

# Understanding Unanimity in Unusual Cases

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Managing Multiplicity and Defeating Duplicity in Jury Verdicts

# Understanding Unanimity

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- Charging Documents and Related Concepts
- Multiplicity
- Duplicity

# Charging Documents and Related Concepts

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- Charging Documents
- Challenges to Indictments
- Jury Consideration

# Charging Documents and Related Concepts

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## Charging Documents

- An indictment must set forth each element of the crime that it charges.
  - ▶ *Almendarez-Torres v. US*, 523 U.S. 224 at 228 (1998)

# Charging Documents and Related Concepts

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## Elements

- Federal crimes are made up of “factual elements”
  - ▶ *Richardson v. US*, 526 U.S. 813, 817 (1999)
- [Elements] are ordinarily listed in the statute that defines the crime.
  - ▶ *Richardson* at 817 (1999)
- The Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and

# Charging Documents and Related Concepts

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## Elements

- A legislature may not place legal significance upon certain facts in a way which shifts the burden.
  - ▶ *Mullaney v Wilbur*, 421 US 684 (1975)
    - (All murders can not be presumed to be committed with malice unless heat of passion is proven by the accused)
- Calling a particular kind of fact an “element” carries certain legal consequences. *Richardson*, at 817 (1999)

# Charging Documents and Related Concepts

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## Elements

- The Constitution mandates three subsidiary requirements in respect to ordinary, legislatively intended, elements of crimes:
  - ▶ The indictment must state the “element.” See, e.g., *Hamling v. US*, 418 U.S., at 117, 94 S.Ct., at 2907–2908.
  - ▶ The Government must prove that “element” to a jury. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968).
  - ▶ And the Government must prove the “element” beyond a reasonable doubt. See, e.g., *Patterson v. New York*,

# Charging Documents and Related Concepts

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## Elements

- “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”
  - ▶ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)
- Any fact which increased the mandatory minimum is to be considered an element and treated as such for procedural purposes such as grand jury presentation and petit jury determination.



# Charging Documents and Related Concepts

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## Challenges to the Indictment

- Double Jeopardy
- Notice - Cotton/Gentry
- Particularity
- Election
- Duplicity
- Multiplicity
- Variance between Indictment and Proof

# Charging Documents and Related Concepts

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## Challenges to the Indictment

- Double Jeopardy
  - ▶ Being tried twice for the same offense
    - U.S. Const. amend. V and S.C. Const. art. I, § 12
  - ▶ Requires review to see if one count is a lesser included of another count
  - ▶ Blockburger test
    - Only a restraint on the courts and prosecutors
    - Not a restraint on the legislature
  - ▶ Traditional Treatment test
    - State v. Elliott, 346 S.C . 603, 607, 552 S.E.2d 727, 729 (2001), overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)

# Charging Documents and Related Concepts

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Notice - Cotton/Gentry - movement away from jurisdiction

- *US v. Cotton*, 535 U.S. 625, 634 (2002)
  - ▶ Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power.
  - ▶ No doubt that is true.
  - ▶ See, e.g., 3 Story, Commentaries on the Constitution § 1779 (1883), reprinted in 5 The Founders' Constitution 295 (P. Kurland & R. Lerner eds.1987)

# Charging Documents and Related Concepts

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Notice - Cotton/Gentry - movement away from jurisdiction

- Article 1, Section 18 of the South Carolina Constitution:
  - ▶ in all criminal prosecutions the accused shall have the right 'to be fully informed of the nature and cause of the accusation.'

# Charging Documents and Related Concepts

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Notice - Cotton/Gentry - movement away from jurisdiction

- *State v Gentry*, 610 S.E.2d 494 at 500 (SC 2005)
  - ▶ The sufficiency of an indictment is determined by whether:
    - (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and
    - (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

# Charging Documents and Related Concepts

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## Particularity

- “an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason,” 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872).
  - ▶ Quoted by Justice Scalia in *Blakely v Washington*, 542 US 296, at 301-302 (2004)

# Charging Documents and Related Concepts

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## Particularity

- In *Town of Mayesville v. Clamp*, 149 S.C. 346, 147 S.E. 455, 457, Justice Blease, later Chief Justice, stated in a concurring opinion:
  - ▶ “While an accused may be arrested on a warrant that does not fully inform him of the nature and cause of the accusation, he may, when he is brought to trial, demand the information he is entitled to have under the provisions of Section 18 of article 1.”

