

CHAPTER 20

Defects in the Complaint or Indictment

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Except for special constitutional requirements relating to grand jury indictments,⁴ complaints and indictments are subject to the same requirements.⁵ Counsel must be familiar with these requirements and their underlying policies in order to challenge errors effectively.

§ 20.1 PURPOSES OF INDICTMENT OR COMPLAINT

The charging document is intended to serve five purposes:⁶

1. *Notice:* The charge gives the defendant notice both of the alleged facts and of the prosecution's basic legal theory. A deficient charge may deprive the defendant of the opportunity to prepare his defense.⁷

2. *Judicial review:* The requirement that the charging document allege every essential element of the offense permits the defendant to test the sufficiency of the prosecution's legal theory by moving to dismiss the charge. If successful, this avoids an unnecessary trial. In any event, the requirement gives the parties a common legal framework to guide presentation of the evidence at trial.⁸

3. *Grand jury:* In cases prosecuted by indictment, the indictment must demonstrate that the grand jury voted on the essential elements of the offense and

⁴ See *infra* § 20.6B.

⁵ See G.L. c. 277, § 79. See also *supra* § 4.1 (complaints and indictments generally).

⁶ This discussion draws on LAFAVE, ISRAEL, KING & KERR, CRIMINAL PROCEDURE § 19.2 (5th ed. 2009).

⁷ Commonwealth v. Hobbs, 385 Mass. 863, 870–71 (1982).

⁸ See, e.g., Commonwealth v. Murphy, 409 Mass. 665 (1991) (complaint charging operation after suspension of license under G.L. c. 90, § 23 is not defective for failure to allege operation on a public way, which is not an element of the crime). *Murphy* in effect overrules the contrary view approved in Commonwealth v. Armenia, 4 Mass. App. Ct. 33 (1976), see *infra* note 134.

agreed that those elements were satisfied. Otherwise prosecutors could frustrate the right to indictment by filling in elements of the case with facts other than those considered by the grand jury.

4. *Double jeopardy*: A charge must be framed specifically enough to enable the defendant to plead double jeopardy if re-prosecuted for the same offense.⁹

5. *Jurisdiction*: Due process requires the pleading to allege all of the essential elements of the offense in order to establish the trial court's jurisdiction to punish the defendant.¹⁰

§ 20.2 AVAILABLE REMEDIES FOR CHALLENGING DEFECTS

Defects in the charging document may initially be challenged by a motion to dismiss. In addition, the defendant may force the Commonwealth to allege further details by requesting a bill of particulars or moving to amend the charge by striking prejudicial surplusage.¹¹

A dismissal motion based on defects in the charging paper must be distinguished from a pretrial motion to dismiss based on the insufficiency of the evidence to convict as a matter of law.¹² Even an indictment that is facially valid should be dismissed if the evidence presented to the grand jury was insufficient to indict.¹³ To be sufficient, the grand-jury evidence, viewed in the light most favorable to

⁹ See Commonwealth v. Hobbs, 385 Mass. 863, 870–71 (1982); Stirone v. United States, 361 U.S. 212, 215–18 (1960). Regarding the relevance of specificity in the charge to defendant's ability to plead collateral estoppel see *infra* § 21.5B, note 134. Regarding multiple punishments for the same offense see *infra* § 21.7.

¹⁰ Commonwealth v. Wilson, 72 Mass. App. Ct. 416, 418 (2008); Commonwealth v. Palladino, 358 Mass. 28, 30–31 (1970).

¹¹ See *infra* §§ 20.5 (bill of particulars) and 20.6D (striking surplusage).

¹² A pretrial motion to dismiss because the Commonwealth has insufficient evidence to prove its case is analogous to a motion for summary judgment in a civil case. Unlike a civil case, however, the prosecutor must agree to allow the motion to be heard. Commonwealth v. Rosenberg, 372 Mass. 59 (1977); Commonwealth v. Clark, 393 Mass. 361 (1984). Cf. Mass. R. Crim. P. 13(c)(1)(providing “[a]ll defenses available to a defendant, *other than not guilty*, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief”) (emphasis added). The prosecutor may have evidence of guilt which she chooses not to reveal at the time of the motion. The S.J.C. has held that requiring the prosecution to submit to the motion would violate the separation of powers. See *infra* § 39.5A; Commonwealth v. Pellegrini, 414 Mass. 402, 404 –06 (1993); Commonwealth v. Edelin, 371 Mass. 497 (1967); Commonwealth v. Brandano, 359 Mass. 332 (1971). If the prosecution's agreement can be obtained, the motion may save time, money, and the inconvenience occasioned by the trial process. *Rosenberg, supra*, 372 Mass. at 59 . Counsel should especially consider a motion to dismiss for insufficient evidence when the issue being contested is a matter of law. Commonwealth v. Black, 403 Mass. 675 (1989).

¹³ See Commonwealth v. McCarthy, 385 Mass. 160, 163-64 (1982)(holding that indictment for assault with intent to rape should have been dismissed because grand jury heard no evidence of the defendant's participation in or presence at the crime). See *supra* § 5.6A. Ordinarily, the dismissal would be without prejudice. See Commonwealth v. O'Dell, 392 Mass. 445, 447 (1984) (dismissing without prejudice an indictment because the prosecutor's presentation to the grand jury of defendant's statement with exculpatory portions excised impaired the integrity of the grand jury, reserving dismissal with prejudice for cases in which the prosecutor's presentation of evidence was “willfully deceptive or otherwise egregious”).

the prosecution,¹⁴ must be such that a reasonable grand juror could have concluded that there was probable cause to believe that the charged offense occurred and that defendant committed it.¹⁵ A motion attacking an indictment on this ground (a *McCarthy* motion) should thus draw on case law concerning probable cause to search and arrest.¹⁶ *McCarthy* motions, while difficult to win, are most likely to succeed if the prosecutor's case before the grand jury was built on thin circumstantial evidence.¹⁷

§ 20.3 TIMING OF MOTION TO DISMISS

Like any defense that is capable of determination before trial, a motion to dismiss a complaint or indictment must normally be filed before trial. Because a charge that fails to state an offense must be dismissed whenever the defect is noticed — even on appeal¹⁸ — counsel might be tempted to delay the motion until after the start of trial.

¹⁴ See Commonwealth v. Rodriguez, 75 Mass. App. Ct. 235, 238 (2009).

¹⁵ See Commonwealth v. McCarthy, 385 Mass. 160, 163-64 (1982) (holding that indictment for assault with intent to rape should have been dismissed because the grand jury heard no evidence of the defendant's participation in or presence at the crime). This probable-cause standard is in contrast to the "directed-verdict" standard applied in district court bind-over hearings. *See supra* § 2.1.

¹⁶ A motion to dismiss on this ground permits counsel to test the prosecution view of the law as applied to the facts presented to the grand jury. *See, e.g.*, Commonwealth v. Caracciola, 409 Mass. 648, 650 (1991) ("[T]he prosecutor must present sufficient evidence to establish the identity of the accused, and probable cause to arrest him or her. However, the 'requirement of sufficient evidence to establish [these two facts] is considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding.'") (citing Commonwealth v. O'Dell, 392 Mass. 445, 451 (1984)); Commonwealth v. De Cologero, 19 Mass. App. Ct. 956, 958 (1985) ("although the links between [the defendant and the crime], as presented to the grand jury, would not warrant a finding of guilty, probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction"). *See also*, Commonwealth v. Jones, 77 Mass. App. Ct. 53, 59 (2010); Reporter's Notes, Mass R Crim P 3(g)(2).

¹⁷ See, e.g., Commonwealth v. Lopez, 80 Mass. App. Ct. 390, 396-97, *rev. denied*, 461 Mass. 1103 (2011) (upholding dismissal of a joint-venture first-degree felony-murder indictment arising from an unarmed robbery because the grand jury heard no evidence suggesting defendant's pre-robbery knowledge that the co-defendant principal planned either to rob or punch the victim, much less in a life-threatening manner); Commonwealth v. Reveron, 75 Mass. App. Ct. 354, 358-60, *rev. denied*, 450 Mass. 1107 (2009) (upholding dismissal of joint-venture assault, robbery, and felony-murder indictments because insufficient evidence that defendant, who was not present, knew his co-defendant principal was armed and planned to rob the victim); Commonwealth v. Tam, 49 Mass. App. Ct. 31 (2000) (three hours after armed assault by four Asian males and one female, and apprehension of one of the males, three Asian males and one female came to police station in same car driven by assailants, to bail out arrestee. All the males were the same approximate height as the assailants; only one of them had visible injuries. As to the other two, evidence was equally consistent with noncriminal purpose, and insufficient to identify them as participants. Court held that evidence before grand jury was insufficient to identify defendants as being among perpetrators of crime).

¹⁸ Dismissal for failure to state an offense, *infra* § 20.4B, may occur at any time, even on appeal, and the court must consider such a point on its own motion. Commonwealth v. Burns, 8 Mass. App. Ct. 194, 196 (1979) (*quoting* Commonwealth v. Andler, 247 Mass. 580, 581-82 (1924)); G.L. c. 277, § 47A. However, courts frown on a defendant's raising insufficiency of the charging document for the first time on appeal. *See* Commonwealth v. Donoghue, 23 Mass. App. Ct. 103, 111 (1986); United States v. Previte, 648 F.2d 73, 80 (1st

Although jeopardy does not attach in proceedings later voided because of a defective charge,¹⁹ and so waiting until after the trial begins will not protect the defendant from re-prosecution,²⁰ counsel would get discovery of the Commonwealth's case and perhaps discourage re-prosecution. However, intentionally to delay raising such defects until after trial begins might raise ethical concerns.²¹

§ 20.4 CHALLENGES TO FACE OF CHARGING PAPER

Some defects are apparent on the face of the charging document. These are considered immediately below.

§ 20.4A. DEFECT IN UNDERLYING STATUTE

A charge based on an unconstitutional criminal statute cannot stand. It follows that counsel may raise statutory defects, such as excessive vagueness, overbreadth, or violation of equal protection, by moving to dismiss the charge.²²

§ 20.4B. FAILURE TO STATE AN OFFENSE

1. General Principles

Implementing article 12 of the Massachusetts Constitution Declaration of Rights,²³ Mass. R. Crim. P. 4(a) requires the charge to contain "a plain, concise description of the act which constitutes the crime or an appropriate legal term

Cir. 1981) (in the federal system, if challenge is made after verdict, the indictment will be construed liberally in favor of validity).

¹⁹ G.L. c. 263, § 8: "If a person has been acquitted by reason of a variance between an indictment or complaint and the proof, or by reason of a defect of form or substance in the indictment or complaint, he may be again arraigned, tried and convicted for the same crime on a new indictment or complaint, notwithstanding such former acquittal."

