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Double Jeopardy and the Virginia Supreme Court: Three Approaches to Multiple Punishment

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DOUBLE JEOPARDY AND THE VIRGINIA SUPREME COURT: THREE APPROACHES TO MULTIPLE PUNISHMENT

The double jeopardy clause of the fifth amendment of the United States Constitution[1] affords three primary protections. First, the clause protects against a second prosecution for the same offense after acquittal. Secondly, it protects against a second prosecution for the same offense after conviction.[2] Thirdly, the clause prohibits the imposition of multiple punishment for a single offense.[3] Although the double jeopardy principle has roots in antiquity, it may be one of our least understood constitutional protections.[4] This comment will focus on the third protection of double jeopardy as it has been developed by the United States Supreme Court and recently applied by the Virginia Supreme Court.

I. DEVELOPMENT BY THE UNITED STATES SUPREME COURT

A. *The* Lange *and* Blockburger *Decisions*

In *Ex parte Lange*,[5] the Supreme Court recognized that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried."[6] In *Lange*, the defendant was convicted of stealing mailbags from a United States post office, an offense that carried a maximum penalty of either one year in prison or a $200 fine.[7] The judge sentenced the defendant to both the fine and the prison term. The defendant paid the fine and began serving his

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1. U.S. CONST. amend. V., provides in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The Virginia Constitution has a similar provision. VA. CONST. art. I, § 8. "[N]or be twice put in jeopardy for the same offense . . . ." *Id.*

2. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

3. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

4. The idea of not putting a man twice in jeopardy for the same offense has roots in ancient common law:

> Actually, the double jeopardy principle existed in the days of the Greeks and Romans, finding limited expression in the *Digest of Justinian.* Canon law contained a similar principle. There is evidence that pleas similar to double jeopardy may have appeared in English law as early as the fourteenth century, but the earliest conclusive evidence of the principle appears in writings of Hale (seventeenth century), and Coke (seventeenth century), and later Blackstone (eighteenth century).

Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 262 n.1 (1965). However, as Justice Rehnquist has noted: "Despite its roots in antiquity . . . this guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion . . . ." Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

5. 85 U.S. (18 Wall.) 163 (1873).

6. *Id.* at 173.

7. *Id.* at 164.

sentence before the judge realized his mistake. Vacating the original sentence, the judge resentenced the defendant to one year in prison without acknowledging payment of the fine. The Supreme Court vacated the second prison sentence and released the defendant, declaring that any further punishment would violate the double jeopardy clause.[8] *Lange* held that the double jeopardy clause prohibits imposing two separate penalties for a single statutory offense.[9] The case implied, however, that the double jeopardy clause also prohibits a court from imposing a penalty more severe than the legislature intended.[10]

The Court in *Lange* noted the difficulty which arises when a defendant's single criminal transaction is described in more than one statutory offense.[11] In such "double-description" cases, the law contains more than one statute which describes the defendant's conduct.[12] The increase in the number of statutory offenses has further complicated this question.[13] The multiple punishment double jeopardy issue thus arises when the defendant claims that the statutes under which he is being tried describe what is essentially the "same offense," and, therefore, that his convictions and cumulative sentences exceed what the law prescribes as a penalty for one offense.[14]

In *Blockburger v. United States*,[15] the Supreme Court articulated the

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8. *Id.* at 176.

9. *Id.* at 173. Although *Lange* expressly held that the double jeopardy clause was violated by imposing the second sentence, the Court's reasoning suggests the original sentence also violated the constitutional guarantee: "We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176.

10. In North Carolina v. Pearce, 395 U.S. 711 (1969), the Court "confirmed the suggestion in *Lange* that a person suffers double punishment whenever his sentence is excessive under the domestic law." Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 108. In *Pearce*, the defendant had served two and one-half years of a 10 year term when the sentence was reversed. Later he was retried and reconvicted and received 25 years in prison without credit for time served. The Supreme Court held that "[t]he constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction." 395 U.S. at 718.

11. 85 U.S. (18 Wall.) at 168.

12. *See* Gore v. United States, 357 U.S. 386, 392 (1958).

13. [A]t common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense. In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startling numerous series of offenses from a single alleged criminal transaction.

Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1969).

14. *See* Westen & Drubel, *supra* note 10, at 111-12.

15. 284 U.S. 299 (1932). In *Blockburger* the defendant was charged with selling drugs in other than their original package and selling the same drugs without a written order of the purchaser.

test to be applied to determine whether two separate statutory offenses are constitutionally the "same offense."[16] In upholding two convictions under separate statutes arising from a single sale of narcotics, the Court stated:

> Each of the offenses created requires proof of a different element. 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.[17]

Thus, the test focuses on the elements of the offenses and not upon the facts of a particular case.

The *Blockburger* test has been consistently relied on by the courts to determine whether two or more statutory violations constitute the same offense. If they do constitute the same offense, a defendant convicted of violating them in a single transaction will claim this is a violation of the double jeopardy clause. However, the courts have utilized two approaches in the application of *Blockburger*. One emphasized legislative deference as the overriding concern.[18] The other stressed an analysis based on lesser included offenses, or instances where one offense contains all the statu-

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16. In the English case of Rex v. Vandercomb, 168 Eng. Rep. 455 (K.B. 1796), the first test for determining when two crimes constitute the same offense focused on the facts alleged in the indictments: "[U]nless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." *Id.* at 461.

The test first articulated in this country, however, focused on the elements of the offenses. In Morey v. Commonwealth, 108 Mass. 433 (1871), the court did not bar a subsequent prosecution for adultery after conviction of cohabitation. "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Id.* at 434. Thus, there was an initial dichotomy between an approach based upon the facts of a particular case and one based upon the elements of the offenses. This dichotomy still exists. *See* notes 85-152 *infra*. *See generally* Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem*, 25 WAYNE L. REV. 825 (1979).

17. 284 U.S. at 304. Thus, the test is essentially as stated in Morey v. Commonwealth, 108 Mass. 433 (1871) and is commonly referred to as the "same evidence test." *See* Note, *Double Jeopardy—Defining The Same Offense*, 32 LA. L. REV. 87, 89 (1971); Comment, *Identity of Criminal Offenses in Tennessee*, 43 TENN. L. REV. 613, 617 (1976). *See also* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

18. In Gore v. United States, 357 U.S. 386 (1958), the Court applied *Blockburger* and upheld the defendant's three cumulative sentences, and three sentences based on two illegal drug transactions to run concurrently with these. *Id.* at 387-88. The Court said: "Whatever views may be entertained regarding the severity of punishment, whether one believes in its efficacy or its futility . . . these are peculiarly questions of legislative policy." *Id.* at 393. *See also* Iannelli v. United States, 420 U.S. 770 (1975), a case involving Wharton's rule in which the Court, in dicta, said of *Blockburger:* "The test . . . serves . . . [the] function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." *Id.* at 785 n.17.

tory elements of a second offense.[19] The Supreme Court in *Whalen v. United States*[20] applied the *Blockburger* test and determined that the primary consideration in a multiple punishment case should be what punishment the legislature intended.

