# A. PLEADINGS

## A.1. Rules of court concerning pleadings

### A.1.c. State - Trial

**TITLE:** Funk v. State
**INDEX NO.:** A.1.c.
**CITE:** (11-18-81), Ind., 427 N.E.2d 1081
**SUBJECT:** Rules of Court concerning pleadings -Waiver of noncompliance issue
**HOLDING:** D's failure to object to State's noncompliance with rule then in effect requiring copies of all pleadings & motions to be served on adversary party's counsel constituted waiver of subsequent objection by D to introduction by State of photos of property returned to burglary victim on latter's motion. Therefore, this was not basis for establishing error on part of Tr. Ct. in denying motion of D to produce property or dismiss. Held, judgment affirmed; Prentice, J., concurring in result; DeBruler, J., concurring in part & dissenting in part.

**TITLE:** Wagner v. State
**INDEX NO.:** A.1.c.
**CITE:** (2/14/85), Ind., 474 N.E.2d 476
**SUBJECT:** Pleadings - failure to serve
**HOLDING:** Tr. Ct. did not err in denying D's motions to strike certain pleadings (motions for discovery & in limine) for state's failure to serve his counsel with copies. CR 18 requires that a copy of every pleading/motion be served upon each attorney for each adverse party. Party complaining of failure to comply with rule must call matter to Ct.'s attention at first opportunity or compliance is waived. Jurdzy v. Liptak 180 N.E.2d 530; see also Funk 427 N.E.2d 1081. Here, on 6/16/80, 9/11/80 & 8/5/81, state filed motions in question. On 8/14/81 & 9/11/81, D moved to strike for failure to serve. Ct.

**NOTES:** upon D's motion to strike, state mailed copies of earlier motions to defense. D fails to show how he was harmed by denial of motion to strike. Held, no error.

# A. PLEADINGS

## A.2. Grand jury (Ind. Code 35-34-2)

**TITLE:** Music v. State
**INDEX NO.:** A.2.
**CITE:** (3/12/86), Ind., 489 N.E.2d 949
**SUBJECT:** Grand jury charge not required
**HOLDING:** Because issue concerning charge was known and available to D at trial and in original appeal, failure to raise it until PCR petition waives issue. Nonetheless, Ct. notes U.S. S. Ct. has held there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. Beck v. WA, (1962), 369 U.S. 541, 545, 82 S. Ct. 955, 957, 8 L.Ed.2d 98, 104; Hurtado v. CA, (1884), 110 U.S. 516, 538, 4 S. Ct. 111, 122, 28 L.Ed. 232, 239; State v. Swafford, 237 N.E.2d 580, 583-84. Held, denial of PCR affirmed. DeBruler CONCURS IN RESULT without opinion.

**TITLE:** Rehberg v. Paulk
**INDEX NO.:** A.2.
**CITE:** (04-02-12), S. Ct., 132 S. Ct. 1497
**SUBJECT:** Grand jury witness entitled to absolute immunity to Section 1983 lawsuits
**HOLDING:** A witness testifying before a grand jury is entitled to the same absolute immunity from a lawsuit under 42 U.S.C. § 1983 as a witness who testifies at trial.

Paulk testified at three separate grand jury proceedings with each leading to a separate indictment against Rehberg. Each indictment was dismissed, and Rehberg later sued Paulk under 42 U.S.C § 1983, claiming Paulk lied to the grand jury. The District Court denied Paulk's motion to dismiss on immunity grounds, but the Eleventh Circuit reversed, ruling that Paulk had absolute immunity from a § 1983 claim based on his grand jury testimony.

Common law guides the Court to determine the scope of immunities available against 1983 lawsuits. See Kalina v. Fletcher, 522 U.S. 118, 123 (1997). Using a "functional approach," the Court identifies those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed with independence and without fear of consequences." Pierson v. Ray, 386 U.S. 547, 554 (1967).

One such function is the testimony of a witness at trial. Thus, such witnesses have absolute immunity from any 1983 claim. Briscoe v. LaHue, 460 U.S. 325, 332-333 (1983). When a witness is sued because of his testimony, "the claims of the individual must yield to the dictates of public policy." Id. (*quoting* Calkins v. Sumner, 13 Wis. 193, 197 (1860)). Without absolute immunity for witnesses, truth-seeking at trial would be impaired. Witnesses might be reluctant to come forward to testify, and even if a witness took the stand, the witness might be inclined to shade his testimony in favor of the potential plaintiff "for fear of subsequent liability." Briscoe, 460 U. S., at 333.

These factors apply equally to grand jury witnesses. A witness's fear of retaliatory litigation may deprive the grand jury of key evidence. Further, a witness's potential civil liability based on his testimony is not needed to deter perjurious testimony; other sanctions, notably prosecution for perjury, should suffice. Eleventh Circuit affirmed, 9-0. Alito, J.; Chief Justice and all Justices concurring.

**TITLE:** Vasquez v. Hillery
**INDEX NO.:** A.2.
**CITE:** (1986), 474 U.S. 254, 106 S. Ct. 617, 88 L.Ed.2d 598 01/14/1986
**SUBJECT:** Grand jury - racial discrimination in selection requires automatic reversal
**HOLDING:** Where D has proved racial discrimination in selection of grand jury that indicted him, harmless error doctrine does not apply & D's conviction must be reversed. Court bases its holding on numerous grounds. First, it is required by prior precedent. Rose v. Mitchell, (1979), 443 U.S. 545, 99 S. Ct. 2993, 61 L.Ed.2d 739. Second, reversal is only effective remedy. Third, even if grand jury's determination of probable cause is confirmed in hindsight by later conviction on indicted offense, that confirmation in no way suggests that discrimination did not impermissibly infect framing of indictment &, consequently, nature or very existence of proceedings to come. Fourth, when constitutional error calls into question the objectivity of those charged with bringing D to judgment, reviewing court can neither indulge presumption of regularity nor evaluate resulting harm. Held, discrimination in selection of grand jury requires automatic reversal. O'Connor CONCURS IN JUDGMENT; Powell, joined by Burger, & Rehnquist, DISSENTS.

**TITLE:** U.S. v. Williams
**INDEX NO.:** A.2.
**CITE:** (05/04/1992), 504 U.S. 36, 112 S. Ct. 1735, 118 L.Ed.2d 352
**SUBJECT:** Grand jury - exculpatory evidence; dismissal
**HOLDING:** Federal courts do not have authority to establish rule under which otherwise valid indictment would be dismissed if prosecutor failed to present substantial exculpatory evidence to grand jury. D was indicted for making false statements to federally insured financial institution. He sought dismissal because of government's failure to present to grand jury certain financial documents that, he argued, could have shown that alleged false statements were merely result of unorthodox accounting method. District Court dismissed, & Ct. App. affirmed dismissal, based on its own prior ruling that government has obligation to present "substantial exculpatory evidence" to grand jury. See U.S. v. Page, 808 F.2d 723 (Tenth Cir. 1987). Government here argues that federal courts' inherent supervisory power, authorizing them to formulate procedural rules, does not extend to this sort of rule regarding grand jury practice. U.S. S. Ct. agrees, noting that prior cases recognizing that power deal strictly with courts' control over their own procedures, whereas grand juries are separate institutions over whose functioning courts do not preside. Any power federal courts may have over grand jury procedure is very limited & would not permit sort of reshaping of grand jury proposed here. Grand jury's true role has traditionally been fulfilled by hearing only prosecution's evidence, & there is no reason to find that insufficient now. Reversed. Stevens, Blackmun, O'Connor, & Thomas, JJ. DISSENT, arguing that court can dismiss indictment substantially affected by prosecutorial misconduct, even if that misconduct did not violate any written rule.

# A.2. Grand jury (Ind. Code 35-34-2)

## A.2.a. General powers/duties

**TITLE:** In Re Grand Jury for 4th Quarter
**INDEX NO.:** A.2.a.
**CITE:** (3d Dist. 9/29/86), Ind. App., 497 N.E.2d 1088
**SUBJECT:** Grand jury - no power to issue reports
**HOLDING:** Grand jury has no authority to issue a report calling attention to "certain inadequacies" of partially publicly funded training facility for handicapped individuals. Here, grand jury declined to indict, but wished to release report. Tr. Ct. granted prosecutor's motion to publish report. Facility filed verified petition for expungement, which Ct. granted, ordering report sealed. State appeals. Ct. rejects state's contention that Ind. Code 35-34-2-11 would allow publication. Case discusses other cases in which grand jury requests to publish reports were denied. Ct. also rejects state's contention that common law would allow publication of report. Grand jury proceedings are strictly statutory; grand juries have no common-law powers. Held, Tr. Ct. affirmed.

**TITLE:** Mounts v. State
**INDEX NO.:** A.2.a.
**CITE:** (8/5/86), Ind., 496 N.E.2d 37
**SUBJECT:** Effect of grand jury "no-bill"
**HOLDING:** Amendment to statute, making grand jury no-bill conclusory, is procedural & applies retroactively. Here, grand jury investigated arson in which D was target & returned no-bill. Prosecutor then commenced prosecution by information on same facts. Tr. Ct. granted D's motion to dismiss information, but state successfully appealed (State v. Mounts, App., 460 N.E.2d 168). On remand, D's motion to dismiss information was denied & he appealed, arguing that amended statute applied retroactively; however, Ct. affirmed viability of information (Mounts, App., 489 N.E.2d 100). ON TRANSFER, Ind. S. Ct. determined, that although alleged crime occurred & information was filed before enactment of amendment, amendment is procedural & applies to all actions pending on, as well as after, its effective date. Prosecuting attorney receives authority to act from Legislature, & any legislative enactment supersedes residual authority that prosecutor may have had at common law. Thus, under amended statute, prosecuting attorney may not charge by information after grand jury returns no-bill, unless prosecutor shows newly discovered material evidence not presented to grand jury. Held cause remanded to Tr. Ct. with instruction to dismiss information. DeBruler DISSENTS, arguing statute should not be given retroactive application.

**TITLE:** State ex rel. Atkins v. Juvenile Court of Marion County
**INDEX NO.:** A.2.a.
**CITE:** (5/6/69), Ind., 247 N.E.2d 53
**SUBJECT:** Grand jury - power to indict juveniles; juvenile matters
**HOLDING:** Grand jury's power to indict is limited to jurisdiction of court of which it is extension; therefore, grand jury cannot charge by indictment any person under eighteen with crime not punishable by death or life imprisonment, except after waiver from juvenile court or for contempt of juvenile court. Juvenile matters are civil in nature. Writ of prohibition granted. Givan and Arterburn, JJ. dissenting.

**RELATED CASES:** Frost, 527 N.E.2d 228 (proceedings in juvenile court are civil in nature; act of juvenile delinquency is not a crime).

**TITLE:** State ex rel. Atkins v. Juvenile Court of Marion County
**INDEX NO.:** A.2.a.
**CITE:** (6/11/75), Ind., 329 N.E.2d 573
**SUBJECT:** Grand jury - power to compel production of documents; privilege against self-incrimination
**HOLDING:** If personal records of public officials bear indelible marks of illegal conduct, those records should, with proper safeguards, be made available for grand jury's inspection. Grand jury may require witnesses to produce papers and documents relevant to grand jury investigation. Fourth Amendment prohibitions against unreasonable searches and seizures are inapplicable to subpoenas *duces tecum* because subpoenas are incapable of accomplishing constitutionally proscribed conduct. Greatest protection which Fourth Amendment affords witness subject to grand jury subpoena *duces tecum* is requirement of reasonableness; witness desiring to raise objections must do so immediately upon receipt of subpoena *duces tecum* by presenting a motion to quash to court which convened grand jury. Constitutional privilege against self-incrimination accompanies all who appear before grand jury. Held, writ of prohibition denied.

**RELATED CASES:** Gillespie, 773 F. Supp. 1154 (court questions Pollard by stating that it is persuaded that Miranda, 384 U.S. 486, has no more application in grand jury context than it does in probation interview or bankruptcy contexts; witness before grand jury, whether target or not, is not in custody under Miranda).

# A. PLEADINGS

## A.2. Grand jury (Ind. Code 35-34-2)

### A.2.b. Challenge to Composition/Panel

**TITLE:** Campbell v. Louisiana

**INDEX NO.:** A.2.b.

**CITE:** (4/21/98), 118 S. Ct. 1419

**SUBJECT:** Discrimination against Blacks in Selection of Grand Jurors -- Standing of White Defendant to Challenge

**HOLDING:** A white defendant has third-party standing to raise an equal protection claim alleging discrimination against Blacks in selection of grand jurors, as well as standing to raise a claim that his own due process rights were violated as the result of such discrimination. In Powers v. Ohio, 499 U.S. 400 (1991), the Court held that a white defendant had standing to raise an equal protection claim alleging discrimination against Blacks in selection of petit jurors. The Powers Court used a three-part test: (1) Did the defendant suffer an injury in fact; (2) did the defendant have a close relationship to the excluded jurors so as to be an effective advocate for the equal protection rights; and (3) Is there a hindrance to the excluded jurors' assertion of their own rights? Under Louisiana's grand jury selection system, the trial judge selects a foreperson, and then the remaining grand jurors are selected randomly. It is the trial judge's selection of forepersons which the defendant alleges to be discriminatory. Consequently, the injury suffered by defendant here is greater than that suffered by the defendant in Powers, because if the defendant's allegations are true, the impartiality, discretion, and lawfulness of the judge himself would be called into question. The defendant's relationship to the excluded grand jurors and effectiveness in advocating for their equal protection rights is similar to that of the defendant in Powers since he has the incentive of a potential reversal of his conviction if he is successful. Finally, the hindrance to the excluded jurors asserting their own equal protection rights is similar to that in Powers since there is substantial cost and little incentive to filing a legal claim. Scalia and Thomas, JJ. DISSENT, arguing that Powers was wrongly decided and inapposite to the case at hand.

**TITLE:** Hasselbring v. State
**INDEX NO.:** A.2.b.
**CITE:** (11/9/82), Ind. App., 441 N.E.2d 514
**SUBJECT:** Grand jury -- jury commissioners
**HOLDING:** Technical defects in appointment of jury commissioners will not be grounds for disturbance of conviction where there has otherwise been substantial compliance with statutes directing selection of jurors. Here, fact that jury commissioner's family residence was outside county did not render jury selection improper. Held, conviction affirmed.

**RELATED CASES:** Daugherty, App., 466 N.E.2d 46 (where jury commissioners took oath only three days after period for taking oath expired, defect was technical and not substantive and not grounds for reversal in absence of showing of potential prejudice); Shack, 288 N.E.2d 155 (where commissioners were appointed in December instead of November as required, error did not affect substantial rights of D); Wireman, 432 N.E.2d 1343 (absence of a commissioner during selection process does not render panel void unless bad faith is shown).

**TITLE:** Sparks v. State
**INDEX NO.:** A.2.b.
**CITE:** (11/6/86), Ind., 499 N.E.2d 738
**SUBJECT:** Grand jury -- waiver
**HOLDING:** Generally, D who fails to challenge grand juror before grand jury is sworn is deemed to have waived his right to challenge. Freedom from personal bias is not legal qualification for grand juror. Grand juror held to not be biased even though he was EMT called to crime scene and was named as State's witness on indictment. Held, denial of post-conviction relief affirmed.

**RELATED CASES:** Deaton, 389 N.E.2d 293; Porter, 391 N.E.2d 801; disapproved on other grounds by Fleener, 412 N.E.2d 778 (parties to criminal litigation must challenge grand jurors before grand jury is sworn or right to challenge is waived).

**TITLE:** State ex rel. Burns v. Sharp
**INDEX NO.:** A.2.b.
**CITE:** (8/6/79), Ind., 393 N.E.2d 127
**SUBJECT:** Grand jury -- selection of grand jurors
**HOLDING:** When there has been substantial compliance with statutes directing selection and calling of jurors, minor irregularities usually will not create prejudice to D's rights. Completely random selection of jurors is not required so long as system used is impartial and not arbitrary. Shack, 288 N.E.2d 155. Nevertheless, grand jury which is not organized substantially in accordance with statutory requirements is unlawful jury; and indictment returned by such grand jury should be dismissed. Rudd, 107 N.E.2d 168. Here, jury commissioners' manner of selecting list of potential grand jurors clearly contravened both statute and tr. ct.'s orders. Thus, upon discovery of total lack of compliance, tr. ct. was bound to dismiss any indictments returned. Held, writ of prohibition issued.

**TITLE:** Thomas v. State
**INDEX NO.:** A.2.b.
**CITE:** (1/24/83), Ind., 443 N.E.2d 1197
**SUBJECT:** Grand jury -- exclusion of groups
**HOLDING:** Eighteen-year-olds were not shown to be per se excluded by fact that tax roles were used. Held, conviction affirmed.

**RELATED CASES:** Vasquez, 474 N.E.2d 254 (grand jury which excluded blacks was illegally constituted and all indictments returned were void even if fair trial was had on merits); Baum, 345 N.E.2d 831 (statutory exclusion of persons over 65 is not discriminatory); Patterson, 324 N.E.2d 482, *overruled* on other grounds by Modesitt v. State, 578 N.E.2d 649 (Ind. 1991) (attorney's unsupported belief that discrimination occurred is insufficient); Overton, App., 317 N.E.2d 467 (D must present evidence of discrimination).

**TITLE:** Weekly v. State
**INDEX NO.:** A.2.b.
**CITE:** (8/4/86), Ind., 496 N.E.2d 29
**SUBJECT:** Grand jury -- use of lists for selection of jurors
**HOLDING:** Property tax lists are appropriate for use provided reasonable cross section is represented and no deliberate attempt was made to exclude certain groups. Held, conviction affirmed.