# Charging Documents and Related Concepts

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## Particularity

- *State v. Randolph*, 239 S.C. 79, 84–85, 121 S.E.2d 349, 351 (1961)
  - ▶ we think it was defective in that the charge was entirely too general.
  - ▶ All that can be found in the affidavit and warrant is the designation of the offense by name, which is a mere legal conclusion.
  - ▶ No facts constituting the alleged offense are stated.
  - ▶ No particularity is given as to the contemplated crime.

# Charging Documents and Related Concepts

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## Particularity

- *State v. Randolph*, 239 S.C. 79, 84–85, 121 S.E.2d 349, 351 (1961)
  - ▶ breach of the peace [Insert name of criminal charge here] embraces a variety of conduct.
  - ▶ “Just what type of conduct is it claimed that appellants agreed to engage in”
  - ▶ “We think the Court erred in not requiring the State to make the charge more definite and certain by giving such information as would enable appellants to understand the nature of the offense named in the warrant.”

# Charging Documents and Related Concepts

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## Variance between Proof and the Indictment

- “In South Carolina, ‘it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.’”
- A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it ‘is not an element of the offense.’”
  - ▶ *State v. Gunn*, 313 S.C. 124, 437 S.E.2d 75, 82 (1993)

# Charging Documents and Related Concepts

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## Jury Consideration

- Consideration of all elements increasing maximum penalty
  - ▶ *Apprendi/Booker-Fanfan/Blakely*
- Consideration of all elements raising mandatory minimum
  - ▶ *Alleyne v US*, 570 US 99, at 116 (2013).
- Does PWID really serve as a lesser included of Trafficking 10-28 grams based upon a possession theory when the “lesser” carries 15 years and the greater only carries 10 years?

# Charging Documents and Related Concepts

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## Unanimity

- In the federal justice system, a jury must be unanimous as to its verdict before an accused may be convicted of a crime.
  - ▶ *E. Richardson v US*, 536 US 813, at 817 (1999)(multiple internal citations omitted) and *Sixth Amendment*, US Constitution.
- the “truth of every accusation” against a defendant “should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,”



# Charging Documents and Related Concepts

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## Specific Unanimity

- One specific instance in which a specific unanimity instruction is required is to avoid concerns of duplicity.
  - ▶ See *US v Holley*, 942 F2d 916, at 927 (5<sup>th</sup> Cir. 1991).
- This unanimity requirement applies not just to the general verdict but also to each element of the crime charged.
  - ▶ *E. Richardson v US*, 536 US 813, at 817 (1999)
- Conversely, the jury need not be unanimous as to the “brute facts” or means in which a crime was

# Multiplicity

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*U.S. v. Langford*, 946 F.2d 798, 802 (11<sup>th</sup> Cir. 1991)

- “Multiplicity is the charging of a single offense in more than one count.”
  - ▶ See also
    - *U.S. v. Anderson*, 872 F.2d 1508, 1520 (11<sup>th</sup> Cir.1989)
    - *Ward v. U.S.*, 694 F.2d 654 (11<sup>th</sup> Cir.1983)
    - *U.S. v. Colton*, 231 F.3d 890, 908 (5<sup>th</sup> Cir. 2000)
    - *U.S. v. Mancuso*, 42 F.3d 836, 847 n.11 (4<sup>th</sup> Cir. 1994)
  - ▶ No South Carolina Cases directly discussing Multiplicity outside of general double jeopardy concerns

# Multiplicity

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*U.S. v. Colton*, 231 F.3d 890, 908 (5<sup>th</sup> Cir. 2000) (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

- “The multiplicity doctrine finds its roots in the Fifth Amendment's Due Process Clause, which ‘assures that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.’”
- Accordingly, it “addresses double jeopardy...”
  - ▶ *US v. Lemons*, 941 F.2d 309, 317 (5<sup>th</sup> Cir. 1991).

