University of Baltimore Law Review

Volume 24
Issue 1 *Fall 1994*

Article 9

1994

Notes: The Uncertain Status of the Required Evidence Test in Resolving Multiple Punishment Questions in Maryland. Eldridge v. State, 329 Md. 307, 619 a.2d 531 (1993)

Robert A. Scott
University of Baltimore School of Law

Follow this and additional works at: http://scholarworks.law.ubalt.edu/ublr

Part of the Law Commons

Recommended Citation
Scott, Robert A. (1994) "Notes: The Uncertain Status of the Required Evidence Test in Resolving Multiple Punishment Questions in Maryland. Eldridge v. State, 329 Md. 307, 619 a.2d 531 (1993)," *University of Baltimore Law Review*: Vol. 24: Iss. 1, Article 9.
Available at: http://scholarworks.law.ubalt.edu/ublr/vol24/iss1/9

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

THE UNCERTAIN STATUS OF THE REQUIRED-EVIDENCE TEST IN RESOLVING MULTIPLE-PUNISHMENT QUESTIONS IN MARYLAND. *Eldridge v. State*, 329 Md. 307, 619 A.2d 531 (1993).

I. INTRODUCTION

With the explosive growth of violent crime, legislatures are under increasing pressure to "get tough" on criminals. This political pressure has resulted in the proliferation and expansion of statutes aimed at punishing criminal behavior.[1] Consequently, a defendant's single act or course of conduct is more likely than ever to violate more than one criminal statute.[2] For example, a defendant who robs a grocery store at gunpoint in Maryland can be convicted and sentenced not only for armed robbery, but also for using a handgun in the commission of a felony.[3] These kinds of multiple punishments implicate the Double Jeopardy Clause of the United States Constitution[4] and create difficult questions for sentencing judges.[5]

In *Eldridge v. State*,[6] the Court of Appeals of Maryland considered a classic multiple-punishment question. The facts in *Eldridge* represent the typical manner in which multiple-punishment questions arise. James Eldridge entered a bar with a so-called "starter's pistol," or phony gun, on December 18, 1989.[7] He threatened the proprietor with the weapon and demanded money.[8] A Baltimore City police

---

1. *See* Kenneth G. Schuler, Note, *Continuing Criminal Enterprise, Conspiracy, and the Multiple Punishment Doctrine*, 91 MICH. L. REV. 2220, 2220-25 (1993).
2. RICHARD P. GILBERT & CHARLES E. MOYLAN, JR., MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE § 37.6, at 441 (1983).
3. Whack v. State, 288 Md. 137, 416 A.2d 265 (1980).
4. U.S. CONST. amend. V; *see* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (holding that the double jeopardy clause of the Fifth Amendment prohibits multiple punishments for the same criminal offense); *see also* Dana M. Franklin, Note, *Are Sanctions Imposed Under the Multiple Punishment Doctrine Violative of the Double Jeopardy Clause of the Fifth Amendment?* Missouri v. Hunter, 27 HOW. L.J. 371 (1984).
5. *See infra* text accompanying notes 155-61; *see also* Franklin, *supra* note 4, at 371-72.
6. 329 Md. 307, 619 A.2d 531 (1993).
7. *Id.* at 310, 619 A.2d at 532-33. Although a "starter's pistol" is incapable of firing a projectile and therefore is not a handgun under Maryland law, the court held that the pistol was nonetheless a deadly weapon because it was heavy enough to be used as a bludgeon and was capable of instilling fear in others. *Id.* at 310, 619 A.2d at 533.
8. *Id.* at 310, 619 A.2d at 533.

officer, however, arrived to interrupt the crime.[9] Eldridge was charged and convicted by a jury of three separate crimes: armed robbery, carrying a deadly weapon concealed, and carrying a deadly weapon openly with intent to injure.[10]

Upon conviction, the trial judge sentenced Eldridge to twenty years for the armed robbery, three years for carrying a weapon concealed, and three years for carrying a weapon openly with intent to injure.[11] The sentences were to run consecutively, for a total of twenty-six years.[12] The sentences were affirmed by the Court of Special Appeals of Maryland in an unreported opinion.[13] The Court of Appeals of Maryland reversed, holding that the convictions and sentences for the weapons violations in addition to the conviction and twenty year sentence for armed robbery were improper.[14] Six years of Eldridge's twenty-six year sentence were thereby vacated.[15]

In reaching its decision in *Eldridge*, the Maryland high court appears to have adopted a new analytical approach to multiple-punishment questions.[16] The court of appeals applied traditional rules of statutory construction to determine if a defendant could properly receive separate sentences for violating two separate statutory provisions.[17] Accordingly, the *Eldridge* decision signals a move by the court toward the adoption of the approach to multiple-punishment questions developed by the United States Supreme Court and other appellate courts.[18] The problems with *Eldridge*, however, include the court of appeals' failure to clearly define this new doctrine and to fully repudiate the court's traditional and highly confusing methodology for resolving multiple-punishment questions.

II. BACKGROUND

Multiple-punishment questions arise in two sets of circumstances: (1) where a single course of conduct is charged as multiple violations

---

9. *Id.*
10. *Id.* at 308-09, 619 A.2d at 532. Section 488 of Article 27 authorizes punishment for the common-law felony of robbery, when the robbery is committed with a deadly weapon. *Id.* at 311, 619 A.2d 535-36 (citing MD. ANN. CODE art. 27, § 488 (1992)). Section 36(a) of Article 27 creates the misdemeanor of carrying a deadly weapon either "concealed on or about [the] person" or "openly with the intent to injure." *Id.* at 311, 619 A.2d at 533 (citing MD. ANN. CODE art. 27, § 36 (1992)). Section 36 does not apply to handguns, which are governed by § 36B. *See* MD. ANN. CODE art. 27, § 36B (1992).
11. *Eldridge*, 329 Md. at 309, 619 A.2d at 532.
12. *Id.*
13. *Id.*
14. *Id.* at 320, 619 A.2d at 537-38.
15. *Id.* at 320-21, 619 A.2d at 537-38.
16. *See infra* part V.
17. *See infra* part V.
18. *See infra* part IV.

of the same criminal statute, and (2) where a single act or transaction is charged as violating two or more separate statutes.[19] In *Eldridge*, the court of appeals was concerned with the second type of situation.[20]

A. Common-Law Merger

At common law, questions of whether a single act or course of conduct could be subject to multiple punishments were resolved through application of the "merger doctrine."[21] Under this principle, if a single criminal act constituted both a felony and a misdemeanor, there could be no punishment imposed for the misdemeanor.[22] The lesser crime was said to have "merged" into the felony.[23]

The common-law doctrine of merger, however, was not easily applied in twentieth century America.[24] By definition, its application was limited to cases in which a single act constituted both a misdemeanor and a felony.[25] It was of no use in cases where a single act was charged as two misdemeanors or two felonies.[26] Accordingly, the doctrine was never fully embraced by American courts.[27] By 1962,