²⁰ "No court has jurisdiction to sentence a defendant for that which is not a crime." Commonwealth v. Burns, 8 Mass. App. Ct. 194, 196 (1979) (quoting Commonwealth v. Andler, 247 Mass. 580, 581–82 (1924)).

²¹ Mass. R. Prof. C. 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client"); ABA Standards Relating to the Administration of Criminal Justice 4-1.2 ("Defense counsel should avoid unnecessary delay in the disposition of cases"). See also former S.J.C. Rule 3:07, DR 7-101(A)(1), and DR 7-102(A)(1). Willful violation of Mass. R. Crim. P. 13(c)'s time requirement might also subject counsel to court-imposed sanctions under Mass. R. Crim. P. 48.

²² See Mass. R. Crim. P. 13(c); Commonwealth v. Oakes, 401 Mass. 602 (1988) (overbreadth); City of Cambridge v. Phillips, 415 Mass. 126 (1993) (vagueness); Commonwealth v. Gagnon, 387 Mass. 567 (1982) (vagueness). Challenges to a statute's vagueness "as applied" may be raised by a pretrial motion to dismiss, but in any event must be the subject of a motion for a required finding in order to preserve the issue for appeal. Commonwealth v. Kwiatkowski, 418 Mass. 543 (1994); Commonwealth v. Oakes, 407 Mass. 92, 94 (1990), discussing Commonwealth v. Jasmin, 396 Mass. 653, 655 (1986).

²³ Art. 12 requires that "[n]o subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him. . . ."

descriptive thereof.” A motion to dismiss will lie if the charging document is insufficient on its face. This can occur in three circumstances:²⁴

1. The charge fully and clearly specifies the acts defendant is alleged to have done, but these acts constitute no crime.²⁵

2. The charging document is wholly conclusory, lacking specific factual allegations: “an indictment must do more than simply repeat the language of the criminal statute.”²⁶

3. An element of the crime is missing from the charging document.²⁷ The question then is whether or not the element is “essential,” and if so whether the omission is fatal. This varies from crime to crime but, in Massachusetts, generally, matters discoverable by bill of particulars — the date, place, manner, and means of an alleged offense — are not “essential.”²⁸

At one time, in order to withstand a motion to dismiss the Commonwealth had to set forth in the charging document every essential element of the crime, including mens rea elements.²⁹ However, the S.J.C. now holds that “it is not necessary for the Commonwealth to set forth in the complaint or indictment every element of the crime to withstand a motion to dismiss.”³⁰ Even if an essential element is missing, “[a] complaint will not be dismissed if the offense is charged with sufficient clarity to show a violation of law and to permit the defendant to know the nature of the accusation against him,”³¹ and to “plead an acquittal or conviction in bar of future prosecution for

²⁴ This paragraph draws on AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 173 (5th ed. 1988).

²⁵ See, e.g., Commonwealth v. Richards, 426 Mass. 689 (1998) (affirming dismissal of complaint for making annoying telephone calls; statute does not apply to sending of annoying fax messages); Commonwealth v. Black, 403 Mass. 675 (1989), affiriming dismissal of complaint alleging use of certain animal trap ruled not proscribed by applicable statute.

²⁶ Russell v. United States, 369 U.S. 749, 764 (1962) (“It is an elementary principle of criminal pleading, that where the definition of an offence . . . includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species — it must descend to particulars.” *Russell, supra*, 369 U.S. at 765 (quoting United States v. Cruikshank, 92 U.S. 542, 558 (1875)).

²⁷ See Commonwealth v. Cantres, 405 Mass. 238, 239–40 (1989) (indictment defective if it fails to allege any fact necessary to constitute an offense and, because defect also deprives court of jurisdiction, it may be raised at any time (citing Commonwealth v. Bracy, 313 Mass. 121, 124 (1943)). See also G.L. c. 277, § 47A (lack of jurisdiction or failure to charge a crime must be heard at any time).

²⁸ See G.L. c. 277, §§ 20, 21 (time, place, and means need not be alleged unless it is an essential element). See *infra* § 20.5. However, place is an essential element of an offense that is “by its nature local” such as burglary or arson. Commonwealth v. Heffron, 102 Mass. 148, 150 (1869). Also, the caption of all charging documents must contain certain information as to place and time in order to establish the court’s territorial jurisdiction and to satisfy the statute of limitations. See 30 Mass. Prac. § 15.4 (3d ed. Smith 2007 & Supp. 2010).

Whether an element is “essential” also affects the rules governing amendments and variances. See *infra* §§ 20.6, 20.7.

²⁹ See, e.g., Commonwealth v. Lombard, 321 Mass. 294 (1947) (complaint alleging “offensive language” charged no crime under statute punishing “offensive and disorderly . . . language”).

See discussion in this section *infra* regarding the special case of mens rea elements.

³⁰ Commonwealth v. Green, 399 Mass. 565, 566 (1987).

³¹ Commonwealth v. Green, 399 Mass. 565, 666 (1987).

the same offense.”³² The courts have found on several occasions that a charge that does not expressly include an essential element might still give sufficient implicit notice through other factual or legal allegations.³³

Although case law indicates a judicial reluctance to dismiss charging documents for insufficiency, such motions should be pursued when appropriate. Counsel contemplating such a challenge should check for statutes and cases establishing charging requirements for the particular crime.³⁴ Also, counsel should be aware of two other factors stressed by the courts: (1) Whether the charge tracks the language of the statute defining the offense. If it does (while adding essential facts such as the name of the victim), it is likely to be held sufficient.³⁵ Failure to set forth the elements in the exact words of the statute is not necessarily fatal³⁶ but does favor the defense. (2) Whether the charge complies with the specific form of indictment mandated by statute. G.L. c. 277, § 79 establishes charge³⁷ forms for a number of

³² Commonwealth v. Donoghue, 23 Mass. App. Ct. 103, 110 (1986).

³³ For example:

1. A complaint charging that the defendant “[d]id indecently assault and beat [the victim] a child under the age of fourteen years” was sufficient even though it failed to allege the victim’s lack of consent, which was then an element of the offense. Commonwealth v. Green, 399 Mass. 565, 566 (1987). Lack of consent was held to be implicit in the legal definition of both assault and battery and indecent assault and battery.

2. A larceny complaint alleging that the defendant “did steal” property was sufficient without enumerating the elements of larceny such as “taking and carrying away.” *Id. at 566*.

3. An indictment alleging a conspiracy to violate competitive bidding statutes by noncriminal means was sufficient without specifically averring the element of great danger to the public interest because the charges in the indictment “clearly lead to that conclusion” and such an averment “would merely be conclusory and would add nothing.” Commonwealth v. Gill, 5 Mass. App. Ct. 337, 341–42 (1977) (indictments alleged that the defendants “did conspire . . . to cause a contract . . . to be awarded by [a city] . . . to a person who was not the lowest responsible and eligible bidder on the basis of competitive bids publicly opened and read in the manner provided by . . . [G.L. c. 30, § 39M]”).

4. A mayhem indictment that failed to allege that the defendant’s assault disfigured or inflicted serious or permanent physical injury on the victim was nonetheless upheld on the ground that the missing element was instinctively conveyed by [the indictment’s specific allegations.] The indictment cited the criminal statute, and alleged that the defendant “slash[ed] and cut” the victim’s face with a knife.” Commonwealth v. Donoghue. 23 Mass. App. Ct. 103, 110–11 (1986).

³⁴ See generally G.L. c. 277, §§ 18–35, 36–45, 79.

³⁵ Commonwealth v. Lombardo, 23 Mass. App. Ct. 1006 (1987); Commonwealth v. Bacon, 374 Mass. 358, 360 (1978) (“Thus, it is significant that the indictments in this case tracked the statute”); Commonwealth v. Burns, 8 Mass. App. Ct. 194, 197 n.1 (1979).

³⁶ Commonwealth v. Lent, 46 Mass. App. Ct. 705 (1999) (where kidnapping indictment “clearly and unequivocally informed the defendant of the nature and elements of the crime . . . charged,” no prejudice from omission of word “seized” from quoted clause of statute), citing G.L. c. 277, § 34, prohibiting dismissal of indictment “if it is sufficient to enable the defendant to understand the charge and to prepare his defense”); Commonwealth v. Donoghue, 23 Mass. App. Ct. 103, 110 (1986).

³⁷ G.L. c. 277, containing laws governing indictments, applies as well to complaints. G.L. c. 277, § 79.

offenses. A charging document that tracks the form language is likely to be upheld.³⁸ Although these forms merely exemplify sufficient descriptions and are not mandatory,³⁹ failure to allege an element included in the form supports an argument for insufficiency.

Following is a survey of the consequences of omitting particular allegations from the charging document.

2. Date of Offense

The date of an offense need not be alleged unless it is an essential element of the offense,⁴⁰ and the cases generally hold that it is not.⁴¹ Other cases have upheld temporal vagueness in the charge⁴² and variances between proof and indictment

³⁸ See, e.g., Commonwealth v. Senior, 454 Mass. 12, 14-15 (2009) (attempted perjury indictment following statutory form valid where the defendant could obtain information concerning unspecified overt act through a bill of particulars); Commonwealth v. Hyrcenko, 417 Mass. 309, 313 (1994) (multiple identically worded indictments that follow statutory form are valid if defendant has opportunity to obtain, through bill of particulars, sufficient information to prepare defense); Commonwealth v. Watkins, 33 Mass. App. Ct. 7, 8 (1992) (upholding rape indictments following statutory form, adding only date of the offenses); Commonwealth v. Bacon, 374 Mass. 358 (1978); Commonwealth v. Burns, 8 Mass. App. Ct. 194, 197 n.1 (1979); Commonwealth v. Green, 399 Mass. 565 . 567 (1987).

³⁹ Commonwealth v. Weiner, 255 Mass. 506 (1926) (indictment in the form, “A robbed B of the property of C” valid although G.L. c. 277, § 79, prescribes form “A robbed B of the property of B”); Commonwealth v. Souza, 397 Mass. 236, 238–39 (1986) (larceny complaint need not allege owner of property despite inclusion of ownership allegation in G.L. c. 277, § 79, form). *See also* G.L. c. 277, § 39. defining selected terms used in indictments.

⁴⁰ G.L. c. 277, § 20.