**RELATED CASES:** Thomas, 443 N.E.2d 1197 (property tax rolls are appropriate pool unless it can be shown identifiable group was systematically excluded); Smith, 475 N.E.2d 1139 (voter registration lists are appropriate); Wooten, App., 418 N.E.2d 538 (limit to "householders" is not discriminatory); Stevens, 354 N.E.2d 727 ("householders" are those who have experience of making important and binding practical decisions of everyday living).

**TITLE:** Woods v. State
**INDEX NO.:** A.2.b.
**CITE:** (4/3/68), Ind., 235 N.E.2d 479
**SUBJECT:** Composition of grand jury
**HOLDING:** It is not the drawing of prospective jurors immediately preceding term of court which Ind. Anno. Stat. § 4-3304 requires to be in proportion to population distribution, but original yearly selection of pool of names from which, prospective jurors will be drawn for various terms of court during calendar year. Held, conviction affirmed.

# A. PLEADINGS

## A.2. Grand jury (Ind. Code 35-34-2)

### A.2.c. Qualifications

**TITLE:** Sparks v. State
**INDEX NO.:** A.2.c.
**CITE:** (11/6/86), Ind., 499 N.E.2d 738
**SUBJECT:** Grand jury - qualifications
**HOLDING:** Ct. rejects D's allegation of ineffective assistance of counsel based upon his trial attorney's failure to challenge allegedly defective grand jury indictment. Here, D contends indictment was defective because one grand juror was emergency medical technician who attended victim at crime scene. Generally, D who fails to challenge grand juror before grand jury is sworn is deemed to have waived right to challenge. McFarland, 381 N.E.2d 85; Sisk, 110 N.E.2d 627. Freedom from personal bias is not a legal qualification for a grand juror. Ind. Code 33-4-5-7. Therefore, presence of such member does not render grand jury illegally constituted & does not subject indictment to a motion to dismiss. Jones, 385 N.E.2d 426; Stevens, 354 N.E.2d 727. Held, no error in denial of PCR.

# A. PLEADINGS

## A.2. Grand jury (Ind. Code 35-34-2)

### A.2.d. Proceedings

**TITLE:** Averhart v. State
**INDEX NO.:** A.2.d.
**CITE:** (10/29/84), Ind., 470 N.E.2d 666
**SUBJECT:** Grand jury -- prosecutorial conduct
**HOLDING:** Prosecutor presented additional witnesses who spoke about desirability of death penalty. Although this conduct was, perhaps, ill-advised, it was not such flagrant imposition of grand jurors' will or independent judgment that there was violation of due process. Improper prosecutorial influence will not affect indictment if there is probable cause. Held, affirmed in part and reversed in part.

**TITLE:** Comer v. State
**INDEX NO.:** A.2.d.
**CITE:** (8/19/82), Ind. App. 438 N.E.2d 1037
**SUBJECT:** Grand jury -- privilege against self-incrimination
**HOLDING:** Fifth Amendment claim requires hearing if person claiming privilege is non-target witness. Due process requires full hearing. Contempt order for refusing to answer questions propounded by grand jury reversed.

**TITLE:** Fair v. State
**INDEX NO.:** A.2.d.
**CITE:** (6/15/77), Ind., 364 N.E.2d 1007
**SUBJECT:** Grand jury -- unauthorized persons appearing before grand jury
**HOLDING:** Indiana has no per se rule presuming prejudice when unauthorized persons appear before grand jury, or even when those persons participate in interrogation of witnesses (this differs from federal rule). Presence of stranger in grand jury during investigation of criminal charge is not sufficient to abate an indictment, unless it appears that person indicted was thereby injured in his substantial rights. Bates, 48 N.E.2d 2 (*quoting* Shattuck, 11 Ind. 473). Held, no error.

**RELATED CASES:** Deardorf, App., 477 N.E.2d 934 (whether prejudice has occurred from unauthorized presence and participation of police investigator during grand jury proceedings is question of fact which trial court must decide); Brown, App., 434 N.E.2d 144 (where trial court finds presence of police investigator during grand jury proceedings intrusive, producing pressure on other witnesses and jurors, indictment should be dismissed; here, D's substantial rights were prejudiced); Bowman, 423 N.E.2d 605 (where minimum protection afforded by statute, that indictment will follow only from impartial consideration in neutral and detached atmosphere, is violated, indictment must fall; presence of two police officers, who were friends and acquaintances with most of witnesses, in grand jury proceedings influenced course of proceedings in manner adverse to defendant's substantial rights); Hardy, App., 406 N.E.2d 313 (presence and active participation of prosecuting attorney who had requested appointment of special prosecutor to avoid possible conflict of interest constituted prejudice to D's substantial rights).

**TITLE:** King v. State
**INDEX NO.:** A.2.d.
**CITE:** (1/30/57), Ind., 139 N.E.2d 547
**SUBJECT:** Grand jury -- recall of grand jury; evidence
**HOLDING:** Grand jury which has been dismissed before adjournment of court for term generally may be recalled at same term of court. Court will not apply screening process to evidence coming before grand jury; grand jurors may return indictment upon their own knowledge or even hearsay. Held, judgment affirmed.

**TITLE:** Robinson v. State
**INDEX NO.:** A.2.d.
**CITE:** (9/23/83), Ind., 453 N.E.2d 280
**SUBJECT:** Grand jury -- contents of subpoena
**HOLDING:** Subpoena must state that person has right to consult with attorney.

**RELATED CASES:** Snyder, App., 393 N.E.2d 802 (no due process violation where accused was subpoenaed by subpoena which did not relate nature of proceedings and/or that he was target. Court found error harmless because D knew he was target and rights were explained to him in grand jury room); State ex rel. Pollard, 329 N.E.2d 573 (if foreman or prosecutor intentionally fails to advise target of status, indictment is subject to dismissal).

**TITLE:** Robinson v. State
**INDEX NO.:** A.2.d.
**CITE:** (5/22/85), Ind., 477 N.E.2d 883
**SUBJECT:** Grand Jury (GJ) - unauthorized persons present
**HOLDING:** Tr. Ct. did not err in allowing lawyer of murder victim's mother (also a suspect) to question her during GJ proceeding or be present when D was questioned. IN has no per se rule presuming prejudice when unauthorized persons appear before GJ/participate in interrogation of witnesses. Fair, 364 N.E.2d 1007. D must demonstrate prejudice. Rennert, 329 N.E.2d 595. Ct. distinguishes this case from State v. Hardy, 406 N.E.2d 313 in which prejudice was found (regular prosecutor who had been disqualified because of conflict of interest actually conducted GJ proceedings investigating local sheriff; dismissal of indictments upheld). Opportunity for influencing jury to return wrongful indictment was restricted to one witness & her questioning. That attorney for another target witness appeared and examined his client before grand jury, and was present when defendant was questioned, does not invalidate indictments. Held, no error.

**RELATED CASES:** Rennert, 329 N.E.2d 595 (presence of parents of 18 year-old witness did not prejudice grand jury where he took no part in proceedings; presence of 18 year-old non-target witness did not constitute violation even though attorney cross-examined witness); Brown, App., 434 N.E.2d 144 (fact that investigating police officer was in grand jury room telling witnesses to testify more fully and to testify even when they requested attorney was not error because of strong evidence of probable cause). Deardorf, App., 477 N.E.2d 934 (Indict 10.1(5), 144.1(2); Ct. rejects D's contention that presence of investigating officer during GJ proceeding requires dismissal of indictment; D's substantial rights were not prejudiced, *citing* Brown 434 N.E.2d 144, Fair, & Sappenfield, App., 462 N.E.2d 241; Ct. rejects D's reliance on State v. Bowman 423 N.E.2d 605, which held that presence & participation of 2 officers in GJ proceedings violated D's right to a neutral & detached consideration by GJ).

**TITLE:** Sappenfield v. State
**INDEX NO.:** A.2.d.
**CITE:** (4/18/84), Ind. App., 462 N.E.2d 241
**SUBJECT:** Grand jury -- omnibus date
**HOLDING:** Trial court did not abuse its discretion when it denied defendant's motion to produce transcript of entire grand jury proceedings to support his second motion to dismiss indictment, filed 81 days after his motion to produce and 171 days after it was required to be filed by omnibus statute. Affirmed.

**RELATED CASES:** Averhart, 470 N.E.2d 666 (motion to dismiss untimely filed because filed 4 days before omnibus hearing date).

**TITLE:** State ex rel. Goldsmith v. Superior Court of Hancock County
**INDEX NO.:** A.2.d.
**CITE:** (3/22/79), Ind., 386 N.E.2d 942
**SUBJECT:** Grand jury -- recusal of prosecutor
**HOLDING:** Recusal of elected prosecutor recuses entire office, including duly elected successor prosecutors. Disqualification of deputy prosecutor does not disqualify office and prosecutor may assign another deputy to replace one with conflict. If this is done without resort to court, no recusal has occurred; recusal of deputy disqualifies current staff; recusal by deputy does not bind incoming or newly elected prosecutor. Held, temporary writ of mandate and prohibition made permanent.

**RELATED CASES:** Hardy, App., 406 N.E.2d 313 (participation of disqualified prosecutor renders proceedings voidable and indictments invalid; petition for special prosecutor is recusal whether petition is filed by elected prosecutor or his deputy).

**TITLE:** State ex rel. Pollard v. Criminal Court of Marion County, Division One
**INDEX NO.:** A.2.d.
**CITE:** (6/11/75), Ind., 329 N.E.2d 573
**SUBJECT:** Grand jury -- refusal to comply not contempt
**HOLDING:** Decision to appear and testify is optional with accused, because best way to maintain inviolate his Fifth Amendment rights is to provide him with simple expedient of refusing to assist in any way in procurement of his conviction. Accused who refuses to comply with either subpoena *duces tecum* or subpoena ad testificandum may not be held in contempt. Held, remanded. Alternate writs of prohibition dissolved and request for permanent writ denied.

**TITLE:** State ex rel. Pollard v. Criminal Court of Marion County
**INDEX NO.:** A.2.d.
**CITE:** (6/11/75), Ind., 329 N.E.2d 573
**SUBJECT:** Grand jury -- advisement of privilege
**HOLDING:** Due regard for privilege against self-incrimination requires that each person appearing before grand jury, after being sworn, but prior to any questioning, be advised of the privilege and instructed that he may claim it at any point in proceeding if he determines that his answer may criminally implicate him. Warning must be given by prosecutor, or in this absence, by foreman of grand jury. Only when individual subpoenaed to testify before grand jury is made aware of his right against self-incrimination may he then make knowing and voluntary waiver of that right if he chooses to testify before grand jury. When prosecutor or grand jury foreman elicits testimony by intentionally failing to advise witness that he is subject of investigation, any indictment returned against him would be subject to motion to quash. Held, remanded.

**RELATED CASES:** Reina, 81 S. Ct. 260 (ordinary rule is that once person is convicted of crime, he no longer has privilege against self-incrimination because he can no longer be incriminated by his testimony about crime).

**TITLE:** State ex rel. Pollard v. Criminal Court of Marion County
**INDEX NO.:** A.2.d.
**CITE:** (6/11/75), Ind., 329 N.E.2d 573
**SUBJECT:** Grand jury -- Fourth Amendment
**HOLDING:** Fourth Amendment requirements of probable cause applicable to subpoenas *duces tecum* to extent that grand jury or prosecutor issuing such subpoenas may not act arbitrarily or in excess of their statutory authority. Greatest protection Fourth Amendment affords witness subject to grand jury subpoena *duces tecum* is requirement of reasonableness. Requirement is that subpoena be sufficiently limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome. Fourth Amendment's prohibition against unreasonable searches and seizures inapplicable to subpoena *duces tecum* because subpoenas incapable of accomplishing constitutionally proscribed conduct. Exclusionary rule inapplicable in grand jury proceedings. Held, reversed, and remanded.

**RELATED CASES:** Calandra, 414 U.S. 338 (subpoena must be limited in scope, relevant to investigation, and specific in this directive to witness; grand jury may consider evidence obtained in violation of Fourth Amendment).

**TITLE:** State v. Heltzel
**INDEX NO.:** A.2.d.
**CITE:** (3/27/90), Ind., 552 N.E.2d 31
**SUBJECT:** Grand jury (GJ) - secrecy; attempt to induce unauthorized disclosure
**HOLDING:** Tr. Ct. did not err in dismissing indirect contempt charges alleging that 2 newspaper reporters questioned 2 men in 1987 regarding their service on GJ impaneled in 1984. Because Ds were not charged with inducing or causing violation of Ind. Code 35-34-2-10, making it misdemeanor for person present at GJ proceedings to disclose evidence given, grand juror statements, or votes, Ind. S. Ct. does not review constitutionality of that statute. Instead, Ds are charged with indirect contempt of Ct. under Ind. Code 34-4-7-3 through 5, defined as act committed outside presence of Ct. "which nevertheless tends to interrupt, obstruct, embarrass or prevent the due administration of justice." 6 I.L.E. Contempt, §2. Ds argue that 1st Amendment protections require compelling state interest, specifically that threat to administration of justice is extremely serious & imminent. First Amendment protections extend to news gathering activities, [citations omitted], but case law does not suggest that they extend to unlawful news gathering activities. However, while conduct alleged is not subject to 1st Amendment protection, it still does not rise to level of indirect criminal contempt. GJ secrecy is of great importance in preventing escape of those who may be indicted, preventing improper influence, encouraging free disclosure by witnesses, & protecting innocent accused who is later exonerated. [Citations omitted.] However, these concerns drop off dramatically once GJ is discharged. Conduct alleged here did not impede administration of justice & Tr. Ct. did not err in dismissing charges. Givan & Pivarnik, JJ. DISSENT.

**TITLE:** State v. Hogan
**INDEX NO.:** A.2.d.
**CITE:** 144 N.J. 216; 676 A.2d 533 (N.J. 1996) 05/23/1996
**SUBJECT:** Grand Jury -- Exculpatory Evidence
**HOLDING:** New Jersey Court unanimously rejects "hands off" approach of U.S. Supreme Court in U.S. v. Williams, 504 U.S. 36 (1992), and holds that it has supervisory authority to require that prosecutors present to grand juries "clearly exculpatory evidence" that "directly negates" the guilt of the accused. To be considered "clearly exculpatory", evidence must be reliable. Further, to be found to "directly negate" guilt of the accused, evidence must "squarely refute an element of the crime in question."

**TITLE:** State v. Peters
**INDEX NO.:** A.2.d.
**CITE:** (5th Dist., 05/31/94), Ind. App. 637 N.E.2d 145
**SUBJECT:** Immunized grand jury testimony, subsequent indictment
**HOLDING:** Ct. refused to apply a per se rule that indictment of D by same Grand Jury that previously heard his immunized testimony was forbidden but found State did not show adequate basis for prosecution not related to immunized testimony.

**TITLE:** Walker v. State
**INDEX NO.:** A.2.d.
**CITE:** (9/25/80), Ind., 409 N.E.2d 626
**SUBJECT:** Use of grand jury testimony at criminal trial
**HOLDING:** In prosecution for murder, there was no error in introducing witness' grand jury testimony where State laid proper foundation for impeachment by bringing to witness' attention circumstances under which contradictory statements were made, and witness identified his statements made to grand jury and authenticated that exhibit was transcript of his statements. In addition, exhibit was under seal. Held, conviction affirmed.

**RELATED CASES:** Holovachka, Ind., 142 N.E.2d 593 (government should not be permitted to use grand jury testimony to provide basis of civil suits, disciplinary actions, etc.); Doe, Inc. I, 481 U.S. 102 (Rule 6(e) does not require government attorney to obtain court order before re-familiarizing himself or herself with details of grand jury investigation); Sells Engineering, Inc., 463 U.S. 418 (no Justice Department attorney is free to rummage through records of any grand jury in county, simply by right of office; disclosure under Rule 6(e)(3)(A)(i) is permitted only in the performance of such attorney's duty).

**TITLE:** Wurster v. State
**INDEX NO.:** A.2.d.
**CITE:** (7-28-99), Ind., 715 N.E.2d 341
**SUBJECT:** Grand jury - direct questioning of witnesses; failure to record proceedings
**HOLDING:** On transfer from Ct. App.' decision at 708 N.E.2d 587, S. Ct. held that proceedings before grand jury that issued indictment in this case violated both right of grand jurors to question witnesses & statutory requirement that complete record of proceedings be kept. Procedure of having grand jurors submit their questions to prosecutor to have him pose questions to witnesses does not violate due process as prosecutorial misconduct. However, usual & better practice in Ind. is to allow grand jurors to pose questions directly to witnesses that appear before them. Oath administered to grand jurors provides that they "diligently inquire of all offenses committed...of which [they] have or can obtain legal evidence..." Ind. Code 35-34-2-3(e). Further, grand jury shall be exclusive judge of facts with respect to any matter before it. Ind. Code 35-34-2-4(j). However, absent showing of prejudice, this alleged statutory violation is not basis for dismissal of indictment.

As to failure to keep record of proceedings, which is required by Ind. Code 35-34-2-3(d), Ct. held that this error does not require showing of prejudice because, by its nature, it forecloses D from knowing or being able to prove what occurred in grand jury. Despite violation of statutory requirement in this case, reversal was not required because error was not presented to Tr. Ct. Held, transfer granted, Tr. Ct.'s denial of Ds' motions to dismiss affirmed in part & reversed in part.

