

19-7653

IN THE UNITED STATES SUPREME COURT

CASE NO. 7062

ROOSEVELT BIGBEE JR.

Petitioner,

v.

JONATHAN LEBOW, WARDEN

Respondent.

WRIT OF CERTIORARI
ON APPEAL FROM THE TENNESSEE SUPREME COURT

PERMISSION SOUGHT BY PETITIONER
ROOSEVELT BIGBEE JR.

ORIGINAL

Supreme Court, U.S.
FILED

JAN - 7 2020

OFFICE OF THE CLERK

ROOSEVELT BIGBEE JR.
Pro se,
West Tennessee State Prison
P.O. Box 1150
Henning, Tn. 38041-1150

QUESTION PRESENTED FOR REVIEW

Whether the admission of the plea agreement testimony evidence, of felony murder in the ~~PER~~petration of a robbery violated T.C.A 39-12-101 Criminal attempt statute?

Whether the petitioner was ~~tried~~ for an offense not charged in the indictment count one, "in the perpetration of a robbery"? U.S.C.A. Amend. 5

Whether the plea agreement testimony evidence constructively amended the indictment count one, by broadening the grounds for conviction? U.S.C.A. Amend. 5

PARTIES TO THE PROCEEDING

The petitioner is Roosevelt Bigbee Jr. an inmate at West High Correctional facility in Henning, TN.
The respondent is Jonathan Lebo, the Warden of West High Correctional facility in Henning, TN.

TABLE OF CONTENTS

The questions presented	ii
Parties to the proceeding	iii
Table of contents	iv
Table of Authorities	v
Jurisdictional Statements	1
Basis for Federal jurisdiction	2
Constitutional and Statutory provisions	3
Statement of the case	4
Argument	5
Conclusion	16
Certificate of service	17
Certificate of compliance	18
Appendix	19

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

	PAGE
U.S. Const. Amend. 5, 8 and 14	5, 14
Tenn. Const. Art. 14 and 16	5, 14

CASES

State v. Bigbee 885 S.W.2d. 797,	6, 8
State v. Rice 184 S.W.3d. 646	11
Ex parte Bain 1887, 121 U.S. 1, 7, S.Ct. 781, 30, L.Ed. 849	14
Stirone v. U.S. 361, U.S. 212, 215, 80 S.Ct. 270, 272, 4 L.Ed.2d. 252.	14, 15
U.S. v. Adams 778 F.2d. 1117, 1123.	14
Gaither v. U.S. 413 F.2d. 1061, 1071-72	11

STATUTES

TCA 39-2-202 repealed T.C.A. 39-13-202	6, 10, 11
TCA 39-2-501	5
TCA 39-12-101	6, 11

IN THE UNITED STATES SUPREME COURT

CASE NO. 7062

ROOSEVELT BIGBEE JR.

Petitioner,

v.

JONATHAN LEBOW, WARDEN

Respondent,

ON APPEAL FROM THE TENNESSEE SUPREME COURT

JURISDICTIONAL STATEMENTS

The trial court decision of Lauderdale County Tenn. is attached herein as appendix A1, The Court of Criminal Appeals of Tenn. decision is attached herein as appendix A2. No motion to rehear was filed.

An application to appeal pursuant to T.R.A.P 11 was denied by the Tenn Supreme Court on Dec. 18, 2019. appendix A3.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction is invoked pursuant to supreme court rule(b) and(c), which states as follows:

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of the last resort or of a United states court of appeals.

(c) a state court or a United states court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

This is a criminal prosecution against the petitioner for the 1991 felony murder conviction. T.C.A. 39-2-202 indictment No. 57488

In the petitioners writ of Habeas corpus petition proceeding, the petitioner argued that his indictment violates his U.S. Const. Amend 5, 14 rights and his Tenn. Const. art. 14 rights.

