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CASE NOTES

Constitutional Law—EIGHTH CIRCUIT VACATES A LIFE SENTENCE FOR FELONY-MURDER WHEN A SHORTER CONSECUTIVE SENTENCE FOR THE UNDERLYING FELONY WAS SATISFIED THROUGH COMMUTATION—*Thomas v. Morris*, 844 F.2d 1337 (8th Cir. 1988).

On April 21, 1988, convicted murderer Larry Thomas won his petition for a writ of habeas corpus in the Eighth Circuit Court of Appeals as a result of a decision which may be a legal anomaly. In *Thomas v. Morris*,[1] the court of appeals remanded Thomas's habeas corpus appeal to the trial court with instructions to issue the writ after Thomas had served just seven years of two consecutive sentences of 15 years and life imprisonment.[2] Thomas's sentences were imposed for the underlying felony of attempted robbery with a deadly and dangerous weapon and felony-murder;[3] the sentence for attempted robbery was to be served first.[4]

In the fall of 1972 Larry Thomas and an accomplice attempted to rob an auto parts store in St. Louis. During that attempt, Thomas shot and killed a customer in the store. Thomas was convicted in 1973 of felony-murder and attempted robbery. In 1981, however, the governor of Missouri, acting in response to changes in the law governing multiple punishments in felony-murder cases, commuted Thomas's sentence for attempted robbery.[5]

Sitting en banc, a sharply divided Court of Appeals for the Eighth Circuit[6] held that due to the governor's commutation, Thomas had completed one of his two punishments; therefore, his continued incarceration would violate the double jeopardy clause.[7] The majority based its result on analogous but distinguishable authority.[8] In a forcefully argued dissent, Judge Bowman demonstrated why the majority's authority was inapposite. He went on to argue convincingly

1. 844 F.2d 1337, 1342 (8th Cir. 1988) (en banc) (*Thomas II*), *cert. granted sub nom* Jones v. Thomas, — U.S. —, 109 S. Ct. 781 (1989).
2. *Id.*
3. *Id.* at 1338.
4. *Id.*
5. *Id.*
6. Joining in Judge McMillan's majority opinion were Chief Judge Lay and Judges Heaney, Arnold, and McGill. Judge Bowman wrote the dissent in which he was joined by Judges Gibson, Fagg, and Wollman. *Id.* at 1337, 1342.
7. *Id.* at 1342.
8. *See id.* at 1338–42.

that the state court's remedy for the double jeopardy violation was appropriate.[9]

The well-known axiom of American law that one cannot be tried twice for the same crime has its roots in ancient Greek and Roman law.[10] Also a part of the early law of England, double jeopardy in English common law was hampered at times by the absolute power of the Crown to pass statutes exempting certain crimes from the double jeopardy rule.[11] Nevertheless, the notion that a person should not be punished more than once for the same crime persisted in England and was eventually incorporated in the fifth amendment to the Constitution of the United States.[12]

Little historical material exists that discusses the inclusion of the double jeopardy clause in the fifth amendment. One commentator has stated that it may be an exercise in pure speculation to attempt to divine the original intent of those who framed the clause.[13] Interest-

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9. *Id.* at 1343–44. The Missouri Court of Appeals affirmed the state trial court's remedy of vacating Thomas's conviction and sentence for the underlying felony of attempted robbery, leaving his life sentence for felony-murder intact and applying the time served on the attempted robbery sentence to the life term. Thomas v. State, 665 S.W.2d 621, 625 (Mo. Ct. App. 1983).

10. Cantrell, *Double Jepoardy and Multiple Punishment: An Historical And Constitutional Analysis*, 24 S. TEX. L.J. 735, 747 (1983). *See also* J. JONES, LAW AND LEGAL THEORY OF THE GREEKS 148 (1956); M. RADIN, HANDBOOK OF ROMAN LAW 475 n.28 (1927).

11. Cantrell, *supra* note 10, at 748–60.

> The "fundamental" character of double jeopardy in England was extremely straightforward. Its primary purpose was to safeguard against governmental tyranny and the threat of multiple prosecutions and punishments. Unfortunately, full development of that ideal was not realized because of the Crown's ability to pass a statute excepting homicide cases from the common law rule. When the very instrumentality targeted by the common law rule as dangerous and tyrannical possessed the power to modify legal rules, it is clear that the concept of double jeopardy did not experience a fair or logical test of its fundamental character.

Id. at 760.