---

19. *See* Randall Book Corp. v. State, 316 Md. 315, 324, 558 A.2d 715, 720 (1989). The first type of situation is typically referred to as a "multiplicity," or the charging of the same offense in more than one count. *See* Brown v. State, 311 Md. 426, 432 n.5, 535 A.2d 485, 488 n.5 (1988). The question presents itself, for example, when a single transaction affects more than one victim. *See id.* at 429, 535 A.2d at 487. The propriety of cumulative punishments under such circumstances is resolved through a court determination of legislative intent. *See id.* at 432, 535 A.2d at 488. If the legislature intended a statute to authorize multiple punishments for a single course of conduct, courts will uphold multiple punishments. *See id.* at 436, 535 A.2d at 490. In discerning legislative intent in such cases, courts will employ traditional rules of statutory construction. *See id.* at 435, 535 A.2d at 489.
20. Eldridge's convictions and sentences for two violations of § 36(a) were based on the trial judge's belief that Eldridge had violated two different provisions of the same statute—one proscribing the carrying of a weapon concealed and the other prohibiting the carrying of a weapon "openly with intent to injure." Eldridge v. State, 329 Md. 307, 312, 619 A.2d 531, 534 (1993). The trial judge saw these violations as two separate and distinct offenses, each barred by a different provision of the statute. *Id.* When conduct violates more than one provision of the same statute, the question is the same as if both offenses were contained in separate statutes. *Brown*, 311 Md. at 431, 535 A.2d at 487 (citing Gore v. United States, 357 U.S. 386, 393-94 (1958)).
21. *See* Veney v. State, 227 Md. 608, 612, 177 A.2d 883, 885 (1962); JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 786-90 (7th ed. 1877).
22. *Veney*, 227 Md. at 612, 177 A.2d at 885.
23. *See* Gilpin v. State, 142 Md. 464, 468-69, 121 A. 354, 356 (1923).
24. *See Veney*, 227 Md. at 612, 177 A.2d at 885-86.
25. *Gilpin*, 142 Md. at 469, 121 A. at 356.
26. *Id.*
27. *Id.* at 469-70, 121 A. at 356.

the Court of Appeals of Maryland had expressly repudiated the doctrine.[28]

The court developed "a more modern concept of merger based on double jeopardy principles"[29] to resolve multiple-punishment questions. This approach focused on the minimum evidence required to convict the accused for each offense being charged.[30] The basic principle was stated in its earliest form by the court of appeals in 1923: "[I]f the lesser felony is a necessary ingredient of the other, a conviction of one will bar prosecution for the other."[31] In other words, if all the elements of a lesser offense were included in the greater offense, the conviction for the lesser offense merged into the conviction for the greater offense. Therefore, there could be only one punishment under the common-law bar against double jeopardy.[32]

B. The Required-Evidence Test

In 1962, the court of appeals, in *Bennett v. State*,[33] clarified its standard for determining whether a single act could constitute two offenses, thereby allowing two punishments for the single act. Incorporating principles from federal case law, the court adopted the "required-evidence test"[34] from *Blockburger v. United States*[35] that provides: "[W]here 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 that the other does not."[36]

---

28. Bennett v. State, 229 Md. 208, 212, 182 A.2d 815, 817 (1962).
29. Newton v. State, 280 Md. 260, 267, 373 A.2d 262, 266 (1977).
30. Thomas v. State, 277 Md. 257, 266, 353 A.2d 240, 246 (1976).
31. *Gilpin*, 142 Md. at 469, 121 A. at 356.
32. *Id.* At the time, the prohibition against double jeopardy in Maryland was strictly a rule of state common law. Maryland's constitution has no bar against double jeopardy, *Bennett*, 229 Md. at 212, 182 A.2d at 817, and federal constitutional restrictions on double jeopardy were not yet held applicable to the states until Benton v. Maryland, 395 U.S. 784 (1969). *See* GILBERT & MOYLAN, *supra* note 2, § 37.1, at 4432-33; *see also infra* note 37.
33. 229 Md. 208, 182 A.2d 815 (1962).
34. *Id.* at 214, 182 A.2d at 818.
35. 284 U.S. 299 (1932).
36. *Id.* at 304 (quoted in *Bennett*, 229 Md. at 214, 182 A.2d at 818). The required-evidence test, developed in 16th century England, was first employed in the United States in Morey v. Commonwealth, 108 Mass. 433, 434 (1871). The test was adopted by the United States Supreme Court in Gaviers v. United States, 220 U.S. 338, 342 (1911), and in Blockburger v. United States, 284 U.S. 299 (1932). *See generally* Michael W. Prokopik, Note, *Under "Required Evidence" Test, Underlying Attempted Armed Robbery Merges Upon Conviction for Felony Murder:* Newton v. State, 7 U. BALT. L. REV. 345, 347 n.17 (1978).

The required-evidence test focuses on the elements necessary to prove each offense.[37] If each crime requires proof of one element not required to prove a violation of the other crime, the crimes are separate; cumulative convictions and punishments are allowed.[38] On the other hand, if all the elements of one crime are included in the other, so that the second crime requires proof of only one additional element, the crimes are deemed the same and multiple punishments are barred by double jeopardy principles.[39] For example, separate convictions and punishments are barred under the test for both simple assault and for assault with intent to rob.[40] The elements of the two crimes are exactly the same, except that assault with intent to rob requires the proof of one additional fact—the intent to rob.[41] Accordingly, the crime of assault is *included* within the crime of assault with intent to rob. Therefore, separate punishments for each crime are not allowed. Also prohibited under the required-evidence test are separate punishments for assault and rape,[42] and for battery and third-degree sexual assault.[43] Conversely, separate convictions and punishments are allowed under the test for third-degree sexual offense and assault with intent to maim.[44]

Seven years after the Court of Appeals of Maryland adopted the *Blockburger* test, United States Supreme Court rulings made application of the required-evidence test a constitutional mandate,[45]

---

37. Williams v. State, 323 Md. 312, 317, 593 A.2d 671, 673 (1991). The required-evidence test differs from the "actual evidence" test, which focuses on the evidence actually produced at trial to determine if two offenses are the same. Newton v. State, 280 Md. 260, 271, 373 A.2d 262, 268 (1977). The actual evidence test has been rejected by both the United States Supreme Court and the Court of Appeals of Maryland. *Id.* (citing to Harris v. United States, 359 U.S. 19 (1959), and Thomas v. State, 277 Md. 257, 265 n.4, 353 A.2d 240, 245 n.4 (1976)).
38. *Thomas*, 277 Md. at 267, 353 A.2d at 247.
39. *See id.*
40. *See* Simms v. State, 288 Md. 712, 717, 421 A.2d 957, 960-61 (1980).
41. *See id.* at 718-19, 421 A.2d at 960.
42. Green v. State, 243 Md. 75, 80-81, 220 A.2d 131, 135 (1966).
43. Biggus v. State, 323 Md. 339, 351, 593 A.2d 1060, 1065 (1991).
44. *See* Dillsworth v. State, 308 Md. 354, 360, 519 A.2d 1269, 1272 (1987).
45. In *Benton v. Maryland*, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment applied to the states through the Fourteenth Amendment's Due Process Clause. 395 U.S. 784, 793-96 (1969). That same year, the Court made clear that the Double Jeopardy Clause prohibited the imposition of multiple punishments for a single criminal offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Under these holdings, state courts are required to follow Supreme Court standards to determine if multiple punishments for a single act or course of conduct are constitutional. Newton v. State, 280 Md. 260, 263, 373 A.2d 262, 263 (1977); Thomas v. State, 277 Md. 257, 267 n.5, 353 A.2d 240, 246 n.5 (1976). As the court of appeals pointed out in *Newton*, however, Maryland had already adopted the required-

and Maryland courts dutifully applied it for several years thereafter.[46]

C. *Legislative Intent Becomes Dispositive*

1. Merger by Legislative Intent

In 1979, however, the court of appeals changed course. In *Brooks v. State*,[47] the court announced, in dictum, that the required-evidence test was "not the exclusive standard" for determining when two statutory violations based on the same transaction would be treated as one crime.[48] Following United States Supreme Court precedent, the court of appeals adopted the doctrine of "merger by legislative intent" as a companion to the *Blockburger* test.[49] Under the doctrine of merger by legislative intent, courts are allowed to determine, using traditional methods of statutory construction, whether the legislature truly intended to authorize separate punishments for the two crimes at issue.[50] In other words, even though two offenses might be separate under the *Blockburger* test, courts can use the doctrine of merger by legislative intent to prohibit separate punishments.[51]

In applying this doctrine, the Court of Appeals of Maryland looked to a number of factors to determine whether the legislature

---

evidence test to resolve multiple-punishment questions. *Newton*, 280 Md. at 267, 373 A.2d at 266. The significance of *Benton*, therefore, was not to change the standard used by Maryland courts, but to make the inquiry a constitutional mandate, rather than a rule of Maryland common law. *See Id.* at 267, 373 A.2d at 266.

