22-6464

No. _____

ORIGINAL

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

LEONARD CHASE, JR. — PETITIONER
(Your Name)

vs.

SUPERINTENDENT ALBION SCI, ET AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Leonard Chase Jr., KC #5573
(Your Name)

SCI Albion, 10745 Rt. 18
(Address)

Albion, PA., 16475-0002
(City, State, Zip Code)

N/A
(Phone Number)

LIST OF PARTIES

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all the parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

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RELATED CASES

Commonwealth v. Leonard Chase, Jr., No. CP-67-CR-0003518-2010, The Court of Common Pleas of York County, Pennsylvania. Trial Court - Judgement entered Apr. 7, 2011.

Commonwealth of Pennsylvania v. Leonard Chase, Jr., No. 2064 MDA 2011, The Superior Court of Pennsylvania Middle District. Direct Appeal - Judgement entered Dec. 20, 2012.

Commonwealth of Pennsylvania v. Leonard Chase, Jr., No. CP-67-CR-0003518-2010, The Court of Common Pleas of York County, Pennsylvania. PCRA - Judgement entered June 19, 2019.

Commonwealth of Pennsylvania v. Leonard Chase, Jr., No.1122 MDA 2019, The Superior Court of Pennsylvania Middle District. PCRA Appeal - Judgement entered Apr. 8, 2020.

Leonard Chase v. Superintendent Albion SCI, et al, No. 4:18-CV-00101, U.S. District Court for the Middle District of Pennsylvania. Habeas Corpus - Judgement entered Oct. 29, 2021.

Leonard Chase, Jr. v. Superintendent Albion SCI, et al, No. 21-3139, U.S. Court of Appeals for the Third Circuit. COA Request - Judgement entered Oct. 6, 2022.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at unknown; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at unknown; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the The Superior Court of Pennsylvania Middle District court appears at Appendix C to the petition and is

[X] reported at unknown; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 6, 2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

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 offence 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, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

The Fourteenth Amendment's Due Process Clause provides that no state may deprive any person of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS

-The Pennsylvania Suggested Standard Criminal Jury Instruction 15.3701

-Title 18, Crimes and Offense Article C., Offenses against Property, Chapter 37, Robbery§3701

-PENNSYLVANIA'S ROBBERY STATUTE 18 PA. C.S.A. § 3701 (A) (1) (ii)

(a) Offense defined.–

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

(ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;

(iii) commits or threatens immediately to commit any felony of the first or second degree;

(iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury;

(v) physically takes or removes property from the person of another by force however slight; or

(vi) takes or removes the money of a financial institution without the permission of the financial institution by making a demand of an employee of the financial institution orally or in writing with the intent to deprive the financial institution thereof.

(2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

STATEMENT OF THE CASE

On Aril 24, 2010, the petitioner was arrested and charged on six counts of robbery and one count of conspiracy to commit robbery. The trial court presented the following facts: On April 24, 2010, approximately 10:00 p.m. two masked men enter the Wine and Spirits store located at 2414 Eastern Boulevard in York, Pennsylvania just before closing with guns pointed in the air. (Notes of Transcripts 4/4/2011-4/7/2011, pg. 101). The two men bypassed the customers and went straight towards the cash register and safe demanding three of the employees by way of gun point to deliver the store's cash. According to the police affidavit the two actors deprived the store of its $413.00 from two cash registers. (N.T. 4/4/2011, pg. 132-135)

The two men then fled the store by car and shortly after were apprehended by police. There were three men found in the car once the vehicle came to a stop. Three occupants were arrested, two men (Petitioner and Co-Defendant) were charged for the crimes, and the third suspect was released. At trial there were seven witnesses who were present at the time of the Wine and Spirits store robbery. Four of the seven witnesses were employees, and three were bystanders (customers). Six of the seven witnesses were counted as robbery victims.

