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Criminal Law: The Permissibility of Multiple Punishments for One Criminal Offense: *Missouri v. Hunter* and Its Effect on Oklahoma Law

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NOTES

Criminal Law: The Permissibility of Multiple Punishments for One Criminal Offense: *Missouri v. Hunter* and Its Effect on Oklahoma Law

The fifth amendment to the Constitution of the United States provides in part, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[1] This is the double jeopardy clause, made applicable to the states through the due process clause of the fourteenth amendment in *Benton v. Maryland*.[2] Although the language seems clear enough, this particular passage in the fifth amendment has spawned a wealth of confusing case law, which has been described aptly as a "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[3] In at least one area, however, clarity has been achieved by the United States Supreme Court's decision in *Missouri v. Hunter*,[4] although at substantial cost to the protection afforded an accused by the double jeopardy clause.

In *Hunter*, the Court addressed the specific issue of: "[W]hether the prosecution and conviction of a criminal defendant in a single trial on both a charge of 'armed criminal action' and a charge of first degree robbery—the underlying felony—violates the Double Jeopardy Clause of the Fifth Amendment."[5] Prior to *Hunter*, the answer to this question was unclear. Language in various opinions suggested that such an issue must be answered in the affirmative because conviction and punishment under two statutes that proscribe the single act committed by an accused was forbidden by the double jeopardy clause.[6] Other opinions included dicta indicating that such cumulative punishments would be permissible.[7] In *Hunter*, however, the Court unequivocally adopted the position that such multiple convictions and

1. U.S. CONST. amend. V.

2. 395 U.S. 784 (1969).

3. Albernaz v. United States, 450 U.S. 333, 343 (1981). *See also* Burks v. United States, 437 U.S. 1, 9 (1978) ("Our holdings on this subject 'can hardly be characterized as models of consistency and clarity'.").

4. 103 S.Ct. 673 (1983).

5. *Id.* at 675.

6. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 717 (1969) ("And it [the double jeopardy clause] protects against multiple punishments for the same offense.").

7. *See, e.g.*, Albernaz v. United States, 450 U.S. 333, 344 (1981) ("Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed."). Under this language, statutory authorization for multiple punishment presumably meets no double jeopardy bar.

punishments for one single act are not barred by the double jeopardy clause and are thus constitutionally permissible where a statutory scheme authorizes this procedure.[8]

This note will attempt to evaluate the decision in *Hunter* in several ways. It will begin with an examination of the historical development of the double jeopardy clause and decisions thereunder. The Court's opinion in *Hunter* will then be considered in light of those previous decisions, and pertinent criticisms will be voiced. Finally, Oklahoma law will be examined in an effort to determine what effect, if any, *Hunter* may have on double jeopardy jurisprudence in this state.

The Road to Hunter

The question of whether cumulative punishments for a single criminal offense are permissible under the double jeopardy clause is at first a problem of constitutional construction. The wording of the clause is unclear because nothing in it defines what is meant by being "twice put in jeopardy" for one offense. On its face, the clause would not necessarily prevent either multiple prosecutions or punishments. Therefore, if the wording of the double jeopardy clause is unclear, determining the intent of the Framers of the Constitution should provide a better understanding of the protection contemplated by the clause.

The initial version of the double jeopardy clause was proposed by James Madison and submitted to the First Congress. Its wording was much like that of the proposal finally adopted: "No person shall be subject, except in cases of impeachment, to *more than one punishment or trial* for the same offense . . . ."[9] Obviously, Madison intended that prosecutions and punishments were to be treated as functional equivalents for purposes of double jeopardy.[10] Thus, it would be a violation of the clause to punish more than once as well as to prosecute more than once. Several objections were raised to Madison's proposal because some representatives feared that his language might prevent a defendant from seeking a new trial after conviction.[11] The language of the present double jeopardy clause was submitted to ensure that a defendant could indeed seek a new trial.[12] However, the change in wording was not intended to alter the ban against multiple punishments, and the protection afforded by the clause as contemplated by Madison was thought to be included under the new wording.[13] Although initially the expansive wording of Madison's proposal appeared to offer more protection than the final dou-

8. Missouri v. Hunter, 103 S.Ct. 673, 679 (1983).

9. 1 ANNALS OF CONGRESS 753 (1789) (emphasis added).

