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Post-Whalen Double Jeopardy in Virginia

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THE constitutional prohibition against double jeopardy[1] serves three distinct purposes: (1) prohibition of a second prosecution after acquittal; (2) prohibition of a second prosecution after conviction; and (3) prohibition of multiple punishments for the same offense.[2] This article addresses the problem of defining "the same offense," and specifically focuses on the application of the *Blockburger*[3] test in light of *Whalen* v. *United States*.[4]

The *Blockburger* test applies to situations where one transaction violates two or more criminal statutes. If each statutory provision requires proof of a fact which the other does not, there exist separate and distinct offenses which may be punished separately. E.g., common law burglary requires proof of the breaking and entry of a dwelling, while a larceny committed in the dwelling requires proof of the separate element of taking and carrying away personal property. Multiple punishments can be imposed. If, however, proof of one offense requires proof of all of the elements of the other offense, then the crimes stand in the relationship of a lesser included offense and a greater offense, and the double jeopardy provision normally bars imposition of multiple punishment.[5] E.g., since robbery is larceny from a person by force or intimidation, the elements of larceny must always be proved in order to establish the greater offense of robbery. Multiple punishments may not be imposed. *Whalen* v. *United States* raises the question of whether the court will apply the *Blockburger* test to the generic statutory language defining the multiple offenses, or to the facts alleged in a particular case. However, before considering the application of the *Blockburger* test, it is necessary to identify two situations where the Virginia Supreme Court has held *Blockburger* to be inapplicable.

I. *The legislature clearly intends to impose multiple punishments.*

Until recently the United States Supreme Court had "often hedged our bets with veiled hints that a legislature might offend the Double Jeopardy Clause by authorizing too many separate punishments for any single 'act.'"[5] What was "hinted" at was that the double jeopardy clause, like the cruel and unusual punishment clause of the Eighth Amendment, stood as a constitutional limitation on the maximum punishment which could be imposed. Concurring in *Whalen,* Justice Blackmun took issue with the concept of the double jeopardy clause as a limitation on the legislature's authority to proscribe punishments and stated: "The question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."[6] The Supreme Court of Virginia was quick to adopt this view of double jeopardy and thus anticipated the recent holding in *Albernaz* v. *United States*.[7]

Albernaz recognized that if the double jeopardy clause were viewed as a prohibition on legislative intent to impose "too much" or "too many" punishments, then the double jeopardy clause and the cruel and unusual punishment clause were redundant. *Albernaz* adopted the view that the double jeopardy clause is not a constitutional standard against which to measure legislative intent because the power to define criminal offenses and prescribe punishment resides *wholly* with the legislature. Thus the *Blockburger* test functions merely as "a rule of statutory construction and because it serves as a means of discerning legislative purpose, the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent."[8]

In *Turner* v. *Commonwealth*[9] the defendant contended that his conviction for use of a firearm in the commission of a felony was a lesser included offense of his conviction for murder in the commission of a robbery while armed with a deadly weapon. If the *Blockburger* test were applicable the defendant could not be sentenced for both the lesser included and greater offense. The Virginia Supreme Court rejected the defendant's double jeopardy claim and held *Blockburger* inapplicable because Virginia Code § 18.2-53.1[10] "reflects an unambiguous intent to authorize multiple punishment for a single criminal transaction."[11] *Turner* establishes that if the legislature clearly indicates its

