

20-6505

IN THE UNITED STATES SUPREME COURT

ORIGINAL

CASE NO. 7138

ROOSEVELT BIGBEE JR.

Petitioner,

v.

JOHNNY FITZ, WARDEN

Respondent,

Supreme Court, U.S.
FILED

NOV 18 2020

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WRIT OF CERTIORARI

PERMISSION SOUGHT BY PETITIONER

ROOSEVELT BIGBEE JR.

ROOSEVELT BIGBEE JR.

Pro se,

West Tenn. State Prison

P.O. Box 1150

Henning tn. 38041

THE QUESTION PRESENTED FOR REVIEW

Whether the Court of Crim. App. erred in deeming the essential robbery elements that the petitioner was found guilty of, in the lesser included statutory robbery language alleged in the second count of the indictment "mere surplusage" raise an variance evidence sufficiency issue?

Whether the Court of Crim. App. raising an variance evidence sufficiency issue denied the petitioner his Due process rights to be found guilty upon sufficient proof. U.S.C.A. Const. Amend. 14

Whether the lesser and greater statutory robbery offenses alleged in the second and third counts of the indictment constitute the same statutory robbery offense within the meaning of the double jeopardy clause, violating U.S.C.A. Const. Amend. 5, 6, and Tenn. Const. Art. I 9, 10

Whether the Court of Crim. App. erred in deeming the essential element that defines robbery and a robbery accomplished by the use of a deadly weapon governed under Statute Tenn. Code Ann. 39-2-501 "mere surplusage" violated Tenn. R. Crim. Proc. 9-26, Tenn. Code Ann. 40-13-105 and Fed. Rules Crim. Proc. rule 6, U.S.C.A. amend. 5, 18

PARTIES OF THE PROCEEDING

The petitioner is Roosevelt Bigbee Jr. an inmate at West Tenn. high correctional facility in Henning Tn.

The Respondant is the New Warden Johnny Fitz of the West High correctional facility in Henning, Tenn.

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5	State v. Bigbee No. 01-0019106 CC00173 (Tenn. Crim. App. 1992)
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7	Brown v. Allen, 69 S.W. 3d 181.
7	Brown v. Oatis, 432 U.S. 161, 97 S.Ct. 2221, 53 L. Ed. 2d. 187.
8	Galtner v. U.S. 415 F.2d. 1061, 1071-72
8	State v. Collins, 65 Tenn. 151, 1873 WL 3999 (1873)
8	Whitaker v. State, 220 Tenn. 155, 415 S.W. 2d. 121 (1961)
9	Ex parte Bain, 121 U.S. 1, 7, 5 Ct. 281, 36 L. Ed. 849.
9	State v. March, No. M2006-02732-CCM-R3-CD.
9	State v. Henderson, 198, 695 S.W. 2d. 484
9	Blackburn v. U.S. 284 U.S. 299, 304, 52 S.Ct. 180, 182.
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10	In re Wilship, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d. 368.
11	Jackson v. Virginia, 443, U.S. 307, 99, 5 Ct. 2781, 61, L. Ed. 2d. 560.
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JURISDICTIONAL STATEMENT

The habeas corpus court of WAYNE COUNTY TENN. decision is attached herein as appendix A.1. The COURT OF CRIM. APP. OF TENN. decision is attached herein as appendix A.2.

An application to Appeal pursuant to T.R.A.P. 11 was denied by the Tenn. SUPREME COURT, appendix A.3 attached herein. No motion to rehear was filed for appendix A.2

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BASIS FOR FEDERAL JURISDICTION

The basis for Federal jurisdiction is invoked pursuant to the Supreme court Rule (10)(b)(c) which state 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 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.

In the petitioners Writ of Habeas Corpus proceeding, the Petitioner argued, that his indictment the second and third counts lesser and greater included Statutory underlying felony robbery languages and their referenced statute violated T.C.A. 39-2-501 that defines Robbery and A Robbery accomplished by the use of a deadly weapon, Violates his U.S. Const. amend. 5, 6 and 14, and Tenn. Const. ART. I, 9, 10 rights.

The judgment or decree to be reviewed herein is the ruling of the habeas corpus court, issued on March 15, 2020 and the ruling of the Court of Crim. App. issued on July 30, 2020, and the Supreme courts of Tenn. denying T.R.W.P. 11 on Oct. 12, 2020.