10. This is particularly interesting in light of Justice Marshall's objection that *Hunter* mandates prohibition against multiple prosecutions but not against multiple punishments. *Hunter*, 103 S.Ct. at 679 (Marshall, J., dissenting).

11. 1 ANNALS OF CONGRESS 753 (1789).

12. *Id.*

13. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HISTORY 283, 304-06 (1963).

ble jeopardy clause language, the Framers nevertheless intended that the clause would prohibit multiple punishments for a single criminal offense.[14] The double jeopardy clause is therefore implicated by the issue of whether cumulative punishments are permissible.[15]

The Supreme Court recognized the prohibition against multiple punishments for a single offense at a very early date. In *Ex parte Lange*,[16] the defendant was convicted for one offense punishable by fine or imprisonment. The defendant was sentenced to pay a fine *and* to be imprisoned. In determining the proper disposition of the case, the Court announced the protection afforded by the double jeopardy clause:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution.[17]

Clearly, the Court in *Lange* considered the multiple punishment issue as one most vital to the defendant. Thus, the Court held that the double jeopardy clause was intended to prohibit more than multiple prosecutions: "The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."[18] *Lange* followed quite closely in the tradition of Madison's proposed double jeopardy clause because that case required a convicted defendant to be punished only once.[19]

The problem with the wording of the double jeopardy clause was not whether multiple punishments were permissible but rather the meaning of the word "offence." A criminal act might well constitute more than one offense for purposes of the clause. Thus, the issue of whether multiple punishments are permissible is related closely to the question of whether a single criminal act might amount to two or more offenses.

14. The Supreme Court recognized early on that the double jeopardy clause was designed to prevent an accused from running the risk of "double punishment." *See* United States v. Ewell, 383 U.S. 116, 124 (1966).

15. This historical analysis has often been observed by the Court. *See, e.g.*, Tibbs v. Florida, 457 U.S. 31, 40 n.14 (1982); United States v. Wilson, 420 U.S. 332, 340-42 (1975); North Carolina v. Pearce, 395 U.S. 711, 729 (1969) (Douglas, J., concurring).

16. 85 U.S. (18 Wall.) 163 (1873).

17. *Id.* at 173.

18. *Id.*

19. More recent decisions indicate this same proposition, i.e., one punishment for a single offense. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 717 (1969). *Cf.* United States v. Wilson, 420 U.S. 332, 344 (1975) ("By contrast, where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended.").

In *Blockburger v. United States*,[20] the Supreme Court established the test to determine whether a single criminal act might constitute more than one offense. Recognizing that a legislature ordinarily does not intend to punish the same act under two statutes, the Court devised a rule of construction to determine when an act could be punished under more than one statute: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[21] Thus, the act would be but one offense where both statutes required the same set of facts to constitute the crime, but where one statute required facts not needed to prove the other, the criminal act would constitute two offenses.

The problem with the *Blockburger* test is that consistently it has been held to be one of statutory construction rather than a constitutional rule.[22] Presumably, this is because the rule was developed only to address the question of how many times the legislature intended to prosecute a single act. Thus, the rule was developed only to divine legislative intent from the structure of the overlapping statutes.

If *Blockburger* were deemed a constitutional rule, multiple punishments would be prohibited by the double jeopardy clause whenever the test for more than one offense could not be met.[23] However, since *Blockburger* is used only for statutory construction, it might be constitutionally permissible to punish a defendant under more than one statute even though *Blockburger* would define only one offense.

Dicta in recent cases prior to *Hunter* suggested that acts that constituted but one offense under *Blockburger* might be punishable under more than one statute. In *Whalen v. United States*,[24] the Court considered the question of whether an accused might be convicted of rape and felony murder based on the rape. Because a conviction for rape required no facts that a conviction for felony murder in the commission of rape did not require, the act was but one offense under *Blockburger*,[25] and the judgment of conviction was reversed.[26]

The Court in *Whalen* suggested that the defendant could have been punished under both statutes despite the result under *Blockburger*. In fact, the Court in dicta implied that such multiple punishment might be permissible. "And where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress."[27] The Court

20. 284 U.S. 299 (1932).

21. *Id.* at 304, *citing* Gavieres v. United States, 220 U.S. 338, 342 (1911).

22. *See, e.g.*, Albernaz v. United States, 450 U.S. 333, 337 (1981); Whalen v. United States, 445 U.S. 684, 691 (1980).

