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Casenotes: Criminal Procedure — Double Jeopardy Clause Does Not Prohibit Legislatures from Authorizing Cumulative Punishment for Separate Offenses Considered the Same under Blockburger Test. *Missouri v. Hunter*, 103 S. Ct. 673 (1983)

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CRIMINAL PROCEDURE — DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT LEGISLATURES FROM AUTHORIZING CUMULATIVE PUNISHMENT FOR SEPARATE OFFENSES CONSIDERED THE SAME UNDER *BLOCKBURGER* TEST. *Missouri v. Hunter*, 103 S. Ct. 673 (1983).

Defendant was convicted by a Missouri state court of robbery in the first degree and armed criminal action.¹ The court, in accordance with applicable state law,² sentenced him to concurrent terms of ten years imprisonment for the robbery and fifteen years imprisonment for the armed criminal action.³ On appeal, the Court of Appeals of Missouri agreed with the defendant that the imposition of cumulative punishment violated the double jeopardy clause of the fifth amendment.⁴ As a result, the intermediate appellate court reversed the trial court and vacated the fifteen year sentence for armed criminal action.⁵ The court of appeals based its decision on previous Supreme Court of Missouri decisions⁶ which provided that the imposition of cumulative sentences for both of these crimes constituted multiple punishment for the same

1. *State v. Hunter*, 622 S.W.2d 374, 375 (Mo. Ct. App. 1981), *rev'd sub nom.* *Missouri v. Hunter*, 103 S. Ct. 673 (1983). Defendant and two accomplices robbed a supermarket. In the course of the robbery, the defendant struck the store manager twice with a revolver. In addition to the two other charges, Hunter was convicted of assault with malice. *Id.*
2. Missouri law prescribes the punishment for robbery in the first degree and provides in pertinent part: "Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon . . . shall be punished by imprisonment by the division of corrections for not less than five years. . . ." MO. ANN. STAT. § 560.135 (Vernon 1939 & Supp. 1975). This statute was later repealed and redefined at MO. ANN. STAT. § 569.020 (Vernon 1978). The statute which proscribes armed criminal action states in pertinent part:
[A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon.
MO. ANN. STAT. § 559.225 (Vernon 1939 & Supp. 1976) (repealed and recodified at MO. ANN. STAT. § 571.015 (Vernon 1978)).
3. *Missouri v. Hunter*, 103 S. Ct. 673, 676 (1983).
4. *State v. Hunter*, 622 S.W.2d 374, 375 (Mo. Ct. App. 1981), *rev'd sub nom.* *Missouri v. Hunter*, 103 S. Ct. 673 (1983). U.S. CONST. amend. V states in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." In *Benton v. Maryland*, 395 U.S. 784 (1969), the Supreme Court made the double jeopardy clause applicable to the states through the fourteenth amendment. For a discussion of the history of double jeopardy law, see *Bartkus v. Illinois*, 359 U.S. 121, 151-55 (1958) (Black, J., dissenting); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 262 n.1 (1965).
5. *State v. Hunter*, 622 S.W.2d 374, 375 (Mo. Ct. App. 1981), *rev'd sub nom.* *Missouri v. Hunter*, 103 S. Ct. 673 (1983).
6. *State v. Haggard*, 619 S.W.2d 44 (Mo. 1981), *vacated*, 103 S. Ct. 1171 (1983); *Sours v. State*, 593 S.W.2d 208 (Mo.), *vacated sub nom.* *Missouri v. Sours*, 446 U.S. 962, *on remand* *Sours v. State*, 603 S.W.2d 592 (Mo. 1980), *cert. denied*, 449 U.S. 1131 (1981).

offense. The basis of these decisions was that armed criminal action and robbery in the first degree were construed to be the same offense under the *Blockburger*⁷ test. A violation of the double jeopardy clause was thus found in each of these prior cases, even though the legislature had clearly provided for cumulative punishment in the armed criminal action statute.⁸

In *Missouri v. Hunter*,⁹ the United States Supreme Court held that the double jeopardy clause of the fifth amendment does not bar the imposition of cumulative punishment¹⁰ in a single trial when a legislature clearly intended such a result.¹¹ The Court concluded that even when separate statutory crimes are considered the same under the *Blockburger* test, the double jeopardy clause does not operate to defeat specific legislative intent.¹²

The constitutional guarantee against double jeopardy prohibits the imposition of cumulative punishment for the same offense.¹³ The Supreme Court first recognized this principle in *Ex parte Lange*¹⁴ when it stated that "we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."¹⁵ Thereafter, to avoid imposing cumulative punishment on a defendant in violation of the double jeopardy clause, courts had to determine whether multiple statutory violations that resulted from a single criminal transaction constituted the same offense.