⁴¹ See, e.g., Commonwealth v. Hosmer, 49 Mass. App. Ct. 188 (2000) (improper to dismiss OUI complaint because of variance between evidence and charged date of offense; date is not an essential ingredient of OUI, and defendant not prejudiced); Commonwealth v. Jervis, 368 Mass. 638 (1975) (amendment before trial changing date of larceny offense upheld because time is not an essential element of larceny, amendment was therefore one of form and not substance, and no prejudice shown). But regarding the defendant's constitutional right to fair notice, discussed *infra* § 20.5, *see* Commonwealth v. Montanino, 409 Mass. 500, 511–13 (1991) (failure to specify dates of alleged sexual crimes more precisely than “between January and April, 1981,” where alleged victim was “a relatively mature teenager [who] held a steady job,” raises “troubling” due process concerns; case remanded for new trial on other grounds). *But see* Commonwealth v. Kirkpatrick, 423 Mass. 436 (1996) (no due process violation where, owing to youth of victim complaining of repeated sexual assaults occurring over a substantial period of time by “resident molester,” Commonwealth is unable to specify dates of particular incidents of abuse; in such cases alibi or identity defense rarely available, so defendant is not prejudiced).

⁴² Commonwealth v. King, 387 Mass. 464 (1982) (exact date not essential element of unnatural sexual intercourse with child under 16; allegation of “divers dates” between X and Y sufficed. D failed to move for a bill of particulars, nor was he apparently prejudiced by lack of specificity). Temporal vagueness in the charge may also raise questions of duplicity, unless the crime is a “continuing offense.”; Commonwealth v. Conefrey, 420 Mass 508, 511 n.6 (*accord*, but defendant entitled to jury instruction requiring unanimity on at least one incident). *See* G.L. c. 277, § 32, and *infra* § 20.4D.

relating to the date in property and sexual offenses, at least where no prejudice results.⁴³

3. Failure to Negate Excuses and Exceptions Relieving the Defendant of Liability

G.L. c. 277, § 37, states that excuses, exceptions, and provisos negating the defendant's liability, if not stated in the "enacting clause"⁴⁴ of the statute creating the crime, need not be negated in the indictment unless necessary for a complete definition of the crime.⁴⁵ If a statute provides a form of indictment for the crime, then the presence or absence of negating words in the form may determine whether absence of the exception is "necessary" to the crime.⁴⁶

4. Name of Defendant: "John Doe"

In order to satisfy a defendant's right to grand jury indictment under article 12 of the Massachusetts Constitution Declaration of Rights, an indictment must either name him or, if his name is unknown, contain other words particularly describing him.⁴⁷ An indictment merely describing the defendant as "John Doe" is fatally defective, even if later amended under G.L. c. 277, § 19, to include the defendant's name.⁴⁸

5. Name of Defendant: Use of Alias

The S.J.C. has disapproved the unnecessary inclusion of aliases in indictments.⁴⁹ Although there is old case-law holding that the judge has no obligation to review the necessity of such prejudicial allegations before letting the jury hear

⁴³ G.L. c. 277, § 35. *Compare Commonwealth v. Day*, 387 Mass. 915, 921–23 (1983) (court applies G.L. c. 277, § 35, to uphold statutory rape conviction where jury was instructed it could convict even if it found that the offense was committed on different date than charged; date is not essential element, essential elements were correctly stated, and defendant failed to show prejudice from this immaterial variance between proof and indictment) *and Commonwealth v. Tivnon*, 8 Gray 375, 379 (1857) (time not an essential ingredient of possession of burglarious instruments) *with Commonwealth v. American News Co.*, 333 Mass. 74 –77 (1955) (failure to prove dates of possession of obscene publications as alleged in unamended bill of particulars is fatal).

⁴⁴ The "enacting clause" is the clause that defines the offense. 30 MASS. PRAC. § 15.32 (3d ed. Smith 2007 & Supp. 2010).

⁴⁵ See *Commonwealth v. David*, 365 Mass. 47, 55 (1974) (indictment charging sale of securities by person not registered as broker did not have to negative an exemption that was merely referred to, but not "stated," in enacting clause, and was unnecessary to a complete description of the crime).

⁴⁶ *Commonwealth v. Sokorelis*, 254 Mass. 454 (1926).

⁴⁷ See *Commonwealth v. Dixon*, 458 Mass. 446, 453-54 (2010) (indictment identifying rape defendant as John Doe, described by unique DNA profile coupled with age, height, weight and race, held valid under art. 12).

⁴⁸ *Connor v. Commonwealth*, 363 Mass. 572 (1973).

⁴⁹ *Commonwealth v. Walters*, 12 Mass. App. Ct. 389, 396 (1981); *Commonwealth v. Torrealba*, 316 Mass. 24, 26 (1944). See also *Commonwealth v. Sheline*, 391 Mass. 279, 285–87 (1984) (alias in drug analysis certificate).

them,⁵⁰ more recent provision for defense motions to amend the charging document supports an argument that the trial judge should require the prosecution to justify inclusion of an alias when the issue is so raised. *See infra* § 20.6C.

6. Name of Victim or Other Third Party

Misnomer of the victim or other third party can, if material, give rise to a fatal variance.⁵¹ Regarding owners of property, *see infra*.

7. Prior Convictions

Statutes authorizing increased punishment for second or subsequent violations require that prior convictions be alleged in the complaint or indictment and proved.⁵² However, the defendant is entitled to a separate jury trial on the issue of the prior conviction following conviction of the new offense.⁵³ No reference may be made to the

⁵⁰ *See Commonwealth v. Torrealba*, 316 Mass. 24, 26 (1944).

⁵¹ *See, e.g.*, Commonwealth v. Azer, 308 Mass. 153 (1941) (complaint alleging illegal sale to *A* unproved by evidence of sale to *B*, absent evidence that *A* and *B* were the same person). *See also Commonwealth v. Ohanian*, 373 Mass. 839 (1977) (fatal misnomer of drawee bank in prosecution for larceny by check); Commonwealth v. Barbosa, 421 Mass. 547 (1995) (where grand jury heard evidence of two drug distributions to different buyers on same date, conviction under single distribution count of indictment specifying neither time nor buyer violated art. 12; substantial risk that defendant was convicted of a crime for which he was not indicted). *Compare Commonwealth v. O'Connor*, 432 Mass. 657, 660 (2000) (failure to name victim in indictments for indecent assault and battery on child under 14, and posing a child in a state of nudity, was not material).

⁵² Commonwealth v. Miller, 8 Gray (74 Mass.) 484 (1857); Garvey v. Commonwealth, 8 Gray (74 Mass.) 382 (1857). *See Commonwealth v. Hall*, 19 Mass. App. Ct. 1004 (1985), *aff'd*, 397 Mass. 466 (1986). But no notice in the charge is required for sentencing as a “common and notorious thief under G.L. c. 266, § 40 because, unlike sentencing under the habitual criminal statutes, G.L. c. 278, § 11A and G.L. c. 279, § 25, the defendant receives one consolidated sentence for his several crimes. Commonwealth v. Crocker, 384 Mass. 353, 355–56 (1981). *See also Commonwealth v. Santucci*, 13 Mass. App. Ct. 933, 934–35 (1982) (adjudication as “common receiver” under G.L. c. 266, § 62 is regarded as an aggregate judgment).

⁵³ G.L. c. 278, § 11A; Commonwealth v. Jarvis, 68 Mass. App. Ct. 538, 540–41 (2007) (error under G.L. c. 278, § 11A to impose sentence for new OUI offense before separate trial and enhanced sentencing based on status as a repeat offender); Commonwealth v. Zuzick, 45 Mass. App. Ct. 71 (1998) (trial court refused to hold jury trial on charge that OUI was a subsequent offense; judgment and sentence vacated). However, repeat offender statutes do not define separate crimes. Commonwealth v. Bynum, 429 Mass. 705, 708–09 (1999) (G.L. c. 94C, § 32A(d) solely provides sentence enhancement for repeat drug offenders convicted under G.L. c. 94C, § 32A(c)). Therefore, an indictment need not, under art. 12, describe the prior convictions with particularity. *See Commonwealth v. Fernandes*, 430 Mass. 517 (1999) (although the “better practice” is to specify “the date of the prior offense and the date of the conviction and the court in which such a conviction was obtained,” art. 12 satisfied by language that tracks the statutory language of the enhanced sentencing provision, or that notifies the defendant that the prior conviction was for a “similar offense.”), *citing Wilde v. Commonwealth*, 43 Mass. 408 (1841).

prior conviction at the first trial,⁵⁴ not even, in all probability, to impeach the defendant's credibility if he testifies.⁵⁵

8. Statutory Citation

The charging document need not cite the statute defining the offense,⁵⁶ nor use its precise language.⁵⁷

9. Inchoate Offenses

a. Attempt

Although the charge of a completed crime "logically includes" the charge of attempting to commit that crime, a defendant may not be convicted of an attempt unless the charge "set[s] forth in direct terms that the defendant attempted to commit a crime, and [alleges] the act or acts done towards its commission."⁵⁸ This is true whether the attempt is charged under G.L. c. 274, § 6, the general attempt statute, or under a substantive attempt statute.⁵⁹

b. Conspiracy

Although *Commonwealth v. Bessette* (No. 1)⁶⁰ restricted liability for conspiracies where no crime is contemplated to situations involving great danger to the public interest, the indictment need not allege that danger if the charges in the indictment "are such as clearly lead to that conclusion."⁶¹

⁵⁴ G.L. c. 278, § 11A.

⁵⁵ See, e.g., *Commonwealth v. Little*, 453 Mass. 766, 773-74 (2009) (noting impeachment with similar crime invites unfair prejudice and holding, where defendant on trial for possessing marijuana with the intent to distribute, it was an abuse of discretion to deny defendant's motion in limine to preclude impeachment with prior narcotics offenses).

⁵⁶ G.L. c. 277, § 33. Several decisions have rejected claims that defendants convicted of cocaine distribution under G.L. c. 94C, § 32A, which allows harsher sentencing under subsection (c) than (a), must be sentenced under the latter unless the indictment specifies the former. See *Commonwealth v. Ortiz*, 39 Mass. App. Ct. 70 (1995) (although body of indictment neither cited subsection (c) nor tracked its precise language, caption did cite it and language of indictment gave sufficient notice); *Commonwealth v. Zwickert*, 37 Mass. App. Ct. 364 (1994) (although indictment failed to cite subsection (c), words of indictment tracked its precise language); *Commonwealth v. Bradley*, 35 Mass. App. Ct. 525 (1993) (although indictment neither cited subsection (c) nor tracked its precise language, language of indictment gave sufficient notice, and no prejudice shown) (citing *Commonwealth v. Jiminez*, 22 Mass. App. Ct. 286, 295-96 (1986)).

⁵⁷ G.L. c. 277, § 17; *Commonwealth v. Bradley*, 35 Mass. App. Ct. 525, 527 (1993), citing Mass. R. Cr. P. 4(a).

⁵⁸ *Commonwealth v. Gosselin*, 365 Mass. 116, 121 (1974); *Commonwealth v. Senior*, 454 Mass. 12, 15 & n. 3 (2009) (citing and quoting *Gosselin* on this point); *Commonwealth v. Burns*, 8 Mass. App. Ct. 194, 197 (1979).