B. *The* Whalen *and* Albernaz *Decisions*

In *Whalen v. United States,*[21] the defendant was convicted in the Superior Court of the District of Columbia of rape[22] and of killing in the perpetration of rape.[23] Whalen was sentenced to consecutive terms of imprisonment of twenty years to life for first-degree murder and fifteen

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19. There are three types of lesser included offenses. The "pure" example is when offense One contains elements A, B and C and offense Two contains only element A. Under *Blockburger,* offense Two would be a lesser included offense of offense One because offense Two does not require proof of any element not required to prove offense One. "The double jeopardy clauses apply when (1) the two offenses are identical, (2) the former is lesser-included in the subsequent offense, and (3) the subsequent offense is lesser-included in the former offense." Martin v. Commonwealth, 221 Va. 720, 722, 273 S.E.2d 778, 780 (1981).

When offense One requires proof of elements A and B and offense Two requires proof of element C, convictions of both will be barred when human experience indicates that in every instance the facts needed to prove elements A and/or B will also prove element C. *See* Brown v. Ohio, 432 U.S. 161 (1977) and discussion this note *infra.*

The third type of lesser included offense is where offense One consists of elements A and B, and element B consists of a class of offense, such as offenses Three, Four and Five. An example is the felony murder statute. *See* Harris v. Oklahoma, 433 U.S. 682 (1977) and discussion this note *infra.* For further discussion of this third type of lesser included offense *see* notes 85-152 *infra* and accompanying text. *See also* Schwartz, *supra* note 16, at 832-33.

The lesser included offense analysis resurfaced in Brown v. Ohio, 432 U.S. 161, where the Court concluded that the double jeopardy clause barred prosecution and punishment for the lesser included offense of operating the vehicle without the owner's consent. The Court stated: "[T]he lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft. The greater offense is therefore . . . the 'same' for purposes of double jeopardy." *Id.* at 168.

In Harris v. Oklahoma, 433 U.S. at 682, the Court in a per curiam opinion stated: "[W]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of a lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."

20. 445 U.S. 684 (1980).

21. *Id.*

22. D.C. CODE ANN. § 22-2801 (1967) provides: "Whoever has carnal knowledge of a female forcibly and against her will, . . . shall be imprisoned for not more than thirty years . . . ."

23. D.C. CODE ANN. § 22-2401 (1967) provides: "Whoever . . . kills another in perpetrating or in attempting to perpetrate any arson . . ., rape, mayhem, robbery, or kidnapping . . . is guilty of murder in the first degree." This statute embodies the felony murder concept. "[T]he malice required to establish murder is imputed from the initial felony . . . so that to constitute murder, the killing must have been done by the defendant or an accomplice . . . in furtherance of the felonious undertaking." *Ex Rel.* Smith v. Myers, 438 Pa. 218, 228, 261 A.2d 550, 555 (1970). *See also* Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

years to life for rape.[24] The District of Columbia Court of Appeals affirmed the lower court's decision.[25] The Supreme Court reversed. In the majority opinion, the Court resorted to the *Blockburger* test and concluded that Congress did not authorize consecutive sentences for rape and for killing committed in the course of rape. "A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape."[26] Because Congress had not authorized consecutive sentences for the violation of these statutes, the two statutory offenses were the same offense under the lesser included offense test of *Blockburger* so that the double jeopardy clause of the fifth amendment prohibited the imposition of consecutive sentences.[27]

The *Whalen* decision attempted to resolve the conflict between the legislative deference analysis and the lesser included offense analysis. The Court held that the "dispositive question"[28] in a multiple punishment case is whether the legislature has intended cumulative punishments for the violation of two statutes during one criminal transaction.[29] This result is based on the principle that the legislature has "the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them. . . ."[30] The Court proposed an analysis in which the *Blockburger* test is applied in the context of an evaluation of legislative intent. Where two statutes proscribe the same offense under the *Blockburger* test, they are construed not to authorize cumulative punishment in the absence of a clear indication of contrary legislative intent. If two statutory offenses are not the same under this analysis, cumulative punishment may properly be imposed.[31]

Justice Rehnquist, in his dissenting opinion, articulated the problem that remains in the application of the *Blockburger* test after the *Whalen* decision.[32] Justice Rehnquist criticized the majority's analysis by pointing to the difficulties involved in applying the *Blockburger* test to the com-

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24. 445 U.S. at 685.

25. *Id.*

26. *Id.* at 693-94.

27. *Id.* at 693.

28. *Id.* at 689. *See also* Comment, *Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States*, 66 CORNELL L. REV. 819 (1981).

29. Although the *Whalen* decision applied expressly to federal courts, Virginia was willing to use this analysis. *See* notes 51-58 *infra* and accompanying text. *See also* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1025 (1980). "[T]he double jeopardy clause merely incorporates by reference whatever the domestic law—state or federal—defines as an offense and as a lawful sentence for an offense." *Id.*

30. 445 U.S. at 689.

31. *Id.* at 691-93.

32. *Id.* at 699-714 (Rehnquist, J., dissenting).

pound-predicate type of statute before the Court.[33] Because a murder conviction under a felony murder statute could be supported by any one of a list of underlying felonies, Justice Rehnquist stated that the underlying felony could not be a lesser included offense unless the *Blockburger* test was applied to the facts alleged in a particular indictment.[34] Thus, only by looking to the indictment could the majority conclude that rape was a lesser included offense of the offense of killing in the course of rape.[35] In Justice Rehnquist's opinion, the *Blockburger* test should be applied to the *statutes* in question[36] because the test distinguishes between separate offenses on the basis of whether a criminal act violates "two distinct statutory provisions, . . . [and] whether each provision requires proof of a fact which the other does not."[37] Whether *Blockburger* applies to the facts alleged in the indictment or to the statutes delineating the offenses has yet to be resolved by the Supreme Court.[38]

In *Albernaz v. United States*,[39] the Court considered whether Congress intended two convictions and consecutive sentences under two statutory provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970[40] and, if so, whether such punishment violated the double jeopardy clause. The petitioners made an agreement to import marijuana for domestic distribution. They were convicted before the United States District Court for the Southern District of Florida of conspiracy to import and distribute marijuana.[41] They received consecutive sentences for the violation of two separate statutory provisions. The United States Court of Appeals for the Fifth Circuit affirmed.[42] On appeal to the Supreme Court, the petitioners asserted that it is not clear whether Congress intended to authorize multiple punishment when one agreement results in violation of two statutes. The Court, applying the *Blockburger*[43] test, concluded that Congress intended the two statutes to "proscribe separate statutory offenses the violation of which *can* result in the imposition of consecutive

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33. *See* note 19 *supra* and accompanying text.