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7. See *State v. Haggard*, 619 S.W.2d 44, 51 (Mo. 1981), *vacated*, 103 S. Ct. 1171 (1983); *Sours v. State*, 593 S.W.2d 208, 213-22 (Mo.), *vacated sub nom. Missouri v. Sours*, 446 U.S. 962, *on remand Sours v. State*, 603 S.W.2d 592, 597-98 (Mo. 1980), *cert. denied*, 449 U.S. 1131 (1981). The *Blockburger* test refers to the same evidence test announced in *Blockburger v. United States*, 284 U.S. 299 (1932). This test is used to determine whether two separate crimes arising out of the same transaction constitute the same offense for double jeopardy purposes. See *infra* text accompanying notes 16-20.
 8. See *State v. Haggard*, 619 S.W.2d 44, 51 (Mo. 1981), *vacated*, 103 S. Ct. 1171 (1983); *Sours v. State*, 593 S.W.2d 208, 216 (Mo.), *vacated sub nom. Missouri v. Sours*, 446 U.S. 962, *on remand Sours v. State*, 603 S.W.2d 592, 598 (Mo. 1980), *cert. denied*, 449 U.S. 1131 (1981).
 9. 103 S. Ct. 673 (1983).
 10. Consecutive sentences and concurrent sentences are both forms of cumulative punishment. For a discussion of the different forms cumulative punishment may take, see Comment, *supra* note 4, at 299 n.161.
 11. *Missouri v. Hunter*, 103 S. Ct. 673, 679 (1983).
 12. *Id.*
 13. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); see *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). The fifth amendment also bars multiple prosecutions for the same offense. See *Pearce*, 395 U.S. at 717. Since *Hunter* involved only one trial for both armed criminal action and first degree robbery, the issue of multiple prosecutions was not raised. For a discussion of how the double jeopardy clause operates in multiple prosecution cases, see C. WHITEBREAD, CRIMINAL PROCEDURE §§ 24.02 to .06 (1980 & Supp. 1982).
 14. 85 U.S. (18 Wall.) 163 (1873).
 15. *Id.* at 173.

In the 1932 case of *Blockburger v. United States*,¹⁶ the Supreme Court formulated a test for making this determination. The *Blockburger* test prohibits cumulative punishment when two offenses arise out of a single criminal act unless each offense requires proof of a fact which the other does not.¹⁷ This test has been employed by a majority of jurisdictions.¹⁸ Several jurisdictions have found cumulative punishment constitutional if each offense contains an element which the other does not.¹⁹

Prior to 1978, the Supreme Court used the *Blockburger* test as the sole criterion by which it determined whether cumulative punishment could be imposed in a single trial.²⁰ In 1978, however, the Court deviated from this approach in *Simpson v. United States*.²¹ In *Simpson*, the defendants were convicted of bank robbery under two statutes. Each statute provided for an enhanced penalty since dangerous weapons were used.²² The Court, in deciding whether cumulative punishment could be imposed, used a statutory construction analysis which did not include the use of the *Blockburger* test. After examining the legislative history of the statutes involved, the Court found that it was unclear whether Congress intended that both penalties be imposed in a single trial. Therefore, the Court resolved the issue in favor of the defendants

16. 284 U.S. 299 (1932).

17. *Id.* at 304. The imposition of consecutive sentences was upheld in *Blockburger* because each of the separate narcotics violations required proof of a fact which the other did not. *Id.* The *Blockburger* test, also known as the "same evidence test," had its genesis in *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871), and was adopted by the Supreme Court in *Gavieres v. United States*, 220 U.S. 338, 342 (1911).

18. *E.g.*, *Yarborough v. State*, 257 Ark. 732, 520 S.W.2d 227 (1975); *State v. Sanderson*, 60 N.C. App. 604, 300 S.E.2d 9 (1983); *Commonwealth v. Houtz*, 496 Pa. 345, 437 A.2d 385 (1981). See generally WHITEBREAD, *supra* note 13, § 24.04, at 502. Maryland courts use the *Blockburger* test. See, *e.g.*, *Whack v. State*, 288 Md. 137, 141-42, 416 A.2d 265, 267 (1980); *Newton v. State*, 280 Md. 260, 266-68, 373 A.2d 262, 265-66 (1977). A minority of jurisdictions employ the "same transaction test" to determine what constitutes the same offense. For a discussion of this test, see *State v. Gosselin*, 117 N.H. 115, 118-19, 370 A.2d 264, 267-68 (1977); WHITEBREAD, *supra* note 13, § 24.04, at 506-07.

