State v. Gardner: North Carolina Sails into the Sargasso Sea

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"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."[1] This tenet, which is commonly referred to as the guarantee against double jeopardy, is firmly entrenched in both federal and state law.[2] Ironically, however, while no one questions the importance of the guarantee, no one seems to know exactly what it encompasses. The rule, according to one commentator, is "more commonly revered than understood";[3] and the law that surrounds it has been described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[4]

One of the most controversial areas of double jeopardy law involves the question of when a defendant can be sentenced more than once in a single trial for what is essentially the same offense. The United States Supreme Court, viewing the double jeopardy provision as primarily a restraint on the courts and on prosecutors, has held that a court may impose cumulative punishments in a single trial pursuant to specific legislative authorization.[5] In a recent North Carolina case, *State v. Gardner*,[6] the North Carolina Supreme Court parroted the Supreme Court's holding when it wrote,

> "Where [the] legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the same conduct . . . , 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."[7]

With this holding the *Gardner* court overruled North Carolina precedent without fully examining the underlying double jeopardy principles. This Note explores the evolution of the law governing double jeopardy in a single prosecution context and concludes that the *Gardner* court erred in adopting the United States Supreme Court's rule. In addition, it examines the court's newly articulated standard for determining legislative intent and finds that the standard in-

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1. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873).

2. *See infra* notes 30-40, 73-79 and accompanying text.

3. Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 263 (1965).

4. Albernaz v. United States, 450 U.S. 333, 343 (1981). According to the Delaware Supreme Court, "[t]he Sargasso Sea is a large oval-shaped area of the North Atlantic Ocean set apart by the presence of maritime plants, or seaweed . . . ." Hunter v. State, 430 A.2d 476, 480 n.2 (Del.) (citing 17 WORLD BOOK ENCYCLOPEDIA 111 (1976)), *cert. denied*, 454 U.S. 971 (1981). Legends and myths developed about the region during the era of the early navigators. People believed that the area contained a blanket of netted seaweed from which it was impossible to escape. *Id.*; *see* Thomas, *Multiple Punishments for the Same Offense: The Analysis After* Missouri v. Hunter *or Don Quixote, the Sargasso Sea and the Gordian Knot*, 62 WASH. U.L.Q. 79, 79 (1984).

5. Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).

6. 315 N.C. 444, 340 S.E.2d 701 (1986).

7. *Id.* at 460-61, 340 S.E.2d at 712 (quoting Missouri v. Hunter, 459 U.S. 359, 368-69 (1983)). The court's holding answered a question that neither defendant Franklin D. Gardner, Jr. nor the State had asked. Instead, both sides had focused on the facts of the case and applied the standards then in force in North Carolina. *See* Defendant Appellant's New Brief, *Gardner* (No. 390A84); New Brief for the State, *Gardner* (No. 390A84).

creases judicial as well as legislative power to define sentences. The supreme court supplanted the mechanical standard that existed and replaced it with a more ambiguous, less workable one. This Note evaluates the court's analysis of the statutes in question, which define larceny and breaking or entering, and determines that the court permitted cumulative sentencing in a situation in which the legislature's purpose was unclear. Finally, this Note discusses the North Carolina cases following *Gardner* and indicating the breadth of power that the new law has carved out for the judiciary.

On July 7, 1982, defendant Franklin D. Gardner, Jr. broke into a home in Gastonia, North Carolina and stole some guns, a television, and a stereo.[8] Defendant was subsequently arrested and indicted for felonious breaking or entering and felonious larceny.[9] Upon his conviction on both charges, Gardner appealed. He contended that felonious breaking or entering was a lesser included offense of the felonious larceny for which he was convicted and that therefore he could not be convicted of both crimes. The court of appeals unanimously and summarily dismissed this claim.[10] The court relied entirely on *State v. Smith*,[11] in which the court of appeals held that felonious larceny and felonious breaking or entering are separate and distinct offenses.[12]

On appeal to the North Carolina Supreme Court, defendant again challenged the multiple penalties on double jeopardy grounds.[13] Defendant based

8. State v. Gardner, 68 N.C. App. 515, 516, 316 S.E.2d 131, 131 (1984), *aff'd*, 315 N.C. 444, 340 S.E.2d 701 (1986).

9. Record at 4-5, *Gardner* (No. 8327SC966). Breaking or entering with the intent to commit larceny is considered felonious larceny. N.C. GEN. STAT. § 14-72(b)(2) (1986).

10. *Gardner*, 68 N.C. App. at 522, 316 S.E.2d at 135.

11. 66 N.C. App. 570, 312 S.E.2d 222, *disc. rev. denied*, 310 N.C. 747, 315 S.E.2d 708 (1984).

12. *Id.* at 575-76, 312 S.E.2d at 225-26. In response to defendant's contention that he could not be convicted of both felonious larceny and felonious breaking or entering, the *Smith* court applied the traditional test for determining whether there are two distinct offenses. *Id.* For further discussion of this standard, see *infra* notes 44-48 and accompanying text. Larceny, the court explained, requires "the wrongful taking and carrying away" of another's property; this element is not necessary to establish breaking or entering. To show breaking or entering, the State must prove an element not necessary to prove the larceny: the "breaking or entering of a building." The fact that the breaking or entering may be used to upgrade the larceny to a felony, the court stated, "does not change the nature of the crime" or the elements of proof. *Smith*, 66 N.C. App. at 575-76, 312 S.E.2d at 225-26. Regardless of its merit, this argument reflects an attempt by the court to justify its ruling under pre-*Gardner* standards. The court of appeals in *Gardner* did not posit any reason for this part of its decision other than that *Smith* had resolved the issue by finding no double jeopardy violation. *Gardner*, 68 N.C. App. at 522-23, 316 S.E. at 135. Thus, the court's decision did not break with North Carolina double jeopardy law by following *Smith*.