34. 445 U.S. at 711 (Rehnquist, J., dissenting).

35. *Id.*

36. *Id.*

37. *Id.* (quoting *Blockburger*, 284 U.S. at 304) (emphasis omitted).

38. 445 U.S. at 710-11 (Rehnquist, J., dissenting). *See* notes 85-151 *infra* for the approach taken by the Supreme Court of Virginia.

39. 101 S.Ct. 1137 (1981).

40. The conviction of conspiracy to import marijuana was in violation of 21 U.S.C. § 963(a)(1), and the conviction of conspiracy to distribute marijuana was in violation of 21 U.S.C. § 846(a)(1).

41. 101 S.Ct. at 1140.

42. *Id.*

43. *Id.* at 1143. "The *Blockburger* test is a 'rule of statutory construction' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Id.*

sentences."[44] Because the statutes specified different goals of the conspiracy, *i.e.*, distribution and importation,[45] the Court found that each statute unambiguously "requires proof of a fact . . . [that] . . . the other does not."[46] Additionally, the Court found that the intent of Congress was "reinforced by the fact that the two conspiracy statutes are directed to separate evils . . . [which] . . . impose diverse societal harms."[47]

Albernaz reinforced the *Whalen* approach to multiple punishment cases. By focusing on the legislative intent and applying the *Blockburger* test, the Court could conclude that Congress intended that the two offenses be punished cumulatively.[48] However, the Court in *Albernaz* was willing to go one step further than in *Whalen*. The *Albernaz* Court stated that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed."[49] This statement implies that if a court can conclude that a legislature has intended multiple punishment, the *Blockburger* test is in effect inapplicable.[50] In other words, if a court finds that the legislature intended multiple punishment, there would be no violation of the double jeopardy clause even if offenses were "the same" under the *Blockburger* test. Thus, if the court finds that the legislative intent for multiple punishment is clear, it need never resolve the question of whether a defendant's conduct constitutes the "same offense."

II. The Virginia Supreme Court's Recent Applications of the Protection Against Double Punishment

A. *The Clear Legislative Intent Approach*

In *Turner v. Commonwealth*,[51] the Virginia Supreme Court anticipated the *Albernaz* implication of the importance of legislative intent in multiple punishment cases. Turner entered a jewelry store and, displaying a sawed-off shot gun, demanded money and jewelry. A police officer entered without knowing a robbery was in progress and was detained by Turner who took the police officer's gun. Turner, upon discovering that a silent alarm had been triggered and hearing sirens, shot the store owner in the head. The police officer tried to reason with Turner, but Turner shot the

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44. *Id.* at 1142 (emphasis added).
45. *Id.*
46. *Id.* (quoting *Blockburger*, 284 U.S. at 304).
47. 101 S.Ct. at 1144.
48. *Id.* at 1142.
49. *Id.* at 1145.
50. In the concurring opinion, three justices disagreed: "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger v. United States.*" *Id.* at 1145-46 (citation omitted) (Stewart, J., concurring).
51. 221 Va. 513, 273 S.E.2d 36 (1980).

owner again.[52] Turner argued that his conviction of the use of a firearm in the commission of a felony[53] and murder in the commission of a robbery while armed with a deadly weapon[54] constituted the "same offense" for double jeopardy purposes. The court held that Turner's "double jeopardy claim has no merit."[55]

The court endorsed the *Whalen* legislative intent approach. It stated that because of *Whalen,* the question of whether these two offenses were the same under *Blockburger* need not be resolved.[56] Because the "General Assembly has clearly indicated its intent to impose multiple punishment for capital murder and use of a firearm in the commission of a felony,"[57] the unambiguous language of the statute authorized the court to uphold the multiple punishment for a single criminal transaction.[58] Because the court could infer from the statutes themselves that the General Assembly had intended to focus on two distinct evils, the *Blockburger* test was held inapplicable. Whether Turner's violations constituted the same offense did not have to be resolved. The legislature had spoken and authorized multiple punishment. Where a court is willing to make such an inference, a defendant's double jeopardy claim must fail because analysis stops with a finding of legislative intent to impose multiple punishment.

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52. *Id.* at 518, 273 S.E.2d at 39.

53. Turner was convicted under VA. CODE ANN. § 18.2-53.1 (Cum. Supp. 1978) (amended in 1980 to include malicious wounding), which provides that:

> It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary, or abduction. *Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a term of imprisonment of one year for a first conviction, and for a term of three years for a second or subsequent conviction under the provisions of this section.* Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or part, nor shall anyone convicted hereunder be placed on probation. *Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.* (emphasis added).

54. VA. CODE ANN. § 18.2-31(d) (Cum. Supp. 1978) (amended in 1979, 1980, 1981) provided that "[t]he willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon" constitutes a capital murder.

55. 221 Va. at 530, 273 S.E.2d at 47.

56. "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to impose." *Id.* at 530, 273 S.E.2d at 47 (quoting *Whalen,* 445 U.S. at 698 (Blackmun, J., concurring)). This statement subsequently appeared in the majority opinion in *Albernaz v. United States. See* note 49 *supra* and accompanying text.

57. 221 Va. at 530, 273 S.E.2d at 47.

58. Turner's claim was that the use of a firearm in the commission of a felony was a lesser included offense of his conviction of murder in the commission of robbery while armed with a deadly weapon. *Id.* at 528, 273 S.E.2d at 44.

B. *Finding Separate Acts*

The Virginia Supreme Court has recently taken a second approach in multiple punishment cases to hold that the *Blockburger* test is inapplicable. Since the *Blockburger* test is applicable only where the *"same act or transaction* constitutes a violation of two distinct statutory provisions,"[59] there is neither a double jeopardy question nor any need for *Blockburger* if the court analyzes the fact situation and determines that more than one act or transaction is involved.

This analysis is not problematic where, for example, a defendant is convicted of committing one robbery at noon and another at midnight, because there is a sufficient time element separating the two acts. The problem arises in deciding where the line regarding time, space, or place which will define the two acts is to be drawn in less clear cases. The Virginia Supreme Court addressed these issues in two recent cases.

Jones v. Commonwealth[60] presented the question of whether conviction of grand larceny of an automobile is a lesser included offense of robbery involving larceny of money. Jones, armed with a pistol, entered a Holiday Inn and ordered the clerk to give him the money in the cash drawer and the keys to the motel's courtesy car. After requiring the clerk to accompany him to the car, Jones drove away. Jones was convicted of robbing the clerk of the money[61] and sentenced to thirty-one years in jail. Under a separate indictment, he was convicted of grand larceny of the automobile[62] and was sentenced to four years to run concurrently with the armed robbery conviction. On appeal, the Virginia Supreme Court held that "for purposes of the double jeopardy clauses, grand larceny is a lesser-included offense of robbery only when it is the theft expressly charged in the robbery indictment."[63] One of the "essential elements of that larceny

59. 284 U.S. 299, 304 (emphasis added).

