

No. 18-106

In The
Supreme Court of the United States

—◆—
JOHN R. TURNER,

Petitioner,

v.

UNITED STATES,

Respondent.

—◆—

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

—◆—

**BRIEF AMICUS CURIAE ON BEHALF OF
C. FERGUSON, W. D. MASSEY AND J. OZMENT
IN SUPPORT OF PETITIONER**

—◆—

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INTEREST OF *AMICI CURIAE*

Amici Curiae are former Tennessee practitioners with substantial experience in Tennessee criminal law and procedure.¹

Mr. Claiborne Ferguson has been licensed to practice in Tennessee since 2000, and he has practiced criminal law exclusively during that time. Mr. Ferguson is a Certified Criminal Trial Specialist by the National Board of Trial Advocacy, and he is an instructor at the Tennessee Criminal Defense College and Advance Trial Program. Mr. Ferguson is currently serving as, and in the past has served as, a board member of the Tennessee Association of Criminal Defense Lawyers. He is Death Certified in Tennessee and is licensed to practice before the Supreme Court of the United States.

William D. Massey has been licensed to practice in Tennessee since 1981, and he has practiced criminal defense exclusively for the last twenty years. Mr. Massey is certified as a Criminal Trial Specialist by the National Board of Trial Advocacy and is a Founder and Senior Instructor of the annual Tennessee Criminal Defense College. Mr. Massey has also served as a Past

¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than the *Amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have received timely notice of the intent to file this brief, and have consented to this filing.

President of the Tennessee Association of Criminal Defense Lawyers, served for six years on the Board of Directors for the National Association of Criminal Defense Lawyers, and served for two years on the Executive Committee of the National Association of Criminal Defense Lawyers. Mr. Massey is licensed to practice before the Sixth Circuit Court of Appeals and before the United States Supreme Court.

Joseph Ozment has been licensed to practice in Tennessee since 1992 and practices criminal defense. Mr. Ozment practices both trial level and appellate level defense, and he has appeared before the Sixth Circuit Court of Appeals, the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court in the defense of clients on criminal law issues.



SUMMARY OF THE ARGUMENT

As experienced former Tennessee criminal defense practitioners, *Amici* offer the following insights to the Court:

- Under Tennessee law, the crime of simple robbery is a lesser-included offense of aggravated robbery.
- By operation of law, a person indicted for aggravated robbery under Tennessee law also has pending charges for simple robbery.
- In Tennessee, prosecutors do not indict a defendant separately for a lesser-included offense.

These issues are relevant to John Turner's Second Question Presented, which addresses whether the Sixth Amendment's right to counsel attaches when a federal prosecutor conducts plea negotiations prior to filing formal charges in federal court when the defendant has already been charged with the same offense in state court. Both the United States Courts of Appeals for the Second and Eighth Circuits have determined that the right to counsel attaches for forthcoming federal charges, if they are considered the same offense as the pending state charges under the *Blockburger* test. See *United States v. Mills*, 412 F.3d 325, 329-330 (2d Cir. 2005); *United States v. Red Bird*, 287 F.3d 709, 714-15 (8th Cir. 2002). Under *Blockburger*, offenses are not the same offense if "each provision requires proof of a fact which the other does not." *Texas v. Cobb*, 532 U.S. 162, 173 (2001). But if all the elements of one offense are contained within the other, then they are the same offense. In this brief, the *Amici* focus only on the effect of Tennessee law on the prosecution of aggravated robbery and the indictments for aggravated robbery.

In the case at bar, Turner had been indicted in a Tennessee Court for four counts of aggravated robbery in violation of Tennessee Code Annotated section 39-13-402. In Tennessee, simple robbery is a lesser-included offense of aggravated robbery; therefore, because Turner had been indicted for aggravated robbery, he also had pending simple robbery charges by operation of Tennessee Code Annotated section 40-18-110(a). As practitioners of criminal law in Tennessee, the *Amici* attest that the effect of the two preceding

principles is that prosecutors do not indict a criminal defendant separately for lesser-included offenses because the judge will instruct the jury on all lesser-included offenses by and through the indictment for the higher-level offense. The *Amici* hope this analysis assists the Court in applying the *Blockburger* test in Mr. Turner's case.