12. *Id.* The fifth amendment, which was adopted in 1791 and included the double jeopardy clause, provides in its entirety:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

13. Cantrell commented on the interpretation of the double jeopardy clause:

> The search for an illuminating commentary on the protection against double jeopardy has proven to be one of the most fruitless excursions for constitutional historians. There are few references as to the founders' views on the meaning and application of the clause. . . . The true intent of the framers may indeed be an exercise in speculation. Unfortunately, the amount of evidence regarding the intent of the founders will not increase in

ingly, it was not until 1873 that the United States Supreme Court handed down its first important decision providing a substantive interpretation of the double jeopardy clause.[14]

In *Ex parte Lange*,[15] the United States Supreme Court made at least this much clear: a person cannot be punished a second time in the same court for the same offense stemming from the same occurrence.[16] Justice Miller, writing for the Court, not only found that the double jeopardy clause banned multiple prosecutions for the same offense, but that it also barred multiple punishments.[17] Specifically, he concluded 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."[18]

The Court's opinion in *Lange* dealt only with the erroneous imposition of multiple punishments for a violation of a single statute.[19] This left open the question of whether multiple convictions and punishments were possible when different statutes were violated during the same criminal event. To aid in answering this question, the Court in 1932 formulated a rule of statutory construction to help cope with this problem.[20] The Court stated 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 an additional fact which the other does not." [21]

Within this general framework courts have labored in an effort to harmonize the common law felony-murder rule with the double jeopardy clause. Under the felony-murder rule, a defendant who caused the death of another during the commission of a felony could

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> direct proportion to the amount of speculation by constitutional interpreters. Reviewing the statements and supplementary evidence, one must conclude that the founders possessed no clearly expressed intent.

Cantrell, *supra* note 10, at 769–70.

14. *See Ex Parte* Lange, 85 U.S. (18 Wall) 163 (1873).

15. *Id.*

16. The Court stated in *Lange:*

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Id. at 168.

17. *Id.* at 173.

18. *Id.*

19. *Id.* at 164.

20. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

21. *Id.* at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1910)).

be tried, convicted, and punished for both the felony and the killing.[22] This imposition of multiple punishments, which arguably resulted from a single course of criminal conduct, seemed destined to conflict with the admonition in *Ex parte Lange*,[23] that punishing a criminal more than once based on the same set of facts violated the double jeopardy clause. Nevertheless, the common law principle of permitting multiple punishments in felony-murder cases remained acceptable until 1979 when the United States Supreme Court held, in *Whalen v. United States*,[24] that multiple punishments could be imposed in felony-murder cases only if legislatures expressly authorized such punishment.[25]

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22. At early English common law, the felony-murder rule required that "one who, in the commission or attempted commission of a felony, caused another's death, was guilty of murder, without regard to the dangerous nature of the felony involved or to the likelihood that death might result from the defendant's manner of committing or attempting the felony." W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.5, at 206–07 (2d ed. 1986). These authors are quick to point out that the defendant must actually cause a death during a felony or an attempted felony in order for the felony-murder rule to come into play. A death, even though related to a felony, will not be grounds for a felony-murder conviction unless the prosecution proves that the defendant caused the death. *Id.* at 222.

The broad sweep of the English common law felony-murder rule has been limited in modern times.

> American jurisdictions have limited the rule in one or more of the following ways: (1) by permitting its use only as to certain types of felonies; (2) by more strict interpretation of the requirement of proximate or legal cause; (3) by a narrower construction of the time period during which the felony is in the process of commission; [or] (4) by requiring that the underlying felony be independent of the homicide.

Id. at 206.

The felony-murder rule has proved perplexing for courts. One reason for this is that it is the only form of homicide which does not require proof of a specific mental element. Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1919 (1986). Additionally, due to problems of proof, "affirmative defenses have proved to be of little practical value to defendants charged with felony-murder." Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 447 (1985). Although it has been subjected to much criticism, the felony-murder rule is still used in most states. *Id.* at 446.

23. *See supra* notes 15–18 and accompanying text.

24. 445 U.S. 684 (1979).

25. *Id.* at 688. One commentator has argued that deference to legislative intent on the issue of multiple punishment is inappropriate because the protections of the double jeopardy clause are fundamental constitutional principles.