23. Simpson v. United States, 435 U.S. 6, 11 (1978).

24. 445 U.S. 684 (1980).

25. *Id.* at 694.

26. *Id.* at 695.

27. *Id.* at 693.

appears to indicate that the double jeopardy clause would not prevent multiple punishments where Congress explicitly authorized them, despite the fact that there was but one offense under *Blockburger*.

In *Albernaz v. United States*,[28] the Supreme Court further reinforced this incongruous result. In *Albernaz*, the defendant was convicted for conspiracy to import marijuana and conspiracy to distribute marijuana.[29] Both convictions arose out of the same criminal act, the act of conspiracy. However, the Court found that the act constituted two offenses under *Blockburger*, and concluded that punishment under both statutes was permissible.[30]

The Court did not rest at a disposition of the case under *Blockburger*, but said that had there been but one offense under that test, multiple punishments would still have been permissible. The *Albernaz* Court cited *Whalen* for the following proposition: "[T]he question whether 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."[31] The Court then cited dicta from *Brown v. Ohio*[32]: "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."[33] Reasoning that *Brown* defined the constitutional restriction as no more narrow than legislative intent and authorization, the Court in *Albernaz* then concluded: "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed."[34]

Thus, the *Albernaz* Court rejected the notion that the double jeopardy clause prohibited cumulative punishments for a single offense. "The *Blockburger* test is a 'rule of statutory construction', and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent."[35] The precedential value of this language was questionable prior to *Hunter* because *Albernaz* had been decided under *Blockburger* and further discussion of constitutional issues was clearly dicta.[36] Justice Stewart noted

28. 450 U.S. 333 (1981).

29. *Id.* at 334.

30. *Id.* at 344.

31. *Id.*, *citing Whalen*, 445 U.S. at 688.

32. 432 U.S. 161 (1977).

33. *Albernaz*, 450 U.S. at 344, *citing* Brown v. Ohio, 432 U.S. 161, 165 (1977).

34. 450 U.S. 333, 340 (1981).

35. *Id.* at 343 [citation omitted]. Thus, *Blockburger* is not held to be a constitutional rule because the underlying assumption is that a legislative body does not intend to punish under more than one statute. The test was devised to determine when the legislature would intend to punish under more than one statute.

36. "The definitive ultimate and penultimate sentences of *Albernaz* are dicta, unnecessary to reach the Court's conclusion in that case . . . ." Hunter v. State, 430 A.2d 476, 480 (Del. 1981).

this in his concurring opinion.[37] "These statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court's conclusion."[38] Justice Stewart was concerned about the tenuous connection between the language in *Whalen* and that in *Albernaz*.[39] However, the questionable nature of the *Albernaz* dicta was brief. In *Hunter* the Court adopted the *Albernaz* position as its holding.

The Hunter Decision

The *Missouri v. Hunter* decision marked the end of a protracted battle between the United States Supreme Court and the Missouri Supreme Court. The Missouri legislature had enacted an "armed criminal action" statute, which provided in 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.[40]

In *Sours v. State*,[41] the defendant was convicted of first degree robbery by means of a dangerous and deadly weapon and armed criminal action. The Missouri Supreme Court reversed the conviction for armed criminal action but affirmed the conviction for robbery because the two crimes were the same offense under *Blockburger*. Thus the multiple convictions violated the double jeopardy clause despite the presence of clear legislative authorization. On certiorari, the United States Supreme Court vacated and remanded for consideration in light of the *Whalen* decision.[42] On remand, the Missouri Supreme Court reaffirmed its position that the double jeopardy clause barred punishment under both statutes cumulatively.[43]

After *Sours*, the Missouri appellate court began reversing convictions under the armed criminal action statute. In many cases, the state of Missouri

37. Justice Stewart authored the opinion in *Whalen*, which seemed to imply the dicta in *Albernaz*. However, he concluded his *Albernaz* concurrence in a puzzling fashion, suggesting the *Blockburger* test was constitutionally linked: "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger v. United States*. [Citations omitted.] 450 U.S. 333, 345 (1981).

38. 450 U.S. at 345.

39. *Id.*

40. MO. REV. STAT. § 559.225 (1979).

41. 593 S.W.2d 208 (Mo.), *vacated sub nom.* Missouri v. Sours, 446 U.S. 962 (1980).