Ms. Sabrina Robinson, an employee that was working in an aisle on the other side of the store away from where the robbers were. Ms. Robinson was not able to identify the petitioner as one of the robbers. Ms. Robinson testified that she was restocking and facing shelves (facing product labels towards customers) during the time of the robbery of the business. Ms. Robinson heard something up front of the store but was unsure of what she heard. Ms. Robinson never testified that she was approached by the two actors, nor did the actors deprived her of personal property, nor any demands for her to get down on the ground, or to handover the store's property (cash), nor were there any threats made towards her, nor were there a gun pointed at her at any time during the store robbery. The petitioner points out that Sabrina Robinson had no control over the cash registers or safe, her assignment during the time of the store robbery was "restocking and facing shelves." The petitioner notes that Ms. Robinson had no contact with, or heard the perpetrators say, "get down on the ground," she stayed in the aisle and was able to call 911 while the store robbery was still in progress without any interference from the robbers. (N.T. 4/4/2011 pg. 177-184)

Ms. Petra Meckley, an employee of the Wine and Spirits store did testify that one of the actors made threats by gun point and demanded her to open the cash register, but she was unable to. (N.T 4/4/2011, pg. 102-105) However, based on Ms. Petra Meckley's testimony the robbers never demanded any personal property.

Ms. Kelli Herman, an employee of the Wine and Spirits store did testify that one of the actors demanded her to help Petra Meckley (employee, victim #2) open the cash register. Kelli Herman testified that the robber took all the money from the draw. (N.T 4/4/2011, pg. 120-121).

Mr. David Smith, an employee of the Wine and Spirits store did testify that one of the actors made threats towards him by way of gun point and demanded him to open the safe. Mr. Smith was unable to open the safe because he had no key. (N.T 4/4/2011, pg. 130-134)

Ms. Stefanie Santana, one of the two victims referenced in robbery count #5, was a customer inside the store during the time of the store robbery, never testified that she was able to identify the petitioner, nor were she approached by actors, nor did the actors deprived her of personal property, nor were there any direct threats made towards her, nor did the perpetrators point a gun at her any time during the store robbery. (N.T. 4/4/2011, pg. 172-176).

Ms. Stephanie Hernandez, the second victim referenced in robbery count #5, a customer that was able leave the store completely after the two men enter the Wine and Spirits store. Ms. Hernandez never testified that she was able to identify the petitioner, nor were she approached by the actors, nor were she deprived of her

personal property, nor were there any threats made towards her, nor were there a gun pointed towards her by the perpetrators. (N.T. 4/4/2011, pg. 186-200).

Mr. Donte Pittman testified that he saw two men emerge from the store and that as they moved on foot, he started following them in his car. As Mr. Pittman drove past, he observed a white car parked in the back. He testified that while looking in his rear-view mirror he was unable to see anyone enter the car but heard doors close and car driving off. Mr. Pittman broke his observation so he can return to the store to pick up his cousin. Once driving again, he saw a like color car at a nearby intersection. (N.T. 4/4/2011, pg. 208-221)

On April 07, 2011, the petitioner was convicted by a jury of five counts of robbery, a felony in the first degree and one count of Conspiracy to Commit Robbery, a felony of a first degree. On June 27, 2011, the petitioner was sentenced to a consecutive sentence of seven (7) to fourteen (14) years for each count from 1 through 5, count 6 was dismissed. The consecutive sentences totaled thirty-five (35) to seventy (70) years, all to be served in Pennsylvania's State Correctional Institution. The petitioner challenged his convictions and sentences through the state procedures and properly exhausted all the state's remedies for relief.

The petitioner later filed a timely Federal Habeas Corpus petition in the Middle District Court of Pennsylvania, the district court denied Habeas relief and

declined to issue Certificate of Appealability (COA), entered on the 29th day of October 2021. The petitioner filed a timely Notice of Appeal on the 17th day of November 2021 to the U.S. Court of Appeals for the Third Circuit. The petitioner asked the Third Circuit Court to grant a COA so that the petitioner can further proceed with his federal claims. However, the petitioner was denied a COA on the 6th day October 2022. And now, the petitioner files in the United States Supreme Court a timely petition for a writ for certiorari.

REASON FOR GRANTING THE PETITION

I. THE STATE COURT'S USE OF A SINGLE ACT OF THEFT FROM ONE COMPANY RESPECTIVELY TO ESTABLISH FIVE DISTINCT ROBBERY CONVICTIONS AND CONSECUTIVE SENTENCES WAS MULTIPLICITIOUS AND DID VIOLATE THE U.S. CONSTITUTION FITH AND FOURTEENTH AMENDMENT.

