, Ind. Code § 35-34-1-4(a)(10);
- any other ground that is a basis for dismissal as a matter of law, Ind. Code § 35-34-1-4(a) (11).

A motion to dismiss based on lack of jurisdiction over subject matter may be made at any time. Ind. Code § 35-34-1-4(b).

Compare Taylor-Bey v. State, 53 N.E.3d 1230 (Ind. Ct. App. 2016) (despite defendant's claimed status as a "Moorish American National Sovereign" and "Secured Party Creditor," trial court had both subject matter and personal jurisdiction over defendant's murder case; under Ind. Code § 33-29-1.5-2, Marion Superior Court has jurisdiction over all criminal cases allegedly committed in Marion County, and under Ind. Code § 35-41-1-1(b), Marion Superior Court had personal jurisdiction over defendant because he committed his crime in Marion County). See also Brown v. State, 64 N.E.3d 1219 (Ind. Ct. App. 2016).

e. Failure to File Motion Waives Defects

Failure to move to dismiss waives defects in an indictment or information. Stwalley v.

State, 534 N.E.2d 229 (Ind. 1989) (*overruled in part on other grounds by* Lannan v. State, 600 N.E.2d 1334, 1335-90 (Ind. 1992)); Brown v. State, 442 N.E.2d 1109 (Ind. 1982).

f. Dismissal May Bar Reprosecution

Ind. Code § 35-34-1-4(f) provides:

> An order of dismissal does not, of itself, constitute a bar to a subsequent prosecution of the same crime or crimes except as otherwise provided by law.

Ind. Code § 35-34-1-13(b) provides:

> In any case where an order sustaining a motion to dismiss would otherwise constitute a bar to further prosecution of the crime charged, unless the defendant objects to dismissal, the granting of the motion does not bar a subsequent trial of the defendant on the offense charged.

> Johnson v. State, 740 N.E.2d 118, 120 (Ind. 2001) (State may not abuse its power to dismiss and re-file so as to prejudice the defendant's substantial rights. The question of substantial prejudice is a fact-sensitive inquiry, not readily amenable to bright-line rules).

> Burdine v. State, 515 N.E.2d 1085 (Ind. 1987) (dismissal of original charges prior to attachment of jeopardy did not preclude State from re-filing information charging same offense in identical terms), *overruled in part on other grounds by* Joyner v. State, 678 N.E.2d 386, 398 (Ind. 1997).

> Marsh v. State, 104 Ind. App. 377, 8 N.E.2d 121 (1937) (trial judge may stop trial on his own motion, without thereby barring future proceedings, when indictment is so defective in form as to entitle defendant to reversal of any judgment entered thereon against him or judge discovers any defect which would render verdict against defendant void or voidable after commencement of trial).

But see

> State v. Moore, 553 N.E.2d 199 (Ind. Ct. App. 1990) (court granted defendant's motion to dismiss defective indictment. State re-filed same indictment and affidavit for probable cause. Court refused to find probable cause because the "'Affidavit for Probable Cause re-alleges the same facts that were the subject of the ... [former charge] which was dismissed by order of this Court[.] ... [The] dismissal constituted an adjudication on the merits, [and] would constitute double jeopardy.'" The State filed the same charge once again. This third attempt was also unsuccessful; the trial court granted defendant's motion to dismiss. The State appealed the dismissal. Held that the initial dismissal was a final judgment which the State was required to appeal and that the present appeal was a collateral attack on the prior determination).

See also State v. Lynn, 625 N.E.2d 499 (Ind. Ct. App. 1993).

2. STATE MAY APPEAL ORDER TO DISMISS

Ind. Code § 35-38-4-2 governs appeals by the State, and provides in part:

> Appeals to the Supreme Court or to the court of appeals, if the court rules so provide, may be taken by the state in the following cases:
>
> (1) From an order granting a motion to dismiss one (1) or more counts of an indictment or information.

a. Dismissal with Prejudice

A dismissal with prejudice is a final judgment which the State must appeal in order to avoid being bound by it.

> State v. Lynn, 625 N.E.2d 499 (Ind. Ct. App. 1994) (where State failed to appeal the dismissal with prejudice, but instead re-filed the charges, its appeal from the dismissal of the re-filed charges was an impermissible collateral attack on the prior judgment. In dicta, the court criticized the State's attempt to use dismissal to circumvent continuance rules: "A very forceful argument can be made that the prior court's dismissal with prejudice was within the inherent power of the trial court as a means for the court to deter the state from usurping the court's administrative power when the state attempts to dismiss a cause rather than to comply with the statutory requirements for a continuance found at Ind. Code § 35-36-7-2." Id. at 500, n.2.).

3. MOTION TO DISMISS BY PROSECUTING ATTORNEY

Ind. Code § 35-34-1-13(a) provides:

> Upon motion of the prosecuting attorney, the court shall order the dismissal of the indictment or information. The motion may be made at any time before sentencing and may be made on the record or in writing. The motion shall state the reason for the dismissal.

> Holifield v. State, 572 N.E.2d 490 (Ind. 1991) (trial court has no discretion under statute but to grant prosecuting attorney's motion to dismiss charge).
>
> Rhoton v. State, 491 N.E.2d 577 (Ind. Ct. App. 1986) (statute requires prosecutor to state the reason for dismissal, to insure public accountability).

See IPDC Pretrial Manual, Chapter 9 ("Motions to Dismiss").

4. PURPOSE OF INFORMATION

Purpose of information is to inform court of facts alleged, so that it may decide whether they are sufficient in law to support conviction and furnish accused with such description of charge as will: (1) enable him to make his defense; and (2) prevent double jeopardy violation. Dudley v. State, 480 N.E.2d 881 (Ind. 1985).

5. SEALING OF INDICTMENT OR INFORMATION

Ind. Code § 35-34-1-1(d) provides:

> The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as a contempt.

Sealing is intended to avoid flight by the defendant.

> Worrell Newspapers of Ind. v. Westhafer, 739 F.2d 1219 (7th Cir. 1984) (statute criminalizing the truthful publication of name of defendant from a sealed indictment or information, was on its face an overbroad and unconstitutional infringement of the 1st Amendment), *aff'd by* 469 U.S. 1200, 105 S.Ct. 1155.

6. PRETRIAL DIVERSION PROGRAM

Ind. Code § 33-39-1-8(d)-(f) provides grounds and conditions that prosecuting attorney may withhold prosecution in misdemeanor cases.

See IPDC Pretrial Manual, Chapter 10 ("Guilty Pleas").

7. PROSECUTOR'S DUTY TO AMASS EVIDENCE AND PROSECUTE

The function of the prosecuting attorney is to investigate crimes and bring criminal charges. Meyers v. State, 266 Ind. 513, 364 N.E.2d 760 (1997).

a. Duty of prosecutor on receiving information of crime

Ind. Code § 33-39-1-4 specifies duties of prosecutor on receiving information of felony or misdemeanor:

> (a) When a prosecuting attorney receives information of the commission of a felony or misdemeanor, the prosecuting attorney shall cause process to issue from a court (except the circuit court) having jurisdiction to issue the process to the proper officer, directing the officer to subpoena the persons named in the process who are likely to have information concerning the commission of the felony or misdemeanor. The prosecuting attorney shall examine a person subpoenaed before the court that issued the process concerning the offense.
>
> (b) If the facts elicited under subsection (a) are sufficient to establish a reasonable presumption of guilt against the party charged, the court shall:
>
> (1) cause the testimony that amounts to a charge of a felony or misdemeanor to be reduced to writing and subscribed and sworn to by the witness; and
>
> (2) issue process for the apprehension of the accused, as in other cases.

"The statute merely provides a tool for prosecutors to investigate crimes in the first instance. All the statute says is that if a prosecutor learns that a crime may have been committed, the prosecutor may, first, subpoena anyone in the jurisdiction who may know about the crime and, second, seek "process" leading to an arrest if the facts uncovered support that action. Thus, by its express terms the statute is not available at the post-

indictment or post-information stage." Rita v. State, 674 N.E.2d 968 (Ind. 1996) (prior statute, Ind. Code § 33-14-1-3).

b. Bringing Charges

Criminal actions are instituted only by action of prosecuting attorney in a court with jurisdiction over the crime charged. Crimes may be charged by a grand jury returning an indictment, or by a prosecutor filing an information. Niece v. State, 456 N.E.2d 1081 (Ind. Ct. App. 1983).

> Beverly v. State, 543 N.E.2d 1111 (Ind. 1989) (the federal constitutional right to be charged by indictment does not apply in state courts). See Hurtado v. California, 110 U.S. 516 (1884).

Upon request, the clerk of court shall make a copy available to defendant or his attorney. Ind. Code § 35-34-1-1(c)(3).

II. CONTENTS AND FORM

A. STATUTORY REQUIREMENTS

Indiana Code § 1-1-2-2 states:

> Crimes shall be defined, and punishment therefor fixed by statutes of this state and not otherwise.

"In this state there are no common law offenses. All crimes and misdemeanors must be defined and punishment therefor fixed by statute, and not otherwise." McCormick v. State, 119 N.E.2d 5, 233 Ind. 281, 285 (1954).

1. CONTENTS

The information or indictment shall be in writing and allege the commission of an offense by stating:

(a) title of the action, and name of the court where filed. Ind. Code § 35-34-1-2(a) (1),

(b) name of the offense in the words of the statute or any other words conveying the same meaning. Ind. Code § 35-34-1-2(a) (2),

(c) citation of statutory provision allegedly violated, except that failure to include such a citation or any error in such a citation does not constitute grounds for reversal of a conviction where the defendant was not otherwise misled as to the nature of the charges against him. Ind. Code § 35-34-1-2(a) (3),

(d) nature and elements of the offense charged in plain and concise language without unnecessary repetition. Ind. Code § 35-34-1-2(a) (4),

(e) date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense. Ind. Code § 35-34-1-2(a) (5),

(f) time of the offense as definitely as can be done if time is of the essence of the offense. Ind. Code § 35-34-1-2(a) (6),

(g) place of the offense with sufficient particularity to show that the offense was committed within the jurisdiction of the court where the charge is to be filed. Ind. Code § 35-34-1-2(a) (7),

(h) place of the offense as definitely as can be done if the place is of the essence of the offense. Ind. Code § 35-34-1-2(a) (8), and

(i) name of every defendant, if known, and if not known, by designating the defendant by any name or description by which he can be identified with reasonable certainty. Ind. Code § 35-34-1-2 (a) (9).

a. Must State Names of Material Witnesses

"An indictment or information shall have stated upon it the names of all the material witnesses. Other witnesses may afterwards be subpoenaed by the state, but unless the name of a witness is stated on the indictment or information, no continuance shall be granted to the state due to the absence of the witness." Ind. Code § 35-34-1-2(c).

Greer v. State, 543 N.E.2d 1124 (Ind. 1989) (State's failure to list names of its witnesses in its amended information did not require dismissal of charges against defendant, where defendant was able to obtain the names, and State had difficulty in locating some of the witnesses).

(1) Amend to Add Names

Upon written notice to defendant, prosecuting attorney may amend to add names of material witnesses at any time up to 30 days before omnibus date for felonies: or 15 days before omnibus date for only one or more misdemeanors. Ind. Code § 35-34-1-5(b).

b. Reference to Defendant's Alias

Error to inform jury (whether or not by the charging document) that defendant has been known by aliases if such information is not necessary to identify the defendant or to show an element of the crime. If alias used unnecessarily, defendant must show prejudice. Prejudice resulting from unnecessary use of aliases may be cured by a proper instruction. Moore v. State, 156 Ind. App. 687, 298 N.E.2d 17 (1973).

2. FORM OF ALLEGATIONS

"The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to the statement. Presumptions of law and matters of which judicial notice is taken need not be stated." Ind. Code § 35-34-1-2(d).

a. Follow Language of Statute

An information need only state the crime charged in the language of the statute or in words conveying a similar meaning. Dudley v. State, 480 N.E.2d 881 (Ind. 1985).

Schlacter v. State, 466 N.E.2d 1 (Ind. 1984) (form of indictment or information must substantially comply with form delineated in statute; if accused is specifically

informed of the charge against him by wording of particular information or indictment, then the information or indictment substantially complies with the statute).

Kerlin v. State, 573 N.E.2d 445 (Ind. Ct. App. 1991) (usually, if information tracks language of statute defining offense, information is sufficient).

(1) Minor Variances

Minor variances are allowed as long as defendant is not misled, and essential elements of crime are not omitted. Powers v. State, 499 N.E.2d 192 (Ind. 1986).

Smith v. State, 465 N.E.2d 702 (Ind. 1984) (charging information stated, "crime of murder" rather than "knowingly or intentionally kill another human being." Common meaning attaches to the word "murder;" defendant not misled).

Burris v. State, 465 N.E.2d 171 (Ind. 1984) (robbery charge failed to allege defendant knowingly or intentionally took money from victim; defendant not misled), *superseded by statute on other grounds as stated in* Wrinkles v. State, 690 N.E.2d 1156, 1171 (Ind. 1997).

Whaley v. State, 843 N.E.2d (Ind. Ct. App. 2006) (given number of officers involved in arresting defendant and number of ways defendant was alleged to have fled, correct names of officers involved were essential to a proper description of offenses charged).

But see

Blythe v. State, 14 N.E.3d 823 (Ind. Ct. App. 2014) (amending charge during trial from claiming defendant forged election ballots to making or uttering forged ballots did not prejudice defendant's substantial rights, as amendment did not undermine defense defendant had been using throughout trial).