This is a criminal prosecution against the petitioner for the 1990 felony murder conviction T.C.A. 39-2-202 indictment NO. 26444. Jurisdiction of this appeal is conferred upon this court by the Const. of the U.S. amend. 5, 8 and 14 and Title 28 of the U.S. Code section 28 U.S.C. 1651 (a)

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, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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 persons 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.

U.S.C.A. 6 . . . to be informed of the nature and cause of
the accusation;

STATEMENT OF THE CASE AND FACTS

On Feb 19, 2020 the Petitioner filed a second habeas corpus Petition in Lauderdale County Tenn. Claiming, when applying the applicable rule stated in Blockburger v. U.S. 299 U.S 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) to Statute Tenn. Code Ann. 39-2-501, that defines robbery and a robbery accomplished by the use of a deadly weapon, and the lesser and greater included statutory robbery languages alleged in the second and third counts of the indictment, the lesser included statutory robbery language, being alleged in the second count along with the Statutory Felony murder language, to establish a double jeopardy violation upon the face of the indictment. see writ, (Bigbee v. LEBB, case NO. 7138) p. 12-14

The lesser included statutory robbery languages in the second count charges as follows: that of feloniously willfully and maliciously, that of taking property from the person of Vada B. Langston against her will by the use of physical force or violence, and by putting her in fear by threats and intimidation, all this with the intent to permanently deprive said victim of the property in violation of Tenn. Code Ann. 39-2-501. see (Appendix A-4)

The greater included statutory robbery language alleged in the third count charges as follows: Unlawfully and feloniously did make an assault upon the body of one Vada B. Langston then and there put in fear and violently did steal, take and carry from the person and against the will of the said Vada B. Langston certain personal property, said robbery being accomplished by the use of a deadly weapon in violation of Tenn. Code Ann. 39-2-501 see (Appendix A-4)

The habeas Corpus court of Lauderdale County Tenn. denied the Petitioners writ on ground, the Criminal court has jurisdiction or Authority to sentence a defendant. see order, (Bigbee v. LEBB case NO 7138) Appendix A-1

On June 1, 2020, the petitioner filed an Appeal from the final judgment of the Circuit Court of Lauderdale County Tenn. Case No. 7138 for the Court of Crim. App. of Tenn. to determine when applying the applicable rule stated in *Blockburger v. U.S.*, 299 U.S. 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to the lesser and greater robbery offenses and their referenced statute cited violated Tenn. Code Ann. 39-2-501 in the second and third counts, constitute the same statutory offense within the meaning of the double jeopardy clause. see Brief, (*Bigbee v. State*, No. W2020-00510-CCA-R3-HC) (p. 7-11)

In denying the petitioner relief, the Court of Crim. App deemed the entire lesser-included statutory robbery language and the reference statute violated Tenn. Code Ann. 39-2-501 in the second count, to be "mere surplusage" not fatal to the charging instrument. see (*Bigbee v. LEBB*, No. W2020-00510-CCA-R3-HC) (p. 3) AND (*Bigbee v. LINDAMOOD*, No. W2016-00440-CCA-R3-HC) (p. 3) Appendix A-2.

The Petitioners complaint before the Tenn. Supreme Court, was to establish the lesser and greater robbery offenses alleged in the second and third counts, met the intent requirement, governed under the Sentencing Reform Act of 1989. see (*Bigbee v. State*, No. W2020-00510-SC-R11-HC) (p. 7-10)

The Tenn. Supreme Court denied TRAP 11. Appendix A-3

ARGUMENT

On August 24, 1990, the petitioner was convicted of first degree felony murder and robbery by the use of a deadly weapon, in Montgomery County Tenn. see (Appendix A-5.6)

The petitioner was sentence to life for the felony murder conviction and 11 yrs for the armed robbery conviction. On direct appeal, the petitioner challenged the sufficiency of the convicting evidence supporting the convictions. The court of crim. app. upheld the judgment of the trial court. see State v. Bigbee, No. 01-C019106CC00173. (Tenn. crim. app. 1992)

The court of crim. app. held. There was indeed overwhelming evidence from which any rational trier of fact would concluded beyond a reasonable doubt that the petitioner was guilty of participating in both the armed robbery and felony murder of the victim. Rule 13(e) Tenn. App. P. Evidence is sufficient if after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The statutory felony murder language cited, in the second count charges as follows: Roosevelt Bigbee, unlawfully and feloniously did kill and murder Vada E. Langston, a reasonable creature in being and under the peace of the state, in the perpetration of the crime of Robbery; see (appendix A.4) The petitioner was sentence under the governing statute at the time Tenn. code ann. 39-2-202 now Tenn. code ann. 39-13-202. Tenn. code ann. 39-2-202 defines first degree felony murder as follows: Every murder perpetrated by means of poison, lying in wait, or by other kind or 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 . . .