60. 218 Va. 757, 240 S.E.2d 658 (1978), *cert. denied,* 435 U.S. 909 (1978).

61. *Id.* at 758, 240 S.E.2d at 660. VA. CODE ANN. § 18.2-58 (Repl. Vol. 1975) provided:

> If any person commit robbery . . . by assault or otherwise putting a person in fear of serious bodily harm, or by the threat of presenting of firearms . . . he shall be guilty of a felony and shall be punished by confinement in the penitentiary for life or any term not less than five years.

This section provides the punishment for robbery and does not change the common law elements of the crime. Robbery at common law is defined as the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. *See* Smith v. Cox, 435 F.2d 453, 456 (4th Cir. 1970); Hunt v. Haga, 368 F. Supp. 527, 528 (W.D. Va. 1973); Pettus v. Payton, 207 Va. 906, 910, 153 S.E.2d 278, 280 (1967); Mason v. Commonwealth, 200 Va. 253, 254, 105 S.E.2d 149, 150 (1958).

62. 218 Va. at 758, 240 S.E.2d at 660. VA. CODE ANN. § 18.2-95(2) (Repl. Vol. 1975) provided that any person who: "[c]ommits simple larceny not from the person of another of goods and chattels of the value of one hundred dollars or more, shall be deemed guilty of grand larceny . . . ."

Robbery involves violence or intimidation, while larceny does not. 435 F.2d at 457.

63. 218 Va. at 759, 240 S.E.2d at 660.

offense was the value of the car."[64] Because this element was not charged in the robbery indictment, the larceny for which the defendant was convicted was not a lesser offense included in his robbery conviction. Thus, the court found that there were two separate offenses for which Jones could receive separate punishments.

Jones also argued that his two convictions were based on one act so that the Virginia statute prohibiting multiple prosecutions[65] precluded his being convicted for both robbery and larceny.[66] The court properly focused on the identity of the criminal activity and stated that if "the acts are different, the statutory mandate does not apply."[67] The defendant supported his argument with the rule enunciated by the court in *Holly's Case*[68] that "[t]he theft of several articles at one and the same time constitutes an *indivisible offense,* and a conviction or acquittal of any one or more of them is a bar to a subsequent prosecution for the larceny of the others."[69] The court noted that this rule only applies to cases involving multiple larceny prosecutions.[70] Here, however, Jones was convicted of only one larceny offense. Instead, the court found that there were thefts of multiple articles which did not occur at "one and the same time."[71] The court stated that:

> [l]arceny of the money was complete and the act underlying that offense ended the moment the money was taken and carried away. Larceny of the car, located two hundred yards from the scene of the first theft, and the act underlying that offense occurred at a different place at a later point in time. . . . Here, in terms of time and situs, the two thefts involved two separate and distinct acts of caption and two different acts of asportation.[72]

The court concluded that Jones' criminal transaction could be divided into two separate acts. Such a division precludes an application of *Blockburger* which starts with one act and also allows a court to fit a punishment for each separate act.

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64. *Id.* at 760, 240 S.E.2d at 661.

65. VA. CODE ANN. § 19.2-294 (Repl. Vol. 1975) provided: "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." (emphasis added).

66. 218 Va. at 760, 240 S.E.2d at 661.

67. *Id.* at 761, 240 S.E.2d at 661. *See also* Epps v. Commonwealth, 216 Va. 150, 216 S.E.2d 64 (1975). In *Epps,* the defendant claimed his acquittal of a federal robbery charge barred prosecution of an attempted murder charge. The court held the two offenses were not the same based on the *Blockburger* test. *Id.* at 154, 216 S.E.2d at 68. "It is the identity of the offense, and not the act, which is referred to in the constitutional guaranty against double jeopardy." *Id.* at 153-54, 216 S.E.2d at 67. *See also* Miles v. Commonwealth, 205 Va. 462, 467, 138 S.E.2d 22, 27 (1964).

68. 113 Va. 769, 772, 75 S.E. 88, 89 (1912) (emphasis added).

69. 218 Va. at 761, 240 S.E.2d at 661 (quoting Holly's case).

70. 218 Va. at 761, 240 S.E.2d at 661.

71. *Id.*

72. *Id.*

The second case in which the Virginia Supreme Court addressed the problem of defining separate offenses for one act was *Martin v. Commonwealth.*[73] As in *Jones,* the defendant was indicted for robbery and grand larceny. Martin drove into a service station and while his gasoline tank was being filled, displayed a shotgun and asked the attendant for all of his money. The attendant, in his fright, dropped the money on the ground, and Martin picked it up.[74] Martin and the attendant then went inside the station where the attendant removed money kept in a locked refrigerator and gave it to Martin.[75] At trial, Martin was convicted of robbery and petit larceny.

On appeal, Martin claimed that to convict him of both robbery and petit larceny would constitute double jeopardy. Relying on *Jones v. Commonwealth,*[76] he argued that the two indictments charged exactly the same theft.[77] The court disagreed. Applying *Jones,* the court found that, although the indictments charged *similar* amounts,[78] this similarity did not require the conclusion that they charged the same theft—the same physical dollars. In addition, different victims were identified. The robbery indictment identified the attendant while the grand larceny indictment identified the owner of the station.[79]

The court also focused on the "separateness of offenses"[80] based on space and time considerations. Concluding that this situation differed from *Jones* only in degree, the court stated that although the two thefts were separated in space only by the distance from the gasoline pumps to the refrigerator, and in time only by the time required for the defendant to walk that distance,[81] separate and distinct acts of caption and asportation were present.

Chief Justice I'Anson dissented on the ground that the focus of the majority opinion resulted in a blurring of the distinction between the

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73. 221 Va. 720, 273 S.E.2d 778 (1981).

74. *Id.* at 722, 273 S.E.2d at 779.

75. *Id.*

76. 218 Va. 757, 240 S.E.2d 658 (1978), *cert. denied,* 435 U.S. 909 (1978).

77. 221 Va. at 723, 273 S.E.2d at 780.

78. The robbery indictment . . . charged that . . . [defendant] . . . "unlawfully and feloniously did rob one Earl Randolph Griffin of United States currency and monies having a value of about Two Hundred Fifty Dollars ($250.00)." The grand larceny indictment alleged that . . . the defendant "unlawfully and feloniously did steal United States monies and currencies having a value of Two Hundred Fifty Dollars ($250.00) belonging to Melvin Davis, trading as 'Big G' Service Station, in the possession of Earl Randolph Griffin."