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ARGUMENT

The salient issues addressed herein are: (1) simple robbery is a lesser-included offense of aggravated robbery in Tennessee; (2) a person indicted for aggravated robbery under Tennessee law also has pending charges for simple robbery; and (3) the effect of these legal principles on the practice of criminal law in Tennessee.

I. Under Tennessee law, the crime of simple robbery is a lesser-included offense of aggravated robbery.

In *State v. Burns*, the Tennessee Supreme Court stated that “[a]n offense is a lesser-included offense if . . . all of its statutory elements are included within the statutory elements of the offense charged.” *State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999). The Tennessee Legislature later codified this part of the *Burns* decision in Tennessee Code Annotated section 40-18-110(f). See Tenn. Code Ann. § 40-18-110(f)(1) (“An offense is a lesser included offense if . . . [a]ll of its statutory elements are included within the statutory elements of the offense charged.”).

Based on this legal framework, robbery is a lesser-included offense of aggravated robbery. Tennessee Code Annotated section 39-13-402(a) (2014 & Supp. 2017) defines aggravated robbery as a “robbery as defined in § 39-13-401” that is either “[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon” or “[w]here the victim suffers serious bodily injury.” Tennessee Code Annotated section 39-13-401 (2014 & Supp. 2017) defines robbery as “the intentional or knowing theft of property from the person of another by violence or putting the person in fear.”

Pursuant to both section 40-18-110(f) and *Burns* part (a), robbery under section 39-13-401 is a lesser-included offense of aggravated robbery under section 39-13-402(a). *See Burns*, 6 S.W.3d at 466. The definition of an aggravated robbery begins as a “robbery as defined in § 39-13-401” and then adds the additional elements of the robbery being either “[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon” or “[w]here the victim suffers serious bodily injury.” Therefore, the very definition of an aggravated robbery mandates that a simple robbery under section 401 must occur as a condition precedent to any aggravating circumstance. Tenn. Code Ann. § 39-13-402 (2014 & Supp. 2017). In recognition of this statutory construction, the Tennessee Supreme Court stated, “Robbery is clearly a lesser-included offense of aggravated robbery under part (a) of the *Burns* test

because all of its statutory elements are included within the statutory elements of the charged offense.” *State v. Richmond*, 90 S.W.3d 648, 660 (Tenn. 2002).

II. If a person has pending charges for aggravated robbery in Tennessee, that person also has pending charges for simple robbery.

Recognition of a charge’s lesser-included offenses is important in Tennessee because when an individual is charged with a higher-level offense, they are *de facto* charged with the lesser-included offenses by operation of section 40-18-110(a) and (b), which states:

When requested by a party in writing prior to the trial judge’s instructions to the jury in a criminal case, the trial judge *shall* instruct the jury as to the law of each offense specifically identified in the request that is a lesser included offense of the offense charged in the indictment or presentment. However, the trial judge shall not instruct the jury as to any lesser included offense unless the judge determines that the record contains any evidence which reasonable minds could accept as to the lesser included offense.

. . . .

In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses. . . .

(emphasis added). Therefore, as long as an instruction is requested by a party and there is evidence supporting the lesser-included offense, the trial judge *must* provide the jury with instructions regarding their ability to find the defendant guilty of the lesser-charge, which for purposes of this discussion is simple robbery, in addition to instructions regarding the higher offense, which here is aggravated robbery. Alternatively, even if a party fails to request a specific jury instruction, the judge may still instruct the jury on any lesser-included offense. *See* Tenn. Code Ann. § 40-18-110(b).

As to the evidence necessary to support the lesser-included offense, Tennessee Code Annotated section 40-18-110(a) provides:

In making this determination, the trial judge shall view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgment on the credibility of evidence. The trial judge shall also determine whether the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.