The Supreme Court has held in Benton v. Maryland, *post,* p. 784, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. See Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) that guarantee has been said to consist of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." 'Brown v. Ohio, 432 U.S. 161, 165 [97 S.Ct. 2221, 2225, 53 L.Ed.2d 187] (1977), quoting North Carolina v. Pearce, 395 U.S. 711, 717 [89 S.Ct. 2072, 2076, 23

L.Ed.2d 656] (1969)." Ohio v. Johnson, 467 U.S. 493, 498, 104 S.Ct. 2536, 2540, 81 L.Ed.2d 425 (1984). Id.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U. S. 358, 397 U. S. 364. Id. The petitioner's case stemmed from an armed robbery of a Wine and Spirits store located at 2414 Eastern Boulevard in York, Pennsylvania on April 24, 2010, approximately at 10:00 p.m. The evidence presented at trial did reveal that there were one establishment (Wine and Spirits store) robbed on April 24, 2010, however, the state's evidence did not reveal that there were six (6) distinct robberies that took place inside the store. The state court used one act of theft of the Wine & Spirits store to lay the foundation to pyramid five robbery counts that included employees and customers present during a single criminal episode of a store robbery uninterrupted by any substantial interlude of non-criminal conduct. In Wooden v. United States, 595 U.S. __ (2022)

> Wooden's ten ministorage burglaries raised from a single criminal episode and did not occur on different "occasions." Wooden's successive burglaries occurred on one "occasion" under a natural construction of that term. An ordinary person using language in its normal way would describe Wooden's entries into the storage units as happening on a single occasion, rather than on ten "occasions different from one another." Given what "occasion" ordinarily means, whether criminal activities occurred on one occasion or different occasions requires a multi-factored inquiry that may depend on a range of circumstances, including timing, location, and the character and relationship of the offenses. Mr. Wooden's ten ministorage burglaries arose from the same criminal opportunity, and thus were committed on the same occasion.

The petitioner respectfully argues that the actors never strayed from their intent of robbing only the Wine & Spirits establishment. In robbery count #1, #2, and #3 the property (cash) taken was from the Wine and Spirits store's cash registers and not from any of the employees' personal property and for robbery count #4 and #5 the victims were three bystanders in the store at the time of the store robbery, they were never approach by the actors for their personal property. The evidence pointed to a single robbery (i.e., "same transaction, single criminal episode, one occasion") of the Wine & Spirits store's property (cash).

The petitioner points out that, courts throughout the United States are divided when applying punishments for robbery. Many courts throughout our country have chosen to reject the multiple robberies stemming from one act of theft theory. Courts have ruled that such circumstances result in only one robbery. For instance, in State v. Faatea, 65 Hawaii 156, 648 P.2d 197 (1982), the Supreme Court of Hawaii held that there was only one robbery when the defendant and a companion entered a Ramada Inn accounting office, pointed a gun and said "`Everyone down on the floor. This is a holdup,'" 65 Hawaii at 156, 648 P.2d at 197-98, and left with $25,000 of the hotel's money. Because there were five employees in the office, the robbers were charged in a five-count indictment. In dismissing four of the five indictments, the court stated:

> [I]inasmuch as there was but one act of theft here, from one owner, we are constrained to hold that the defendant could be convicted and sentenced for but one robbery offense. The theft was of Ramada Inn property, and each of the five employees named were simply custodians of the property for the benefit of their employer. The threatened use of force was directed against all five for the purpose of effectuating the unlawful taking of their employer's property. It was this threat which converted the taking from theft to robbery. Thus, there was only one aggravated theft for which a sentence could be imposed." 65 Hawaii at 157, 648 P.2d at 198. *See also* State v. Perkins, 45 Or.App. 91, 607 P.2d 1202 (1980). State v. Collins, 329 S.E.2d 839 (W. Va. 1985); Williams v. State, 395 N.E.2d 239 (Ind. 1979); State v. Potter, 204 S.E.2d 649 (N.C. 1974); People v. Nicks, 319 N.E.2d 531 (Ill. App. 1974). Id.