> The Court's shift in interpretation is due in a large part to the Burger Court's deferential posture toward leglislative enactments. . . . Noteworthy attempts have been made by the Court in recent years to regain some type of balance in the area of federalism. However, judicial deference to the legislature when individual rights are at stake is a disturbing development. The narrowing of judicial scrutiny in these cases must necessarily result in a reduction of the protections and freedoms previously enjoyed. . . .
>
> [A] reexamination of the fundamental protection extended by the double jeopardy clause can only be accomplished after a reordering of the

On a day in early November, 1972, Larry Thomas and a companion, Fancell Johnson, entered an auto parts store in St. Louis.[26] The store manager, a clerk, and a customer, Mentoe Vernell, were the only other people in the store.[27] Just after Johnson began to talk to the manager about auto parts, Thomas announced that they were holding up the store.[28] Vernell then reached out for Thomas, but Thomas, who had a gun, fired four or five shots point blank at Vernell.[29] Vernell, however, was still able to pull a gun from his pocket and fire three shots at Thomas, hitting him in the leg and arm.[30] Vernell died on his way to the hospital.[31]

Larry Thomas was convicted by a jury of felony-murder and attempted robbery in the first degree with a deadly and dangerous weapon.[32] On May 25, 1973, Thomas was sentenced to fifteen years for the underlying felony of attempted robbery and life imprisonment for the felony-murder; the sentences were to run consecutively and in that order.[33] When Thomas was sentenced, Missouri law allowed separate convictions and sentences for the underlying felony, in this case attempted robbery, and felony-murder in a felony-murder prosecution.[34]

> judicial and legislative roles in multiple punishment cases. Recent cases from the Court have consistently ignored this essential premise. Once the Supreme Court recognizes its duty to safeguard individual freedoms, it will undoubtedly realize that deferential abdication to the legislative branch is a constitutional aberration and dangerously short-sighted.

Cantrell, *supra* note 10, at 771–72.

26. Petition For Writ of Certiorari To the United States Court of Appeals for the Eighth Circuit at 3, Thomas v. Morris, 844 F.2d 1337 (8th Cir. 1988)(No. 88-420), *cert. granted sub nom* — U.S. —, 109 S. Ct. 781 (1989).

27. *Id.*

28. *Id.*

29. *Id.* at 4.

30. *Id.*

31. *Id.*

32. Thomas v. Morris, 816 F.2d 364, 365 (8th Cir. 1987) (*Thomas I*), *vacated and withdrawn*, Thomas v. Morris, 844 F.2d 1337, 1338 (8th Cir. 1988) (en banc) (*Thomas II*).

33. *Thomas I*, 816 F.2d at 365.

34. The principal Missouri case which established that a separate conviction and sentence were permissible for both felony-murder and the underlying felony was State v. Moore, 326 Mo. 1199, 33 S.W.2d 905 (1930). There, the defendant shot and killed a shopkeeper who refused to loan him money. *Id.* at 1203, 33 S.W.2d at 906. Moore pleaded guilty to the murder and was sentenced to life. *Id.* He was subsequently convicted on the robbery charge and sentenced to 20 years. *Id.* at 1202, 33 S.W.2d at 905.

Moore challenged his robbery conviction, arguing that the murder and robbery merged into one transaction thus barring further prosecution after his plea for the murder. *Id.* at 1203, 33 S.W.2d at 906. The Missouri Supreme Court held, however, that although "[i]t may be that during the same transaction both offenses are committed, yet they remain separate and distinct offenses and are not the same offense." *Id.* at 1204–05, 33 S.W.2d at 907. Since Moore had committed two separate offenses,

Four years after Thomas's conviction, in 1977, the law with respect to multiple punishments in felony-murder cases began to change when the United States Supreme Court, in *Harris v. Oklahoma*,[35] determined that, at least under one state's statutory framework, the underlying felony was a lesser-included offense of the crime of felony-murder.[36] Accordingly, the Missouri Supreme Court held in *State v. Morgan*[37] that "the felony relied on to prove intent in a felony-murder case is a lesser-included offense of the murder."[38]

Shortly after *Harris* was decided, a new approach to analyzing mul-

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the court held that the double jeopardy clause was not offended. *Id.* at 1025, 33 S.W.2d at 907.

Just two years after Thomas was convicted, in State v. Chambers, 524 S.W.2d 826, 829 (Mo. 1975), the Missouri Supreme Court reaffirmed the rule that a separate conviction and punishment for the underlying felony was proper. In *Chambers*, the court framed the issue as whether a theft during which a murder is committed was a lesser-included offense of the felony-murder. *Id.* at 829. The court answered this question with a resounding no. "The offense of stealing requires proof of taking of property; the offense of murder requires proof of killing. Thus, the two offenses, stealing and murder, second degree, are not merged, but are separate and distinct in law and fact." *Id.* Chambers' sentences of ten years for theft and twenty-five years for each count of murder, to run consecutively, were affirmed. *Id.* at 827, 834.