13. Defendant also raised an evidentiary issue. He argued that the prosecutor had committed an "error of constitutional magnitude" by questioning defendant at trial regarding his post-arrest silence. *Gardner*, 315 N.C. at 446, 340 S.E.2d at 704. The court did not agree. First, the court found that by failing to object to the cross-examination during trial, defendant had waived the right to assert the error on appeal. Second, the court stated that the cross-examination did not violate defendant's right to remain silent because the questions elicited answers that were consistent with information brought out at trial and therefore had no impeaching effect. The probative value of the evidence in question was slight, leading the court to maintain that even if the questions had violated defendant's constitutional rights, the violation would have been of insufficient magnitude to warrant reversal. Last, the court refused to review the issue pursuant to the "plain error" rule. Even if the error in a particular case is an obvious one, the court claimed, relief can only be granted when the error has a probable effect on the verdict. The questions asked on cross-examination in *Gardner* were not deemed significant enough to warrant review. *Id.* at 447-50, 340 S.E.2d at 704-06. The

his challenge on a disagreement with the reasoning of the *Smith* court.[14] He reiterated his argument that, on the facts of this case, the breaking or entering was included in the larceny with which he was charged. When breaking or entering is used to raise the larceny to a felony, defendant argued, double jeopardy forbids punishment for more than one charge.[15]

The supreme court decided that it did not matter whether the breaking or entering was included in the felonious larceny. The court stated that even when "the predicate crime of breaking or entering [is] used to raise the larceny charge to the compound crime of felony larceny," a court does not violate either the North Carolina or United States Constitution by convicting and punishing a defendant for both charges.[16] The court determined that the federal constitutional issue was controlled by a recent United States Supreme Court decision, *Missouri v. Hunter*,[17] which permits multiple penalties when they are unambiguously authorized by the legislature.[18] Prior to *Gardner*, North Carolina courts had always held that "[w]hat the state cannot do by separate indictments returned successively and tried successively, it cannot do by separate indictments returned simultaneously and consolidated for simultaneous trial."[19] The *Gardner* court, however, asserted that these prior decisions reflected a misunderstanding of double jeopardy principles. The majority claimed that this confusion existed because the court had never distinguished adequately between single prosecution and successive prosecution cases.[20] To clear up this confusion and "properly" interpret the constitutional provision, the court overruled these state cases and incorporated the United States Supreme Court's double jeopardy test into North Carolina's constitutional law.[21]

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supreme court unanimously affirmed the court of appeals' ruling on this issue. *Id*; *see Gardner*, 68 N.C. App. at 517, 316 S.E.2d at 131.

14. *See* Defendant-Appellant's New Brief at 15.

15. *See id.* at 14-17. Defendant based his argument on the assumption that the larceny was a felony because it was committed pursuant to a breaking or entering. *See* N.C. GEN. STAT. § 14-72(b)(2) (1986). In fact, it was unclear whether the jury reached that conclusion. The State had presented two theories on which the charge of felonious larceny could have rested. *See* Record at 5. Defendant's conviction for felonious larceny could have resulted from a determination that the goods stolen exceeded the statutory minimum or the jury could have concluded that the larceny was committed pursuant to a breaking or entering. *See* N.C. GEN. STAT. § 14-72 (1986). The jury's verdict did not state the theory on which it relied. *Gardner*, 315 N.C. at 450-51, 340 S.E.2d at 706. In such situations, defendant claimed, the "verdict is to be construed in favor of the defendant." Defendant-Appellant's New Brief at 16-17 (relying on State v. Williams, 235 N.C. 429, 70 S.E.2d 1 (1952)).

The State argued that the jury could have based the felony larceny conviction on the theory that the value of the stolen goods exceeded $400. *See* New Brief for the State at 10-11. Even if the conviction for felonious larceny had been based on the breaking or entering, the State maintained that the two offenses were separate and that double jeopardy did not bar the two convictions. *Id.* at 8-10.

16. *Gardner*, 315 N.C. at 451, 340 S.E.2d at 706-07.

17. 459 U.S. 359 (1983).

18. *See Gardner*, 315 N.C. at 453, 340 S.E.2d at 708.

19. State v. Midyette, 270 N.C. 229, 234, 154 S.E.2d 66, 70 (1967), *overruled by* State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

20. *See Gardner*, 315 N.C. at 452, 340 S.E.2d at 707 (citing People v. Robideau, 419 Mich. 458, 484-85, 355 N.W.2d 592, 602-03 (1984)). For further discussion of *Robideau*, see *infra* notes 118-20 and accompanying text.

21. *Gardner*, 315 N.C. at 453, 340 S.E.2d at 708. The court attempted to distinguish the fel-

Finally, the court examined the subject, language, and history of the criminal statutes. The court reasoned that the general assembly had intended to carve out a portion of the larceny statute which preserved larceny's common-law felony status. The court further noted that the general assembly prescribed equal punishment for felony larceny pursuant to a breaking or entering, and felony breaking or entering itself. In addition, the court pointed to past cases in which defendants had been convicted under both statutes.[22] Based on this analysis the court determined that the general assembly had intended to allow separate penalties.[23]

The majority consisted of only four members of the North Carolina Supreme Court; Justices Frye and Martin joined Justice Exum in dissent. Justice Exum conceded that *Hunter* allows cumulative punishment for an offense and its lesser included offense when the general assembly clearly condones this result.[24] He argued, however, that "*Hunter* was incorrectly decided," because it was based on a misunderstanding of the double jeopardy clause.[25] Although a state court cannot overturn the United States Supreme Court on matters of federal constitutional law, the dissent asserted that the court should have refused to follow *Hunter* and should have reached a contrary result under the North Carolina Constitution.[26] Justice Exum stated that the majority misinterpreted double jeopardy law and North Carolina precedent in adopting a rule inconsistent with other North Carolina doctrines such as the felony murder merger rule.[27]

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ony-murder merger doctrine, discussed *infra* notes 87-90 and accompanying text, from the concept of lesser included offenses. It found that prior cases were wrong in stating that the underlying felony in a felony murder case is a lesser included offense of the felony murder itself. *Id.* at 457, 340 S.E.2d at 710 (discussing State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972)). In this way, the court attempted to justify the retention of the felony murder merger doctrine even in light of its holding in *Gardner*. *See Gardner*, 315 N.C. at 456-60, 340 S.E.2d at 710-12.