The judgment or decree to be reviewed herein is the ruling of the Tenn. Supreme Court denying rule 11 application regarding his writ of Habeas corpus petition. That ruling was issued on Dec. 10, 2019 appendix A3.

Jurisdiction of this appeal is conferred upon this court by the Const. U.S. amend. 5, 8 and 14

and Title 28 of the United States Code, section 28 U.S.C. 1257 (A), 28 U.S.C. 1651, 28 U.S.C. 2241 (c)(3), and 28 U.S.C. 2242.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.C.A. 5 No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand jury . . .

U.S.C.A. 8 Excessive bail shall not be required, nor excessive fines imposed, nor cruel and Unusual punishment inflicted.

U.S.C.A. 14/sec. 1 All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENN. STATUTE T.C.A. 16-5-108 (A) The jurisdiction of the court of criminal appeals shall be appellate only, and shall extend to review of the final judgment of the trial courts in:

- 1. Criminal cases, both felony and misdemeanor;
- 2. Habeas corpus and post-conviction procedure attacking the validity of a final judgment of conviction or the sentence in a criminal case, and other cases, or proceeding instituted with reference to or arising out of a criminal case;

TENN CONST. ART. 14 No person shall be put to answer any criminal charge but by presentment, indictment, or impeachment.

STATEMENT OF THE CASE

The summer County Grand Jury indicted the petitioner Roosevelt Bigbee Jr. with one count of first degree felony murder committed "during the attempt to perpetrate a robbery" and aggravated robbery the complete act, both offenses occurring to the same victim at the same time, place and date, during one felony murder. (Ex. A)

Count one charges: heretofore on or about the 28th day of Dec. 1988 in the County and State aforesaid, did unlawfully and feloniously kill and murder Monty Hugh Clymer "during the attempt to perpetrate a robbery". . .

Count two charges: heretofore on or about the 28th day of Dec. 1988 in the County and State aforesaid, did unlawfully, feloniously and forcibly take from the person of Monty Hugh Clymer, money". . .

The proof at trial showed that the defendant and his two other co-defendants charged in the indictment and a unindicted accomplice Joel Hoosier killed Monty Hugh Clymer "in the perpetration of a robbery," according to the State's key witness Joe T. Baker one of the defendants and the only co-defendant charged in the indictment to testify as to what occurred during the felony murder at the defendants trial. State v. Bigbee 885, S.W.2d. 797, NO-01-S-01-9201-CR-00014. (p. 2)

A Sumner County jury convicted the petitioner of the Dec. 28, 1988 felony murder "during the attempt to perpetrate a robbery" and acquitted the petitioner on the aggravated robbery. This Supreme Court of Tenn. affirmed his conviction but reversed and remanded the death sentence for resentencing, finding that the combination of improper prosecutorial argument and admission of evidence of the petitioner's previous felony murder conviction resulted in plain error that effected the substantial rights of the defendant. State v. Bigbee 885 S.W.2d. 797 (p.1)

In 2016 the petitioner filed his first habeas corpus petition challenging his Sumner County felony murder conviction. Complaining that the indictment failed to charge the underlying felony for the felony murder charge attempt of robbery, denying him adequate notice of the charges against him. Case # 6918 Bigbee v. Lebo, NO. W2016-01997-CCA-R3-HC, 2017 WL 838482, at *1 (Tenn. Crim. App. Mar. 3, 2017) (Bigbee II) perm. App. denied (Tenn. May. 24, 2017)

On Dec. 11, 2018 the petitioner filed a second habeas corpus petition complaining that he was tried for an offense not charged in the indictment, and that the indictment was illegally broadened by the evidence submitted at trial. Case # 7062, Bigbee v. Lebo NO. W2019-00051-CCA-R3-HC, denied (Tenn. Aug. 14, 2019)

The Supreme Court of Tenn. denied the petitioners application to Appeal on Dec. 10, 2019. NO. W2019-00051-SC-R11-HC.