The Tennessee Supreme Court has explained that “[a]s a general matter, evidence that is sufficient ‘to warrant an instruction on the greater offense will support an instruction on the lesser offense under Part (a) of the *Burns* test.’” *State v. Banks*, 271 S.W.3d 90, 125 (Tenn. 2008) (citation omitted). Therefore, as a practical matter, a jury will almost always be instructed on a lesser-included offense if any party requests such an

instruction. Applying these concepts to robbery and aggravated robbery, if there is evidence sufficient to submit aggravated robbery to the jury, there will also be sufficient evidence to submit robbery to the jury. In sum, due to this legislative mandate for submitting lesser-included offenses to the jury upon request, or at the judge's discretion without a request, any time that a person is charged with aggravated robbery, they are also *de facto* charged with simple robbery by and through the same indictment.

III. The effect of Tennessee Code Annotated sections 40-18-110(a), (b), and (f) on the practice of criminal law in Tennessee.

The preceding two legal principles have had a significant and important impact on the practice of law in Tennessee. Due to the operation of Tennessee Code Annotated sections 40-18-110(a) and (f), Tennessee prosecutors do not separately indict defendants for the lesser-included offenses of a higher-level indicted offense. In our collective experience, it is exceedingly rare, if it ever occurred, that Tennessee prosecutors prepared an indictment for aggravated robbery, and additionally prepared a separate indictment for simple robbery for the same criminal episode. In fact, preparing two separate indictments for simple robbery and aggravated robbery for the same criminal episode could later lead to issues of merger and/or double jeopardy during the conviction and sentencing phase of a criminal trial. *See State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012).

To elucidate these principles, please consider the following scenario. In the course of a robbery, a man punches another man in the face in order to steal a wallet causing the victim to sustain significant bruising to his face. Therefore, whether such facts constitute an aggravated robbery would depend upon if the jury determined the victim suffered a serious bodily injury. *See* Tenn. Code Ann. § 39-13-402(a). In practice, Tennessee prosecutors would indict the assailant for aggravated robbery knowing that by operation of section 40-18-110(a) the judge would instruct the jury on the lesser-included offense of simple robbery, and the jury would have the option of picking *either* aggravated robbery *or* simple robbery for the indicted offense. Furthermore, if the State later offered the defendant a plea to simple robbery, there would be no need to amend the indictment for the defendant to accept the plea. In other words, a defendant could plead to simple robbery upon an indictment solely for aggravated robbery without amending the charging document – as simple robbery is necessarily contained within indictment for aggravated robbery.

In contrast, if a prosecutor in the example above were to indict the assailant for robbery and aggravated robbery, the trial court would still instruct the jury on both charges; however, if the jury convicted on both separately indicted charges, the judge, either upon motion or *sua sponte* would then have to merge the aggravated robbery conviction and the simple robbery conviction to avoid violating the defendant's right against dual convictions pursuant to the double

jeopardy prohibitions of the United States and Tennessee Constitutions. *See State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012). Therefore, due to the operation of Tennessee Code Annotated section 40-18-110(a) and as a way to avoid double jeopardy concerns, prosecutors in Tennessee indict defendants only for a higher-level offense and not for each applicable lesser-included offense.

Finally, while the trial courts must instruct the jury as to lesser-included offenses upon the request of a party, *see* Tenn. Code Ann. § 40-18-110(a), Tennessee criminal courts routinely instruct the jury as to all statutory lesser-included offenses regardless of whether requested by any party. *See* Tenn. Code Ann. § 40-18-110(b). In our collective experience, upon a trial of an indictment for aggravated robbery, the trial court would always instruct the jury for simple robbery as well. As such, when John Turner was indicted for aggravated robbery in a Tennessee Court, necessarily pending were also charges of simple robbery under Tennessee law.

In light of these practices and by operation of law, when the right to counsel attaches to the higher-level offense, it also attaches to the lesser-included offense. As such, in Tennessee, if the right to counsel has attached to a charge of aggravated robbery, then it has also attached to any lesser-included charge of robbery.



CONCLUSION

For the reasons stated above and in John Turner's petition for a writ of certiorari, the Court should grant the petition and consider the effect of Tennessee's laws on the issues therein.

Respectfully submitted,

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