35. 433 U.S. 682 (1972).

36. In *Harris*, the Supreme Court stated that "[w]hen . . . [a] conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Id.* at 682. Felony-murder and the underlying felony in *Harris* were prosecuted in separate trials. *Id.* That, however, did not prevent several state courts from relying on *Harris* in barring multiple punishments in felony-murder cases even where both crimes were prosecuted in the same trial. *See, e.g.*, State v. Pinder, 375 So. 2d 836, 839 (Fla. 1979); Tyson v. State, 270 Ind. 458, 469, 386 N.E.2d 1185, 1193 (1978); Mitchell v. State, 270 Ind. 4, 7, 382 N.E.2d 932, 934 (1978); State v. Morgan, 592 S.W.2d 796, 803 (Mo. 1980); State v. Innis, 120 R.I. 641, 658, 391 A.2d 1158, 1167 (1978). *But see* Harrison v. Commonwealth, 220 Va. 188, 193, 257 S.E.2d 777, 780 (1979) (underlying felony treated separately because proof of intent for murder is distinct from evidence of underlying felony).

37. 592 S.W.2d 796 (Mo. 1980). In *Morgan*, the defendant was convicted in one trial of stealing over fifty dollars and of felony-murder. *Id.* at 798. The victim was killed when struck by a car driven by the defendant as he was attempting to escape from the police after stealing goods and money from a gas station. *Id.*

38. *Morgan*, 592 S.W.2d at 803. Relying on Harris v. Oklahoma, 433 U.S. 882 (1972), the Missouri court went on to say "[t]hat there should be more protection for a defendant who is doubly prosecuted than one who is doubly punished for the same offense is not supported by the cases from the United States or Missouri Supreme Court." *Id.* The defendant in *Morgan* had been convicted of both crimes in one trial. *Id.* at 798. Both judgments were vacated and the case remanded for resentencing. *Id.* at 808.

In *Morgan*, State v. Chambers, 524 S.W.2d 826 (Mo. 1975) was called into question as infirm, "at least to the extent that it holds that a defendant may be convicted and punished for felony murder and the underlying offense, whether in one trial or two." *Morgan*, 592 S.W.2d at 801. Clearly, the felony-murder sentencing landscape had changed since Larry Thomas was sentenced in 1973.

tiple punishment issues emerged from the United States Supreme Court. In *Whalen v. United States*,[39] a felony-murder case where the underlying felony was rape, the Court stressed the need to look to legislative intent for an indication of whether multiple punishments were authorized.[40] The Court concluded:

> Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape.[41]

Three months later the Missouri Supreme Court relied on *Whalen* to vacate a conviction for the underlying felony in *State v. Olds*.[42] The defendant in *Olds* was convicted of felony-murder and the underlying felony of kidnapping.[43] After examining the appropriate murder and kidnapping statutes, the court concluded that they did "not contain a legislative intent or directive that a defendant may be separately punished if one offense is determined to be a lesser included [offense] of the other."[44] The remedy used to cure the double jeopardy violation in *Olds* was to vacate the defendant's conviction for the underlying felony.[45]

Apparently prompted by these changes in the law governing felony-murder sentencing, on June 21, 1981, Governor Christopher

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39. 445 U.S. 684 (1980).

40. *Id.* at 686–90. "[W]hether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Id.* at 688. The underlying rationale for finding legislative intent so important is that a court cannot impose more punishment than the legislature has authorized. *Id.* at 689.

41. *Id.* at 693–94. The Court in *Whalen* did not offer any suggestion to cure the double jeopardy problem which was created in that case since the defendant had been sentenced to consecutive terms for felony-murder and the underlying felony rape. The circuit court's affirmance of the convictions was merely reversed and the case remanded for further proceedings. *Id.* at 695.

42. 603 S.W.2d 501, 509–11 (Mo. 1980).

43. *Id.* at 502–03.