42. Missouri v. Sours, 446 U.S. 962 (1980).

43. Sours v. State, 603 S.W.2d 592 (Mo. 1980), *cert. denied*, 449 U.S. 1311 (1981).

applied for writs of certiorari, which the Supreme Court of the United States granted regularly, vacating and remanding for consideration in light of *Albernaz*.[44] The Missouri Supreme Court held fast, and language in *State v. Kane*[45] typified the position of that court: "It is our conclusion that in order to establish uniformity of sentencing in *Sours* type cases, the armed criminal action sentence should be reversed in all instances."[46] The Missouri court maintained the position that the statute, as enacted, violated the double jeopardy clause by prescribing multiple punishments for one criminal offense.[47]

The *Hunter* case reached the Supreme Court of the United States on certiorari in the heat of the battle with the Missouri Supreme Court. In *Hunter*, the defendant was convicted of first degree robbery and armed criminal action, but the Missouri appellate court set aside the armed criminal action conviction consistent with the Missouri Supreme Court's previous holdings.[48] The United States Supreme Court granted certiorari,[49] but this time declined to vacate and remand for further state court consideration.

The Court discussed *Whalen* and *Albernaz* and found those cases controlling on the issue in *Hunter*.[50] *Albernaz* had paved the way for multiple punishments for a single offense where a legislature so authorized, and the Court noted that the Missouri Supreme Court had found clear intent on the part of the legislature to punish under both statutes,[51] concluding:

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, 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.[52]

Criticisms of Hunter

The Dissent

The majority opinion in *Hunter* was met with dissent by Justice Marshall.[53] The dissenting opinion focused on the constitutional issue, asserting that the double jeopardy clause was indeed implicated in a cumulative punishment situation despite clear legislative intent that multiple punishments

44. *See* State v. Haggard, 619 S.W.2d 44, 49 n.2 (Mo. 1981).
45. 629 S.W.2d 372 (Mo. 1982), *vacated* 103 S.Ct. 1172 (1983).
46. 629 S.W.2d at 377.
47. The Missouri court suggested that the statute was constitutional when it was applied merely to enhance punishment, rather than to define a separate crime. *Id.*
48. State v. Hunter, 622 S.W.2d 374 (Mo. App. 1981), *vacated* 103 S.Ct. 673 (1983).
49. 103 S.Ct. 218 (1982).
50. 103 S.Ct. at 678-679.
51. *Id.* at 679.
52. *Id.*
53. Justice Stevens joined Justice Marshall's dissenting opinion. *Id.*

should be imposed. Justice Marshall noted the incongruous result that would be reached under *Hunter*: "I do not believe that the phrase 'the same offence' should be interpreted to mean one thing for the purposes of the prohibition against multiple prosecutions and something else for the purposes of the prohibition against punishment."[54]

Justice Marshall stated several reasons why this result was possible under *Hunter*. At the outset, he noted that armed criminal action and first degree robbery constituted the same offense under the *Blockburger* test because "[t]o punish respondent for first degree robbery, the State was not required to prove a single fact in addition to what it had to prove to punish him for armed criminal action."[55] As Marshall noted: "Respondent was thus punished twice for the elements of first-degree robbery: once when he was convicted and sentenced for that crime, and again when he was convicted and sentenced for armed criminal action."[56] This multiple punishment was in marked contrast to the fact that the defendant could not have been tried separately for these two charges.[57] Obviously, *Hunter* allowed this result because the double jeopardy clause was held not to affect what punishment could be imposed.

Justice Marshall recognized that a legislature had "wide latitude to define crimes and to prescribe the punishment for a given crime,"[58] but concluded that

> the Constitution does not permit a State to punish as two crimes conduct that constitutes only one "offence" within the meaning of the Double Jeopardy Clause.[59] . . . If the Double Jeopardy Clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create . . . a series of greater and lesser-included offenses, with the first crime a lesser-included offense of the second, the second a lesser-included offense of the third, and so on.[60] [Citation omitted.]

54. *Id.*

55. *Id.* at 680.

56. *Id.*

57. Harris v. Oklahoma, 433 U.S. 682 (1977); Brown v. Ohio, 432 U.S. 161 (1977). These cases prohibited a second prosecution on a lesser included offense of the crime for which a defendant was first convicted or acquitted, and also a second prosecution for the higher substantive offense after prior conviction or acquittal on the lesser included offense.

58. 103 S.Ct. at 680.