ARGUMENT

The petitioner argues that his U.S. Const. Amend. 5, 14 rights and his Tenn. Const Art. 14, 16 rights were violated, in that he was tried for an alleged capital offense not by presentment or indictment of a Grand Jury.

The petitioner argues that his two count indictment charges as follows: Joe T. Baker, Roosevelt Bigbee and Chris Hoosier on or about the 28th day of Dec. 1988. did unlawfully and feloniously kill and murder Monty Hugh Clymer during the attempt to perpetrate a robbery, thereby committing the crime of murder in the first degree, in violation T.C.A. 39-2-202 (EX.A)

The second count charges as follows: Joe T. Baker, Roosevelt Bigbee and Chris Hoosier on or about the 28th day of Dec. 1988 did unlawfully, feloniously and forcibly take from the person of Monty Hugh Clymer, money, by putting Monty Hugh Clymer in fear of his life and personal safety by the use of a deadly weapon, to-wit: a gun, with the intent to convert the same to their own use and benefit and deprive the true owner thereof, in violation of T.C.A. 39-2-501 (EX.A)

The petitioner argues that count one of the indictment, the felony murder "during the attempt to perpetrate a robbery" of Monty Hugh Clymer, that occurred on or about the 28th day of Dec. 1988, that the charging language, "during the attempt to perpetrate a robbery,"

Clears him of the agg. robbery of Monty Hugh Clymer charged in the second count of the indictment, that occurred on the 28th day of Dec. 1988, the same day count one clearly state's Monty Hugh Clymer was kill and murder "during the attempt to perpetrate a robbery," on or about the 28th day of Dec. 1988 in violation of T.C.A. 39-2-202 (EX.A)

T.C.A. 39-2-202 defines felony murder as follows:
Every murder perpetrated by means of Poison, lying in wait, or by other kind of willfull, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery

In the petitioners case the state choose, "during the attempt to perpetrate a robbery," as the basis for the underlying felony of the first degree murder of Monty Hugh Clymer, on or about the 28th day of Dec. 1988. T.C.A. 39-12-101 Criminal attempt (C) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed. Subsection (C) expressly eliminates the defense that the offense has in fact been committed.

The petitioner argues that the prosecution presented evidence from the Store manager at the petitioners trial, that NO MONEY WAS MISSING FROM THE MARKET and testimony evidence from the detective that \$200 WAS FOUND IN THE VICTIM'S WALLET. State v. Bigbee 885 S.W.2d. 797, Lexis 271 (p.1)

The petitioner argues that this evidence of NO MONEY WAS MISSING FROM THE MARKET AND \$200 WAS FOUND IN THE VICTIM'S WALLET, showed the prosecution way before the Petitioners trial, that Monty Hugh Clymer was ever robb during the felony murder, on or about the 29th day of Dec. 1988, thus the charged offense cited in count one, "during the attempt to perpetrate a robbery." (EX. A)

The petitioner argues not only does the indictment count one and the evidence of NO MONEY WAS MISSING FROM THE MARKET AND \$200 WAS FOUND IN THE VICTIM'S WALLET, eliminates the agg. robbery charge of Monty Hugh Clymer before the petitioners trial, but also eliminated the prejury plea agreement testimony evidence from the state's key witness Joe T. Baker, the only co-defendant charged in the two count indictment to testify as to what occurred during the felony murder of Monty Hugh Clymer, at the Petitioners trial.

The petitioner argues, that the prosecution offered no testimony from Chris Hoosier a co-defendant charged in the two count indictment, that Monty Hugh Clymer was murder during the attempt to perpetrate a robbery. The prosecution offered no testimony from Joel Hoosier an unindicted accomplice, that Monty Hugh Clymer was murder during the attempt to perpetrate a robbery. The prosecution was solely relying on Joe T. Baker's prejury plea agreement testimony evidence, as to what occurred during the felony murder of Monty Hugh Clymer, at the Petitioners trial.