Id. at 722, 273 S.E.2d at 780.

79. However, the court indicated that even if the two amounts belonged to the same victim, the double jeopardy clause would not necessarily bar conviction of both robbery and larceny. 221 Va. at 726 n.5, 273 S.E.2d at 782 n.5.

80. *Id.* at 726, 273 S.E.2d at 782.

81. *Id.*

same *act* and the same *offense*.[82] As the majority recited, "[i]t is the identity of the offense, *and not the act,* which is referred to in the constitutional guaranty against double jeopardy."[83] The dissent, however, pointed out that because the evidence clearly indicated that the same money was involved in both indictments, the defendant's criminal conduct was in reality one offense under the standard set forth in *Jones*.[84] The majority, however, by scrutinizing the act rather than the evidence, was able to find separate thefts which could lead to two convictions and two punishments without confronting the double jeopardy issue.

If a court is willing to divide a criminal transaction into separate acts, it will never reach the stage of applying the *Blockburger* test which determines whether *one* criminal act may lead to more than one punishment. A defendant's double jeopardy argument must fail because analysis stops with the finding that two separate criminal acts were involved in a single transaction.

C. *Virginia's Response to* Whalen's *Unresolved Question of Compound-Predicate Offenses*

The remaining examination concerns the approach the Virginia Supreme Court has taken when the *Blockburger* test is applied to compound-predicate offenses. Justice Rehnquist's dissent in *Whalen*[85] presented the difficulty of applying *Blockburger* to statutes defining compound and predicate offenses: "[T]wo statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present."[86] An example of this type of statute is the felony murder statute in *Whalen*[87] and the similar Virginia statute.[88] Since each statute enumerates a list of felonies (the predicates), no spe-

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82. *Id.* at 727 n.2, 273 S.E.2d at 783 n.2 (I'Anson, C.J., dissenting).

83. *Id.* at 723, 273 S.E.2d at 780 (emphasis added) (quoting Epps v. Commonwealth, 216 Va. 150, 153-54, 216 S.E.2d 64, 67 (1975)). *See also* Miles v. Commonwealth, 205 Va. 462, 467, 138 S.E.2d 22, 27 (1964). The majority reasoned that if the criminal transaction can be divided into numerous acts, each can be punished cumulatively without confronting the double jeopardy issue because the lesser act is not incorporated in the double jeopardy prohibition, but rather is a "different" act.

84. 221 Va. at 728, 273 S.E.2d at 784 (I'Anson, C.J., dissenting). A strict application of *Blockburger* would "lead to the conclusion that grand larceny and robbery can never be the 'same offense' " because the value of the stolen item is an essential element of grand larceny and not robbery. *Id.* at 727 n.1, 273 S.E.2d at 783 n.1.

85. 445 U.S. 684 (1980).

86. *Id.* at 709 (Rehnquist, J., dissenting).

87. *See* note 23 *supra* and accompanying text.

88. VA. CODE ANN. § 18.2-32 (Cum. Supp. 1981) provides in pertinent part: "Murder, . . . in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction . . . is murder of the first degree, punishable as a Class 2 felony."

cific felony is ever a lesser included offense of felony murder (the compound). As Justice Rehnquist pointed out in *Whalen,* rape can be committed without committing felony murder just as felony murder can be committed without committing rape.[89]

The problem is determining whether to apply *Blockburger* to the indictment in a particular case or to the statute in question. The United States Supreme Court has never squarely addressed this issue. Justice Rehnquist would focus on the statute in question:

> 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'. . . . If . . . one looks to the *facts alleged in a particular indictment* . . ., then *Blockburger* would bar cumulative punishments . . . since proof of the . . . [compound offense] would necessarily entail proof of the . . . [predicate offense].[90]

The *Blockburger* test itself states that "[t]he 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."[91] Additionally, as noted above, because the *Blockburger* test is designed to determine legislative intent, "it seems more natural to apply it to language as drafted by the legislature than to the wording of a particular indictment."[92] Justice Rehnquist's disagreement with the majority's analysis stems from its focus upon the particular indictment in *Whalen* to conclude that proof of the rape was a "necessary element of proof of the felony murder."[93] The majority, however, has denied that its conclusion was based upon the application of *Blockburger* to the particular indictment involved in the *Whalen* case.[94]

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89. 445 U.S. at 710 (Rehnquist, J., dissenting).

90. *Id.* at 709.

91. 284 U.S. 299, 304 (emphasis added). In Brown v. Ohio, 432 U.S. 166 the test was announced as whether "each *statute* requires proof of an additional fact which the other does not . . . ." (emphasis added in original).

92. 445 U.S. at 711 (Rehnquist, J., dissenting).

93. *Id.* at 694 (Stewart, J., opinion of the Court).

94. *Id.* at 694 n.8. The majority states that although Congress could have broken down felony murder into six separate statutes, "[i]t is doubtful that Congress could have imagined that so formal a drafting had any practical significance, and we ascribe none to it." *Id.* at 694. Justice Rehnquist notes, however, that since Congress did *not* break felony murder down into six separate statutes, it was inappropriate for the majority to apply *Blockburger* to a statute Congress did not enact (a separate statute for a felony murder during the commission of a rape). He also stated that "[o]nly by limiting the inquiry to a killing committed in the course of a rape, a feat that cannot be accomplished without reference to the facts alleged in this particular case, can the Court conclude that the predicate offense is necessarily included in the compound offense under *Blockburger.*" *Id.* at 711-12 n.6 (Rehnquist, J., dissenting).

In *Jones v. Commonwealth*,[95] the Virginia Supreme Court reviewed the proceedings of two different trials. In the first proceeding, the defendant, Jones, was convicted of robbery through the use of a pistol[96] and with the use or attempted use of a firearm while committing a felony.[97] Jones and another man had entered a restaurant, and Jones had forced the manager to give them $218 at gunpoint. Before the manager was able to open the restaurant safe, Jones struck him and fled with his companion.[98] In the second proceeding, Jones was convicted of robbery by means of a firearm[99] and use or attempted use of a firearm in the commission of a felony.[100] Jones had walked into Ward's Baking Company, selected an item for purchase, and approached the check-out counter whereupon he displayed a gun and took $195 from an employee.[101]

In both cases Jones was sentenced to ten years imprisonment for the robbery and five years for the use and display of a firearm.[102] Jones contended that charging him with the use of a firearm in the commission of a felony and robbery violated the double jeopardy clause because "the offenses arose out of the same facts, and the same elements were necessary to prove the charges . . . ."[103] He argued that the use of a firearm in the commission of a felony was a lesser included offense in the crime of robbery by means of a firearm. Because the court did not find a clear legislative intent to impose multiple punishment,[104] and because it did not subdivide the criminal transactions into two or more acts, the court applied the *Blockburger* test. Comparing the *statutory elements* of robbery and the use of a firearm in the commission of a felony,[105] the court concluded

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95. 218 Va. 18, 235 S.E.2d 313 (1977).