Parhams v. State, 908 N.E.2d 689 (Ind. Ct. App. 2009) (where defendant was charged with one act of resisting law enforcement, State's failure to identify the correct officer in the charging information against whom defendant allegedly resisted did not mislead him in the preparation of his defense).

Vest v. State, 930 N.E.2d 1221 (Ind. Ct. App. 2010) (charging information was not duplicitous for naming all three officers from whom defendant fled, and trial court did not err when it did not issue a more specific unanimity instruction to jury because jurors were not required to agree on which particular officer defendant fled).

Adetokundo v. State, 29 N.E.3d 1277 (Ind. Ct. App. 2015) (proof of battery against a person other than the victim is not an immaterial variance; charging information must include the name of any person whose identity is essential to a proper description of the offense).

Jones v. State, 938 N.E.2d 1248 (Ind. Ct. App. 2010) (State's failure to name correct officer in information was not fatal to his conviction, because there was only a single charge of resisting law enforcement and defendant did not explain how the error hindered his defense).

(2) Construction

In determining whether the information states alleged offense with sufficient clarity, words must be construed in the manner in which they are commonly and ordinarily accepted. Reasonable doubt as to what offense is charged should be resolved in favor of the defendant. Dorsey v. State, 254 Ind. 409, 260 N.E.2d 800 (1970).

Where there is a conflict between headings and text, language of text controls.

Jordan v. State, 502 N.E. 2d 910 (Ind. 1987) (where count was labeled "Forgery (Uttering)," and text alleged "making," language of text controls; no due process error in conviction of forgery which requires making).

b. Citation to Statute

Any failure to include:

(1) citation to statutory provision alleged to have been violated, or
(2) any error in such a citation
(3) does not constitute grounds for reversal of a conviction where the defendant was not otherwise misled as to the nature of the charges against him. Ind. Code § 35-34-1-2(a).

Hestand v. State, 491 N.E.2d 976 (Ind. 1986) (although statute under which defendant was charged was cited incorrectly in information, defendant was not misled to an extent entitling him to reversal of child molesting conviction, where proper statutory language was set forth as an explanation of the charge).

But see

Salary v. State, 523 N.E.2d 764 (Ind. Ct. App. 1988) (where the statute is not cited, and the information fails to list an essential element of the crime, the defendant is deprived of notice and the opportunity to defend, and a judgment of conviction is contrary to law).

See also Ind. Code § 35-34-1-5(a)(6) (mistake in statutory provision alleged to have been violated is immaterial defect and may be amended at any time).

c. Must Specify if Statute Defines Crime in General Terms

When a criminal statute defines a crime in general terms, the information must be more specific than merely tracking the language of the statute to inform the defendant of the particular offense which comes under the general definition. Gebhard v. State, 459 N.E.2d 58, 60 (Ind. Ct. App. 1984).

Moran v. State, 477 N.E.2d 100, 104 (Ind. Ct. App. 1985) (all counts dismissed where indictment was not sufficiently specific to enable the defendant to defend himself at trial).

See IPDC Pretrial Manual, Chapter 1 § III.C., *below*, for a discussion of Double Jeopardy.

d. Court May Compel State to Elect Among Offenses

Ind. Code § 35-34-1-5(a) provides:

> An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including: * * * (5) the use of alternative or disjunctive allegations as to the acts, means, intents, or results charged.

Trial court has discretion to compel state to elect among offenses charged. Schweitzer v. State, 531 N.E.2d 1386 (Ind. 1989).

(1) Repetitive Charges

Where the information complies with statutory requirements and defendant does not show prejudice, the State is not required to dismiss allegedly repetitive charges.

> Marshall v. State, 590 N.E.2d 627 (Ind. Ct. App. 1992) (State has unrestricted discretion to file allegedly repetitive charges, even though defendant charged and found guilty may not be convicted and sentenced more than once for same offense or for single larceny).
>
> Merriweather v. State, 128 N.E.3d 503 (Ind. Ct. App. 2019) (information alleging two ways of committing intimidation was not duplicitous because the State alleged two means or theories of finding defendant guilty of the single offense of intimidation).

e. Sample Information/Indictment

Ind. Code § 35-34-1-2(e) provides:

> The indictment may be substantially in the following form:
>
> IN THE _____ COURT OF INDIANA, 20___
> STATE OF INDIANA vs. CAUSE NUMBER _____
> A _____ B _____
>
> The grand jury of the county of _____ upon their oath or affirmation do present that AB, on the _____ day of _____, 20__ at the county of _____ in the state of Indiana (HERE SET FORTH THE OFFENSE CHARGED).

Ind. Code § 35-34-1-2(f) provides that the information may be substantially in the same form as the indictment. It is not necessary in an information to state the reason why the proceeding is by information rather than indictment.

> IN THE _____ COURT OF INDIANA, 20___
> STATE OF INDIANA vs. CAUSE NUMBER _____
> A _____ B _____
>
> CD, being duly sworn on his oath or having affirmed, says AB, on the _____ day

of _____, 20__ at the county of _____ in the state of Indiana (HERE SET FORTH THE OFFENSE CHARGED).

3. TIME AND DATE OF OFFENSE

Under Ind. Code § 35-34-1-2(a) (5) and (a) (6), an indictment or information must state:

(1) date of the offense with sufficient particularity to show that the offense was committed within the statute of limitations, and

(2) time of offense as definitely as can be done if time is of the essence of the offense.

Kelsie v. State, 265 Ind. 363, 354 N.E.2d 219 (1976) (time of death not of the essence in murder case; no error in failing to specify date of offense).

State v. Schell, 248 Ind. 183, 224 N.E.2d 49 (1967) (where time not of the essence of the offense, it is sufficient to allege time specifically enough to establish that the offense was committed within period of limitations);

Thurman v. State, 162 Ind. App. 267, 319 N.E.2d 151 (1974) (typing error in charging information misstating the year of the offense in narcotics case was not reversible error since the date was not of the essence of the offenses and could not have misled defendant);

Black v. State, 153 Ind. App. 309, 287 N.E.2d 354 (1972) (information for crime of burglary did not have to state exact time of offense; time is not of the essence).

But see,

Greichunos v. State, 457 N.E.2d 615 (Ind. Ct. App. 1983) (conviction reversed where information in arson case alleged time outside of statute of limitations and no facts alleged sufficient to constitute an exception).

a. Filing of Alibi Makes Time of the Essence

Filing of alibi defense (Ind. Code § 35-36-4-1) makes time of the essence of the offense, and State's answer to notice of alibi restricts State to proof of date in answer. Jennings v. State, 514 N.E.2d 836 (Ind. 1987); McNeely v. State, 529 N.E.2d 1317 (Ind. Ct. App. 1988).

But see Johnson v. State, 734 N.E.2d 530 (Ind. 2000) (defendant was not prejudiced by variance between evidence and information, where information alleged that murders took place "on or about April 22" and evidence showed that the murders took place in the late night of April 22 or the early morning of April 23; variance did not mislead defendant in preparing and maintaining defense, nor was it likely to place him in second jeopardy for same offense).

McCallip v. State, 580 N.E.2d 278 (Ind. Ct. App. 1991) (defendant did not file notice of alibi, thus time of the crime not made of the essence).

See IPDC Alibi Defense Guide (2018).

b. Child Molest Offenses - Time Not of the Essence

Because of peculiar problems attending child molesting cases and youthful witnesses, such offenses may be alleged generally in terms of time and place.

Vail v. State, 536 N.E.2d 302 (Ind. Ct. App. 1989) (indictment charging defendant with child molesting, which alleged only year of offense and county in which it occurred, stated offense with sufficient certainty. "We recognize that in cases like this the consequence may be to preclude a defendant from claiming an alibi unless he can account for the entire period of time.").

Thurston v. State, 472 N.E.2d 198 (Ind. 1985) (State is only required to set forth the time with such reasonable specificity as circumstances and evidence permit).

McNeely v. State, 529 N.E.2d 1317 (Ind. Ct. App. 1988) (State was not required to prove specific determination of date of offense where molestation victim could not remember exact dates defendant molested her but remembered that the offenses occurred near the time, she was attending Bible school).

Phillips v. State, 499 N.E.2d 803 (Ind. Ct. App. 1986) (allegation of child molestation over two-week period held adequate; time was not essence of child molesting, and, thus, information stating that offense occurred between "February 15, 1985, and March 1, 1985" was sufficiently particular).

Hoehn v. State, 472 N.E.2d 926 (Ind. Ct. App. 1984) (no error where court *overruled* motion to dismiss molest charge; victim pinpointed time as "May or June" and time was not of the essence).

NOTE: Refer to IPDC Pretrial Manual, Chapter 9 § II.I.2 on statute of limitations issues in child molest cases. Under Ind. Code § 35-41-4-2(e), the period of limitation for certain sex crimes extends to the alleged victim's 31st birthday. This statute has been amended frequently in recent years. The federal *ex post facto* clause bars states from amending statutes of limitations to revive previously time-barred criminal prosecutions. See Stogner v. California, 123 S.Ct. 2446 (2003). The Indiana Court of Appeals has held that extending an unexpired statute of limitations does not violate the *ex post facto* clause. Minton v. State, 802 N.E.2d 929 (Ind. Ct. App. 2004) (distinguishing Stogner).

4. PLACE OF OFFENSE

A defendant has the right to be tried “in the county in which the offense shall have been committed[.]” Ind. Const. Art. 1, Section 13(a).

Charging information must state place of offense with sufficient particularity to show that the offense was committed within the jurisdiction of the court where charge is filed. Ind. Code § 35-34-1-2(a) (7).

a. Variance

A variance between the information and the proof at trial is fatal to the State's case only when the variance "misleads the defendant in the preparation of his defense or is of such a degree as to be likely to place a defendant in double jeopardy." Weaver v. State, 583 N.E.2d 136, 141 (Ind. 1991) (where information alleged that victim was killed in a given county, but evidence at trial was only that the body was discovered in that county, the

defendant was not misled in preparation of his defense).

The test for a fatal variance between the proof and the charge is found in Allen v. State, 720 N.E.2d 707 (Ind. 1999). See IPDC Pretrial Manual, Chapter 1 § IV.K, *below*.

5. SIGNATURES AND VERIFICATION REQUIRED

a. Indictment

The foreman, or five (5) members of the grand jury, and the prosecutor or deputy prosecutor must sign the indictment. Ind. Code § 35-34-1-2(b).

b. Information

Information must be signed by the prosecutor or deputy prosecutor and must be sworn to or affirmed by the prosecutor or any other person. Ind. Code § 35-34-1-2(b).

The requirement that a prosecutor indorse a charging information is not a mere technical formality. The prosecutor's signature of approval is necessary because he is the only officer authorized to initiate a criminal prosecution on behalf of the State. Lashley v. State, 745 N.E.2d 254, 259 (Ind. Ct. App. 2001).

> Alstott v. State, 205 Ind. 92, 185 N.E. 896 (1933) (any person may swear to an affidavit charging criminal offense).

Cf.

> Davis v. State, 74 N.E.3d 1215 (Ind. Ct. App. 2017) (trial court did not err in denying motion to dismiss traffic infraction summons and complaint which bore electronic rather than hand-written signature; Ind. Code § 9-30-3-6 does not specify what form the signature must take).

(1) Verified or Sworn Documents

Ind. Code § 35-34-1-2.4 specifies requirements of a sworn document. Swearing or affirming need not be done before a notary if document complies with Ind. Code § 35-34-1-2.4(a). A person making a false affirmation or verification may be prosecuted for perjury under Ind. Code § 35-44.1-2-1.

> Frink v. State, 568 N.E.2d 535 (Ind. 1991) (defendant was not entitled to dismissal of charges based on defects in information and probable cause affidavits that did not contain notarizations required, where documents contained verifications which complied with Trial Rule 11(B); purpose of oath requirement had been fulfilled).
>
> Adamovich v. State, 529 N.E.2d 346 (Ind. Ct. App. 1988) (information signed by prosecutor stating that he affirmed under penalties for perjury that representations were true was sufficient, even though information lacked jurat or other evidence that it had been signed in conjunction with oath administered by "a person").

III. CONSTITUTIONAL ISSUES

A. DUE PROCESS RIGHT TO NOTICE

Under the 14th Amendment, the Due Process Clause of the 5th Amendment, and the notice and jury trial requirements of the 6th Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment or information, submitted to a jury, and proven beyond a reasonable doubt. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000); Jones v. U.S., 526 U.S. 227, 119 S. Ct. 1215 (1999).

PRACTICE POINTER: The United States Supreme Court has held that the 6th Amendment right to notice requires that any fact used to enhance the maximum sentence must be contained in the charging document. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000). In Blakely v. Washington, 542 U.S. 296 (2004), the U.S. Supreme Court invalidated a state sentencing scheme under another part of the Apprendi holding – violation of the right to jury trial – without specifically discussing the notice requirement. Following *Blakely*, the Indiana Supreme Court invalidated part of Indiana's sentencing law in Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (superseded in part by statute as stated in Anglemyer v. State, 868 N.E.2d 482, 487 (Ind. 2007)) and remanded the defendant's case, seemingly assuming without explanation that although no aggravating circumstances were contained in the charging information, the defendant's 6th Amendment right to notice would not be violated by jury fact-finding on the aggravators. After *Smylie*, the legislature amended the sentencing statutes by removing the requirement of an aggravating circumstance before a defendant was eligible for an enhanced sentence.