The 'Uniform Crime reporting (UCR) Program National Incident-based reporting System (NIBRS)." Accordingly, the offense definitions in the NIBRS are based on common-law definitions found in Black's Law Dictionary, as well as those used in the UCR Handbook and the NCIC Uniform Offense Classifications, since most state statutes are also based on common-law definitions, even though they may vary as to specifics, most should fit into the corresponding NIBRS offense classifications.

> **Robbery**-The taking, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of another person by force or violence and/or by putting the victim in fear of immediate harm.

NIBRS 2012. U.S. Department of Justice-Federal Bureau of investigation

The petitioner argues that the "Fifth Amendment guaranty against double jeopardy, it provides constitutional protection against multiple prosecutions for the same offense and multiple punishments for the same crime." *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969). Multiplicity exists if

the State uses a single wrongful act as the basis for multiple charges. *Brown v. Ohio*, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). Id.

The petitioner notes that a "challenges to an illegal sentence can never be waived and may be reviewed *sua sponte* by this Court." Commonwealth v. Randal, 837 A.2d 1211, 1214 (Pa. Super.2003) " An illegal sentence must be vacated." Id. The petitioner adds that multiplicity involves "the charging of a single offense in more in one count." United States v. Anderson, 872 F.2d 1508, 1520 (11th Cir.1989) (quoting Ward v. United States, 694 F.2d 654 (11th Cir.1983)). The petitioner further argues that the concern with multiplicity is that it creates the potential for multiple punishments for the same offense, which is prohibited by the double jeopardy clause of the Fifth Amendment of the United States Constitution. "When the court 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." United States v. Reed, 639 F.2d 896, 904 (2d Cir.1981); United States v. Hearod, 499 F.2d 1003, 1005 (5th Cir.1974).

In Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine

whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . ." Id., at 304, 52 S.Ct., at 182.4.

The description of the petitioner's multiple offenses that occurred at the same location, date, and time are as follows:

CR-3518-2010 Count #1: Robbery, 18 Pa. C.S.A. 3701 (a) (1) (ii), F1

On April 24, 2010, the Actor, in the course of committing a theft, threatened David Smith, a Wine and Spirits employee, with or intentionally put him in fear of immediate serious bodily injury with a handgun in the course of committing a theft from the Wine and Spirits, 2500 Eastern Boulevard, Springettsbury Township. This constitutes the first-degree felony of Robbery.

CR-3518-2010 Count #2: Robbery, 18 Pa. C.S.A. 3701 (a) (1) (ii), F1

On April 24, 2010, the Actor, in the course of committing a theft, threatened Petra Meckley, a Wine and Spirits employee, with or intentionally put him in fear of immediate serious bodily injury with a handgun in the course of committing a theft from the Wine and Spirits, 2500 Eastern Boulevard, Springettsbury Township. This constitutes the first-degree felony of Robbery.

CR-3518-2010 Count #3: Robbery, 18 Pa. C.S.A. 3701 (a) (1) (ii), F1

On April 24, 2010, the Actor, in the course of committing a theft, threatened Keli Herman, a Wine and Spirits employee, with or intentionally put him in fear of immediate serious bodily injury with a handgun in the course of committing a theft from the Wine and Spirits, 2500 Eastern Boulevard, Springettsbury Township. This constitutes the first-degree felony of Robbery.

CR-3518-2010 Count #4: Robbery, 18 Pa. C.S.A. 3701 (a) (1) (ii), F1

On April 24, 2010, the Actor, in the course of committing a theft, threatened Sabrina Robinson, a Wine and Spirits employee, with or intentionally put him in fear of immediate serious bodily injury with a handgun in the course of committing a theft from the Wine and Spirits, 2500 Eastern Boulevard, Springettsbury Township. This constitutes the first-degree felony of Robbery.

CR-3518-2010 Count #5: Robbery, 18 Pa. C.S.A. 3701 (a) (1) (ii), F1

On April 24, 2010, the Actor, in the course of committing a theft, threatened Stephanie Hernandez and Stefanie Santana a customer inside the Wine and Spirits store, with or intentionally put him in fear of immediate serious bodily injury with a handgun in the course of committing a theft from the Wine and Spirits, 2500 Eastern Boulevard, Springettsbury Township.