96. *See* note 61 *supra* and accompanying text.

97. VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 1975) provided at the time the offenses were committed that:

> [i]t shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing a felony. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be guilty of a Class 6 felony.

The statute was amended in 1976 and 1980. *See* note 53 *supra*.

98. 218 Va. at 19-20, 235 S.E.2d at 314.

99. *See* note 61 *supra*.

100. *See* note 97 *supra*.

101. 218 Va. at 20, 235 S.E.2d at 314.

102. *Id.* at 19-20, 235 S.E.2d at 314.

103. *Id.* at 20, 235 S.E.2d at 314.

104. VA. CODE ANN. § 18.2-53.1 (Cum. Supp. 1981) was amended in 1976 (after Jones' conviction) to include the sentence "[s]uch punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony." It is submitted that this same fact situation would now render a decision consistent with Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980). *See* notes 51-58 *supra* and accompanying text.

105. "To determine whether two offenses are different, the test is whether *one offense* requires proof of an additional fact which the other does not." 218 Va. at 21, 235 S.E.2d at 314 (emphasis added). The court here appears to be mistaken as to the wording of the test.

that the use of a firearm was not an essential element of the crime of robbery: "To convict a defendant on a charge of using or displaying a weapon in the commission of a felony . . . requires proof of a different element and evidence in addition to that required for the offense of robbery."[106] Although robbery may be committed with the use of a firearm, there are other threatening means that may be used to satisfy the element of intimidation. The conviction under the use of a firearm in a felony statute requires proof of use of a weapon. By focusing on the statutes, the court found that the use of a firearm is a separate and distinct offense from the crime of robbery: "Thus, 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."[107]

In *Blythe v. Commonwealth*,[108] the Virginia Supreme Court reviewed an appeal by a defendant who had been convicted of voluntary manslaughter[109] and unlawful wounding in the commission of a felony[110] after a domestic dispute in which the defendant stabbed and killed his mother's boyfriend.[111] The defendant claimed that the consecutive sentences he received violated statutory and constitutional prohibitions against multiple punishments for the same offense.

The court dismissed the claim that the Code of Virginia barred conviction for both voluntary manslaughter and unlawful wounding. Section 19.2-294 provides in part, "[i]f 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."[112] Because this section only bars prosecution for two or more *statutory* offenses, the court concluded that it was inapplicable because voluntary manslaughter is a common law offense, unlike unlawful wounding which is a statutory offense.[113]

The defendant's constitutional claim was based on the argument that,

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Blockburger requires a determination whether "*each provision* requires proof of a fact which the other does not." 284 U.S. at 304.

106. 218 Va. at 22, 235 S.E.2d at 315.

107. *Id. See also* United States v. Crew, 538 F.2d 575 (4th Cir.), *cert. denied*, 429 U.S. 852 (1976); Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971); People v. Chambers, 7 Cal. 3d 666, 498 P.2d 1024, 102 Cal. Rptr. 776 (1972); State v. Saxon, 193 Neb. 278, 226 N.W.2d 765 (1975).

108. 222 Va. Adv. Sh. 722, 284 S.E.2d 796 (1981).

109. VA. CODE ANN. § 18.2-35 (Repl. Vol. 1975) provides that voluntary manslaughter is punishable as a Class 5 felony.

110. VA. CODE ANN. § 18.2-53 (Repl. Vol. 1975) provides: "If any person, in the commission of, or attempt to commit, felony, unlawfully shoot, stab, cut or wound another person he shall be guilty of a Class 6 felony."

111. 222 Va. Adv. Sh. at 724, 284 S.E.2d at 797.

112. VA. CODE ANN. § 19.2-294 (Repl. Vol. 1975).

113. 222 Va. Adv. Sh. at 725, 284 S.E.2d at 797 (VA. CODE ANN. § 18.2-35 fixes the punishment and does not define the offense).

for double jeopardy purposes, the wounding charge was a lesser included offense of the murder charge, upon which he was convicted of voluntary manslaughter, because the same evidence was required to convict him of both offenses. The court focused on the legislative intent and applied *Blockburger* to determine whether the two offenses could be punished cumulatively.[114]

By focusing on the legislative intent, the court looked at the two offenses "in the abstract, rather than with reference to the facts of the particular case under review."[115] Applying *Blockburger* to this predicate-compound situation, the court found that because conviction under a murder charge requires proof of the victim's death whereas conviction of unlawful wounding does not, and because conviction under a murder charge does not require proof of any of the predicates listed in the unlawful wounding statute (*i.e.*, shooting, stabbing, cutting or wounding),[116] the charges were separate and, therefore, unlawful wounding was not a lesser included offense under a charge of murder.[117]

The court's very reasons for denying the defendant's statutory argument raise serious questions about its use of the *Blockburger* test. Because the *Blockburger* test applies to statutory offenses, it too should have been inapplicable to the court's reasoning that voluntary manslaughter is a common law, rather than a statutory, offense.

However, in applying *Blockburger* to the murder and unlawful wounding charges, the court reached the conclusion suggested by Justice Rehnquist in his *Whalen* dissent.[118] A comparison of the statutory elements of compound and predicate offenses will consistently result in courts determining that the legislature intended to authorize cumulative punishment either because no particular predicate offense is necessarily included in

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114. 222 Va. Adv. Sh. at 725-26, 284 S.E.2d at 797.

115. *Id.* at 726, 284 S.E.2d at 798 (citing *Whalen*, 445 U.S. at 694 n.8).

116. Shackleford v. Commonwealth, 183 Va. 423, 426, 32 S.E.2d 682, 684 (1945) (wounding requires a breaking of the skin).

117. 222 Va. Adv. Sh. at 726, 284 S.E.2d at 798. The court also disagreed with the defendant's contention that because the legislature had not included an express statement to the effect that cumulative punishment is authorized by § 18.2-53 as is provided in § 18.2-53.1 with respect to the use or display of a firearm in the commission of a felony, such punishment was not authorized. Section 18.2-53.1 provides:

> It shall be unlawful for any person to use . . . any pistol, shotgun, rifle . . . while committing or attempting to commit murder, rape, robbery, burglary, malicious wounding . . . or abduction. Violation of this section shall constitute a separate and distinct felony. . . . Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

VA. CODE ANN. § 18.2-53.1 (Cum. Supp. 1981). The court found clear legislative intent for cumulative punishment in § 18.2-53 despite a lack of an express statement of such intent. 222 Va. Adv. Sh. at 727, 284 S.E.2d at 799.

118. *See* notes 85-91 *supra* and accompanying text.

the compound offense or because proof of a compound offense does not necessarily entail proof of a particular predicate offense and vice versa.