22. *Gardner*, 315 N.C. at 456, 340 S.E.2d at 710 (citing State v. Murray, 310 N.C. 541, 313 S.E.2d 523 (1984) and State v. Brown, 308 N.C. 181, 301 S.E.2d 89 (1983)).

23. *Id.* at 461-63, 340 S.E.2d at 712-14.

24. *Id.* at 463, 340 S.E.2d at 714 (Exum, J., dissenting).

25. *Id.* at 463-64, 340 S.E.2d at 714 (Exum, J., dissenting).

26. *Id.* at 464, 340 S.E.2d at 714 (Exum, J., dissenting). The prohibition against double jeopardy is incorporated into the state constitution's law of the land clause, which provides that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19; *see* State v. Irick, 291 N.C. 480, 502, 231 S.E.2d 833, 847 (1977); State v. Crocker, 239 N.C. 446, 449, 80 S.E.2d 243, 245 (1954).

27. *See Gardner*, 315 N.C. at 464-71, 340 S.E.2d at 714-18 (Exum, J., dissenting). For a discussion of the felony-murder merger rule see *infra* notes 87-90 and accompanying text. Justice Exum did not blame the confusion surrounding the double jeopardy issue on the failure to distinguish between single prosecution and successive prosecution cases. Instead, he accused the *Gardner* majority of failing to distinguish between a situation in which a single transaction is punishable by two or more statutes and a situation in which two statutes constitute the same offense. *Gardner*, 315 N.C. at 464-65, 340 S.E.2d at 714-15 (Exum, J., dissenting). According to Justice Exum, multiple punishments may be imposed only in the first of these two examples. Then, the general assembly may express its intent to allow multiple punishments by satisfying the *Blockburger* test, discussed *infra* at notes 44-52 and accompanying text. *See Gardner*, 315 N.C. at 464-65, 340 S.E.2d at 714-15 (Exum, J. dissenting).

Justice Exum further stated that the felony-murder merger doctrine clearly supported his view of the double jeopardy issue. Justice Exum argued that the felony-murder merger doctrine was based on double jeopardy principles and was firmly established as a part of North Carolina law. The

In addition, Justice Exum argued, the majority was incorrect in finding that the general assembly intended to authorize multiple punishments. When the statutes were enacted, decisions of both the North Carolina Supreme Court and the United States Supreme Court indicated that multiple punishments were unconstitutional.[28] Justice Exum reasoned that courts should presume that statutes enacted by the general assembly when this was the accepted rule did *not* authorize multiple punishments. Because on their face their statutes did not support the majority's finding, the presumption could not be rebutted. Therefore, the dissent concluded that even under the court's newly articulated standard, the majority reached the wrong result.[29]

At the root of the *Gardner* controversy is the double jeopardy guarantee, which appears in the fifth amendment of the United States Constitution. It reads simply: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[30] The double jeopardy principle emerged hundreds of years ago[31] and was deeply embedded in English common law[32]

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majority's efforts to alter the basis for the doctrine, Justice Exum contended, failed entirely. *See id.* at 466-70, 340 S.E.2d at 715-17 (Exum, J., dissenting).

28. *See Gardner*, 315 N.C. at 471, 340 S.E.2d at 718 (Exum, J., dissenting).

29. *Id.* at 471-72, 340 S.E.2d at 718-19 (Exum, J., dissenting).

30. U.S. CONST. amend. V. The provision encompasses three basic prohibitions. It protects against retrial for the same offense following an acquittal, retrial for the same offense following a conviction, and multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); *Gardner*, 315 N.C. at 451, 340 S.E.2d at 707. This Note focuses on the protection against multiple punishments for the same offense. For a more comprehensive discussion of double jeopardy, see M. FRIEDLAND, DOUBLE JEOPARDY (1969) (discussing the law as it is applied in the United States, Canada, and England); J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969).

For a discussion of the protection against retrial, see Bigelow, *Former Conviction and Former Acquittal*, 11 RUTGERS L. REV. 487 (1957); Note, *The Protection From Multiple Trials*, 11 STAN. L. REV. 735 (1959).

31. *See* J. SIGLER, *supra* note 30, at 2-3; Comment, *supra* note 3, at 262 n.1. The guarantee dates back to the days of the Greeks and Romans. Bartkus v. Illinois, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting). Under Roman law the governor could not permit a citizen to be accused of a crime after he or she had been acquitted. J. SIGLER, *supra* note 30, at 2. Although these guarantees existed during ancient times, they were of limited scope and legal force because criminal procedure was much less formal. *Id.* at 2-3.

32. *See* M. FRIEDLAND, *supra* note 30, at 5-15; J. SIGLER, *supra* note 30, at 4-16; Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 3 (1984). It is hard to determine exactly when the protection against double jeopardy first emerged in England. A dispute between Henry II and Archbishop Thomas á Becket in 1163 probably played a significant role in introducing the concept of double jeopardy into English common law. In that year Henry retried a clerk, de Brois, after de Brois' acquittal in the spiritual courts. Becket challenged the King's actions, claiming that clerks tried in the ecclesiastical courts could not be retried in the King's courts. He based his argument on the maxim *nemo bis in idipsum* (no man ought to be punished twice for the same offense). The fight between the two men ended with Becket's murder. However, in 1176 Henry made some concessions regarding the principles over which they had fought. *See* M. FRIEDLAND, *supra* note 30, at 5-6; *see also* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 444-57 (2d ed. 1899) (chronicling the controversy between Henry and Becket).

The concept of double jeopardy developed slowly and sporadically following Henry's concession in 1176. Coke and Blackstone are attributed with clarifying the principle and endowing it with its significance. J. SIGLER, *supra* note 30, at 16-17. In 1769 Blackstone described four pleas that a prisoner could give at bar when threatened with double jeopardy. J. EHRLICH, EHRLICH'S BLACKSTONE 926-28 (1959). Two of these pleas, former attainder and former pardon, have no relevance in modern American law. J. SIGLER, *supra* note 30, at 20; Comment, *supra* note 3, at 262 n.1. The other two pleas, former acquittal and former conviction, have continued vitality today in the prohibitions against retrial after conviction and acquittal.

long before its incorporation into the American Constitution.[33] Because the form and scope of the guarantee differed throughout its evolution,[34] there is no consensus regarding its precise scope when it became part of American constitutional law.