19. See, *e.g.*, *State v. Horn*, 101 Idaho 192, 196-97, 610 P.2d 551, 555-56 (1980); *Cepulonis v. Commonwealth*, 1981 Mass. Adv. Sh. 2089, 427 N.E.2d 17, *cert. denied*, 445 U.S. 931 (1982). In each case there was no double jeopardy violation because the *Blockburger* test was satisfied.

20. See, *e.g.*, *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975); *Gore v. United States*, 357 U.S. 386 (1958); *American Tobacco Co. v. United States*, 328 U.S. 781, 787-89 (1946). In 1977, the Court stated that the *Blockburger* test was the established test for determining the permissibility of cumulative punishment. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Also, even though the *Blockburger* test originated in a multiple punishment setting, the *Brown* Court extended the test to multiple prosecution cases. *Id.*

21. 435 U.S. 6 (1978).

22. 18 U.S.C. § 924(c) (1971) (additional sentence imposed when a firearm is used during the commission of any felony); 18 U.S.C. § 2113(d) (1970) (enhanced penalty imposed when bank robbery is committed "by the use of a dangerous weapon or device").

and held that cumulative punishment could not be imposed.²³ The *Simpson* Court thus took a defense oriented approach by not using the *Blockburger* test. Even if two crimes were considered separate offenses under *Blockburger*,²⁴ cumulative punishment could not be imposed unless clearly provided for by the legislature.

The next major cumulative punishment case decided by the Supreme Court was *Whalen v. United States*.²⁵ In this 1980 decision, the defendant was convicted under two separate statutes of rape and of killing the victim in the perpetration of the rape.²⁶ The Court, again using a statutory construction approach, found a statutory provision which expressly authorized the use of the *Blockburger* test in determining whether cumulative punishment could be imposed for the statutes violated.²⁷ The *Whalen* Court, however, implied that even if the two crimes were the same under *Blockburger*, cumulative punishment could be imposed if provided for by the legislature in express language.²⁸

One year later in *Albernaz v. United States*,²⁹ the Supreme Court further advanced the idea that the specific intent of the legislature controls when deciding cumulative punishment cases. In *Albernaz*, each defendant was given a consecutive sentence under two separate drug conspiracy statutes.³⁰ The statutes and the legislative history were both silent as to the imposition of cumulative punishment. The *Albernaz* Court, in upholding the consecutive sentences, interpreted this silence to mean that Congress wanted to use the *Blockburger* test in determining whether cumulative punishment was permissible.³¹ The Court, however, again implied that a clear indication of legislative intent would override the results of the *Blockburger* test.³² In dictum, the Court stated that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed."³³ This dictum has caused confusion among the courts that have attempted to interpret its meaning.³⁴

23. *Simpson v. United States*, 435 U.S. 6, 12-16 (1978).

24. The *Simpson* Court implied that it would agree with the prosecution that the sections violated are separate offenses under the *Blockburger* test. *Id.* at 11-12 n.6.

25. 445 U.S. 684 (1980).

26. *Id.* at 685.

27. *Id.* at 690-92; see D.C. CODE ANN. § 23-112 (1973).

28. *Whalen v. United States*, 445 U.S. 684, 692-93 (1980).

29. 450 U.S. 333 (1981).

30. *Id.* at 334-35.

31. *Id.* at 340-42.

32. *Id.* at 340.

33. *Id.* at 344.

34. The Supreme Court of Missouri had refused to follow this dictum. See *State v. Haggard*, 619 S.W.2d 44 (Mo. 1981), *vacated*, 103 S. Ct. 1171 (1983). The Supreme Court of Delaware, however, decided that the dictum in *Albernaz* was the evolving law, and therefore the court allowed legislative intent to override the results of the *Blockburger* test. *Hunter v. State*, 430 A.2d 476, 481 (Del. 1981).