# Multiplicity

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## Concern about Multiplicity

- “The chief danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense.”
  - ▶ *US v. Lemons*, 941 F.2d 309, 317 (5<sup>th</sup> Cir. 1991) citing *US v. Swain*, 757 F.2d 1530, 1537 (5th Cir.), cert. denied, 474 U.S. 825, 106 S.Ct. 81, 88 L.Ed.2d 66 (1985).

# Multiplicity

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## Concern about Multiplicity

- “When the government charges a defendant in multiplicitous counts, two vices may arise.
  - ▶ First, the defendant may receive multiple sentences for the same offense.
  - ▶ Second, a multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes -- not one.”
  - ▶ *Langford*, 946 F.2d at 802 (citing *U.S. v. Reed*, 639 F.2d 896, 904 (2d Cir.1981); *United States v. Hearod*, 499 F.2d 1003, 1005 (5th Cir.1974)).

# Multiplicity

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## Concern about Multiplicity

- “Moreover, [w]hether a continuous transaction results in the commission of but a single offense or separate offenses ... is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed.”
  - ▶ *US v. Lemons*, 941 F.2d 309, 317 (5<sup>th</sup> Cir. 1991).

# Multiplicity

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## Remedy

- “[W]here the jury is allowed to return convictions on multiplicitous counts, the remedy is to remand for resentencing, with the government dismissing the count(s) that created the multiplicity.”
  - ▶ *US v. Moody*, 923 F.2d 341, 347 (5th Cir.1991).



STATE OF SOUTH CAROLINA )

County/  Municipality of )  
WEST COLUMBIA )

AFFIDAVIT

Form Approved by  
S.C. Attorney General  
April 21, 2003  
SCCA 618

Personally appeared before me the affiant ~~WADE BRUCE~~ Matthew Deas who  
being duly sworn deposes and says that defendant RITTER, DAMIEN LAVAR  
did within this county and state on 07/05/2018 violate the criminal laws of the

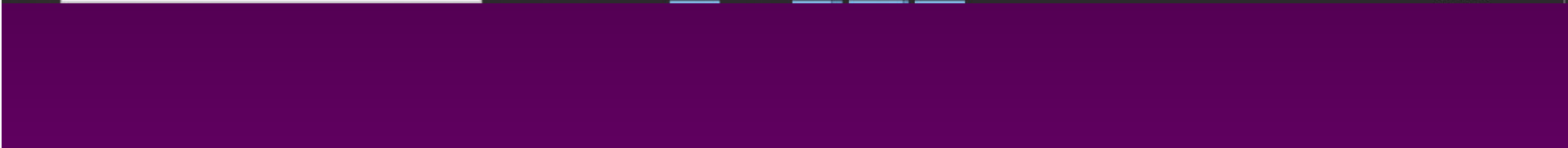
State of South Carolina (or ordinance of  County/  Municipality of WEST COLUMBIA)  
in the following particulars:

**DESCRIPTION OF OFFENSE:**

**ROBBERY WHILE ARMED WITH A DEADLY WEAPON - 16-11-330, (A)**

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:  
IN THAT ON OR ABOUT JULY 5, 2018 WHILE AT 925 GLENN STREET APT #13 IN THE CITY OF WEST COLUMBIA, COUNTY AND STATE AFORESAID, ONE DAMIEN LAVAR RITTER DID WHILE ARMED WITH A HANDGUN ROB THE VICTIMS, SAMIR ATKINS, ELZIE MACK, AND RODNEY FURTICK, OF CELL PHONES, A SAFE CONTAINING APPROXIMATELY \$5000 AND OTHER ITEMS; ALL OF WHICH CONSTITUTES THE CRIME OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON AND IS IN VIOLATION OF THE SOUTH CAROLINA CODE OF LAWS OF 1976, AS AMENDED. THE FOREGOING IS BASED ON AN INVESTIGATION BY THE WEST COLUMBIA POLICE DEPARTMENT

CASE #1818945





STATE OF SOUTH CAROLINA )  
 County/  Municipality of )  
 WEST COLUMBIA )