It is clear that the fifth amendment was meant to protect against multiple punishments for the same offense. The version initially submitted to the First Congress by James Madison provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."[35] Congress changed the wording primarily to guarantee that the clause would not be used to prevent a defendant from appealing a conviction.[36] Thus, the change further ensured the rights of accused persons and did not limit the scope of the provision.[37] The Supreme Court recognized this in 1873 in *Ex parte Lange*:[38]

> 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 offense? 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. . . .
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> . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.[39]

No court disputes the enduring vitality of the principle enunciated in *Lange*.[40] The confusion arises in trying to determine exactly when two provisions punish "the same offense" as it is defined in double jeopardy law. In some cases two sentences obviously do not involve the same offense. For example, a criminal may be convicted of committing two murders when he or she kills two individuals. A criminal also may be sentenced for both robbery and murder. The cases, however, are not always this clear. For example, an individual may injure two people by firing one gunshot.[41] Moreover, a person could be sen-

33. Comment, *supra* note 3, at 262 n.1. The guarantee also existed in the United States prior to its adoption as part of the fifth amendment. The doctrine was a part of the common law and became expressly included in the codes and constitutions of many states. *See* J. SIGLER, *supra* note 30, at 21-27; Bigelow, *supra* note 30, at 487-88. The double jeopardy prohibition in America was broader than the guarantee in England and has influenced the development of the protection in that country. *See* Hunter, *supra* note 32, at 15.

34. *See* J. SIGLER, *supra* note 30, at 1-27. Sigler attributes this largely to changes in both substantive criminal law and the state of criminal procedure. *See id.* at 7.

35. 1 ANNALS OF CONG. 433 (1789).

36. Bigelow, *supra* note 30, at 488. The adopted version also used the standard double jeopardy terminology. *See* Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple Punishment Prohibition*, 90 YALE L.J. 632, 635 n.16 (1981).

37. Note, *Criminal Law: The Permissibility of Multiple Punishments for One Criminal Offense:* Missouri v. Hunter *and Its Effect on Oklahoma Law*, 36 OKLA. L. REV. 875, 876-77 (1983).

38. 85 U.S. (18 Wall.) 163 (1873).

39. *Id.* at 173.

40. *See, e.g.*, Ohio v. Johnson, 467 U.S. 493, 498-99 (1984) (double jeopardy protects against multiple punishment).

41. Ladner v. United States, 358 U.S. 169 (1958) (one offense). *See also* Bell v. United States,

tenced for both conspiracy to import drugs and conspiracy to distribute the same drugs or two similar overlapping offenses.[42] Finally, one could be convicted of both a crime and its lesser included offense, such as stealing an automobile and operating that same automobile without the owner's consent.[43]

In difficult cases, courts traditionally have resorted to the *Blockburger* rule. This rule, as explained in *Blockburger v. United States*,[44] states 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."[45] In *Blockburger* defendant was charged with three counts based on two illegal sales of morphine to the same buyer. Applying this test, the Court held that defendant could be punished twice for the second sale—for not selling the morphine in its original stamped package and for selling the drug without a prescription.[46]

After *Blockburger* courts systematically used this test to decide when a legislature had intended for a single transaction to be punishable under more than one statute. If each statute required proof of even one additional element, then the courts could punish a crime under both laws. This was true even in cases involving substantial overlap in the proof necessary to support the multiple convictions.[47] If no additional facts were needed to obtain the second conviction, however, then the second statute was "included" in the first, and double jeopardy barred the second conviction.[48]

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349 U.S. 81 (1955) (transporting two women across state line in one vehicle for "immoral purposes" constituted only one offense). In each of these cases, the Supreme Court determined that the legislature had intended to impose only one penalty for the act in question. The Court applied the rule of lenity, discussed *infra* notes 71-72 and accompanying text, which dictates that courts resolve ambiguities in favor of the less harsh interpretation. Therefore, the Court did not reach the double jeopardy issue. For an example of a case in which the Court's analysis yielded a different conclusion, see Ebeling v. Morgan, 237 U.S. 625 (1915) (successive cuttings of mailbags with criminal intent constituted separate offenses that could be separately punished).

42. Albernaz v. United States, 450 U.S. 333 (1981) (two offenses).

43. Brown v. Ohio, 432 U.S. 161 (1977) (one offense). Although *Brown* involved successive prosecutions, the test applied—the *Blockburger* test, discussed *infra* at notes 44-52 and accompanying text—reflects the standard then used in cases involving single prosecutions as well. *See Brown*, 432 U.S. at 166. Later cases limited the test's applicability in single prosecution situations. This development in the law is discussed *infra* notes 52-64 and accompanying text. Unless otherwise noted, the cases mentioned involving successive prosecutions apply the same analysis that would be used in single prosecutions.

44. 284 U.S. 299 (1932). The test did not originate in the *Blockburger* case, however. In fact, the *Blockburger* Court expressly relied on Gavieres v. United States, 220 U.S. 338 (1911), as authority for the proposition. *Blockburger*, 284 U.S. at 304. *Gavieres*, in turn, adopted a standard earlier articulated in Morey v. Commonwealth, 108 Mass. 433, 434 (1871).

45. *Blockburger*, 284 U.S. at 304.

46. *Id.* at 303-04. The Court also found that the sales comprised "distinct and separate sales made at different times." *Id.* at 301.

47. Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

48. *See, e.g.*, Harris v. Oklahoma, 433 U.S. 682 (1977) (per curiam) (underlying felony of robbery included in felony-murder charge by concession of the State; successive prosecution barred); Brown v. Ohio, 432 U.S. 161 (1977) (joyriding included in automobile theft; successive prosecution barred). This analysis still applies to successive prosecutions and to single prosecutions in cases in which the legislative intent is unclear. *See* Ohio v. Johnson, 467 U.S. 493, 499 n.8 (1984); Thomas, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 5-8 (1985).