The Supreme Court in *Albernaz* incorporated the *Blockburger* test into its statutory construction approach to cumulative punishment cases. Under *Albernaz*, the *Blockburger* test is used to decide whether multiple punishment is permissible when legislative intent is unclear. Thus, *Albernaz* undermined the defense oriented approach of *Simpson*. As a result, the Court will no longer automatically rule in favor of the defendant absent clear legislative intent.

In *Missouri v. Hunter*,³⁵ the state legislature had specifically authorized cumulative punishment for the two criminal statutes violated. The Supreme Court held that when a legislature clearly intends such a result, the double jeopardy clause does not prohibit the imposition of cumulative punishment in a single trial, even though the two statutes are considered the same offense under the *Blockburger* test.³⁶ The Court reached this decision after examining the analysis of the *Blockburger* test in *Whalen*³⁷ and *Albernaz*.³⁸

In both *Whalen* and *Albernaz*, the *Blockburger* test was treated only as a rule of statutory construction to be used in ascertaining legislative intent. Both opinions implied that clear legislative intent prevails over the results of the *Blockburger* test when there is a conflict between the two.³⁹ In both cases, however, the *Blockburger* test was the criterion used in determining whether the cumulative punishment was permissible since there was no indication of contrary legislative intent.

Therefore, *Missouri v. Hunter*⁴⁰ provided the Supreme Court with the opportunity to establish the rule that express legislative intent controls when it conflicts with the results of the *Blockburger* test in cumulative punishment cases. The *Hunter* Court unequivocally defined the limits of the test by stating that it "is not a constitutional rule requiring courts to negate clearly expressed legislative intent."⁴¹ The Missouri legislature's clear intent to impose cumulative punishment was thus not defeated by the finding that the two statutes involved were the same under *Blockburger*.⁴²

The *Hunter* Court clarified the role played by the double jeopardy clause when cumulative punishment is imposed in a single trial. The double jeopardy clause acts as a constraint on the sentencing court, but not on the legislature. Under the Court's holding, the double jeopardy clause does not prevent a legislature from clearly authorizing cumulative punishment for violations of separate statutory provisions that are

35. 103 S. Ct. 673 (1983).

36. *Id.* at 679.

37. *Whalen v. United States*, 445 U.S. 684 (1980).

38. *Albernaz v. United States*, 450 U.S. 333 (1981).

39. *Albernaz*, 450 U.S. at 340; *Whalen*, 445 U.S. at 691-92.

40. 103 S. Ct. 673 (1983).

41. *Id.* at 679.

42. *Id.* The Missouri legislature's clear intent is evidenced by the express language of the armed criminal action statute. See *supra* note 2.

considered the same under the *Blockburger* test.⁴³ Rather, the clause only operates to prevent a court "from prescribing greater punishment than the legislature intended."⁴⁴ The *Hunter* Court thus incorporated legislative intent into the double jeopardy clause in cases challenging cumulative punishment imposed at a single trial by making it the determinative factor in deciding whether such punishment is constitutionally permissible. The fifth amendment's protection against multiple punishment is implicated only when a court imposes a sentence in excess of what the legislature intended. Therefore, the double jeopardy clause can no longer be used by criminal defendants in objecting to cumulative punishment, if that punishment is imposed in accordance with specific legislative intent.

The Court's decision in *Hunter* also defines the role the *Blockburger* test will play in future multiple punishment cases. This judicially created test had been the criterion used for over forty-five years in determining whether cumulative punishment could be imposed for the violation of separate statutory offenses arising out of the same criminal act.⁴⁵ The *Blockburger* test has been treated as a tool of statutory construction to be used in determining legislative intent.⁴⁶ The constitutionality of cumulative punishment, rendered in a single trial, can no longer be determined simply by applying *Blockburger*. The *Hunter* decision mandates that a court first look to the appropriate statutes and their legislative histories to determine the actual intent of the legislature.⁴⁷ A court need only resort to the presumptions that arise under the *Blockburger* test when the legislative intent is unclear.⁴⁸

43. Under this rationale, a legislature can impose whatever punishment it believes appropriate. This power, however, is constrained by the eighth amendment's cruel and unusual punishment clause. See *Solem v. Helm*, 103 S. Ct. 3001 (1983).

44. *Missouri v. Hunter*, 103 S. Ct. 673, 678 (1983).

45. See, e.g., *Brown v. Ohio*, 432 U.S. 161 (1977); *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975); *Gore v. United States*, 357 U.S. 386 (1958); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

46. The dissent argued that the *Blockburger* test is a constitutional rule and, as such, it should have the same application in both multiple prosecution and multiple punishment cases. If the separate statutes violated are the same under *Blockburger*, then cumulative punishment would be unconstitutional under the dissent's view. *Missouri v. Hunter*, 103 S. Ct. 673, 679-82 (1983) (Marshall & Stevens, J.J., dissenting).