1. MUST INFORM ACCUSED OF NATURE OF CHARGES

Ind. Const., Art. 1, Sec. 13 provides: "In all criminal prosecutions, the accused shall have the right ... to demand the nature and cause of the accusation against him, and to have a copy thereof."

This Constitutional provision requires that the indictment or information sufficiently inform the accused of the nature of the charges against him so that he may anticipate the State's proof and prepare a defense in advance of trial. Flores v. State, 485 N.E.2d 890 (Ind. 1985).

The notice and jury trial guarantees of the 6th Amendment, which apply to state prosecutions by action of the 14th Amendment, provide that defendants in criminal cases shall have the right "to be informed of the nature and cause of the accusation against them." Due process requires clear, adequate notice of the charge or charges to defend against, and "will brook no confusion on the subject [of the charges brought]." Wright v. State, 658 N.E.2d 563, 565 (Ind. 1995).

a. Standard for Adequate Notice

A charging document "is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables his to plead an acquittal or conviction in bar of future prosecutions for the same offense[.] It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." Hamling v. U.S., 418 U.S. 87, 117, 94 S. Ct. 2887, 2907 (1974) (internal citations and quotations omitted).

Information or affidavit must charge and direct in unmistakable terms the offense with which the defendant is accused. If there is reasonable doubt as to what offenses are set forth, that doubt should be resolved in favor of the defendant. Garcia v. State, 433 N.E.2d 1207 (Ind. Ct. App. 1982).

Kaur v. State, 987 N.E.2d 164 (Ind. Ct. App. 2013) (taken together, charging information and probable cause affidavit adequately notified defendant of charges).

But see:

Gordon v. State, 645 N.E.2d 25 (Ind. Ct. App. 1995), *reh'g denied, trans. denied* (informations for criminal deviate conduct charges were not deficient and did not mislead defendant of charges even though informations did not set forth element of force; by specifically directing defendant to statutory offense and describing particular facts of case, informations adequately advised defendant of crimes charged).

b. Dismissal Required

Where indictment and statute defining the offense employ generic terms which do not inform the accused in any meaningful way of particular conduct complained of, dismissal is required. Failure to adequately inform the defendant of charges against him is fundamental error, requiring reversal even when not objected to at trial. Griffin v. State, 439 N.E.2d 160 (Ind. 1982) (*overruled in part on different grounds by* Woodson v. State, 778 N.E.2d 475, 478 (Ind. Ct. App. 2002)).

Flores v. State, 485 N.E.2d 890, 894 (Ind. 1985) (amendments to robbery information, deleting references to "wallet" and "jewelry box" so as to simply accuse defendant of taking "property" from victims, failed to apprise defendant of the robbery charges against him).

Griffin v. State, 439 N.E.2d 160 (Ind. 1982) (In prosecution for receiving stolen property, information which failed to specify stolen property was "totally inadequate." No description of whose property, what property, or where offense took place. Inadequate allegations to inform defendant to prepare for trial; failure to specify conduct exposed defendant to risk of double jeopardy), *overruled in part on other grounds by* Woodson v. State, 778 N.E.2d 475, 478 (Ind. Ct. App. 2002).

Salary v. State, 523 N.E.2d 764 (Ind. Ct. App. 1988) (defendant could not be convicted for not yielding right of way to oncoming traffic at through intersection under information charging him with failure to stop, absent any language in information defining traffic to which defendant failed to yield).

Moran v. State, 477 N.E.2d 100 (Ind. Ct. App. 1985) (indictment for official misconduct by "violating bidding procedures," which did not set out the specific required statutory procedures allegedly violated, was inadequate under Ind. Code § 35-34-1-4(a) (4)).

Gebhard v. State, 459 N.E.2d 58 (Ind. Ct. App. 1984) (information charging defendant with knowingly engaging in "tumultuous conduct" failed to state facts and circumstances sufficiently to apprise defendant of charge against him; information inadequate under statutory guidelines).

Young v. State, 30 N.E.3d 719 (Ind. 2015) (conviction for Class B felony aggravated battery reversed because charging information did not give adequate notice; information alleged that defendant shot victim but in finding defendant guilty, trial court found that defendant "pounded on" and "beat on" victim; failure of proof always requires reversal).

See also Lee v. State, 43 N.E.3d 1271 (Ind. 2015) (co-defendant of appellants in Young, above, granted relief despite fact that Lee failed to file timely transfer petition. It was fundamental error to convict defendant, like her co-defendants, based on critical fact State neither pleaded nor claimed at trial).

2. NOTIFICATION OF EMPLOYERS FOR PERSONS WORKING WITH CHILDREN

Ind. Code § 33-39-1-9 provides:

> A prosecuting attorney who charges a person with committing any of the following shall inform the person's employer of the charge, unless the prosecuting attorney determines that the person charged does not work with children:
>
> (1) Rape (Ind. Code § 35-42-4-1) if the victim is less than eighteen (18) years of age.
> (2) Criminal deviate conduct (Ind. Code § 35-42-4-2) (repealed effective July 1, 2014), if the victim is less than eighteen (18) years of age.
> (3) Child molesting (Ind. Code § 35-42-4-3).
> (4) Child exploitation (Ind. Code § 35-42-4-4(b) or Ind. Code § 35-42-4-4(c)).
> (5) Vicarious sexual gratification (Ind. Code § 35-42-4-5).
> (6) Child solicitation (Ind. Code § 35-42-4-6).
> (7) Child seduction (Ind. Code § 35-42-4-7).
> (8) Incest (Ind. Code § 35-46-1-3) if the victim is less than eighteen (18) years of age.

3. UNCHARGED OFFENSE

a. Convicted of Offense Not Within Charge - Fundamental Error

It is a denial of due process of law to convict an accused of a charge not made. Where instructions are given or a verdict is rendered on a particular offense which is not the same as the offense charged, reversal usually is warranted. Maynard v. State, 508 N.E.2d 1346 (Ind. Ct. App. 1987).

Brooks v. State, 526 N.E.2d 1171 (Ind. 1988) (fundamental error where trial court instructed jury that Class D felony child molestation by fondling was a lesser included offense of Class C felony of child molestation by deviate sexual conduct. Conviction for a crime defendant was not charged with is a nullity).

b. Lesser Included Offense (LIO)

When either party requests a jury instruction on lesser included offenses of the crime charged, the trial court must first compare the statute defining the charged offense with the statute defining the lesser included offense. If all the elements of the lesser charge are inherently included in the crime charged, proceed to the third step (below). Second, if the statutory elements of the lesser offense are not inherently included in the crime charged,

compare the statute defining the lesser included offense with the charging instrument. If the charging instrument alleges facts that include all the elements of the alleged lesser offense, then the lesser offense is factually included in crime charged; proceed to the third step (below). Third, if the lesser offense is either inherently or factually included in the crime charged, consider the evidence presented in the case by both parties. If there is a serious evidentiary dispute about element(s) distinguishing the greater from the lesser offense, and the jury could conclude that the lesser offense was committed but not the greater, it is reversible error to not give a lesser included offense instruction when requested. Wright v. State, 658 N.E.2d 563 (Ind. 1995).

The wording of a charging instrument can never foreclose or preclude an instruction on an inherently included offense. Aschliman v. State, 589 N.E.2d 1160 (Ind. 1992).

It is reversible error to give an instruction on a lesser included offense in the absence of a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense. Watts v. State, 885 N.E.2d 1228 (Ind. 2008).

A trial court should not give an instruction on a lesser included offense if it is neither inherently nor factually included in crime charged. Straub v. State, 567 N.E.2d 87 (Ind. 1981).

(1) Guilty Plea to lesser included offense

Ohio v. Johnson, 467 U.S. 493, 104 S. Ct. 2536 (1984) (guilty plea to a lesser included offense contained in same indictment does not bar a trial for the greater offense. There is no implied acquittal in this case, unlike a case where one is convicted of a lesser offense and then separately charged with a greater offense as in Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221 (1977)).

c. Appellate Court Raise *Sua Sponte*

Where the charge does not comport with the defendant's ultimate conviction, the error is fundamental and even if not raised by the defendant, should be addressed *sua sponte* on appeal. E.g., Young v. State, 249 Ind. 286, 231 N.E.2d 797 (1967).

Contra:

Linder v. State, 589 N.E.2d 1188 (Ind. Ct. App. 1992) (where defendant was charged only with Class B felony arson, but requested jury instruction on Class A felony arson, defendant would not be heard to argue that a conviction of arson as a Class A felony violated due process).

4. FAILURE TO PROVE CRIME *AS CHARGED*

Townsend v. State, 632 N.E.2d 727 (Ind. 1994) (defendant charged with unlawful touching of two children (battery on victim 1 **and** victim 2); although instruction included requirement that defendant touch **both** children, trial court erred by providing four verdict forms allowing jury to convict based upon battery of **either** child. The verdict forms were diametrically opposed to the element instruction, and relieved state of its burden to prove commission of battery on both children as charged. The defendant was denied fair trial and due process, and the error was fundamental).

Young v. State, 30 N.E.3d 719 (Ind. 2015) (State's evidence did not conform to charging information and constituted failure of proof; information alleged defendant shot victim, but State's evidence at trial showed that defendant "pounded on" and "beat on" victim; failure of proof always requires reversal).

Granger v. State, 113 N.E.3d 773 (Ind. Ct. App. 2018) (Court rejected State's argument that defendant could have been validly convicted under a different subsection of the paraphernalia possession statute, an offense not charged).

5. JOINT VENTURE THEORIES

Dudley v. State, 480 N.E.2d 881 (Ind. 1985) (Information which failed to specify who entered the bank, who took the money, who drove the car and who fired a shot at a police officer was not void; one may be criminally liable for the acts of his confederates which are the probable and natural consequence of their common plan).

But see McCorker v. State, 797 N.E.2d 257 (Ind. 2003) (criticizing use of "probable and natural consequences" language in jury instructions).

6. FAILURE TO SPECIFY INTENT - UNDERLYING FELONY

Failure to specify intent requirement as to underlying felony does not make the indictment defective for failing to give adequate notice.

Burris v. State, 465 N.E.2d 171 (Ind. 1984) (*superseded by statute on other grounds as stated in* Wrinkles v. State, 690 N.E.2d 1156, 1171 (Ind. 1997) (where defendant was charged with committing murder while in commission of robbery, information was sufficiently certain to enable defendant to prepare his defense, even though it failed to allege that defendant knowingly or intentionally took money from victim).

B. "VAGUENESS"

Due Process prohibits bringing information for offenses where statute defining offense is "void for vagueness." Vagueness means that a person of common intelligence, reading the statute, would not know what conduct was prohibited. Wilson v. State, 468 N.E.2d 1375, 1377 (Ind. 1984).

If the information tracks the statutory language, and still is not specific enough, consider a due process challenge to the statute on grounds of vagueness. Penal statutes must define criminal offense with sufficient clarity and definiteness that ordinary people may reasonably understand what conduct is prohibited. Statutes must be worded in a manner which does not encourage arbitrary and discriminatory enforcement. Moreover, vague laws "also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect," as "[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." United States v. Davis, 139 S.Ct. 2319 (2019).

1. INDIANA CASES

A statute will not be found unconstitutionally vague when the language is sufficiently definite to inform a person of ordinary intelligence of a conduct which is prohibited. Payne v. State, 484 N.E.2d 16 (Ind. 1985); Hess v. State, 260 Ind. 427, 297 N.E.2d 413, 415 (1973), *reversed*

on other grounds 414 U.S. 105.

Brown v. State, 868 N.E.2d 464 (Ind. 2007) (Indiana's criminal confinement statute, Ind. Code § 35-42-3-3, as to the inclusion of the words "fraud" and "enticement" is void for vagueness).

Bozarth v. State, 520 N.E.2d 460 (Ind. Ct. App. 1988) (use of term "mentally disabled or deficient" does not render rape statute unconstitutionally vague; language is not so esoteric as to prevent a consensus of meaning among persons of ordinary intelligence).

Miller v. State, 449 N.E.2d 1119 (Ind. Ct. App. 1983) (criminal recklessness statute is not unconstitutionally vague as written, or as applied, because "recklessness" is sufficiently precise, and conduct charged was clearly reckless).

See also "Unconstitutional Statute - Grounds to Dismiss," IPDC Pretrial Manual, Chapter 9 § II.L.2.a.

2. FEDERAL CONSTITUTION

Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849 (1999) (Chicago ordinance prohibiting gang members from loitering in public places is vague and arbitrarily restricts personal liberties, in violation of due process. Loitering is defined as remaining "in any one place with no apparent purpose." The ordinance fails to give the ordinary citizen notice of what is forbidden and what is permitted and fails to provide even minimal standards to guide law enforcement).

Akron v. Akron Center for Reproductive Care, 462 U.S. 416, 103 S. Ct. 2481 (1983) (provision that physicians performing abortions ensure, on pain of criminal penalty, that fetal remains be disposed of in "humane and sanitary manner" is void for vagueness), *overruled in part on other grounds*, Planned Parenthood of Southeaster PA v. Casey, 112 S.Ct. 2791 (1992).

Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855(1983) (statute construed to require persons stopped with reasonable suspicion under Terry v. Ohio, 392 U.S. 1 (1968), to provide "credible and reliable" identification or be guilty of a misdemeanor is void for vagueness on its surface because it encourages discriminatory enforcement. Whether Fourth or Fifth Amendment would permit a non-vague requirement not decided. See Brennan, J., dissenting). See also Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring).

Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755 (1976) (ordinance requiring notice of door-to-door canvass for "recognized charitable cause" vague as to who is covered and what is required).

Plummer v. Columbus, 414 U.S. 2, 94 S. Ct. 17 (1973) (ordinance penalizing use of "fighting words" vague; invalid on face).

Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839 (1972) (vagrancy ordinance void for vagueness).

C. DOUBLE JEOPARDY

Double Jeopardy is one reason why charging instruments must be specific. Otherwise, a defendant might be tried more than once on the basis of the same conduct. The Indiana Constitution provides broader protection against double jeopardy than does the U.S. Constitution.

Federal double jeopardy analysis consists of the 'same elements' test under Blockburger v. U.S., 284 U.S. 299, 52 S. Ct. 180 (1932). Whether there are two offenses or only one under *Blockburger* is determined by whether each statutory provision requires proof of an additional fact which the other does not. In federal practice, pretrial denial of a double jeopardy claim is a final appealable order. Abney v. United States, 431 U.S. 651, 97 S. Ct. 2034 (1977).

Indiana's Double Jeopardy Clause was intended to prevent the State from being able to proceed more than once against a person for the same criminal transgression. In Wadle v. State, 151 N.E.3d 227 (Ind. 2020), the Indiana Supreme Court expressly *overruled* the Constitutional tests formulated in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), as they apply to claims of substantive double jeopardy, noting that the standard had caused "more confusion than clarity." In its place, the court articulated a new analytical framework to resolve multiple punishment claims going forward. When multiple convictions for a single criminal act or transaction implicate two or more statutes, a court first looks to the statutory language itself. If either statute clearly permits multiple punishment, either expressly or by unmistakable implication, there is no violation of substantive double jeopardy. But if the statutory language is not clear, a court must then apply Indiana's included offense statutes to determine whether the charged offenses are the same. (See Ind. Code §§ 35-38-1-6 and 35-31.5-2-168). If neither offense is included in the other (either inherently or as charged), there is no double jeopardy violation. But if one offense is included in the other, then the court must examine the facts underlying those offenses, as presented in the charging instrument, and as adduced at trial. The key question of that examination is whether the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." If the factual analysis reveals two separate and distinct crimes, there is no violation of substantive double jeopardy, even if one offense is, by statutory definition, "included" in the other. But if the analysis shows a single continuous crime with one statutory offense included in the other, then the prosecutor may charge these offenses only in the alternative, not cumulative, sanctions. The State can rebut this presumption only by showing that the statute - either in express terms or by unmistakable implication - clearly permits multiple punishment. Under the new framework, the defendant's two OWI offenses based on BAC concentration and endangerment violate double jeopardy. The court also vacated Wadle's conviction for Level 5 felony leaving the scene of an accident, finding that it was one continuous transaction and included in his Level 3 felony conviction for leaving the scene of an accident.

The doctrine of double jeopardy is inapplicable to habitual offender proceedings because the habitual offender statute does not create new or separate offenses and the habitual offender proceeding does not deal with the underlying facts on the substantive charge. Thus, the use of prior convictions at more than one habitual offender proceeding does not constitute double jeopardy. Baker v. State, 425 N.E.2d 98 (Ind. 1981).

See Ind. Code § 35-41-4-3 and the discussion of double jeopardy in IPDC Pretrial Manual, Chapter 9 § II.H, "Motions to Dismiss." For an extensive discussion on double jeopardy, see IPDC Sentencing Manual, Chapter 9.

D. CHALLENGING CONSTITUTIONALITY OF STATUTE - PROCEDURE

1. MOTION TO DISMISS

A defendant may challenge the constitutionality of a criminal statute invoked against him by filing a motion to dismiss. Ind. Code § 35-34-1-6(a) (3), (c).

Ind. Code § 35-34-1-4(b) requires such challenge to be raised against a felony charge no later than 20 days prior to omnibus date. (No later than 10 days prior to omnibus date for only misdemeanors.)

See Ind. Code § 35-34-1-8 for requisites of motion to dismiss by defendant. Criminal Rule 3 requires filing of memorandum stating specifically the grounds for dismissal.

a. Failure to File a Motion to Dismiss May Waive Issue for Appeal

There is a split in Indiana courts as to whether the failure to file a motion to dismiss challenging a statute as unconstitutional waives the error for appeal. Compare Poling v. State, 853 N.E.2d 1270 (Ind. Ct. App. 2006) (noting that a party may raise the constitutionality of a statute at any point in the proceedings and the Court may *sua sponte* raise the issue) with Burke v. State, 943 N.E. 2d 870 (Ind. Ct. App. 2011) with Payne v. State, 484 N.E.2d 16, 18 (Ind. 1985) and Newton v. State, 456 N.E.2d 736 (Ind. Ct. App. 1983) (failure to file motion to dismiss challenging statute as unconstitutional waived error on appeal). It is proper to address a defendant's constitutional claim on the merits if he raised it before sentencing and not for first time on appeal. Brown v. State, 848 N.E.2d 699 (Ind. Ct. App. 2006), *vacated on other grounds*, 868 N.E.2d 464 (Ind. 2007).

Reed v. State, 796 N.E.2d 771 n.2 (Ind. Ct. App. 2003) (constitutional challenge to a statute was properly before the court on appeal).

IV. DEFECTS IN CHARGING DOCUMENT

Under Ind. Code § 35-34-1-6(a) (1) an indictment/information is defective if it does not conform to the requirements of Ind. Code § 35-34-1-2(a). See IPDC Pretrial Manual, Chapter 1 § II.A.1, *above*, for requirements of Ind. Code § 35-34-1-2(a).

Defects in charging documents are generally categorized as material or immaterial. The issue usually arises when the prosecution seeks to amend charging instrument after mistake is discovered and the time for substantive amendments has passed. Whether that defect can be promptly cured by the prosecution will depend on whether the defect affects substantial rights of the accused.

Pennington v. State, 523 N.E.2d 414 (Ind. 1988) (amendments to caption to indicate that felonies were Class A rather than Class B, and to text to substitute "threatening to use deadly force" for "threats to kill her," were not prejudicial to substantial rights of the accused, and therefore could be made after 20 days prior to omnibus date).

A. MATERIAL DEFECTS

"A defect is material only if the prosecutor's amendment affects the availability of a defense or the applicability of evidence which existed under the original information." Lacy v. State, 438 N.E.2d 968, 972 (Ind. 1982).

Abner v. State, 497 N.E.2d 550 (Ind. 1986) (a charging information defect is material if it requires a substantive amendment to be cured).

1. TEST FOR MATERIAL DEFECT

Ind. Code § 35-34-1-5 distinguishes between amendments of 'immaterial defect' and

amendments of 'substance.' Haak v. State, 695 N.E.2d 944 (Ind. 1998).

"If the defense under the original information would be equally available after the amendment is made and the accused's evidence would be equally applicable to the information in one form as in the other, the amendment is one of form and not of substance. An amendment is of substance only if it is essential to the making of a valid charge of the crime." Haak v. State, 695 N.E.2d 944 (Ind. 1998); Sharp v. State, 534 N.E.2d 708, 714 (Ind. 1989).

2. EXAMPLES OF MATERIAL DEFECTS

a. Failure to Give Adequate Notice

The Sixth Amendment to the U.S. Constitution, and Art. I, § 13 of the Indiana Constitution require defendant be informed of the "nature and cause of the action."

Brooks v. State, 526 N.E.2d. 1171 (Ind. 1988) (trial court erred in submitting defendant's case to jury on offense of child molest where offense was neither charged nor included in charged crime; defendant was improperly convicted of crime with which he was not charged).

b. Failure to Allege Elements of the Offense

All essential elements of the offense must be set out or be inferable from allegations which are made in the pleadings. Mauricio v. State, 476 N.E.2d 88 (Ind. 1985) (*reversed on other grounds by* Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988)).

State v. Pickett, 424 N.E.2d 452 (Ind. Ct. App. 1981) (trial court properly dismissed two counts of information because facts alleged did not constitute stated criminal offenses; information must state crime which it is intended to charge).

State v. Gotwals, 165 Ind. App. 109, 330 N.E.2d 766 (1975) (no statutory offense charged, conviction reversed).

But see

Gordon v. State, 645 N.E.2d 25 (Ind. Ct. App. 1995), *reh'g denied, trans. denied* (informations for criminal deviate conduct charges were not deficient and did not mislead defendant of charges even though informations did not set forth element of force; by specifically directing defendant to statutory offense & describing particular facts of case, informations adequately advised defendant of crimes charged).

Cf.

Miller v. State, 634 N.E.2d 57 (Ind. Ct. App. 1994) (omission of 'force' element from information for resisting law enforcement was not fundamental error, because defendant was able to present defense and was not misled; defendant argued he did not resist at all, rather than that resistance was not forcible).

c. Failure to Allege Name of Victim

In order to give defendant proper notice of charge against him, charging document must

allege victim's name. Robinson v. State, 232 Ind. 396, 112 N.E.2d 861 (1953). See also Adetokundo v. State, 29 N.E.3d 1277 (Ind. Ct. App. 2015) (proof of battery against a person other than the victim is not an immaterial variance; charging information must include the name of any person whose identity is essential to a proper description of the offense).

Locke v. State, 530 N.E.2d 324 (Ind. Ct. App. 1988) (omission of victims' names from two separate child molestation informations was not cured by attachment of probable cause affidavits and statements from the victims).

Radford v. State, 468 N.E.2d 219 (Ind. 1984) (no error in allowing State to substitute name for "confidential informant" on day of trial; defendant did not request continuance & had sought name through discovery; court found no prejudice).

d. Failure to Adequately Specify Criminal Conduct

Allegations must be specific enough to allow defendant to prepare his defense, and to operate as a double jeopardy bar. Flores v. State, 485 N.E.2d 890 (Ind. 1985) and Fadell v. State, 450 N.E.2d 109 (Ind. Ct. App. 1983).

e. Amendments That Change Theory of the Case

Prosecution may not amend charging information in manner which materially changes factual allegations which form basis of theory of prosecution. Griffin v. State, 439 N.E.2d 160 (Ind. 1982), *overruled in part on other grounds by* Woodson v. State, 778 N.E.2d 475, 478-79 (Ind. Ct. App. 2002). See also Kelly v. State, 586 N.E.2d 927 (Ind. Ct. App. 1992).

(1) conspiracy to commit murder by drowning rather than shooting. Abner v. State, 497 N.E.2d 550 (Ind. 1986);

(2) attempted burglary and burglary amended to conspiracy to commit burglary counts. Briscoe v. State, 388 N.E.2d 638 (Ind. Ct. App. 1979);

(3) murder to felony-murder. Reynolds v. State, 536 N.E.2d 541 (Ind. Ct. App. 1989) (but not fundamental error, where State could have achieved same result by dismissing information and refiling charges within statutory limitations period);

(4) sexual misconduct with minor-deviate sexual conduct. Harris v. State, 992 N.E.2d 887 (Ind. Ct. App. 2013) (After jury acquitted defendant of rape and hung on class C felony sexual misconduct with a minor, statute of limitations barred State from amending sexual misconduct charge by adding deviate sexual conduct as alternative basis for charge; proposed amendment constituted a matter of substance and included a new and additional offense), *reh'g granted in part*, *trans. denied*;

(5) adding battery and auto theft counts to resisting law enforcement. Fowler v. State, 878 N.E.2d 889 (Ind. Ct. App. 2008).

But see:

Haak v. State, 695 N.E.2d 944, 951-52 (Ind. 1998) (in conspiracy to commit murder, amending information to delete one of eight overt acts performed in furtherance of the agreement – that the defendant 'shot and killed' the victim – was not 'of

substance' and therefore not prejudicial).

Davis v. State, 539 N.E.2d 929 (Ind. 1989) (trial court properly allowed State to change theory of offense from relying solely on invasion of dwelling to support class B burglary, to include fact that defendant was armed with deadly weapon. Defendant had been fully advised that State would attempt to prove he entered dwelling and did so with intent to commit felony battery).

Tolbert v. State, 442 N.E. 2d 718 (Ind. Ct. App. 1982) (theory of case in original indictment resurfaces in second amended indictment; no error in allowing motion to amend).

f. Missing Signature

Prosecutor's failure to sign an indictment or information is a fatal defect. Anderson v. State, 439 N.E.2d 558 (Ind. 1982); Ind. Code § 35-34-1-5(b).

Sprague v. State, 203 Ind. 581, 181 N.E.507 (1932) (indictment endorsed on back by grand jury foreperson was sufficient).

g. Failure to Affirm or Swear to Contents of Charge

Failure to swear or affirm contents of charge is a fatal defect. Anderson v. State, 439 N.E.2d 558 (Ind. 1982).

h. Inflammatory Language and Surplusage

Language must be "manifestly detrimental" to accused, e.g., by threatening impartiality of jurors, to warrant dismissal of charge, or as basis for order striking language in charging instrument. Doss v. State, 256 Ind. 174, 267 N.E.2d 385 (1971); Candler v. State, 266 Ind. 440, 363 N.E.2d 1233 (1977).