The language used in *Blockburger*, however, does not suggest that the rule is one of constitutional magnitude.[49] Instead, the *Blockburger* decision focused on the intent of the legislature.[50] On its face, the doctrine allows courts to bypass a double jeopardy analysis when its application yields one of two results. If two statutes create distinct offenses under the test, then no double jeopardy problem arises when an individual receives cumulative punishments.[51] If the two statutes constitute the same offense under *Blockburger* because they deal with an offense and its lesser included offense, then the prosecutor may charge a defendant with both crimes so long as the court only imposes a single sentence.[52] It is only when the two offenses are the same and multiple penalties are still imposed that double jeopardy enters into the analysis.

The emphasis that the *Blockburger* rule places on statutory construction and legislative intent made it relatively easy for the Supreme Court to narrow the rule's application in single prosecution situations. Before the Court expressly limited the scope of the doctrine in *Hunter*,[53] there were a few cases that heralded the change. In *Whalen v. United States*,[54] for example, the Court held that federal legislation did not permit the imposition of cumulative punishments for felony murder and the underlying felony of rape. The Court's opinion, however, indicated that the double jeopardy clause may not always preclude cumulative sentences for the same offense: "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences *unless authorized by Congress to do so.*"[55] *Whalen* thus implied that with express congressional authorization a court could impose multiple penalties. In his concurring opinion Justice Blackmun urged the Court to expressly adopt this doctrine and stated that "[t]he *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended."[56] This, he contended, would clear up the confusion caused by language in prior cases suggesting that the Court held a contrary view.[57]

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49. Note, *supra* note 37, at 878. Subsequent cases, however, discussed both double jeopardy and the *Blockburger* rule together. *See, e.g.*, Jeffers v. United States, 432 U.S. 137, 151 (1977) (two offenses considered the same for double jeopardy purposes when each requires proof of no additional fact); Brown v. Ohio, 432 U.S. 161, 165-66 (1977) (stating that *Blockburger* set forth the test used to determine whether there was a double jeopardy violation).

50. *Blockburger*, 284 U.S. at 303-04.

51. *See id.* at 304.

52. *See Hunter*, 459 U.S. at 372 n.4 (Marshall, J., dissenting).

53. The *Hunter* Court held that a legislature can authorize multiple punishments for a single offense in a single trial. *Hunter*, 459 U.S. at 368-69; *see infra* notes 66-72 and accompanying text.

54. 445 U.S. 684 (1980). In *Whalen* defendant received consecutive sentences for rape and for killing his victim in the perpetration of the rape. He appealed, taking the position that double jeopardy principles mandated the application of the felony-murder merger doctrine, discussed *infra* notes 87-90 and accompanying text, and that he could not be cumulatively punished under both statutes. *Whalen*, 445 U.S. at 685-86.

55. *Whalen*, 445 U.S. at 689 (emphasis added).

56. *Id.* at 697 (Blackmun, J., concurring).

57. *Id.* at 697-98 (Blackmun, J., concurring). Justice Blackmun was referring to Simpson v. United States, 435 U.S. 6, 11-13 (1978), and Jeffers v. United States, 432 U.S. 137, 155 (1977). Both

In *Albernaz v. United States*[58] a strict application of the *Blockburger* rule established that conspiracy to import marihuana was distinct from conspiracy to sell the same marihuana.[59] The Court's analysis, however, did not end at that point. The opinion went on to state that "[t]he *Blockburger* test is a rule of statutory construction . . . [that] should not be controlling where, for example, there is a clear indication of contrary legislative intent."[60] Although the crimes in *Albernaz* survived the *Blockburger* analysis, the Court's dicta indicated that it was prepared to find that *Blockburger* was not constitutionally mandated and that multiple penalties could stand under the proper circumstances.[61]

It was *Missouri v. Hunter*[62], however, that took the dicta in *Albernaz* and transformed it into law. At issue in *Hunter* were convictions for robbery in the first degree, armed criminal action, and assault with malice. All three convictions resulted from a single criminal transaction, the armed robbery of a grocery store.[63] The Missouri Court of Appeals reversed defendant's conviction for armed criminal action on double jeopardy grounds.[64] The United States Supreme Court agreed to hear the case following the Missouri Supreme Court's refusal to do so.[65]

The Supreme Court reversed, holding that Missouri law permitted sentencing for both armed criminal action and the underlying felony of first degree robbery.[66] The Court accepted the Missouri Court of Appeals' conclusion that the two statutes defined the same offense, but held that this fact was irrelevant in light of the legislature's express intention to permit multiple punishments.[67] The Court relied on its reasoning in *Whalen* and *Albernaz*[68] to conclude that when legislatures permit multiple punishments, courts may impose them.[69]

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cases implied that two statutes must always be evaluated in light of the *Blockburger* rule when the State presents the same evidence to obtain both convictions.

58. 450 U.S. 333 (1981).

59. *Id.* at 339. The Court reasoned that the two provisions "specif[ied] different ends as the proscribed object of the conspiracy—distribution as opposed to importation," and concluded that each provision required proof of an additional fact. *Id.*

60. *Id.* at 340.

61. *Id.* at 344 (dictum).

62. 459 U.S. 359 (1983).

63. *Id.* at 361-62.

64. *See* State v. Hunter, 622 S.W.2d 374, 375 (Mo. Ct. App. 1981), *vacated*, 459 U.S. 359 (1983). The court's decision rested entirely on prior decisions of the Missouri Supreme Court. Those opinions had held that under the *Blockburger* test, robbery in the first degree and armed criminal action comprised the same offense. *Id.* at 375 (citing State v. Haggard, 619 S.W.2d 44 (Mo. 1981), *vacated*, 459 U.S. 1192 (1982); Sours v. State, 603 S.W.2d 592 (Mo. 1980) (en banc), *cert. denied*, 449 U.S. 1131 (1981) (*Sours II*), and Sours v. State, 593 S.W.2d 208 (Mo.) (en banc), *vacated*, 446 U.S. 962 (1980) (*Sours I*)).