# A. PLEADINGS

## A.3. Requirements of pleadings (Ind. Code 35-35-2-1)

**TITLE:** Lashley v. State

**INDEX NO.:** A.3.

**CITE:** (1st Dist., 3-26-01), Ind. App. 745 N.E.2d 254

**SUBJECT:** Validity of charging information - witness's signature before prosecutor inserted charges

**HOLDING:** Where arresting police officer signed blank charging information under oath, which was approved by deputy prosecuting attorney, charging information satisfied requirements of Ind. Code 35-34-1-2(b). Statute requires information to be signed by prosecutor or his deputy & sworn to or affirmed by him or any other person. Requirement that prosecutor indorse information is not mere technical formality but assures that prosecution has been investigated by & approved by prosecuting attorney. Brown v. State, 403 N.E.2d 901 (Ind. Ct. App. 1980). Prosecuting witness's signature serves simply to foreclose filing of frivolous charges by imposing penalties of perjury upon prosecuting witness. Hendricks v. State, 426 N.E.2d 367 (Ind. 1981). Here, officer's sworn testimony both in his probable cause affidavit & at trial effectively served purpose of assuring that charges against D were not frivolous. While police officer should have sworn to contents of information after charges had been inserted, on these facts Ct. held that his failure to do so did not render charging information fatally defective or require dismissal of charges against D. Held, no reversible error.

**TITLE:** Sunday v. State
**INDEX NO.:** A.3.
**CITE:** (12-14-99), Ind., 720 N.E.2d 716
**SUBJECT:** Information - enhancement for firearm must be pled on separate paper
**HOLDING:** Tr. Ct. erred in adding five years to otherwise maximum sentence for rape, because State did not comply with requirement of Ind. Code 35-50-2-11(c) that it seek enhancement on page separate from rest of charging instrument. State may seek on page separate from rest of charging instrument, to have person who allegedly committed offense sentenced to additional fixed term of imprisonment if State can show beyond reasonable doubt that person knowingly or intentionally used firearm in commission of offense. Ind. Code 35-50-2-11(c). Here, Tr. Ct. stated that he sentenced D to "maximum allowed by law . . . fifty years for rape & five years for having committed same while armed with deadly weapon." However, State never filed enhancement on separate page as required by statute. Because it is clear that legislature intended to require State to seek five-year enhancement by first filing its allegation on separate page of charging instrument, Ct. remanded with order to reduce fifty-five-year sentence for rape to fifty years. Held, judgment reversed in part.

**RELATED CASES:** Apprendi v. New Jersey, 120 S. Ct. 2348 (constitution requires that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury and proved beyond reasonable doubt; see full review at D.9.a).

# A. PLEADINGS

## A.3. Requirements of pleadings (Ind. Code 35-35-2-1)

### A.3.a. Indictment or Information (Ind. Code 35-34-1-2)

**TITLE:** Dorsey v. State
**INDEX NO.:** A.3.a.
**CITE:** (7/28/70), Ind., 260 N.E.2d 800
**SUBJECT:** Pleadings -- construction
**HOLDING:** Fact that information alleged D possessed "hypodermic syringe" but evidence at trial established D possessed eye dropper with needle attached did not constitute material variance between information & proof at trial. In determining whether affidavit states alleged offense with sufficient clarity, words of affidavit must be construed in manner in which they are commonly & ordinarily accepted. Here, Court looked at Webster's definition of syringe & hypodermic syringe, into which needle attached to eyedropper fell. Thus, affidavit stated alleged offense with sufficient clarity as to permit D to be able to intelligently prepare defense. Held, reversed with instruction to grant D's motion for new trial.

**TITLE:** Driver v. State
**INDEX NO.:** A.3.a.
**CITE:** (2nd Dist.; 3-17-00), Ind. App. 725 N.E.2d 465
**SUBJECT:** Information - incorrect date of notarization
**HOLDING:** Fact that notarization of Information was dated November 1, 1998, which was twenty-seven days prior to commission of charged offense, did not deprive Ct. of subject matter jurisdiction. Information shall be signed by prosecuting attorney or his deputy & sworn to or affirmed by him or any other person. Ind. Code 35-34-1-2(b). Furthermore, subject matter jurisdiction is not dependent upon existence of good cause of action or sufficiency of bill or complaint. Brown, 219 Ind. 251, 37 N.E.2d 73 (Ind. 1941). Here, prosecutor's signature on Information was accompanied by statement "Comes now undersigned Affiant, Mark A. McCann, Chief Deputy, Prosecuting Attorney of the 62nd Judicial Circuit, who being duly sworn upon his oath deposes & says . . ." This statement meets statutory requirements. Even if statement did not meet requirements, defect would not have caused Ct. to lose subject matter jurisdiction because Ct. has subject matter jurisdiction over criminal cases & this was criminal case. Held, conviction affirmed.

**TITLE:** Dudley v. State
**INDEX NO.:** A.3.a.
**CITE:** (7/15/85), Ind., 480 N.E.2d 881
**SUBJECT:** Pleadings -- follow language of statute
**HOLDING:** D is entitled to be informed specifically of crime with which he is charged so that he may be able to intelligently prepare defense. Here, Ds charged with robbery, but information failed to state Ds acted together & amount & type of U.S. currency taken. Because same facts supported each D's charge of robbery, there was sufficient notice. In addition, information failed to specify who entered bank, took money, drove car, & fired gunshot at police officer; however, information not invalidated. Information need only state crime charged in language of statute or in words conveying similar meaning. It is well-settled that one is criminally liable for acts done by his confederates which were probable & natural consequences of their common plan. Parks, 455 N.E.2d 904. Because information did state with sufficient specificity Ds' acts constituted criminal recklessness, Ds given sufficient notice of crime to defend themselves. Held, convictions affirmed.

**TITLE:** Estep v. State
**INDEX NO.:** A.3.a.
**CITE:** (12/17/85) Ind., 486 N.E.2d 492
**SUBJECT:** Information - name
**HOLDING:** Information sufficiently stated D's name, despite omission of "Sr." Addition of "Senior" or "Junior" to name of person referred to in charging instrument is "mere matter of description, constituting no part of the name, and need not be proved." Geraghty, (1887), 110 Ind. 103. Here, "Jr." was 15 months old at time of trial. Ct. rejects D's contention that Ind. Code 35-34-1-2(a)(9) *overrules* Geraghty; in fact, two are complementary. Held, no error.

**TITLE:** Flores v. State
**INDEX NO.:** A.3.a.
**CITE:** (12/5/85), Ind., 485 N.E.2d 890
**SUBJECT:** Pleadings -- must inform accused of nature of charges
**HOLDING:** Ind. Const., Art. 1, Sec. 13 requires that indictment or information sufficiently apprise accused of nature of charges against him so that he may anticipate state's proof & prepare defense in advance of trial. Here, amendments to robbery information, which deleted references to wallet & jewelry box so as to simply accuse D of taking property from victims, failed to apprise D of robbery charges against him. Held, robbery convictions reversed, burglary conviction affirmed.

**RELATED CASES:** Garcia, App., 433 N.E.2d 1207 (information or affidavit must charge & direct in unmistakable terms offense with which D is accused; if there is reasonable doubt as to what offenses are set forth, doubt should be resolved in favor of D); Griffin, 439 N.E.2d 160 (where indictment & statute defining offense employ generic terms which do not inform accused in any meaningful way of particular conduct complained of, dismissal is required; failure to adequately inform D of charges against him is fundamental error); Salary, App., 523 N.E.2d 764 (D could not be convicted for not yielding right of way to oncoming traffic through intersection under information charging him with failure to stop, absent any language in information defining traffic to which D failed to yield); Gebhard, App., 459 N.E.2d 58 (information charging D with knowingly engaging in tumultuous conduct failed to state facts & circumstances with sufficient precision so as to apprise D of charge against him; information inadequate under statutory guidelines).

**TITLE:** Gordon v. State
**INDEX NO:** A.3.a.
**CITE:** (1st Dist., 1/9/95), Ind. App. 645 N.E.2d 25
**SUBJECT:** Adequacy of charging information - *citing* statute but not elements
**HOLDING:** Informations for criminal deviate conduct charges were not deficient & did not mislead D of charges against him. Although informations did not set forth element of force necessary to establish offenses, they cited Ind. Code 35-42-4-2(a). Ct. held that by specifically directing D to statutory offense & describing particular facts of case, informations adequately advised D of crimes charged. Held, Tr. Ct. affirmed.

**RELATED CASES:** Kaur, 987 N.E.2d 164 (Ind. Ct. App. 2013) (taken together, charging information & PC affidavit adequately notified D of charges).

**TITLE:** Griffin v. State
**INDEX NO.:** A.3.a.
**CITE:** (8/27/82), Ind., 439 N.E.2d 160
**SUBJECT:** Pleadings -- failure to inform D of prohibited conduct
**HOLDING:** It is fundamental tenet of pleading criminal causes that information must set forth nature and elements of offense charged in plain and concise language. Ind. Code 35-3.1-1-2. Precision in pleading, which is embraced within constitution, is designed to afford all Ds safeguards guaranteed by due process of law. To permit conviction on charge not made would be sheer denial of due process. Where indictment and statute defining offense employ generic terms which do not inform accused in any meaningful way of particular conduct complained of, dismissal is required. Failure to adequately inform D of charges against him is fundamental error, requiring reversal even when not objected to at trial.

Here, D was charged with four counts of theft and one count of being habitual criminal. First four counts of original information described stolen property and named owners of stolen goods, but amended information alleged only that D knowingly received stolen property. There was no description of property or any indication as to identities of rightful owners. Even though D did not question adequacy of information at any time during trial, fact remains that D was tried on charge which was totally inadequate in informing D about what he should defend against, and his conviction also places him in jeopardy because Ct. could not determine from information what property D received as stolen goods. Held, conviction and habitual offender status set side, and all charges dismissed.

**TITLE:** Hestand v. State
**INDEX NO.:** A.3.a.
**CITE:** (4/23/86), Ind., 491 N.E.2d 976
**SUBJECT:** Pleadings -- incorrect citation to statute
**HOLDING:** Although statute under which D was charged was cited incorrectly in information, D was not misled to extent entitling him to reversal of child molesting conviction, because proper statutory language was set forth as explanation of charge. Held, conviction affirmed.

**TITLE:** Hollowell v. State

**INDEX NO.:** A.3.a.

**CITE:** (4th Dist., 3-29-99), Ind. App. 707 N.E.2d 1014

**SUBJECT:** Conjunctively charged acts in information - claim of insufficient proof of both acts

**HOLDING:** When indictment or information conjunctively charges acts which are disjunctively proscribed in criminal statute, only one of the acts need be proven in order to support conviction. Chubb, 640 N.E.2d 44. Here, in battery prosecution, D argued that there was no evidence to prove that he used deadly weapon & caused serious bodily injury, as alleged in charging information. Ct. held that despite conjunctive charge, State was only required to prove either use of deadly weapon or serious bodily injury to sustain D's conviction. There was ample evidence from which jury could reasonably infer that battery was either committed by means of deadly weapon or that it resulted in serious bodily injury, or both. Held, conviction affirmed.

**TITLE:** Hoskins v. State
**INDEX NO.:** A.3.a.
**CITE:** (11/4/82), Ind., 441 N.E.2d 419
**SUBJECT:** Pleadings -- principals & accessories
**HOLDING:** One can be charged as principal & convicted on proof that he aided or abetted another in committing crime. State not required to explicitly allege D was accessory, & conviction will stand even though charged as principal. Held, conviction affirmed; Prentice & Hunter, JJ. concurring in result on other grounds.

**RELATED CASES:** Dudley, 480 N.E.2d 881 (fact that information failed to specify who entered bank, who took money, who drove car, & who fired gun shot at police officer, did not void information; one is criminally liable for acts done by confederates which were probable & natural consequences of their common plan).

**TITLE:** Jennings v. State
**INDEX NO.:** A.3.a.
**CITE:** (11/6/87), Ind., 514 N.E.2d 836
**SUBJECT:** Pleadings -- filing of alibi makes time of essence
**HOLDING:** Although filing of alibi defense does not impose greater burden of proof on state than would otherwise be required, filing of alibi defense does make time of alleged offense of essence. In this case, it was reversible error to give instructions relieving state from need, when alibi defense was asserted, to prove date of charged offenses with particularity. Held, conviction reversed & remanded for new trial.

**RELATED CASES:** Sangsland, App., 715 N.E.2d 875 (proof of precise dates alleged in State's answer to D's notice of alibi was not necessary to sustain convictions; see card at M.5.b) McCallip, App., 580 N.E.2d 278 (D did not file notice of alibi, thus time of crime not made of essence).

**TITLE:** Jordan v. State
**INDEX NO.:** A.3.a.
**CITE:** (1/22/87) Ind., 502 N.E.2d 910
**SUBJECT:** Information - conflict between title & text
**HOLDING:** D was not denied due process by conflict in title & text of information. Here, information was titled, Count I, Forgery (Uttering) & text of information alleged that D "did lawfully & with intent to defraud MAKE a written instrument." D contends he was charged with uttering a forged instrument but convicted of forgery (making). When title of indictment conflicts with language of text, latter will control. Howard (1879), 67 Ind. 401. See also Freeling, App., 38 N.E.2d 644. Ct. finds rule also applicable to charging information at hand. D was charged with making a forged instrument & convicted of that crime. Held, no error.

**RELATED CASES:** Funk, App., 714 N.E.2d 746 (variance between title & text of charging information did not mislead D or prejudice him in any demonstrable manner).

**TITLE:** Kelsie v. State
**INDEX NO.:** A.3.a.
**CITE:** (9/21/76), Ind., 354 N.E.2d 219
**SUBJECT:** Pleadings -- time & date of offense
**HOLDING:** Indictment need only state time of crime with sufficient particularity to show that offense was committed within statute of limitations. Time of death is not of essence in case of murder. Held, conviction affirmed.

**RELATED CASES:** Greichunos, App., 457 N.E.2d 615 (conviction reversed where information in arson case alleged time outside of statute of limitations & no facts alleged sufficient to constitute an exception); Schell, 224 N.E.2d 49 (where time not of essence of offense, it is sufficient to allege time specifically enough to establish offense committed within period of limitations); Thurman, App., 319 N.E.2d 151 (typing error in charging information misstating year of offense in narcotics case not reversible error since date not of essence of offenses & could not have misled D).

**TITLE:** Locke v. State
**INDEX NO.:** A.3.a.
**CITE:** (2d Dist. 11/23/88), Ind. App., 530 N.E.2d 324
**SUBJECT:** Information - names of victims must be alleged
**HOLDING:** Tr. Ct. erred in denying D's motion to dismiss on ground that information failed to allege names of victims. D was charged with child molesting by means of 2 informations which did not allege names of victims. Attached to informations were probable cause affidavits & statements from various victims. State concedes that in order to clearly apprise D of charge against him, name of victim must be alleged. Robinson, 112 N.E.2d 861; Fadell, App., 450 N.E.2d 109. However, state argues that defect was cured by attachments to information. Ind. Code 35-34-1-2 requires that indictment be in writing & allege commission of offense by setting forth nature & elements without unnecessary repetition. This requirement does not contemplate incorporation by attachment of probable cause affidavit & 19-page statement of one who may or may not be purported victim of particular charge. Even in jurisdictions which allow bill of particulars to flesh out details of short-form charge, such will not cure defect in information. 41 Am. Jur.2d, Indictments & Informations §165 (1968). Further, Ind. S. Ct. has held that where Tr. Ct. finds grounds for granting bill of particulars, it has ample reason for quashing indictment for uncertainty. Sherrick, 79 N.E. 193; Reichert 78 N.E.2d 785. Held, convictions reversed. Buchanan, J., DISSENTS on ground that motion to dismiss was untimely.

**TITLE:** Mauricio v. State
**INDEX NO.:** A.3.a.
**CITE:** (4/2/85), Ind., 476 N.E.2d 88
**SUBJECT:** Pleadings -- failure to allege elements of offense
**HOLDING:** Absence of detail in charging information is fatal to information only if such phraseology misleads D or fails to give him notice of charges against him. Smith, 445 N.E.2d 998. Held, convictions affirmed.

**RELATED CASES:** Pickett, App., 424 N.E.2d 452 (Tr. Ct. 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); Gotwals, App., 330 N.E.2d 766 (no statutory offense charged, conviction reversed); Miller, App., 634 N.E.2d 57 (omission of essential element of forcible nature of resistance from information charging D with resisting law enforcement was not fundamental error, because D was able to present defense, & was not misled; D argued that he did not resist at all rather than that resistance was not forcible, & information specified date, police officer involved, & statute prohibiting resistance).

**TITLE:** Mauricio v. State
**INDEX NO.:** A.3.a.
**CITE:** (4/2/85), Ind., 476 N.E.2d 88
**SUBJECT:** Information - surplusage
**HOLDING:** Where information charged D with robbery and evidence clearly proved he committed crime, reference in information to co-conspirator (not proven) was surplusage. Heflin 370 N.E.2d 895. Here, information charged D with robbery "while acting with a co-conspirator." D contends state failed to prove robbery against him because it failed to prove co-D was his co-conspirator. Ct. finds information charges robbery, not conspiracy to commit robbery. Held, no error.

**TITLE:** McBride v. State
**INDEX NO.:** A.3.a.
**CITE:** (2nd Dist., 11-14-05), Ind. App., 837 N.E.2d 182
**SUBJECT:** Robbery conviction reduced based on charging information
**HOLDING:** Ct. concluded that Class B felony robbery conviction must be reduced to a Class C felony based on the language of the charging information. Post-conviction Ct. reduced a Class A felony robbery conviction to a Class B felony due to double jeopardy implications in conjunction with a murder conviction. The charging information for robbery charge alleged that D took property from the victim by putting the victim in fear or by using or threatening the use of force on the victim, which resulted in serious bodily injury, that is: mortal gunshot wounds. Pursuant to Ind. Code 35-42-5-1, Class B felony robbery requires that the crime be committed "while armed with a deadly weapon" or results in bodily injury to a person. The bodily injury language would implicate the double jeopardy concerns addressed by the PCR Ct. Ct. found Francis v. State, 758 N.E.2d 528 (Ind. 2001), directly on point & the State's failure to provide D with notice in the charging information alleging that the offense was committed while armed with a deadly weapon required the conviction to be reduced to a Class C felony. As in Francis, Ct. was not persuaded that other parts of the record provided sufficient notice to D that he was alleged to have been in possession of a deadly weapon. Francis conclusively established that only the charging information is to be considered as to whether a Class B felony robbery is a factually included lesser offense of a Class A felony. Held, judgment reversed & remanded for resentencing.