59. Justice Marshall regarded the *Blockburger* test as determinative of whether the punishments were for the same offense under the clause, a notion the majority had rejected in both *Albernaz* and *Hunter*. "[T]here is no more reason to treat the test as simply a rule of statutory construction in multiple punishment cases than there would be in multiple prosecution cases." *Id.* at 682.

60. *Id.* at 680.

Justice Marshall's concern may be well warranted. In *Whalen* the Court decided that a defendant could not be convicted of both felony murder in the commission of rape and the lesser included offense of rape at the same trial.[61] However, the *Hunter* decision may now limit *Whalen* to its particular facts. Statutory law made clear that Congress did not intend to punish twice for offenses arising out of the "same transaction."[62] Thus, *Whalen* would control only cases where a legislature had expressly forbidden multiple punishments for a single act by way of charging some lesser included offenses as well. By contrast, *Hunter* purports to control where the legislature has expressed an intent to impose multiple punishments. The problem here is that statutory schemes that do not fall under *Whalen* or *Hunter* have no appropriate controlling authority if both cases are read literally. In cases such as these, the legislature may have enacted several statutes proscribing the same conduct, as in *Whalen*, but provided no legislative guide as to whether multiple punishment was intended. This is true with the typical series of substantive crimes and their lesser included offenses.

Prior to the *Hunter* decision, *Whalen* clearly forbade convicting and punishing a defendant under a substantive offense and its lesser included offenses at the same trial. But *Whalen* dealt with a statutory scheme that prohibited multiple punishments. Even in that case, the dissent would have allowed punishment under both statutes despite the legislative intent because an appellate court had found that the legislature had intended to punish cumulatively.[63] Thus, the direction of the Court is obvious, and the trend is to permit multiple punishments in a growing number of cases. Justice Stewart noted the breadth of the jump from *Whalen* to *Albernaz* and *Hunter*.[64] The next logical move for the Court would be to permit multiple punishments where not forbidden by legislative intent. If this occurred, the defendant could be charged, tried, convicted, and punished for a substantive crime and its lesser included offense whenever legislative intent did not indicate that such was not permissible.[65]

Justice Marshall addressed the argument that imposition of two punishments was permissible under these circumstances because the state could have achieved the same result by merely enhancing the punishment for one substantive offense:

> This argument incorrectly assumes that the total sentence imposed is all that matters, and that the number of convictions that can be obtained is of no relevance to the concerns underlying the Double Jeopardy Clause . . . . The very fact that the State could simply

61. Whalen v. United States, 445 U.S. 684, 694 (1980).

62. *Id.* at 691.

63. *Id.* at 707 (Rehnquist, J., dissenting).

64. *See* Justice Stewart's concurring opinion in Albernaz v. United States, 450 U.S. 333, 345 (1981).

65. This is true despite the fact that, as in *Hunter*, the state could not try the separate charges at different trials. See *supra* text accompanying note 54.

> convict a defendant such as respondent of one crime and impose an appropriate punishment for that crime demonstrates that it has no legitimate interest in seeking multiple . . . punishment.[66]

Justice Marshall suggested that the multiple convictions were different from a single charge with harsher punishment for two reasons: each conviction has "collateral consequences,"[67] and the additional charges increase the likelihood that the defendant will be found guilty.[68]

Justice Marshall's criticisms are well taken. "The prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges."[69] The Court has long recognized that the ability to convict on lesser included offenses aids a prosecutor. Thus, in *Beck v. Alabama*,[70] the Court stated: "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged."[71] Similarly, in *Cichos v. Indiana*,[72] the advantages to the prosecution of possible conviction on lesser included offenses were discussed: "[I]t [gives] the prosecution the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue [to debate as] to his innocence."[73] Thus, the extra charges permitted under *Hunter* merely because punishment is authorized violates a basic protection afforded by the double jeopardy clause—that the prosecutor may not procedurally enhance the probability that the defendant will be convicted.[74] Since multiple charges permissible under *Hunter* present a far greater opportunity for conviction than a single charge, it is obvious that these procedures are not equivalent and that Justice Marshall recognized a valid distinction.[75]

66. 103 S.Ct. at 681-82. Justice Marshall finds the collateral consequences of multiple convictions to be an important factor. *Id.* at 681. However, Justice Brennan is on record as stating that the most important factor is indeed the time spent in punishment: "I suggest that most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction. United States v. DiFrancesco, 449 U.S. 117, 149 (1980)."

