

No. 15-0901 - *Brandon Flack, Petitioner Below, Petitioner v. David Ballard, Warden, Mount Olive Correctional Complex, Respondent Below, Respondent*

JUSTICE KETCHUM, concurring, in part, and dissenting, in part.

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While I generally agree that the petitioner is not entitled to habeas relief, I take exception on one issue. I disagree with the majority's conclusion that double jeopardy did not prevent the petitioner from being tried and punished for both felony-murder and robbery. I would uphold the ruling of the habeas court which dismissed the robbery conviction, thereby correcting a double jeopardy violation which occurred at the trial court level.

Both burglary and robbery are included in the list of predicate offenses pertaining to felony-murder in *W.Va. Code*, 61-2-1 [1991]. Here, as the trial court's instructions demonstrate, both burglary and robbery were placed before the jury in the context of felony-murder. Although the trial court later dismissed the burglary conviction as having merged with the felony-murder conviction, the petitioner was nevertheless convicted of robbery. The result was an additional penitentiary sentence of forty years for robbery to be served consecutively with the murder and conspiracy convictions. The robbery charge was, thus, treated by the trial court as both an element of felony-murder and as a separate offense, resulting in the additional sentence.

Even though the jury was instructed that robbery, under the circumstances, could be considered in conjunction with burglary, it is impossible to tell from the trial record the respective weight the jury assigned to the burglary and robbery charges. If the jury based its felony-murder conviction on robbery, double jeopardy would prohibit the petitioner from being convicted and sentenced for both felony-murder and robbery. It can reasonably be inferred that the jury gave significant consideration to the robbery charge inasmuch as the petitioner was found guilty of robbery in the first degree.

Syllabus point 8 of *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983), holds: “Double jeopardy prohibits an accused charged with felony-murder, as defined by W.Va. Code § 61-2-1 (1977 Replacement Vol.), from being separately tried or punished for both murder and the underlying enumerated felony.” Based upon *Williams*, I agree with the conclusion of the habeas court that the trial court “improperly sentenced the Petitioner to an additional forty years on the robbery offense - the robbery should have been merged with the felony murder as the other underlying predicate felony offense.”

Therefore, for the reasons stated, I concur, in part, and dissent, in part.