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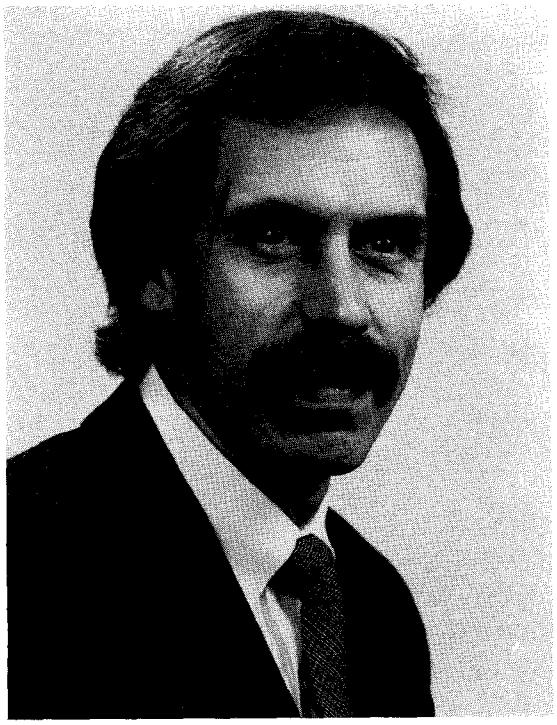

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desire to impose multiple punishments, it is immaterial whether the punishments are based on a single offense or separate offenses, thus the *Blockburger* test for defining separate offenses is inapplicable.

II. *Blockburger is inapplicable where multiple offenses arise from separate acts.*

The *Blockburger* test starts from the premise that the defendant has performed one act, and the relevant issue is whether that act constitutes separate and distinct offenses. If the premise is rebutted by establishing that the defendant committed separate acts, then there is nothing to trigger application of the *Blockburger* test. E.g., if the defendant commits robbery on Monday and again on Tuesday no one would seriously argue that double jeopardy prohibits punishment for both robberies. Thus a court need never consider the *Blockburger* rule if all of the alleged offenses are seen as arising from separate and distinct acts.

The Supreme Court of Virginia addressed the issue of defining separate acts in two recent cases.[12] In *Jones* v. *Commonwealth*[13] the defendant robbed a hotel clerk of the money in the hotel safe and then made his getaway by obtaining the keys to the hotel courtesy car which was located some 200 yards from the hotel. The defendant contended that the larceny of the automobile was a lesser included offense of robbery, thus *Blockburger* would preclude punishment for both robbery and larceny. The court held that *Blockburger* was applicable only when multiple articles are stolen "at one and the same time."[14] The facts in *Jones,* however, revealed that "in terms of time and situs, the two thefts involved separate and distinct acts of caption, and two different sets of asportation."[15]

In *Martin* v. *Commonwealth*[16] the court again distinguished a single transaction from separate acts by considering spatial factors of time and distance. As dissenting Chief Justice I'Anson pointed out, the *Martin* majority may have been hairsplitting on the facts in order to subdivide the defendant's course of conduct into separate and distinct acts. In theory and in practice there appear to be no limitations on a court's inclination to characterize a defendant's conduct as constituting separate acts. Consider this hypothetical: Defendant approaches victim, points a gun and demands all of the victim's valuables. The victim surrenders his wallet. The defendant then cocks the gun and angrily shouts: "I said all your valuables." The victim then surrenders his wristwatch. The hypothetical can be seen as constituting two separate instances of robbery if the court regards the cocking of the gun as a separate physical act which produced further apprehension on the part of the victim and resulted in an additional loss of property. Focusing on spatial considerations permits any course of conduct to be subdivided into an infinite number of separate acts and thus leads to the type of hairsplitting used in *Martin.* The alternative to spatial considerations would involve examination of legislative intent and thus would overlap with the *Blockburger* test.[17]

The application of the "Blockburger" test

If the court finds (1) an absence of clear legislative intent to impose multiple punishments; and (2) that the defendant's conduct constitutes a single transaction, then the court must apply *Blockburger* to determine if that single transaction violates two criminal statutes each of which require proof of a separate element. *Blockburger* is relatively easy to apply to classic lesser included and greater offenses. For example: Evidence of

assault with a deadly weapon necessarily requires proof of the lesser included offense of simple assault. *Blockburger* is not so easily applied to cases where the defendant has been convicted of felony murder and the underlying felony. Justice Rehnquist refers to these types of offenses as *predicate* and *compound* offenses rather than classic lesser included and greater offenses. The distinction being that while it is impossible to prove a greater offense without first proving the lesser included offense, the compound offense of felony murder can be proved by establishing any one of a number of alternative predicate felonies.[18]