**TITLE:** Niece v. State
**INDEX NO.:** A.3.a.
**CITE:** (2d Dist. 12/14/83), Ind. App. 456 N.E.2d 1081
**SUBJECT:** Information - once dismissed cannot be reinstated by judge
**HOLDING:** Tr. Ct. erred in reinstating theft count which had been dismissed by state. Here, Tr. Ct. corrected erroneous sentence (sentence improperly suspended) by vacating guilty plea & sentencing for forgery, reinstating forgery count & theft count (latter dismissed by state pursuant to plea bargain) & pleas of not guilty to those counts & setting case for trial. Criminal actions may only be instituted by prosecuting attorney via indictment or information. Ind. Code 35-3.1-1-1, now Ind. Code 35-34-1-1. If D is to be re-prosecuted on theft charge, prosecutor must refile charge, unless such refiling is barred by vindictive prosecution. See Cherry, 414 N.E.2d 301; Selva, App., 444 N.E.2d 329. Held, Tr. Ct. order reinstating theft count reversed.

**TITLE:** Powers v. State
**INDEX NO.:** A.3.a.
**CITE:** (10/27/86), Ind., 499 N.E.2d 192
**SUBJECT:** Information - minor defect in form
**HOLDING:** Tr. Ct. did not err in refusing to dismiss HO charge. Here, D contends prosecuting attorney's failure to append date of expiration of his commission as notary resulted in defective information, divesting Tr. Ct. of any jurisdiction. Ind. Code 33-14-5-3 allows prosecuting attorneys to act as notaries public. Statute prescribes general procedure for prosecuting attorneys signing various documents. Ct. reads statute in light of Ind. Code 35-34-1-2 (form of charge). Latter statute lists specific formal requirements for indictments/informations; it does not require date of expiration of prosecuting attorney's notary commission. Case is unlike Anderson, 439 N.E.2d 588, where prosecuting attorney failed to swear to or affirm contents of HO charge. Case is more like Smith, 465 N.E.2d 702, which held minor variances from wording of statute do not make information defective. Held, no error.

**TITLE:** Schlacter v. State
**INDEX NO.:** A.3.a.
**CITE:** (7/23/84), Ind., 466 N.E.2d 1
**SUBJECT:** Pleadings -- follow language of statute
**HOLDING:** Form of indictment or information must substantially comply with form delineated in statute; if accused is specifically informed of charge against him by wording of particular information or indictment, then information or indictment substantially complies with statute. Here, D was not entitled to dismissal of information charging him with class A robbery on ground that information allegedly contained elements of class B as well as class A robbery, because D was not misled by information & did not show any prejudice resulting from content of information. Held, judgment affirmed.

**RELATED CASES:** Kerlin, 573 N.E.2d 445 (usually, if information tracks language of statute defining offense, information is sufficient); Gebhard, App., 459 N.E.2d 58 (when criminal statute defines crime in general terms, information must be more specific than merely tracking language of statute to inform D of particular offense which comes under general definition); Moran, App., 477 N.E.2d 100 (simply charging D with conduct which contravenes statute is just as improper as using language from statute which defines crime in general terms when many different acts could fall within that general definition).

**TITLE:** Schweitzer v. State
**INDEX NO.:** A.3.a.
**CITE:** (1/5/89), Ind., 531 N.E.2d 1386
**SUBJECT:** Multiplicity of charges - forced election
**HOLDING:** Where an information complies with statute [apparently Ind. Code 35-24-1-2], State is not required to dismiss repetitive charges, but Tr. Ct. has discretion to compel State to elect among offenses charged. Vaughn 378 N.E.2d 859. Ct. leaves open possibility that, if prejudice is shown, Tr. Ct.'s discretion may be more limited. Reversed in part on double jeopardy grounds.

**TITLE:** Shanholt v. State
**INDEX NO.:** A.3.a.
**CITE:** (3d Dist. 4/27/83), Ind. App. 448 N.E.2d 308
**SUBJECT:** Information - duplicity; conjunctive charging
**HOLDING:** Charging information is not duplicitous where statute (criminal confinement) embraces in the disjunctive separate & distinct acts as a crime but information charges in the conjunctive. Troutman v. US, (CA10 1938) 100 F.2d 628; see Smith, 168 N.E.2d 199. Here, charging information contained elements of Ind. Code 35-42-3-3(a)(2) & (a)(3), charged in the conjunctive. D contends state attempted to combine elements & create a hybrid offense. Ct. holds information was sufficient for state to prove either removal of children by fraud & enticement from one place to another or their removal to a place outside of Ind. in violation of a custody order. Held, no hybrid offense was created; information was valid.

**RELATED CASES:** Townsend, App., 616 N.E.2d 47 (Single indictment charging D with battery against two different individuals was apparently duplicitous, but error in indictment was waived because of failure to move for dismissal); Marshall, App., 590 N.E.2d 627 (State has unrestricted discretion to file allegedly repetitive charges, even though D charged & found guilty may not be convicted & sentenced more than once for same offense or for single larceny); Davis, App., 476 N.E.2d 127 (Indict 71.4(1); Ds were charged with neglect of dependent: endangerment and/or abandonment; inclusion of "and/or" did not hamper Ds' ability to understand the nature of charge or prepare defense).

**TITLE:** Smith v. State
**INDEX NO.:** A.3.a.
**CITE:** (7/12/84), Ind., 465 N.E.2d 702
**SUBJECT:** Pleadings -- minor variances from statutory language
**HOLDING:** Minor variances from wording of statute do not make information defective so long as words, construed according to their common usage, do not mislead accused or omit essential element of crime. Here, charging information stated, "crime of murder" rather than "knowingly or intentionally kill another human being." Common meaning attaches to word "murder." Held, D not misled; no error.

**RELATED CASES:** Burris, 465 N.E.2d 171 (robbery charge failed to allege D knowingly or intentionally took money from victim; D not misled).

**TITLE:** Vail v. State
**INDEX NO.:** A.3.a.
**CITE:** (4/6/89), Ind. App. 536 N.E.2d 302
**SUBJECT:** Pleadings -- time not of essence with child molest offenses
**HOLDING:** There are peculiar problems attending child molesting cases & youthful witnesses which necessitate such offenses to be alleged generally in terms of time & place. Here, indictment charging D with child molesting, which alleged only year of offense & county in which it occurred, stated offense with sufficient certainty. Held, conviction affirmed.

**RELATED CASES:** Cabrera, 178 N.E.3d 344 (Ind. Ct. App. 2021) (State's charging information alleged a limited time period for each of the eight charged counts spanning a total of 50 months, but none of those time periods spanned longer than one year; State crafted each time frame to correspond with the victim's progression through each grade in school, which is as definite as the State could have framed them); Garner, App., 754 N.E.2d 984, *sum*. *aff'd* 777 N.E.2d 721 (information which narrowed range of dates to five months charged D with adequate specificity to allow him to prepare defense); Buzzard, App., 712 N.E.2d 547 (5-month period & another 1-month period were held to be sufficient in allegations of child molest); Thurston, 472 N.E.2d 198 (state is only required to set forth time with such reasonable specificity as circumstances & evidence permit); McNeely, App., 529 N.E.2d 1317 (state was not required to prove specific determination of date of offense where molestation victim could not remember exact dates D molested her but remembered that offenses occurred near time she was attending Bible school); Phillips, App., 499 N.E.2d 803 (allegation of child molestation over two week period alleged held to be adequate; time was not essence of child molesting, and, thus, information stating that offense occurred between February 15, 1985 & March 1, 1985 was sufficiently particular); Hoehn, App., 472 N.E.2d 926 (no error where court *overruled* motion to dismiss molest charge; victim pinpointed time as May or June as well as he could & time was not of essence).

**TITLE:** Williams v. State
**INDEX NO.:** A.3.a.
**CITE:** (3rd Dist., 10/26/92), Ind. App. 601 N.E.2d 347
**SUBJECT:** Adequacy of Charging Information - Robbery
**HOLDING:** Charging Information which alleged that D did: "knowingly and feloniously obtain and exert unauthorized control over the property of . . . . to-wit: cash in the approximate sum of $700.00 by fear with intent to permanently deprive the owners of the use and benefit thereof ..." was not erroneous, even though it appeared to combine statutory wording of both theft and robbery statutes. Ct. found that it is not necessary for charging information to conform to exact words of robbery statute, and that there is no error unless there is reasonable doubt as to what D is charged with. Here, element of fear was contained in information, and furthermore, theft is lesser-included offense of robbery. Therefore, Ct. found there was not reasonable doubt as to whether D was being charged with robbery, Sullivan, J., DISSENTING on ground element of fear was buried within language of theft, and extremely careful reading was necessary to discern robbery charge.

# A. PLEADINGS

## A.3. Requirements of pleadings (Ind. Code 35-35-2-1)

### A.3.b. Indictment only (Ind. Code 35-34-2-12)

**TITLE:** Youngblood v. State
**INDEX NO.:** A.3.b.
**CITE:** (11/24/87), Ind., 515 N.E.2d 522
**SUBJECT:** Amended indictment - sufficient as information
**HOLDING:** Amended indictment, which lacked signature of grand jury foreperson, did not constitute fundamental error. D argues that prosecutor's failure to obtain foreperson's signature was fundamental error, *citing* Walker 241 N.E.2d 792. In Walker, D was charged with murder. After indictment was quashed by Ct., prosecutor amended it without resubmitting it to grand jury. In Walker, charge was murder & had to be made by indictment. Here, prosecutor had option of charging D by information. Although it was captioned "amended indictment," charging document was signed by prosecutor & was sufficient as information. Any shortcoming in form was waived by D, who raised it for first time in motion to correct errors. Held, no fundamental error.

# A. PLEADINGS

## A.4. Waiver of defects in pleadings

**TITLE:** Brown v. State
**INDEX NO.:** A.4.
**CITE:** (12/29/82), Ind., 442 N.E.2d 1109
**SUBJECT:** Waiver of defects in pleading
**HOLDING:** Challenge to sufficiency of indictment or information is governed by statute & must be made by motion to dismiss prior to arraignment & plea or any error is waived. Ind. Code 35-3.1-1-4(a)(9); Diggs, 364 N.E.2d 1176; Lisenko, 355 N.E.2d 841; Brown, 260 N.E.2d 876. Here, D challenges conviction for attempted robbery, arguing that charging information did not sufficiently state charge. Ct. rejects contention - D should have moved to dismiss prior to arraignment/plea. Held, any error is waived.

**RELATED CASES:** Miller, 634 N.E.2d 57 (Although information charging D with RLE was defective because it did not allege essential element of force, omission did not constitute fundamental error, as D failed to show he was misled or unable to prepare his defense. Proper procedure under Ind. Code 35-34-1-4(b)(1) to challenge deficiencies in charging information is to file motion to dismiss no later than 20 days before omnibus date.); Marshall, App., 602 N.E.2d 144 (where Information did not delete inapplicable portions of preprinted charging document, it charged D with all four varieties of public indecency and was erroneously duplicitous, but such error did not rise to level of fundamental error. D's failure to object to Information, therefore, waived error); Flores, 485 N.E.2d 890 (issue was preserved for review where information was amended on day of trial over D's broad objection, D moved for (and was denied) both continuance & mistrial & D argued issue in MCE & appellate brief; held, information defective & conviction reversed).

**TITLE:** Frink v. State
**INDEX NO.:** A.4.
**CITE:** (3/19/91), Ind., 568 N.E.2d 535
**SUBJECT:** Pleadings -- verified or sworn documents; waiver
**HOLDING:** D was not entitled to dismissal of charges based on defects in information & probable cause affidavits that did not contain notarizations required by Ind. Code 35-34-1-2 & Ind. Code 35-33- 5-2. Documents contained verifications which complied with Trial Rule 11(B). Purposes of oath requirement had been fulfilled. Moreover, if affidavit is uncontradicted, reviewing Ct. must accept its contents as true. Majko, 503 N.E.2d 898 (*overruled* on other grounds by Wright, 658 N.E.2d 563). Since D did not challenge content of probable cause affidavit, reviewing Ct. must accept them as true. Held, no error.

**RELATED CASES:** Adamovich, App., 529 N.E.2d 346 (information signed by prosecutor stating that he affirmed under penalties for perjury that representations were true was sufficient, even though information lacked evidence that it had been signed in conjunction with oath administered by person; D waived challenge to deficiency by failing to file motion to dismiss information no later than twenty days before omnibus date).

**TITLE:** Moore v. State
**INDEX NO.:** A.4.
**CITE:** (7/10/73), Ind. App. 298 N.E.2d 17
**SUBJECT:** Pleadings -- informing jury of D's aliases
**HOLDING:** It is error to inform jury (whether or not by charging document) that D has been known by aliases if such information is not necessary to identify D or to show element of crime. If alias is used unnecessarily, D must show prejudice. Here, D was not prejudiced by Tr. Ct.'s failure to strike alias from charging affidavit, where only single alias was used & testimony of D's mother not only explained use of alias but was sufficient to obviate any prejudice flowing therefrom. Prejudice resulting from unnecessary use of aliases may be cured by proper instruction. Held, conviction affirmed.

**RELATED CASES:** Wilson, 997 N.E.2d 38 (Ind. Ct. App. 2013) (by testifying about his nickname on direct, D opened door to questions about other nicknames on cross-examination).

**TITLE:** Adcock v. State
**INDEX NO.:** A.5.
**CITE:** (08-27-10), 933 N.E.2d 21 (Ind. Ct. App. 2010)
**SUBJECT:** Amendment to Repeat Sexual Offender (RSO) Notice - no error
**HOLDING:** Trial court did not err in allowing State to amend RSO Notice after opening arguments in RSO phase of trial to reflect that Defendant's prior conviction for child molesting was entered on May 16, 1986, not December 18, 1990, as the original Notice stated.

A defendant must be given a reasonable opportunity to prepare a defense against an amended charge. Baker v. State, 922 N.E.2d 723, 729 (Ind. Ct. App. 2010). Here, the amendment to the RSO Notice was not one of substance because: a) any defenses available under the original Notice were equally available under the amended Notice and b) Defendant's evidence would apply to the Notice in either form. See Fajardo v. State, 859 N.E.2d 1201, 1207 (Ind. 2007). The original Notice properly identified the relevant prior offense and gave sufficient notice of the proposed sentence enhancement. Further, the amended Notice did not change the material elements for an RSO finding, i.e., that Defendant had a prior conviction for a sex offense. Even with the incorrect conviction date, the original Notice fulfilled its purpose of advising Defendant that the State intended to have him sentenced as an RSO. Thus, Defendant failed to show that immaterial defect in original Notice substantially prejudiced his ability to prepare a defense. Held, judgment affirmed.

**TITLE:** Baker v. State
**INDEX NO.:** A.5.
**CITE:** (06-28-10), 928 N.E.2d 890 (Ind. Ct. App. 2010) *sum. aff'd*, 948 N.E.2d 1169
**SUBJECT:** Amendment of charges after mistrial
**HOLDING:** On rehearing from Court of Appeals' opinion at 922 N.E.2d 723, Court *clarified* holding about deadlines under Ind. Code 35-34-1-5 to amend charges in trial where previous trial ended in a mistrial. Court said applicable deadline for amendments is not "before the commencement of the trial that ended in a *mistrial*; rather, it is before the commencement of the trial that was held on the amended charges . . . the one from which [D] filed his appeal." Here, about two weeks after trial on two counts of child molestation ended in mistrial, State sought leave to amend charges by, inter alia, expanding the period during which alleged molestations occurred. On rehearing, D argued amendments occurred after expiration of deadlines related to the omnibus date of first trial and commencement date of first trial.

Court acknowledged that revised statute does not address amendment deadlines for cases ending in mistrial, but because key factor in deciding if D's substantial rights were violated is whether he was given a reasonable opportunity to prepare and defend against amended charges, Hurst v. State, 890 N.E.2d , 88, 95 (Ind. Ct. App. 2008), and because D's second trial occurred more than twelve months after Tr. Ct. granted State's request to amend charges, setting deadlines in second trial according to date second trial began did not undermine policy of ensuring amendments did prejudice D's ability to prepare for trial. Held, rehearing granted for sole purpose of clarification. Judge Riley voted to deny rehearing.

**RELATED CASES:** Black, 79 N.E.3d 965 (Ind. Ct. App. 2017) (Ct. rejected D's argument that Tr. Ct.'s approval of amendments after mistrial was fundamental error, even though during second trial D was tried on different, more severe charges than the charges in his original trial).

**TITLE:** Barnett v. State
**INDEX NO.:** A.5.
**CITE:** (8/25/17), 83 N.E.3d 93 (Ind. Ct. App. 2017)
**SUBJECT:** Belated amendment of charges did not prejudice D's substantial rights
**HOLDING:** State's second amendment of charging information, which added two new charges-- Class A felony burglary and Class D felony State's second amendment of charging information, which added two new charges-- Class A felony burglary and Class D felony intimidation-- was not impermissibly late under Ind. Code § 35-34-1-5. Thus, dismissal of charges added five weeks after omnibus date was not required. Defendant was initially charged with Class C felony battery, and argued that the version of Ind. Code § 35-34-1-5 in effect at the time of D's trial categorically prohibited any amendment as to matters of substance unless made thirty days before the omnibus date for felonies. See Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). But the Legislature amended the statute in response to Fajardo by requiring defendants to show prejudice from late substantive amendments. Under the amended statute, which applies retroactively to D's 2003 charging information, the State had discretion to substantively amend charges at any time before the commencement of trial so long as the amendment did not prejudice D's substantial rights.

