

RULE 13.5 — Amendments to indictment — Defendant must consent to amendment other than amendments of technical defects — Revised 11/2009

Rule 13.5, Ariz. R. Crim. P., provides:

Rule 13.5. Amendment of the charges; defects in the charging document

a. Prior Convictions and Other Non-Capital Sentencing Allegations.

The prosecutor may amend an indictment, information or complaint to add an allegation of one or more prior convictions or other non-capital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b).

b. Altering the Charges; Amendment to Conform to the Evidence. The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

c. Amendment to Conform to Capital Sentencing Allegations; Challenges to Capital Sentencing Allegations. The filing of a notice to seek the death penalty with noticed aggravating circumstances shall amend the charging document, and no further pleading needs to be filed. A defendant may challenge the legal sufficiency of an alleged aggravating circumstance by motion filed pursuant to Rule 16.

d. Challenges to Non-Capital Sentencing Allegations. A defendant may challenge the legal sufficiency of an alleged prior conviction or non-capital sentencing allegation that must be found by a jury by motion filed pursuant to Rule 16.

e. Defects in Charging Document. No issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16.

A defendant may be convicted of an offense different from the offense charged only if (a) the conviction is for a lesser-included offense of the charged offense or (b) the defendant consents to amendment of the charge. *State v. Foster*, 191 Ariz. 355, 357, 955 P.2d 993, 995 (App. 1998). Although a person cannot be convicted of an offense (other than a lesser-included offense) not charged against him through indictment or information, the trial court can amend an indictment upon an oral motion by the State if the defendant does not object. *State v. Schwartz*, 188 Ariz. 313, 319-20, 935 P.2d 891,

897-98 (App. 1996); *State v. Sanders*, 115 Ariz. 289, 564 P.2d 1256 (App.1977). If the defendant does object to the proposed amendment, under Rule 13.5(b), Ariz. R. Crim. P., the court has authority to amend an indictment "only to correct mistakes of fact or remedy formal or technical defects."

The trial court may not amend an indictment to charge new and different matters of substance without the concurrence of the grand jury. *State v. Kelly*, 123 Ariz. 24, 597 P.2d 177 (1979); *State v. Rybolt*, 133 Ariz. 276, 650 P.2d 1258 (App.1982), *reversed on other grounds*, *State v. Diaz*, 142 Ariz. 119, 688 P.2d 1011 (1984). A defect in the indictment may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant. *State v. Bruce*, 125 Ariz. 421, 610 P.2d 55 (1980); *State v. Barber*, 133 Ariz. 572, 653 P.2d 29 (App.1982) *affirmed*, 133 Ariz. 549, 653 P.2d 6 (1982).

State v. O'Haire, 149 Ariz. 518, 520, 720 P.2d 119, 121 (App. 1986). *Accord*, *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980); *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996).

An error as to the date of the offense alleged in the indictment does not change the nature of the offense, and therefore may be remedied by amendment. *Id.*; *State v. Self*, 135 Ariz. 374, 380, 661 P.2d 224, 230 (App.1983). "When the amendment results in no change in the underlying offense or actual prejudice to the defendant, the indictment is automatically deemed amended to conform to the evidence adduced at trial. *State v. Roscoe*, 145 Ariz. 212, 225, 700 P.2d 1312, 1325 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 525 (1985); *State v. Winter*, 146 Ariz. 461, 465, 706 P.2d 1228, 1232 (App.1985); Rule 13.5(b), Ariz. R. Crim. P." *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996). The above rules about indictments also apply to charges filed by information. *See State v. Sanders*, 205 Ariz. 208, 214, 68 P.3d 434 (App. 2003). When an indictment or information has been amended to

conform to the evidence presented, the defendant bears the burden of showing that he has suffered actual prejudice from the amendment. *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996).