44. *Id.* at 510. State v Morgan, 592 S.W.2d 796 (Mo. 1980)(*Morgan* I), which had been decided on the basis of *Harris*, 433 U.S. 682 (1972), was remanded by the Supreme Court to be reconsidered in light of *Whalen*, 445 U.S 684 (1980). *See* Missouri v. Morgan, 449 U.S. 809 (1980). When the Missouri court reconsidered *Morgan* it turned to the *Olds* legislative intent analysis and held that the applicable statutes did not contain legislative intent to the effect that there should be multiple punishments in a felony-murder case when the underlying felony was theft. State v. Morgan, 612 S.W.2d 1, 1 (Mo. 1981) (*Morgan II*). Accordingly, the court in *Morgan II* vacated the conviction and sentence for theft while affirming the conviction and sentence for second degree murder. *Id.* at 2.

45. *Olds*, 603 S.W.2d at 511.

Bond commuted Larry Thomas's sentence for attempted robbery.[46] Upon motion by Thomas, the state trial court subsequently vacated his conviction and sentence for the attempted robbery.[47] The Missouri Court of Appeals affirmed this ruling, and also found that the trial court had acted properly in crediting the time Thomas had already served to his life sentence, which the trial court left intact.[48]

Thomas proceeded to file a petition for federal habeas corpus relief.[49] A federal magistrate recommended that the writ should issue. Applying Eighth Circuit precedent, the magistrate reasoned that Thomas's attempted robbery sentence could not have been vacated by the state court because he had completed that sentence due to the commutation.[50] According to the magistrate, since Thomas had completed one of two illegal consecutive sentences, continued enforcement of the felony-murder punishment amounted to a double jeopardy violation.[51] The district court, however, rejected this analysis and agreed with the state court of appeals that no double jeopardy violation was present.[52] According to the district court judge, requiring Thomas to serve the remaining sentence of life imprisonment was proper because that sentence did not amount to more punishment than the legislature intended.[53]

When the Court of Appeals for the Eighth Circuit first ruled on Thomas's appeal of the denial of his habeas corpus petition (*Thomas I*) the three judge panel delivered three separate opinions.[54] Judges McMillan and Hanson agreed that Thomas had satisfied his fifteen-year sentence and that his continued incarceration was a violation of the double jeopardy clause; however, they could not agree on a remedy.[55] Judge Bowman did not believe a double jeopardy violation

46. *Thomas II*, 844 F.2d 1337, 1338 (8th Cir. 1988). There is no precise explanation in any of the reported opinions as to why Governor Bond decided to commute Thomas's attempted robbery sentence.

47. *Id.*

48. Thomas v. State, 665 S.W.2d 621, 625 (Mo. Ct. App. 1983). On appeal, Thomas argued that the court should vacate both sentences and remand for resentencing. *Id.* He asserted that the commutation meant that he had effectively completed his sentence for attempted robbery and continued incarceration on the felony-murder sentence was a double jeopardy violation. *Id.*

49. *Thomas II*, 844 F.2d at 1338 (reaching the same conclusion as the state court of appeals in deciding to affirm the state trial court's opinion).

50. Thomas v. Morris, No. 96-1760C(5), slip op. at 10 (E.D. Mo. Mar. 29, 1985) (magistrate's recommendation that the writ should issue). For the text of this recommendation see the Petition for Writ of Certiorari, *supra* note 26, at A55, A64.

51. *Id.*

52. *Thomas II*, 844 F.2d at 1338.

53. *Id.*

54. *Thomas I*, 816 F.2d 364 (8th Cir. 1987).

55. *Id.* at 367. Judge Hanson believed the state court could correct the problem by changing the jeopardy-barred conviction to a non-jeopardy-barred lesser-included offense. *Id.* at 371. Judge McMillan thought that the problem was irremedial. *Id.*

was present, but he felt that assuming there had been such a violation, remand for resentencing or retrial would cure the problem.[56] In a separate opinion, Judge McMillan expressed his belief that no remedy on remand could correct the double jeopardy problem and, therefore, Thomas should be granted immediate habeas corpus relief.[57] The panel reversed the district court's holding that the state court's remedy of vacating Thomas's attempted robbery conviction and sentence was an adequate cure for the double jeopardy problem.[58] The relief the panel fashioned was to remand the case to the state trial court with instructions to resentence or retry Thomas on a non-jeopardy barred lesser-included offense, presumably second degree murder or another lower degree of murder.[59] Rehearing en banc was granted upon petition by both parties.[60]

The en banc majority[61] (*Thomas II*) first decided that Thomas's fifteen year attempted robbery sentence was satisfied when it was commuted.[62] The state had argued that the commutation merely changed Thomas's punishment from fifteen years plus life to a sentence of life only.[63] The reasons offered by the majority for rejecting this argument were that the commutation order expressly commuted the sentence and the order made no mention of substituting one sen-

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56. *Id.* at 372 (Bowman, J., dissenting in part).