According to the evidence found by a trier of fact beyond a reasonable doubt, the petitioner was found guilty of every essential elements of the felony murder charged offense. see (State v. Bigbee, No. 01-C019106CC00173) (see Appendix A5-6)

The governing statute at the time of the petitioners conviction for the armed robbery was Tenn. Code Ann. 39-2-501, that defines robbery and a robbery accomplished by the use of a deadly weapon. The statute defines the robbery elements as follows: Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. A robbery accomplished by the use of a deadly weapon is a Class X felony.

The complaint, that is before this United States Supreme Court, and that was before the habeas corpus court and court of crim. app. is because there was indeed overwhelming evidence from which any rational trier of fact would concluded beyond a reasonable doubt that the petitioner was guilty of participating in the armed robbery, see (Appendix A5-6) that the robbery elements that alleged in the greater included robbery offense, third count of the indictment, "Put in fear," "Violently," "take and carry away from the person certain personal property;" are elements found in the lesser included statutory robbery language alleged in the second count, along with the felony murder language, see (Appendix A.4)

In Tennessee, as a procedural matter simple robbery and armed robbery are treated under the same statute as different degrees of the same crime. Tenn. Code Ann. 39-2-501, and when legislature determine to Amend penalty statute for crime of robbery . . . did not create separate or distinct offense . . . see (State ex. rel. Anderson v. WINDSETT, 399 S.W. 2d. 741)

Under the test adopted in *State v. Burns*, 6, S.W.3d. 433, 466, 67 (Tenn. 1996) an offense is a lesser included offense if: (a) all of its statutory elements are included within the statutory elements of the offense charged; The court further held, robbery is a lesser included offense under part (a) of this test because all of its statutory elements are included within the statutory elements of the charged offense of aggravated robbery. In proving the greater offense the state necessarily has proven the lesser offense because all of the statutory elements of the lesser offense are included in the greater. (*State v. Allen*, 69, S.W.3d. 181)

The petitioner argues, if the State of Tenn. is holding these positions, on Statute Tenn. Code Ann. 39-2-501, that defines robbery and a robbery accomplished by the use of a deadly weapon and in proving the greater offense the state necessarily has proven the lesser offense because all of the statutory elements of the lesser offense are included in the greater. Then the evidence found in *State v. Bigbee*, NO. 01-0019106CC00173, to be ample, indeed overwhelming to sustain the conviction and sentence beyond a reasonable doubt, for both the felony murder and armed robbery offense, see (Appendix A 5.6) that same proof, proved the lesser included statutory robbery offense alleged in the second count beyond a reasonable doubt as well. Placing the petitioner in jeopardy to be twice tried for different degrees of the same robbery offense. Violating the petitioner U.S.C.A. Const. Amend 5.6 and Tenn. Const. ART. I 9.10 rights, see (*Brown v. Ohio*, 432, U.S. 161, 97, S.Ct. 2221, 53 L Ed. 2d. 187)

The petitioner put forth these very principles held by these courts to establish the double jeopardy violation, before the habeas corpus court, and the court of crim. App. see writ (*Bigbee v. LEBO*, case No. 1738 (p. 12-16) and Brief (*Bigbee v. State*, NO. W2020-00510-CCA-R3-HC) (p. 7-11) also supplement, (*Bigbee v. State*, No. W2020-00510-CCA-R3-HC) (p. 1-7)

The habeas corpus court denied the writ on ground the criminal court had jurisdiction and authority. (Appendix A.1.) And the court of crim. app. deemed the entire lesser included statutory robbery language and the reference statute violated Tenn. Code Ann. 39-2-501 as "mere surplusage". (Appendix A.2)

