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Casenotes: Constitutional Law — Criminal Law — Double Jeopardy — Under "Required Evidence" Test, Underlying Attempted Armed Robbery Merges upon Conviction for Felony-Murder. Newton v. State, 280 Md. 260, 373 A.2d 262 (1977)

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CONSTITUTIONAL LAW — CRIMINAL LAW — DOUBLE JEOPARDY — UNDER "REQUIRED EVIDENCE" TEST, UNDERLYING ATTEMPTED ARMED ROBBERY MERGES UPON CONVICTION FOR FELONY-MURDER. *NEWTON v. STATE,* 280 Md. 260, 373 A.2d 262 (1977).

I. INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution[1] generally is perceived as prohibiting successive prosecutions for the same offense.[2] Whether two particular crimes are the same offense[3] for double jeopardy purposes is of practical significance for the criminal lawyer. A determination that two otherwise separate offenses are the same in this context may result in the merger of the lesser offense into the greater; only one sentence may be imposed. In *Newton v. State,*[4] the Court of Appeals of Maryland, in a four-to-two decision, held that convictions in one

1. U.S. CONST. amend. V provides, *inter alia*: "[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb." While the Maryland Constitution does not include a similar provision, there was an early recognition that the double jeopardy prohibition was a part of the common law in Maryland. Gilpin v. State, 142 Md. 464, 466, 121 A. 354, 355 (1923). The fifth amendment double jeopardy clause was made applicable to the states through the due process clause of the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

   For an excellent discussion of the origins of the concept of double jeopardy and its acceptance by American society, see Bartkus v. Illinois, 359 U.S. 121, 150-64 (1959) (Black, J., dissenting), and materials cited therein. *See generally* Commonwealth v. Bolden, 472 Pa. 602, 614-19, 373 A.2d 90, 96-98 (1977); Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution,* 28 U. CHI. L. REV. 591, 603-04 (1961).
2. *See* Green v. United States, 355 U.S. 184, 187-88 (1957); United States v. Ball, 163 U.S. 662, 669 (1896); *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873); Comment, *Double Jeopardy — Defining the Same Offense,* 32 LA. L. REV. 87, 88 (1971); Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 277-79 (1965). *See,* for an interesting discussion of the same offenses in a multiple prosecution setting, United States v. Wheeler, 98 S. Ct. 1079 (1978).
3. *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873). A threshold question in any discussion of double jeopardy is what makes one offense the same as another within the meaning of the fifth amendment. *See* Abbate v. United States, 359 U.S. 187, 196-201 (1959) (Brennan, J., concurring); Gore v. United States, 357 U.S. 386, 388-93 (1958); Gavieres v. United States, 220 U.S. 338, 342-45 (1911); Carroway, *Pervasive Multiple Offense Problems — A Policy Analysis,* 1971 UTAH L. REV. 105, 107-13; Note, *The Protection From Multiple Trials,* 11 STAN. L. REV. 735, 741-46 (1959). *Compare In re* Nielson, 131 U.S. 176, 188-89 (1889) (held that a second prosecution for an offense which was a "various incident" in the prosecution of the first offense, unconstitutionally placed Nielsen twice in jeopardy for the same offense) *with* Burton v. United States, 202 U.S. 344, 379-80 (1906) (stated that the offenses, to be deemed the same, must be the same both in fact and in law).
4. 280 Md. 260, 373 A.2d 262 (1977).

trial for attempted armed robbery and felony-murder[5] necessitated merger of the former crime into the latter for sentencing purposes.[6]

The majority[7] and dissenting[8] opinions in *Newton* differed, not only in results, but also in the test applied to the merger issue. Both opinions, however, purported to apply the "required evidence" test.[9] The dissenting opinion criticized the majority for applying the "actual evidence" test.[10] The majority actually applied a hybrid of the "required evidence" and "actual evidence" tests, while the dissent applied a strict "required evidence" test. It is the purpose of this Casenote to analyze in detail the majority and dissenting opinions in *Newton* in light of other double jeopardy cases in Maryland courts and in the United States Supreme Court. The differences between the "required evidence" and "actual evidence" tests shall be explained. The lines of the new hybrid test will then be drawn.

II. NEWTON'S CRIMES

Newton and a companion hailed and entered a taxicab. After the cab proceeded a short distance, Newton's companion ordered the cabdriver to stop the cab and informed him at gunpoint that he was being robbed.[11] Despite his offering no resistance, the cabdriver was shot and killed.

The trial court found Newton guilty of felony-murder and attempted armed robbery,[12] for which Newton received sentences of

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5. MD. ANN. CODE art. 27, § 410 (Supp. 1977) provides:
> All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, burglary, kidnapping as defined in §§ 337 and 338 of this article, storehouse breaking as defined in §§ 32 and 33 of this article, or daytime housebreaking as defined in § 30(b) of this article, or in the escape or attempt to escape [from any penal institution] shall be murder in the first degree.

The felony-murder doctrine is of common law origin in Maryland. Evans v. State, 28 Md. App. 640, 686 n.23, 349 A.2d 300, 329-30 n.23 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976). The statutory classification of felony-murder is found in MD. ANN. CODE art. 27, §§ 408-410 (1976 & Supp. 1977). Section 408 pertains to a murder resulting from an arson, or its attempt, while § 409 refers to the burning of or attempt to burn warehouse-type facilities.