Unnecessary verbiage is not prejudicial unless it is manifestly detrimental and wholly foreign to the subject matter of the information. Kelsie v. State, 265 Ind. 363, 354 N.E.2d 219 (Ind. 1976), *cert. den*.

i. Inconsistent Allegations

Defendant must show some prejudice where actual harm would result from logically inconsistent pleadings in order to support dismissal, i.e., potential harm if defendant will be convicted on both counts. Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95 (1974), *appeal dismissed*, 95 S.Ct. 25, *appeal after remand* 340 N.E.2d 764.

j. Amending Date of Offense

In determining whether an amendment of the date of the offense in an information is material, the inquiry is whether the amendment affects the availability of a defense.

Taylor v. State, 614 N.E.2d 944 (Ind. Ct. App. 1993) (State can amend information as to date of offense *after trial* only if amendment does not affect availability of defense or applicability of evidence which existed under original information. Cross-examination of alleged victim established that the victim was not in Indiana during

the time alleged in Count V of the charging information. After State's case in chief, State sought to amend dates in information to conform to the witness' testimony. Held, trial court erred in permitting State to amend; amendment deprived defendant of his defense and was thus material).

k. Variance Between Charging Information and Proof at Trial

The test to determine whether a variance between the proof at trial and a charging information or indictment is fatal is as follows:

(1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby; and

(2) will the defendant be protected against double jeopardy in a future criminal proceeding covering the same event, facts, and evidence?

Young v. State, 30 N.E.3d 719 (Ind. 2015) (fundamental error as defendants lacked fair notice of charge for which they were ultimately convicted, where State charged defendants with murders as accomplices in a shooting but after the trial court dismissed the murder charges it entered judgment of conviction against the defendants for attempted aggravated battery; under these unusual circumstances, attempted aggravated battery by a beating was not just a lesser offense of the charged offense of murder by shooting; it was an entirely different offense).

See also Lee v. State, 43 N.E.3d 1271 (Ind. 2015) (Co-defendant of appellants in *Young*, *supra*, granted relief despite fact that Lee failed to file timely transfer petition. It was fundamental error to convict defendant, like her co-defendants, based on critical fact State neither pleaded nor claimed at trial.).

Granger v. State, 113 N.E.3d 773 (Ind. Ct. App. 2018) (Court rejected State's argument that defendant could have been validly convicted under a different subsection of the paraphernalia possession statute, an offense not charged).

Allen v. State, 720 N.E.2d 707, 713 (Ind. 1999) (where charging information in murder and criminal deviate conduct case alleged penetration by defendant's "sex organ" and evidence at trial was of penetration by an "object," variance warranted reversal and new trial. Statute distinguishes between "sex organ" and "object," and sentence imposed for this count was fifty years; State should provide evidence that plainly matches the charge).

Broude v. State, 956 N.E.2d 130 (Ind. Ct. App. 2011) (variance between charging information and proof at trial required reversal of conviction for class A felony child molesting by submitting to criminal deviate conduct).

Variance between the charging information and the proof at trial is material when it: (1) misleads the defendant in the preparation of his defense; and (2) subjects him to the likelihood of another prosecution for the same offense. Madison v. State, 234 Ind. 517, 130 N.E.2d 35 (1955); Dellenbach v. State, 508 N.E.2d 1309 (Ind. Ct. App. 1987).

Matthews v. State, 978 N.E.2d 438 (Ind. Ct. App. 2012) *trans. denied* (no fatal variance where information charged defendant with public intoxication at a private residence but where trial evidence met requisite showing that defendant was

intoxicated in a public place, just one block away from the private residence).

Daniels v. State, 957 N.E.2d 1025 (Ind. Ct. App. 2011) (no fatal variance where charge alleged defendant drew his gun, but evidence showed he merely "used" gun by displaying it to victim by lifting his shirt to show gun tucked in waistband; defendant was not misled in preparation of defense).

Reinhardt v. State, 881 N.E.2d 15 (Ind. Ct. App. 2008) (although State alleged a specific recipient in its charging information, Ind. Code § 35-48-4-1 does not require that identity of recipient must be alleged, thus it is not an essential element of the crime; accordingly, the unnecessary allegation as to the identity of the ultimate recipient of the cocaine is considered surplusage).

Mitchem v. State. 685 N.E.2d 671 (Ind. 1997) (allegation in attempted murder charge that defendant used handgun and shotgun while evidence at trial suggested he used a rifle was surplusage and not fatal because defendant was not misled in preparing defense and was not harmed or prejudiced).

Harrison v. State, 507 N.E.2d 565 (Ind. 1987) (variance between proof and indictment, which mistakenly alleged mortgagee was the owner, was not fatal).

Robinson v. State, 634 N.E.2d 1367 (Ind. Ct. App. 1994) (even if variance existed between charging information, which asserted that defendant delivered cocaine to undercover officer, and evidence at trial, which showed that defendant handed drug to informant and officer then removed it from informant's possession, no reversible error because defendant failed to show how his entrapment defense would have changed had information mentioned informant instead of officer, there was nothing indicating undue surprise due to wording of information, and no showing that defendant had been placed in danger of double jeopardy).

Lewellen v. State, 358 N.E.2d 115 (Ind. 1976) (variance is material if it places defendant in danger of double jeopardy; charge must be sufficiently specific that if after jeopardy has attached, second like charge is filed covering same evidence; defendant here was not misled in preparation of defense & was not subjected to risk of double jeopardy). See also Majors v. State, 251 N.E.2d 571 (Ind. 1969).

Gaines v. State, 999 N.E.2d 999 (Ind. Ct. App. 2013) (variance not fatal where information alleged defendant knowingly violated a protective order and State presented evidence that defendant violated an ex parte protective order; defendant was not misled by alleged variance, as difference between an ex parte protective order and a protective order was never mentioned during the trial, and only one protective order was issued).

Whaley v. State, 843 N.E.2d 1 (Ind. Ct. App. 2006) (given number of officers involved in arresting defendant and number of ways defendant was alleged to have fled, correct names of officers involved were essential to a proper description of offenses charged).

Golladay v. State, 875 N.E.2d 389 (Ind. Ct. App. 2007) (trial court violated due process by finding defendant guilty of home improvement fraud under Ind. Code § 35-42-6-12(a)(4) (now Ind. Code § 35-43-6-1, et. seq.) when defendant was charged under Ind. Code § 35-42-6-12(a) (3)).

B. IMMATERIAL DEFECTS

1. STATUTORY DEFINITION

Defects not affecting substantial rights of the accused:

(a) Any misspellings, grammatical errors, or miswritings, Ind. Code § 35-34-1-5(a) (1);
(b) Any misjoinder of parties defendant or offenses charged, Ind. Code § 35-34-1-5(a) (2);
(c) Presence of any unnecessary repugnant allegation, Ind. Code § 35-34-1-5(a) (3);
(d) Failure to negate any exception, excuse or provision contained in the statute defining the offense, Ind. Code § 35-34-1-5(a) (4);
(e) Use of alternative or disjunctive allegations as to acts, means, intents, or results charged, Ind. Code § 35-34-1-5(a) (5);
(f) Any mistake as to the name of the court or county, or the citation to the statutory provision alleged to have been violated, Ind. Code § 35-34-1-5(a) (6);
(g) Failure to state time or place where time or place is not of the essence of the offense, Ind. Code § 35-34-1-5(a) (7);
(h) Failure to state an amount of value or price of any matter where not of the essence of the offense, Ind. Code § 35-34-1-5(a) (8);
(i) Any other defect which does not prejudice the substantial rights of defendant, Ind. Code § 35-34-1-5(a) (9).

2. EXAMPLES OF IMMATERIAL DEFECTS

a. Naming Defendant

Burse v. State, 515 N.E.2d 1383 (Ind. 1987) (absence of defendant's name from information did not affect his substantial rights where he was aware that he was charged with the crime alleged in the information, and thus State could have amended the information).

Estep v. State, 486 N.E.2d 492 (Ind. 1985) (failure to specify whether "Sr." or "Jr." was being charged is immaterial when Junior was 15 months old at trial).

b. Conflict Between Title and Text

Jordan v. State, 502 N.E.2d 910 (Ind. 1987) (where count was labeled "Forgery (Uttering)", and text alleged "making", language of text controls; no due process error in conviction of forging which requires making).

c. Surplusage

Surplusage does not invalidate an indictment. Sheets v. State, 217 Ind. 676, 30 N.E.2d 309 (1940).

Heflin v. State, 267 Ind. 427, 370 N.E.2d 895 (1977) (information proper where it stated "take, rob and steal" to support charge of armed robbery).

Mauricio v. State, 476 N.E.2d 88 (Ind. 1985) (where information charges defendant with robbery and evidence clearly proved he committed crime, reference in

information to co-conspirator was surplusage), *reversed on other grounds by* Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988).

The prosecution is not bound to prove allegations which are surplusage.

Mauricio v. State, 476 N.E.2d 88 (Ind. 1985) (reference to conspirator does not require proof of conspiracy where gist of information was robbery charge), *reversed on other grounds by* Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988).

Jones v. State, 467 N.E.2d 1236 (Ind. Ct. App. 1984) (allegations that defendant moved property from the premises in theft case is surplusage; failure of proof is immaterial, defendant was not misled, and no double jeopardy problems are presented).

Reinhardt v. State, 881 N.E.2d 15 (Ind. Ct. App. 2008) (although State alleged a specific recipient of cocaine in its charging information, Ind. Code § 35-48-4-1 does not require that identity of recipient must be alleged, thus it is not an essential element of the crime; accordingly, the unnecessary allegation as to identity of ultimate recipient of cocaine is considered surplusage).

d. Use of "and/or" to Join Language Charging Two Distinct Offenses in One Count

Courts are inclined to treat alternative or disjunctive allegations as separate charges, not as creating a hybrid, non-statutory offense.

When an indictment of information conjunctively charges acts that are disjunctively proscribed in the criminal statute only one of the acts need be proven in order to support a conviction. Chubb v. State, 640 N.E2d 44, 47 n.2 (Ind. 1994).

Davis v. State, 476 N.E.2d 127 (Ind. Ct. App. 1985) (defendants charged with neglect by "endangerment and/or abandonment;" defendant was not hampered in understanding charge or preparing defense).

Shanholt v. State, 448 N.E.2d 308 (Ind. Ct. App. 1983) (charging information was valid and not duplicitous where statute (criminal confinement) embraces in disjunctive separate and distinct acts as crime but information charges in conjunctive).

PRACTICE POINTER: An allegation that the defendant performed act A **and** act B is a **conjunctive** allegation. At least in the legal community, an allegation that the defendant performed act C **or** act D is said to be a **disjunctive** allegation.

e. Misspelling/Grammatical Error

If the meaning is clear, mistakes in grammar, spelling, or punctuation will not invalidate an information. Bader v. State, 176 Ind. 268, 94 N.E. 1009 (1911).

Eguia v. State, 468 N.E.2d 559 (Ind. Ct. App. 1984) (where controlled substance "diazepam" was misspelled in a narcotics case, amendment was proper under Ind. Code § 35-34-1-5). Cf. Hudson v. State, 462 N.E.2d 1077 (Ind. Ct. App. 1984).

State ex rel. Tucker v. Elkhart Superior Court, 245 Ind. 683, 201 N.E.2d 40 (1964)

(amendment allowed to correct misspelling of name of property owner victim in burglary case).

Oller v. State, 469 N.E. 2d 1227 (Ind. Ct. App. 1984) (court allowed State to amend due to typing error of "State Road 55" rather than "State Road 53"), *reh'g denied*.

Pounds v. State, 443 N.E.2d 1193 (Ind. 1983) (State allowed to amend at close of evidence, to allege gun, rather than knife, was used in a forcible rape, because error was a "typo").

f. Misnomer

Amendments are allowed where a pleading misnames an object, person or place, or to substitute a name which is an equivalent.

Morris v. State, 273 Ind. 614, 406 N.E.2d 1187 (1980) (permitting amendment of location of prior offense charged in habitual offender information from "Jefferson, Missouri" to "Jefferson City, Missouri" was not error. The defect was immaterial, and the defendant was not prejudiced by the amendment), *superseded by statute on other grounds as recognized in* Havens v. State, 429 N.E.2d 618, 622 (Ind. 1981).

Radford v. State, 468 N.E.2d 219 (Ind. 1984) (no error in allowing State to substitute name for "confidential informant" on day of trial; defendant did not request continuance and had sought name through discovery; court found no prejudice).

Whether a name for an object is material to the charge being made and to defendant's effort to prepare his defense, will have a substantial effect on court's ruling on motion.

Gibbs v. State, 952 N.E.2d 214 (Ind. Ct. App. 2011) (amendments that would omit names of alleged victims of arson were substantive because the omission of names seriously compromised defendant's defense; because amendments were substantive, state should have offered them before trial, which begins with voir dire).

Flores v. State, 485 N.E.2d 890 (Ind. 1985) (amendment of description of stolen property taken in robbery case was substantive and was properly denied as untimely).

g. Date - Time Not of the Essence

Where time is not of the essence, State may prove any date prior to the indictment, within the statute of limitations. Moritz v. State, 465 N.E.2d 748 (Ind. Ct. App. 1984).

Adcock v. State, 933 N.E.2d 21 (Ind. Ct. App. 2010) (trial court did not err in allowing State to amend RSO Notice after opening arguments in RSO phase of trial to reflect defendant's prior conviction for child molesting was entered on May 16, 1986, not December 18, 1990, as original Notice stated), *trans. denied*.