In State v. Bigbee 885 S.W.2d 797 Lexis 277 NO. 81-5-01-9201-CR-00014. The Supreme Court of Tenn. findings Where, On cross examination, the defense attorney question Baker closely and Baker acknowledge that he had lied repeatedly to both Clarksville and Hendersonville authorities, that he had been convicted of perjury as a result of his testimony at Joel Housier's preliminary hearing, that he looked upon the Hendersonville case as a way out of his problems in Clarksville where he was facing a capital trial, that he was willing to say almost anything to avoid the death penalty, that his testimony against Bigbee was part of a plea agreement with the state whereby he receive a life sentence... (p.2)

The petitioner argues, in State v. Bigbee 885 S.W. 2d. 797 Lexis.

The supreme court of Tenn. found that this plea agreement testimony evidence to be the "key state's evidence" in the case. (p.1)

Baker testified that on the evening of Dec. 27 1988, he and the defendant had picked up Chris and Joel Hoosier at a poolroom in Clarksville around 6:30 p.m. According to him (Baker) the four men rode around for awhile and discussed robbing a convenience store somewhere away from Clarksville. Baker related that the four then drove around for hours, wandering between Nashville and Springfield looking for an easy target until they arrived at the Delta Market in Hendersonville. When the four entered the market, Baker testified, Joel Hoosier, who was standing by the door, told Clymer to give him the money. Thinking Clymer was reaching for something other than cash, Baker stepped forward and began pistol whipping Clymer about the face. Chris Hoosier was standing behind Baker on the left; the defendant was to Baker's right. According to Baker, he struggled with Clymer until he felt his pistol slipping from his grasp and heard a gun fire. At that point, Clymer loosened his grip on Baker's wrist and fell to the floor. firing his own pistol, Baker fled the market, Baker testified that for some unknown reason his gun stopped working during this time. After the other three men returned to the car, Baker testified, Joel Hoosier tried to give(him) Baker some money. Baker testified that before entering the

market, none of the group had any money. Baker said that he had refused the money. Baker also told the jury that his companions had agreed with him when he had remarked that he hoped the clerk was dead because he had seen all of them. . . (p 1.2) State v. Bigbee 885 S.W. 2d. 797

The petitioner argues, that this prejury plea agreement testimony evidence is of felony murder "in the perpetration of a robbery," which is consistent with the agg. robbery of Monty Hugh Clymer charged in the second count of the indictment, that occurred on or about the 28th day of Dec. 1988, at the same time and place, as the felony murder "during the attempt to perpetrate a robbery" of Monty Hugh Clymer occurred, charged in count one. (Ex. A) Testimony evidence of an underlying felony theory "in the perpetration of a robbery," that the evidence of NO MONEY WAS MISSING FROM THE MARKET AND \$2.00 WAS FOUND IN THE VICTIM'S WALLET, eliminated way before the petitioners trial.

The petitioner argues, that the state's key witness Joe T. Baker's prejury plea agreement testimony evidence concerning the underlying felony, of the felony murder of Monty Hugh Clymer presented at the petitioners trial by the prosecution, is consistent with the felony murder rule T.C.A 39-13-202 as an alleged felony murder offense, making the basis of the underlying felony of the felony murder of Monty Hugh Clymer

"in the perpetration of a robbery," charging language, that is not charged in the felony murder count of the indictment, count one. (Ex. A) State v. Rice 184 S.W.3d. 646

No. W2002-00471-SC-DDT-DD. The felony murder rule applies when the killing is done in pursuance of the unlawful act, and not collateral to it. T.C.A. 39-13-202 Under the felony murder rule the killing may precede, coincide with, or follow the felony and still be considered as occurring in the perpetration of the felony offense, so long as there is a connection in time, place, and continuity of action, T.C.A. 39-13-202

The petitioner argues that the prosecution offered a defense at the petitioners trial that the charged offense attempted "during the attempt to perpetrate a robbery," cited in the felony murder count was actually committed, violated T.C.A. 39-12-101 Criminal attempt (c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