6. 280 Md. at 273-74, 373 A.2d at 269-70.
7. Judge Eldridge delivered the opinion of the court, joined by Judges Singley, Digges and Levine.
8. Chief Judge Murphy filed a dissenting opinion in which Judge Smith concurred.
9. *See* text accompanying note 17 *infra*.
10. 280 Md. at 276-77, 373 A.2d at 271. *See* text accompanying note 22 *infra*.
11. 280 Md. at 262, 373 A.2d at 263.
12. *Id.* at 262, 373 A.2d at 263.
> The trial court also convicted Newton of handgun violations as to the felony-murder and the attempted armed robbery. The legislative intent behind the handgun section, MD. ANN. CODE art. 27, § 36B(d) (1976), is quite clear; conviction is punishable as a separate misdemeanor by a maximum of fifteen years imprisonment, with a minimum of five years. Ford v. State, 274 Md. 546, 337 A.2d 81 (1975); Raley v. State, 32 Md. App. 515, 363 A.2d 261 (1976). This

life imprisonment and twenty years, respectively. The Court of Special Appeals of Maryland[13] affirmed both convictions and held that the attempted armed robbery conviction did not merge into the felony-murder conviction.[14] The Court of Appeals of Maryland[15] reversed and directed that Newton's conviction and sentence for attempted armed robbery be vacated.

III. THE REQUIRED EVIDENCE AND ACTUAL EVIDENCE TESTS

An examination of the "required evidence" test and the "actual evidence" test provides the background for a complete comprehension of double jeopardy merger cases. The United States Supreme Court stated the "required evidence" rule in *Blockburger v. United States*:[16]

> 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]

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section was again scrutinized in Couplin v. State, 37 Md. App. 567, 378 A.2d 197 (1977). There, the appellant argued that the use of a handgun in the commission of a crime of violence merged with robbery with a deadly weapon to prevent a conviction of the latter offense. Applying the "required evidence" test, the court of special appeals held that robbery with a deadly weapon required proof of a robbery while the handgun violation required that a handgun be used in the commission of a crime of violence. As each required proof of a fact which the other did not (regardless of whether the actual evidence adduced at trial showed that the robbery with a deadly weapon was committed with a handgun), the two offenses did not merge. *Id.* at 579-82, 378 A.2d at 204-05. *Accord,* Government of the Virgin Islands v. Smith, 558 F.2d 691, 695-96 (3d Cir. 1977); Coates v. Maryland, 436 F. Supp. 226, 231-33 (D. Md. 1977); Jones v. Commonwealth, 218 Va. 18, 21-24, 235 S.E.2d 313, 315-16 (1977). *See* United States v. Crew, 538 F.2d 575, 577-78 (4th Cir. 1977). *Contra,* United States v. Simpson, 98 S. Ct. 909, 913 (1978).

13. 31 Md. App. 344, 356 A.2d 274 (1976).
14. The court admitted that Newton's position was "somewhat persuasive," *id.* at 348, 356 A.2d at 276, but stated, without analysis, that murder and attempted armed robbery simply were not the same crime.
15. 280 Md. 260, 373 A.2d 262 (1977).
16. 284 U.S. 299 (1932).
17. *Id.* at 304, *quoted in* Newton v. State, 280 Md. 260, 266, 373 A.2d 262, 265 (1977). Sometimes referred to as the "same evidence" test, this standard was first enunciated in The King v. Vandercomb & Abbott, 69 Eng. Rep. 455, 461 (1796). The test was first used in this country by Judge Gray in Morey v. Commonwealth, 108 Mass. (12 Browne) 433 (1871):

    > The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence. A single act may be an offence 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. This language was approved by the Supreme Court in Gavieres v. United States, 220 U.S. 338, 342 (1911). *Compare* Iannelli v. United States, 420

The "required evidence" test focuses on whether the elements of the lesser offense are necessarily included in the elements of the greater offense.[18] By definition, the lesser offense must be committed in the course of committing the greater offense. For example, assault merges with assault with intent to murder,[19] robbery merges with armed robbery,[20] and larceny merges with robbery.[21] Since this test views the elements of both crimes in the abstract only, it does not take into account the actual evidence used at trial to prove the existence of the crimes.

The "actual evidence" test,[22] on the other hand, focuses on whether the evidence adduced at trial to prove the lesser offense is an integral part of the evidence used to prove the greater offense. This test was explicitly rejected by the United States Supreme Court in *Harris v. United States,*[23] and thus, it is relevant only in so far as it dilutes the application of the pure "required evidence" test in particular cases. The "actual evidence" test generally is infused into a merger case when the judge believes that fairness requires that more be taken into consideration than only the abstract elements of the offenses in his case.

The first analysis of the modern merger concept in a felony-murder situation in Maryland[24] came in a trilogy of cases beginning with *Parker v. State.*[25] The court of special appeals in *Parker* held that the doctrine of merger was not applicable to convictions for felony-murder and armed robbery.[26] The court stressed the distinct elements of robbery and murder, and emphasized that each crime arose from a different act:

U.S. 770, 785 n.17 (1975) *and* Gore v. United States, 357 U.S. 386, 388-93 (1958) (pursuant to the *Blockburger* test, strictly construed various gambling, *Iannelli,* and narcotic, *Gore,* violations as non-merging) *with* United States v. Simpson, 98 S. Ct. 909, 910-15 (1978) *and* Prince v. United States, 352 U.S. 322, 323-29 (1957) (construed the congressional intent behind various sections concerning bank robbery while armed as merging). 18 U.S.C. §§ 924(c), 2113(a) and (d) (1976). *Cf.* United States v. Jackson, 560 F.2d 112, 120-21 n.9 (2d Cir.), *cert. denied,* 98 S. Ct. 434 (1977) (court agreed there was no double jeopardy violation because trier of fact had found the two attempted bank robberies were distinct criminal transactions).