65. *See Hunter*, 459 U.S. at 363.

66. *Id.* at 368-69. The Court stated that the Missouri Supreme Court had recognized "the [Missouri] legislature intended that punishment for violaton of the statutes be cumulative." *Id.* at 368.

67. *Id.* at 366-68.

68. *Id.* at 368.

69. *Id.* at 368-69. The Court's holding ended a conflict with the Missouri Supreme Court over the breadth of the double jeopardy guarantee. For an account of that conflict, see Thomas, *supra* note 4, at 81-84, 96-106; Note, Missouri v. Hunter *and the Legislature: Double Punishment Without Double Jeopardy*, 37 ARK. L. REV. 1000, 1008-1003 (1984); Note, *supra* note 37, at 880-81.

As a result of the *Hunter* decision, federal law permits cumulative punishment in certain situations. The *Hunter* decision purported to untie the hands of the legislative branch while keeping courts and prosecutors bound by the double jeopardy prohibition. Although the legislature is free to permit multiple penalties, the courts and prosecutors may only impose them pursuant to legislative authorization. When this authorization does not exist, courts must still resort to the *Blockburger* test.[70] Thus, the *Blockburger* rule remains useful even in a single prosecution analysis because the legislative intent is not always clear. In applying this test the rule of lenity serves as a further limitation on the courts. This rule requires courts to resolve statutory ambiguities in favor of the more lenient interpretation.[71] The courts only apply the rule of lenity when the *Blockburger* test does not yield a clear result.[72] When the *Blockburger* test clearly prohibits multiple punishment, the rule of lenity is not reached.

The Supreme Court's pronouncements in the area of double jeopardy law have been binding on the states ever since 1969, when *Benton v. Maryland*[73] incorporated the guarantee into the fourteenth amendment's due process clause. North Carolina, however, protected its citizens against double jeopardy long before *Benton*. As early as 1869, the North Carolina Supreme Court stated: "That no person for the same offence can be twice put in jeopardy of life or limb, is a sacred principle of common law."[74] *State v. Mansfield*,[75] a 1934 decision, grounded this principle in the state constitution as well.[76] By 1954 the supreme court described the guarantee as "an integral part of the 'law of the land'" clause of the state constitution.[77] This guarantee also extended to the protection against multiple punishments.[78] The North Carolina Supreme Court asserted that, because double jeopardy principles were already established as a part of state law, *Benton* added nothing to North Carolina law.[79]

In fact, North Carolina had already developed a system of analysis not un-

70. *See Hunter*, 459 U.S. at 366-69.

71. Bell v. United States, 349 U.S. 81, 83-84 (1955). The rule of lenity, in turn, is qualified by the proviso in Gore v. United States, 357 U.S. 386 (1958). *Gore* warned that courts should not be lenient in interpreting laws in areas in which the legislature has manifested an attitude of severity. *See id.* at 390. Because Congress had expressed such an attitude towards violators of narcotics laws, the Court in *Gore* allowed multiple punishments under three separate provisions. *Id.* at 386. The Court stressed that, in so doing, it was not overruling either *Blockburger* or *Bell*. *Id.* at 388, 391.

72. *See* Thomas, *supra* note 48, at 54-56 (proposing a five-step rule for analyzing double jeopardy problems in the wake of the *Hunter* decision).

73. 395 U.S. 784, 793-96 (1969).

74. State v. Prince, 63 N.C. 529, 531 (1869).

75. 207 N.C. 233, 176 S.E. 761 (1934).

76. *Id.* at 233, 176 S.E. at 761. The *Mansfield* opinion indicated that the guarantee against double jeopardy was generally accepted as a state constitutional guarantee. Although the principle was not discussed in the case, the court stated the rule in a headnote, citing only the state constitution and the fifth amendment for support. *Id.*

77. State v. Crocker, 239 N.C. 446, 449, 80 S.E.2d 243, 245 (1954) (quoting N.C. CONST. art. I, § 19); *see supra* note 26.

78. State v. Cameron, 283 N.C. 191, 198, 195 S.E.2d 481, 485 (1973) (dicta); State v. Summrell, 282 N.C. 157, 173, 192 S.E.2d 569, 579 (1972) (conviction for assault of an officer reversed because it constitutes the same offense as resisting arrest); State v. Parker, 262 N.C. 679, 684, 138 S.E.2d 496, 500 (1964) (conviction for assault with deadly weapon reversed because duplicate of conviction for robbery with firearms).

79. State v. Battle, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971).

like that applied by the United States Supreme Court in *Blockburger*. North Carolina courts commonly referred to their version as "the additional facts test."[80] A court applying this double jeopardy test conducted a two-part examination. First, it analyzed the facts of the case and determined whether those alleged in the second indictment were sufficient to sustain a conviction under the first indictment. Then, the court examined the indictments themselves and asked whether at least one additional fact was necessary in each.[81] The offenses did not pose a double jeopardy problem if "each offense required proof of an additional fact which the other did not."[82] Thus, the United States Supreme Court's *Benton* decision did not force the North Carolina courts to change the framework of their double jeopardy analysis.

In some ways North Carolina law was much clearer than federal law in its articulation of the double jeopardy doctrine.[83] *State v. Midyette*[84] firmly established the rule that the State could not sidestep double jeopardy considerations merely by consolidating the indictments and presenting them at one trial. If double jeopardy barred successive prosecutions, then it also barred multiple punishments.[85] Subsequent North Carolina cases adhered to this doctrine.[86]

North Carolina courts often used the double jeopardy rule to prevent the State from obtaining convictions for both felony murder and the underlying felony.[87] *State v. Thompson*[88] explicitly based the rule, called the felony-murder

80. State v. Birckhead, 256 N.C. 494, 500-01, 124 S.E.2d 838, 844 (1962) (citation omitted); State v. Cannon, 38 N.C. App. 322, 325-26, 248 S.E.2d 65, 68 (1978) (citations omitted).