The petitioner argues, requirement of criminal rules that every indictment must be found by at least 12 grand jurors is a further specification of fifth amendment's command that no person shall be held to answer for capital, or otherwise infamous, crime, unless on presentment or indictment of grand jury. Fed. Rules Crim. Proc. rule 6, 6(c), 12(b)(2,3) 18 U.S.C. Const. Amend 5. see (Gaither v. U.S. 413 F.2d. 1061, 1071-72) Content of felony charge, as well as decision to charge at all, is entirely up to grand jury and grand jury's decision not to indict at all, or not to charge facts alleged by prosecutorial officials, is not subject to review by any other body. U.S.C. Const. Amend. 5. (Gaither v. U.S. 413 F.2d. 1061, 1071-72)

Tenn. P. Crim. Proc. 9.26, Endorsement where indictment or presentment is found - "True Bill," When there are sufficient votes for an indictment, the foreman must endorse the indictment "A True Bill" followed by the foreman's signature. This procedure is mandatory. Tenn. Code Ann. 40-13-105, State v. Collins, 65 Tenn. 151, 1873 WL 3999 (1873) also Wheeler v. State, 220, Tenn. 155, 415, S.W.2d. 121 (1967) see (Appendix A.4)

The petitioner argues, the indictment is clearly signed by the foreman, signifying sufficient votes for the grand jury's approval of the statutory felony murder language, without the reference statute violated and the lesser included statutory robbery language and the reference statute cited violated Tenn. Code Ann. 39-2-501, alleged in the second count. The court of crim. app. has erred in deeming the entire lesser included statutory robbery language

and the Reference statute violated Tenn. Code Ann. 39-2-501 handed up by the grand jury to be "remove surplage" see (Ex. Parte Bain, 121 U.S. 1. 7 S.Ct. 781, 30 L.Ed. 849). In order for the Court of Crim. App. to deny the petitioner relief sought, the Court had to reverse its own decision in State v. Bigbee No. 01-0019106CC00173. (Tenn. Crim. App. 1992) where the petitioner challenged the sufficiency of the convicting evidence. The Court found the evidence overwhelming from which any rational trier of fact would conclude beyond a reasonable doubt that the petitioner was guilty of the felony murder statutory elements and the armed robbery statutory elements. see (Rule 13(e) Tenn. App. P. Appendix A-5-6)

The petitioner argues, in the opinion of the Court of Crim. App. in denying the petitioner relief sought, see (Appendix A-2) the court has raised an variance evidence sufficiency issue. The Court of Crim. App. held, a surplage is one of variance when the State fails to prove the existence of a fact that was alleged in the charging instrument, in this context surplage implicates an evidence sufficiency issue. see (State v. March, No. M2006-02732-CCA-R3-CD.)

If the prosecution failed to prove, "that of taking of property from the person", by "force" or "violence" and "putting in fear", those essential robbery elements alleged in the lesser included robbery offense in the second count. Then the prosecution also failed to prove, "put in fear", and "violently", "take from the person property", alleged in the greater included robbery offense in the third count. Elements necessary to make out offense of robbery are the taking of goods from a person by forcible means, violence, or putting in fear. see (State v. Henderson 198, 695, S.W. 2d. 484. [see Appendix A-4])

Tenn. App. P. Rule 13(e) finding of guilty in criminal action whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact beyond a reasonable doubt.

The petitioner argues by virtue of the Court of Crim. App. reversal from (State v. Bigbee, No. 01-0019106CC00173) (Tenn. Crim. App. 1992) [see Appendix A-5-6]

the said trier of fact, to the petitioners challenge to the sufficiency of the convicting evidence, State v. Bigbee, No. 01-CO19106CC00173 (Tenn. crim. app. 1992) that now the evidence was insufficient to find the petitioner guilty of the essential robbery elements that defines the different degrees of the same robbery offense upon the face of the indictment, second and third counts. That the Petitioner clearly argued was sufficient to find the petitioner guilty of both robbery offenses, when applying the applicable rule stated in Blockburger v. U.S., 299 U.S. 304, 32 S.Ct. 180, 76 L.Ed. 306 (1937) to Statute Tenn. Code Ann. 39-2-501 and the lesser and greater statutory robbery offenses upon the face of the indictment, constitute the same statutory offense within the meaning of the double jeopardy clause, the statute requires no proof beyond that which is required for conviction of the lesser and greater robbery offenses. That the prosecution established the greater included robbery offense at the petitioner's trial and in doing so, established the requisite intent for the lesser included robbery offense. see writ (Bigbee v. LEBB, case No. 7138) (p. 12-16) and brief, (Bigbee v. State, No. W2020-00510-CCA-R3-HC) (p. 7-11) and supplemental (Bigbee v. State, No. W2020-00510-CCA-R3-HC) (p. 1-8)