The petitioner argues, Gaither v. U.S. 413 F.2d. 1061, 1071-72, The court have recognized two kinds of erroneous departure from the original indictment of a grand jury, each with it own standards governing "prejudice". An amendment of the indictment occurs when the charging

terms of the indictment are altered, either literally, or in effect, by prosecutor or court after the grand jury has last passed upon them. A Variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. An amendment is thought to be bad because it deprives the defendant of his right to be tried upon the charge in the indictment as found by the grand jury and hence subjected to its popular scrutiny. A Variance is thought to be bad because it may deprive the defendant of notice of the details of the charge against him and protection against reprosecution. Because the leading amendment case of *Ex parte Bain* rested explicitly upon the Constitution, and because it apparently excludes any notion of a nonprejudicial amendment to the indictment, the concept of harmless error has not been applied to amendments. However, the strictness of this rule, perhaps inconsistent with present notions of efficient administration of justice, has been avoided by a simple expedient. Rather than amend the term of the indictment, a prosecutor simply proves the facts which the amended indictment would have charged. Thus instead of an amendment, there is a variance. And the accepted rule is that a variance does not call for dismissal of the indictment except upon a showing of prejudice.

The Stirone case limited the use of this device. In that case, there was no actual amendment of the indictment rather there was a variation in proof from the grand jury's charge. However, the supreme court found the variance substantial enough to amount to a constructive amendment of the indictment, and relied on Bain in ordering the indictment dismissed. The reason given was not that the variance deprive the defendant of notice or protection against double jeopardy, but rather that it infringed his right to have the grand jury make the charge on its own judgment.

The petitioner argues that the ^{charging} language of his indictment count one, clearly states that Monty Hugh Clymer was unlawfully and feloniously kill and murder "during the attempt to Perpetrate a robbery," on or about the 28th day of Dec. 1988, in violation of T.C.A 39-2-202. (Ex. A)

The admission of the plea agreement testimony evidence of felony murder "in the perpetration of a robbery" was in violation of T.C.A 39-12-101, in that the prosecution offered a defense that the attempted offense charged cited in count one was actually committed. The prosecution altered the charging terms in count one "during the attempt to Perpetrate a robbery," to "in the perpetration of a robbery," placing the petitioner on trial for an alleged capital offense not charged in the felony murder count of the indictment.

Violating the petitioners U.S. Const. Amend 5, 14 rights, that No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

And the petitioners Tenn. Const Art 14 rights, That No person shall be put to answer any criminal charge but by presentment, indictment, or impeachment.

Ex parte Bain 1887, 121 U.S. 1, 7, S.Ct. 781, 30 L Ed. 849. When the indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without resubmission of the case to the grand jury.

Stirone v. U.S 361, U.S. 212, 215, 80 S.Ct. 270, 272, 4, L Ed. 2d. 252 The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment.

U.S. v. Adams, 778 F. 2d. 1117, 1123. Introduction of evidence concerning residence allowed the construction of a factual basis that effectively modified an essential element charged. As such, the indictment was constructively amended and reversal is automatic.

The petitioner argues that the admission of the prejudicial plea agreement testimony evidence, of felony murder, "in the perpetration of a robbery" effectively modified on

essential element of the offense charged, "during the attempt to perpetrate a robbery" cited in Count one of the indictment, constructively amended the indictment, broadening the grounds for conviction. Infringeing upon the petitioners right to have the grand jury make the charge on its own judgment. *Stivone v. U.S.* 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4 L Ed. 2d. 252

CONCLUSION

The petitioner ask this Honorable Court, if his petition for writ of certiorari is granted and his case is reversed and dismissed, that this Honorable Court grant him his good time jail credits from 9-16-89 to 11-14-95 per Judgment Sheet (Ex. B) and apply these good time jail credits to the Second Count of Case# 26444.