67. Such consequences might be civil disabilities, or differential treatment under a habitual offender statute. *Id.* at 681.

68. *Id.*

69. *Id.*

70. 447 U.S. 625 (1980).

71. *Id.* at 633.

72. 385 U.S. 76 (1966).

73. *Id.* at 81 (Fortas, J., dissenting from dismissal of certiorari). Justice Marshall took note of *Cichos* in his *Hunter* dissent. 103 S.Ct. at 681.

74. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 504 (1978); Green v. United States, 355 U.S. 184, 188 (1957).

75. This analysis is not without problems, however. Under the typical procedure, lesser included offenses are often submitted to the jury even where the state is not seeking a conviction under more than one statute. Thus, the advantage contemplated by *Beck* and *Cichos* would often be present without the *Hunter* result.

The Problem of Inconsistent Verdicts

Another problem with the *Hunter* decision is that it may require a rethinking of the issue of inconsistent verdicts in criminal cases. The Court has held that verdicts need not be consistent to sustain convictions.[76] However, the cases so holding have always involved indictments or informations with multiple counts, and the inconsistency permitted by the Court was inconsistency between separate counts.[77] The Court never has addressed the issue of inconsistent verdicts in terms of the *Hunter* fact pattern, and thus inconsistent verdicts in these cases may merit different treatment.

Multicount indictments or informations involve charges that will be seperate offenses under *Blockburger*. Each count defines a crime punishable by statute, and each count is distinct from another count in that it requires different proof. Further, separate counts could be tried at separate trials in most states. Thus, inconsistent verdicts in this setting may reflect failure of proof or insufficiency of evidence as to one particular count and should not disturb the judgment of guilt on other counts.

Under the *Hunter* fact pattern, however, this is not the case. The two charges are the same offense under *Blockburger*. Here, inconsistent verdicts may assume a different meaning. An acquittal as to armed criminal action should logically be considered as an acquittal of the underlying felony of first degree robbery. In resolving factual issues, the jury could not conclude in any sensible manner that a person committed robbery with a firearm without finding him guilty of committing a felony with a firearm. One charge logically implies the other, and inconsistent verdicts in this type of situation are irreconcilable. Thus, the *Hunter* decision may necessitate a reconsideration of the policy of allowing inconsistent verdicts.[78]

The Effect on Oklahoma Law

The Oklahoma Statutes provide the authorization for multiple punishments with a statute much like Missouri's. Oklahoma's statute provides, in part:

> Any person who, while committing or attempting to commit a felony, possesses a firearm or any other offensive weapon in such commission or attempt . . . . *in addition to the penalty provided*

76. *See, e.g.*, Hamling v. United States, 418 U.S. 87, 101 (1974); United States v. Dotterweich, 320 U.S. 277, 279 (1943); Dunn v. United States, 284 U.S. 390, 393 (1932). *See generally* Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues*, 36 OKLA. L. REV. 473 (1983).

77. *See* Hamling v. United States, 418 U.S. 87, 101 (1974); United States v. Dotterweich, 320 U.S. 277, 279 (1943); Dunn v. United States, 284 U.S. 390, 393 (1932).

78. At least one court has concluded that inconsistent verdicts are never erroneous in criminal cases. In People v. Vaughn, 409 Mich. 463, 466, 295 N.W.2d 354, 355 (1980), the Supreme Court of Michigan concluded that inconsistent verdicts were permissible because of the "mercy dispensing power of the jury."

> *by the statute for the felony committed* or attempted, upon conviction shall be guilty of a felony for possessing such weapon or device, which shall be a separate offense, and shall be punishable by imprisonment . . . .[79]

Thus, Oklahoma would seem at first glance to be subject to the *Hunter* decision because under *Hunter* multiple punishments would be permitted, given the statutory authorization. This may not be so, however, because there may be independent state grounds for ignoring *Hunter*. The Supreme Court of the United States has long held that it has no control over issues that are determined wholly on state grounds,[80] and has remanded cases repeatedly to state courts for a determination whether the decision was so based.[81] Therefore, if Oklahoma law forbids multiple punishments and state courts enforce this law, *Hunter* would have no effect on these state cases.