When *Blockburger* is applied to felony murder the result turns on whether the court considers the statutory language which provides for alternative predicates, or whether the court limits its consideration to the particular predicate felony alleged in the specific case. As Justice Rehnquist stated:

> If one applies the test in the abstract by looking solely to the wording of . . . the statutes defining the various predicate felonies, *Blockburger* would always permit imposition of cumulative sentences, since no particular felony is ever "necessarily included" within a violation of the felony murder statute. If, on the other hand, one looks to the facts alleged in a particular indictment . . . then *Blockburger* would bar cumulative punishment for felony murder and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.[19]

Application of *Blockburger* to felony murder necessitates a choice between examining the general wording of a statute or the wording of a particular indictment. The *Whalen* dissenters clearly opted for the language as drafted by the legislature,[20] but the majority denied that they had chosen the opposite approach of focusing on the language of the indictment.[21] Thus *Whalen* did not clearly resolve the question of whether the offenses must be defined by statute or by the indictment.

The three Virginia cases closest in point reflect the same uncertainty evidenced in *Whalen*. In *Jones* v. *Commonwealth*[22] the Virginia Supreme Court held that "the crime of robbery and the crime of using a firearm in committing robbery have different elements as a matter of *law*, although they may have common elements as a matter of fact."[23] While *Jones* disregarded the specific facts and focused on the generic definitions of the crimes, *Harrison* v. *Commonwealth*[24] and *Simpson* v. *Commonwealth*[25] appear to take the opposite approach and disregard general statements of law in order to focus on the facts of the particular case. For example, in *Simpson* the prosecution relied on the concept of felony murder by alleging murder during the commission of robbery. But in upholding convictions of murder and robbery the Virginia Supreme Court held that under the facts established at trial the conviction of first degree murder could have been based, not on felony murder, but on independent proof of premeditation.

Given this inconsistency in Pre-*Whalen* precedent, the Virginia Supreme Court had no clear guidance when confronted with the issue left open in *Whalen*—whether to apply *Blockburger* to the facts of the particular case, or to general statutory language. In its most recent decision, *Blythe* v. *Commonwealth*,[26] the Court acknowledged neither the inconsistency in Virginia precedent nor the controversy that split the United States Supreme Court in *Whalen*. The Virginia Supreme Court disposed of the issue in one sentence, citing *Whalen* for the proposition that in applying *Blockburger* "the two offenses are to be examined in the abstract, rather than with reference to the facts of the particular case under review."[27] It remains to be seen whether this one sentence has definitely resolved the question left open in *Whalen*,[28] or whether the Virginia Supreme Court is willing to consider and expound upon the issue in some detail.

FOOTNOTES

1. ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"; U.S. Const. Amend. V. See also, Va. Const. art. I, § 8.
2. See generally, Westin & Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Review 81.
3. *Blockburger* v. *U.S.*, 284 U.S. 299 (1932).
4. 100 S. Ct. 1432 (1980).
5. Id. at 1443. (Justice Rehnquist, dissenting).
6. Id. at 1441 (Justice Blackmun, concurring).
7. 101 S. Ct. 1137 (1981).
8. Id. at 1143.
9. 221 Va. 513 (1980).
10. § 18.2-53.1 Use or display of firearm in committing a felony, provides in pertinent part: "Violation of this section shall constitute a separate and distinct felony. . . . [P]unishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony."
11. *Turner* v. *Commonwealth*, supra note 9 at 530.
12. In addition to double jeopardy considerations, the question of identifying "separate" acts arises under Va. Code § 19.2-294 which provides in pertinent part: "If the same act be a violation of two or more statutes . . . conviction under one of such statutes . . . shall be a bar to a prosecution or proceeding under the other or others."
13. 218 Va. 757 (1978).
14. Id. at 761.
15. Id.
16. 221 Va. 720 (1981).
17. See *Whalen* v. *United States*, supra note 4, at 1442. (Justice Rehnquist, dissenting).
18. In Virginia felony murder can arise during the commission of arson, rape, robbery, burglary or abduction. Va. Code § 18.2-32.