⁵⁹ See e.g., *Commonwealth v. Anolk*, 27 Mass. App. Ct. 701 (1989) (indictment for attempt to commit arson brought under G.L. c. 226, § 5A defective for failure to allege overt act).

⁶⁰ [Reserved]

⁶¹ 351 Mass. 148, 153-54 (1966).

⁶² *Commonwealth v. Gill*, S Mass. App. Ct. 337, 341-42 (1977) (indictment alleging conspiracy to violate competitive bidding statutes by noncriminal means was sufficient without

10. Property Offenses

a. Identity of Property Owner

An indictment for injury or attempted injury to property need not allege the name of the owner if it describes the property with sufficient certainty in other respects to identify the act.⁶³ An indictment for larceny of a motor vehicle that fails to identify the vehicle's owner gives insufficient notice but may be supplemented by a bill of particulars.⁶⁴ In an indictment for breaking and entering, failure to prove an allegation that the building belonged to a named individual was immaterial, as long as the proof at trial permitted an inference that the defendant was not the owner.⁶⁵

b. Burglary

An indictment need not specify the particular felony the defendant intended to commit after breaking and entering.⁶⁶

c. Larceny

Larceny, embezzlement, and false pretenses may be charged generically as "stealing," and supported by proof of any one of such crimes.⁶⁷ The value of property

specific averment of great danger to public interest). For particularity requirements when punishment depends on the object of the conspiracy, see Commonwealth v. Cantres, 405 Mass. 238, 239–41 (1989), and Commonwealth v. Dellinger, 10 Mass. App. Ct. 549 (1980). If a variance exists between the unlawful purpose alleged in an indictment and the unlawful purpose proved, a directed verdict will not be granted unless the defendant has been misled to his prejudice. *Dellinger, supra*, 10 Mass. App. Ct. at 558–59.

⁶³ G.L. c. 277, § 25. *See also* G.L. c. 277, § 35 (effect of immaterial mistakes in the description of property or the ownership thereof). *See Commonwealth v. Souza*, 397 Mass. 236, 238–39 (1986) (upholding larceny conviction despite failure to prove ownership by individual specified as owner in complaint, even though form provided in G.L. c. 277, § 79, includes an allegation of ownership); Commonwealth v. Caparella, 70 Mass. App. Ct. 506, 513 (2007) (under larceny statute the Commonwealth must allege and prove that the property in question belonged to another, but it "need not prove exact ownership").

⁶⁴ Commonwealth v. Kozlowsky, 238 Mass. 379, 382–83 (1921) (dictum).

⁶⁵ Commonwealth v. Kalinowski, 360 Mass. 682 (1971). *Compare Commonwealth v. DeRome*, 6 Mass. App. Ct. 900 (1978) (rescript) (fatal variance where indictment for breaking and entering alleged A as owner of premises, and proof showed break in different portion of building, leased to B, defendant's brother)).

⁶⁶ Commonwealth v. Hobbs, 385 Mass. 863, 869–70 (1982) (allegation that defendant broke and entered with intent to commit larceny was "harmless surplusage"; variance between that allegation and trial court's instruction permitting jury to consider defendant's intent to commit other felonies was a "technical defect" that did not require acquittal absent prejudice to the defendant). *See also* Rogan v. Commonwealth, 415 Mass. 376, 378–79 (1993) (charge of breaking and entering in daytime need not allege particular misdemeanor defendant intended to commit). *But see Commonwealth v. Cruz*, 430 Mass. 182, 188–89 (1999) (failure of burglary indictment to specify the underlying intended felony did not create likelihood of miscarriage of justice, where separate indictments charged potential underlying felonies, and defendant was aware before trial of Commonwealth's theory of case), *citing Commonwealth v. Gunter*, 427 Mass. 259, 274 (1998) (murder indictment need not mention felonies underlying felony-murder theory; statutory form of indictment sufficient to charge murder, by whatever means).

⁶⁷ G.L. c. 277, § 41; Commonwealth v. Mills, 436 Mass. 387, 391–93 (2002); Commonwealth v. Nadal-Ginard, 42 Mass. App. Ct. 1, 5 (1997) (judge may instruct on larceny by false pretenses despite indictment's failure to include those words); Commonwealth v. Corcoran, 348 Mass. 437, 440–41 (1965).

stolen is not an element of larceny or receiving and need not be alleged in the complaint.⁶⁸

d. Larceny by Check

Defendants indicted under G.L. c. 266, § 37, for obtaining money by means of checks drawn against insufficient funds at one bank were entitled to dismissal for fatal variance, when proof showed the checks were drawn on a different bank. Within the meaning of G.L. c. 277, § 35, the misnomer was material, and the essential elements of the crime were not correctly stated. Moreover, a substantial likelihood of prejudice to the defendants was apparent.⁶⁹

e. Possession of Burglarious Instruments

As long as the statutory language is otherwise satisfied, the Commonwealth need not allege or prove intent to use the tools in a particular place, or for a special purpose, or in any definite manner.⁷⁰ If the “tool or implement” is a motor vehicle master key, the charging document must so specify.⁷¹

11. Mens Rea

S.J.C. cases are not altogether clear concerning when a mens rea element must be alleged in the charging document.⁷² In *Commonwealth v. Palladino*,⁷³ the S.J.C. voided defendant's conviction for sale of obscene materials because the complaint, which tracked the statutory language,⁷⁴ failed to allege his knowledge of the obscene nature of the materials, an element imposed by previous cases. The Court reasoned that a charge that omits an essential element not only deprives the defendant of notice and the opportunity to prepare his defense, but “charges no crime,” thus leaving the court without jurisdiction to punish the defendant. Conviction of such a charge, the Court held, denies the defendant due process.⁷⁵

A few years later, the Court retreated from *Palladino* in *Commonwealth v. Bacon*,⁷⁶ there upholding indictments charging unlawful possession of firearms that omitted the necessary (nonstatutory) element of knowing possession. In *Bacon* the

⁶⁸ It is, however, an “element of punishment” for larceny or receiving stolen property over \$250 and so must be proved at trial if not within the common experience of the jury. *Commonwealth v. Tracy*, 27 Mass. App. Ct. 455, 467 (1989); *Commonwealth v. Kelly*, 24 Mass. App. Ct. 181, 183 (1987), *rev. denied*, 400 Mass. 1103 (1987). See also G.L. c. 277, § 24; *Commonwealth v. Iannello*, 344 Mass. 723, 726–27 (1962).

⁶⁹ *Commonwealth v. Ohanian*, 373 Mass. 839 (1977).

⁷⁰ *Commonwealth v. Tivnon*, 8 Gray 375, 380 (1857) (“general intent” to use the tools for a burglarious purpose suffices). However, where the indictment specifies the defendant's criminal purposes, proof of some other purpose will not support a conviction. *Commonwealth v. Armenia*, 4 Mass. App. Ct. 33, 38–39 (1976).

⁷¹ *Commonwealth v. Collardo*, 13 Mass. App. Ct. 1013 (1982).

⁷² 30 MASS. PRAC. § 15.12 (3d ed. Smith 2007 & Supp. 2010) asserts that when knowledge is an essential element, it need not be alleged in most cases. In most other American jurisdictions the contrary is true. See 42 C.J.S. *Indictments and Informations* § 133 (1991).

⁷³ 358 Mass. 28 (1970).

⁷⁴ G.L. c. 272, § 28A (repealed 1974).

⁷⁵ See also *Commonwealth v. Gill*, 5 Mass. App. Ct. 337, 338–39 (1977); *Commonwealth v. Hobbs*, 385 Mass. 863, 870–71 (1982).

⁷⁶ 374 Mass. 358 (1978). See also *Commonwealth v. Green*, 399 Mass. 565, 567 (1987), discussing *Palladino* and *Bacon*.

Court disavowed any general rule that knowledge must be alleged in the charging document whenever it is a necessary element to be proved. It distinguished *Palladino* because of the nature of the property that was declared contraband in that statute, observing that while “the characteristics of a gun are obvious . . . a complaint asserting unlawful possession of obscene matter must allege scienter, because an obscenity conviction requires knowledge of a more specific kind.”⁷⁷ The reason for requiring this “more specific kind” of knowledge, and presumably for requiring its inclusion in the charging document, is at least in part the need for proof of such knowledge to save the statute from a First Amendment challenge.⁷⁸ Subsequent cases, at least those involving statutes in which a knowledge element has not been judicially implied for constitutional reasons, have followed *Bacon* and upheld indictments and complaints that omit a knowledge allegation even though knowledge is a required element.⁷⁹

Nevertheless, given the decisions, counsel should consider arguing that, in order to promote the “judicial review” and “grand jury” purposes of charging documents (*see supra* § 20.1), *Bacon* should be narrowly construed. Accordingly, a complaint or indictment that fails to allege a specific intent⁸⁰ element should be dismissed whenever: (1) the statute expressly includes a mens rea element (and therefore the pleading does not track the statutory language); (2) neither the statute nor prior cases clearly establish the required mens rea element (thereby leaving the parties and the trial court without guidance as to what must be proved); (3) the mens rea relates to some vaguely defined conduct, circumstance, or result (such as “obscene,” or “loiter”); or (4) under the circumstances of the case, the mens rea is neither implicitly alleged⁸¹ nor “obvious.”⁸²

⁷⁷ Commonwealth v. Bacon, 374 Mass. 358, 361 (1978). The Court stressed that the indictment tracked the wording of the firearms statute and concluded that this wording, together with prior case law, sufficiently informed defendant of the missing element. Because the indictments specified the time and place of the alleged crimes, as well as descriptions of the firearms, defendant's interest in avoiding double jeopardy in the future was also protected. The Court did not address the other policies served by the charging document; *see supra* § 20.1.

⁷⁸ See 30 MASS. PRAC. § 15.31 (3d ed. Smith 2007 & Supp. 2010).

⁷⁹ See, e.g., Commonwealth v. Militello, 66 Mass. App. Ct. 325, 329 (2006) (upholding complaint charging contributing to the delinquency of a child even though it did not allege that the acts were done knowingly, a required element of the offense).

⁸⁰ With respect to “general intent” the argument is harder to make, but should be pressed if the charging document omits a statutory element such as “recklessly” or “negligently,” or if the facts are consistent with complete non-culpability, and counsel anticipates and disputes the imposition of strict liability. Compare JURY TRIAL MANUAL FOR CRIMINAL OFFENSES TRIED IN THE DISTRICT COURT § 1.13 (1987) (“Where general intent is an element of the crime, it need not be specifically alleged”) (citing G.L. c. 277, § 29, which is of dubious relevance).