18. Newton v. State, 280 Md. 260, 276-77, 373 A.2d 262, 270-71 (1977) (Murphy, C.J., dissenting). *See* Iannelli v. United States, 420 U.S. 770, 785-86 n.17 (1975).
19. *E.g.,* Smith v. State, 6 Md. App. 114, 118, 250 A.2d 272, 274 (1969).
20. *E.g.,* Tender v. State, 2 Md. App. 692, 698-700, 237 A.2d 65, 69-71 (1968).
21. *E.g.,* Wiggins v. State, 8 Md. App. 598, 603-04, 261 A.2d 503, 506-07 (1970); Halcomb v. State, 6 Md. App. 32, 37, 250 A.2d 119, 121-22 (1969).
22. The "actual evidence" test determines whether two offenses are the same based upon the evidence actually offered, finding a merger if there is substantial similarity in proof. *See* District of Columbia v. Buckley, 128 F.2d 17, 21-22 (D.C. Cir. 1942) (Rutledge, J., concurring). Judge Rutledge, later an Associate Justice of the United States Supreme Court, applied a two-tiered analysis using both a "required evidence" test and the "actual evidence" test.
23. 359 U.S. 19 (1959).
24. *But see* Robinson v. State, 249 Md. 200, 207-11, 238 A.2d 875, 880-82, *cert. denied,* 393 U.S. 928 (1968).
25. 7 Md. App. 167, 254 A.2d 381 (1969).
26. *Id.* at 199, 254 A.2d at 398.

> The act of taking property from a person by means of force and fear is separate and distinct from the act of firing shots that kill him, even though evidence as to the robbery is admissible as to the murder.[27]

The *Parker* court did not discuss merger specifically with regard to double jeopardy; rather, it dealt with the common law concept of merger.[28]

One year later in *McChan v. State,*[29] the court of special appeals articulated the same rationale as it had in *Parker,* but addressed its opinion to an argument based specifically on double jeopardy. McChan, convicted of felony-murder and armed robbery, contended that the underlying felony merged into the felony-murder upon conviction. McChan urged that the double jeopardy clause thus prohibited a conviction and sentence for the armed robbery.[30] Relying totally on *Parker,* the court affirmed both convictions.

In 1971, the Court of Appeals of Maryland, in *Price v. State,*[31] carried the *Parker-McChan* theory one step further. Price was convicted of first degree murder committed in the perpetration of arson.[32] In both *Parker* and *McChan,* the court of special appeals had relied heavily on the fact that the underlying felony was a "separate and distinct"[33] act from the murder. The court of appeals in *Price* could not rely solely on such reasoning in an arson-murder situation. Concluding that there was a "single, indivisible criminal act,"[34] the act of burning, the court of appeals applied a two-step process to determine whether the arson was a lesser included offense which merged upon conviction of the felony-murder. The court looked first at each act and then examined the "thrust"[35] of each

27. *Id.* at 199, 254 A.2d at 399.
28. *Id.* at 199, 254 A.2d at 398-99. *But cf.* Massey v. State, 7 Md. App. 615, 256 A.2d 614 (1969) (held that convictions of assault with intent to rob and of assault merged into a conviction of robbery on the facts presented). Judge Orth, who authored the court's opinion in *Parker,* concurred in *Massey,* stressing that the applicability of the doctrine of merger is determined by whether one crime "necessarily involves the other." *Id.* at 618, 256 A.2d at 615-16. Veney v. State, 227 Md. 608, 612, 177 A.2d 883, 886 (1962), and Gilpin v. State, 142 Md. 464, 468-70, 121 A. 354, 356 (1923), provide an in-depth discussion on the common law doctrine of merger. This concept was abrogated, Green v. State, 243 Md. 75, 80, 220 A.2d 131, 135 (1966); Bennett v. State, 229 Md. 208, 212, 182 A.2d 815, 817-18 (1962), and a more modern concept of merger was adopted, which focused on whether the lesser offense was a necessary ingredient of the greater offense. Veney v. State, 227 Md. 608, 612, 177 A.2d 883, 886 (1962); Williams v. State, 205 Md. 470, 475-79, 109 A.2d 89, 92-94 (1954).
29. 9 Md. App. 311, 264 A.2d 130 (1970).
30. *Id.* at 315, 264 A.2d at 133.
31. 261 Md. 573, 277 A.2d 256 (1971).
32. MD. ANN. CODE art. 27, § 408 (1976) classifies any murder committed during the perpetration of an arson as first degree murder. *See* note 5 *supra.*
33. McChan v. State, 9 Md. App. 311, 316, 264 A.2d 130, 133 (1970); Parker v. State, 7 Md. App. 167, 199, 254 A.2d 381, 399 (1969).
34. 261 Md. at 579, 277 A.2d at 259.
35. *Id.*

offense. Because the "thrust" of arson and the "thrust" of murder were distinct, the former "directed against property"[36] and the latter "against an individual,"[37] merger was not appropriate. The offenses were "separate and parallel . . . neither being a 'lesser included' offense within the other."[38] The court of appeals, then, strove to change the focus of merger cases from looking only at the acts involved to examining the "thrust" of the offenses. While the court's language was not entirely clear, *Price* did adopt the *Parker-McChan* conclusion and implied that the doctrine of merger was not applicable beyond the most obvious situations.[39]

In *Cousins v. State,*[40] and *Thomas v. State,*[41] the court of appeals approved the application of the "required evidence" test to determine if two offenses were the same for double jeopardy purposes.[42] In both cases, the court provided an extensive history of the formulation of the test, its continued use by the United States Supreme Court,[43] and its effect upon the doctrine of merger in Maryland.[44]

The significance of *Cousins* lies in the Maryland Court of Appeals' refusal to adopt the "same transaction" test[45] advocated by Justices Brennan, Douglas, and Marshall in their concurring opinion in *Ashe v. Swenson.*[46] The "same transaction" test merges the underlying felony into the felony-murder if both offenses arose from a single episode or factual occurrence.[47]