Here, D's defense to battery-- that complaining witness's injury was caused by tripping over her dog when she answered the door to let D in--was equally applicable as a defense to the later-added charges of burglary and intimidation. D had sufficient notice of the new charges and was granted two continuances with more than two months to prepare his case, which mostly hinged on the jury's determination as to the credibility of the witnesses. Held, judgment affirmed.

**TITLE:** Bright v. State

**INDEX NO.:** A.5.

**CITE:** (3/15/23), Ind. Ct. App., 203 N.E.3d 1875

**SUBJECT:** Amendment to auto theft charge on day of trial did not prejudice Defendant

**HOLDING:** In burglary and auto theft prosecution, trial court did not abuse its discretion by permitting the State to amend its charging information on the day of the trial. The day after learning of his father's death, Defendant kicked in the door of his ex-wife's house, intending to take possession of his father's truck, which had been on the ex-wife's property. Defendant took the keys to the truck and a cellphone that belonged to his ex-wife from inside the house. The State charged Defendant with burglary and auto theft, alleging that he knowingly or intentionally exerted unauthorized control over the truck that allegedly belonged to his ex-wife. On the day of trial, the State successfully moved to amend the auto theft count to allege the truck belonged to his ex-wife and/or the ëstate of his father. Following Defendant's conviction, the Court of Appeals rejected his argument regarding the last-minute amendment, concluding it had no effect on Defendant's ability to present evidence that he, in fact, owned or had authorized control over the truck. Thus, the amendment to the charging information did not prejudice his substantial rights.

The Court also rejected Defendant's sufficiency challenge to his burglary conviction, noting the trial court had no obligation to believe his testimony that he did not intend to steal the truck. Defendant "did not avail himself of any legal process but instead took matters into his own hands by forcing entry into [ex-wife's] home without any established right to the truck." The trial court could reasonably infer from the circumstantial evidence that Defendant intended to steal the truck.

**TITLE:** Brooks v. State
**INDEX NO.:** A.5.
**CITE:** (8/18/88), Ind., 526 N.E.2d 1171
**SUBJECT:** Amendment - instruction on offense not charged or included
**HOLDING:** Tr. Ct. erred in submitting D's case to jury on offense of child molest (fondling), where this offense was neither charged nor included in charged crime. D was charged with child molest (sexual deviate conduct). At close of State's case, Tr. Ct. granted D judgment on evidence. However, Tr. Ct. indicated it would submit case to jury on charge of fondling & did so without objection from D. Jury found D guilty of this offense. For first time in appellate brief, D alleged Tr. Ct. committed fundamental error in submitting case to jury upon crime with which D was not charged. Ct. of Appeals, 3d Dist., affirmed. Brooks, 518 N.E.2d 1109. Ind. S. Ct. grants transfer. Child molest (sexual deviate conduct) does not include child molest (fondling). Buck, 453 N.E.2d 993. Tr. Ct. submitted case to jury on latter offense although it was not charged originally or by amendment. Tr. Ct. has no jurisdiction to bring criminal charge. Walker, 241 N.E.2d 792. Neither can it amend charge on its own motion. Role of Tr. Ct. must be restrained to proper sphere. D stands convicted of crime with which he was not charged. This is fundamental error. Conviction is nullity. Held, reversed.

**TITLE:** Campbell v. State

**INDEX NO.:** A.5.

**CITE:** (12-21-20), Ind. Ct. App. 161 N.E.3d 371

**SUBJECT:** Belated habitual offender charge requires State to affirmatively demonstrate good cause - ongoing plea negotiations

**HOLDING:** Trial court abused its discretion in allowing the belated filing of a habitual offender enhancement one business day before trial without requiring or making any finding of good cause for the tardiness.

Defendant was charged with unlawful possession of a firearm by a serious violent felon (SVF), auto theft, three counts of resisting law enforcement, possession of marijuana and two counts of leaving the scene of an accident. In May, the State filed a Notice of Intent to File Habitual Offender Enhancement, notifying Defendant it intended to file a habitual offender sentencing enhancement if good faith plea negotiations were unsuccessful. Nine months later, on the eve of trial, the State filed the Habitual Offender Enhancement. The State argued the belated filing was due to ongoing plea negotiations and that it waited until the last minute to file the Habitual Offender Enhancement to give Defendant the opportunity to accept a plea offer. The trial court found good cause and allowed for the late filing. Trial counsel objected and moved for a continuance, which was granted. In finding an abuse of discretion in allowing the late habitual offender enhancement, the Court of Appeals found the State's tendering of the same plea offer several times and then asking Defendant if he wanted to make a counteroffer is not a bona fide ongoing plea negotiation. Judge Brown, concurring in part and dissenting on this issue, found that because the intent to file the habitual offender enhancement was filed nine months prior to the charge being filed and then the trial did not occur until four months after the charge was filed, the trial court did not abuse its discretion in allowing the State to file the enhancement.

The Court also found sufficient evidence to support the charge of unlawful possession of a firearm by a SVF because the State was required to prove only that Defendant knowingly possessed a firearm after being convicted of a serious violent felony and did not need to prove the Defendant knew he was a serious violent felon. In Rehaif v. United States, 139 S.Ct. 2191(2019), the U.S. Supreme Court held that under two federal statutes which prohibit an individual from possessing firearms, the government had to prove the defendant knew he belonged to a category that barred him from possessing a firearm and that he knew he possessed a firearm. Distinguishing Rehaif, the Court of Appeals found that Indiana's statute SVF statute is different from the federal statute and does not require the State to prove that Defendant knew he was a serious violent felon when he unlawfully possessed a firearm having a prior conviction for a serious violent felony.

**TITLE:** Davis v. State
**INDEX NO.:** A.5.
**CITE:** (1st Dist., 7-23-99), Ind. App. 714 N.E.2d 717
**SUBJECT:** Amendment of information - no error
**HOLDING:** Tr. Ct. did not err in allowing State to amend information to add additional charges six months before trial. Some cases have held that no amendment of information may be allowed which changes theory of prosecution or identity of offense after 30 days prior to omnibus date. Wright, 593 N.E.2d 1192; Hart, App., 671 N.E.2d 420. However, both Wright & Hart upheld amendment of charges because substantial rights of D had not been prejudiced. If amendment is of substance, or prejudicial to D even as to form, it is impermissible under Ind. Code 35-34-1-5. Haak, 695 N.E.2d 944. If defense under original information would be equally available after amendment is made & accused's evidence would be equally applicable to information in one form as in other, amendment is not of substance & does not prejudice substantial rights of D. Id. Here, additional charges all arose from same occurrence, & all evidence pertaining thereto would have been admissible under original information. Defenses were same, & D did not show how his substantial rights were prejudiced by amendment. Held, judgment affirmed.

**RELATED CASES:** Erkins, 13 N.E.3d 400 (Ind. 2014) (amendment to information on second day of trial to change identity of co-conspirator who conducted surveillance was one of form that did not prejudice Ds' substantial rights; identity of co-conspirator who performed the overt act is not essential to the charge); Sides, 693 N.E.2d 1310 (ultimately, question is whether D had reasonable opportunity to prepare for & defend against charges; because D had reasonable opportunity to prepare for & defend against amended charges, he failed to demonstrate prejudice to his substantial rights resulting from amendment of information on day before trial); Townsend, App., 753 N.E.2d 88.

**TITLE:** Davis v. State
**INDEX NO.:** A.5.
**CITE:** (6/15/89), Ind., 539 N.E.2d 929
**SUBJECT:** Amendment - instruction on new theory of offense
**HOLDING:** Tr. Ct. did not err in giving instruction concerning term "deadly weapon" over D's objection. D was charged with Burglary, Class B. Information specifically alleged that D broke & entered dwelling with intent to commit felony battery. During course of trial, Tr. Ct. allowed state to change theory of offense from relying solely on invasion of dwelling to support Class B burglary, to include as well basis that D was armed with deadly weapon. D argues that this violates his constitutional right to notice of charges against him. In order for battery to be felony, it must result in serious bodily injury or be committed by means of deadly weapon. Ind. Code 35-42-2-1. D was fully advised that state would attempt to prove both that he entered dwelling & that he did so with intent to commit felony battery. Tr. Ct. did not err in allowing state to offer evidence that D used deadly weapon, & in instructing jury as to definition of that term. DeBruler, J., DISSENTS.

**TITLE:** Davis v. State
**INDEX NO.:** A.5.
**CITE:** (3d Dist. 10/29/91), Ind. App. 580 N.E.2d 326
**SUBJECT:** Amendment of Information
**HOLDING:** It was not error for Tr. Ct. without holding hearing, to allow state to amend information within 30 days of omnibus date, to add three additional robbery counts. State filed amended information 29 days before omnibus date, & 2 days after trial commenced, D filed motion to dismiss amended information because of failure to provide for proper notice & hearing. Ct. found amendment to be substantive but proper, *citing* Guillion, 546 N.E.2d 121, & Todd, 566 N.E.2d 67, & held that requirement that D have "opportunity to be heard" means only that he be given adequate time to request hearing & object, not that Ct. must hold hearing whenever state seeks amendment closer than 30 days to omnibus date. Because D had notice & nearly five months to object, opportunity for hearing requirement was satisfied. Held, conviction affirmed.

**TITLE:** Fajardo v. State

**INDEX NO:** A.5.

**CITE:** (01-16-07), Ind., 859 N.E.2d 1201

**SUBJECT:** Amendment to Information - material amendment cannot be made after statutory deadline

**HOLDING:** Tr. Ct. erroneously permitted State to amend an information seven days after omnibus date. The requirement that an amendment not prejudice the substantial rights of the D applies only to amendments of certain immaterial defects under Ind. Code 35-34-1-5(a)(9), & to amendments related to defect, imperfection, or omission in form under Ind. Code 35-34-1-5(c). But as to amendments relating to substance, the only prerequisite is that it must be filed the specified number of days before the omnibus date. Ind. Code 35-34-1-5(b). Thus, the first step in evaluating the permissibility of amending an information is to determine whether the amendment is addressed to a matter of substance or one of form or immaterial defect. An amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, & (b) the accused's evidence would apply equally to the information in either form. & an amendment is one of substance only if it is essential to making a valid charge of the crime.

Here, the amendment added a charge of Child Molest as a Class A felony to an existing charge of Class C felony Child Molest. Although both charges involved the same alleged victim, the differences between the two are the date of the offense & the accused's conduct, age, & intent. D's evidence addressed to disputing the occurrence of the original charge would not be "equally applicable" to dispute the date nor the specific conduct alleged in the additional charge sought to be added by the amendment. Because the amendment charges the commission of a separate crime, it also is unquestionably essential to making a valid charge of the crime, & thus, it is not disqualified from being an amendment to a matter of substance. Tr. Ct. erred in allowing State to add charge seven days after omnibus date. Held, transfer granted, judgment affirmed as to Child Molest as a Class C felony & reversed as to Child Molest as Class A felony; because Tr. Ct.'s sentencing determination for the Class C felony may have been substantially affected by the sentence determination for the Class A felony, remanded for new sentencing.

**NOTE:** After this decision, Legislature amended statute to permit charging information to be amended at any time prior to trial as to either form or substance, so long as amendment does not prejudice substantial rights of D.

**NOTE:** Ct. finds that the analysis in many Indiana S. Ct. cases, including Kindred, 540 N.E.2d 1161 (Ind. 1989), Wright, 593 N.E.2d 1192 (Ind. 1992), Haymaker, 528 N.E.2d 83 (Ind. 1988), Hegg, 514 N.E.2d 1061 (Ind. 1987), Brown, 728 N.E.2d 876 (Ind. 2000), Sides, 693 N.E.2d 1310 (Ind. 1998), Chambers, 540 N.E.2d 600 (Ind. 1989), Cornett, 536 N.E.2d 501 (Ind. 1989), Brooks, 497 N.E.2d 210 (Ind. 1986), Graves, 496 N.E.2d 383 (Ind. 1986), & many other listed appellate Ct. cases does not comply with Ind. Code 35-34-1-5.

**RELATED CASES:** Shaw, 82 N.E.2d 886 (Ind. Ct. App. 2017) (Tr. Ct. didn't abuse discretion in letting State amend charge from aggravated battery to murder 17 months after omnibus date; D had adequate notice, an opportunity to challenge amendment, and adequate time to prepare for trial), Blythe, 14 N.E.3d 823 (Ind. Ct. App. 2014) (amending charge during trial from claiming D uttered forged election ballots to making or uttering forged ballots did not prejudice D's substantial rights as amendment did not undermine defense D had been using throughout trial); Singleton, App., 889 N.E.2d 35 (trial counsel did not perform deficiently in failing to object to late addition of habitual offender charge); Fields, App., 888 N.E.2d 304 (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); Brown, 912 N.E.2d 881(Ind. Ct. App. 2009);Ramon, App., 888 N.E.2d 234 (application of legislative response to Fajardo did not violate ex post facto; see full review at V.3); Leatherwood, App., 880 N.E.2d 315 (Fajardo does not apply retroactively to cases on post-conviction relief); Fowler, App., 878 N.E.2d 889 (Tr. Ct. erred in permitting amendment to charging information to add battery & auto theft counts; judicial officer at initial hearing should have set omnibus date); O'Grady, App., 876 N.E.2d 763 (amendment to inherently lesser-included offense was not an amendment of substance & thus was proper after D moved for directed verdict at close of State's case); Fuller, App., 875 N.E.2d 326 (under version of Ind. Code 35-34-1-5 analyzed under Fajardo, D does not have to move for a continuance to preserve late amendment for appeal); Absher, App., 866 N.E.2d 350 (although Tr. Ct. erred by allowing addition of two charges after omnibus date, D failed to object & failed to prove error was fundamental); Jones, App., 863 N.E.2d 333 (change from possession of cocaine to possession of heroin the week prior to trial was one of form that did not prejudice D's substantial rights).

**TITLE:** Fuller v. State

**INDEX NO.:** A.5.

**CITE:** (4th Dist.; 10-23-07), Ind. App. 875 N.E.2d 326

**SUBJECT:** Amendment to information- no need to move to continue to preserve Fajardo issue

**HOLDING:** Tr. Ct. erred by allowing State to untimely amend the charging information to include two new charges of stalking. The version of Ind. Code 35-34-1-5 in effect at the time of D's trial categorically prohibited "any amendment as to matters of substance unless made thirty days before the omnibus date for felonies & fifteen days before the omnibus date for misdemeanors." Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). Here, the addition of the stalking charges were of substance & untimely. However, *citing* to Wright v. State, 690 N.E.2d 1098 (Ind. 1997), the State argued that D waived the issue of the untimely charges by failing to move for a continuance. The Fajardo Ct. made it clear that alleged prejudice to the D simply is not part of the equation when determining the permissibility of an amendment of substance under the previous version of Ind. Code 35-34-1-5. Although the Fajardo opinion did not specifically *cite* Wright, it is precisely the type of case Fajardo intended to *overrule*, at least as to its analysis if not its result, because it failed to examine whether the amendment at issue was one of form or substance. Thus, the objection, without a motion to continue, to the late filing of new charges preserved the issue for appeal. Held, judgment affirmed in part & reversed in part, & remanded with instructions to vacate the Class C felony stalking conviction.

**NOTE:** The Legislature amended Ind. Code 35-34-1-5 effective May 8, 2007. Under the new amendment, a D must show prejudice by the late substantive amendment, & thus, may still need to move to continue to preserve the issue for appeal.

**TITLE:** Gibbs v. State
**INDEX NO.:** A.5.
**CITE:** (06-30-11), 952 N.E.2d 214 (Ind. Ct. App. 2011)
**SUBJECT:** Amendment to charging information - no error
**HOLDING:** Substantive amendments to charging information are only allowed before the commencement of trial, while an amendment to the form of an information is allowed at any time as long as it does not prejudice the substantial rights of the D. See Ind. Code 35-34-1-5(b) and (c). Here, D was charged with three counts of Class B felony arson of a multi-family residence, with two of the charges specifically naming Ds' neighbors as having their residences damaged. He allegedly started the fire in his own apartment. The other charge named a business that had its property damaged. State made amendments to two of the counts before the trial started and read the amended charges to the jury during voir dire. Then, State moved to amend the information to omit the neighbors' names. Court held that amendment was substantive because the changing of names of parties in the information made it so D's defense would not equally apply to the information after the amendment. See Fields v. State, 888 N.E.2d 304 (Ind. Ct. App. 2008). Tr. Ct. erred in allowing the State to amend the charging information after it read the original charges to the jury because Ind. Code 35-34-1-5(b) states that substantive amendments must be made prior to the commencement of trial, which begins with voir dire. Further, D did not waive his claim by failing to move for a continuance after Tr. Ct. allowed the amendment over his objection. Held, conviction reversed and remanded for new trial.

**RELATED CASES:** Nunley, 995 N.E.2d 718 (Ind. Ct. App. 2013), *reh'g* granted 4 N.E.3d 669, (amendment offered 1 day after jury empaneled and that changed predicate offenses for HO charge 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 D's substantial rights, and 3) it did not qualify under section of statute allowing amendments after commencement of trial because it was not merely an amendment in form).

**TITLE:** Gibson v. State
**INDEX NO.:** A.5.
**CITE:** (10/2/2018), 111 N.E.3d 247 (Ind. Ct. App. 2018)
**SUBJECT:** Unamended charges remain "live" when information amended a second time
**HOLDING:** Where 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. Here, six months after the State charged D with three counts of robbery, it amended the information to add a fourth count of conspiracy to commit robbery. A month later, the State moved to amend the three robbery charges to allege accomplice liability but did not dismiss conspiracy charge. The amended information only superseded the previous information as to the amended counts of robbery. Court found nothing that prohibits what the State did here. D was clearly notified of conspiracy to commit robbery charge and prepared and executed a defense to that charge at trial. Entry of judgment of conviction on that charge was not error, let alone fundamental error. Held, judgment affirmed.