⁸¹ Compare Commonwealth v. Sepulveda, 6 Mass. App. Ct. 868 (1978) (allegation of intent to distribute controlled substance implies element of knowledge).

⁸² Where, for example, the defendant's alleged conduct is also compatible with innocent or less culpable mental states. *But see* Commonwealth v. Elwell, 2 Metc. 190 (1840) (adultery indictment need not allege unmarried defendant's knowledge that female partner was married; “malice” implied from unlawful act itself). In Commonwealth v. Bacon, 374 Mass. 358 (1978), defendant's argument would have been stronger had he been charged with possession of a gun located inside an opaque, sealed container. On those facts it could not have been said that, simply because “the characteristics of a gun are obvious,” so was his knowledge.

12. Miscellaneous

A number of special statutes allow flexible charging of particular elements, declare certain types of variance immaterial, and define the meaning of certain terms used in charging documents. *See generally* 30 MASS. PRAC. §§ 15.5, 15.8-15.11, 15.13-15.16, 15.21, 15.23, 15.25, 15.31-15.36 (3d ed. Smith 2007 & Supp. 2010). These include G.L. c. 277, §§ 22 (written instruments), 23 (money and notes), 43–44 (perjury), 24 (value of property), and 19, 33, 35 (wrong name or address). Also, case law establishes that “[w]here a crime can be committed in any one of several ways, an indictment properly charges its commission in all those ways, using the conjunction ‘and’ in joining them.”⁸³ This rule reflects a concern that charging a person disjunctively would fail to give notice of the theory relied on.⁸⁴ In case of conjunctive charging, however, defense counsel should consider moving for a bill of particulars to compel the Commonwealth to specify its theory of liability.⁸⁵

§ 20.4C. DOUBLE JEOPARDY

Defense counsel may move to dismiss a charging document that violates double jeopardy.⁸⁶ Although the Supreme Judicial Court has not been entirely clear on this point, a failure to raise a double jeopardy claim pre-trial may constitute waiver of that defense.⁸⁷ It would thus be wise to consider potential double jeopardy claims pretrial and to assert any such claims through a pretrial motion to dismiss. In some cases it will be apparent from the face of the charge that the defendant has previously been in jeopardy for the identical offense, and immediate dismissal can be won. If it is not apparent, counsel should request a bill of particulars to clarify the matter before trial. The double jeopardy issue potentially arises whenever the defendant is charged with multiple offenses in language that does not adequately differentiate the offenses from each other.⁸⁸

⁸³ Commonwealth v. Murphy, 415 Mass. 161, 164 (1993) (citing Commonwealth v. Dowe, 315 Mass. 217, 219–20 (1943) (indictment under bribery statute punishing conduct with three alternative intentions, charged that defendant acted with all three intentions). *See also* Commonwealth v. Buckley, 76 Mass. App. Ct. 123, 130 n.5 (2010)).

⁸⁴ Commonwealth v. Brogan, 415 Mass. 169, 178–79 (1993) (citing Commonwealth v. Grey, 2 Gray 501, 501–02 (1854)).

⁸⁵ *See infra* § 20.5.

⁸⁶ *See infra* ch. 21.

⁸⁷ *Id.* *See* Commonwealth v. Carlino, 449 Mass. 71, 76 n. 13 (2007) (noting lack of clarity concerning whether failure to raise double jeopardy claim pretrial constitutes waiver, but declining to resolve it).

⁸⁸ Commonwealth v. LaCaprucia, 429 Mass. 440 (1990) (double jeopardy bars retrial of defendant on some indictments for sex crimes against his children, because it cannot be determined whether he was acquitted of those crimes; the question is whether “the alleged conduct for which the grand jury indicted the defendant ..., the evidence, the charge, and the jury verdicts are sufficiently distinguishable to permit an understanding of the allegations on which the jury acquitted the defendant and on which they convicted him.”), *citing* Commonwealth v. Hyrcenko, 417 Mass. 309, 313 (1994) (double jeopardy bars retrial of defendant on two rape indictments after reversal of convictions on appeal and after first jury acquitted him on four other identically worded indictments; impossible to determine whether defendant was being retried for rapes of which he had been acquitted; Defendant’s failure to request bill of particulars before first trial waived any claim that the indictments were defective,

§ 20.4D. DUPLICITY AND MULTIPLICITY

The concepts of duplicity and multiplicity are burdened by confusing terminology. An indictment is “duplicitous” if it charges two or more offenses in the same count.⁸⁹ This pleading defect threatens the defendant’s rights to adequate notice, to fair evidentiary rulings at trial, to a unanimous jury verdict, and to clear judgment for protection against double jeopardy.⁹⁰ A duplicitous charge violates the requirement in Massachusetts that each offense should be stated in a separate count,⁹¹ and might also violate the state constitutional right to grand jury indictment.⁹² Counsel should respond by moving to dismiss, with the likely result of forcing the Commonwealth to remedy the problem by electing between the offenses.⁹³

Although in most jurisdictions the term “multiplicitous” is used to describe an indictment (or multiple indictments) that charges a single offense in more than one count,⁹⁴ in Massachusetts such charges are also described as “duplicitous.”⁹⁵ By

but not claim of double jeopardy on retrial). *See Commonwealth v. Watkins*, 33 Mass. App. Ct. 7, 8–12 (1992) (upholding conviction on only one of two identically worded rape indictments based on conduct in same episode on same date with same victim, even though no way to ascertain which portions of victim's testimony the jury accepted; unclear whether, if conviction reversed, double jeopardy or collateral estoppel would bar retrial).

⁸⁹ *See, e.g.*, Commonwealth v. Devlin, 335 Mass. 555, 565–66 (1957). Commonwealth v. Fuller, 163 Mass. 499 (1895); Commonwealth v. Lombardo, 271 Mass. 41, 43–45 (1930). For federal jurisprudence, *see* 24MOORE'S FEDERAL PRACTICE §608.04[1] (Matthew Bender 3d ed. 2011). For the law governing whether given conduct constitutes one or multiple offenses, *see infra* § 21.2D.

⁹⁰ United States v. Kimberlin, 781 F.2d 1247, 1250 (7th Cir. 1985); 24MOORE'S FEDERAL PRACTICE §608.04 [1] (Matthew Bender 3d ed. 2011).

⁹¹ Mass. R. Crim. P. 9(a)(2). *See Commonwealth v. Dellamano*, 393 Mass. 132, 134 n.4 (1984) (charge that defendant either stole or received a stolen vehicle should be in separate counts or indictments).

⁹² Commonwealth v. Barbosa, 421 Mass. 547 (1995) (reversing conviction of drug distribution under one count of indictment specifying date but not time of incident or name of buyer, where evidence before grand jury of separate distributions with two different buyers on same date). *But see Commonwealth v. Crowder*, 49 Mass.App.Ct. 720 (2000) (upholding rape conviction where grand jury heard evidence of four separate acts of forcible penetration committed by defendant on the victim, but returned only one indictment for aggravated rape; Barbosa distinguished where alleged multiple acts of penetration are part of continuing criminal episode involving same parties). *And compare Commonwealth v. Spencer*, 53 Mass.App.Ct. 45, 49–50 (2001), *rev. denied*, 435 Mass. 1107 (although grand jury heard evidence of two separate drug transactions, objective indicators in indictments, in light of the evidence, made clear which of the two transactions was the subject of the charges).

⁹³ *But see Commonwealth v. Fuller*, 163 Mass. 499 (1895) (Commonwealth erroneously allowed to proceed to trial without election; indictments quashed). Election will not be possible if the indictment is defective. *See Commonwealth v. Barbosa*, 421 Mass. 547, 553 n.7 (1995).

⁹⁴ *See, e.g.*, 24MOORE'S FEDERAL PRACTICE §608.04 [3] (Matthew Bender 3d ed. 2011); State v. Hirsch, 410 N.W.2d 638 (Wis. App. 1987).

⁹⁵ *See, e.g.*, Commonwealth v. Anderson, 425 Mass. 685, 692 (1997) (armed robbery conviction vacated as duplicative where general guilty verdict of first degree murder might have been based on felony murder founded on the underlying robbery); Commonwealth v. Duddie Ford Inc., 409 Mass. 387, 394–97 (1991) (convictions under G.L. c. 266, § 34, for larceny by

whatever name, this practice potentially subjects the defendant to jury prejudice and to multiple punishment for a single offense, a double jeopardy violation,⁹⁶ and so deserves counsel's attention. However, a defendant facing such charges is normally not entitled to relief until after conviction.⁹⁷

§ 20.4E. JURISDICTION AND VENUE

1. Territorial Jurisdiction

Indictments must ordinarily be found in the county where the alleged crime took place.⁹⁸ The charging document must allege facts establishing the court's jurisdiction, a requirement deemed satisfied by inclusion of territorial references in the caption.⁹⁹ Barring a change of venue, the district court may try only crimes committed within its territorial district¹⁰⁰ or within fifty rods (825 feet) of its district. The superior court may try only crimes committed within its county or within 100 rods (1,650 feet) of its county.¹⁰¹ However, if the prosecutor petitions the court before trial stating the evidence leaves doubt whether the crime took place within the court's territorial jurisdiction, the court after hearing may take jurisdiction.¹⁰²

false pretenses, not duplicitous with convictions under G.L. c. 266 § 33(2), for larceny by means of false statement in writing to obtain credit); Commonwealth v. Donovan, 395 Mass. 20, 27–28 (1985) (larcenous scheme that succeeded in taking property from seven bank depositors constituted single crime of larceny; six of seven indictments charging separate larcenies dismissed (after conviction) as “duplicitous”); Commonwealth v. Shuman, 17 Mass. App. Ct. 441, 451 (1984). “[T]he prohibition against duplicitous convictions at a single criminal proceeding is ... limited to ensuring that the court does not [impose] multiple punishments for a single legislatively defined offense.”

⁹⁶ Commonwealth v. Donovan, 395 Mass. 20, 28 (1985).

⁹⁷ “[I]n the event of indictments for two offenses which must be held duplicitous, the ‘proper approach . . . [would be] to submit . . . [both] charges to the jury and, if guilty verdicts were returned on more than one, to dismiss the less serious charge.’ ” Commonwealth v. Sumner, 18 Mass. App. Ct. 349, 353 (1984) (quoting Commonwealth v. Jones, 382 Mass. 387 . 394–95 (1981); Commonwealth v. Martin, 425 Mass. 718 (1997) (convictions for “second branch” mayhem and assault and battery dangerous weapon, which is lesser included, cannot stand; remedy is to dismiss lesser offense and remand for possible resentencing on greater); Commonwealth v. Owens, 414 Mass. 595, 608 (1993) (after conviction of both possession with intent to distribute heroin and trafficking in heroin, conviction for possession vacated and indictment dismissed). *But see* Commonwealth v. Jones, 382 Mass. 387, 395 n.10 (1981) (Commonwealth not ordinarily required to elect before trial the charge on which it wishes to proceed, but if “necessary to protect the substantial rights of the defendant” such an election would be required). *See also infra* section 21.2D.