**AFFIDAVIT**

Form Approved by  
 S.C. Attorney General  
 April 21, 2003  
 SCCA 618

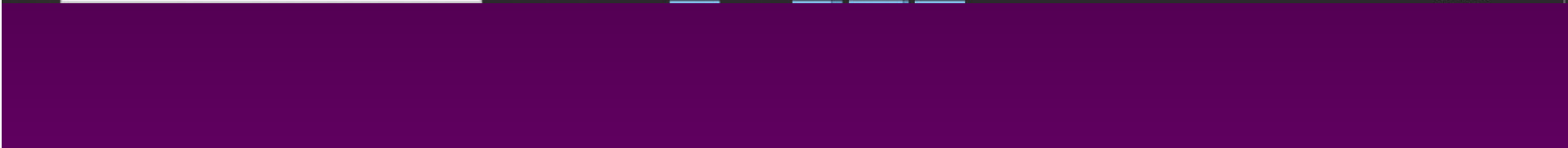
Personally appeared before me the affiant ~~WADE, BRUCE~~ Matthew Deas who  
 being duly sworn deposes and says that defendant RITTER, DAMIEN LAVAR  
 did within this county and state on 07/05/2018 violate the criminal laws of the  
 State of South Carolina (or ordinance of  County/  Municipality of WEST COLUMBIA )  
 in the following particulars:

**DESCRIPTION OF OFFENSE:**

**GRAND LARCENY M/T \$2000.00 BUT L/T \$10,000.00 - 16-13-0030 (B)(1)**

I further state that there is probable cause to believe that the defendant named above did commit  
 the crime set forth and that probable cause is based on the following facts:  
 IN THAT ON OR ABOUT JULY 5, 2018 WHILE AT 925 GLENN STREET APT #13 IN THE CITY OF WEST COLUMBIA,  
 COUNTY AND STATE AFORESAID, ONE DAMIEN LAVAR RITTER DID TAKE, STEAL AND CARRY AWAY A SAFE  
 CONTAINING APPROXIMATELY \$5000 IN CASH; ALL OF WHICH CONSTITUTES THE CRIME OF GRAND LARCENY M/T  
 \$2000 BUT L/T \$10000 AND IS IN VIOLATION OF THE SOUTH CAROLINA CODE OF LAWS OF 1976, AS AMENDED. THE  
 FOREGOING IS BASED ON AN INVESTIGATION BY THE WEST COLUMBIA POLICE DEPARTMENT.

CASE #1818945



# Duplicity

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*State v. Samuels*, 743 S.E.2d 773, 774 (SC 2013)

- “Duplicity is an ill-favored quality in both life and the law, and here we deal with duplicity in several forms.”
- While commonly understood to be synonymous with deceitfulness and double-dealing, when used in the law, duplicity means “[t]he charging of the same offense in more than one count of an indictment.” Black's Law Dictionary 541 (8th ed. 2004).

# Duplicity

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*State v. Samuels*, 743 S.E.2d 773 (SC 2013)

- “After a course of duplicitous conduct in which appellant Myron Samuels romanced two women at the same time, he was tried and convicted for assaulting those women.”
  - ▶ *Samuels* at 774
- “That Myron Samuels did in Richland County on or about April 14, 2009, with malice aforethought commit an assault with intent to kill upon the victim, Patricia Speaks and/or Carla Daniels, in violation of Section 17–25–30 C/L, Code of Laws

# Duplicity

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*State v. Samuels*, 743 S.E.2d 773, 776 (SC 2013)

- The indictment here provided sufficient notice to Samuels and the court by stating:
  - ▶ what crime he allegedly committed,
  - ▶ on what date,
  - ▶ where, and
  - ▶ the name of the victims.

# Duplicity

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*State v. Samuels*, 743 S.E.2d 773, 776 (SC 2013)

- In short, Samuels knew from the indictment what allegations he would be required to defend against at trial
- However, *Gentry* addressed the sufficiency of indictments generally,
- and did not consider duplicitous indictments which allege two distinct and separate offenses in the same count

# Duplicity

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*State v. Samuels*, 743 S.E.2d 773, 776 (SC 2013)

- duplicitous indictments are generally considered defective and
- may be dismissed on that ground. See 41 Am. Jur. 2d Indictments and Informations § 209 (2013).

# Duplicity

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*US v. Murray*, 618 F.2d 892, 896 (2d Cir.1980)

- Duplicitous indictments “implicate a defendant's rights:
  - ▶ to notice of the charge against him,
  - ▶ to a unanimous verdict,
  - ▶ to appropriate sentencing and
  - ▶ to protection against double jeopardy in a subsequent prosecution.”

