Charging Greater and Lesser-Included Offenses Separately

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Is it proper to charge a defendant separately with a greater offense and with a lesser-included offense? For example, is it proper to charge a defendant with robbery and with larceny arising out of the same taking, even though larceny is a lesser-included offense of robbery?

Synthesizing the authorities I could locate on point, it seems that (1) it isn't necessary to charge in that way, (2) as a general rule, charging in that way is to be avoided, but (3) charging in that way doesn't create a fatal defect in a pleading.

Read on for details, and for my request for information about when this happens in practice.

It's not necessary. "When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense." *State v. Hudson*, 345 N.C. 729 (1997). In other words, charging the greater offense effectively charges the lesser-included offense as well, and it's not necessary to charge the lesser-included offense separately.

It's to be avoided. Courts have recognized that a charging document that alleges both a greater and a lesser-included offense is multiplicitous, meaning that several counts charge what amounts to the same offense, as measured by the *Blockburger* test. *See, e.g., United States v. Ganadonegro*, 854 F.Supp.2d 1088 (D. N.M. 2012) (ruling that "Count 1, charging second-degree murder, and Count 2, charging voluntary manslaughter, are multiplicitous" because "voluntary manslaughter is a lesser included offense of second-degree murder"); *Merlina v. Jejna*, 90 P.3d 202 (Ariz. Ct. App. Div. 1 2004) (ruling that separate charges of DWI >.08 and DWI >.15 were multiplicitous because the former is a lesser-included offense of the latter).

Courts and commentators generally discourage multiplicity in charging. It creates an artificially large array of charges, and that can impact the pretrial release conditions that are imposed on a defendant. Also, if the multiplicity isn't addressed at some point along the way, it can result in multiple sentences being imposed for the same offense, which generally violates the Double Jeopardy Clause.

It isn't fatal. Nonetheless, most authorities hold that multiplicity in charging isn't fatal. Rather, the defendant may ask the court to require the prosecution to simplify the charges. *See generally* 41 Am. Jur. 2d Indictments and Informations § 197 (noting that "[r]emedies for multiplicity include an election of counts by the prosecutor prior to trial and the use of appropriate jury instructions"); 42 C.J.S. Indictments § 214 (noting that multiplicity isn't a fatal defect, though courts have deemed it "discouraged" and "improper"); Georgetown Law Journal Annual Review of Criminal Procedure, Indictments, 45 Geo. L.J. Ann. Rev. Crim. Proc. 323 (2016) (stating that multiplicity is "generally improper" but "not fatal," and that remedies include election of counts by the prosecution or consolidation of counts by the court); *Merlina, supra* (stating that while multiplicitous charges may be "defective," they are not fatally so). As it pertains to greater and lesser-included offenses, it makes senses that multiplicity isn't fatal. The potential prejudice to the defendant is limited in light of the fact that, even if the defendant were charged only with the greater offense, the lesser-included offense would still be implicated as described above.

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Perhaps there are some circumstances in which multiplicity is justified, as when it isn't clear whether one offense is a lesser-included offense of another, or when it alleging both the greater and the lesser offenses results in a clearer presentation of the charges. Possibly in recognition of this, an often-quoted Ninth Circuit case states that "[p]rosecutors should not be discouraged from charging defendants with greater and lesser included offenses in separate counts under the same indictment." *United States v. Jose*, 425 F.3d 1237 (9th Cir. 2005). *But see United States v. Favors,* 48 C.M.R. 873 (U.S. Army Ct. Mil. Rvw. 1974) (stating, in a case involving charges of simple assault and assault inflicting grievous bodily harm based on the same conduct, that "Specification 1 merely alleges a lesser included offense of Specification 2," and that "[a]lleging both specifications did not contribute anything to the Government's meeting the exigencies of proof and we are unable to conceive any rationale for these multiplicious pleadings").

What's happening out there? I'm interested in hearing others' thoughts about the legal issues and about the practice out there. Are there circumstances under which it makes sense to charge both a greater and a lesser-included offense separately? If so, what are those circumstances? Are there lesser-included offenses that are routinely charged separately, even if it may not make sense to do so? I'd be very appreciative of whatever information and experiences readers are able to share.

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