Stated in Robinson v. United States,

> Merely because one element of a single criminal act embraces two persons or things, a prosecutor may not carve out two offenses by charging the several elements of the single offense in different counts and designating only one of the persons or things in one count and designating only the other person or thing in the other count.'" (quoting *Robinson v. United States,* 143 F.2d 276, 277 (10th Cir.1944) An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed. See United States v. Holmes, 44 F.3d 1150, 1153-54 (2d Cir.1995); see also United States v. Nash, 115 F.3d 1431, 1437 (9th Cir.1997). This violates the Double Jeopardy Clause of the Fifth Amendment, subjecting a person to punishment for the same crime more than once. See U.S. Const. amend. V; United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) ("In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies."); see also United States v. Morgan, 51 F.3d 1105, 1108 (2d Cir.1995) ("If a person is twice subject to punishment for the same offense, double jeopardy protection attaches.").

In United States v. Canty, 469 F.2d 114 (D.C. Cir.1972), the defendants were convicted of four counts of armed robbery, one count for each of the bank tellers robbed. The court, in setting aside these convictions, stated:

> [W]e cannot agree with the Government's position that the robbery of each teller constitutes a separate taking within the meaning of the statute.... There is no doubt here that only one transaction took place and that only one bank was robbed... even assuming that the intent of the statute in this regard is not perfectly clear, the Supreme Court has held that, unless a statutory intent to permit multiple punishments is stated clearly and without ambiguity doubt will be resolved against turning a single transaction into multiple offenses.'" 469 F.2d at 126-27. (Footnotes omitted).

The petitioner argues that his conviction of cumulative punishments of five (5) counts of robbery indictments was contrary to the Double Jeopardy Clause of the Fifth Amendment. Id. The petitioner argues that "a theft" along with threats to complete the theft of the Wine and Spirits store established one (1) robbery count, the theft harm is satisfied in the first conviction and sentence. The state court used that same "theft" of the store's property (cash) multiplicitously in order to establish

the other four (4) robbery counts. The petitioner respectfully argues that all five robbery offenses are but facets of the same criminal "transaction, episode, occasion." The petitioner further argues that only the business (Wine and Spirits) suffered an actual robbery. The petitioner respectfully argues that the same Wine and Spirits' "theft" element that established the first robbery count was respectively used to pyramid the other four (4) robbery counts.

In Whalen v. United States, 445 U.S. 684 (1980) ...the Supreme Court of the United States stated that the rule of lenity should be applied in double jeopardy cases when the matter of legislative intent is "not entirely free from doubt." Id. The petitioner argues that his convictions and sentences consist of five (5) counts of robbery using the same criminal episode of a theft of Wine and Spirits store. A sentence of seven (7) to fourteen (14) years for each count, to be served consecutively, for a total of 35 to 70 years in Pennsylvania's State Correctional Institution was multiplicitous and prejudicial and did violate the petitioner's U.S. Constitutional Fifth and Fourteen Amendment right. See *Brown v. Ohio*, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). The petitioner reiterates that to include a person as a robbery victim using "a single theft" of someone else's property and pyramid that single theft cyclically into multiple indictments in order to establish each robbery count is a recipe for "Multiplicity" which violates the U.S.

Constitutional Double Jeopardy prohibition and due process Fourteenth Amendment right to all U.S citizen. This issue is ripe for review by the U.S. Supreme Court.

II. THE STATE COURT'S VAGUE AND OVERBROAD INTERPRETATION OF THE PENNSYLVANIA'S ROBBERY STATUTE 18 PA. C.S.A. § 3701 (A) (1) (ii) VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT

The lower court's decision to not grant Federal Habeas relief is in conflict with the U.S. Constitution and the U.S. Supreme Court's established laws due to the fact that the Pennsylvania's Robbery statute, [18 Pa. C.S.A. § 3701(a) (1) (ii)] is being interpreted and applied to cases in a way that violates the U.S. Constitution Double Jeopardy a guarantee Fifth Amendment and Fourteen Amendment and goes against this Court's decision in Bell v. United States which states, "that unless a statutory intent to permit multiple punishments is stated "clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses". Bell v. United States, 349 U.S. 81, 84 (1955).