**TITLE:** Gillie v. State
**INDEX NO.:** A.5.
**CITE:** (8/21/87), Ind., 512 N.E.2d 145
**SUBJECT:** Pleadings -- information filed after remand
**HOLDING:** Informations recharging D with robbery & confinement after reversal of those convictions on appeal & remand were not amendments to original informations, but were initial charges of new proceedings. Thus, charging informations were not affected by statutes limiting amendments to information. Held, conviction affirmed.

**TITLE:** Greer v. State
**INDEX NO.:** A.5.
**CITE:** (9/26/89), Ind., 543 N.E.2d 1124
**SUBJECT:** Pleadings -- failure to list witnesses in amended information
**HOLDING:** State's failure to list names of its witnesses in its amended information, as required by Ind. Code 35-34-1-2(c), did not require dismissal of charges against D, where D was able to obtain names & State had difficulty locating some witnesses. Purpose of statute requiring witnesses to be listed in information is to inform D of witnesses against him or her & serves as method of discovery. Effect of not complying with statute is to prevent State from obtaining continuance due to absence of unlisted witnesses. Held, conviction affirmed.

**TITLE:** Harris v. State

**INDEX NO.:** A.5.

**CITE:** (8/13/2013), 992 N.E.2d 887 *reh'g* granted on other grounds 9 N.E.3d 679 (Ind. Ct. App. 2013)

**SUBJECT:** Statute of limitations precluded untimely amendment to charging information

**HOLDING:** After jury acquitted D of rape and hung on class C felony sexual misconduct with a minor charge, statute of limitations barred State from amending the sexual misconduct charge by adding deviate sexual conduct as alternative basis for charge. Alleged crime occurred on December 25, 2005, and class C felony has a period of limitations of five years. See Ind. Code 35-41-4-2(a)(1). After first trial, the State moved to amend its remaining count against D by adding "or deviate sexual conduct" on September 20, 2011, nearly a year after the period of limitations for the alleged deviate sexual conduct expired.

Proposed amendment constitutes a matter of substance and includes a new and additional offense. Just as the State would be barred from bringing a new or refiled charge of deviate sexual conduct, it is barred from bringing the charge through an amendment. The statute of limitations cannot be circumvented because of the procedural availability of amending informations or the happenstance of a mistrial. Held, denial of State's motion to amend information affirmed.

**TITLE:** Haymaker v. State

**INDEX NO.:** A.5.

**CITE:** (9/22/88), Ind., 528 N.E.2d 83

**SUBJECT:** Amendment to habitual offender (HO) pleadings -- notice & opportunity to be heard

**HOLDING:** State properly allowed to amend HO information to reflect modification of prior burglary conviction, absent showing of prejudice. Cause number of prior conviction remained unchanged, so D could not allege that amendment to theft conviction was surprise for which he could not have prepared or that identity of convictions used for HO purposes were unknown to him. Held, judgment affirmed.

**RELATED CASES:** Sides, 693 N.E.2d 131 (amendment to HO after closing no surprise because D argued error in HO during closing argument); Dixon, 524 N.E.2d 2 (HO count does not allege separate crime or change theory of case & is therefore permissible amendment to information after arraignment & plea on principal offense so long as D has adequate time to prepare defense); Denton, 496 N.E.2d 576 (Tr. Ct. granted State's oral motion to file amended HO count; amended affidavit filed under same cause number as original proceeding; 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; D not prejudiced by amendment).

**TITLE:** Howard v. State

**INDEX NO.:** A.5.

**CITE:** (4/30/2019), Ind. App., 122 N.E.3d 1007

**SUBJECT:** Abuse of discretion to allow State's belated amendment to charging information

**HOLDING:** Trial court abused its discretion in permitting the State to amend charging information without giving defense reasonable time to develop a defense against new charges. Defendant was charged with thirteen counts, including drug possession and dealing, neglect of a dependent and possession of a firearm. More than nineteen months after filing the original counts, sixteen months after the omnibus date, and just two days before the commencement of a bench trial, the State moved to amend the charging information to allege four new counts of neglect of a dependent. Each of the amended counts was premised on Defendant having allegedly endangered the dependent's life or health by having left firearms unsecured that could be accessed by the dependent child. The amended counts were not premised on the same underlying facts as the original counts, which related to Defendant's drug possession and dealing rather than possession of a gun. Court noted that nothing about the facts underlying the original counts would have impelled a reasonable defense attorney to investigate further the facts upon which the amended counts were premised. The late amendment to the charges substantially affected the defense by not allowing reasonable time to engage in pre-trial investigation to effectively prepare for cross-examination of State's witness. Held, judgment affirmed in part and reversed in part; Altice, J., dissenting, believes trial court did not abuse its discretion in allowing amendment to charging information because defense could have anticipated the possible amended counts.

**RELATED CASES:** Hobbs v. State, 160 N.E.3d 543 (Ind. Ct. App. 2020) (in child molesting cases, even assuming the defense at trial remains the same, amendments to the charging information which add entirely new charges a mere two weeks before trial constitutes insufficient notice; see full review, this section).

**TITLE:** Hudson v. State
**INDEX NO.:** A.5.
**CITE:** (4th Dist. 4/26/84), Ind. App. 462 N.E.2d 1077
**SUBJECT:** Amendment of information - notice & opportunity to be heard
**HOLDING:** Tr. Ct. erred in failing to accord D adequate notice & right to be heard before amendment of information, as required by Ind. Code 35-34-1-5 (1983 amendment), but error is not reversible because D was not prejudiced by change in form rather than substance. Here, D was charged with sale of "Preluding." State moved to amend generic name "Preluding" to "phenmetrazine." Essence of facts/offense did not change, drug remained Schedule II drug. D did not request continuance & shows no prejudice. Held, conviction affirmed.

**RELATED CASES:** Nunley, 995 N.E.2d 718 (Ind. Ct. App. 2013) affirmed, 4 N.E.3d 669 (amendment offered 1 day after jury empaneled and that changed predicate offenses for HO charge 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 D's substantial rights, and 3) it did not qualify under section of statute allowing amendments after commencement of trial because it was not merely an amendment in form); Flores, 485 N.E.2d 890 (amendment of robbery informations on first day of trial violated Ind. Code 35-34-1-5 (amendments required 30 days before omnibus) & Ind. Const. Art. 1, §12 & 13 because references to "wallet" & "jewelry box" were deleted & replaced with "property;" held, robbery convictions reversed); Radford,468 N.E.2d 219 (no error in allowing state to substitute name for "confidential informant" on day of trial; D did not request continuance & had sought name through discovery; Ct. finds no prejudice).

**TITLE:** Lacy v. State
**INDEX NO.:** A.5.
**CITE:** (8/18/82), Ind., 438 N.E.2d 968
**SUBJECT:** Amendments to pleadings - typos & citation errors
**HOLDING:** An information may be amended if the defect is not material & the amendment" does not prejudice the substantial rights" of D. "A defect is material only if the . . . amendment affects the availability of a defense or the applicability of evidence which existed under the original information." Humphrey, 377 N.E.2d 631; Highsaw, 381 N.E.2d 470. Pounds, 443 N.E.2d 1193 (initial information stated gun used during rape; typo in second changed weapon to knife; state allowed to amend at close of its evidence). Here, amendment in date of offense (robbery) from 8/7/80 to 8/7/78 not material where D did not interpose alibi defense. Further, record indicates D was not misled by initial error. Held, no error.

**RELATED CASES:** Whitehair, App., 654 N.E.2d 296 (no error in amendment to correct typographical error in information); Didio, 471 N.E.2d 1117 (amendment of statutory citation upheld); Lahrman, 465 N.E.2d 1162; Belcher, 453 N.E.2d 214 (amendment during trial substituting name of owner was one of form where D's defense was that property was abandoned); Equia, App., 468 N.E.2d 559 (Indict 161 (4); amended spelling of diazepam proper under Ind. Code 35-34-1-5); Hoy, App., 448 N.E.2d 31 (no error in amendment to correct erroneous statutory citation).

**TITLE:** Murphy v. State
**INDEX NO.:** A.5.
**CITE:** (11/12/86), Ind., 499 N.E.2d 1077
**SUBJECT:** Pleadings -- amendments to add habitual offender (HO) counts
**HOLDING:** State implicitly moved to add HO count when it filed amended information, which was not effective until Tr. Ct. accepted it; therefore, fact that state did not seek leave of court to amend information to add HO count did not violate Ind. Code 35-34-1-5(c), which provides that upon motion of prosecutor, court may permit amendment to indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice substantial rights of accused. Held, conviction affirmed.

**NOTE**: Ind. Code 35-34-1-5 now requires filing of HO charge to be made not later than ten days after omnibus date unless Ct. finds good cause for later filing.

**RELATED CASES:** Cornett, 536 N.E.2d 501 (correction, by amendment, of error as to location of prior conviction in information alleging HO status not prejudicial to D in that amendment did not change theory of prosecution or character of offense); Rainey, App., 557 N.E.2d 1071, *overruled* on other grounds, 698 N.E.2d 732 (D chose to proceed with trial rather than availing himself of continuance after amendment to information was allowed in order to change cause numbers of alleged felony convictions listed on HO information; D waived claim that he did not have time to prepare); Simmons, App., 455 N.E.2d 1143 (no error where two & one half years after escape charge was filed, information charging D with HO count was filed); Hegg, 514 N.E.2d 1061 (no error in allowing State to amend information during trial to allege D was HO, where full hearing was conducted at which D received his opportunity to be heard; motion to amend filed nearly month before hearing & trial & D acknowledged that if amendment was granted no continuance would be needed).

**TITLE:** Owens v. State
**INDEX NO.:** A.5.
**CITE:** (1st Dist., 2-25-05), Ind. App. 822 N.E.2d 1075
**SUBJECT:** Vindictive prosecution - additional charges after successful appeal
**HOLDING:** Tr. Ct. erred in allowing State to file an additional charge following D's first successful appeal. Due Process clauses of Article I, section 12 of Indiana Constitution & Fourteenth Amendment to U.S. Constitution prohibit prosecutorial vindictiveness. Blackledge v. Perry, 417 U.S. 21 (1974); Warner v. State, 773 N.E.2d 239 (Ind. 2002). Prosecutorial vindictiveness is presumed where more serious charges are brought against a D after he has successfully exercised his rights to an appeal or moved for a mistrial. Warner. The rationale for protecting a D's right to a fair trial, which justifies presumption of prosecutorial vindictiveness, is even more compelling in case of a successful appeal than in the case of a successful motion for mistrial. In order to avoid chilling the exercise of the right to an appeal, Court will apply the Warner presumption in case of a successful appeal by a criminal D that results in a remand to Tr. Ct. for further proceedings. Here, State conceded that there was no new evidence or information discovered that would warrant filing of additional charges. Further, deputy prosecutor admitted that additional charge was brought against D because he would not accept State's plea bargain. Held, judgment reversed & remanded with instructions to dismiss added charge.

**RELATED CASES:** Schiro, App., 888 N.E.2d 828 (no prosecutorial vindictiveness where, after successful appeal of death sentence, newly filed charges stemmed from unrelated conduct).

**TITLE:** Owens v. State

**INDEX NO.:** A.5.

**CITE:** (3-28-23), Ind. Ct. App., 206 N.E.3d 1187

**SUBJECT:** Habitual offender amendment must be filed no less than 30 days before beginning of trial as opposed to particular trial setting

**HOLDING:** Indiana Code § 35-34-1-5(e) requires that a charging amendment for habitual offender enhancement must be made at least 30 days "before the commencement of trial," whenever that may occur. Here, a habitual offender enhancement that was filed 21 days before a trial that was eventually rescheduled for 18 months later was not untimely, thus the State was not required to show good cause for its allegedly belated filing of the amendment. Relying on plain language of the statute, the Court of Appeals rejected Defendant's argument that the phrase "before the commencement of trial" meant the trial date on the books when the habitual offender enhancement was filed. If the legislature intended the deadline to be measured from the "trial date" in place when the State files its amendment, it would have chosen that language. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the habitual offender enhancement.

**TITLE:** Rainey v. State
**INDEX NO.:** A.5.
**CITE:** (8/6/90), Ind. App., 557 N.E.2d 1071, *overruled* on other grounds, 698 N.E.2d 732
**SUBJECT:** Pleadings -- cannot amend theory of case or identity of offense charged
**HOLDING:** Any immaterial defect which does not prejudice substantial rights of D can be amended. However, information may not be amended to change theory of case or identity of offense charged. If defense under original information would be equally available after amendment is made & accused's evidence would be equally applicable to information in one form as in another, amendment is one of form & not substance. Held, amendment is of substance only if it is essential to making valid charge of crime.

**RELATED CASES:** Litel, 527 N.E.2d 1114 (State's amendment of information on morning of trial to allege that crime occurred on August 20 rather than August 18 as originally charged was of no consequence in battery, robbery, & confinement prosecution because record revealed that prosecutor filed amendment 30 days before omnibus date which reflected August 20 date; prosecutor may amend 30 days before omnibus date even on matters of substance); Utterback, 310 N.E.2d 552 (preferred practice is for State to file amended affidavit as early as possible); Wright, 593 N.E.2d 1192 (allowing state to amend count charging D 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 D); McCloud, App., 452 N.E.2d 1053 (no prejudice where amendment is made during trial, where original indictment alleged conspiracy took place between 10/81 & 12/81, & amendment provided that applicable dates were 10/81 to 12/82, & D's vigorous defense to indictment was based upon assumption later dates were correct).

**TITLE:** Stanley v. State
**INDEX NO.:** A.5.
**CITE:** (12/15/88), Ind., 531 N.E.2d 484
**SUBJECT:** Habitual - amendment during trial
**HOLDING:** Addition of habitual count during trial was not error. D alleges he was not given due process notice that he was charged as HO. D was charged with burglary, & during trial, information containing HO count was filed. D did not object. General rule is that information may be amended at any time before, during, or after trial as long as amendment does not prejudice substantial rights of accused. Hegg, 514 N.E.2d 1061; Cheney, 486 N.E.2d 508. Held, filing of habitual count during trial did not deny D due process. Dickson, J., DISSENTS.

**TITLE:** Stanger v. State
**INDEX NO.:** A.5.
**CITE:** (11/6/89), Ind. App., 545 N.E.2d 1105
**SUBJECT:** Amendments to pleadings -- continuance to prepare
**HOLDING:** Upon permitting amendment of charging information, Tr. Ct. shall, upon D's motion, order any continuance which may be necessary to accord D adequate opportunity to prepare defense. Ind. Code 35-34-1-5(d). Here, Tr. Ct. granted state's motion to amend information from child molesting as class C felony to class B felony, alleging that D performed deviate sexual conduct. State also added third count involving separate victim. Tr. Ct. failed to afford D continuance & matter proceeded to trial five days later. This length of time was not so inadequate under circumstances of case as to preclude D from preparing adequate defense. It is incumbent upon movant to demonstrate to satisfaction of tr. judge that continuance is necessary. Held, conviction affirmed.

**RELATED CASES:** Phillips, App., 386 N.E.2d 704 (adequacy of preparation time must be determined on case by case basis by considering totality of circumstances, including complexity of issues, necessity for pretrial motions, necessity to interview witnesses, & whether D is available to assist in preparation of defense); Riley, 506 N.E.2d 476 (failure of D to avail himself of 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); Todd, 566 N.E.2d 67 (although State's amendment of information on morning of trial changed theory on which case would be prosecuted, court, on its own motion, continued trial; D's substantial rights were not prejudiced where defense counsel declined continuance but Tr. Ct. on its own motion continued tr. more than five weeks); Davis, 487 N.E.2d 817 (fundamental error, which would relieve appellant from burden of showing prejudice on appeal, occurs only when it has been established that adequate time was not afforded).

**TITLE:** State v. Gullion
**INDEX NO.:** A.5.
**CITE:** (4th Dist. 11/20/89), Ind. App., 546 N.E.2d 121
**SUBJECT:** Amendment to pleadings - new count
**HOLDING:** Ind. Code 35-34-1-5(D) permits Ct. to allow state to substantively amend information within 30 days of omnibus date. D was charged in 11/86 with involuntary manslaughter, neglect of dependent causing serious bodily injury, & battery causing serious bodily injury in connection with death of his son. In 1/89, state amended information by adding count alleging that D knowingly killed son by pushing his head down in mattress & suffocating him. Prior amendment statute contained subsection E, providing that amendment which changed theory of prosecution or identity of offense charged was impermissible, & that amendment to cure failure to state offense or legal insufficiency of factual allegations was not allowed after arraignment. In 1981, Ind. S. Ct. commented that it did not understand why state could not make such amendments if they did not prejudice substantial rights of accused. Trotter, 429 N.E.2d 637. During next session, legislature repealed subsection E. In light of this, Ct. App. determines that legislative intent was to allow substantive amendment within 30 days of omnibus date, provided that D is given notice & opportunity to be heard, D's substantial rights are not prejudiced, & Tr. Ct. affords D adequate opportunity to prepare defense. Requiring state to dismiss & refile would merely exalt form over substance, & may well result in hardship for D. Held, denial of motion to amend reversed.

**RELATED CASES:** Rita, App., 663 N.E.2d 1201 (even assuming State's amendment was substantive & changed theory of case, D was afforded adequate notice of amendment & his substantial rights were not prejudiced); Todd, 566 N.E.2d 67 (state allowed to amend substance of information on morning of trial because Ct. continued trial & D was not prejudiced); Gilley, 560 N.E.2d 522, *overruled* in part on other grounds by Watts v. State, 885 N.E.2d 1228 (Ind. 2008) (amendment to information adding voluntary manslaughter to charge of murder not material change required to be made more than 30 days prior to omnibus date; D could not have been convicted and sentenced for both murder and included offense of voluntary manslaughter arising from same conduct).