Dellenbach v. State, 508 N.E.2d 1309 (Ind. Ct. App. 1987) (variance between 11/30 date on indictment for larceny offense, and 11/20 and 11/28 date proven was not fatal. Not misleading in preparation of the defense; no double jeopardy risk).

Hudson v. State, 462 N.E.2d 1077 (Ind. 1984) (State permitted to amend information during trial to reflect actual date of offense, in absence of showing that defendant deprived of any defense, or that evidence under the original information was

inapplicable).

Lacy v. State, 438 N.E.2d 968 (Ind. 1982) (no alibi defense was interposed, therefore amendment in date of offense from 8/7/80 to 8/7/78 was not material).

Cf. Kribs v. State, 917 N.E.2d 1249 (Ind. App. 2009) (given the trial court's finding that defendant was unaware that he had a firearm in his possession at the time he entered airport security and placed it on the x-ray conveyor belt, court of appeals held that the State failed to prove beyond a reasonable doubt that he knowingly or intentionally possessed firearm at the time of the events in question).

PRACTICE POINTER: Filing a notice of alibi defense makes the time of the offense "material."

h. Errors Not Affecting Preparation of Defense

(1) Mistake in Statutory Citation

Didio v. State, 471 N.E.2d 1117 (Ind. 1984) (no error for trial court to permit State to amend information caption to designate Ind. Code § 35-42-1-1(1), knowingly killing another human being, rather than Ind. Code § 35-42-1-1(2), felony murder).

(2) Mistake as to Amount of Controlled Substance

Henry v. State, 269 Ind. 1, 379 N.E.2d 132 (1978) (information amended, after jury was selected, to allege sale of "3.15 grams" of heroin rather than ".315 grams" of heroin allowed, because weight of drug was not element of offense and did not subject defendants to greater penalty).

(3) Ownership of Property

Harrison v. State, 507 N.E.2d 565 (Ind. 1987) (variance between proof and indictment, which mistakenly alleged mortgagee was the owner, was not fatal).

Belcher v. State, 453 N.E.2d 214 (Ind. 1983) (where defendant's defense that property he was accused of taking had been abandoned, amendment to allege ownership in an individual rather than a corporation not a substantive amendment).

(4) Clerical Error

Woodfork v. State, 594 N.E.2d 468 (Ind. Ct. App. 1992) (clerical error in information did not mislead defendant in preparation of his defense or likely place him in danger of double jeopardy; did not nullify defendant's conviction).

i. Principals and Accessories

The State is not required to explicitly allege that the defendant was an accessory. A conviction will stand even though the defendant was charged as a principal. Hoskins v. State, 441 N.E.2d 419 (Ind. 1982).

See Ind. Code § 35-41-2-4 (aiding, inducing, or causing an offense).

Fisher v. State, 468 N.E.2d 1365 (Ind. 1984) (Ind. Code § 35-41-2-4, providing that

an accessory to an offense commits that offense, authorizes the State to charge and convict an accessory as a principal; change in statute in 1977 did not imply that an accomplice may not be charged and convicted as a principal).

Rufer v. State, 264 Ind. 258, 342 N.E.2d 856 (1976) (in prosecution for being an accessory before the fact to the commission or attempt to commit a felony while armed, question whether the principal had been charged with the crime was immaterial, as it would be no evidence of defendant's guilt).

j. Signature of Grand Jury Foreperson

Youngblood v. State, 515 N.E.2d 522 (Ind. 1987) (amended indictment which lacked signature of jury foreperson was not error meriting reversal. Prosecutor had option to submit charges to grand jury. Prosecutor was authorized to file charges by information. Amended charges filed were properly endorsed by prosecuting attorney and did not require approval of grand jury. Fact that instrument was titled "amended indictment" did not change body and substance of it. Any shortcoming pleading might have had was waived by defendant since he did not object or raise any question until his motion to correct error).

V. AMENDMENTS

In Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007), *superseded by statute*, the Indiana Supreme Court found that many of its previous decisions and those of the Court of Appeals did not comply with Ind. Code § 35-34-1-5 (statute governing amendments) and held that the trial court erroneously permitted the State to amend an information seven days after the omnibus date. Thus, *Fajardo* put more teeth into the time-provisions of Ind. Code § 35-34-1-5. However, almost immediately thereafter, the legislature amended Ind. Code § 35-34-1-5 to allow the State much more latitude as to the timeliness of amendments. The statute provides as follows:

(a) The indictment or information may be amended in matters of substance and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:

(1) up to:

(A) thirty (30) days if the defendant is charged with a felony; or
(B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date; or

(2) **before the commencement of trial**;

If the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney or a deputy prosecuting attorney.

(Emphasis added).

With the statutory change, a defendant can still gain relief if he can show "prejudice" to his "substantial rights," but otherwise removes any time limitation upon an amendment of substance if the amendment is done before the commencement of trial.

To the extent *Fajardo* questioned previous decisions that declined to rigorously enforce the deadlines in Ind. Code § 35-34-1-5, the amended version of the statute revitalized the precedential value of those pre-*Fajardo* cases, especially in regard to late substantive amendments.

A. FAJARDO'S EFFECT ON CASES BEFORE STATUTORY CHANGE

1. RETROACTIVITY

The Seventh Circuit Court of Appeals has granted habeas corpus relief to Indiana defendants who sought and were denied post-conviction relief based on their attorneys' failure to object to the untimely amendments of their charging documents. See Jones v. Zatecky, 917 F.3d 578, 579-80 (7th Cir. 2019).

Absher v. State, 162 N.E.3d 1141 (Ind. Ct. App. 2021) (trial counsel was ineffective for failing to object to State's untimely motion to amend charging information three days before trial); Cf. Leatherwood v. State, 880 N.E.2d 315 (Ind. Ct. App. 2008) (*Fajardo* does not apply retroactively to cases on post-conviction relief).

Fields v. State, 888 N.E.2d 304 (Ind. Ct. App. 2008) (*Fajardo* applies where offense was committed prior to, but tried after, statutory fix; amendment of HSO charge to replace Class C misdemeanor OWI with Class A misdemeanor OWI as a predicate substance offense was of substance).

But see Hurst v. State, 890 N.E.2d 88 (Ind. Ct. App. 2008) (disagreeing with *Fields*, "though the legislature did not expressly provide for retroactive application of the amended statute, we are confident that this was the clear intent of such legislation."). See also Barnett v. State, 83 N.E.3d 93 (Ind. Ct. App. 2017).

2. EX POST FACTO

Gomez v. State, 907 N.E.2d 607 (Ind. Ct. App. 2009) (retroactive application of amendment to Ind. Code § 35-34-1-5 does not violate ex post facto because the amendment is procedural), *trans. denied*.

Ramon v. State, 888 N.E.2d 234 (Ind. Ct. App. 2008) (application of legislative response to *Fajardo* did not violate ex post facto; Robb, J., dissented).

Hurst v. State, 890 N.E.2d 88 (Ind. Ct. App. 2008) (strong and compelling reasons existed for retroactive application of legislative response to *Fajardo*).

But see Fields v. State, 888 N.E.2d 304 (Ind. Ct. App. 2008) (*Fajardo* applies where offense was committed before but tried after statutory fix; amendment of HSO charge to replace Class C misdemeanor OWI with Class A misdemeanor OWI as predicate substance offense was of substance).

B. CURRENT LAW - PRE-FAJARDO ANALYSIS PARTLY STILL IN EFFECT

Analysis prior to *Fajardo* looked at whether an amendment was one of substance or form. Although the statutory change following *Fajardo* has made it more difficult to challenge even a substantive amendment, the pre-*Fajardo* case law as to substance or form is still applicable as a late substantive amendment remains can be challenged if prejudice is shown.

In regard to amendment of information, if defense under original information would be equally

available after amendment is made and accused's evidence would be equally applicable to information in one form as in another, amendment is one of form and not of substance. Amendment is of substance only if it is essential to making of valid charge of crime. Sharp v. State, 534 N.E.2d 708 (Ind. 1989), *cert den.*

State v. O'Grady, 876 N.E.2d 763 (Ind. Ct. App. 2007) (amendment to inherently lesser-included offense was not an amendment of substance and thus was proper after defendant moved for directed verdict at close of State's case).

1. CANNOT AMEND THEORY OF CASE OR IDENTITY OF OFFENSE CHARGED

Information may not be amended to change theory of the case or identity of the offense charged. Sharp v. State, 534 N.E.2d 708 (Ind. 1989); Rainey v. State, 557 N.E.2d 1071 (Ind. Ct. App. 1990), *overruled on other grounds by* Seay v. State, 698 N.E.2d 732, 375 (Ind. 1998).

Jackson v. State, 84 N.E.3d 706 (Ind. Ct. App. 2017) (trial court committed fundamental error when it permitted the State to amend the criminal gang enhancement allegation to charge defendant with being "a known member" of a criminal gang because, in its operation and effect, the amended charge poisoned the well as it skewed the evidence and argument and caused defendant to be tried for and defend against an offense that did not exist), *sum. aff'd by* 105 N.E.3d 1081 (Ind. 2018).

2. CURE IMMATERIAL DEFECTS ANY TIME

Immaterial defects may be amended at any time, on motion of the prosecutor, before, during or after trial. Ind. Code § 35-34-1-5(c). See also Ind. Code § 35-34-1-5(a)(9) (amendment of immaterial defects which does not prejudice substantial rights of defendant).

Lacy v. State, 438 N.E.2d 968 (Ind. 1982) (indictment/information may be amended if the defect is not material and the amendment "does not prejudice the substantial rights" of defendant).

3. MATERIAL DEFECTS

a. May Amend Up to 30 Days Before Omnibus

Up to 30 days before the omnibus date [15 days before the omnibus date for only misdemeanors], the indictment or information may be amended in substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time. Ind. Code § 35-34-1-5(b) (1) and (b) (2).

Litel v. State, 527 N.E.2d 1114 (Ind. 1988) (State's amendment of information on morning of trial was of no consequence because prosecutor filed amendment 30 days before omnibus date, and State may amend 30 days before omnibus date even on matters of substance).

Utterback v. State, 310 N.E.2d 552 (Ind. 1974) (preferred practice is for State to file amended affidavit as early as possible).

b. May Amend within 30 Days of Omnibus - If Defendant Not Prejudiced

"Generally, a charging information may be amended at any time before, during or after trial as long as the amendment does not prejudice the substantial rights of the defendant." Parks v. State, 752 N.E.2d 63, 65 (Ind. Ct. App. 2001); see also Rita v. State, 663 N.E.2d 1201, 1205 (Ind. Ct. App. 1996). The trial court may also allow an amendment of substantive character provided the defendant was given reasonable notice and the opportunity to be heard. Davis v. State, 714 N.E.2d 717, 721 (Ind. Ct. App. 1999). 'The requirement of an 'opportunity to be heard' is satisfied when the defendant is given adequate time to object and request a hearing after proper notice.' Id. (quoting Davis v. State, 580 N.E.2d 326, 328 (Ind. Ct. App.1991)). To preserve this issue for appeal, the defendant must object to the request to amend, and if the objection is *overruled*, must request a continuance to prepare a new defense strategy. Haak v. State, 695 N.E.2d 944, 953 n.5 (Ind. 1998).

Under Ind. Code § 35-34-1-5(b) and (d) trial court may permit substantive amendment within 30 days of omnibus date provided:

(1) defendant is given notice and opportunity to be heard,
(2) defendant's substantial rights are not prejudiced, and
(3) trial court affords defendant adequate opportunity to prepare defense as to new count.

See State v. Gullion, 546 N.E.2d 121 (Ind. Ct. App. 1989).

Wright v. State, 593 N.E.2d 1192 (Ind. 1992), *cert. den.* (allowing State to amend count charging defendant with conspiracy to commit murder later than 30 days prior to omnibus date not error; amendment did not change identity of offense or defenses available to defendant).

Davis v. State, 580 N.E.2d 326 (Ind. Ct. App. 1991) (signed certificate of service on amended information, certifying that deputy prosecutor sent copy of document to each party or attorney of record on date amended information was filed, established that defendant received adequate notice of amended information).

Erkins v. State, 988 N.E.2d 299 (Ind. Ct. App. 2013) (amendment to information on second day of trial to change identity of coconspirator who conducted surveillance was one of form that did not prejudice defendant's substantial rights; identity of coconspirator who performed the overt act was not essential to the charge).

Wheeler v. State, 95 N.E.3d 149 (Ind. Ct. App. 2018) (trial court did not abuse its discretion by letting the State, on the last day of trial, amend its charge that defendant was a habitual vehicle substance offender by removing one of the three predicate convictions that State had initially alleged; defendant suffered no prejudice because the State was required to prove only two predicate convictions).

Sides v. State, 693 N.E.2d 1310 (Ind. 1998) (ultimate question is whether defendant had reasonable opportunity to prepare for & defend against charges; because defendant had reasonable opportunity to prepare & defend, he failed to show prejudice to substantial rights from amendment of information day before trial).

c. May Amend any Time after Omnibus Date if no Prejudice

Howard v. State, 122 N.E.3d 1007 (Ind. Ct. App. 2019) (abuse of discretion to allow State's belated amendment to charging information more than 19 months after filing the original counts, 16 months after the omnibus date, and just two days before commencement of a bench trial, without giving defense reasonable time to develop a defense against new charges; amended counts of neglect of dependent were not premised on same underlying facts as original counts, which related to defendant's drug possession and dealing rather than gun possession).

