

## Alabama Rules of Criminal Procedure

### Rule 13. Charges: Indictment, Information, and Complaint.

*Rule 13.5. Amendment of charge; defect in charge.*

(a) AMENDMENT OF CHARGE. A charge may be amended by order of the court with the consent of the defendant in all cases, except to change the offense or to charge new offenses not contemplated by the original indictment. The court may permit a charge to be amended without the defendant's consent, at any time before verdict or finding, if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.

(b) DEFECTS IN CHARGES. No issue concerning a defect in the charges shall be raised other than by a motion filed in accordance with Rule 15.

(c) EFFECT OF DEFECT IN CHARGE.

(1) A motion to dismiss the indictment may be based upon objections to the venire, the lack of legal qualifications of an individual grand juror, the legal insufficiency of the indictment, or the failure of the indictment to charge an offense.

(2) No charge shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested, or in any manner affected, for any defect or imperfection in the charge which does not tend to prejudice the substantial rights of the defendant upon the merits.

### Committee Comments

Ala.Code 1975, § 15-8-90, provides:

“An indictment may be amended, with the consent of the defendant entered of record, when the name of the defendant is incorrectly stated or when any person property or matter therein stated is incorrectly described.”

This Code section reflects the common law view that an indictment cannot be amended, even as to immaterial matters, without the consent of the defendant, and it has been consistently held that to permit amendment without such consent is reversible error. *Fearn v. City of Huntsville*, 568 So.2d 349 (Ala.Crim.App.1990); *Spurlin v. State*, 539 So.2d 403 (Ala.Crim.App.1988), aff'd, 539 So.2d 407 (Ala.1989); *Ex parte Sisson*, 528 So.2d 1159 (Ala.1988); *Dix v. State*, 8 Ala.App. 338, 62 So. 1007 (1913); *Gregory v. State*, 46 Ala. 151 (1871). See Rule 5.3(d), A.R.Crim.P.

If the defendant refused to consent, or if the amendment concerned a matter of substance and not form, then the procedure was to seek a new indictment.

“If the defendant will not consent to such amendment of an indictment, the prosecution may be dismissed at any time before the jury retires as to the count in the indictment to which the variance applies, and the court may order another indictment to be preferred at a subsequent time....”

Ala.Code 1975, § 15-8-91.

The common law rule, however (except as to amendments to charge a new offense not contemplated in the original indictment), appears to be statutory and not constitutional. Thus, Rule 13.5(a) is a permissible change of prior rules of procedure. The need for this rule is cited in *Ex parte Allred*, 393 So.2d 1030 (Ala.1981), concurring opinion of Justice Maddox.

Rules 13.5(b) and (c)(1) make it clear that the proper means of challenging the legality or sufficiency of the indictment is by a motion to dismiss under Rule 15. Rule 13.5(c)(2) provides a requirement that the defect be prejudicial to the defendant before it will be fatal to a conviction.

In cases where the circuit court has original trial jurisdiction over an indictment charging a felony offense, the court does not lose jurisdiction if the indictment is amended to charge only a misdemeanor offense or if all felony offenses charged therein are dismissed or nol-prossed. Ala.Code 1975, § 12-11-30(2).