46. *See Dillsworth*, 308 Md. at 358, 519 A.2d at 1270; Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979); *Newton*, 280 Md. 260, 373 A.2d 262. *But see* Bremer v. State, 18 Md. App. 291, 344-45, 307 A.2d 503, 534-35 (1973), *cert. denied*, 415 U.S. 930 (1974) (Court of Special Appeals of Maryland holding legislative intent dispositive in determining propriety of cumulative sentences).
47. 284 Md. 416, 397 A.2d 596 (1979).
48. *Id.* at 423, 397 A.2d at 599-600 (citing Simpson v. United States, 435 U.S. 6 (1978)). Although the reference in *Brooks* to the doctrine of merger by legislative intent appeared in dictum, the court applied the rule in subsequent cases. *See, e.g.*, State v. Jenkins, 307 Md. 501, 515 A.2d 465 (1986) (applying doctrine to merge assault with intent to maim into assault with intent to murder).
49. *Brooks*, 284 Md. at 423-24, 397 A.2d at 600. In *Simpson*, the Supreme Court applied a statutory-construction analysis, rather than the required-evidence test, to disallow cumulative punishments for a single bank robbery. *Simpson*, 435 U.S. at 13-16. The Court looked to the legislative history of the relevant statutes and applied the established rule of construction that any ambiguity concerning whether the legislature intended multiple punishments should be resolved in favor of the defendant. *Id.* at 14 (citing United States v. Bass, 404 U.S. 336 (1971)). As a result of *Benton*, Maryland was required to follow this standard in resolving multiple-punishment questions. *Newton*, 280 Md. at 263, 373 A.2d at 264; *see also supra* note 45.
50. *Brooks*, 284 Md. at 423-24, 397 A.2d at 600.
51. *See id.*

intended to authorize multiple punishments under separate statutes.[52] Included in these considerations are the language of the statutes at issue,[53] the statutes' legislative histories,[54] basic rules of statutory construction,[55] decisions from other jurisdictions,[56] and the fairness of imposing multiple punishments.[57]

2. Legislative Intent Authorizing Separate Punishments

One year after the court of appeals adopted the doctrine of merger by legislative intent, the court greatly expanded its application. In *Whack v. State*,[58] the court declared that if legislative intent could be employed to bar multiple punishments, it could also be used to justify them, despite the *Blockburger* test.[59] In *Whack*, the defendant was convicted of robbing a Safeway store in Landover, Maryland with a handgun.[60] Based on this single act, the defendant received two separate convictions and sentences—twenty years for armed robbery and five years for using a handgun in the commission of a felony.[61] The sentences were cumulative, for a total of twenty-five years.[62] In upholding the multiple punishments, the court of appeals

52. *See infra* notes 53-57 and accompanying text.
53. *See* Hunt v. State, 312 Md. 494, 510, 540 A.2d 1125, 1133 (1988), *cert. denied*, 502 U.S. 835 (1991), *habeas corpus denied*, Hunt v. State, 856 F. Supp. 251 (D. Md. 1994).
54. *See* Dickerson v. State, 324 Md. 163, 172, 596 A.2d 648, 652 (1991); Williams v. State, 323 Md. 312, 322, 593 A.2d 671, 676 (1991).
55. *See Dickerson*, 324 Md. 163, 596 A.2d 648 (holding that multiple punishments would be an illogical result). One rule of statutory construction the court of appeals has used frequently in resolving multiple-punishment questions is the "rule of lenity." *See* White v. State, 318 Md. 740, 744-45, 569 A.2d 1271, 1273 (1990). Under this rule, any doubt or ambiguity as to whether the legislature intended to punish both offenses is supposed to be resolved in favor of a single punishment. *Id.* At times, the Maryland high court has used the phrases "rule of lenity" and "merger by legislative intent" interchangeably. *Hunt*, 312 Md. at 510, 540 A.2d at 1133. This creates unnecessary confusion. As a practical matter, the rule of lenity, as applied by the court, operates as a rule of statutory construction. *White*, 318 Md. at 745, 569 A.2d at 1273. Conversely, the doctrine of merger by legislative intent stands for a broader proposition—the intent of the legislature analysis controls the outcome of multiple-punishment questions, not the outcome of a required-evidence test. *See Brooks*, 284 Md. at 423-24, 397 A.2d at 600; *see also infra* notes 58-69 and accompanying text.
56. *See Williams*, 323 Md. at 323-24, 593 A.2d at 676; State v. Jenkins, 307 Md. 501, 518-21, 515 A.2d 465, 468-69 (1986).
57. *Williams*, 323 Md. at 324, 593 A.2d at 676.
58. 288 Md. 137, 416 A.2d 265 (1980), *cert. denied*, 450 U.S. 990 (1981).
59. *Id.* at 143, 416 A.2d at 268.
60. *Id.* at 139, 416 A.2d at 266.
61. *Id.*
62. *Id.*

rejected application of the *Blockburger* test.[63] The court ruled that "even though two offenses may be deemed the same under the required-evidence test, separate sentences may be permissible, at least where one offense involves a particularly aggravating factor, if the Legislature expresses such an intent."[64] Looking to both the language[65] and the legislative history[66] of the handgun statute, the court concluded that the legislature had clearly intended to punish the defendant's single act as two separate crimes.[67]

The intent of the legislature had become dispositive in determining the propriety of multiple sentences for a single act or transaction, instead of the outcome of a required-evidence analysis. Under *Whack*, if a court found that the legislature intended a single act to be punishable under more than one statute, it could impose penalties under more than one statute, notwithstanding the result of a required-evidence analysis.[68] Similarly, under *Brooks* and the doctrine of merger by legislative intent, if a court found that the legislature did not intend to impose multiple punishments under the statutes at issue, the court was free to disregard the outcome of a required-evidence analysis and merge the two charged offenses.[69]

---

63. *Id.* at 141-42, 416 A.2d at 267-68. The court conceded that the two crimes were probably the same under the *Blockburger* test. *Id.* at 149 & n.5., 416 A.2d at 271 & n.5. Nine years later, the court held that the crimes were indeed the same under the test. State v. Ferrell, 313 Md. 291, 298-301, 545 A.2d 653, 656-58 (1988).
64. *Whack*, 288 Md. at 143, 416 A.2d at 268.
65. The statute at issue in *Whack*, the 1980 version of § 36B(d) of Maryland's Article 27, provided, in relevant part:

    > Any person who shall use a handgun in the commission of *any felony* or any crime of violence as defined in § 441 of this article, shall be guilty of a *separate misdemeanor* and on conviction thereof shall, *in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor*, be sentenced to the Maryland Division of Correction for a term of no less than five nor more than fifteen years . . . .

    Id. at 147-48, 416 A.2d at 270 (emphasis added by court) (current version of statute at MD. ANN. CODE art. 27, §36B(d) (1992)).
66. The court found that in enacting the statute, the legislature had amended several other provisions of the criminal code dealing with handguns, as well as repealing all local laws proscribing the carrying of handguns. *Id.* at 145-46, 416 A.2d at 269-70. In adopting these amendments, the court reasoned, the legislature had dealt with the problem of duplicative penalties and the pyramiding of sentences. *Id.* Because the legislature did not amend § 445(c), the court found that the intent was not to prohibit separate penalties under both § 445(c) and § 36B. *Id.* Accordingly, the legislature did not intend to avoid multiple penalties. *Id.*
67. *Id.* at 149-50, 416 A.2d at 271.
68. *Id.* at 143-50, 416 A.2d at 268-71.
69. *Id.* at 143, 416 A.2d at 267-68 (citing Brooks v. State, 284 Md. 416, 423, 397 A.2d 596, 600 (1979)).