Hobbs v. State, 160 N.E.3d 543 (Ind. Ct. App. 2020) (trial court erred in allowing State to amend charging information for child molest two weeks before trial because amendments did not merely clarify details of existing charges but added entirely new ones; amendments were sought nearly three years after omnibus date and just 20 days before trial with no indication as to why State waited so long to file new charges).

Barnett v. State, 83 N.E.3d 93 (Ind. Ct. App. 2017) (adding two new charges five weeks after omnibus date did not prejudice defendant's rights; although defendant was charged when statute and Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007) barred such amendments, the post-Fajardo amendment to the statute applied retroactively).

Shaw v. State, 82 N.E.3d 886 (Ind. Ct. App. 2017) (trial court did not abuse discretion in letting State amend charge from aggravated battery to murder 17 months after omnibus date; defendant had adequate notice, an opportunity to challenge amendment, and adequate time to prepare for trial.).

(1) Opportunity to be Heard/Hearing

Ind. Code § 35-34-1-5(d) provides:

> Before amendment of any indictment or information other than amendment as provided in subsection (b), the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

Defendant's "opportunity to be heard" with respect to amendment to information made within 30 days before omnibus date is not equivalent to hearing; rather, requirement is satisfied when defendant is given adequate time to object and request hearing after proper notice.

> Davis v. State, 580 N.E.2d 326 (Ind. Ct. App. 1991) (defendant had notice and nearly 5 months to object; held, opportunity to be heard satisfied; defendant's failure to make timely request for hearing, continuance or dismissal waived right).
>
> Wilson v. State, 931 N.E.2d 914 (Ind. Ct. App. 2010) (trial court did not err in letting State amend charging information from auto theft to receiving stolen auto parts on eve of trial; even if defendant's substantial rights were prejudiced, under amended version of IC 35-41-1-5, failure to request continuance after trial court allows pre-trial substantive amendment results in waiver), *trans. denied*.

Jones v. State, 863 N.E.2d 333 (Ind. Ct. App. 2007) (change from possession of cocaine to possession of heroin week prior to trial was one of form and did not prejudice defendant's substantial rights).

Hudson v. State, 462 N.E.2d 1077 (Ind. Ct. App. 1984) (error to allow State to amend information substituting word "phenmetrazine" in the offense in place of "Preludin," without prior notice to defendant and opportunity to be heard; not reversible error because the amendment was change in form only, not substance, and defendant failed to show prejudice or ask for continuance).

Nunley v. State, 995 N.E.2d 718 (Ind. Ct. App. 2013) (amendment offered one day after jury empaneled and that changed habitual offender predicate offenses was impermissible under Ind. Code § 35-34-1-5 because amendment: (1) was not to correct an immaterial defect, (2) was offered after trial had begun and prejudiced defendant's substantial rights, and (3) did not qualify under section of statute allowing amendments after trial begins because it was not merely an amendment in form), *clarified on reh'g*.

(2) Continuance to Prepare

Granting a continuance pursuant to Ind. Code § 35-34-1-5(d) is not mandatory unless it is necessary to enable counsel to adequately prepare a defense. The movant must demonstrate that a continuance is necessary. Stanger v. State, 545 N.E.2d 1105 (Ind. Ct. App. 1989), *overruled on other grounds,* Smith v. State, 689 N.E.2d 1238, 1247 n.11 (Ind. 1997).

Adequacy of preparation time must be determined on a case-by-case basis by considering the totality of circumstances, including the complexity of the issues, necessity for pretrial motions, necessity to interview witnesses, and whether the defendant is available to assist in preparation of a defense. Phillips v. State, 179 Ind. App. 517, 386 N.E.2d 704, 706 (1979).

Riley v. State, 506 N.E.2d 476 (Ind. 1987) (failure of defendant to request continuance under this section to allow "adequate opportunity to prepare his defense" precluded appellate review of his claim of permitting prejudicial pretrial amendment of information).

Absher v. State, 866 N.E.2d 350 (Ind. Ct. App. 2007) (although trial court erred by allowing addition of two charges after omnibus date, defendant failed to object and also failed to prove error was fundamental).

Todd v. State, 566 N.E.2d 67 (Ind. Ct. App. 1991) (defendant's substantial rights were not prejudiced by amendment to charges morning of trial, where defense counsel declined continuance, but court continued trial on its own motion).

Fundamental error, which would relieve an appellant from the burden of showing prejudice on appeal, occurs only when it has been established that adequate time was not afforded. Davis v. State, 487 N.E.2d 817, 820 (Ind. 1986). See Robinett v. State, 563 N.E.2d 97, 99 (Ind. 1990). See also Absher v. State, 866 N.E.2d 350 (Ind. Ct. App. 2007).

4. PRESERVE ERROR

Defendant's prompt and vigorous objection to amendment may preserve error.

Flores v. State, 485 N.E.2d 890 (Ind. 1985) (information amended day of trial over defendant objection; defendant preserved issue by moving for continuance and mistrial).

Absher v. State, 866 N.E.2d 350 (Ind. Ct. App. 2007) (although trial court erred by allowing addition of two charges after omnibus date, defendant failed to object and also failed to prove error was fundamental).

5. AMENDMENT FILED IN COURT AFTER IT HAD GRANTED CHANGE OF VENUE

Woods v. State, 547 N.E.2d 772, 784 (Ind. 1989) (amended criminal charges, filed in court after the court had granted a change of venue from the county, were not a nullity, where the filing occurred during the period of time granted by the court for opposing counsel to agree upon a new county and before preparation of the transcript for dispatch and did not entail any exercise of jurisdiction by the court), *op. on reh'g* 557 N.E.2d 1325, *superseded on other grounds by* Richardson v. State, 717 N.E.2d 32, 49 n.36 (Ind. 1999).

6. AMENDMENT FILED AFTER DIRECTED VERDICT

Baca v. State, 122 N.E.3d 1019 (Ind. Ct. App. 2019) (trial court erred in permitting the State to amend one of the counts of child molestation against defendant after granting his motion for a directed verdict because, as a matter of law, the trial court's grant acted as an acquittal which barred retrial under his federal and state double jeopardy rights).

7. INFORMATION FILED AFTER REMAND

Appellate reversal and remand nullify original trial and place parties in position they would have occupied if no proceedings on the charges had ever occurred. Layton v. State, 251 Ind. 205, 240 N.E.2d 489 (1968).

Gillie v. State, 512 N.E.2d 145 (Ind. 1987) (informations recharging defendant with robbery and confinement, after reversal of those convictions on appeal and remand, were not "amendments" to original informations, but were initial charges of a new proceeding and were not affected by Ind. Code § 35-34-1-5(b) (1) limiting amendments to information).

8. UNAMENDED CHARGES REMAIN "LIVE" WHEN INFORMATION AMENDED A SECOND TIME

Where the State amends some but not all charges in an information without any reference to unamended charges previously filed, the amended information does not act as a dismissal of the previously charged but unamended counts.

Gibson v. State, 111 N.E.3d 247 (Ind. Ct. App. 2018) (Six months after the State charged defendant with three counts of robbery, it amended information to add fourth count of conspiracy to commit robbery; a month later, State moved to amend three robbery charges to allege accomplice liability but did not dismiss the conspiracy charge. The amended information only superseded the previous information as to amended counts of

robbery. Court found nothing prohibits what State did here. Defendant was clearly notified of conspiracy to commit robbery charge and prepared and executed defense to that charge at trial. Entry of judgment of conviction on that charge was not error, let alone fundamental error).

C. SENTENCE ENHANCEMENTS: HABITUAL OFFENDER, LIFE WITHOUT PAROLE, DEATH SENTENCE, USE OF FIREARM

1. HABITUAL OFFENDER - PROCEDURE

Habitual pleadings do not allege a separate offense. State v. Hicks, 453 N.E.2d 1014 (Ind. 1983), *appeal after remand*, 510 N.E.2d 676.

Allegations of habitual criminal must contain all of the procedural matters and safeguards of the original and underlying charges in that they are brought by sworn affidavit contained in an information and endorsed by the prosecuting attorney, setting out the facts sufficient and adequate for the defendant to defend himself and giving the defendant an opportunity to plead to such allegations. Lawrence v. State, 259 Ind. 306, 286 N.E.2d 830 (1972).

Clark v. State, 561 N.E.2d 759 (Ind. 1990) (reversal of habitual offender conviction was not required because count of amended information was not signed by prosecuting attorney, where motion for leave to amend count was signed by deputy prosecuting attorney, thus satisfying purpose of statutory requirement for such signature).

Harmon v. State, 518 N.E.2d 797 (Ind. 1988) (variance between dates of prior convictions in information and those proven by State's exhibits not material and fatal variance and did not require reversal of conviction on habitual offender count, as there was no showing or claim that defendant was misled in any way by variance).

a. Alleged on Separate Page

Habitual offender count must be alleged on a page separate from the charging instrument. Ind. Code § 35-50-2-8(a). See also Murphy v. State, 499 N.E.2d 1077 (Ind. 1986).

b. Specificity as to Prior Offense(s)

Prior offenses must be identified in a habitual pleading.

Miller v. State, 563 N.E.2d 578 (Ind. 1990) (filing of habitual offender count on trial date did not prejudice defendant; trial court took judicial notice of record, and defendant's prior testimony at bond reduction hearing acknowledged prior convictions alleged by State, and thus defendant could not have been unfamiliar with prior convictions at habitual offender phase).

Anderson v. State, 439 N.E.2d 558 (Ind. 1982) (error to deny defendant's motion to dismiss habitual offender information, which was not sworn to, and merely alleged that defendant had accumulated two or more prior unrelated felony convictions, without specifying the felonies. Amended pleading, which specified four prior felonies "among others," was also defective. Charging document did not advise defendant of offense charged and did not enable him to prepare his defense).

Roe v. State, 598 N.E.2d 586 (Ind. Ct. App. 1992), *reh'g den.* (habitual offender

information and facts alleged at guilty plea hearing were not sufficient to support defendant's guilty plea to being a habitual offender; state did not allege, and there was no evidence, that defendant's prior unrelated felonies and present underlying felony occurred in the sequence mandated by statute; guilty plea court erred when it accepted defendant's plea and enhanced his sentence for habitual offender adjudication).

Collier v. State, 572 N.E.2d 1299 (Ind. Ct. App. 1991) (for habitual offender purposes, State may plead and prove more than two prior unrelated felony convictions, and additional convictions are merely harmless surplusage).

c. Amendments to Add Habitual Offender Counts

State must seek leave of court to amend information to add habitual offender count. Ind. Code § 35-34-1-5(e). State may add habitual criminal allegation to the original information if it does not change theory of the prosecution, or identity of the crime charged, or otherwise affect the substantial rights of a defendant. Murphy v. State, 499 N.E.2d 1077, 1083 (Ind. 1986).

Cornett v. State, 536 N.E.2d 501 (Ind. 1989) (correction, by amendment, of error as to location of prior conviction in information alleging habitual offender status not prejudicial to defendant in that amendment did not change theory of prosecution or character of offense).

Rainey v. State, 557 N.E.2d 1071 (Ind. Ct. App. 1990) (defendant who chose to proceed with trial rather than seek a continuance after information was amended could not later complain that he did not have time to prepare), *overruled on other grounds by* Seay v. State, 698 N.E.2d 732, 375 (Ind. 1998).

(1) File Not Later than 30 Days before Trial

Ind. Code § 35-34-1-5(e) provides:

> An amendment of an indictment or information to include a habitual offender charge under Ind. Code § 35-50-2-8 must be made at least thirty (30) days before commencement of trial. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial if the amendment does not prejudice the substantial rights of the defendant. If the court permits the filing of a habitual offender charge less than thirty (30) days before the commencement of trial, the court shall grant a continuance at the request of the:
>
> (1) state, for good cause shown; or
> (2) defendant, for any reason.

White v. State, 963 N.E.2d 511 (Ind. 2012) (suggesting that where the State fails to present in motion or hearing any facts justifying a finding of good cause, it is an abuse of discretion to allow late HO amendment; however, defendant failed to preserve issue for appeal by not objecting and requesting a continuance).

Attebury v. State, 703 N.E.2d 175 (Ind. Ct. App. 1998) ("good cause" is not defined in statute, but it must require something more than lack of prejudice),

disapproved on other grounds by Williams v. State, 735 N.E.2d 785 (Ind. 2000).

Williams v. State, 735 N.E.2d 785 (Ind. 2000) (fact that State and defendant were engaging in plea negotiations up until date HO enhancement was filed constituted good cause to amend). See also Johnican v. State, 804 N.E.2d 211 (Ind. Ct. App. 2004); Land v. State, 802 N.E.2d 45 (Ind. Ct. App. 2004); and Falls v. State, 797 N.E.2d 316 (Ind. Ct. App. 2003).

Campbell v. State, 161 N.E.3d 371 (Ind. Ct. App. 2020) (trial court abused its discretion in allowing belated filing of habitual offender enhancement one business day before trial without requiring or making any finding of good cause for tardiness; State's tendering of same plea offer several times and asking defendant if he wanted to make counteroffer did not establish bona fide ongoing plea negotiations).

Hooper v. State, 779 N.E.2d 596 (Ind. Ct. App. 2002) (trial court erred by allowing late filing of HO enhancement after omnibus date; State failed to show good cause).