⁹⁸ Commonwealth v. Handren, 261 Mass 294, 296 (1927). Territorial jurisdiction exists over an accessory before the fact whose criminal acts take place outside Massachusetts if he intended his acts to have effect within the state. Commonwealth v. Fafone, 416 Mass. 329 (1993); Commonwealth v. Hare, 361 Mass. 263, 265 (1972).

⁹⁹ G.L. c. 277, § 20.

¹⁰⁰ G.L. c. 218, §§ 1–3, defines the territorial jurisdiction of particular district courts.

¹⁰¹ G.L. c. 277, § 57.

¹⁰² G.L. c. 277, § 57A. Although G.L. c. 277, § 57A speaks of “territorial jurisdiction,” the S.J.C. considers it to be concerned with venue, not jurisdiction. *See* Commonwealth v. Robinson, 48 Mass. App. Ct. 329, 336 (1999) (defendant’s failure to request hearing or object to prosecutor’s petition for leave to bring murder case in Suffolk County because of doubt as to

2. Venue

The defendant has a constitutional and common law right to be tried in the vicinity where the crime occurred.¹⁰³ Where the crime was committed outside this boundary, a motion to dismiss for improper venue will lie. However, venue can be waived by explicit consent, by moving for a change of venue,¹⁰⁴ or by failure to move for a change.¹⁰⁵ Although the Commonwealth also has a right to proper venue,¹⁰⁶ a case may be transferred to another county if necessary to obtain an impartial trial.¹⁰⁷ The defendant's right to a change of venue is based in common law,¹⁰⁸ court rule,¹⁰⁹ and the

the place of death, waived claims as to improper venue), *citing* Commonwealth v. Manos, 311 Mass. 94 (1942). *See also* G.L. c. 277, §§ 58–62, establishing place of trial for crimes of larceny, receiving etc. stolen property, embezzlement, larceny by false pretenses, making false reports of explosives, and homicide. For application of § 62, governing local jurisdiction over homicides where death occurs outside the Commonwealth, *see* Commonwealth v. Lent, 420 Mass. 764, 768 (1995) (death must be one that would not have occurred but for the violence or injury that was inflicted in Massachusetts); 30 MASS. PRAC §2.2 (3d ed. Smith 2007 & Supp. 2010) (noting that “jurisdiction” and “venue” are often used interchangeably, even in statutes, but that there are important differences between the two concepts of which the practitioner should be aware). One important difference between jurisdiction and venue noted in the foregoing section of Mass. Practice is that jurisdiction cannot be waived but venue can be waived by consent or by failure to assert a timely objection. *See* 30 MASS. PRAC., *supra* at §2.2.

¹⁰³ Mass. Const. Declaration of Rights art. 13 (right to “verification of facts in the vicinity where they happen,” and U.S. Const., 6th amend. (right to be tried in “State and district” where crime committed); Commonwealth v. Handren, 261 Mass. 294, 297 (1927); Crocker v. Superior Court, 208 Mass. 162, 167 , (1911). *But see* Commonwealth v. Siciliano, 420 Mass. 303 (1995) (legislature may permit transfer of trial from one county to another); Commonwealth v. Duteau, 384 Mass. 321, 323 (1981) (upholding legislative power to provide otherwise); Opinion of the Justices, 372 Mass. 883, 896–98 (1977) (bill authorizing Chief Justice of the S.J.C. to transfer criminal cases from one county to an adjoining county would not violate art. 13 of the Declaration of Rights); G.L. c. 218, § 27A(b) (jury trial may be heard by properly designated jury of six in named adjoining counties).

¹⁰⁴ Commonwealth v. Aldoupolis, 390 Mass. 438, 441 (1983).

¹⁰⁵ Commonwealth v. Noxon, 319 Mass. 495, 550 (1946); Hazard v. Wason, 152 Mass. 268, 270 (1890).

¹⁰⁶ Commonwealth v. Aldoupolis, 390 Mass. 438, 441–442 (1983].

¹⁰⁷ Mass. R. Crim. P. 37(b)(1). By statute not yet constitutionally tested, an appeal may be heard by a properly designated jury of six in an adjoining county. G.L. c. 218, § 27A(b) (amended July 20, 1992: St. 1992, c. 133, § 557) reflects reaction to issue raised in Valentin v. Commonwealth, 411 Mass. 608, 611–12 (1992) (under § 27A(b) before amendment, appeal de novo of defendant convicted in Plymouth County could not be tried in Norfolk County without defendant's consent). According to a 9/92 CPCS Training Bulletin, there is a question whether this satisfies the right to a jury of peers from the “vicinage” of the offense. U.S. Const., 5th and 6th amends.; Mass. Const. Declaration of Rights arts. 12, 13. *But see* Commonwealth v. Brogan, 415 Mass. 169, 172–74 (1993) (use of “vicinity” rather than “county” shows intent in art. 13, Mass. Const. Declaration of Rights to avoid narrow interpretation; no violation of art. 13 to try defendant in Middlesex County for criminal contempt of superior court order issued in that county, based on contumacious acts allegedly occurring in other counties).

¹⁰⁸ *See* Commonwealth v. Brogan, 415 Mass. 169, 172–74 (1993) (Massachusetts does not follow the common law rule normally requiring an indictment to be found and the trial held

constitutional right to trial by impartial jury.¹¹⁰ A motion to change venue might therefore be appropriate in situations where, because of media publicity or other reason, the community is predisposed against the defendant.¹¹¹ However, because the defendant's motion for change of venue leaves the decision where to hold the trial to the trial court's discretion, caution is advised.¹¹²

In lieu of a change of venue, a judge may, with the defendant's consent, impanel a jury in another county and return to the original county to try the case, with the jury housed and sequestered in a hotel.¹¹³ This approach might be used, for example, in a high-publicity case that has too many witnesses to move easily across the state for trial.

3. Delayed Citations

A special statute applies to Chapter 90 traffic citations, requiring that a copy of the citation be given to the violator at the time and place of violation, and that in criminal or "mixed" cases a copy be delivered to the court within four business days of the violation. Failure to do so "constitutes a defense" except in circumstances specified in the statute.¹¹⁴

§ 20.5 BILL OF PARTICULARS

Mass. R. Crim. P. 13 permits the defendant or the court on its own motion to request the prosecution to file a bill of particulars "as may be necessary to give . . . reasonable notice of the crime charged, including time, place, manner or means."¹¹⁵ The defendant's motion should be made within the time for pretrial motions but the court has inherent power to order a bill at any time.¹¹⁶

in the county where the crime occurred); Commonwealth v. Handren, 261 Mass. 294, 297 (1927), Crocker v. Superior Court, 208 Mass. 162 (1911).

¹⁰⁹ Mass. R. Crim. P. 37(b)(1) (court may order transfer for trial if satisfied that "there exists in the community where the prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial").

¹¹⁰ See Commonwealth v. Bonomi, 335 Mass. 327, 333 (1957); Groppi v. Wisconsin, 400 U.S. 505 (1971).

¹¹¹ But see Commonwealth v. Bonomi, 335 Mass. 327, 333 (1957) (change of venue "should be ordered with 'great caution and only after a solid foundation of fact has been first established' "; prejudicial newspaper accounts did not require change). See *infra* § 26.3C for discussion of change of venue to avoid community prejudice.

¹¹² See Commonwealth v. Aldoupolis, 390 Mass. 438, 441 (1983) and cases cited. A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 254–57 (5th ed. 1988) discusses the legal and tactical aspects of change of venue. For discussion of defendant's right to trial by a jury drawn from a community with racially similar demographics to those of the community where the crime occurred, see *infra* § 30.4.

¹¹³ Commonwealth v. Aldoupolis, 390 Mass. 438 (1983).

¹¹⁴ For authorities, see *infra* § 23.1A, note 19.

¹¹⁵ Mass. R. Crim. P. 13(b)(1). See also Commonwealth v. Iannello, 344 Mass. 723, 726 (1962) (purpose of bill of particulars "is to give a defendant reasonable knowledge of the nature and character of the crime charged").

¹¹⁶ Mass. R. Crim. P. 13(b).

A bill of particulars serves two key functions:

1. Like pretrial discovery, it aids the defendant to prepare for trial by providing notice of details of the charge. For example, the defense might discover whether the prosecution intends to prove the defendant's personal commission of the criminal act or his liability by virtue of a joint venture.¹¹⁷

2. It narrows the complaint or indictment, restricting the case the Commonwealth is entitled to prove.¹¹⁸

Although Rule 13 leaves the grant or denial of defendant's request for particulars to the discretion of the trial court "in the interest of justice,"¹¹⁹ defendant's request for particulars has constitutional roots in the requirement of article 12 of the Massachusetts Constitution Declaration of Rights that "[n]o subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him."¹²⁰ If the constitutional standard is not met, the defendant should be entitled to a bill of particulars, but the courts have not explicated the constitutional standard with any precision.¹²¹ The S.J.C. has called for a "liberal exercise of discretion when considering a conventional request for particulars of the time, place, nature and grounds of the crime charged,"¹²² but in practice will reverse a conviction only if the trial court has abused its discretion to the defendant's prejudice.¹²³

¹¹⁷ See, e.g., Commonwealth v. Whitehead, 379 Mass. 640, 649 (1980). Although the state is required to provide the defendant with "reasonable notice of the nature and character of the crimes charged," the defendant's motion for a bill of particulars is not designed to secure a resume of all evidence or to serve as a set of interrogatories. Commonwealth v. Amirault, 404 Mass. 221, 233 (1989) (citing Commonwealth v. Hayes, 311 Mass. 21, 25 (1942)).

¹¹⁸ For example, in Commonwealth v. Edelin, 371 Mass. 497, 520-21 (1976), a prosecution for manslaughter, the bill of particulars alleged that defendant caused the death of the fetus in utero or when it was partially removed from the mother. Therefore the conviction, based on proof of death occurring after live birth of the fetus, by defendant's postnatal conduct, could not stand. Having failed to amend its bill of particulars, the Commonwealth was "held to the ground it selected." *Edelin, supra*, 371 Mass. at 521. See also Commonwealth v. Crawford, 429 Mass. 60 (1999) (variance between bill of particulars and argument/jury instructions; decided on other grounds).

¹¹⁹ Commonwealth v. Hayes, 311 Mass. 21, 25 (1942).