At the time of the court of appeals' adoption of this approach, questions remained as to whether the approach complied with binding Supreme Court precedent.[70] Within three years, however, the Supreme Court made clear that reliance on legislative intent as the dispositive factor in resolving multiple-punishment issues was constitutional. In *Missouri v. Hunter*,[71] the Supreme Court held that the Double Jeopardy Clause of the United States Constitution does no more than prevent courts from imposing multiple punishments where the legislature did not so authorize.[72] Under *Hunter*, a court's only task in analyzing the constitutionality of multiple punishments for a single act is to ascertain the intent of the legislature.[73] If the legislature intended to authorize punishments under two separate statutes, the imposition of sentences under both statutes was constitutionally permissible.[74] The *Blockburger* test, *Hunter* held, was not a dispositive rule of constitutional law, but simply a rule of statutory construction used to guide courts in their efforts to determine whether the legislature had intended to authorize multiple punishments.[75]

Since *Hunter*, courts outside Maryland have construed Supreme Court doctrine to require that a statutory-construction analysis be employed *before* application of the *Blockburger* test.[76] In *United*

---

70. Maryland courts are required to follow Supreme Court decisions in resolving multiple-punishment questions. *See supra* note 45. Supreme Court doctrine regarding multiple-punishment questions was in a state of flux at the time *Whack* was decided. Prior to *Simpson*, discussed *supra* note 49, the Court had relied exclusively on the *Blockburger* test to resolve multiple-punishment questions. *See* Jeffery M. Kotz, Note, *Criminal Procedure—Double Jeopardy Clause Does Not Prohibit Legislatures from Authorizing Cumulative Punishment for Separate Offenses Considered the Same Under the Blockburger Test*, 13 U. BALT. L. REV. 179, 184-85 (1983). In Whalen v. United States, 445 U.S. 684 (1980), and Albernaz v. United States, 450 U.S. 333 (1981), however, the Court implied in dictum that it was constitutionally permissible, despite the outcome of a *Blockburger* analysis, for courts to find that a legislature had intended to authorize multiple punishments under separate statutes. Kotz, *supra*, at 182-83. This dictum was not adopted by the Court as binding law until 1983, in Missouri v. Hunter, 459 U.S. 359 (1983). Kotz, *supra*, at 183. For an in-depth discussion of the development of the Supreme Court's multiple-punishment doctrine, see generally Franklin, *supra* note 4.
71. 459 U.S. 359 (1983).
72. *Id.* at 365-68.
73. *Id.*
74. *Id.*
75. *Id.* at 368-69.
76. *See* United States v. Maldonado-Rivera, 922 F.2d 934, 981 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991); United States v. Merchant, 731 F.2d 186, 189-90 (4th Cir.), *cert. denied*, 469 U.S. 844 (1984) (using a statutory-construction analysis before the *Blockburger* test); State v. Rummer, 432 S.E.2d 39 (W. Va. 1993) (holding that a court should look first to the language and legislative history of the relevant statutes, then to the *Blockburger* test if necessary, to determine legislative intent regarding multiple punishments).

States v. Maldonado-Rivera,[77] for example, the United States Court of Appeals for the Second Circuit faced a typical multiple-punishment question. A defendant received separate sentences for violations of multiple federal bank robbery statutes.[78] In applying the Supreme Court multiple-punishment doctrine, the federal appeals court first examined the language of the relevant statutes and applied the *Blockburger* test only as a secondary matter.[79]

3. No Clear Standard Emerges

It is clear that under both Maryland common law and United States Supreme Court precedents, legislative intent controls the resolution of multiple-punishment questions. What remains painfully unclear, however, is what methods Maryland's highest court will use to ascertain legislative intent in the multiple-punishment context. The unmistakable rule of *Brooks*, *Whack*, and *Hunter* is that Maryland courts are not required to use the *Blockburger* test.[80] Other methods of analysis are permissible to ascertain legislative intent for solutions to multiple-punishment questions. The court of appeals, however, has not repudiated the *Blockburger* test. Nor has it set out standards for when the test is to be applied, or when it should be ignored in favor of other methods of discerning legislative intent.[81]

In resolving multiple-punishment questions since *Whack*, the Maryland high court has relied on a virtual potpourri of approaches.[82]

77. 922 F.2d 934, 981 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991).
78. *Id.* at 980.
79. *Id.* at 981-84.
80. *See supra* notes 47-75 and accompanying text.
81. The Maryland high court has made attempts to clarify its doctrine regarding the *Blockburger* test. In *Williams*, the court declared that this test is the usual rule for resolving multiple-punishment questions, "the only exception [being where] legislative intent to authorize cumulative punishments is clear." Williams v. State, 323 Md. 312, 318, 593 A.2d 671, 673-74 (1991). This construction of the Maryland court's position is accurate to a point, but it does not incorporate the cases where the court has rejected the required-evidence test upon finding *an absence* of clear intent to authorize such punishments. An example of such a case is Dickerson v. State, 324 Md. 163, 596 A.2d 652 (1991), decided just a few months after *Williams*. In *Dickerson*, the court rejected the outcome of a required-evidence-test analysis and merged two offenses because it found *an absence* of legislative intent to authorize multiple punishments. *Id.* at 170-74, 596 A.2d at 651-53; *see also infra* notes 97-101 and accompanying text.
82. *See, e.g., Dickerson*, 324 Md. at 174, 596 A.2d at 653 (relying on the cannon of construction that absurd results should be avoided); Biggus v. State, 323 Md. 339, 351, 593 A.2d 1060, 1066 (1991) (relying on the required-evidence test to resolve the question of whether separate punishments could be imposed for battery and sexual assault); *Williams*, 323 Md. at 323-24, 593 A.2d at 676 (relying on decisions from other states); Frazier v. State, 318 Md. 597, 614-15, 569 A.2d 684, 692-93 (1990) (relying on legislative history); Hunt v. State, 312 Md. 494, 510, 450 A.2d 1125, 1133 (1988) (relying on language of statute).

At the same time, the court has continued to announce that the required-evidence test is the "usual rule" for deciding multiple-punishment cases.[83] This lack of clear standards has resulted in inconsistent rulings and a difficult-to-apply body of case law.[84]

For example, in *Hunt v. State*,[85] the court of appeals held that a defendant who murdered a police officer could not be convicted of both using a handgun in a crime of violence and the lesser offense of carrying or transporting a handgun.[86] The court noted that the statute at issue[87] contained no express language authorizing the imposition of multiple punishments.[88] Accordingly, the court applied the doctrine of merger by legislative intent and resolved the question in favor of the defendant.[89] Yet less than two years later, in *Frazier v. State*,[90] the court construed the same handgun statute[91] as authorizing the opposite result.[92] The court held that a defendant could be convicted of both possessing a pistol after being convicted of a crime of violence and the carrying of a handgun.[93] This result was reached despite a lack of express language in the statute authorizing multiple punishments.[94]

