

The requirements for informations and indictments are set forth in ARK. CONST. art. VII § 49, Ark. Code Ann. § 16-85-403; *Archer v. Benton County Circuit Court*, 316 Ark. 477, 872 S.W.2d 397 (1994).¹ Arkansas Code Annotated § 16-85-403 provides, in pertinent part that:

(a) The language of the indictment [or information] must be certain as to the title of the prosecution, the name of the court in which the indictment [or information] is present, and the name of the parties.

(1) It shall not be necessary to include a statement of the act or acts constituting the offense, *unless the offense cannot be charged without doing so.*

....

(b) The indictment [or information] must be direct and certain as regards:

....

(4) The particular circumstances of the offense *charged where they are necessary to constitute a complete offense.*

(Emphasis added).

The Arkansas Supreme Court has interpreted Ark. Code Ann. § 16-85-403 to mean that it is only necessary that the information name the offense and the party to be charged and the state is not required to include a statement of the act or acts constituting the offense, *unless the offense cannot be charged without doing so.* See *David v. State*, 295 Ark. 131, 748 S.W.2d 177 (1988) (emphasis added).

In this case, Gillean is charged with three counts of burglary, one count of fraudulent insurance acts and one count of issuing a false financial statement. Each statute constituting those offenses requires a statement of the act or acts constituting the offense. Without that

¹ The provisions of ARK. CONST. art. VII § 49 are not an issue in this case.

language being included in the information, the defendant will not receive adequate notice of what he must defend against and the state will be able to alter its theory of prosecution to deny the defendant the ability to plead Double Jeopardy in the event of an acquittal.

The United States Supreme Court has held that there are several primary functions of a charging instrument. They include the following:

[F]irst, to furnish the accused with such a description of the charge against him as will enable him to make his defense (sic) and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in the law to support a conviction, if one should be had.

United States v. Cruikshank, 92 U.S. 542, 558 (1875); *See also, Russel v. United States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1047 (1962) (emphasizing the two protections as “guarantee[s]”).

Without the specific circumstances as requested in Defendant’s motion, the defendant is left guessing as to what act or acts he allegedly committed that constitute the offense charged in the Information. In addition, without the specific details of what act or acts constitute the fraudulent insurance acts charge and the issuing a false financial statement charge, the defendant is once again at the mercy of the state’s imagination.

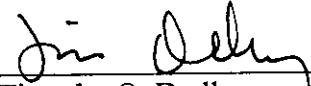
Merely tracking the statutory language will be acceptable if “the words of the statute itself fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense” *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 2907 (1974). Furthermore, the United State Supreme Court has held that “[w]here guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that [a] [charging instrument] must do more than simply repeat the language of the criminal

statute.” *Hamling*, 418 U.S. at 118, 94 S. Ct. at 2908 (quoting *Russell v. United States*, 369 U.S. at 764, 82 S. Ct. at 1047 (1962)).

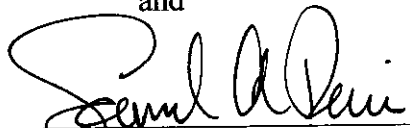
With these principles in mind, the counts included in the Information must allege more. The counts must descend to the particulars in order to provide Defendant Gillean with sufficient notice as required by the due process clause of both the Arkansas and United States constitutions.

Wherefore, Defendant prays for an Order of this Court granting his motion and for any and all other proper relief to which he may be entitled.


Respectfully submitted,

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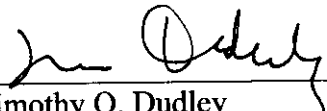
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CERTIFICATE OF SERVICE

I, Timothy O. Dudley, do hereby certify that a true and correct copy of the foregoing has been served upon the Prosecuting Attorney, Cody Hiland, via hand delivery this 28th day of February 2013.



Timothy O. Dudley