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36. *Id.* at 580, 277 A.2d at 260. In practical application, *Price* would have the same results as strict use of the "required evidence" test.
37. *Id.*
38. *Id.*
39. *See* text accompanying notes 19-21 *supra.*
40. 277 Md. 383, 354 A.2d 825, *cert. denied,* 429 U.S. 1027 (1976).
41. 277 Md. 257, 353 A.2d 240 (1976).
42. *See generally* note 17 *supra* and accompanying text.
43. *E.g.,* Thomas v. State, 277 Md. 257, 261-66, 353 A.2d 240, 243-46 (1976).
44. *Id.* at 266-69, 353 A.2d at 246-48.
45. 277 Md. 383, 389-97, 354 A.2d 824, 829-33 (1976). Adoption of the "same transaction" test "would compel the prosecution to join all offenses arising from a single criminal act, episode or transaction in a single trial." *Id.* at 390, 354 A.2d at 830. It has been rejected by the Supreme Court in past years, Morgan v. Devine, 237 U.S. 632, 641 (1915), and by a majority of the present Court, Brown v. Ohio, 432 U.S. 161 (1977). The rationale behind the test is to expand the protection afforded by the double jeopardy clause. *See* Carey v. State, 37 Md. App. 689, 693-94, 379 A.2d 178, 180-81 (1977). *See generally* Carroway, *Pervasive Multiple Offense Problems — A Policy Analysis,* 1971 UTAH L. REV. 105, 112-19, 126-30; Kirchheimer, *The Act, The Offense and Double Jeopardy,* 58 YALE L.J. 513 (1949); Note, *The Protection From Multiple Trials,* 11 STAN. L. REV. 735, 743-46 (1969); Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 275-77 (1965); Note, *Double Jeopardy and the Multiple-Count Indictment,* 57 YALE L.J. 132, 137-38 (1947); Note, 37 MD. L. REV. 112 (1977).
46. 397 U.S. 436, 448-60 (1970). For other examples of the continuing effort by Justice Brennan and Justice Marshall to persuade a majority of the Court of the necessity for adoption of the "same transaction" test, see Harris v. Oklahoma, 433 U.S. 682, 683 (1977) (Brennan, Marshall, J.J., concurring); Thompson v. Oklahoma, 429 U.S. 1053, 1053-54 (1977) (Brennan, Marshall, J.J., dissenting from denial of *writ of certiorari*).
47. *See* note 45 *supra.*

Thomas was decided upon the first unarticulated use of a hybrid merger test. In that case, which involved successive prosecutions, the court of appeals reversed a conviction for unauthorized use of a motor vehicle,[48] concluding that all of the *elements* of that offense were contained in the offense of driving a vehicle without consent of the owner,[49] of which Thomas had been convicted previously. The second conviction was prohibited by what the court called the "required evidence" test, but only because the *evidence adduced at trial* to prove Thomas guilty of unauthorized use was identical to the evidence adduced at trial in the first conviction.[50] The court held that the two offenses, while "not precisely the same"[51] elementally, would be considered the same for the purposes of the double jeopardy clause.[52] This conclusion was hardly the result of a strict application of the "required evidence" test. In fact, it appears to have been an application to some extent of the "actual evidence" test, as the court examined the theory under which the state prosecuted Thomas and viewed the evidence adduced at trial. The court, in applying a hybrid version of the "required evidence" test, provided the background for the holding in *Newton*.

IV. NEWTON ANALYSIS

In interpreting the "required evidence" test in *Newton*, the court of appeals concluded that if the elements of one offense necessarily required "proof sufficient to establish the underlying [offense],"[53] then the underlying offense merged into the greater offense.[54] The majority noted that to obtain a felony-murder conviction the prosecution must prove two sets of elements. First, the prosecution is required to prove every element of the specific felony or its attempt.[55] Secondly, the prosecution must prove a resulting death having a "direct causal connection"[56] to the underlying felony. If these two sets of elements are compared, it becomes obvious that the "only additional fact necessary to secure the first degree murder conviction [upon the felony-murder theory], which [was] not necessary to secure a conviction for the underlying felony, [was] proof of death."[57]

48. MD. ANN. CODE art. 27, § 349 (1976). "The offense can be established either by showing an entry and a taking or by showing a taking of the vehicle from wherever it may be located." Thomas v. State, 277 Md. 257, 269, 353 A.2d 240, 248 (1976).
49. MD. ANN. CODE art. 66½, § 4-102 (1970) (now amended and codified in MD. TRANSP. CODE ANN. § 14-102 (1977)).
50. Thomas v. State, 277 Md. 257, 270, 353 A.2d 240, 248 (1976).
51. *Id.*
52. *Id.* People v. Gray, 69 Ill. 2d 44, 51-52, 370 N.E.2d 797, 800 (1977).
53. 280 Md. at 273 n.2, 373 A.2d at 269 n.2.
54. *Id.* at 269, 373 A.2d at 267.
55. MD. ANN. CODE art. 27, §§ 408-410 (1976 & Supp. 1977). *See* note 5 *supra*.
56. Mumford v. State, 19 Md. App. 640, 644, 313 A.2d 563, 566 (1974).
57. Newton v. State, 280 Md. at 269, 373 A.2d at 267.

Proof of the underlying felony relieved the prosecution of the burden of establishing other elements normally required to prove first degree murder,[58] namely, premeditation, willfulness, and deliberateness.[59] Therefore, proof of the underlying felony was an *alternative* set of elements in proving first degree murder, only demanded, however, by a felony-murder theory. Under this alternative mode of proving first degree murder, the abstract elements of first degree murder are conspicuously absent; no proof of premeditation, willfulness, and deliberateness, as conceived in ordinary first degree murder cases, are required.

When not employing a felony-murder theory, the elements of attempted armed robbery and the elements of murder are not identical.[60] This contradiction, an obvious merging of elements under felony-murder, as opposed to an irreconcilable set of non-merging elements under ordinary first degree murder and attempted armed robbery, that the dissent in *Newton* addressed.