---

83. *Williams*, 323 Md. at 316, 593 A.2d at 673.
84. The Court of Special Appeals of Maryland has generally continued to apply the required-evidence test and its companion doctrine, the rule of lenity, when faced with multiple-punishment questions. *See* Selby v. State, 76 Md. App. 201, 218-19, 544 A.2d 14, 23 (1988), *aff'd*, 319 Md. 174, 571 A.2d 1236 (1990). In applying these standards, the intermediate appellate court has sometimes reached results that have conflicted with the outcomes reached by the court of appeals on almost identical facts. *See, e.g., id.* In *Selby*, the court of special appeals applied the required-evidence test and the rule of lenity to uphold separate convictions and cumulative punishments for armed robbery and for wearing a concealed weapon. *Id.* at 218-19, 544 A.2d at 23-24. In *Eldridge v. State*, the court of appeals rejected application of the required-evidence test in construing the same statutes and reached the opposite result. Eldridge v. State, 329 Md. 307, 619 A.2d 531 (1993); *see also infra* part III.
85. 312 Md. 494, 540 A.2d 1125 (1988), *cert. denied*, 502 U.S. 835 (1991), *habeas corpus denied*, Hunt v. Smith, 856 F. Supp. 251 (D. Md. 1994).
86. *Id.* at 510, 540 A.2d at 1133.
87. The current statute provides, in relevant part: "Any person who shall wear, carry, or transport any handgun, whether concealed or open, upon or about his person . . . shall be guilty of a misdemeanor." MD. ANN. CODE art. 27, § 36B(b) (1992); *see Hunt*, 312 Md. at 510 n.10, 540 A.2d at 1133 n.10.
88. *Hunt*, 312 Md. at 510, 540 A.2d at 1133.
89. *Id.*
90. 318 Md. 597, 569 A.2d 684 (1990).
91. MD. ANN. CODE art. 27, § 36B(b) (1992).
92. *Frazier*, 318 Md. at 614-15, 569 A.2d at 692-93.
93. *Id.*
94. The court relied on the kind of legislative history analysis it used in *Whack* regarding the legislature's failure to amend § 445(c) to specifically bar the pyramiding of sentences. *See id.* at 613-15, 569 A.2d at 692-93.

Because of these inconsistencies, difficulties arose, prior to *Eldridge*, in gleaning a general analytical pattern of the way that the court of appeals resolved multiple-punishment questions. Seemingly, the only constant was that the court almost always applied the *Blockburger* test as a threshold matter.[95] Once completing a *Blockburger* analysis, the court engaged in a traditional statutory-construction inquiry to determine whether the legislature intended multiple punishments in circumstances like those before the court.[96]

For example, in *Dickerson v. State*,[97] the defendant was arrested for possession of a single vial of cocaine.[98] At trial, the defendant was convicted of violations of two separate statutes—one proscribing the possession of cocaine, and the other proscribing the possession of drug paraphernalia.[99] On appeal, the Maryland high court first applied the *Blockburger* required-evidence test to determine that possession of paraphernalia and possession of the cocaine were indeed separate offenses.[100] Nonetheless, the court concluded that the legislature did not intend the anti-paraphernalia statute to enhance the penalty for possession of a controlled substance.[101]

The court used this same approach in *Williams v. State*,[102] where it held that attempted murder and assault with intent to murder were not the same offense under the *Blockburger* test, but merged the offenses anyway under a statutory-construction analysis.[103] This two-tiered approach was used in resolving virtually all multiple-punishment questions the court faced until *Eldridge v. State*.[104]

---

95. *See, e.g.*, Dickerson v. State, 324 Md. 163, 596 A.2d 648 (1991).
96. *See id.* (applying the required-evidence test as the first step in analysis of multiple punishments, then resorting to a statutory-construction inquiry); Williams v. State, 323 Md. 312, 593 A.2d 671 (1991) (applying the *Blockburger* test as the first step in analysis of multiple punishments for attempted murder and assault with intent to murder); White v. State, 318 Md. 740, 569 A.2d 1271 (1990) (acknowledging that the *Blockburger* test was the first step in analysis before applying a statutory-construction inquiry in deciding propriety of multiple punishments for both child abuse and homicide); Dillsworth v. State, 308 Md. 354, 519 A.2d 1269 (1987) (applying the required-evidence test before engaging in statutory-construction analysis to determine propriety of multiple punishments for assault with intent to maim and third-degree sexual offense). *But see infra* note 104 (for cases cited therein).
97. 324 Md. 163, 596 A.2d 648 (1991).
98. *Id.* at 164, 596 A.2d at 648-49.
99. *Id.* at 165, 596 A.2d at 649.
100. *Id.* at 169-70, 596 A.2d at 651.
101. *See id.* at 169-70, 596 A.2d at 652.
102. 323 Md. 312, 593 A.2d 671 (1991).
103. *Id.* at 322-23, 593 A.2d at 676.
104. On at least one occasion, however, the court ignored the *Blockburger* test and went directly to a statutory-construction analysis. *See* Whack v. State, 288 Md. 137, 416 A.2d 265 (1980) (refusing to apply the *Blockburger* test where

In *Eldridge*, however, the court of appeals ignored the *Blockburger* test and skipped directly to a statutory-construction analysis.[105] Although the court in *Eldridge* did not expressly disclaim the required-evidence test, its decision to refrain from using it, even as a threshold matter, raises serious doubts about *Blockburger's* status as the "usual" standard for solving multiple-punishment questions in Maryland.

III. THE INSTANT CASE

A. *Sentences for Two Weapons Violations*

Eldridge was sentenced to twenty years for armed robbery, three years for carrying a deadly weapon concealed, and three years for carrying a deadly weapon openly.[106] In analyzing the propriety of the three sentences, the court of appeals first considered the two three-year terms, running consecutively, for two violations of the weapons statute.[107] Article 27, section 36(a) of the Maryland Annotated Code prohibits the carrying of a weapon either concealed or openly with intent to injure.[108] The trial court ruled that Eldridge had committed two separate and distinct violations of the statute. The first occurred when Eldridge carried the weapon concealed into the bar, and the second occurred when he pulled it out in the open and threatened his victim.[109]

In reversing both lower courts, the court of appeals concluded that the legislature did not intend a single course of conduct to be subject to cumulative sentences under this single statute.[110] Rather than applying the *Blockburger* test to reach this conclusion, however, the court relied on the basic principle of statutory construction that absurd or illogical interpretations should be avoided.[111] The court noted the kind of result that could occur under the trial court's approach.[112] A defendant who, in the course of a single incident, hid

---

legislative intent to impose multiple punishments is clear from a statutory-construction analysis). The court of special appeals also used this approach at least once. *See* Bremer v. State, 18 Md. App. 291, 344-45, 307 A.2d 503, 534-35 (1973), *cert. denied*, Bremer v. Maryland, 415 U.S. 930 (1974) (applying a statutory-construction analysis without first using the *Blockburger* test). These cases, however, are anomalies.

105. Eldridge v. State, 329 Md. 307, 312, 619 A.2d 531, 534 (1993).

106. *See supra* notes 10-12 and accompanying text.

107. *Eldridge*, 329 Md. at 312, 619 A.2d at 534.

108. MD. ANN. CODE art. 27, § 36(a) (1992).

109. 329 Md. 307, 312, 619 A.2d 531, 534 (1993).

110. *Id.* at 315, 619 A.2d at 535.

111. *See id.* at 314-15, 619 A.2d at 535.

112. *Id.*

a weapon in his pocket, removed it, and placed it back in his pocket several times could receive numerous consecutive sentences.[113] To conclude that the legislature intended this kind of "pyramiding of sentences," the court reasoned, was nonsensical.[114]

The court relied by analogy on *Dickerson v. State*,[115] in which it had ruled that a defendant could not be convicted of violating two separate statutes, one proscribing the possession of cocaine and the other proscribing the possession of drug paraphernalia.[116] The *Dickerson* court stated that to construe the statute as authorizing separate punishments would be to reach an unreasonable and illogical interpretation, under which a defendant caught with a marijuana cigarette could be convicted of both possession of marijuana and possession of drug paraphernalia.[117]

B. Sentences for Armed Robbery and Carrying a Dangerous Weapon

In addition to the weapons offenses, Eldridge also was convicted of armed robbery, for which he received a twenty year sentence.[118] The Court of Special Appeals of Maryland upheld Eldridge's consecutive sentences, stating that the crimes were not the same under

---

113. *Id.*

114. *Id.* at 315, 619 A.2d at 535.