¹²⁰ See also Commonwealth v. Montanino, 409 Mass. 500, 512–13 (1991) (failure to allege dates of alleged sexual offenses more precisely than "between January and April, 1981" raises "troubling" due process concerns under United States v. Cruikshank, 92 U.S. 542 (1875); defendant is entitled to notice "with reasonable particularity of time, place, and circumstances," considering "all relevant circumstances" of the case).

¹²¹ See Commonwealth v. Allison, 434 Mass. 670, 677 (2001) ("Although there may be circumstances under which Massachusetts Declaration of Rights requires a court to issue a bill of particulars, the decision to order a bill ... is a matter of sound discretion").

¹²² The Court added, however, that "[t]hese observations are not to be construed as an invitation to defendants to request . . . particulars which, in their requirement for detail or otherwise, amount to the imposition of a straitjacket on the prosecution." Commonwealth v. Baker, 368 Mass. 58, 77 (1975).

¹²³ See, e.g. Commonwealth v. Vinnie, 428 Mass. 161, 167 (1998) (although Commonwealth could have narrowed time frame of alleged murder beyond "on or about April 11, 1990," any error was harmless: defendant had pretrial discovery of Commonwealth theory that victim was murdered between 8:30 and 9:00 pm).

G.L. c. 277, § 34, states that no indictment “shall be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars.” This language suggests that defense counsel’s failure to request particulars will invariably preclude later attack on a vague or incomplete charging document.¹²⁴ But that is not so if the indictment fails to set forth all the elements necessary to state a crime,¹²⁵ (*see supra* § 20.3), because a bill of particulars cannot “enlarge the scope of an indictment to include an offense not charged therein.”¹²⁶ However, an appellate court’s judgment as to whether or not the charging document “sufficiently sets forth all the elements” of a crime may be influenced by defendant’s failure.¹²⁷ This points up the importance of moving before trial to dismiss a defective charge.

On the other hand, if an indictment is facially sufficient, the specifications provided in a bill of particulars do not — for purposes of a motion to dismiss — derogate from it. The indictment’s sufficiency is “judged without regard to the bill of particulars.”¹²⁸

The defense may move to strike indefinite, irrelevant, or prejudicial particulars and may always request further particulars.¹²⁹ Vague responses by the Commonwealth need not be stricken if the charge is stated with as much certainty as the known circumstances permit.¹³⁰ But counsel should vigorously move to strike prejudicial matter because, as part of the charging document, the bill of particulars will be read to the jury at the start of trial and may accompany them into the jury room for their deliberations.¹³¹

The last-mentioned practice points up one danger to the defense in requesting a bill of particulars. A well-drafted bill not only provides the defendant with notice of the charges but gives the jury a more forceful summary of the Commonwealth’s case than is communicated by the often stilted, formal language of the charge itself.

§ 20.6 AMENDMENTS

¹²⁴ See Commonwealth v. Hyrcenko, 417 Mass. 309, 313 (1994) (multiple identically worded indictments that follow statutory form are valid if defendant has opportunity to obtain, through bill of particulars, sufficient information to prepare defense); Commonwealth v. Erazo, 63 Mass. App. Ct. 624, 627 (2005) (to avoid dismissal, “all that is required is that the indictment or complaint, read with the bill of particulars, be sufficient to give the accused reasonable knowledge of the crime so as to enable him or her to prepare a defense”).

¹²⁵ See Commonwealth v. Burns, 8 Mass. App. Ct. 194, 197 (1979) (conviction for attempted larceny reversed because the complaint — which omitted to allege an overt act — was fatally defective, despite the defendant’s failure to request a bill of particulars).

¹²⁶ Commonwealth v. Burns, 8 Mass. App. Ct. 194, 198 (1979) (quoting Commonwealth v. Ries, 337 Mass. 565, 580 (1958)).

¹²⁷ See, e.g., Commonwealth v. Donoghue, 23 Mass. App. Ct. 103, 111 (1986); Commonwealth v. Wainio, 1 Mass. App. Ct. 866, 867 (1974).

¹²⁸ Commonwealth v. Hare, 361 Mass. 263, 268 (1972).

¹²⁹ Commonwealth v. Soule, 6 Mass. App. Ct. 973 (1979) (rescript).

¹³⁰ Commonwealth v. Burke, 339 Mass. 521, 523 (1959) (circumstances did not permit the Commonwealth to be more specific in its description of the murder weapon or location).

¹³¹ Commonwealth v. Snyder, 282 Mass. 401, 411–12 (1983), *aff’d*, 291 U.S. 97 (1934) (particulars read to jury); JURY CRIMINAL MODEL JURY INSTRUCTIONS FOR THE DISTRICT COURT No. 2.420 (2009) (judge’s discretion to permit in jury room).

§ 20.6A . GENERALLY

Mass. R. Crim. P. 4(d)¹³² permits a judge, “upon his own motion or the written motion of either party,” to “allow amendment of the form of a complaint or indictment if such amendment would not prejudice the defendant or the Commonwealth.”¹³³ Amendments may also be made to the bill of particulars.¹³⁴

Rule 4 allows only amendments of “form,” not of “substance.” The criterion for distinguishing the two is the double-jeopardy test: whether a conviction or acquittal on the indictment or complaint as originally drawn would bar a new charge in the amended form.¹³⁴ If so, then the amendment is one of form. If not, then the amendment is one of substance.¹³⁵

¹³² This rule broadens former G.L. c. 277, § 35A, repealed in 1979.

¹³³ Mass. R. Crim. P. 13(b).

¹³⁴ Commonwealth v. Miranda, 441 Mass. 783, 787-88 & n.8 (2004) (upholding post-verdict amendment of drug-distribution indictment to include repeat-offender component, observing that the repeat-offender component was not an element of the charged drug distribution but only a sentencing factor and that acquittal or conviction of the drug distribution as originally charged would have barred prosecution for the amended indictment); Commonwealth v. Murphy, 415 Mass. 161, 165 (1993) (upholding amendment to bribery indictment under statute punishing conduct with three alternative intentions; indictment charging that defendant acted with all three intentions was validly amended as to “form” by changing conjunctive “and” to “or”); Commonwealth v. Baker, 10 Mass. App. Ct. 852 (1980) (rescript); Commonwealth v. Snow, 269 Mass. 598, 609–10 (1930). *Contrast* Commonwealth v. McGilverry, 74 Mass. App. Ct. 508, 511-13 (2009) (amendment of complaint charging possession of a Class A substance to one charging possession of a Class B substance was one “of substance and not form” and thus impermissible because the amended complaint charged a different crime, not one that was a lesser-included of the original charge).

¹³⁵ The “form-substance” distinction hinges on whether the amendment affects an “essential element” of the crime. *See supra* § 20.4B. This is illustrated by the Appeals Court decision in Commonwealth v. Baker, 10 Mass. App. Ct. 852 (1980) (rescript). There the defendant had been convicted of unlawfully carrying a firearm. The original complaint had failed to allege that the defendant was not licensed to carry a firearm, and the trial court permitted the Commonwealth to amend the complaint to add that allegation. On appeal for trial *do novo* following conviction the defendant was convicted, and defendant successfully moved to dismiss the complaint on the ground that the amendment was one of substance. The Appeals Court reversed, reasoning that absence of a license to carry a firearm was not an element of the crime because it “neither added nor materially altered any element of the crime originally charged.” *Baker, supra*, 10 Mass. App. Ct. at 853. Therefore the amendment was of “form” and, absent prejudice to defendant, was permissible. *See also* Commonwealth v. Hosmer, 49 Mass. App. Ct. 188 (2000) (improper to deny Commonwealth motion to amend date of OUI complaint by one day; the date is not an essential ingredient of OUI). *Compare* Commonwealth v. Williams, 73 Mass. App. Ct. 833, 836-40 (2008) (amending complaint to replace count charging operating to endanger with one charging vehicular homicide by negligent operation was an impermissible amendment “of substance” and thus prejudicial to the defendant); Commonwealth v. Souza, 42 Mass. App. Ct. 186, 192–93 (1997) (amendment substituting charge of unlawful possession of firearm for charge of unlawful carrying of dangerous weapon was of “substance”); Commonwealth v. Balliro, 385 Mass. 618, 619 (1982) (amendment to OUI complaint replacing reference to liquor with reference to drugs was of “substance”).

The double jeopardy test distinguishing “form” from “substance” applies as follows. In *Baker*, defendant’s conviction or acquittal on the original complaint would have barred a new charge in the amended form, for essentially the same offense. Therefore the amendment was one of “form.” If, however, absence of license were an essential element of the crime, the original

Counsel should be alert to possible abuse of the amendment power. Thus in *Commonwealth v. Woods*¹³⁶ the indictment alleged that the defendant raped the victim on September 23. Before trial the prosecution demanded disclosure of alibi, which defendant supplied. Subsequently the prosecution was permitted to amend the indictment to allege commission of the crime “on or about September 23,” and prosecution witnesses testified that the crime had occurred in the “latter part of September.” The Supreme Judicial Court ordered a new trial for various reasons, while noting its “disquieting” observation that the witnesses “might have been accommodating, whether consciously or unconsciously,” to the defendant’s strong alibi for September 23.¹³⁷

§ 20.6B. AMENDMENT OF INDICTMENTS: CONSTITUTIONAL ISSUE

Although Rule 4(d) treats amendments of complaints and indictments identically, when the charging document is an indictment an amendment may infringe on the defendant’s right to have the grand jury exclusively determine the content of the charge. Therefore amendments to indictments are constitutional only if they relate to “matters of form”—that is, matters “not essential to the description of the crime charged.”¹³⁸ Such amendments are justified on the presumption that the grand jury’s decision to indict did not depend on immaterial allegations and that such were included by inadvertence. Permitting amendment of such nonessentials therefore does not impair the integrity of the grand jury function.¹³⁹

complaint would have been fatally defective, giving the court no jurisdiction to try the defendant. Therefore, any conviction or acquittal of defendant on the original complaint would have been void and would not have barred trial on a new complaint in the amended form. The amendment would have been of “substance.”

¹³⁶ 382 Mass. 1 (1980).

¹³⁷ *Commonwealth v. Woods*, 382 Mass. 1, 6 n.7 (1980).

