

IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA,

*

v.

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Case No. CC-00-0000

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JOE CLIENT.

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MOTION TO DISMISS THE INDICTMENT
BECAUSE ITS THREE COUNTS ARE DUPLICITOUS

Joe Client respectfully moves this Court to dismiss each count of the indictment on grounds of duplicity. In support of this motion, Mr. Client submits the following:

1. Mr. Client is before the Court on an indictment dated April 13, 2011, that charges him with capital murder of Ms. Vicky Victim. The State is seeking the death penalty.
2. Count One charges Mr. Client with robbery-murder and/or burglary-murder and reads as follows (emphasis added):

The Grand Jury of said County charges that, before the finding of this indictment, on or about January 13, 2011, JOE CLIENT did intentionally cause the death of Vicky Victim by stabbing her with a knife, during the time that JOE CLIENT was in the course of committing or attempting to commit a theft of, to-wit: United States Currency, the property of Vicky Victim, by the use of force against the person of Vicky Victim, with intent to overcome her physical power of resistance while the said JOE CLIENT was armed with a deadly weapon, to-wit: a knife, in violation of § 13A-5-40(a)(2) of the Code of Alabama, **and/or** during the time that JOE CLIENT was in the course of knowingly and unlawfully entering or remaining in the home of Vicky Victim with the intent to commit a crime therein, while the said JOE CLIENT was armed with a deadly weapon, to wit: a knife, in violation of § 13A-5-40(a)(4) of the Code of Alabama.

3. Count Two charges Mr. Client with kidnapping-murder and/or rape-murder, and reads, in relevant part (emphasis added):

JOE CLIENT did intentionally cause the death of Vicky Victim by stabbing her with a knife, during the time that JOE CLIENT was in the course of abducting or attempting to abduct Vicky Victim with intent to inflict physical injury upon her in violation of § 13A-5-40(a)(1) of the Code of Alabama, **and/or** during the time that JOE CLIENT was in the course of engaging in sexual intercourse with Vicky Victim, by forcible compulsion, in violation of § 13A-5-40(a)(3) of the Code of Alabama. Count Two fails to state which, if either, of the predicate felonies a majority of the grand jury found in order to vote a true bill based on capital murder.

4. Count Three charges Mr. Client with robbery or kidnapping, and reads, in relevant part (emphasis added):

JOE CLIENT, during the course of committing a theft of property, to-wit: United States Currency, from the person of Vicky Victim, used force against Vicky Victim with intent to overcome her physical power of resistance while the said JOE CLIENT was armed with a deadly weapon, to-wit: a knife, in violation of § 13A-8-41(a)(1) of the Alabama Code, **or** JOE CLIENT did abduct or attempt to abduct Vicky Victim with intent to accomplish the commission of a theft of property, to-wit: United States Currency, from her person, in violation of § 13A-6-43(a)(3) of the Code of Alabama.

5. The indictment is duplicitous because it charges two separate offenses in each count. Count One charges both burglary-murder and robbery-murder; Count Two charges rape-murder and kidnaping-murder; and Count Three charges both robbery and kidnaping. These are separate offenses. See Ex parte Peraita, 897 So. 2d 1227, 1236 (Ala. 2004) (holding that each subsection of § 13A-5-40 constitutes distinct and separate offense as opposed to separate method of proving one offense); see also Blockburger v. United States, 284 U.S. 299, 304 (1932) (test of identity of offenses is whether each separate statutory provision requires proof of fact that other does not require).

6. Because the indictment is duplicitous, it violates Mr. Client's rights to due process and to stand trial on a true bill. A true bill must result from the concurrence of a minimum of twelve jurors. Ala. Code § 12-16-204. None of these counts states which – if any – predicate felony a majority of the grand jury found to vote a true bill based on capital murder. In Count One, it is impossible to tell whether a majority voted a true bill on burglary-murder, or robbery-murder, or both, or neither. Count Two suffers the same defect. Count Three fails to state which felony a majority found to vote a true bill – it is impossible to know whether the true bill was for a robbery or kidnapping, or whether a majority voted for either one at all. The indictment should be dismissed because there is no guarantee that

twelve jurors considered the evidence in support of a particular offense to be sufficient to establish probable cause.¹

7. Moreover, the duplicity of Counts One and Two, which use “and/or” deprives Mr. Client of his state and federal right to adequate notice and to prepare a defense. Minshew v. State, 542 So. 2d 307, 312 (Ala. Crim. App. 1988). The use of “and/or” is fatal where it results in uncertainty or confusion. Here, it results in both.

8. This Court should dismiss the indictment before the case goes to trial because the duplicitous charges will “[prevent] the jury from deciding guilt or innocence on each offense separately,” and should Mr. Client be convicted, it may be difficult to determine upon which offense or offenses the conviction rests. Campbell v. State, 508 So. 2d 1186, 1191 (Ala. Crim. App. 1986) (citing Walter R. LaFave & Jerold H. Israel, Criminal Procedure § 19.2(e) (1984)). If each juror were to find that the defendant committed one of the offenses in each count, but there was no agreement as to which offense he committed, a conviction would violate Mr. Client’s Sixth Amendment right to a unanimous verdict.

9. Failing to dismiss the indictment before trial would prejudice Mr. Client “in . . . shaping . . . evidentiary rulings . . . , in sentencing, and limiting review on appeal, and in exposing the defendant to double jeopardy.” Campbell, 508 So. 2d at 1191. For example, evidence admissible for one – but not the other – offense charged in the same count would be confused or improperly considered by the jury. Mr. Client also risks receiving excessive or inappropriate sentences based on uncertain or nonunanimous verdicts. Finally, the duplicitous indictment potentially exposes Mr. Client to double jeopardy, i.e., the jury might find him not guilty on the duplicitous capital murder charges, but the State might then decide to re-indict on burglary-murder alone. The Court should prevent these problems by dismissing the indictment before trial.

10. If the duplicitous indictment is not dismissed, Mr. Client will be deprived of a fair trial by impartial jury, reliable sentencing proceeding, effective assistance of counsel, due process, and the right to confront witnesses against him and present a defense, as protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law.

¹Even if the counts had permissibly alleged alternative offenses of the same character, proof against each allegation would have to be separately offered and considered. Wells v. State, 378 So. 2d 747, 751 (Ala. Crim. App. 1979).

For these reasons, Mr. Client respectfully moves this Court to enter an order dismissing the indictment against him and causing new grand jury proceedings to commence.

Respectfully submitted,

/s/ Linda Lawyer

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[CERTIFICATE OF SERVICE]

[MOTION UPDATED ON 09/26/17]