115. 324 Md. 163, 596 A.2d 648 (1991).

116. *Id.* at 174, 596 A.2d at 652-53. In addition to *Dickerson*, the *Eldridge* court also relied on Webb v. State, 311 Md. 610, 536 A.2d 1161 (1988), in which, five years earlier, it had construed the statute proscribing the carrying of handguns, MD. ANN. CODE art. 27, § 36B (1992), as authorizing only one punishment for a single course of conduct. *Eldridge*, 329 Md. at 314, 619 A.2d at 534-35. The court analogized *Webb* to the facts in *Eldridge*, reasoning that § 36 was the "counterpart" to § 36B and therefore it must also create only one offense. *Id.* at 314, 619 A.2d at 534-35. The court's reliance on *Webb* was somewhat misplaced, however. *Webb* involved a single course of conduct charged as two violations of the same statute. *Webb*, 311 Md. at 612, 536 A.2d at 1161. *Eldridge*, on the other hand, involved a single course of conduct charged as violations of two separate sections of the same statute, each proscribing different conduct. *Eldridge*, 329 Md. at 311-12, 619 A.2d at 533-34. When a single act violates two provisions of a single statute, the case should be analyzed, under Maryland common-law rules, as if the conduct violated two separate statutes. *See supra* note 20 and accompanying text.

117. *Dickerson*, 324 Md. at 172, 596 A.2d at 652-53. The court noted that there was nothing in the language of the statute or the legislative history to suggest that possession of a vial containing drugs could result in a conviction under both statutes. Furthermore, the court stated that to construe the statute otherwise would reach an unreasonable and illogical result. *Id.* at 174, 596 A.2d at 652-53.

118. *Eldridge*, 329 Md. at 308-09, 619 A.2d at 532.

the *Blockburger* required-evidence test, and therefore separate sentences for each were properly imposed.[119]

In reversing, the court of appeals expressly rejected the lower appellate court's application of the *Blockburger* test.[120] Although the court stated that the test still remains the "general rule" in Maryland for determining the propriety of multiple sentences for a single act,[121] the court ignored the test and analyzed the case using a traditional statutory-construction approach instead.[122] In concluding that the Maryland General Assembly had not intended to impose multiple punishments under both the robbery statute and the weapons statute, the court (1) construed the statute in a way to avoid an absurd or illogical result, (2) analyzed the language of the statute, and (3) analyzed its legislative history.[123]

In applying the first principle of avoiding illogical results, the court noted that the legislature had already provided an enhanced penalty for using a weapon in the commission of a robbery—the penalty for armed robbery being double that for robbery committed without a weapon.[124] Therefore, the court reasoned, to construe section 36(a) as providing an additional penalty for the same aggravating factor, the use of a weapon, would be to reach an illogical result.[125] "It offends common sense to believe that the legislature, already punishing the robber for using a deadly weapon, contemplated that the robber could receive an additional term of imprisonment because he carried the weapon used in the robbery."[126]

Secondly, the court found nothing in the language of the statute indicating that the legislature intended the two statutes to result in multiple punishments for the same conduct.[127] Unlike the handgun statute, section 36B(d), which expressly provides for separate penalties, section 36(a) does not.[128] To illustrate this distinction, the court

---

119. *Id.* at 309, 619 A.2d at 532. The court of special appeals opinion was unreported. *Id.* at 309, 619 A.2d at 537.
120. *Id.* at 319, 619 A.2d at 537.
121. *Id.* (stating that application of the test "is not simply a mechanical operation").
122. *Id.* The court declared that the imposition of multiple punishments is "'particularly dependent on the intent of the legislature.'" *Id.* (quoting Whack v. State, 288 Md. 137, 143, 416 A.2d 265, 268 (1980)).
123. *Id.* at 316-21, 619 A.2d at 535-38.
124. *Id.* at 316, 619 A.2d at 536.
125. *Id.*
126. *Id.*
127. *Id.* at 318, 619 A.2d at 537.
128. *Id.* at 316-17, 619 A.2d at 537. Section 36B provides, in relevant part, that "any person who shall use a handgun . . . in the commission of any felony or crime of violence . . . shall be guilty of a *separate misdemeanor* and on conviction thereof shall, *in addition to* any other sentence imposed" be sentenced under the statute. MD. ANN. CODE art. 27, § 36(B) (1992) (emphasis added).

relied on *Whack v. State*,[129] in which the court used the language of section 36B(d) to justify upholding separate sentences for both armed robbery and carrying a handgun.[130] Unlike section 36B(d), the weapons statute that Eldridge violated, section 36(a), contained no express authorization for a "separate" punishment.[131] The court declared that ordinarily, when the legislature intends a statute to authorize multiple punishments, it expresses its intent in the language of the statute itself.[132] The court noted that in at least one other instance, the Controlled Substances Laws, the legislature stated clearly that it was intending to create multiple penalties for the same conduct.[133]

Finally, the court found nothing in the legislative history of section 36(a) to indicate that the legislature intended to authorize multiple punishments.[134] The court contrasted the facts before it to those in *Frazier v. State*,[135] in which it relied on the history of the statute to find plain legislative intent to allow multiple sentences.[136]

---

129. 288 Md. 137, 416 A.2d 265 (1980), *cert. denied*, 450 U.S. 990 (1981) (discussed *supra* notes 58-66 and accompanying text).
130. *Eldridge*, 329 Md. at 317, 619 A.2d at 536 (citing Whack v. State, 288 Md. 137, 149, 416 A.2d 265, 271 (1980)).
131. *Id.* at 316, 619 A.2d at 536.
132. *Id.* at 318, 619 A.2d at 537.
133. *Id.* (citing MD. ANN. CODE art. 27, § 291 (1992)). Section 291 provides, in part: "Any penalty for violation of [the controlled substance laws] shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law." *Id.*
134. *Id.* at 317-18, 619 A.2d at 536-37. The *Eldridge* opinion does not contain any specific reference to the legislative history of § 36(a). The court's contrasting of the instant case with that of *Frazier*, in which the court used the legislative history of § 36B to justify a finding of legislative intent to authorize multiple punishments, however, suggests that the court did not find similar evidence of intent in the history of § 36(a).
135. 318 Md. 597, 569 A.2d 684 (1990); *see Eldridge*, 329 Md. at 317-18, 619 A.2d at 536-37.
136. In *Frazier*, the defendant, because of a previous conviction for a crime of violence, was prohibited by § 445(c) from possessing a pistol or revolver. *Frazier*, 318 Md. at 603-04, 569 A.2d at 687. Upon conviction for possession of a Colt .38 caliber revolver, he was sentenced under both § 445(c) and § 36B(b), which proscribes the carrying of a handgun. *Id.* at 604, 569 A.2d at 687. To determine whether the legislature intended pyramiding of sentences under § 445(c) and § 36B(b), the court looked to the legislative history of the handgun control statute, including § 36B. *Id.* at 612-15, 569 A.2d at 692-93. Adopting an analysis of the statute's history employed in *Whack*, *see supra* note 66, the court found that the legislature, in enacting the statute, amended several other provisions of the criminal code dealing with handguns, as well as repealing all local laws proscribing the carrying of handguns. *Frazier*, 318 Md. at 613-15, 569 A.2d at 692-93. In adopting these amendments, the court reasoned, the legislature had dealt with the problem of duplicative penalties and the pyramiding of sentences. *Id.* Because the legislature did not amend § 445(c), the court found that it did not intend to prohibit separate penalties under both § 445(c) and § 36B. *Id.* Accordingly, the two offenses did not merge into one. *Id.*