And the Court of Crim. App. the trier of fact, State v. Bigbee, No. 01-CO19106CC00173 (Tenn. crim. app. 1992) (Appendix A5-6) denied the convicting evidence of the essential robbery elements alleged in the greater included robbery offense, by deeming those same essential robbery elements alleged in the lesser included robbery offense in the second count to be "mere surplusage"

The Court of Crim. App. is allowing its self to have it both ways. restraining the petitioner of his liberty on the proven essential robbery elements alleged in the greater included robbery offense alleged in the third count, that the Court of Crim. App. the trier of fact concluded beyond a reasonable doubt the petitioner was guilty of. State v. Bigbee, No. 01-CO19106CC00173 (Tenn. crim. app. 1992). And denying the petitioner relief sought by deeming those same essential proven robbery elements to be "mere surplusage" in the lesser included robbery offense in the second count.

see. (Bigbee v Lindamood, NO. W2016-00440-CCA-K3-HC)(P.3)(Appendix 42)
and (Bigbee v. LEB0, NO. W2020-00510-CCA-K3-HC)(P.3)(Appendix 42)

Due process requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. see (In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L Ed 2d. 368)

The petitioner argues that he is before this United States Supreme Court as a last resort to intervene between the two conflicting inferences on the facts raised by the Court of Crim. App. in denying the petitioner relief sought and restraining the petitioner of his Liberty. In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L Ed 2d. 560. This United States Supreme Court held, under the standard established in this opinion as necessary to preserve the due process protection recognized in Winship, a federal habeas corpus court faced with a record of historical facts that support conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. Applying these criteria, we hold that a rational trier of fact could reasonably have found that the petitioner committed murder in the first degree . . .

The petitioner argues, as held in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L Ed. 2d 560, that this United States Supreme Court defer to the resolution the trier of fact resolved any such conflicts in favor of the prosecution as found in (State v. Bigbee, NO. 01-CO106CC00173)(Tenn. Crim. App. 1992) and find the evidence was and indeed overwhelming to find the petitioner guilty of the lesser and greater robbery offenses upon the face of the indictment, second and third counts. Placing the petitioner in jeopardy to be twice tried for the same robbery offense, violating the petitioner. U.S.C.A. Amend 5, 6 and Tenn. Const Art. I § 10 rights, to be protected from double jeopardy. see (Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L Ed. 2d. 187.)

CONCLUSION

The relief sought from this Honorable Court by the petitioner by virtue of its power, is to reverse and dismiss the petitioner's void and illegal conviction and sentence, and grant the petitioner immediate release, because the petitioner was sentence to life on case NO. 5748, ~~see~~ (Appendix A-7) and sentenced in the present case, case NO. 26444 ON Aug. 24, 1990 ~~see~~ (Appendix A-5) and up until the present the petitioner would have served 29 yrs on case NO. 26444 (Appendix A-5) the governing statute at the time for both cases 5748 and 26444 was Tenn. Code Ann. 39-2-202, life carried 30 yrs.

The trial courts pursuant to Tenn. Code Ann. 40-23-101 granted the petitioner good time jail credits on both judgment sheets in case NO. 26444 (Appendix A-5) and case NO. 5748 judgment sheet (Appendix A-7) which equals up to $9\frac{1}{2}$ yrs. Tucker v. Morrow, 335 S.W.3d. 446. When the word shall is used in constitutions and statutes, it is ordinary construed as being mandatory and not discretionary.

The petitioner argues with the $9\frac{1}{2}$ yrs. good time jail credits add to the 29 yrs he has done day for day would equal up to $38\frac{1}{2}$ yrs. And if case NO. 26444 (Appendix A-5) is reversed and dismiss by this Honorable Supreme Court the applied $38\frac{1}{2}$ yrs. to case NO. 5748 (Appendix A-7) would make case NO. 5748 (Appendix A-7) to have expired.