State v. McFarland, 134 N.E.3d 1027 (Ind. Ct. App. 2019) (filing of amended habitual offender charge three days and two business hours before trial would have prejudiced defendant in that it did not provide adequate notice and deprived him of defense that one of the two convictions was not a valid predicate offense; further, allowing amendment would have left defense counsel "scrambling to fashion a new defense within a matter of hours," which would have implicated his Sixth Amendment right to effective assistance of counsel).

Cash v. State, 557 N.E.2d 1023 (Ind. 1990) (State is not foreclosed from seeking this enhancement merely because the allegation was not made at the same time that the original information or indictment was filed), *reh'g denied*.

(2) Request for continuance if trial date set

If a trial court permits a belated HO filing when a trial date has already been set, the defendant must move for a continuance in order to preserve the issue for appeal, even if the defendant is seeking a speedy trial. The defendant can seek more time to prepare for the HO enhancement and still proceed on schedule for the speedy trial of the main charge. Williams v. State, 735 N.E.2d 785, 789 (Ind. 2000) and Blanchard v. State, 802 N.E.2d 14 (Ind. Ct. App. 2004). If no trial date has been set when the HO charge is filed, a motion for continuance is not needed. Falls v. State, 797 N.E.2d 316 (Ind. Ct. App. 2003).

Trial counsel did not perform deficiently in failing to object to late addition of habitual offender charge. Singleton v. State, 889 N.E.2d 35 (Ind. Ct. App. 2008).

(3) Notice and Opportunity to be Heard

Court shall give all parties adequate notice and opportunity to be heard. Upon permitting amendment court shall, upon motion by defendant, order continuance so defendant can adequately prepare his defense. See Ind. Code § 35-34-1-5(d).

Amendment of information to add habitual offender count after plea, but before sentencing, does not violate substantial rights of the accused, provided accused has

notice prior to entry of plea of guilty that State will seek enhanced sentence on habitual offender count.

Nunley v. State, 995 N.E.2d 718 (Ind. Ct. App. 2013) (amendment one day after jury empaneled and that changed HO predicate offenses was impermissible under Ind. Code § 35-34-1-5 because amendment: (1) was not to correct immaterial defect; (2) was offered after trial had begun and prejudiced defendant's substantial rights; and (3) did not qualify under section of statute allowing amendments after trial begins because it was not merely amendment in form), *clarified on reh'g*, *trans. denied*.

Haymaker v. State, 528 N.E.2d 83 (Ind. 1988) (defendant's rights were not prejudiced when State was allowed to amend habitual offender information to reflect modification of prior burglary conviction to theft conviction; cause number of the prior was unchanged).

Dixon v. State, 524 N.E.2d 2 (Ind. 1988) (habitual offender count does not allege separate crime or change theory of case and is therefore permissible amendment to information after arraignment and plea on principal offense, so long as defendant has adequate time to prepare defense).

Hegg v. State, 514 N.E.2d 1061 (Ind. 1987) (no error in allowing State to amend information during trial to add habitual offender count, where full hearing was conducted at which defendant received his opportunity to be heard; a motion to amend was filed nearly a month before trial, and the defendant acknowledged that if amendment was granted no continuance would be needed).

Baker v. State, 928 N.E.2d 890 (Ind. Ct. App. 2010) (in re-trial, deadline for amendments was not before trial that resulted in mistrial but the re-trial, which included amended charges; key factor in deciding whether defendant's substantial rights were violated is whether defendant was given reasonable time to prepare and defend against amended charges; because second trial began 12 months after trial court allowed State to amend charges, setting deadlines in second trial did not undermine policy of ensuring amendments did not prejudice defendant's ability to prepared for trial), *sum. aff'd by* 948 N.E.2d 1169 (Ind.).

Cf. Black v. State, 79 N.E.3d 965 (Ind. Ct. App. 2017) (Court rejected defendant's argument that trial court's approval of amendments after mistrial was fundamental error, even though during second trial defendant was tried on different and more severe charges than charges in original trial).

(4) Filing Amended Habitual Count Alleging Prior Unrelated Felony Conviction Not Alleged in Original Charge

Denton v. State, 496 N.E.2d 576 (Ind. 1986) (State's oral motion to file amended habitual offender count was properly granted. Amended count alleged four prior unrelated felony convictions, one of which was not alleged in original count; amended affidavit in no way changed either theory of charge as originally stated or identity of "offense" charged, defendant not prejudiced by amendment).

2. DEATH SENTENCE; LIFE IMPRISONMENT WITHOUT PAROLE

Ind. Code § 35-50-2-9(a) provides:

> The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by *alleging, on a page separate from the rest of the charging instrument,* the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a pretrial hearing under Ind. Code § 35-36-9 that the defendant is an individual with an intellectual disability. (Emphasis added).

Woods v. State, 547 N.E.2d 772, 784 (Ind. 1989) (written death penalty request does not necessarily have to be re-filed each time underlying murder charge amended), *superseded on other grounds by* Richardson v. State, 717 N.E.2d 32, 49 n.36.

Games v. State, 535 N.E.2d 530 (Ind. 1989) (prescribed filing sequence under Ind. Code § 35-34-1-5, governing amendment of charges, does not apply to filing death penalty information, but belated death penalty request is improper if it prejudices defendant's substantive rights; continuance here prevented harm).

3. USE OF FIREARM, POSSESSING A FIREARM WHILE DEALING IN A CONTROLLED SUBSTANCE

Pre-July 1, 2005

Before July 1, 2005, Ind. Code § 35-50-2-11 (five-year additional sentence for use of firearm in certain crimes), Ind. Code § 35-50-2-13 (five, ten or twenty-year additional sentence for use or possession of a firearm while committing certain crimes) both provided for sentence enhancements based on a judicial fact-finding at sentencing. Before these statutes were amended in 2005, they were probably unconstitutional under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), which held a defendant has the right, under the 6th Amendment to the U.S. Constitution, to a jury trial on all facts used to increase the maximum sentence for an offense.

The Indiana Supreme Court declined to address the Apprendi issue in Crawford v. State, 755 N.E.2d 565 (Ind. 2001), vacating the enhancement on other grounds, holding that attempted murder is not an offense to which the Ind. Code § 35-50-2-11 enhancement applies.

> But see Parker v. State, 754 N.E.2d 614 (Ind. Ct. App. 2001) (five-year enhancement for the use of a firearm under Ind. Code § 35-50-2-11 did not violate Apprendi in an A felony armed robbery case, where the jury had to find the use of a firearm in order to convict, and the total sentence including the enhancement was still less than the maximum for the A felony).

Effective July 1, 2005

As amended, both statutes allow the same enhancement, but both statutes were changed to require the State to prove, to the jury, or, to the trial court, in the event of a bench trial, **beyond a reasonable doubt** the requisite facts for the enhancement. See Ind. Code § 35-

50-2-11(e) and Ind. Code § 35-50-2-13(c).

4. REPEAT SEXUAL OFFENDER ENHANCEMENT (SEE IND. CODE § 35-50-2-14)

5. CRIMINAL GANG ENHANCEMENT (SEE IND. CODE § 35-50-2-15)

6. ENHANCEMENT IN FELONY CASES FOR CAUSING TERMINATION OF PREGNANCY (SEE IND. CODE § 35-50-2-16)

D. PROSECUTORIAL VINDICTIVENESS - INCREASES IN OFFENSES CHARGED

1. AFTER EXERCISING RIGHT OF APPEAL

There is a presumption of vindictiveness where the State, following a successful appeal or motion for mistrial by a defendant, files more numerous or more severe charges for the same basic criminal conduct. Murphy v. State, 453 N.E.2d 219 (Ind. 1983); Cherry v. State, 275 Ind. 14, 414 N.E.2d 301 (1981), *cert. den.* 453 U.S. 946. Unless the record indicates facts, unknown at time of first sentencing, to justify an increased sentence, it is a denial of due process on remand after appeal to impose sentence greater than that which should have been imposed originally. Craig v. State, 571 N.E.2d 1326 (Ind. Ct. App. 1991).

Thigpen v. Roberts, 468 U.S. 27, 104 S. Ct. 2916 (1984) (prosecution for manslaughter after appeal of conviction of misdemeanor traffic offenses raised a presumption of vindictiveness which State did not rebut, even though there were different prosecutors).

Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098 (1974) (felony charge after appeal to de novo trial from misdemeanor charge violated due process by penalizing right of appeal), *overruled on other grounds by* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072 (1969) (sentence on retrial must give credit for time served on previous sentence. Does not bar greater sentence on retrial but due process prohibits threat of increased sentence to discourage appeals and valid reasons for increased sentence based on facts occurring since first sentence must affirmatively appear and factual basis be made part of record).

Owens v. State, 822 N.E.2d 1075 (Ind. Ct. App. 2005) (trial court erred in allowing State to file additional charge after successful appeal).

Cf.

Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989) (presumption of vindictiveness established in North Carolina v. Pearce, 395 U.S. 711 (1969), when greater sentence is imposed after retrial following appeal, does not apply to sentence imposed after appeal of guilty plea, overruling Simpson v. Rice, 395 U.S. 711 (1969)).

Texas v. McCullough, 475 U.S. 134, 106 S. Ct. 976 (1986) (imposition of sentence on retrial ordered by judge, greater than had been imposed by jury at first trial, does not raise presumption of vindictiveness under North Carolina v. Pearce, 395 U.S. 711 (1969), and does not violate due process. Here trial judge ordered new trial, not appellate court. Even if vindictiveness were presumed, reasons given by judge for increased sentence would overcome presumption even though not based on events or conduct after first trial).

Wasman v. United States, 468 U.S. 559, 104 S. Ct. 3217 (1984) (increased sentence after

appeal and reconviction supported by reasons appearing in record thereby rebutting presumption of vindictiveness).

United States v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485 (1982) (presumption of prosecutorial vindictiveness not warranted by decision to charge misdemeanor defendant with felony after demand for jury trial).

Schiro v. State, 888 N.E.2d 828 (Ind. Ct. App. 2008) (no prosecutorial vindictiveness where newly filed charges stemmed from unrelated conduct after successful appeal of death sentence).

Smith v. State, 695 N.E.2d 909 (Ind. 1998) (unsupervised probation being changed to supervised probation on resentencing was justified increase due to behavior in jail awaiting resentencing).

2. EXERCISING PRE-TRIAL RIGHTS

Prosecutorial misconduct is not reversible error unless, considering all circumstances, misconduct places defendant in position of "grave peril" or evinces deliberate attempt to improperly prejudice defendant. Maldonado v. State, 265 Ind. 492, 355 N.E.2d 843 (1976), *overruled on other grounds by* Thompson v. State, 690 N.E.2d 224, 234 n.9 (Ind. 1997)).

Allowing a prosecutor to dismiss and refile as a tactic to circumvent a proper evidentiary ruling, and to punish the defendant for exercising his procedural rights by piling on additional charges, was an abuse of discretion. Johnson v. State, 740 N.E.2d 118 (Ind. 2001) (after trial court entered pretrial order excluding State's evidence of other crimes, wrongs or acts under Rule 404(b), State dismissed and refiled, adding ten additional charges).

Coates v. State, 534 N.E.2d 1087 (Ind. 1989) (defendant failed to establish any causal relation between his exercising of pretrial rights and prosecutor's decision, three weeks before trial, to add additional charge; defendant contended prosecutor intended to penalize him for exercising bail rights and filing motions for change of judge and suppression of evidence; additional charge filed by prosecutor who took office three months after defendant posted bail, and prosecutor's news release on defendant's arrest on additional charge contained no evidence of desire to penalize defendant).

Collins v. State, 509 N.E.2d 827 (Ind. 1987) (defendant failed to establish prosecutorial misconduct requiring reversal based on prosecutor's attempt to amend charges or file additional charges six days before trial).

Reynolds v. State, 625 N.E.2d 1319 (Ind. Ct. App. 1993) (prosecutor did not act vindictively by charging defendant with class C felony of forgery after presenting defendant with alternative of pleading guilty to class D theft charges or facing trial on forgery charge while defendant elected to proceed to trial).

Kenney v. State, 549 N.E.2d 1074 (Ind. Ct. App. 1990) (no prosecutorial vindictiveness when State amended information to add count for dealing in cocaine to pending count of possession of controlled substance, after defense motion to suppress; increased charge was result of defense counsel inadvertently alerting prosecution to previously unnoted police report which allegedly detailed defendant's sale of cocaine to undercover officer, as this negated evidentiary problems often associated with entrapment defense).

Johnson v. State, 959 N.E.2d 334 (Ind. Ct. App. 2011) (prosecutorial vindictiveness claim rested only on circumstantial inferences, not direct evidence; thus, defendant failed

to show State added class A felony neglect of dependent charge after trial court rejected plea agreement for class B felony neglect of dependent to punish defendant for his successful motion to dismiss the first indictment).

3. AFTER MISTRIAL

"[U]nless there is new evidence or information discovered to warrant additional charges, the potential for prosecutorial vindictiveness is too great for courts to allow the State to bring additional charges against a defendant who successfully moves for a mistrial." Warner v. State, 773 N.E.2d 239, 243 (Ind. 2002).

See also Blackledge v. Perry, 417 U.S. 21, 28, 94 S. Ct. 2098 (1974) (a defendant is entitled to pursue his statutory right to a trial de novo without fear that the State will retaliate by substituting a more serious charge for the original one), *overruled on other grounds by* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Sisson v. State, 985 N.E.2d 1 (Ind. Ct. App. 2012) (no presumption of vindictiveness where prosecutor re-filed previously dismissed SVF and habitual charges after mistrial due to hung jury).