# Duplicity

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*State v. Samuels*, 743 S.E.2d 773, 776 (SC 2013)

- Duplicitous indictments present the risk that a jury divided on the two separate offenses in one count could nevertheless convict through a general verdict on the one count.
- Duplicitous indictments also can create sentencing problems, such as where a jury's general verdict leaves the sentencing judge unsure as to whether the defendant is guilty of and subject to punishment for multiple offenses.

# Duplicity

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*State v. Samuels*, 743 S.E.2d 773, 777 (SC 2013)

- For offenses against the person, a separate offense exists for each person subjected to the criminal conduct.
- Each victim of his threatening conduct constituted a new assault offense.
- By including both victims in one count, the indictment charged two offenses in one count and was defective for duplicity.

# Duplicity

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## How to Address Duplicity?

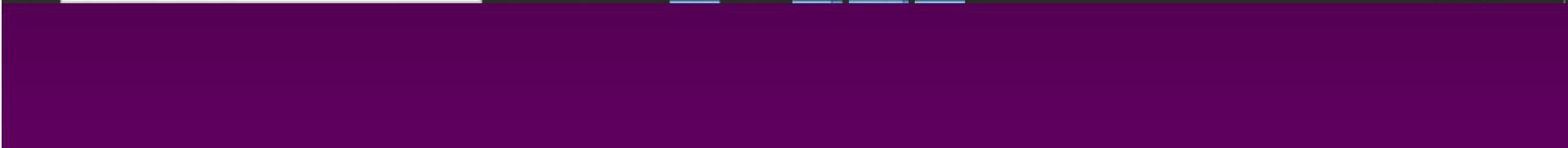
- Challenge for lack of notice
  - ▶ Remember particularity requirement discussed in *Randolph and Clamp*
  - ▶ Remember 404(b) and other acts prohibition
  - ▶ Look at joinder concerns
  - ▶ Ask the judge how the court is to know to what crime jeopardy is attaching
- Samuels says duplicity is a grounds for dismissal!



STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	Armed Robbery
COUNTY OF LEXINGTON	)	
	)	§ 16-11-0330(A)

At a Court of General Sessions, convened on August 2019, the Grand Jurors of Lexington County present upon their oath:

That Damien Lavar Ritter did, along with others, in Lexington County, South Carolina, on or about July 5, 2018, knowingly and willfully while armed with a deadly weapon, to wit: a firearm, feloniously take from the person or presence of Samir Atkins and/or Elzie Mack and/or Rodney Furtick, by means of force, threats, or intimidation, goods or monies being described as follows: a safe and other personal items, with intent to deprive the owner of the use of such property, in violation of Section 16-11-330 (A) of the Code of Laws of South Carolina (1976, as amended).



# Duplicity

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## How to Address Duplicity?

- A duplicitous indictment's potential prejudice can be cured through jury instructions and the use of a special verdict.
  - ▶ *State v. Samuels*, 743 S.E.2d 773, 776 (SC 2013)

# Duplicity

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## Jury Instructions and Specific Unanimity

- One specific instance in which a specific unanimity instruction is required is to avoid concerns of duplicity.
  - ▶ *US v Holley*, 942 F2d 916, at 927 (5<sup>th</sup> Cir. 1991).

# Duplicity

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## Jury Instructions and Specific Unanimity

- A specific unanimity instruction is required when “there exists a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts.”
  - ▶ *Holley*, at 926 (internal citations omitted).

# Duplicity

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## Jury Instructions and Specific Unanimity

- The *Holley* Court noted Justice Scalia's statement on this issue that:
  - ▶ “[w]e would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday.” *Schad v Arizona*, 501 US 624, at 651 (1991).



5 (a). We, the jury in the above captioned case, on the charge of Armed Robbery concerning the safe and its contents belonging to Samir Atkins, unanimously find Damien Lavar Ritter (foreman shall initial one):

DSO Not Guilty

\_\_\_\_\_ Guilty

5 (b). We, the jury in the above captioned case, on the charge of Armed Robbery concerning the cell phone belonging to Rodney Furtick, unanimously find Damien Lavar Ritter (foreman shall initial one):

\_\_\_\_\_ Not Guilty

DSO Guilty