57. *Id.* at 376 (McMillan, J., concurring in part and dissenting in part).

58. *Thomas II*, 816 F.2d at 370.

59. *Id.* at 371.

> We believe the state court judge can correct the double jeopardy problem by changing the jeopardy-barred felony-murder conviction to a non-jeopardy barred lesser-included offense. The burden would then shift to Thomas to show that without the improper inclusion of the jeopardy-barred charge, there is a reasonable probability he would not have been convicted.

Id.

The panel relied on Morris v. Mathews, 475 U.S. 237 (1986), to support its decision to remand for resentencing on a lesser-included offense. Mathews robbed a bank with an accomplice who was found dead from gunshot wounds in a farmhouse at the end of an automobile chase. *Id.* at 238–39. Mathews initially denied killing his cohort and pleaded guilty to aggravated robbery. *Id.* at 240. A few days later he confessed to the killing and was convicted in a separate trial of aggravated murder, for which he was sentenced to life. *Id.* at 242.

By definition, a conviction for aggravated murder included the finding that the murder was committed "while fleeing immediately after committing . . . aggravated robbery." *Id.* at 241. Since Mathews had already pleaded guilty to the aggravated robbery, he successfully argued that his subsequent conviction for aggravated murder was a double jeopardy violation. *Id.* at 245.

The Supreme Court held that the double jeopardy violation in *Mathews* could be cured by reducing the defendant's conviction to the lesser-included offense of murder, which was not jeopardy-barred. *Id.* at 246–47.

60. *Thomas II*, 844 F.2d 1337, 1339 (8th Cir. 1988) (en banc).

61. The majority opinion was written by Judge McMillan. He was joined by Chief Judge Lay and Judges Heaney, Arnold, and McGill. *Id.* at 1342.

62. *Id.* at 1340.

63. *Id.* at 1339.

tence for another nor did it make any reference to the life sentence or the felony-murder conviction.[64]

The majority next turned to the United States Supreme Court cases of *Ex parte Lange*[65] and *In re Bradley*[66] as authority upon which to base its analysis of whether continued confinement of Thomas under the life sentence violated the double jeopardy clause. Both *Lange* and *Bradley* involved convictions under only one statute where both statutorially specified alternative punishments of a fine or imprisonment were mistakenly imposed.[67] In each case the defendants paid the fines and successfully sought habeas corpus relief from their prison sentences.[68] In this regard, the Supreme Court in *Bradley* concluded that "[s]ince one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint."[69] Other than stating the facts of *Lange*[70] and *Bradley*,[71] the majority provided no analysis explaining why these cases should control the outcome in *Thomas v. Morris*.

The majority also cited one case from the Ninth Circuit, *United States v. Edick*,[72] and one from the Fifth Circuit, *United States v.*

64. *Id.* at 1339–40.

65. 85 U.S. (18 Wall.) 163 (1873).

66. 318 U.S. 50 (1943).

67. *Thomas II*, 844 F.2d at 1340.

68. *Id.*

69. *Bradley*, 318 U.S. at 52.

70. The defendant in *Lange* was convicted of stealing mail bags and sentenced to a year in prison and a two hundred dollar fine. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 164 (1873). The controlling statute provided for alternative punishments of prison *or* a fine. *Id.* The defendant paid the fine the day after he began serving his prison sentence and then brought a habeas corpus action, contending that satisfaction of one alternative punishment prevented imposition of the other. *Id.* at 176.

71. The defendant in *In re* Bradley, 318 U.S. 50 (1943), was found guilty of contempt for intimidating a witness who was to appear in a National Labor Relations Board hearing. *Id.* at 51. Bradley was sentenced to six months in prison and a fine of five hundred dollars. *Id.* As in *Lange*, the statute provided only for alternative punishments of a fine or prison. On September 28, 1942, he was incarcerated. *Id.* Bradley's attorney paid the fine on October 1, 1942. *Id.* The judge, realizing his mistake, ordered that the money be returned to Bradley, but he refused to accept the refund. *Id.* The subsequent petition for habeas corpus relief was granted on the theory that he had completed one of two alternative punishments. *Id.* at 52–53.