**TITLE:** State v. Hicks
**INDEX NO.:** A.5.
**CITE:** (9/30/83), Ind., 453 N.E.2d 1014
**SUBJECT:** Amendment to pleadings -- habitual offender (HO); procedure
**HOLDING:** Amendment of information to add HO allegation after D's guilty plea to underlying offenses, but prior to sentence would not have prejudiced substantial right of D. HO allegation is not separate crime but merely vehicle for sentence enhancement. Held, order granting D's motion to dismiss HO count of criminal information reversed.

**NOTE**: Ind. Code 35-34-1-5 now requires filing of HO charge to be made not later than ten days after omnibus date, unless Ct. finds good cause for later filing.

**RELATED CASES:** Miller, 563 N.E.2d 578 (filing of HO count on trial date did not prejudice D, despite claim that State's proof thereof was not disclosed during discovery & resultant surprise could not have been cured by continuance; Tr. Ct. took judicial notice of record, & D's prior testimony at bond reduction hearing acknowledging prior convictions alleged by State; thus, D could not have been unfamiliar with prior convictions at HO phase); Collier, 572 N.E.2d 1299 (for HO purposes, State may plead & prove more than two prior unrelated felony convictions, & additional convictions are merely harmless surplusage).

**TITLE:** Taylor v. State
**INDEX NO.:** A.5.
**CITE:** (5th Dist., 05-26-93), Ind. App., 614 N.E.2d 944
**SUBJECT:** Amendment of Information prejudicial to D
**HOLDING:** Allowing State to amend information at close of case in chief, after D established alleged victim (AV) was out of state during time of incident, deprived D of defense & was erroneous. D was charged with multiple counts of child molesting, one of which alleged incident occurred between 11/1/90 & 11/30/90. During CX, D established AV was in Florida from 10/90 until 1/91. At conclusion of its case in chief, & over D's objection, State was allowed to amend information to allege offense occurred between 9/1/90 & 11/30/90, to "more clearly reflect the testimony as it came in yesterday & today."

Ct. agreed with D that amendment erroneously prejudiced his substantial rights & deprived him of his defense which was in form of alibi, even though no notice of alibi was filed. Ct. rejected State's argument that time was not of essence & it need only prove offense occurred within statute limitations. State is allowed to amend information any time if defect is not material & amendment doesn't prejudice substantial rights of accused. Defect is material only if amendment affects availability of defense or applicability of evidence existing in original. Lacy, (1982), 438 N.E.2d 968. Amendment in this case affected availability of D's defense because he had already established AV was not present in State during time alleged in information. Held, conviction on this count reversed, otherwise affirmed, Garrard, J. DISSENTING on reversal.

**RELATED CASES:** Baber, App., 870 N.E.2d 486 (time was not of essence, as D denied committing offense; thus, D's substantial rights were not prejudiced by amendment of form); Brown, 728 N.E.2d 876 (availability of D's defense & applicability of evidence under original information was unaffected by amendment allowed at close of State's case); Mills, App., 648 N.E.2d 1212 (no error in permitting State to amend charging information to conform to evidence that offense occurred in 1990 rather than in 1991; D did not timely file alibi defense, & he invited error by admitting to having sex with victim in 1991).

**TITLE:** Thomas v. State
**INDEX NO.:** A.5.
**CITE:** (5th Dist., 1-20-06), Ind. App., 840 N.E.2d 893
**SUBJECT:** State amends all charges after resting - mistrial denied
**HOLDING:** Tr. Ct. did not abuse its discretion in denying D's motion for mistrial. The mistrial was sought after Tr. Ct. allowed the State to amend the charging information after the State had presented its case in chief. Previously, the charging information alleged a large number of child molesting incidents generally while the child was between the ages of six & ten. Following the State's case, the Tr. Ct. allowed the State to dismiss four counts because the testimony indicated these instances occurred prior to the child turning six & amend other counts to provide details of when & where they occurred based on the child's testimony. D moved for mistrial on two grounds: (1) the jury heard testimony concerning incidents that occurred prior to the child turning six; & (2) the State's amendment of the charging information confused the jury & prejudiced D.

D argued the Tr. Ct. granted a motion in limine barring reference to events that occurred prior to the dates listed in the charging information, but Court found that motion in limine did not have any such general limitations. Further, D did not show that the complaining witness's testimony was so prejudicial & inflammatory that he was placed in a position of grave peril, noting the properly admitted testimony outweighed any prejudice induced by these previous incidents. Court also found the amendments did not confuse the jury or prejudice D, as the amendments reduced the charges to 20 counts & were more specific as to where the incidents happened & what occurred. "If anything, the amended charging information made it easier for the jury to try the case." Held, judgment affirmed, reversed on other grounds, & remanded.

**TITLE:** Wheeler v. State
**INDEX NO.:** A.5.
**CITE:** (2/28/2018), 95 N.E.3d 149 (Ind. Ct. App. 2018)
**SUBJECT:** Amendment to HVSO charge did not prejudice D
**HOLDING:** Tr. Ct. did not abuse its discretion by letting the State, on the last day of trial, amend its charge that D was a habitual vehicular substance offender ("HVSO") by removing one of the three predicate convictions the State had originally *cited*. The amendment did not prejudice D.

Two officers were investigating a single-vehicle accident in Washington County. One of the officers was accompanied by a teenager who was riding along with the officer. A tow truck had arrived on the scene. While intoxicated, D crashed his truck into the police car and tow truck. D's truck also struck one of the officers in the legs and flying debris struck the teenager. The State alleged, inter alia, that D operated his truck with a BAC of at least .15% and that he was an HVSO. In support of the latter, the State cited three convictions, including a 2006 Floyd County conviction for OWI as a Class A misdemeanor. At the end of trial, the State asked the court to remove the 2006 Floyd County conviction from the HVSO charge. The Tr. Ct. granted the request, leaving only two offenses as predicate convictions. D was convicted of the OWI charge and was adjudicated as an HVSO.

D claimed that removing the 2006 Floyd County conviction from the HVSO charge "eviscerated" his defense because the offense "had been modified such that it no longer qualified as a prior unrelated vehicular offense." However, this argument relies on the mistaken assumption that three prior unrelated convictions are needed to adjudicate someone as an HVSO; the statute only requires two, as long as one of the convictions was entered within ten years of the date of the instant offense, which the State did, in fact, prove here. See Ind. Code § 9-30-15.5-2(a). Held, judgment affirmed.

**TITLE:** Wilkinson v. State
**INDEX NO.:** A.5.
**CITE:** (4th Dist., 8-19-96), Ind. App., 670 N.E.2d 47
**SUBJECT:** Amendment of information on day of trial - no error
**HOLDING:** State may amend charging information on day of trial as long as amendment does not affect defense which was already available to D under original information. Sharp v. State, 534 N.E.2d 708 (Ind. 1990). Here, amendment of information changed charge from child molesting to attempted child molesting. D requested continuance to evaluate amended charge, but continuance was denied. Ct. held that amendment did not prejudice D, because defenses available to D under original information remained available to him under amended charge. D's defense at trial was that he was intoxicated, had passed out, & therefore did not possess requisite intent to commit either child molesting or attempted child molesting. Amended information, with newly available defense of abandonment, did not materially change factual allegations which formed basis of prosecution's theory. Kelly v. State, 58634 N.E.2d 927 (Ind. Ct. App. 1992). D failed to demonstrate that denial of continuance in any way affected his ability to prepare defense, & he did not prove that he would have relied on newly available defense of abandonment. Held, no error; Riley, J., dissenting.

**RELATED CASES:** Jones, App., 766 N.E.2d 1258 (State's amendment on morning of trial which deleted one of two alternative allegations of promoting prostitution did not violate substantial rights of D).

**TITLE:** Williams v. State
**INDEX NO.:** A.5.
**CITE:** (9-22-00), Ind., 735 N.E.2d 785
**SUBJECT:** Late addition of habitual offender (HO) charge – D must move for continuance to preserve issue
**HOLDING:** Where Tr. Ct. permits late filing of HO charge, D must move for continuance in order to preserve propriety of Tr. Ct.'s order for appeal, even if D is seeking speedy trial. Daniel, 526 N.E.2d 1157; Haymaker, 667 N.E.2d 1113. D can seek more time to prepare for habitual question & still proceed on schedule for speedy trial of main charge. Ct. disapproved of Attebury, App., 703 N.E.2d 175, which held that D did not waive late HO filing issue by failing to move for continuance.

Generally, amendment of information to include HO charge under Ind. Code 35-50-2-8 must be made no later than ten days after omnibus date. Upon showing of good cause, however, Tr. Ct. may permit filing of HO charge at any time before commencement of trial. Here, Tr. Ct. found good cause to permit late HO filing because State was conducting plea negotiations with D up until date HO information was filed. D waived issue of late addition of HO charge by not asking for continuance. Held, judgment affirmed.

**RELATED CASES:** Johnican, App., 804 N.E.2d 211 (good cause for belated filing affirmed where plea negotiations continued up to filing of enhancement); Land, App., 802 N.E.2d 45 (despite defense counsel's contentions that no serious plea negotiations occurred, Ct. found State's missing the deadline by six months was justified due to ongoing plea negotiations & fact that D was unable to show how he was prejudiced by the delay in filing); Falls, App., 797 N.E.2d 316 (D did not waive his challenge by failing to file a motion for a continuance because no trial date had been set when habitual was filed); Hooper, App., 779 N.E.2d 596 (Tr. Ct. erred by allowing late filing of an HO enhancement after omnibus date; State did not show good cause for late filing); Watson, App., 776 N.E.2d 914 (Tr. Ct. acted within its discretion in finding that State had good cause to allow belated HO amendment, where State was unaware of D's additional felony charge to support HO allegation until after statutory deadline); Attebury, App., 703 N.E.2d 175, disapproved on other grounds by Williams ("good cause" is not defined in statute, but it must require something more than lack of prejudice).

**TITLE:** Wilson v. State
**INDEX NO.:** A.5.
**CITE:** (08-10-10), 931 N.E.2d 914 (Ind. Ct. App. 2010)
**SUBJECT:** Amendment of charges – D must move for continuance to preserve issue
**HOLDING:** Trial court did not err in allowing State to amend charging information from auto theft to receiving stolen auto parts on day before his trial was scheduled to begin. Even assuming the amendment prejudiced Defendant's substantial rights, under amended version of Ind. Code 35-34-1-5, failure to request a continuance after a trial court allows a pre-trial substantive amendment to the charging information over defendant's objection results in waiver. Riley v. State, 506 N.E.2d 476 (Ind. 1987). Here, Defendant waived this issue for appellate review, and previous speedy trial request did not excuse his failure to seek a continuance. See Haymaker v. State, 667 N.E.2d 1113 (Ind. 1996). Held, judgment affirmed.

**TITLE:** Woods v. State
**INDEX NO.:** A.5.
**CITE:** (11/28/89), Ind., 547 N.E.2d 772
**SUBJECT:** Amendment to pleadings after change of venue
**HOLDING:** General rule is that Tr. Ct. is divested of jurisdiction after granting change of venue. Held, amended criminal charges, filed in Tr. Ct. after Tr. Ct. had granted change of venue from county, were not nullity, because filing occurred during time granted by Ct. for opposing counsel to agree upon new county & before preparation of transcript for dispatch & did not entail any exercise of jurisdiction by Tr. Ct. Held, no error.

# A. PLEADINGS

## A.6. Variance in proof

**TITLE:** Adetokundo v. State
**INDEX NO.:** A.6.
**CITE:** (4/27/2015), 29 N.E.3d 1277 (Ind. Ct. App. 2015)
**SUBJECT:** Battery conviction reversed due to material variance re: victim's identity
**HOLDING:** Proof of battery against a person other than the victim named in the charging information is not an immaterial variance. The State's charging information must include the name of the victim or any person whose identity is essential to a proper description of the offense. See, e.g., Robinson v. State, 232 Ind. 396, 112 N.E.2d 861 (1953).

Here, Court reversed battery conviction where charging information alleged D touched a DCS security guard in a rude, insolent, and angry manner but at trial, the State failed to present any evidence she made any contact with the security guard. At trial, there was testimony that D pushed a police officer who arrived at the scene to assist. But any variance resulting from evidence that D committed a different battery against another victim is a material, fatal variance, "and the State's argument to the contrary is unconvincing." Court distinguished fleeing law enforcement cases where naming the wrong officer in the charging information was found to be an immaterial variance. Held, disorderly conduct and resisting law enforcement convictiond affirmed, battery conviction reversed.

**TITLE:** Allen v. State
**INDEX NO.:** A.6.
**CITE:** (12-13-99), Ind., 720 N.E.2d 707
**SUBJECT:** Variance in proof – required reversal
**HOLDING:** Test to determine whether variance between proof at trial & charging information or indictment is fatal is as follows: (1) was D misled by variance in evidence from allegations & specifications in charge in preparation & maintenance of his defense, & was he harmed or prejudiced thereby; & (2) will D be protected in future criminal proceeding covering same event, facts, & evidence against double jeopardy? Mitchem, 685 N.E.2d 671, 677. Here, State charged D with criminal deviate conduct involving his sex organ. However, state's physician testified at trial that injury was injury of forcible sexual assault caused by forcible penetration into anus by blunt object. Even though it may have been possible that D's sex organ also caused injuries to victim's anus, State failed to present any evidence or testimony stating such. Because State limited charge to sex organ, rather than employing broader object language in information, D could be recharged & tried again on same facts & evidence, in fact, for same event. Thus, D's conviction for criminal deviate conduct cannot stand. Held, judgment affirmed in part & reversed in part; Dickson & Boehm, J.J., dissenting on basis that D was not mislead by variance.

**RELATED CASES:** Blackmon, 32 N.E.3d 1178 (Ind.Ct.App. 2015) (charging information for intimidation alleged that C.W.'s prior lawful act was catching D stealing water; State's argument to jury that C.W.'s prior lawful act was confronting D about stealing water misled him in preparation of his defense, resulting in a fatal variance requiring reversal); Broude, 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); Whaley, App., 843 N.E.2d 1 (given number of officers involved in arresting D & number of ways D was alleged to have fled, correct names of officers involved were essential to a proper description of offenses charged); Oberst, App., 748 N.E.2d 870 (variance between charging information, which alleged sexual intercourse, & proof adduced at trial (criminal deviate conduct) was material & fatal).

**TITLE:** Golladay v. State
**INDEX NO.:** A.6.
**CITE:** (2nd Dist., 10-25-07), Ind. App., 875 N.E.2d 389
**SUBJECT:** Variance in proof charging under one subsection but convicting under another
**HOLDING:** Tr. Ct. violated due process by finding D guilty of home improvement fraud under Ind. Code 35-42-6-12(a)(4) when D was charged under Ind. Code 35-42-6-12(a)(3). In order for a D to be convicted of an uncharged crime, the uncharged crime must be a lesser included offense of the charged crime. An offense is factually included if the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense. Here, D was charged under Ind. Code 35-42-6-12(a)(3), with entering into a home improvement contract & knowingly promising performance, to-wit: to roof the home & barn & side the house: that he did not intend to perform or knows will not be performed. However, Tr. Ct. found D guilty under Ind. Code 35-42-6-12(a) (4), using or employing any deception, false pretense or false promise to cause a consumer to enter into a home improvement contract. Because subsection (a)(4) includes an element, inducing the customer to enter into the contract with the false pretense, it is not a lesser included offense. Thus, the conviction violated due process. Held, judgment reversed & remanded with instructions to enter judgment of acquittal.

**TITLE:** Jones v. State
**INDEX NO.:** A.6.
**CITE:** (4th Dist. 8/28/84) Ind. App., 467 N.E.2d 1236
**SUBJECT:** Variance in proof - standard
**HOLDING:** No material variance existed between charging information & proof at trial. Here, D contends proof at trial did not establish he removed van from victim's business, as alleged in information. Information must apprise D of crime charged to enable D to prepare defense. See Manna 440 N.E.2d 473. Variance between charging information & proof at trial is material when it (1) misleads D in preparation of defense & (2) subjects D to likelihood of second prosecution for same offense. US v. Hansen, (CA7 1983) 701 F.2d 1215; Manna; Grassmyer, 429 N.E.2d 248. Ct. examines charging information & finds point raised by D as material variance was "mere surplusage." Held, no material variance.

**RELATED CASES:** Tucker, App., 725 N.E.2d 894 (description of where officer was struck was not material or essential to offense charged); McCullough, App. 672 N.E.2d 445 (variance between charging information & evidence at trial was immaterial); Weaver, 583 N.E.2d 136 (variance between charging information & proof at trial not fatal where information incorrectly established venue when it alleged victim killed in Boone County, & at trial State established body found in Boone County; D not misled in preparation of his defense); Clark 467 N.E.2d 691 (D was charged with taking money from victim; in fact, D took victim's pants which contained money); D *cites* Wilson, App., 330 N.E.2d 356 [information alleged theft of $600; proof at trial was theft of $6 worth of gas; held, conviction reversed]; court finds D heard change rattle in pants & intended to take money; held, conviction affirmed).

**TITLE:** Lewellen v. State
**INDEX NO.:** A.6.
**CITE:** (12-16-76), Ind., 358 N.E.2d 115
**SUBJECT:** Variance in proof - material variance defined
**HOLDING:** When it is said that variance is material if it places D in danger of double jeopardy, it is meant that charge must be sufficiently specific that in any event after jeopardy has attached, if second like charge is filed covering same evidence against accused, D will be protected. Here, variance was not fatal or material where D was not misled in preparation of his defense & where there was no risk of double jeopardy. Held, judgment affirmed.