This conflict is no easier to resolve in light of the clear import of the double jeopardy clause — to prevent multiple punishment for the "same punishable offense."[61] The *Newton* majority, in attempting to resolve this conflict, equivocated. It applied the "required evidence" test not in a vacuum, but with a careful view of the offenses and their "various incidents,"[62] disclosed as the proof unfolded. This application was made more palatable by the circumstances in *Newton*. Only one offense in this felony-murder situation, the murder, required proof of a fact, a death, which the other, the felony, did not.[63] Under such analysis the underlying felony merged into the murder. *Newton,* although couched in terms of the "required evidence" test, may be read as setting forth a hybrid test. This hybrid test may have offered a facile means of resolving the *Newton* appeal, but it may prove difficult to employ in future cases involving merger of offenses.

In most of the other jurisdictions which have held that an underlying felony merged under the "required evidence" test upon

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58. This requirement is normal in the sense that unless a murder is committed in the perpetration of certain enumerated felonies, MD. ANN. CODE art. 27, §§ 408-410 (1976 & Supp. 1977), the state must prove that the killing was premeditated, willful and deliberate in order to obtain a first degree murder conviction. The intent to commit the underlying felony supplants the intent aspect of malice necessary for a first degree murder conviction. Warren v. State, 29 Md. App. 560, 565-67, 350 A.2d 173, 177-79 (1976).

59. MD. ANN. CODE art. 27, § 407 (1976) provides: "[A]ll murder which shall be perpetrated by means of poison or lying in wait, or by any kind of willful, deliberate and premeditated killing shall be murder in the first degree."

60. Newton v. State, 280 Md. at 270-71, 373 A.2d at 267-68, (quoting State v. Thompson, 280 N.C. 202, 215-16, 185 S.E.2d 666, 675 (1972)).

61. Note, *The Protection From Multiple Trials*, 11 STAN. L. REV. 735, 738 (1959). *See Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873); note 3 *supra*.

62. *In re* Nielsen, 131 U.S. 176, 188 (1889).

63. Newton v. State, 280 Md. at 269, 373 A.2d at 267.

conviction of the felony-murder, the courts have emphasized two factors: that the underlying felony "was an essential and indispensable element in the State's proof of murder,"[64] and, that the "gravamen" of the offense was the murder and not the underlying felony which precipitated the murder.[65] Regardless of how they have arrived at the conclusion that the underlying felony merged, the courts in all of the cases reaching that result have taken note of the proof adduced at trial and the factual situation in which the respective crimes were committed.[66]

The *Newton* dissent based its argument on the theory that felony-murder was but a "species of murder in the first degree [and] not . . . a new crime."[67] Under this view, those sections of the Maryland Annotated Code which pertained to first degree murder[68] merely listed and classified different methods by which a homicide was deemed to be first degree murder. In the dissent's interpretation, while each section might well have required different proof,[69] this did not change the nature of the crime itself. Thus, a conviction of first degree murder could have been obtained without proving an attempted armed robbery. The necessary elements of each crime were "manifestly different and distinct; each crime [could] be proved independently of the other."[70] The dissent charged that the majority had, in reality, applied the "actual evidence" test,[71] which was specifically rejected by the Supreme Court in *Harris v. United States,*[72] and that the majority had found a merger based "on the

64. State v. Thompson, 280 N.C. 202, 215, 185 S.E.2d 666, 675 (1972); *accord,* State *ex rel.* Wikberg v. Henderson, 292 So. 2d 505, 509 (La. 1974); People v. Anderson, 62 Mich. App. 475, 483, 233 N.W.2d 620, 624 (1975). *See* note 92 *infra.*

65. *E.g.,* State *ex rel.* Wikberg v. Henderson, 292 So. 2d 505, 508-09 (La. 1974).

66. *E.g.,* People v. Anderson, 62 Mich. App. 475, 233 N.W.2d 620 (1975), in which the court could not determine whether the first degree murder conviction was based on an armed robbery pursuant to a felony-murder theory, or independent of that underlying felony. The court felt obligated to resolve any doubt in favor of the defendant. *Id.* at 482, 233 N.W.2d at 623-24. *Accord,* Frye v. State, 37 Md. App. 476, 378 A.2d 155 (1977). *Contra,* Godwin v. State, 38 Md. App. 716, 382 A.2d 596 (1977). *See* text accompanying notes 97 & 107 *infra.*

67. 280 Md. at 276, 373 A.2d at 270. At common law, all homicides were either murder or manslaughter. While further codification subdivided homicide into first degree murder, second degree murder and manslaughter and although the felony-murder variety of first degree murder was codified, nevertheless felony-murder was not made a new crime. *See* Wood v. State, 191 Md. 658, 666-69, 62 A.2d 576, 579-80 (1948); Evans v. State, 28 Md. App. 640, 686 n.23, 349 A.2d 300, 329-30 n.23 (1975), *aff'd,* 278 Md. 197, 362 A.2d 629 (1976). *See generally* Davis v. State, 39 Md. 355, 374 (1874).

68. MD. ANN. CODE art. 27, §§ 407-10 (1976 & Supp. 1977).

69. While the *Newton* dissenters acknowledged the distinction in proof necessary to convict for premeditated murder as opposed to conviction for murder in the perpetration of a robbery, they would not, in construing the "required evidence" test, apply this or any distinction with regard to proof. 280 Md. at 275-77, 373 A.2d at 270-71. *See* notes 74-78 and accompanying text *infra.*

70. 280 Md. at 276, 373 A.2d at 270.

71. *See* note 22 and accompanying text *supra.*

72. 359 U.S. 19 (1959).

actual evidence adduced at trial . . . rather than on the elements generally required to establish [the] crime."[73] The "required evidence" test, the dissent implied, was to be applied to the elements of the respective offenses as they existed in the abstract, either before or at the time of trial, and not as the evidence unfolded. Thus, in applying this strict "required evidence" test, the dissent would find that attempted armed robbery did not merge into first degree murder, regardless of whether the state ultimately decided to prosecute pursuant to the felony-murder doctrine, sought to prove premeditation, willfulness, and deliberateness, or employed both theories.