47. This follows from the Court's conclusion that "[w]here . . . a legislature specifically authorizes cumulative punishment under two statutes . . . a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Id.* at 679 (emphasis supplied). Since the *Blockburger* test is a rule of statutory construction that is used to ascertain legislative intent, it is reasonable to require that the statutes be construed before the test is invoked.

48. Two presumptions are associated with the *Blockburger* test. First, cumulative punishment is prohibited by the double jeopardy clause when the two offenses are the same. Second, cumulative punishment may be imposed when two offenses are considered different. In the latter situation, it is presumed that the legislature intended separate punishment.

After *Hunter*, it is clear that the Supreme Court wants cumulative punishment cases to be decided under its statutory construction approach. Specific legislative intent will be the deciding factor in determining whether cumulative punishment can be imposed. Absent clear legislative intent, courts should follow the *Albernaz* ruling by applying the *Blockburger* test.

Maryland courts must follow *Hunter* since states are bound by Supreme Court decisions in determining the permissibility of cumulative punishment.⁴⁹ In a 1980 decision,⁵⁰ the Court of Appeals of Maryland anticipated the *Hunter* approach when it stated that cumulative punishment could be imposed for the violation of separate statutory crimes that are considered the same offense, if that is what the General Assembly clearly intended.⁵¹ When legislative intent is unclear, Maryland courts must apply the *Albernaz* ruling.⁵²

Finally, the *Hunter* Court recognized that a legislature has a valid state interest in authorizing cumulative punishment for certain crimes that are considered the same under the *Blockburger* test.⁵³ Crimes involving aggravating factors, such as the use of a handgun, should be punished more severely because they are considered particularly dangerous to society. To prevent possible prosecutorial abuse of the Court's holding,⁵⁴ however, a valid state interest should be identified before a court imposes cumulative punishment for two crimes that are considered the same offense under *Blockburger*. Legislatures should be required to state specifically in the statutes the purpose to be served by the imposition of cumulative punishment.⁵⁵ This should not be consid-

49. See *Newton v. State*, 280 Md. 260, 263, 373 A.2d 262, 264 (1977); *Thomas v. State*, 277 Md. 257, 267 n.5, 353 A.2d 240, 246 n.5 (1976). In Maryland, there is no provision in the state constitution prohibiting double jeopardy. This protection is only available through the common law. See *West v. State*, 52 Md. App. 624, 626, 451 A.2d 1228, 1231 (1982). The common law doctrine which deals with cumulative punishment, however, no longer applies in Maryland. See *Veney v. State*, 227 Md. 608, 611-12, 177 A.2d 883, 885-86 (1962). Thus, Maryland courts are bound by Supreme Court rulings.

50. *Whack v. State*, 288 Md. 137, 416 A.2d 265 (1980).

51. *Id.* at 149-50, 416 A.2d at 271.

52. In a case decided subsequent to *Albernaz*, the Court of Special Appeals of Maryland overlooked the *Albernaz* decision and did not resort to the *Blockburger* test when legislative intent was unclear. Instead, the court applied the *Simpson* rationale and resolved the uncertainty in favor of the defendant. *Walker v. State*, 53 Md. App. 171, 200-01, 452 A.2d 1234, 1249-50 (1982). Since Supreme Court decisions are controlling in Maryland, the *Walker* court should have followed *Albernaz*.

53. The dissent believed that no valid state interest would be served by imposing cumulative punishment for two crimes that are the same under *Blockburger*. *Missouri v. Hunter*, 103 S. Ct. 673, 682 (1983) (Marshall & Stevens, J.J., dissenting).

54. For example, a prosecutor could threaten cumulative punishment to coerce a defendant to plead guilty.

55. For an example of such a statute, see MD. ANN. CODE art. 27, § 36B(a) (Supp. 1983) (declaration of policy). In this section, the General Assembly stated that guns represent a danger to society and that additional regulations are needed to

ered an unreasonable burden for a state to bear considering that under the *Hunter* rationale the validity of a defendant's double jeopardy claim, in cumulative punishment cases, is now dependent upon the intent of the legislature.

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preserve the peace. This is a valid state interest justifying the imposition of cumulative punishment.