81. *See, e.g.*, State v. Irick, 291 N.C. 480, 502-03, 231 S.E.2d 833, 847 (1977); State v. Martin, 47 N.C. App. 223, 231, 267 S.E.2d 35, 40, *cert. denied*, 301 N.C. 238, 283 S.E.2d 134 (1980). The first part of this analysis showed whether the second offense involved was the same offense as the first in fact; the second test determined whether the two offenses were the same in law. Thus, North Carolina departed from a strict application of the *Blockburger* rule, looking at the facts of the case in addition to the statutes. This approach, however, is in accord with subsequent United States Supreme Court decisions. *See Gardner*, 315 N.C. at 455, 340 S.E.2d at 709 (citing Brown v. Ohio, 432 U.S. 161 (1977); Illinois v. Vitale, 447 U.S. 410 (1980)).

82. State v. Brown, 308 N.C. 181, 184, 301 S.E.2d 89, 91 (1983) (citations omitted), *overruled on other grounds,* State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985).

83. *See Gardner*, 315 N.C. at 464, 340 S.E.2d at 714 (Exum, J., dissenting) ("[O]ur precedents speak with one clear, unambiguous voice on the subject.") A state court may interpret a constitutional standard differently than the United States Supreme Court under the state constitution as long as the state does not limit the breadth of the protection afforded by the federal constitution. *See infra* note 97.

84. 270 N.C. 229, 154 S.E.2d 66 (1967), *overruled by* State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

85. *See id.* at 233-34, 154 S.E.2d at 70. In *Midyette* defendant was convicted of both assault with a deadly weapon with intent to kill and resisting, delaying, and obstructing his own arrest. Defendant did not challenge his convictions on double jeopardy grounds. Nevertheless, the supreme court determined that the two convictions punished precisely the same conduct and arrested judgment in the case. *Id.*

86. *E.g.*, State v. Partin, 48 N.C. App. 274, 282, 269 S.E.2d 250, 255, *disc. rev. denied*, 301 N.C. 404, 273 S.E.2d 449 (1980).

87. The felony-murder doctrine allows a court to charge a defendant with first-degree murder when he or she has killed an individual during the commission of a felony. The theory used to justify the rule is that the defendant's intent to commit the felony supplies the intent to kill that is necessary for the murder charge. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 545-61 (1972). In North Carolina the doctrine is codified at N.C. GEN. STAT. § 14-17 (1986). Another statute allows the State to obtain a conviction for first-degree murder cases in which defendant caused the death of an individual while he or she was engaged in the commission of or an attempt to commit a felony. *See* N.C. GEN. STAT. 15A-2000(e)(5) (1983); State v. Moore, 284 N.C. 485, 494, 202 S.E.2d 169, 174-75

merger rule, on a double jeopardy theory:

> The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering. In this sense, the felonious breaking and entering was a lesser included offense of the felony murder. . . . If defendant had been acquitted in a prior trial of the separate charge of felonious breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder.[89]

When *Gardner* was decided, this rationale was accepted as the rationale for the merger doctrine.[90]

Thus, *Gardner* broke with North Carolina law in a few major respects. It overruled *Midyette*, abandoning the traditional principle that double jeopardy protection was as great in single prosecution situations as in successive prosecution situations.[91] It also criticized the previously asserted rationale for the felony-murder merger doctrine.[92]

The court did not have to decide *Gardner* this way. As Justice Exum pointed out in his dissent in *Gardner*, the *Hunter* decision does not compel state supreme courts to change their state laws.[93] State judges are free to independently interpret their own constitutions as long as the decisions neither directly conflict with existing federal doctrine[94] nor limit federally mandated constitutional guarantees.[95] In *Pruneyard Shopping Center v. Robins*[96] the United States Supreme Court acknowledged the states' right in this area: "Our reasoning in [a particular case] . . . does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[97]

(1974). North Carolina common law further provides that if the felony is used to obtain a conviction for first-degree murder, the defendant cannot also be sentenced for the underlying felony. This is known as the merger rule. *See* State v. Carey, 288 N.C. 254, 274, 218 S.E.2d 387, 400 (1975), *death sentence vacated*, 428 U.S. 904 (1976).

88. 280 N.C. 202, 185 S.E.2d 666 (1972).

89. *Id.* at 215-16, 185 S.E.2d at 675 (citation omitted). The court found that defendant had been convicted of felony murder because he had committed the murder in the perpetration of the felonies of breaking or entering and larceny. Accordingly, the court arrested the judgment for the underlying felonies. *Id.* at 217, 185 S.E.2d at 676.

90. *See* cases cited *infra* note 155.

91. *Gardner*, 315 N.C. at 454, 340 S.E.2d at 708.

92. *Id.* at 457-59, 340 S.E.2d at 709-10.

93. *See id.* at 464, 340 S.E.2d at 714 (Exum, J., dissenting).

94. *See* Ridgway v. Ridgway, 454 U.S. 46, 54 (1981) (state court decisions subject to disturbance to the extent that they "fail to honor federal rights and duties"); Sager, *Foreward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 (1985).

95. *See, e.g.*, State v. Barnes, 264 N.C. 517, 520-21, 142 S.E.2d 344, 344-46 (1965) (state can interpret its own constitution, but is bound to accept the United States Supreme Court's interpretation of the minimum scope of prisoners' rights under the due process clause).

96. 447 U.S. 74 (1980).

97. *Id.* at 81. The Court in *Pruneyard* affirmed a decision of the California Supreme Court, in which the California court claimed that the state constitution provided some protection to those who

North Carolina law reflects this principle. The law of the land clause, which includes the double jeopardy guarantee,[98] is synonymous with the due process clause.[99] In addition, the North Carolina courts have always viewed United States Supreme Court due process decisions as "persuasive" in interpreting North Carolina's law of the land clause.[100] The North Carolina Supreme Court, however, has repeatedly asserted that "in the construction of [a] provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is . . . not binding upon this Court."[101] In *Bulova Watch Co. v. Brand Distributors, Inc.*[102] the North Carolina Supreme Court invalidated a fair trade statute as unconstitutional under the state constitution although the United States Supreme Court had reached the opposite result in an Illinois case involving an

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spoke and petitioned on private premises. The Court upheld this decision in spite of Lloyd Corp. v. Tanner, 407 U.S. 551, 67-81 (1972), which reached a contrary result under the United States Constitution. *See also* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 292 (1982) (Supreme Court will not reverse a case based on its disagreement with a lower court's interpretation of federal law if that court also rests its decision on independent state grounds); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 504 (1977) (commenting that the drafters of the Bill of Rights "would welcome the broadening by state courts of the reach of state constitutional counterparts beyond the federal model.")