The dissent cited a number of cases in which other courts adopted a strict construction of the "required evidence" test in a felony-murder situation.[74] The dissent claimed that the cases represented "the clear weight of authority in the country."[75] In *State v. Hall*,[76] the Idaho Supreme Court succinctly stated what, in this view, is the crux of the issue. The underlying felony and the murder were, in the *Hall* court's opinion, separate offenses regardless of the factual setting in which they occurred. Because a murder, for example, could have taken place without a robbery, the robbery would only have been a "condition or circumstance characterizing the murder a first degree."[77] Under this view, unless each offense has elements necessarily included in the other, making both offenses the same in law as well as fact,[78] the offenses do not merge regardless of the evidence. The underlying felony is not an element of the felony-murder; otherwise, "the elements of [felony-murder] would be as various as the underlying felonies might be."[79]

In some of the cases cited by the dissent in *Newton*, the courts implicitly relied on a presumed legislative intent behind their respective states' felony-murder statutes.[80] A legislature may well

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73. 280 Md. at 276, 373 A.2d at 271. *See generally* United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961); Thomas v. State, 277 Md. 257, 265 n.4, 353 A.2d 240, 245 n.4 (1976). *See also* Carroway, *Pervasive Multiple Offense Problems — A Policy Analysis*, 1971 UTAH. L. REV. 105, 108-09.
74. *E.g.*, Turner v. State, 248 Ark. 367, 452 S.W.2d 317 (1970), *rev'd on other grounds*, 407 U.S. 366 (1972); State v. Hall, 86 Idaho 63, 383 P.2d 602 (1963); State v. Chambers, 524 S.W.2d 826 (Mo. 1975), *cert. denied*, 423 U.S. 1058 (1976); People v. Tutuska, 19 Misc. 2d 308, 192 N.Y.S.2d 350 (1959); Harris v. State, 555 P.2d 76 (Okla. Crim. App. 1976), *rev'd*, 433 U.S. 682 (1977); State v. Barton, 5 Wash. 2d 234, 105 P.2d 63 (1940).
75. 280 Md. at 275, 373 A.2d at 270.
76. 86 Idaho 63, 383 P.2d 602 (1963).
77. *Id.* at 69, 383 P.2d at 606. The dissenters in *Newton* also felt that evidence of the underlying felony only took the place of malice and was not an element of the murder. 280 Md. at 281, 373 A.2d at 273.
78. State v. Hall, 86 Idaho at 69-70, 383 P.2d at 606.
79. People v. Tutuska, 19 Misc. 2d 308, 314, 192 N.Y.S.2d 350, 357 (1959).
80. *E.g.*, State v. Davis, 68 N.J. 69, 77-78, 342 A.2d 841, 845 (1975). *See* Carmody v. Seventh Judicial District Court, 81 Nev. 83, 85, 398 P.2d 706, 707 (1965); People v. Tutuska, 19 Misc. 2d 308, 314, 192 N.Y.S.2d 350, 357 (1959).

have intended in a statutory definition of felony-murder that there be a separate punishment in each step leading to the completion of the crime.[81] Since each offense focuses on a different act, albeit perhaps in one transaction, each crime can be proved without the other. Determining that one offense is necessarily included in another within the meaning of the "required evidence" test does not mean that the lesser offense is merely an aspect of the major offense or a link in a chain leading to one result only. Rather, the lesser offense, by the legal definition of that offense, must be committed in the course of committing the greater offense.

The *Newton* dissent would not have found a merger beyond the most obvious situations.[82] If, indeed, a primary purpose of the double jeopardy clause "is to limit [the] discretion of courts and prosecutors,"[83] such a strict application of the "required evidence" test does not foster such a purpose.

Recently, the Supreme Court in *Brown v. Ohio,*[84] and *Harris v. Oklahoma,*[85] took an even more expansive view of what makes two offenses one in law. Both cases involved successive prosecutions. In *Harris,* the Court held that since a conviction of felony-murder was dependent upon a conviction of a lesser crime — in that case, robbery with firearms — the lesser crime merged upon conviction of the greater.[86] The Court concluded that a "person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."[87]

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81. Two recent decisions, Whalen v. United States, 379 A.2d 1152 (D.C. 1977), and Blango v. United States, 373 A.2d 885 (D.C. 1977), provide an interesting analysis of the congressional intent behind the District of Columbia's felony-murder statute, D.C. CODE ANN. §§ 22-2401 (1973). *Whalen,* which was decided over four months after the Supreme Court decided Harris v. Oklahoma, 433 U.S. 682 (1977), ignored the underlying rationale of that decision — that the underlying felony merges upon conviction of felony-murder. Stressing the societal interest in each of the crimes, the underlying felony and the murder, the District of Columbia Court of Appeals allowed both convictions to stand. Whalen v. United States, 379 A.2d at 1158-60; Blango v. United States, 373 A.2d at 888-89; *accord,* Ladd v. State, 568 P.2d 960, 970-72 (Alaska 1977); Harris v. United States, 377 A.2d 34, 38 (D.C. 1977); State v. Davis, 68 N.J. 69, 77-78, 342 A.2d 841, 845 (1975); Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 302-13 (1965). *See also* Ladd v. State, 568 P.2d 960, 970-72 (Alaska 1977); Commonwealth v. Sparrow, 471 Pa. 490, 502-07, 370 A.2d 712, 718-21 (1977).

82. *See* text accompanying notes 19-21 *supra.*

83. Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 302 (1965).

84. 432 U.S. 161 (1977).

85. 433 U.S. 682 (1977).

86. *Id.* at 682-83. The decision from the Oklahoma court was cited by Chief Judge Murphy in his dissent in *Newton* as representative of the majority of jurisdictions which allowed convictions and sentences both for the felony-murder and the underlying felony. 280 Md. at 275 n.1, 373 A.2d at 270 n.1.