In Ladner, the United States Highest Court also stated, "Moreover, an interpretation that there are as many assaults committed as there are officers affected would produce incongruous results." Citing Ladner V. United States 358 U.S. 169 (1958). In close relation to the petitioner's case and that of Ladner's case, is that the state's vague interpretation of [18 Pa.C.S. § 3701],_stemming from "a single act of theft" can result in as many robbery victims that are present during the time of that

"single theft" regardless if that person was not threaten, regardless if that person were never approached by the actors, regardless if no gun was pointed at the person, and regardless if the person (i.e., observers, customers) were not deprived or an attempt to be deprived of their personal property by the actor(s), or have "an interest" in the property taken (i., e., Wine & Spirit store's money from the cash register).

The state's belief is that just by the mere fact that the actor(s) was arm with weapon(s), even if the gun were not at no time pointed towards an observer/customer or where there were no direct threats made towards them during the time of a store robbery does not change their belief that "a single theft" can result in multiple robbery victims even if those persons did not have "an interest" in the property being taken.

Petitioner do understand that the welfare of the citizens is more valuable than their earthly possessions. However, the common understanding of an act of robbery, is a person or place of business must also suffer an unlawful taken or an attempt to take property no matter the value by way of threats or intentionally put in fear by the perpetrator(s). The petitioner argues that according to the General Assembly, the Pennsylvania robbery statue [18 Pa.C.S. § 3701] was design to protect the persons' property as well as the person. In fact, Pennsylvania's robbery statute is classified as an "offense to property." See (Title 18, Crimes and Offense Article C., Offenses against Property, Chapter 37, Robbery §3701). Id.

The petitioner argues that the essential elements in [18 Pa.C.S.A § 3701(a) (1) (ii)] are that a theft be committed and that there is a threat or intentionally put in fear imminent serious bodily injury towards the person who is being deprived of their property. Thus, the harm against which the statute protects is the deprivation of property by way of threats or actual physical harm in order to retrieve property not belonging to the perpetrator.

The petitioner argues that in order for a person to be considered a robbery victim that same person must suffer an offense to their property. The petitioner argues that an aggravated theft is elevated to robbery once force of some sort is involved. The petitioner further argues that a threat of itself does not constitute robbery, nor does a theft of itself constitute robbery, both main ingredients are necessary to constitute one robbery indictment not using the same element (theft of the Wine and Spirit store) to expand the robbery indictment so that it can create distinct robbery counts by using one occasion of theft.

The petitioner argues that a bystander that is present during a store robbery and witness robbers taking property (cash) that belongs to the owner of the store and during that time were never approached by the actor(s) for their personal property falls short of considering that person a victim of robbery. The petitioner argues that in order to be a victim of robbery under the proper interpretation of [18 Pa.C.S.A. §

3701(a) (1) (ii)] a person must have an interest in the property being taken and not merely because that person was present during a theft of someone else's property being taken.

The petitioner further argues that the state court's unconstitutional understanding is that "a single theft" can establishes the foundation for multiple robbery indictments stemming from that "same transaction" of a single theft and using that same element after that element has already been established and satisfied in the first conviction and sentence may be respectively applied in additional robbery indictments even if the person did not have an interest in the property being taken.

The petitioner respectfully argues that the state court's interpretation of [18 Pa.C.S.A. § 3701(a) (1)(ii)] ultimately leads to a conclusion that is unconstitutionally vague and/ or overbroad and do violates the U.S. Constitutional Fifth and Fourteenth Amendment. The petitioner points out that historical common law understanding of robbery as an aggravated or compound form of theft of a person, or institutions' property. The petitioner contends that to include a person as a robbery victim using a single theft of someone else's property (not pertaining to that person) and pyramid that single theft cyclically into multiple indictments in order to establish each count is a recipe for "Multiplicity" which violates the U.S. Constitutional Double Jeopardy prohibition and due process Fourteenth Amendment right.

