

## *Challenging the Pleadings*

John Rubin  
School of Government  
New Misdemeanor Defender Training  
September 2008

---

---

---

---

---

---

---

---

## *Pleading Basics*

- Is it a pleading?
  
- What kind of pleading is it?

---

---

---

---

---

---

---

---

## *Drafting Defects*

- Failure to charge offense or element of offense
  - Does the charge of “assault officer” fail to charge an offense?
  - What relief should you seek?
  - If you win, does double jeopardy apply?
  - When should you seek relief?
    - Hint: When can the prosecutor amend or do a statement of charges?

---

---

---

---

---

---

---

---

*Examples of Missing Elements*

- Victim's name omitted
- Specific offenses
  - For resist, delay, or obstruct (RDO), failure to allege duty officer was performing and how defendant resisted
  - For assault with deadly weapon, failure to name weapon and allege that weapon is deadly or facts indicating deadly character

---

---

---

---

---

---

---

---

*More Missing Elements*

- More offenses
  - For larceny and related offenses, failure to identify owner of property
    - Alleged owner also must be entity capable of owning property
    - Defect may not be apparent until after trial begins
  - For ordinance violations, technical rules on alleging section, caption, and body of ordinance

---

---

---

---

---

---

---

---

*Other Drafting Defects*

- Duplicity
  - Is the citation “duplicitous”?
  - What relief should you seek? When?
- Other potential issues
  - Is the failure to list the time fatal?
  - Is the failure to specify the location of the driving offenses fatal?

---

---

---

---

---

---

---

---

*Proof Problems*

- Although the defendant is charged with assault on an officer, the evidence shows only that the defendant delayed the officer.
  - What relief should you seek? When?
  - Can the prosecutor amend the pleading to charge RDO?
  - Does double jeopardy apply? To what?

---

---

---

---

---

---

---

*Examples of Variance*

- Change in offense
  - Ex.: charge is assault, proof is resist only
- Change in victim
  - Ex.: victim alleged to be Gabriel Hernandez Gervacio, actual name is Gabriel Gonzalez

---

---

---

---

---

---

---

*More Variance Examples*

- For larceny and related offenses, property owner misidentified
  - Ex.: one person identified as owner when another person is owner
  - Ex.: person identified as owner when corporation is owner

---

---

---

---

---

---

---

### *Jurisdiction on Appeal*

- Assume that the defendant is convicted in district court of assault on an officer. On appeal to superior court, the prosecutor seeks to amend the pleading to charge RDO.
  - May the prosecutor proceed on the RDO charge in superior court?
  - What relief should you seek? When?
- Beware when charges are dismissed per plea agreement

---

---

---

---

---

---

---

---

### *Examples of Lack of Jurisdiction*

- State alleges acts of nonsupport that occurred after district court trial
- Defendant was tried and convicted for DWI in district court, but state dismissed other misdemeanor charges
- District court judgment showed DWI conviction but judgment was silent on whether defendant was convicted of DWLR or other offenses

---

---

---

---

---

---

---

---

### *Double Jeopardy*

- In addition to being charged in district court with assault on an officer, the defendant is charged with felony assault on an officer based on the same act. The misdemeanor case is called in district court, and the defendant pleads guilty.
  - May the state thereafter proceed on the felony charge?
  - What relief should you seek? When?
- Beware exceptions to double jeopardy rules

---

---

---

---

---

---

---

---

*Due Process*

- Assume that the defendant is convicted in district court of assault on an officer. The defendant appeals, and the prosecutor obtains an indictment for felony assault on an officer based on the same act.
  - May the state proceed on the felony assault charge?
  - What relief should you seek? When?

---

---

---

---

---

---

---

---

*Joinder*

- Assume that the evidence in district court shows that the defendant delayed but did not assault the officer, and the defendant is acquitted. Rather than trying to amend the pleading, the prosecutor initiates a new case charging RDO.
  - May the prosecutor proceed on RDO notwithstanding the acquittal of assault based on the same conduct?

---

---

---

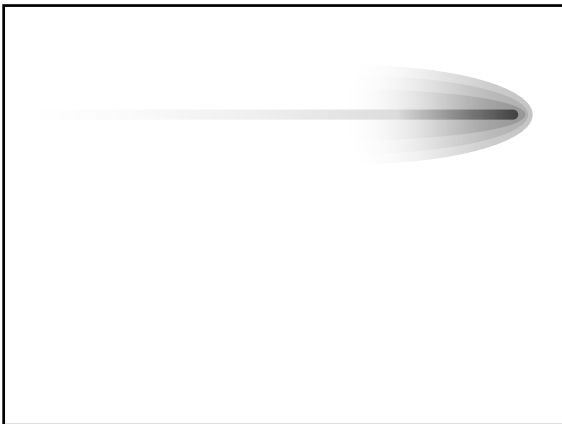
---

---

---

---

---



---

---

---

---

---

---

---

---

### *Summary*

- Drafting
  - If the allegations are insufficient to charge an offense, move to dismiss at the start of trial (unless there are reasons to wait).
  - If duplicity, move to require election at start of trial.
- Proof
  - If there is a variance between the charge alleged and the offense proved, move to dismiss or for nonsuit at the close of the state's and all evidence.

---

---

---

---

---

---

---

### *Summary-2*

- Appeal
  - If the offense is different than the offense for which the defendant was charged and convicted in district court, move to dismiss in superior court before trial for lack of jurisdiction.
- Double Jeopardy
  - If after conviction or acquittal the state brings the same, greater, or lesser charge within the meaning of the "same elements" test, move to dismiss before trial in the court where the case is pending.

---

---

---

---

---

---

---

### *Summary-3*

- Due Process
  - If after an appeal for trial de novo the state brings a greater charge arising out of the same facts, move to dismiss before trial in superior court.
- Joinder
  - If after conviction or acquittal the state files a related charge arising out of the same facts, move to dismiss before trial in the court where the case is pending.

---

---

---

---

---

---

---