In essence, the *Eldridge* court recognized one basic principle emerging from *Whack* and *Frazier*: In order for a court to impose multiple penalties for a single course of conduct, it must find *clear evidence* that the legislature intended to authorize such punishments.[137] This evidence, the *Eldridge* court concluded,[138] can be found in either the language of the statute, as in *Whack*,[139] or in the legislative history, as in *Frazier*.[140] Because the court found nothing in the language or history of section 36(a) indicating legislative intent to punish Eldridge twice for using a weapon in the commission of the robbery, and because the imposition of multiple sentences was an illogical result, the court concluded that Eldridge could not be sentenced under both statutes.[141] Accordingly, the court vacated the sentences for the defendant's violations of the weapons statute.[142]

IV. ALTERNATIVE APPROACHES

In *Eldridge*, the court of appeals faced two multiple-punishment questions.[143] In both, a single criminal transaction had violated different statutory provisions or portions thereof.[144] The court's use of legislative intent as the dispositive factor in resolving both questions was in accord with controlling United States Supreme Court precedent and Maryland common law.[145]

Eldridge is unique because the court of appeals employed, as a threshold matter, basic rules of statutory construction to discern legislative intent regarding the permissibility of multiple punishments.[146] The court mentioned the *Blockburger* test, but did not apply it, stating that the test "is not simply a mechanical operation."[147]

---

137. *Eldridge,* 329 Md. at 316, 619 A.2d at 536.
138. *Id.*
139. Whack v. State, 288 Md. 137, 147-48, 416 A.2d 265, 270 (1980).
140. *Frazier*, 318 Md. at 613-15, 569 A.2d at 692-93.
141. *Eldridge,* 329 Md. at 316-21, 619 A.2d at 536-38.
142. *Id.* at 320-21, 619 A.2d at 538.
143. *See supra* notes 106-07, 118 and accompanying text.
144. *See supra* part III.
145. *See supra* notes 70-75 and accompanying text.
146. *Eldridge,* 329 Md. at 312-21, 619 A.2d at 534-38.
147. *Id.* at 319, 619 A.2d at 537. The court's bypassing of its usual analysis suggests that the court may be moving away from *Blockburger* as the threshold test in resolving multiple-punishment questions. This seems particularly probable considering that the court could have reached the same result through application of its customary *Blockburger*/statutory-construction approach. Under the court's customary *Blockburger*/statutory-construction analysis, as applied in *Williams*, *White*, and other cases, the court first would have applied the required-evidence test to the separate convictions under § 36(a) for both carrying a weapon concealed and carrying a weapon openly with intent. *See supra* note 96 and accompanying text. Clearly, the offenses would not merge because each contains

By rejecting the established *Blockburger* methodology, the court diverged from a large body of Maryland case law.[148] In so doing, however, it employed an analysis more in accord with the approach developed by the federal court system.

Under *Missouri v. Hunter*[149] and its progeny, courts resolving multiple-punishment questions should look *first* at the language of the applicable statutes and their legislative histories to determine legislative intent regarding multiple punishments.[150] If, as a result of this statutory-construction analysis, the court finds clear evidence of an intent to punish both crimes separately, it can forego a *Blockburger* analysis.[151] Under *Hunter*, a traditional statutory-construction inquiry is the threshold test, not *Blockburger*.[152]

---

an element that the other does not. The offense of carrying a concealed weapon requires proof of concealment, which is not an element of carrying a weapon with intent to injure. Similarly, the crime of carrying a weapon with intent to injure requires proof of intent to injure, which is not an element of carrying a concealed weapon. The analysis would not end there, however. Under the *Williams* approach, the court could apply rules of statutory construction, including the rule of lenity. Williams v. State, 323 Md. 312, 321, 593 A.2d 671, 675 (1991). Considering the lack of legislative intent to impose multiple punishments under § 36(a), as evidenced by the *Eldridge* court's statutory-construction analysis, *see supra* notes 110-14, the court could have merged the offenses under the rule. Similarly, Eldridge's separate convictions for armed robbery and carrying a weapon would also be merged under a *Williams*-type analysis. Although the offenses are clearly not the same under the *Blockburger* test, a rule of lenity application, based on a lack of legislative intent to punish both offenses, could have been used to merge the convictions and sentences.

148. It must be noted that to the extent that *Eldridge* diverges from the approach taken in *Williams, Dickerson, White*, and other recent cases, *Eldridge* reaffirms the approach in *Whack*, in which the court completely bypassed the *Blockburger* test in favor of a statutory-construction analysis. *See supra* notes 70-76 and accompanying text. Accordingly, no matter which approach the court had taken in *Eldridge*, either the *Williams-Dickerson* method, or the *Whack* method, it would have diverged from previous case law at least to some extent. This apparent paradox results from the court of appeals' failure to clarify its standards for resolving multiple-punishment questions. *See supra* part II.*C*.3.

149. 459 U.S. 359 (1983).

150. *Id.* at 368-69; Kotz, *supra* note 70, at 184; *see also* United States v. Merchant, 731 F.2d 186 (4th Cir. 1984) (interpreting *Hunter* as requiring a statutory-construction analysis before the *Blockburger* test in analyzing the multiple-punishment issue).

151. *Hunter*, 459 U.S. at 368-69. In *Eldridge*, the court of appeals applied the inverse of this rule. It employed a statutory-construction analysis and determined that the legislature had *not* intended to authorize multiple punishments. Eldridge v. State, 329 Md. 307, 312-20, 619 A.2d 531, 534-38 (1993). The basic approach was the same as in *Hunter* because the court of appeals used statutory-construction principles, instead of *Blockburger*, as the primary mode of analysis. *Id.* at 312-20, 619 A.2d at 534-37.

152. *Hunter*, 459 U.S. at 369.

The approach taken by the court of appeals in *Eldridge*, therefore, complies with *Hunter* more so than previous Maryland multiple-punishment cases. The decision is troubling, however, because the court of appeals failed to properly explain and clarify its doctrine regarding multiple-punishment issues. Curiously, *Eldridge* approvingly cited language from previous cases declaring that the *Blockburger* test remains the general rule for resolving cumulative punishment questions.[153] Yet the court declined to apply the test, stating that it is not "a mechanical operation."[154] This generalized statement provides little guidance for Maryland trial judges, defense attorneys and prosecutors. Predicting when the court might choose to employ the test, as in *Dickerson* and *Williams*, and when it might choose to ignore it, as in *Eldridge*, is now nearly an impossible task. This leaves trial judges facing multiple-punishment questions in a no-win situation.