Initially, the question is one of state constitutional law. The Federal Constitution does not prohibit multiple punishments, but it is elementary that the state constitution can provide more protection than the federal.[82] Thus, if the Oklahoma constitution's double jeopardy clause confers more protection, *Hunter* would be inapplicable to criminal trials in this state.[83]

The Oklahoma constitution's provision which is analogous to the fifth amendment double jeopardy clause provides in part: "[N]or shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense."[84] Clearly, the language encompasses little more than the double jeopardy clause of the fifth amendment, despite some differences in wording. The first part of the Oklahoma clause is similar to the Missouri provision, which the Supreme Court rejected as a basis for the state court decision. The last sentence is only slightly different from the fifth amendment clause. Thus, the language seems to afford no greater double jeopardy protection that the fifth amendment double jeopardy clause.

The Oklahoma Court of Criminal Appeals has indicated that it construes the Oklahoma clause much the same as the Supreme Court of the United States construes the fifth amendment. In *Stockton v. State*,[85] the Court of Criminal Appeals announced that double jeopardy barred *multiple prosecutions* where the second prosecution required the same evidence that was necessary for the first prosecution to end in conviction. Thus, the Oklahoma court used a test similar to *Blockburger* to determine whether multiple prosecutions were permissible.

79. 21 OKLA. STAT. § 1287 (Supp. 1982) (emphasis added).

80. Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

81. *See, e.g.*, California v. Krivda, 409 U.S. 33 (1972).

82. *See, e.g.*, Oregon v. Kennedy, 456 U.S. 667, 680-81 (1982) (Brennan, J., concurring).

83. The Court in *Hunter* noted that the Missouri decisions were based on the United States Constitution. 103 S.Ct. at 676 n.1.

84. OKLA. CONST. art. II, § 21.

85. 509 P.2d 153 (Okla. Cr. App. 1973).

The court has not addressed the issue of whether multiple punishments would be permissible under the Oklahoma constitution because it is not necessary to do so. The Oklahoma statute provides the answer: "But an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions . . . but in no case can he be punished under more than one."[86] Thus, Oklahoma prevents multiple punishments for a single offense under more than one statute, regardless of what punishments might be legislatively authorized. Realizing the inherent conflict between the procedural statute and the armed criminal action statute, the court has resolved the issue in favor of the statutory prohibition against multiple punishments.[87]

It is arguable that the Court of Criminal Appeals has resolved that dispute under the assumption that the double jeopardy clause of the fifth amendment prohibits multiple punishments for a single criminal offense. If this were so, *Hunter* would provide the opportunity for a new construction, which might allow the multiple punishments because the Oklahoma armed criminal action statute authorizes such a procedure. Under this new construction, the expression of legislative intent in the statute could be deemed to impliedly repeal the procedural prohibition for the purposes of the armed criminal action statute. However, this is an unlikely result, and in any event, the leading case construing the armed criminal statute, *Grace v. Harris*,[88] decided the issue wholly on statutory grounds and did not mention what effect the Federal Constitution might have on the imposition of multiple punishments for one criminal offense.[89]

Conclusion

In *Hunter* the Supreme Court validated its dicta in *Albernaz* by holding that multiple punishments for a single offense encounter no double jeopardy bar. This is because the Court considers the *Blockburger* test as applying only to situations where the legislature has not evinced an intent to punish cumulatively. Thus, where the legislature does express intent to so punish, *Blockburger* does not define the "same offense" for the double jeopardy purposes and the intended punishment is constitutionally permissible.

The result is questionable at best. If *Blockburger* is used to determine when multiple prosecutions are constitutionally permissible, it is difficult to understand why that test should not be used to determine whether multiple

86. 21 OKLA. STAT. § 11 (1981).

87. Grace v. Harris, 485 P.2d 757 (Okla. Cr. App. 1971), *overruled on other grounds*, State v. Edens, 565 P.2d 51 (Okla. Cr. App. 1972) (construing 21 OKLA. STAT. § 11 (Supp. 1982)).

88. 485 P.2d 757 (Okla. Cr. App. 1971).

89. 21 OKLA. STAT. § 1287 (Supp. 1982). Section 1287 expressly defines crimes under that section as a "separate offense" from the substantive crime, *id.* However, such a mechanistic device should not change the result under the constitutional or statutory analyses because the test of what constitutes an offense should be independent of definitions given to suit particular statutes. Justice Marshall also advanced this reasoning in his dissent, applying it to the constitutional issue. 103 S.Ct. at 682.