72. 603 F.2d 772 (9th Cir. 1979). The defendant in *Edick* was convicted of possession of a sawed-off shotgun and possession of the same firearm not identified by serial number under two separate federal statutes. *Id.* at 773. He was sentenced to three years on the first count and five on the second; five years of probation was to begin after completion of the three year sentence. *Id.* Finding Edick in violation of his probation, the trial court resentenced him to a three year term on count two after he had completed the three year sentence imposed on count one. *Id.*

The Court of Appeals for the Ninth Circuit agreed with Edick that the initial imposition of two consecutive sentences was incorrect because both violations arose from a single transaction. *Id.* at 775. Citing *Lange* and *Bradley*, the court of appeals

Holmes,[73] in support of the proposition that imposition of two illegally imposed consecutive sentences requires vacation of the remaining sentence after one sentence has been satisfied.[74] The *Thomas II* majority persisted in equating the facts of *Thomas v. Morris* with this line of cases which requires vacating the second of two illegal sentences once the first has been satisfied although the sentences in these cases were statutorily incompatible. Moreover, the majority relied on Eighth Circuit precedent to support the notion that a trial court cannot choose which sentence to vacate after one has been satisfied.[75]

The *Thomas II* majority departed entirely from the *Thomas I* panel in arriving at a decision about what relief to grant Thomas. According to the en banc opinion, the panel incorrectly relied on *Morris v. Mathews*[76] to arrive at the conclusion that the case could be remanded for resentencing on a lesser-included offense because the defendant in *Morris*, unlike Thomas, had not satisfied either of his two sentences.[77] The *Thomas II* majority decided, however, that resentencing was not an acceptable remedy to cure the double jeopardy violation, and the case was remanded to federal district court with instructions to issue the writ.[78]

In dissent, Judge Bowman and his colleagues[79] argued convincingly that *Lange* and *Bradley* were distinguishable. First, Judge Bowman pointed out that the sentences in these cases were illegal when they were imposed, whereas Thomas was sentenced correctly

held that, since Edick had satisfied one of two illegally imposed consecutive sentences, his newly imposed three year term must be vacated. *Id.* at 778.

73. 822 F.2d 481 (5th Cir. 1987). Paul H. "Bud" Holmes pleaded guilty to contempt in exchange for the dismissal of an indictment charging him with impeding a grand jury investigation of official corruption and with perjury in his testimony to the same grand jury. *Id.* at 484–85. As part of his plea, he agreed to testify truthfully for the United States. *Id.* at 485.

On the contempt conviction Holmes was sentenced to a $10,000 fine and one year in prison. *Id.* He promptly paid the fine and moved to vacate the prison sentence since the statute under which he was sentenced provided for alternative punishments of a fine or prison. *Id.* Relying on *Bradley*, the Court of Appeals for the Fifth Circuit held that satisfaction of one sentence, the fine, required vacation of the prison sentence. *Id.* at 498–99.

74. *Thomas II*, 844 F.2d at 1341.

75. The discretion of the trial court to vacate either of two incorrectly imposed sentences exists only "up to the time there has been legal satisfaction of one of the sentences." *Id.* at 1341 (quoting Holbrook v. United States, 136 F.2d 649,652 (8th Cir. 1943)). Judge Bowman refered to this passage from *Holbrook* as dicta. *Thomas II*, 844 F.2d at 1343.

76. 475 U.S. 237 (1986). For a discussion of *Morris v. Matthews* see *supra* note 59.

77. *Thomas II*, 844 F.2d at 1342.

78. *Id.*

79. Judge Bowman was joined in dissent by Judges Gibson, Fagg, and Wollman.

under the law as it stood in 1973.[80] Second, Thomas's sentences were not alternative sentences like those imposed in *Lange* and *Bradley*, but two distinct punishments for two separate crimes.[81] Finally, the dissenters argued that there is an inherent difference between the alternative punishments of a fine or imprisonment and the similarity of two prison terms.[82]

The dissenters distinguished *Edick* and *Holmes* as equally inapplicable to *Thomas v. Morris* because they also involved erroneous impositions of alternative sentences.[83] Judge Bowman pointed out that the defendant in *Holmes* was sentenced to a fine and imprisonment when the statute under which he was convicted provided for punishment of a fine or imprisonment.[84] The dissent found *Edick* similarly distinguishable because in *Edick* the statutory alternative punishments of prison or probation, which were not interchangeable, were both imposed.[85] In regard to the proper remedy, Judge Bowman agreed with the panel's decision in *Thomas I* that earlier precedent provided proper authority to allow Thomas to be resentenced on remand.[86]