For example, consider the situation faced by a trial judge in a case with facts similar to *Eldridge*. If the judge follows the court of appeals command that the required-evidence test is the usual rule for resolving multiple-punishment questions,[155] she will apply the test and conclude, as the trial judge did in *Eldridge*, that the offenses of armed robbery and carrying a dangerous weapon each require proof of an element that the other does not.[156] Thus, the judge would be justified in ruling that the offenses are separate crimes for which separate punishments may be imposed. As *Eldridge* shows, however, a trial judge following this approach may be reversed.[157]

On the other hand, if the trial judge follows the approach used by the court of appeals in *Eldridge* and simply bypasses the required-evidence test, proceeding directly to a statutory-construction analysis, difficult questions arise. The cases provide no clear guidance as to where the judge should look to ascertain legislative intent. In *Hunt*, the court of appeals relied on an analysis of the language of the two statutes the defendant was convicted of violating.[158] In *Frazier*, the

---

153. *Eldridge*, 329 Md. at 319, 619 A.2d at 537 (citing Whack v. State, 288 Md. 137, 141-42, 416 A.2d 265, 267 (1980)).
154. *Id.* at 319, 619 A.2d at 537.
155. *See* Williams v. State, 323 Md. 312, 316, 593 A.2d 671, 673 (1991).
156. Armed robbery requires proof that the defendant had an intent to steal. State v. Gover, 267 Md. 602, 606, 298 A.2d 378, 381 (1973). The offense of carrying a dangerous weapon under § 36(a) requires proof that the defendant either (1) carried the weapon concealed, or (2) carried the weapon openly with intent to injure. MD. ANN. CODE art. 27, § 36(a) (1992). Each offense requires proof of a fact that the other does not. The offenses are therefore separate under the required-evidence test.
157. *Eldridge*, 329 Md. at 320-21, 619 A.2d at 538.
158. Hunt v. State, 312 Md. 494, 510, 540 A.2d 1125, 1133 (1988); *see also supra* note 88 and accompanying text.

court relied on the statutes' legislative history.[159] In *Dickerson*, the court employed a basic canon of statutory construction.[160] In *Eldridge*, the court used a combination of these approaches.[161] Even if a trial judge is able to find her way through this maze of case law and develop a sound statutory-construction analysis, she faces the prospect of reversal on the ground that she failed to comply with *Williams*, *White*, and other cases mandating that a required-evidence analysis be used as the threshold test for resolving multiple-punishment questions.[162]

There is no need for this confusion. Other courts have succeeded in clarifying their doctrine regarding multiple-punishment questions and the *Blockburger* test.[163] Maryland's high court would do well to follow their lead. A clear and workable approach was developed by the United States Court of Appeals for the Second Circuit in *United States v. Maldonado-Rivera*.[164] Under Second Circuit doctrine, a three-step analysis is employed to ascertain legislative intent regarding multiple punishments.[165] First, the language of the relevant statutes is analyzed using traditional rules of statutory construction.[166] If the court needs additional guidance, it employs the *Blockburger* test.[167] If the offenses do not merge under *Blockburger*, the court presumes that the legislature intended separate punishments.[168] Lastly, the result of the *Blockburger* analysis is compared against the legislative history of the relevant statutes to ensure that there is no indication of a contrary intent.[169] This approach is clear, complies with the Supreme Court's Double Jeopardy doctrine,[170] and would be easier for trial

---

159. Frazier v. State, 318 Md. 597, 613-15, 569 A.2d 684, 692-93 (1990); *see also supra* note 94 and accompanying text.
160. Dickerson v. State, 324 Md. 163, 174, 596 A.2d 648, 652-53 (1991) (applying the rule of construction that absurd results should be avoided); *see also supra* note 117 and accompanying text.
161. *Eldridge*, 329 Md. at 312-20, 619 A.2d at 534-37; *see supra* part III.
162. *See* Williams v. State, 323 Md. 312, 320, 593 A.2d 671, 675 (1991); *supra* note 104 and accompanying text.
163. *See* United States v. Maldonado-Rivera, 922 F.2d 934, 981 (2d Cir. 1990) (setting out a three-step inquiry for resolving multiple-punishment questions).
164. 922 F.2d 934 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991).
165. *Id.* at 981.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *See* Garrett v. United States, 471 U.S. 773, 780 (1985) (holding that the result of the *Blockburger* test yields to a statutory-construction analysis); Missouri v. Hunter, 459 U.S. 359, 368-69 (1983) (finding a statutory-construction analysis dispositive, regardless of the outcome of the *Blockburger* test). The Second Circuit's three-step inquiry was recently adopted by the United States Court of Appeals for the Third Circuit in United States v. Xavier, 2 F.3d 1281 (3d Cir. 1993).

judges to apply. Other courts have developed similar approaches.[171]

By foregoing application of the *Blockburger* required-evidence test as a threshold matter in *Eldridge*, the court of appeals appears to have moved toward this kind of approach.[172] *Eldridge* failed to make clear, however, whether the *Blockburger* test should no longer be considered the usual rule for resolving multiple-punishment questions. The unmistakable rule of *Hunter* and subsequent Supreme Court decisions is that courts presented with multiple-punishment questions should look to the language of the statutes and their legislative histories to determine legislative intent.[173] Under *Hunter*, a *Blockburger* analysis should be applied only in situations where legislative intent is unclear from traditional rules of statutory construction.[174] The court of appeals should state this principle definitively and forego applying the *Blockburger* rule as the threshold test for resolving multiple-punishment questions. For the sake of simplicity and clarity, the Maryland high court should adopt the three-step approach developed by the Second Circuit.

Until the court of appeals does so, it is evident that Maryland trial judges no longer need to apply the *Blockburger* test as a threshold matter. Rather, it seems trial judges faced with multiple-punishment questions would be safe to employ a statutory-construction analysis first, and to use the *Blockburger* test only if additional guidance is needed to discern legislative intent. Judges who apply this kind of analysis will be in compliance with both *Eldridge* and prevailing Supreme Court doctrine.

---

171. *See, e.g.*, United States v. Merchant, 731 F.2d 186 (4th Cir. 1984) (using a statutory-construction analysis before the *Blockburger* test); People v. Sturgis, 397 N.W.2d 783, 788-90 (Mich. 1986) (looking first at the language and the legislative history of relevant statutes and applying the *Blockburger* test as a supplemental tool in discerning legislative intent); State v. Bickerstaff, 461 N.E.2d 892 (Ohio 1984) (relying on an analysis of the language of the statute, and refusing to apply the *Blockburger* test to override the conclusion that the legislature intended multiple punishments); State v. Rummer, 432 S.E.2d 39 (W. Va. 1993) (announcing that a court should look first to the language and legislative history of relevant statutes, then to the *Blockburger* test if necessary, in determining legislative intent regarding multiple punishments).
172. In *Eldridge*, the court employed the basic rules of statutory construction without engaging in a *Blockburger* analysis. *Eldridge*, 329 Md. at 312-21, 619 A.2d at 534-37; *see also supra* part III.
173. *See* Garrett v. United States, 471 U.S. 773 (1985) (relying on an analysis of the language and legislative history of statutes to resolve a multiple-punishment question); United States v. Woodward, 469 U.S. 105 (1985) (overriding the Ninth Circuit's use of the *Blockburger* analysis, and employing inquiry into the language of statutes).
174. *Hunter*, 459 U.S. at 368-69; Kotz, *supra* note 70, at 184.

V. CONCLUSION

In *Eldridge v. State*,[175] the court of appeals strayed from its traditional approach for resolving multiple-punishment questions. Prior to *Eldridge*, the Maryland high court tended to rely, at least as a threshold matter, on the required-evidence test to resolve such questions.[176] In *Eldridge*, however, the court of appeals employed a traditional statutory-construction analysis to discern legislative intent regarding multiple punishments imposed under separate statutory provisions.[177]

Although the court, in *Eldridge*, did not properly explain the diminished status of the *Blockburger* test in solving multiple-punishment questions, the court's decision to refrain from using the *Blockburger* doctrine suggests that it is no longer the prevailing standard for solving multiple-punishment questions in Maryland.[178] The prevailing standards are, instead, traditional rules of statutory construction, as used in *Eldridge*.[179] *Eldridge* presented the court of appeals with an opportunity to clearly set forth the standards for resolving multiple-punishment questions. Unfortunately, the court failed to do so.

Robert A. Scott

175. 329 Md. 307, 619 A.2d 531 (1993).
176. *See supra* part II.*B*.
177. *See supra* part III.
178. *See supra* part IV.
179. *See supra* part IV.