The Virginia Supreme Court, however, has not consistently looked to the pertinent statutory elements in applying *Blockburger*. In *Harrison v. Commonwealth*,[119] the defendant and another man drove into a service station and robbed the station manager. During the course of the robbery, the manager was shot and killed.[120] Harrison was convicted under separate indictments of capital murder in the commission of armed robbery[121] and of robbery.[122] He received a sentence of forty years for the murder conviction with twenty years suspended and a like term and suspension for the robbery conviction.[123] On appeal, the defendant argued that his robbery conviction was barred by the double jeopardy clause because proof of the robbery conviction was necessary to sustain his murder conviction. He argued that robbery was a lesser included offense of murder in the commission of robbery and, therefore, that they were the "same offense" for double jeopardy purposes.[124]

The court properly determined that Harrison's conviction had been under the murder of the first degree statute (which also includes Virginia's felony murder provision) and not under the capital murder statute.[125] Because the court neither found itself faced with clear legislative

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119. 220 Va. 188, 257 S.E.2d 777 (1979), *appeal docketed sub nom.*, Harrison v. Johnson, No. CA 80-0449-R (E.D. Va. June 10, 1980).

120. 220 Va. at 190-91, 257 S.E.2d at 778.

121. VA. CODE ANN. § 18.2-31 (Cum. Supp. 1981) provides in pertinent part: "The following offenses shall constitute capital murder, punishable as a Class 1 felony:

. . . .

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon . . . ."

122. VA. CODE ANN. § 18.2-58 (Cum. Supp. 1981).

123. 220 Va. at 190, 257 S.E.2d at 778.

124. *Id.* at 190-91, 257 S.E.2d at 778. Harrison relied on Harris v. Oklahoma, 433 U.S. 682 (1977), in which the Supreme Court reversed a robbery conviction which occurred after the defendant's conviction of felony murder. The state of Oklahoma had conceded in its brief, however, that proof of the underlying felony was needed to prove the intent necessary for a felony murder conviction. 220 Va. at 190, 257 S.E.2d at 778 (quoting *Harris*, 433 U.S. 682). *See* note 19 *supra* and accompanying text.

125. *Id.* at 192, 257 S.E.2d at 779-80. VA. CODE ANN. § 18.2-32 (Cum. Supp. 1981) provides in pertinent part:

> Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, *or by any willful, deliberate, and premeditated killing*, or in the commission of, or attempt to commit, arson, rape, . . . robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony. (emphasis added).

At the trial Harrison was found not to be the triggerman; therefore, he could not be convicted as a principal in the first degree to capital murder. Johnson v. Commonwealth, 220 Va. 146, 149, 255 S.E.2d 525, 527 (1979). Thus, his conviction was as a principal in the second degree. Since "Code § 18.2-18 . . . provides . . . 'an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and

intent for multiple punishment nor with a subdivisible criminal transaction, the *Blockburger* test was applied to determine whether more than one offense had been committed.[126] The *Harrison* case also presented the problem later articulated by Justice Rehnquist in his *Whalen* dissent.[127] The first degree murder statute includes the felony murder provision which lists predicate felonies which, if violated, may be compounded into a murder conviction. The element necessary to compound them would be a death during their commission. Only the intent to commit the felony needs to be proved in order to convict a defendant of felony murder.[128] The problem in such a situation is whether to look to the statute or to the facts alleged in the indictment. In *Harrison* the court chose to look to the *indictment*. The court admitted that the "felony-murder concept was employed to support the defendant's conviction. . . ."[129] However, by looking to the indictment, the court also found the conviction was based on the "proposition that the killing was willful, deliberate, and premeditated."[130] Because the murder of the first degree statute contains separate grounds besides the felony murder provision for conviction—where the killing is shown to be willful, deliberate, and premeditated[131]—the court could pin Harrison's conviction on this separate ground.[132]

Once Harrison's conviction was based on this part of the statute, the court had no trouble dismissing his claim that his conviction of armed robbery was a lesser offense included in the greater offense of murder in the commission of robbery so that multiple punishment would violate the double jeopardy clauses. The court reasoned that:

> [w]illful, deliberate, and premeditated murder requires proof of specific intent to kill and of a killing, without the necessity of showing theft or intent to steal from the victim. Armed robbery requires proof of theft or intent to steal from the victim, without the necessity of showing an intent to kill or a killing.[133]

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punished *as though the offense were murder in the first degree'* (emphasis added)," 220 Va. at 192, 257 S.E.2d at 779, Harrison was actually convicted of murder in the first degree. In addition, the sentence imposed in the case is appropriate only for a Class 2 felony. VA. CODE ANN. § 18.2-10(b) (Cum. Supp. 1981). The only homicide classified as a Class 2 felony is murder of the first degree. VA. CODE ANN. § 18.2-32 (Cum. Supp. 1981).

126. 220 Va. at 193-94, 257 S.E.2d at 780-81.

127. *See* notes 32-38 and 90-94 *supra* and accompanying text.

128. *See* note 141 *infra*.

129. 220 Va. at 192, 257 S.E.2d at 780.

130. *Id.* at 193-94, 257 S.E.2d at 780. "The indictment charged that the defendant did 'willfully, deliberately and with premeditation kill and capital murder [the victim] in the commission of a robbery while armed with a deadly weapon.' " *Id.* at 191 n.2, 257 S.E.2d at 779 n.2. The trial court's finding was that the killing was committed only to "mask the identity of the assailant." *Id.* at 192 n.5, 257 S.E.2d at 780 n.5.

131. *See* note 125 *supra* and accompanying text.

132. 220 Va. at 194, 257 S.E.2d at 781.

133. *Id.*

Using *Blockburger*, the court concluded that each provision under which the defendant was convicted required "proof of a fact which the other does not."[134]

The Virginia Supreme Court used the same analysis in *Simpson v. Commonwealth*[135] to sustain the robbery and murder convictions of the defendant Simpson.[136] The convictions resulted from an armed robbery of a convenience store in which Simpson and his co-defendant took money from the cash register and a six pack of beer. Simpson and his co-defendant also attempted to rob a customer who entered the store during the robbery. Finding no cash in the customer's wallet, Simpson's co-defendant shot both the owner and the customer.[137]

As in *Harrison*,[138] Simpson's original indictment, which had been for capital murder during the commission of a robbery,[139] was amended at trial to allege first degree murder because Simpson was not the triggerman. The commonwealth's attorney had the language "willfully, deliberately and premeditatedly" striken from the indictment.[140] On appeal, Simpson asserted that because there was no language in the indictment alleging a willful or deliberate killing, proof of robbery was necessary to prove the intent for murder under the felony murder provision.[141] Thus, his robbery conviction would be barred by double jeopardy under *Blockburger*, since the robbery would be deemed a lesser included offense of murder in the commission of robbery.