Judge Bowman also raised issues which the majority did not address, claiming the majority had produced what he termed a "strangely anomalous" result.[87] Eighth Circuit precedent held that the intention of the sentencing judge must prevail when one of two sentences must be vacated.[88] Judge Bowman argued that the trial court obviously intended to sentence Thomas to life imprisonment for felony-murder.[89] He stated that the majority's result was possible only because Thomas was sentenced to the fifteen year term first. Thus, he reasoned, had the life sentence been imposed first, no double jeopardy issue would have arisen when the shorter second sentence was vacated. According to Judge Bowman, since Thomas had been legally sentenced in the first place, the state trial court's action in enforcing the life sentence after vacating the fifteen year term preserved the sentencing judge's intention that Thomas should serve a life term for felony-murder.[90]

Moreover, the dissent pointed out that had Thomas been sen-

80. *Thomas II*, 844 F.2d at 1343.
81. *Id.* at 1344.
82. *Id.*
83. *Id.* at 1344 n.3 (Bowman, J., dissenting).
84. *Id.*
85. *Id.*
86. *Id.* at 1346.
87. *Id.* at 1344.
88. *Id.*
89. *Id.* at 1345.
90. *Id.* Although not mentioned in the dissent, it seems unlikely that Governor Bond intended that Larry Thomas should go completely free when he commuted the attempted robbery conviction and sentence.

tenced to concurrent terms, his life sentence would not have been disturbed when the shorter term was vacated.[91] Accordingly, the dissent argued, the majority's holding may create the inconsistent result of preventing a sentencing court from determining which of two sentences to vacate when they have been imposed consecutively while leaving such authority in place when the sentences are concurrent.[92]

Since certiorari has been granted by the United States Supreme Court, it is worth pondering what action the high court will take and what effect that action will have. If the Court of Appeals for the Eighth Circuit is affirmed, the *Lange/Bradley*[93] line of authority dealing with distinctly different alternative punishments will be extended to multiple prison terms. Affirming the en banc opinion would, however, be contrary to the line of authority which advocates the preservation of the sentencing court's intentions.[94] One aspect of the court of appeals' opinion which may also work against affirmance is that the Supreme Court may view the circuit court's action as violating the principals of comity.[95] In other words, did the federal court have the right to put aside the remedy created by the state court and fashion its own?

If the Court of Appeals for the Eighth Circuit is reversed, the Supreme Court will have to choose between either the remedy pro-

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91. *Id.*

92. *Id.* at 1346.

93. *See id.* at 1339–46.

94. *See, e.g.*, Jones v. United States, 396 F.2d 66, 69 (8th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969); Sawyer v. United States, 312 F.2d 24, 27–29 (8th Cir.), *cert. denied*, 374 U.S. 837 (1963). *See also* United States v. Pietras, 501 F.2d 182, 188 (8th Cir.), *cert. denied*, 419 U.S. 1071 (1974).

95. The issue of comity arises in this case because the Missouri state courts claimed jurisdiction to vacate Thomas's attempted robbery conviction and sentence. In doing so, the Missouri courts fashioned a remedy to cure the double jeopardy violation. The Court of Appeals for the Eighth Circuit, however, disregarded the validity of this action when it held the attempted robbery conviction could not be vacated because the sentence had been satisfied. It can be argued that whether a specific remedy is available in state court is a matter of state law. *See* Feeney v. Auger, 808 F.2d 1279, 1283 (8th Cir. 1986).

In dealing with the issue of exhaustion of state remedies in habeas corpus proceedings, the Supreme Court has written the following in regard to comity.

> Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity for the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose v. Lundy, 455 U.S. 509, 518 (1982)(citations omitted).

posed by the Eighth Circuit panel, resentencing on a lesser included offense, or reinstating the state court's approach of vacating the attempted robbery conviction and preserving the life sentence for felony-murder. The option of resentencing provides a compromise which will most likely attract the Court.

There is little argument that Larry Thomas was granted the writ of habeas corpus through a fortuitous series of legal events. Not only were his multiple sentences legal when they were imposed, but in 1984 the Missouri Legislature expressly provided that a sentence may be imposed for the underlying felony in a felony-murder case in addition to a sentence for felony-murder.[96] The unique nature of Thomas's case is underscored by the observation that there is virtually no chance a case like his could ever be repeated given the changes in the law relative to multiple sentencing.

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96. Missouri Statute section 565.021 currently provides the following in relation to felony-murder.

> 1. A person commits the crime of murder in the second degree if he:
>   (2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.
> 2. Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.

Mo. Ann. Stat. § 565.021 (1)(2) & (2) (Vernon Supp. 1989).