**RELATED CASES:** Gaines, 999 N.E.2d 999 (Ind. Ct. App. 2013) (variance not fatal where information alleged D knowingly violated a protective order and State presented evidence at trial that D violated an ex parte protective order; D was not misled by the 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); Majors, 251 N.E.2d 571 (for variance between indictment & proof to be fatal it must have misled D in preparation of his defense or be of such degree as is likely to place D in double jeopardy as is likely to place D in double jeopardy as result thereof); Kimble, App., 659 N.E.2d 182 (variance occurs when proof adduced at trial differs from crime charged).

**TITLE:** Manna v. State
**INDEX NO.:** A.6.
**CITE:** (10-7-82), Ind., 440 N.E.2d 473
**SUBJECT:** Variance in proof - Surplusage
**HOLDING:** Although indictment charged that D murdered victim by striking, beating, hitting & wounding him with "certain deadly weapon, exact nature of which was unknown", & proof at trial failed to establish that deadly weapon was used, allegation of weapon was mere surplusage. Here, D was not misled in preparation of his defense, & no variance between allegations & proof impinged upon D's rights to be informed of nature & cause of accusation in sufficient detail to enable D to prepare defense, to protect D in event of double jeopardy, & to define issues so that Tr. Ct. would be able to determine what evidence was admissible & to pronounce judgment. Held, judgment affirmed.

**RELATED CASES:** Mitchell, App., 360 N.E.2d 221 (in prosecution for robbery, D failed to prove any fatal variance between State's proof at trial as to where crime was committed & State's answer to D's alibi notice, particularly in view of fact that D, in his alibi notice, admitted being near address stated in State's answer to alibi notice at time crime was perpetrated).

**TITLE:** Matthews v. State
**INDEX NO.:** A.6.
**CITE:** (10/23/2012), 978 N.E.2d 438 (Ind. Ct. App. 2012)
**SUBJECT:** Variance of proof - public intoxication
**HOLDING:** Although D was charged with public intoxication at a private residence, there was sufficient evidence from which the jury could infer he was in public just prior to being found at the residence. To award relief on the basis of a variance between allegations in the charge and the evidence at trial, the variance must be such as to either have misled the D in the preparation and maintenance of his defense with resulting harm or prejudice or leave the D vulnerable to double jeopardy in a future criminal proceeding covering the same event, facts and evidence.

Here, police were dispatched to a fight involving D occurring in the street on Piedmont Lane. D left the scene, but was found standing near a private residence on Evergreen Lane which is one street west of Piedmont Lane. D was intoxicated and arrested. In order to get to Evergreen Lane, he had to cross Belmont Road which is public. Although there is evidence that D was intoxicated in a public place when he was on Piedmont Lane and Belmont Road, he was charged with public intoxication at 211 Evergreen Lane, a private residence. A private residence, including the grounds surrounding it, is not a public place. The variance between the evidence and the charging information is not fatal, and the State presented evidence of a probative nature from which a reasonable trier of fact could have found D was guilty of public intoxication. Held, judgment affirmed; Pyle, J., concurring with opinion on separate issue.

**TITLE:** Miller v. State
**INDEX NO.:** A.6.
**CITE:** (4th Dist., 06-28-93), Ind. App. 616 N.E.2d 750
**SUBJECT:** Variance in proof leads to insufficiency of class B Confinement
**HOLDING:** Because D was charged with class B Confinement by confining victim "while armed with a deadly weapon, namely, a handgun," evidence that weapon was pellet gun was insufficient to support conviction as class B felony. Ct. first noted that weapon does not have to be firearm to be deadly weapon, & pellet or BB guns have been considered deadly weapons, Glover, (1982), 441 N.E.2d 1360, Williams, (1983), App., 451 N.E.2d 1026. Ct. than noted, however, that Information specifically charged D with confinement with handgun, & there was no evidence State attempted to broaden charge by deleting term "handgun" & charging simply possession of deadly weapon. "Handgun" is defined in Ind. Code 35-47-1-6 as "firearm," & firearm is defined as weapon capable of expelling projectile by means of explosion or gunpowder. State clearly established that D's pellet gun was not handgun, & therefore there was variance between Information, instructions given, & proof at trial. To warrant reversal, variance must be substantial, such as might mislead defense, Madison, (1955), 130 N.E.2d 35. In instant case, defense counsel relied on Information as charged, arguing for directed verdict at close of State's case on ground it had been clearly shown that pellet gun used by D was not firearm. Because of variance in charge & proof that was obviously relied on as part of defense, variance required reversal of B felony conviction. Held, reversed & remanded for sentencing of D on conviction of confinement as D felony, Rucker, J., DISSENTING on this issue.

**RELATED CASES:** Burns, 91 N.E.3d 635 (Ind. Ct. App. 2018) (even though no guns were found and no witnesses could testify to their authenticity, jury could reasonably infer D possessed a gun; these facts are distinguishable from Miller, where State charged handgun and weapon was affirmatively shown not to be a handgun).

**TITLE:** Mitchem v. State
**INDEX NO.:** A.6.
**CITE:** (9-5-97), Ind., 685 N.E.2d 671
**SUBJECT:** Variance between charging information & proof at trial - no error
**HOLDING:** Because allegation in charging information regarding use of specific weapons was surplusage, it was not necessary for it to be included in jury instruction as allegation which must be proved in order to convict. Variance between proof at trial & charging information was not fatal because D was not misled in preparing defense & was not harmed or prejudiced. Harrison, 507 N.E.2d 565. State charged D with attempted murder with handgun & shotgun, but evidence at trial suggested that D used rifle. Specific weapon used in commission of attempted murder is not element of crime & is unnecessary to allege. Surplusage need not be established in proof, & if there is variance in evidence from such unnecessary particularity, it does not vitiate proceedings unless it is shown that D has been misled or prejudiced thereby. Madison, 130 N.E.2d 35. All three weapons involved in this case were firearms & use of any of these weapons results in same charge & same punishment. Thus, D was not misled & variance was not fatal. Id. Held, convictions affirmed.

**RELATED CASES:** Daniels, 957 N.E.2d 1025 (Ind. Ct. App. 2011) (no fatal variance where charge alleged D 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; D was not misled in preparation of defense because defense strategy was to claim D did not even have gun with him; also, D was protected from successive prosecution for using his gun because only evidence he used gun was that he displayed his gun); Reinhardt, App., 881 N.E.2d 15 (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).

**TITLE:** Morgan v. State
**INDEX NO.:** A.6.
**CITE:** (10-20-82), Ind., 440 N.E.2d 1087
**SUBJECT:** Variance in proof - Habitual offender charge
**HOLDING:** Variance between information in habitual offender charge, which indicated that one of D's prior convictions was for robbery, & proof introduced at trial, which showed that D's prior conviction was for armed robbery, was not fatal & did not require reversal of conviction where date, Ct. & cause number alleged were all identical, D himself referred to his armed robbery as robbery conviction in memorandum in support of his pretrial motion to dismiss, & D failed to show any unfairness caused by variance. Held, judgment affirmed in part & reversed & remanded in part; Givan, C.J., concurring in result; Prentice, J., concurring in part & dissenting in part.

**RELATED CASES:** Goodwin, 439 N.E.2d 595 (in habitual offender prosecution, there was variance between evidence showing prior conviction for theft under $100 & allegation of prior conviction for theft by deception, but such variance was not material, in light of close relationship between two crimes, both of which were subspecies of theft, & given other distinguishing characteristics, & fact that it was not evident that D was misled in his defense); Gregory, 524 N.E.2d 275 (variance between allegations of conspiracy D's habitual offender status, & actual proof of prior convictions was not reversible error absent showing D was misled in his defense by reason of variance in dates).

**TITLE:** Moritz v. State
**INDEX NO.:** A.6.
**CITE:** (1st Dist. 6/26/84) Ind. App., 465 N.E.2d 748
**SUBJECT:** Variance in proof - amount & dates of bribes
**HOLDING:** Variance in proof between dates & amounts of bribes was not fatal. See Smith, 168 N.E.2d 199. Where state charges specific date of offense in bribery case (or other felonies in which time is not of essence), state may prove any date prior to indictment & within statute of limitations. Herman, 210 N.E.2d 249. Reversal is required only if D was misled in defense or when evidence may not preclude second jeopardy. Thomas, 238 N.E.2d 20. D was not subjected to potential second jeopardy & fails to show he was misled in his defense. Held, no error.

**RELATED CASES:** Blount, 22 N.E.3d 559 (Ind. 2014) (fact that evidence showed possession of gun may have occurred prior to the date in charging information was not a material variance when the information qualified the date with "on or about."); Harmon, 518 N.E.2d 797 (variance between dates of prior convictions in information & those proven by State's exhibits not material & fatal variance, & did not require reversal of conviction on habitual offender (HO) count, as there was no showing that D was misled in any way by variance, nor did he make such claim at trial).

**TITLE:** Murphy v. State
**INDEX NO.:** A.6.
**CITE:** (9/16/83), Ind., 453 N.E.2d 219
**SUBJECT:** Variance in proof - custody/ownership; theft
**HOLDING:** Evidence introduced at trial to prove theft did not fatally vary from allegation of theft in information. Here, information alleged D exerted unauthorized control over property in "custody of The Post, Inc." Owner of property was actually Southwest Communications. Ct. finds D incorrectly equates custody with ownership. Rights of possessor against taker are significant in theft cases; relative rights of possessor & third parties are irrelevant. Thomas, 263 N.E.2d 158. D was not misled or otherwise prejudiced by alleged variance. Montes, 332 N.E.2d 786. Held, no error.

**RELATED CASES:** Robinson, App., 634 N.E.2d 1367 (No material variance between charging information & proof at trial, where information alleged D handed cocaine to one person & evidence showed he handed it to intermediary who gave it to that person. Question was addressed in U.S. v. Perry, (11th Cir., 1984), 740 F.2d 854, where D was charged with distributing cocaine to undercover officer, while proof at trial indicated he actually handed cocaine to informant who was working with officer, & then informant handed it to officer. Perry Ct. found that even though D did not openly discuss sale with officer, did not give cocaine directly to him, & did not receive money directly from him, evidence still showed D knew officer was intended recipient of part of cocaine & provided part of payment. Ct. here found situation analogous to that in Perry.); Bates, App., 486 N.E.2d 574 (Indictment named store manager as owner, rather than true owner; probable cause affidavit stating store manager's relationship to property resolved any confusion; held, no error); Butler, App., 478 N.E.2d 126 (Possession rather than ownership is essential element of burglary); Beard, App., 327 N.E.2d 629 (no fatal variance between affidavit describing burglarized premises as "7-Eleven Food Stores, Inc." and description of premises during trial as "Seven-Eleven Super Market Inc.").

**TITLE:** Parhams v. State
**INDEX NO.:** A.6.
**CITE:** (3rd Dist., 06-30-09), 908 N.E.2d 689 (Ind. Ct. App. 2009)
**SUBJECT:** Variance in proof between charging information & proof at trial - resisting law enforcement
**HOLDING:** Where D was charged with one act of resisting law enforcement, State's failure to identify the correct officer in the charging information against whom D allegedly resisted did not mislead him in the preparation of his defense. Unlike Ds in Bonner v. State, 789 N.E.2d 491 (Ind. Ct. App. 2003) and Whaley v. State, 843 N.E.2d 1 (Ind. Ct. App. 2006), who were charged with multiple counts of resisting law enforcement, the variance between the charging information and proof at trial did not prejudice D in this case. D's one charged act of resisting was fleeing from a police officer after he was told to stop. The probable cause affidavit attached to the charging information listed five officers who were present at the scene. At trial, State proved that one of those officers (but not officer named in charging information) ordered D to stop when he began to flee. Court could not conclude that variance was fatal to State's case. Thus, State presented sufficient evidence that D committed resisting law enforcement. Held, judgment affirmed.

**RELATED CASES:** Adetokundo, 29 N.E.3d 1277 (Ind. Ct. App. 2015) (in reversing battery conviction due to fatal variance re: victim's identity, Ct. distinguished fleeing law enforcement cases where naming the wrong officer in the charging information was found to be an immaterial variance, because fleeing is not a crime that implicates a victim "injured in his person"); Jones, 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 D did not explain how the error hindered his defense); Vest, 930 N.E.2d 1221 (Ind. Ct. App. 2010) (charging information was not duplicitous for naming all three officers from whom D fled, & Tr. Ct. did not err when it did not issue a more specific unanimity instruction to jury because jurors where not required to agree on which particular officer D fled).

**TITLE:** Robinson v. State
**INDEX NO.:** A.6.
**CITE:** (4th Dist., 6-15-94), Ind. App., 634 N.E.2d 1367
**SUBJECT:** Variance in proof
**HOLDING:** Even if variance existed between charging information, which asserted that D delivered cocaine to undercover officer, & evidence at trial, which showed that D handed drug to informant & officer then removed it from informant's possession, D failed to show that reversible error resulted, where D made no attempt to show how his entrapment defense would have changed had information specifically mentioned informant instead of officer, there was nothing indicating undue surprise due to wording of information, & there was no showing that D had been placed in danger of double jeopardy. Held, judgment affirmed.

**TITLE:** State v. McFarland

**INDEX NO.:** A.6.

**CITE:** (10-10-19), Ind. Ct. App., 134 N.E.3d 1027

**SUBJECT:** Trial court properly denied State's motion to amend habitual offender charging information three days before trial

**HOLDING:** The State moved to amend the habitual offender charging information just three calendar days, and two business hours, before a Monday trial and the trial court denied its motion. On interlocutory appeal, the Court of Appeals affirmed the trial court's denial. The State filed the proposed amendment because one of the prior convictions alleged in the original information was actually a misdemeanor and the State wanted to replace it with a different prior felony conviction. The Court of Appeals held that the State's proposed amendment was one of substance, not form, and that allowing the amendment would have prejudiced Defendant. The court reviewed the denial of the State's motion to amend without regard to whether a continuance might have alleviated the prejudice and noted the late filing did not provide adequate notice to Defendant and also deprived him of his defense that one of the two convictions was not a valid predicate offense. Further, the court noted that allowing the amendment would have left his defense counsel "scrambling to fashion a new defense within a matter of hours" and forcing his attorney to modify his defense on the fly would have implicated his Sixth Amendment right to effective assistance of counsel. Finally, the trial court was in a better position to judge how the last-minute amendment would prejudice Defendant's substantial rights.

**TITLE:** Townsend v. State
**INDEX NO.:** A.6.
**CITE:** (04-18-94), Ind., 632 N.E.2d 727
**SUBJECT:** Failure to prove crime as charged
**HOLDING:** Where D was charged with battery by knowingly or intentionally touching victim 1 and victim 2, it was error to allow separate verdicts as to each alleged victim, reversing Ct. App. decision at 616 N.E.2d 47. D was charged in single count indictment & on first day of trial State's motion to amend indictment by substituting "or" for "and," was denied. Although instruction on elements of offense included requirement that D touch both children in rude, etc., manner, Tr. Ct. also submitted four verdict forms to jury, allowing verdicts of guilty or not guilty as to each of children. Argument that D was erroneously subjected to two separate battery charges, where only one was charged, would generally have been waived because there was no objection to multiple verdict forms at time they were given, but Ct. found error was fundamental. Verdict forms were diametrically opposed to element instruction, & relieved State of burden to prove commission of battery on both children as charged. Because anomaly denied D fair trial & due process, reversal was required. Ct. also looked at whether double jeopardy (DJ) would preclude retrial & although opinion is not absolutely clear, it appears Ct. found collateral estoppel principles precluded retrial altogether. When State receives adverse decision on critical issue of fact in trial, that decision prevents later re-litigation of same issue. Held, judgment reversed with order of discharge, Dickson, J. & Shepard, C.J., concurring; Givan & Sullivan, JJ. dissenting.

**NOTE**: Justice Shepard's concurrence agreed that DJ precluded retrial on charge D committed battery on both children, but said no decision was being made as to possibility of retrial on new information charging battery on child he was not acquitted of battering.

**TITLE:** Young v. State
**INDEX NO.:** A.6.
**CITE:** (5/14/2015), 30 N.E.3d 719 (Ind. 2015)
**SUBJECT:** Ds lacked fair notice of charge of which they were ultimately convicted
**HOLDING:** In murder and conspiracy prosecution, Ds were denied due process right to fair notice about the crime for which they were convicted. State chose to charge Ds with murder as accomplices in a shooting, and relied on that theory alone at Ds' bench trial. Tr. Ct. found that there was insufficient evidence that Ds knew a member of the group would shoot the victim, so it dismissed the murder charge (the actual shooter remained unidentified). However, after finding that Ds intended a group beating of the victim, Tr. Ct. entered judgment of conviction for attempted aggravated battery as a lesser-included offense.

Although Ds did not argue that attempted aggravated battery was not a lesser included offense of murder or that there was an impermissible variance from the charging Information, the Supreme Court found fundamental error.

Ds must have "fair notice" of the charges of which they may be convicted, including inherently or factually included lesser offenses. Under these unusual circumstances, attempted aggravated battery by beating was not just a lesser offense of the charged murder by shooting, it was a completely different offense, based on a completely different "means used" than alleged in the charging informations. This deprived Ds of fair notice to extend their defense to that very different lesser charge. Held, transfer granted, Court of Appeals' opinions at 11 N.E.3d 964 and 15 N.E.3d 670 vacated, convictions reversed and remand with instructions to enter judgments of acquittal in both cases.

**RELATED CASES:** Granger, 113 N.E.3d 773 (Ind. Ct. App. 2018) (Ct. rejected State's alternative argument that D could have been validly convicted under a different subsection of the paraphernalia possession statute; the State could not seek conviction for an offense not charged, and in any event, the prosecution failed to present any evidence that use of a grinder would "enhance" marijuana's effects); Lee, 43 N.E.3d 1271 (Ind. 2015) (Ct. granted third co-D's belated petition to transfer to avoid "serious injustice" of facing opposite results than her son and Young on the very same issue originating from the very same trial).