87. 433 U.S. at 683 (citing *In re* Nielsen, 131 U.S. 176, 188 (1889)). *See* text accompanying note 62 *supra.*

In *Brown,* the Court began its discussion by stating that for double jeopardy purposes, the identity of offenses did not depend on exact identity either of elements or of proof necessary to convict a defendant.[88] The facts of *Brown* were extremely similar to those of *Thomas.* In *Brown,* the defendant was charged in one municipal locale with "taking or operating a car without the owner's consent"[89] and subsequently charged in another locale with auto theft.[90] The Court, applying what it claimed to be the "required evidence" test, concluded that since the lesser offense contained no elements other than those of the greater offense, the two offenses were the same for double jeopardy purposes.[91] The Court's holdings in *Harris* and *Brown* have seriously diminished the vitality of the strict "required evidence" test. Although the Supreme Court claimed to have applied the "required evidence" test, the Court, like the court of appeals, appears in fact to have used a modified version of the "actual evidence" test.

The exact shape of the proper test has not yet been settled. The majority of the Supreme Court, the majority judges in *Newton,* and the *Newton* dissenters agree that the "required evidence" test is the constitutional standard; nevertheless, the prevailing test is clearly not the "required evidence" test in its strict form. That strict test was the standard advocated by the dissent in *Newton,* namely that two offenses are the same for double jeopardy purposes only if, before trial, all the elements of one offense are necessarily included in the other offense. The majority in *Newton,* in a view subsequently bolstered by both *Harris v. Oklahoma* and *Brown,* would not construe double jeopardy in a restrictive manner, such as looking solely at the elements of the crimes on paper. While *Harris v. United States,* which rejected the "actual evidence" test, has never explicitly been overruled, the *Newton* majority and the majority of Supreme Court justices would to some extent take cognizance of the proof as well as the elements of the crimes. The "actual evidence" test has not been implemented fully, but the nature of the proof offered at trial is no longer meaningless in determining the merger of offenses.[92]

A hybrid test appears to be emerging. The test examines first, whether all the elements of a lesser offense, such as an underlying felony, are necessarily included in the elements of a greater offense, such as felony-murder. If they are not, the text examines, secondly, whether the elements of the lesser offense are "various incident[s]"[93]

88. 432 U.S. at 164.
89. *Id.* at 162.
90. *Id.* at 163.
91. *Id.* at 167-69.
92. *E.g.,* Brooks v. State, 38 Md. App. 550, 552-53, 381 A.2d 718, 720-21 (1978) (*certiorari* was granted by the court of appeals on March 23, 1978 (No. 469)). People v. Gray, 69 Ill. 2d 44, 51-52, 370 N.E.2d 797, 800 (1977).
93. *See* text accompanying notes 62 & 87 *supra.*

in the proof of the greater offense. This hybrid test, if adopted, would effectuate the purpose of the double jeopardy clause. It would not rely on the actual evidence adduced and would stop far short of adopting the "same transaction" test. It would allow a court to read the double jeopardy clause in the expansive manner which is warranted.[94]

Questions remain about the implementation of the *Newton* merger theory. One vital question, alluded to but not definitively answered in *Newton,* concerns the situation in which a jury considers a first degree murder charge tried upon a theory of premeditation, willfulness, and deliberateness,[95] as well as upon a felony-murder theory.[96] In the recent case of *Frye v. State,*[97] the court of special appeals considered the application of a *Newton* dictum that if the evidence is sufficient for a jury to find premeditated murder, and the theory upon which the jury convicts is not articulated or manifested upon a verdict sheet,[98] the offenses do not merge.[99] The state in *Frye* relied upon this dictum and also upon *Robinson v. State.*[100] In *Robinson,* evidence was presented and submitted to the jury upon both a premeditated and felony-murder theory. The court of appeals held that, taking into consideration all the evidence, the jury's verdict in all probability[101] reflected a finding of a premeditated, willful, and deliberate murder. The *Frye* court, in an opinion by Chief Judge Gilbert, incorporated the portion which appears in italics in the *Newton* dicta:

> If . . . the murder conviction is premised upon independent proof of wilfulness, premeditation and deliberation under § 407, or if the evidence is sufficient for a jury [*under proper advisory instructions from the court*] to find those elements, the offenses do not merge. Each offense would then require proof of facts which the other did not, and convictions on both would be proper.[102]

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94. *See generally* Carroway, *Pervasive Multiple Offense Problems — A Policy Analysis,* 1971 UTAH L. REV. 105, 118-19; Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 311-21 (1965); Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties,* 67 YALE L.J. 916, 924-31 (1958).
95. *See* note 59 *supra* and accompanying text.
96. *See* notes 5 & 55 *supra* and accompanying text.
97. 37 Md. App. 476, 378 A.2d 155 (1977). The court of appeals granted *certiorari* on December 23, 1977.
98. The verdict sheet is helpful to both the jury and the trial judge, especially where a number of issues are submitted to the jury. The sheet reflects the offenses the jury is to consider; the jury checks "guilty" or "not guilty" as to each crime. This tends to create less confusion both for the jury in deliberating and for the trial judge in instructing.
99. Newton v. State, 280 Md. 260, 269, 373 A.2d 262, 267 (1977).
100. 249 Md. 200, 238 A.2d 875, *cert. denied,* 393 U.S. 928 (1968).
101. *Id.* at 209, 238 A.2d at 881.
102. 37 Md. App. at 479, 378 A.2d at 156 (emphasis in original) (quoting in part Newton v. State, 280 Md. 260, 269, 373 A.2d 262, 267 (1977)).