In *Simpson*, the court was unable to look to the indictments since the willful and deliberate language was struck from them. Instead, the court looked to the trial court's finding that Simpson "was a principal in the second degree to a willful, deliberate and premeditated killing which provides an independent statutory basis for his first degree murder conviction, apart from any association with or relation to the crime of rob-

134. *Id.* at 193, 257 S.E.2d at 780 (quoting *Blockburger*, 284 U.S. at 304).

135. 221 Va. 109, 267 S.E.2d 134 (1980). This was a post-*Whalen* case although the court generally applied a pre-*Whalen* analysis.

136. VA. CODE ANN. §§ 18.2-32 and -58 (Cum. Supp. 1981). Simpson was also convicted of attempted murder, VA. CODE ANN. § 18.2-28 (Repl. Vol. 1975), and two counts of use of a firearm in the commission of a felony, VA. CODE ANN. § 18.2-53.1 (Cum. Supp. 1981), but these issues were not raised on appeal. 221 Va. at 111, 267 S.E.2d at 136.

137. *Id.* at 111, 267 S.E.2d at 136.

138. 220 Va. 188, 257 S.E.2d 777. *See* notes 119-133 *supra* and accompanying text.

139. VA. CODE ANN. § 18.2-31(d) (Cum. Supp. 1981).

140. 221 Va. at 112, 267 S.E.2d at 137.

141. *Id.* at 112-13, 267 S.E.2d at 137-38. In its opinion the Virginia Supreme Court articulates the rationale of the felony murder doctrine as stated by the Oklahoma Court in Harris v. State, 555 P.2d 76, 81 (Okla. Crim. App. 1976); "[T]he legal theory transfers the intent to commit the underlying felony to the homicide even though the felon does not intend to cause the death of anyone." 221 Va. at 114, 267 S.E.2d at 138. The Oklahoma Court's decision was, of course, reversed in Harris v. Oklahoma, 433 U.S. 682 (1977).

bery."[142] Therefore, the court could conclude that Simpson's murder conviction did *not* require proof of any other felony, and thus his intent to commit murder was not transferred from his intent to commit robbery.[143] According to the court, his murder conviction rested solely on the independent basis of a willful, deliberate and premeditated killing.[144] Thus under *Blockburger*, each crime required proof of an additional fact—the intent to kill under Simpson's first degree murder conviction and the proof of theft or intent to steal in the robbery conviction. Simpson's criminal transaction thus constituted a violation of two provisions for which he could receive multiple punishment.

The Virginia Supreme Court in applying the *Blockburger* test has faced the difficulty articulated by Justice Rehnquist in his *Whalen* dissent and has reached inconsistent results. In *Jones v. Commonwealth*[145] the court looked to the *statutes* and found that robbery and use of a firearm in the commission of a felony "have different elements as a matter of law, although they may have common elements as a matter of fact."[146] As Justice Rehnquist indicated,[147] this approach would always result in a multiple punishment since, as in *Jones*, proof of robbery (the predicate felony) involves different elements than proof of the compound offense, use of a firearm in the commission of a felony. Therefore, the use of a firearm is a separate and distinct offense which may be punished as such. The same result was achieved in *Blythe v. Commonwealth*[148] by focusing on legislative intent to avoid applying *Blockburger* to murder and unlawful wounding in the commission of a felony.

However, in *Harrison*[149] and *Simpson*,[150] the court upheld the convic-

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142. 221 Va. at 113, 267 S.E.2d at 137.

> [T]he trial court explicitly determined that Simpson and Thompson "were full lone partners" . . . and each was equally as guilty as the other. . . . [T]he killing of . . . [the store owner was] "an execution style of murder" and . . . [the court] could not "think of a more premeditated, intentional crime with malice than that."

Id.

143. *See* note 141 *supra*

144. 221 Va. at 114, 267 S.E.2d at 138. Simpson also contended that because the "willful, deliberate and premeditated" provision was struck from the indictment, the conviction had to be under the felony murder doctrine. The court disagreed. VA. CODE ANN. § 19.2-221 (Repl. Vol. 1975) provides for short form indictments for murder or manslaughter. "No constitutional or statutory requirement attaches that the indictment charge the degree of murder alleged or use the specific statutory language constituting that degree of offense." *Id.* at 115, 267 S.E.2d at 139. *See also* Ward v. Commonwealth, 205 Va. 564, 568, 138 S.E.2d 293, 296 (1964) ("It is not necessary that the indictment should charge murder in the first degree or use that description which, according to the statute, constitutes that degree of offense").

145. 218 Va. 18, 235 S.E.2d 313 (1977).

146. *Id.* at 22, 235 S.E.2d at 315.

147. *See* notes 85-94 *supra* and accompanying text.

148. 222 Va. Adv. Sh. 722, 284 S.E.2d 796.

149. 220 Va. 188, 257 S.E.2d 777.

150. 221 Va. 109, 267 S.E.2d 134.

tions and focused on the *facts alleged* in the *indictments* and on the lower courts' evidence. Under Rehnquist's analysis, this approach would bar cumulative punishment.[151] The proof of the underlying felony would be necessary to prove the intent to kill. Yet, because of the Virginia Supreme Court's willingness to find an independent basis to support a defendant's conviction under a felony murder statute, such as participation in a willful, deliberate and premeditated killing, the court is still able to uphold the imposition of cumulative punishment on a defendant.

III. Conclusion

The Supreme Court in *Whalen* attempted to make the *Blockburger* test a means of discerning legislative intent when the multiple punishment issue of double jeopardy is raised. The problems which remain after *Whalen* are whether to apply *Blockburger* at all when the legislative intent to allow cumulative punishment is expressly stated and how to apply *Blockburger* to compound and predicate offenses.

The Virginia Supreme Court's approach to the issue of multiple punishment has moved in three directions which lead to inconsistent results and which render the third protection of double jeopardy virtually meaningless. First, the court renders *Blockburger* inapplicable if the court finds that the General Assembly clearly expressed a desire to allow the imposition of multiple punishment. In other words, the *Blockburger* test is irrelevant if the court finds that the will of the legislature is clearly expressed. Second, the court also renders *Blockburger* inapplicable if it finds that a criminal transaction is divisible into more than one act so that a defendant can be punished for each separate offense. The third approach used by the court is seen when the *Blockburger* test is applied to compound and predicate offenses. The court looks to both the statutory provisions and the facts alleged in the indictment or at the trial record in order to sustain a defendant's conviction. Until the United States Supreme Court articulates a clear standard, the confusion surrounding the Virginia Supreme Court's application of the third protection of double jeopardy will continue to be what Justice Rehnquist has described as a "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[152]

Jane S. Glenn

151. *See* notes 85-94 *supra* and accompanying text.
152. 101 S. Ct. at 1144-45.