To leave the state's interpretation in place will result in many miscarriages of justice throughout the commonwealth of Pennsylvania and other states that may want to use Pennsylvania court's interpretation of robbery as a model to guide their decisions. If the state court's vague and/or overbroad interpretation of robbery continue to stand, nothing will prevent the court from broadening the scope of punishment for single occasion of robbery. For example, if an actor show a weapon to a cashier and demands cash from the registers in a crowded Walmart that has approximately 100 customers and 20 employees present during the time of the store robbery, the state court's interpretation of the robbery statue [18 Pa.C.S. § 3701] would include each customer and employee that observed the robbery incident of the supermarket to be counted as a robbery victim. The state sees a single criminal episode of a theft that occurred on the same date and time, and at the same location without a non-criminal break in conduct worthy of separate robbery counts, one for each employee and customer present during the store robbery. This would create 120 robbery indictments stemming from one episode of a theft of the supermarket's property by way of threats with a weapon.

The petitioner notes that although this illustration may seem impractical, however, according to the state court's broad interpretation it is not. The petitioner respectfully argues that if left unaddressed, the state's interpretation of the robbery statue [18 Pa.C.S. § 3701] will allow limitless robbery counts from a single act of

theft. To allow this to continue, would continue to allow, multiplicitous and prejudicial convictions and sentences which violates the U.S. Constitution Fifth and Fourteenth Amendment. The multiple robbery theory stemming from a single criminal episode of a theft on its face violates the U.S. Constitution and can't be left as is. This issue is ripe for review by the U.S. Supreme Court.

III. THE STATE COURT'S SUPPLEMENTAL JURY INSTRUCTION VIOLATED THE U.S. CONSTITUTION FOURTEENTH AMENDMENT

The petitioner points out the fact that, a conviction is subject to challenge if the jury was instructed on multiple theories of guilt and may have relied on an invalid one. See Yates v. United States, 354 U.S. 298 (1957). A reviewing court finding such error should ask whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619,623 (1993). The standards set forth in Kotteakos v. United States, 328 U.S. 750 (1946), and O'Neal v. McAninch, 513 U.S. 432 (1995), a (harmless analysis) is appropriate in the petitioner's case. See Brecht v. Abrahamson, 507 U.S. 619 (1993). The petitioner respectfully argues that the trial court's creation of constitutionally deficient additional theory of guilt were harmful to the petitioner's defense. See (N.T. 4/4/2011, pg. 429-433). The invalid jury instruction relieved the trial court of its burden to prove beyond reasonable doubt each essential element needed to convict petitioner on each robbery count.

The Pennsylvania Suggested Standard Criminal Jury Instruction 15.3701 A states:

The defendant has been charged with robbery. To find the defendant guilty of this offense, you must find that the following two elements have been proven beyond a reasonable doubt:

First, that the defendant:

a. Inflicted serious bodily injury on the victim; [or]
b. Threatened the victim with serious bodily injury; [or]
c. Intentionally put the victim in fear of immediate serious bodily injury; [or]
d. Committed or threatened to immediately commit the felony

and

Second, the defendant did this during the course of the theft.

During the jury charged, the trial court supplemented the proper jury instruction with an improper instruction as an attempt to clarify the Standard Robbery Jury Instruction. The additional invalid instruction, defense counsel objected to.

The supplemental jury instruction stated:

> If you find beyond a reasonable doubt that the Defendant threatened more than one person with or intentionally put those persons in fear of, immediate serious bodily injury during the course of committing a theft, then you should find the Defendant guilty of robbery for each of those persons, regardless of whether those persons personally possessed or had a personal protective interest in the property stolen, in this case the cash from the Wine and Spirits store. [Emphasis added].
>
> (N.T. 4/4/2011, pg. 432)

The petitioner points the fact that the jurors did not ask the court to clarify the standard jury instruction. The petitioner argues that there was evidence presented during trial that showed that there was more than one person who was threaten in order to gain access to the store's cash in the register and safe, victim #1, 2, and 3 testimonies supports that fact. However, the evidence did not support a total of six distinct robbery victims within the same criminal episode of the store robbery. The petitioner further argues that the primary concern with a jury instruction that is fashioned in a way that enable a jury to convict on multiple counts stemming from one wrongful act, can ultimately result in "multiple punishments for the same crime in violation of the Double Jeopardy Clause of the Fifth Amendment." *United States v. Chacko,* 169 F.3d 140, 145 (2d Cir.1999).