¹³⁸ *Commonwealth v. Snow*, 269 Mass. 598, 606, 608 –09 (1930), construing G.L. c. 277, § 35A (repealed), the forerunner of Rule 4(d). In *Snow*, the court found error in amending an extortion indictment to substitute a different victim (*B*), even though it is unnecessary to identify the victim by name. This was an amendment of “substance” because a threat to injure *some* victim (even an unspecified “another”) was an essential element of the crime, the grand jury had presumably considered and rejected evidence of extortion in respect of injury to *B*, and double jeopardy would not bar trial on the amended charge if defendant had been convicted or acquitted on the original one. *See also Commonwealth v. Williams*, 73 Mass. App. Ct. 833, 837–38 (2008) (amendment of complaint by replacing count charging operation to endanger with one charging negligent motor-vehicle homicide was one of substance and thus prejudicial because it added an essential element not required by the original charge and it subjected the accused to possibility of more severe punishment); *Commonwealth v. Cooper*, 264 Mass. 378, 382 (1928) (granting motion in arrest of judgment where prosecution improperly allowed to amend arson indictment that charged no offense, by adding indispensable mens rea element); *Commonwealth v. Miranda*, 415 Mass. 1, 5–7 (1993) (error to permit resurrection, on the day of trial, of indictment “mistakenly” nolle prossed three months earlier; Mass. R. Crim. P. 42, allowing correction of “clerical mistakes,” does not apply to correction of errors of substance).

¹³⁹ *Commonwealth v. Serrano*, 48 Mass. App. Ct. 163, 168 (1999) (where no prejudice to defendant, no abuse of discretion to allow amendment of indictment to correct “scrivener’s error” citing sub-clause (1) instead of (2) of drug statute); *Commonwealth v. Campiti*, 41 Mass. App. Ct. 43, 49 (1997) (no error to allow amendment of indictments to change dates to “on or before” x date, making the indictments less specific as to time; time alleged for an offense is ordinarily a matter of immaterial detail, not substance); *Commonwealth v. Jervis*, 368 Mass.

§ 20.6C. SURPLUSAGE

Language in an indictment that is unnecessary to describe the crime charged is “surplusage,” which need not be proved, and the presence of which is considered harmless unless it misleads the defendant or confuses the jury.¹⁴⁰ However, defense counsel should try to keep from the jury any unnecessary allegation in the charging document that might prejudice the accused. The defendant's alias, if not relevant to prove identity or consciousness of guilt, is an example.¹⁴¹ Counsel should move before trial to amend the charge by striking the surplus language and, if that fails, seek to prevent the prejudicial language from being read to the jury.¹⁴²

§ 20.7 VARIANCES

“[A] crime must be proved as charged and must be charged as proved.”¹⁴³ Therefore a conviction may be challenged on the ground of a variance between the complaint or indictment on the one hand, and the trial court's instructions or the proof on the other. Such challenges are approached in essentially the same manner as challenges to amendments.¹⁴⁴ Subject to special rules governing greater inclusive and lesser included offenses,¹⁴⁵ the defendant is entitled to acquittal if an essential element

638, 643–44 (1975) trial court allowed pretrial amendment of larceny indictment changing date of offense; S.J.C. upheld this ruling because time is not essential element of larceny, amendment was therefore one of “form,” and no prejudice was shown). *See also* Commonwealth v. Sitko, 372 Mass. 305, 308 (1977) (amendment of indictment charging breaking and entering in the nighttime to refer to daytime was not a change of substance; because breaking and entering in the daytime is lesser included offense of crime originally charged, amendment was not even necessary to sustain conviction). A different situation would exist if a grand jury heard evidence of two alleged robberies, on different dates, and indicted only for one. If the time of commission is all that differentiates two crimes, an amendment or variance would not be permitted. Commonwealth v. Campiti, 41 Mass. App. Ct. 43, 49 (1997).

¹⁴⁰ Commonwealth v. Hobbs, 385 Mass. 863, 870 (1982).

¹⁴¹ Commonwealth v. Walters, 12 Mass. App. Ct. 389, 396 (1981); Commonwealth v. Torrealba, 316 Mass. 24, 26 (1944).

¹⁴² *See* WRIGHT'S FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 128 (4TH ed. 2010).

¹⁴³ Commonwealth v. Robinson, 26 Mass. App. Ct. 441, 443 (1988) (quoting Commonwealth v. Grasso, 375 Mass. 138, 139 (1978)).

¹⁴⁴ *See* Commonwealth v. Hobbs, 385 Mass. 863, 870 n.8 (1982) (the “concerns at stake and the test to be applied” for amendments and variances are essentially the same).

¹⁴⁵ “A crime is a lesser-included offense of another crime if each of its elements is also an element of the other crime.” Commonwealth v. Martin, 425 Mass. 718, 722 (1997) (quoting Commonwealth v. Perry, 391 Mass. 808, 813 (1984)). The defendant may always be convicted of a lesser included offense if one exists. *See* G.L. c. 278, § 12 (re felony indictments). *But see* Commonwealth v. Walker, 426 Mass. 301, 304 –05 (1997) (defendant charged with forcible rape of child under 16 may be convicted of indecent assault and battery on child under 14; despite “technical flaw” of indictment's failure to allege that the victims were under 14; age element in lesser offense was “different from, but . . . not in addition to” age element in greater, and defendants had actual notice of victim's age, which was undisputed).

If the defendant is charged with a lesser included offense and the proof establishes the greater offense, he may only be convicted as charged. If, however, the defendant is erroneously

in the charging document is not proved. In such case the variance between charge and proof is “material.”¹⁴⁶ So too a variance between the charging document and the trial judge’s instructions is fatal if essential elements of the crime were not “correctly stated”,¹⁴⁷ or if the variance was prejudicial to the defendant.¹⁴⁸

However, a variance between the charging document (as supplemented by the bill of particulars) and proof relating to a nonessential allegation is regarded as “immaterial” and entitles the defendant to reversal only if he can show prejudice.¹⁴⁹ G.L. c. 277, § 35, has codified certain variances as immaterial.¹⁵⁰

convicted of the uncharged greater offense, such erroneous verdict may stand as a guilty verdict on the lesser included crime; there is no error, and no need for a new trial, so long as the sentence does not exceed the punishment allowable for the properly charged lesser offense. *See Commonwealth v. Robinson*, 26 Mass. App. Ct. 441, 443–46 (1988) (where in trial for assault with intent to maim, the judge improperly instructed jury on greater charge of mayhem, verdict of mayhem may stand as conviction of the charged lesser included offense, but remanded for resentencing).

¹⁴⁶ *See, e.g.*, Commonwealth v. Armenia, 4 Mass. App. Ct. 33 (1976), reversing a conviction for use of a motor vehicle without authority after notice of revocation, where the indictment alleged operation “on a way” but the proof related only to operation in a place to which the public had access as invitees or licensees. Whether or not the evidence on the latter theory sufficed to go to the jury, the variance was fatal because “[a] criminal offense must be proved as charged.” *Armenia, supra*, 4 Mass. App. Ct. at 36 (quoting Commonwealth v. Langenfeld, 1 Mass. App. Ct. 813, 814 (1973)). *See also Armenia, supra*, 4 Mass. App. Ct. at 38–39 (1976) (although indictment for possession of burglarious tools might have charged intent to use tools to commit “any other crime,” where it alleged the defendant’s intent to steal from vehicle, and proof equally suggested intent to use the vehicle instead, conviction reversed); Commonwealth v. Stone, 300 Mass. 160, 163–66 (1938) (invalidating conviction under indictment charging unlawful abortion by use of an instrument, where proof was of some other unlawful means but not an instrument).

¹⁴⁷ Commonwealth v. Ohanian, 373 Mass. 839 (1977).

¹⁴⁸ *See Commonwealth v. Edelin*, discussed *supra* at § 20.5; Commonwealth v. Dean, 21 Mass. App. Ct. 175, 181–82 (1985) (no fatal variance between language in kidnapping indictments and judge’s instructions to jury where defendant not misled or surprised by nature of evidence against him); Commonwealth v. Leavitt, 17 Mass. App. Ct. 585, 595–96 (1984) (fatal variance in prosecution for contempt between bill of particulars and misleading, open-ended instructions to jury).

¹⁴⁹ Commonwealth v. Tivnon, 8 Gray 375, 380 (1857) (on indictment for possession of a number of specified burglarious instruments, immaterial if proof failed to show possession of some). *See also Commonwealth v. Hosmer*, 49 Mass. App. Ct. 188 (2000) (improper to dismiss OUI complaint because of one-day discrepancy between evidence and charged date of offense; date is not an essential ingredient of OUI, and defendant not prejudiced); Commonwealth v. Randolph, 415 Mass. 364, 367 (1993) (on indictment charging armed assault in dwelling “with intent to commit a felony, to wit: murder,” it was not error to instruct jury that they could find defendant guilty if they found he had intent to commit either murder or assault and battery by means of dangerous weapon, because allegation “to wit, murder” was “mere surplusage”); Commonwealth v. Tilley, 327 Mass. 540 (1951) (no fatal variance between indictment charging defendant as accessory after fact to two felonies, and proof that he was accessory to one of them).

¹⁵⁰ G.L. c. 277, § 35, bars an acquittal on the ground of variance between allegations and proof if the essential elements of the crime are correctly stated, unless the defendant is thereby prejudiced in his defense. The statute also bars acquittals by reason of (1) immaterial misnomer of a third party, (2) an immaterial mistake in the description of property or the ownership thereof, (3) failure to prove unnecessary allegations in the descriptions of the crime,

In cases prosecuted by indictment, material variances, like amendments, can infringe the defendant's constitutional right. The federal courts have equated a substantial variance between indictment and proof or jury instruction to a constructive amendment of the indictment.¹⁵¹

§ 20.8. SENTENCING FACTORS

As the Supreme Court has held, “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be *charged in an indictment*, submitted to a jury, and proved beyond a reasonable doubt.”¹⁵² Therefore, unless specifically charged in the complaint or indictment, facts such as drug quantities or the possession of firearms may not be found by sentencing judges, and relied upon as predicates for imposing penalties beyond the maximum for the crime described in the charging instrument.¹⁵³

and (4) other immaterial mistakes in the indictment. Application of each of these rules turns upon determining which elements of a particular crime are “essential” and which are “immaterial” and “unnecessary.” *See supra* § 20.4B(1).

¹⁵¹ *Stirone v. United States*, 361 U.S. 212 (1960), *discussed in Gaither v. United States*, 413 F.2d 1061, 1072 (D.C. Cir. 1969). *See also Commonwealth v. Barbosa*, 421 Mass. 547 (1995) (where grand jury heard evidence of two drug distributions to different buyers on same date, conviction under single distribution count of indictment specifying neither time nor buyer violated art. 12; substantial risk that defendant was convicted of a crime for which he was not indicted). *Compare Commonwealth v. Bynoe*, 49 Mass.App.Ct. 687 (2000), *rev denied*, 432 Mass. 1107 (although material variance between indictment and proof constitutes error per se, material variance between complaint and proof is subject to harmless error review).

¹⁵² *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (*emphasis supplied*), reaffirmed in *Apprendi v. New Jersey* 530 U.S. 466, 476 (2000).

¹⁵³ *See, e.g.*, *United States v. Thomas*, 274 F.3d 655, 659-60 (2d Cir. 2001).