The court stated further that when there is sufficient evidence of both a premeditated and a felony-murder, the trial judge should instruct the jury to indicate specifically under which theory its verdict is based, where there is a finding of first degree murder. The court reasoned that in any felony-murder situation there would be some independent evidence of premeditation.[103] If the jury's verdict were based on a felony-murder, a guilty verdict upon the underlying felony would merge into the murder, precluding the imposition of another sentence based on the underlying felony.[104] Without such an instruction, the court concluded, it could not determine under which theory the jury returned its verdict.[105] The court "resolve[d] the doubt in favor of the appellant"[106] and vacated the conviction of the underlying felony. The *Frye* court required, in order to avoid a merger under *Newton,* the specific articulation of the jury's theory, and set forth a procedure for a trial judge to follow when both theories of first degree murder are considered by a jury.

The clarity of *Frye* soon was destroyed, however, by another court of special appeals case, *Godwin v. State.*[107] The court, in an opinion by Judge Moylan, indicated that under the circumstances, the first degree murder verdicts returned by the jury without articulation of the theory behind them had to have been based upon premeditation and not felony-murder, even though both theories were submitted to the jury. In refusing to hold that Godwin's kidnapping convictions merged into his murder convictions, the court found the evidence of premeditation so overwhelming that "[u]nder the circumstances of this case, a merger of the convictions [was] not remotely called for."[108] While the court in *Godwin* placed more emphasis on the sordid facts than did the court in *Frye,* the *Godwin* court could have been no more certain of the jury's rationale. Whether *Godwin* incorrectly restricts *Newton* or whether *Frye*

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103. 37 Md. App. at 479, 378 A.2d at 156.
104. *Id.* at 480, 378 A.2d at 157.
105. *Id. Accord,* People v. Anderson, 62 Mich. App. 475, 233 N.W.2d 620 (1975); Commonwealth v. Sparrow, 471 Pa. 490, 516-22, 370 A.2d 712, 726-29 (1977) (Nix, J., dissenting).
106. 37 Md. App. at 480, 378 A.2d at 157.
107. 38 Md. App. 716, 382 A.2d 596 (1977). *Godwin* was filed on November 14, 1977, one month after *Frye.*

Godwin was originally reported in 379 A.2d 754 (1977). An explanation was added by Judge Moylan distinguishing *Frye* and relying on Robinson v. State, 249 Md. 200, 238 A.2d 875, *cert. denied,* 393 U.S. 928 (1968), thus necessitating the latter citation, 382 A.2d 596 (1977).
108. Godwin v. State, 38 Md. App. at 737, 382 A.2d at 608. The identical conclusion, based upon the same factual circumstances, was reached in Jones v. State, 38 Md. App. 288, 303-05, 380 A.2d 659, 668 (1977). The state, in appealing *Frye, see* note 97 *supra,* has taken the position that merger should occur only if the sole possible rationale for the first degree murder verdict is a felony-murder theory. Petitioner's Brief for Certiorari at 3-6. *See* Pulley v. State, 38 Md. App. 682, 691, 382 A.2d 621, 626-27 (1978); Commonwealth v. Sparrow, 471 Pa. 490, 502-07, 370 A.2d 712, 718-21 (1977).

unnecessarily broadens the scope of *Newton* remains to be determined by the court of appeals. If a liberal construction of the double jeopardy clause with respect to the merger of offenses is necessary pursuant to *Newton,* then the *Frye* court would seem to have taken the proper approach.

Another question which remains unanswered concerns the situation in which the trier of fact convicts on a felony-murder theory where there are a number of underlying felonies. Do all of the underlying felonies merge — some — or just one? Using the rationale of *Frye* and the "required evidence" test, all of the underlying offenses connected to or which could have served as a basis for a finding of felony-murder would be merged into the murder conviction.

In any criminal trial in which multiple offenses of a potentially merging nature have been submitted to the jury and the jury returns a guilty verdict as to each, *Frye* necessitates that the judge, prior to sentencing, merge the lesser offense into the greater ones if the "required evidence" test so dictates. Where the trial judge does not *sua sponte* merge the offenses, the *Newton* rule clearly would sanction a motion to correct an illegal sentence,[109] or a direct appeal to the court of special appeals grounded on the illegality in sentencing. The most pronounced practical effect of *Newton,* however, probably will be in the context of collateral review[110] of previously finalized homicide cases tried upon a felony-murder theory. Although neither the courts of appeals nor the court of special appeals yet has considered whether *Newton* must be applied retroactively, retroactive application appears necessary under accepted principles.[111]

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109. MD. RULE 774(a) (1977). This provision gives the trial court the power to correct an illegal sentence at any time.

110. In Maryland, collateral review is generally conducted under the Post Conviction Procedure Act, MD. ANN. CODE art. 27, § 645(A) (Supp. 1977). *See* Jourdan v. State, 275 Md. 495, 341 A.2d 388 (1975) (held that, absent an effective waiver, a claim of double jeopardy could be raised on post conviction).

111. Courts generally apply a three-pronged test to determine whether a ruling on constitutional grounds should be applied retroactively. "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967); *accord,* Robinson v. Neil, 409 U.S. 505, 507-11 (1973); Linkletter v. Walker, 381 U.S. 618, 627-29, 636 (1965); Wiggins v. State, 275 Md. 689, 718, 344 A.2d 80, 96-97 (1975) (Eldridge, J., dissenting). The majority in *Wiggins* held that "retroactive application is mandated, (1) where the old rule affected the integrity of the fact-finding process, (2) where no trial was constitutionally permissible, and (3) *where the punishment is not constitutionally permissible.*" 275 Md. at 701, 344 A.2d at 87 (emphasis supplied). Because an underlying felony merges upon conviction of felony-murder, any punishment of the underlying felony is prohibited.

V. CONCLUSION

Newton marks the ascendancy of a new approach to merger. The court of appeals, while reaffirming the use of the "required evidence" test, also examined the evidence adduced at trial. This approach stops short of adopting the "actual evidence" test, but allows a court some flexibility in determining if two offenses are to be deemed the same for double jeopardy purposes. That flexibiliy allows the court to effectuate the essential reason for the double jeopardy clause — to prevent a person from twice being convicted for the same offense.[112]

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112. *See* text accompanying note 61 *supra*.