> In *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the trial judge in a bench trial held that although the State's proof was sufficient to warrant a finding of guilt by a preponderance of the evidence, it was not sufficient to warrant such a finding beyond a reasonable doubt. The outcome of the case turned on which burden of proof was to be imposed on the prosecution. This Court held that the Constitution requires proof beyond a reasonable doubt in a criminal case, and Winship's adjudication was set aside.

The petitioner notes that out of the six allege victims, three were employees that testified that they were approach and threaten by the actors and three were observers (two customers and one employee) that testified that they were not threaten, nor approach, and no gun was pointed at them at any time during the robbery of the business (N.T. 4/4/2011, pg.102-200).

The broad improper jury instruction vacuumed two customers and one employee that were never approached, threaten, nor were a gun pointed towards them at any time during the store robbery, or deprived of their personal property by the actors, into a "one size fit all" jury charge. The jury charge was guided by the decision in Commonwealth v. Rivera, 349 Pa.Super. 303, 307, 503 A.2d 11, 12-13 (Pa. Super.1985) and in Commonwealth v. Rozplochi, 561 A.2d (Pa. Super. 1989). The petitioner notes that the U.S. Constitutional soundness in both the Gillard and Rozplochi cases are constitutionally questionable and does not have a direct comparison with the action of the perpetrators in the petitioner's case. The petitioner respectfully argues that the trial court manufactured invalid jury instruction that coerced the jury into an unconstitutional verdict of guilt. The petitioner further argues that a conviction cannot stand if the jury were instructed in a manner that would relieve the state's burden to prove beyond reasonable doubt each essential element for each distinct robbery charge. See *(In re Winship,* 397 U. S. 358, 397 U. S. 364 (1970)).

The petitioner argues that the additional erroneous instruction was an inaccurate statement under [18 Pa.C.S.A. § 3701 (a) (ii)]. It made it "reasonably likely" that the jury convicted the petitioner on an impermissible theory. The petitioner further argues that the ambiguity in the robbery statute and the trial court creation of additional jury instruction that contradicts common law, combined made

it reasonable likely that the jury applied the improper instruction in an unconstitutional way.

The petitioner further argues that when a jury instruction omits an element of an offense or generalizes an element that creates a broad scope of the facts in order to meet multiple offenses relieves the prosecutions of it burden to prove beyond reasonable doubt each main element necessary to convict on each separate count. The improper jury instruction intolerably enhanced the "risk of an unwarranted conviction" because it interjected irrelevant considerations into the fact-finding process.

Furthermore, the petitioner argues that the word "intentionally" which is found under [18 Pa.C.S.A. § 3701 (a) (ii)] threatens another with or intentionally puts him in fear of immediate serious bodily injury. created a "mandatory presumption" because this action (intentionally put in fear) was not proven by the court beyond reasonable doubt. In Sandstrom v. Montana, *supra.* Pp. 471 U. S. 313-327, "a jury instruction that creates a mandatory presumption whereby the jury must infer the presumed fact if the state proves certain predicate". Pp.471 U. S. 308. A fact violates the Due Process Clause if it relieves the state of the burden of persuasion on an element of an offense. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating such a presumption,

the potentially offending words must be considered in the context of the charge. Pp. 471 U. S. 313-315. Id.

Furthermore, "a finding of multiplicity, and subsequent vacatur of any of the multiplicitous counts, does not overturn any of the factual findings made by the jury. It simply says that, as a matter of law, the jury found the same thing twice." (Quoting United States v. Ansaldi, 372 F.3d 118) In the petitioner's case, a decision to vacate the conviction of the multiplicitous robbery charges stated here does not undercut any part of the jury's findings that a robbery did occur. See United States v. Ansaldi, 372 F.3d 118 (2d Cir.2004)

The petitioner respectfully argues that the trial court foreclosed independent jury consideration of whether the facts established certain elements of the offenses which the petitioner was charged, and relieved the state of its burden, under *In re Winship*, 397 U. S. 358, of proving by evidence every essential element for each of the petitioner's robbery charges beyond a reasonable doubt, a violation of the Fourteenth Amendment due process guarantees set forth in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). This issue is ripe for review by U.S. the Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leonard Chase Jr.

Date: 12/28/2022