(continued on page 26)

envelope, a return receipt post card, or a typed check on a television screen. Typewriters using TV displays are excellent tools for *text editing* applications because you are working with only one kind of paper stock in your printing unit. But when you are working with an intermix of different kinds of paper stock a stand-alone automatic typewriter that prints directly onto its roller may be more versatile.

Myth: By measuring the quantity of output (lines produced, etc.) you can judge the effectiveness of your word processing staff.

Reality: You can measure only the *quantitative* aspects of your staff's productivity. The *qualitative* aspects can only be *judged.* Word processing jobs are an intermix of both quantitative and qualitative factors, and many of the qualitative ones are in no way reflected by measuring output. These include such abilities as the capacity to resolve ambiguous, illegible or unclear dictation, to make intelligent format decisions, to determine the correct variable information to be added onto prerecorded materials without having to be told, to select the correct paper stock when it has not been indicated, or even when it has been indicated incorrectly, to prepare the customary number of carbon copies even though no copies were called for, to know when to consult a dictionary, to be able to handle basic correspondence on one's own, etc. Above all, we need to have secretarial help that is capable of understanding how automatic typing equipment can be made to do all the jobs it's able to do, and how to design documents and encode magnetic media appropriately. What's really devastating is that the clock watching, line counting, timekeeping efficiency experts with their quantity thinking, may in fact be screening out of the word processing environment the kind of quality support staff we most need in it.

Myth: The one-lawyer-one-secretary arrangement is ineffective and must be replaced.

Reality: What's wrong with the one-lawyer-one-secretary arrangement is that it's unthought about. Under some circumstances it may in fact be extremely effective. Where it is, it should be retained; where it's not, it should be replaced. But what's really important is that you ought to be thinking about alternatives. You might get some good ideas about ways to regroup your support people in my article "An Easy and Effective Way to Reorganize Your Law Office for Automation." For a free copy, send a self-addressed envelope marked with the title and stamped with postage for two ounces to me at 5 Hawke Lane, Rockville Centre, New York 11570.

What is ultimate reality? Perhaps it's that there is no one in charge of *methods.* Each lawyer and secretary do their thing in their own way. Sometimes well, sometimes poorly, sometimes differently than the time before. Perhaps it's that no one thinks about how each job could have been done better, and no one asks how the best method could be institutionalized. Perhaps it's that no one cares about efficiency. Perhaps we delude ourselves with the belief that we somehow offer a service so unique that its efficient delivery is of no consequence. Perhaps that will some day be seen as the ultimate myth.

EDITOR'S NOTE: Mr. Sternin has written extensively on word processing and related subjects. His works include the article "The Bottom Line: Document Design," copies of which may be obtained by writing to Mr. Sternin at 5 Hawke Lane, Rockville Centre, New York, N.Y. 11570.

Post-*Whalen* Double Jeopardy . . .

(continued from page 19)

19. *Whalen* at 1447.
20. *Whalen* at 1448.
21. *Whalen* at n. 8, 1439.
22. 218 Va. 18 (1977).
23. Id. at 22.
24. 220 Va. 188 (1979).
25. 221 Va. 109 (1980).
26. *Blythe* v. *Commonwealth,* No. 810 338 (Dec. 4, 1981) (Convictions of voluntary manslaughter and wounding in the commission of a felony).
27. Id. at 3.
28. See e.g., *Barbee* v. *Mitchell,* Civil Action No. 79-0563-R, Jan. 15, 1981 (E.D. Va.), where Judge Merhige held: "this Court believes that the Virginia Supreme Court would rule that felony murder and the underlying felony are separate and distinct offenses under Virginia statutes."