Michigan v. Long, 463 U.S. 1032 (1983), does not invalidate this fundamental principle. In *Long* the Supreme Court reversed a Michigan Supreme Court decision that ostensibly rested on both the state and federal constitutions. The Court contended that the references to the Michigan Constitution did not evidence an independent state ground for the decision. The Michigan court, the Supreme Court claimed, relied exclusively on federal law to interpret the state constitution. *Id.* at 1037. Therefore, the Supreme Court had the authority to review the Michigan court's analysis and holding. *See id.* at 1040-41. The Court emphasized, however, that when a state court "indicates clearly and expressly that [its decision] is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041. Thus, the states' rights in this respect are unquestioned. As one commentator noted, this is one of the few areas of law in which liberals and conservatives are in agreement, even though their rationales differ. Liberals want the state courts to protect individual rights. Conservatives, on the other hand, emphasize the importance of properly allocating power between the federal government and the state government. Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1092-93 (1985).

The growing trend on the part of state courts to interpret their state constitutional guarantees more broadly than the federal guarantees is a result of the current Supreme Court's retreat from the positions of the Warren Court on issues involving individual rights. *See, e.g.*, State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981) (automatic standing rule retained in New Jersey despite United States Supreme Court decision limiting scope of standing in federal law); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980) (interpreting right to speak and right to assemble); State v. Stroud, 106 Wash. 2d 144, 720 P.2d 436 (1986) (noting the "heightened privacy protection" accorded by Washington in the area of search and seizure law). For a more detailed study of this topic, see Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Brennan, *supra*; Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L.J. 708 (1983).

98. *See supra* note 26, and notes 61-65 and accompanying text.

99. Henry v. Edmisten, 315 N.C. 474, 480, 340 S.E.2d 720, 725 (1986); State v. Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949).

100. *In re* Clark, 303 N.C. 592, 600, 281 S.E.2d 47, 53 (1981); *see* Bulova Watch Co. v. Brand Distrib., Inc., 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974); Horton v. Gulledge, 277 N.C. 353, 359, 177 S.E.2d 885, 889 (1970), *overruled on other grounds by*, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

101. Bulova Watch Co. v. Brand Distrib., Inc., 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974); *see* Henry v. Edmisten, 315 N.C. 474, 480, 340 S.E.2d 720, 725 (1986); *Gardner*, 315 N.C. at 464, 340 S.E.2d at 714; Horton v. Gulledge, 277 N.C. 353, 359, 177 S.E.2d 885, 889 (1970).

102. 285 N.C. 467, 206 S.E.2d 141 (1974).

identical statute.[103] In another case the North Carolina Supreme Court applied its own standard of review to determine whether a license revocation procedure was constitutional under the state constitution;[104] the court's rationale was that the federal balancing test was inadequate.[105] Under these precedents, the *Gardner* court could have retained its traditional double jeopardy standard by holding multiple punishments unconstitutional under the North Carolina Constitution.

The *Gardner* majority, however, appeared to overlook this fact in reaching its decision to conform to the *Hunter* rule.[106] Early in its discussion of the issue, the court stated that it would decide whether the multiple convictions violated either the state or the federal constitution.[107] The opinion that followed, however, largely ignored North Carolina precedent. Instead, the court focused on the recent decisions of the United States Supreme Court without independently analyzing the issue under the state constitution; then, in overruling *Midyette*, the court merely stated that "the holding in that case has been rendered no longer authoritative."[108]

To the extent that it did consider North Carolina decisions in reaching this conclusion, the court's reliance was misplaced. The court first quoted *State v. Murray*,[109] which stated that the United States Supreme Court allows the imposition of cumulative punishments in a single trial. Although the court's language in *Murray* implied that the state was ready to adopt the *Hunter* rule, the court never reached the issue. Instead, the court in *Murray* applied the additional facts test and found that the two statutes were distinct.[110] The *Gardner* court relied on dicta in reaching its decision to overrule years of North Carolina precedent.[111]

The other state case mentioned by the majority in this part of its decision was *State v. Perry*.[112] The *Perry* court emphasized that in determining whether defendant could be punished for both larceny of property and possession of the same property, courts must focus on the general assembly's intent.[113] The *Perry* court, however, viewed legislative intent as an additional limitation that arose only after a court deemed the two statutes "separate and distinct" under the

103. *See id.* at 474, 206 S.E.2d at 146.

104. Henry v. Edmisten, 315 N.C. 474, 480, 340 S.E.2d 720, 725 (1986). The court nevertheless reached the same conclusion under both state and federal law.

105. *Id.* at 490-91, 340 S.E.2d at 731.

106. In other parts of its analysis, however, the court did deviate slightly from the United States Supreme Court's approach. *See infra* notes 147-148, and text accompanying notes 196-97.

107. *Gardner*, 315 N.C. at 451, 340 S.E.2d at 707.

108. *Id.* at 454, 340 S.E.2d at 708. According to the court, this result was dictated by two United States Supreme Court decisions and dicta in a state decision that merely recited the *Hunter* holding. *Id.* The court clearly assumed that *Hunter* was controlling. *Id.* at 453, 340 S.E.2d at 708.

109. 310 N.C. 541, 313 S.E.2d 523 (1984).

110. *Id.* at 547-49, 313 S.E.2d at 528-29.

111. In addition, the *Murray* case did not reach a conclusion regarding whether North Carolina should adopt this rule. It merely recited the *Hunter* doctrine without discussing it. *Id.* at 547, 313 S.E.2d at 528.

112. 305 N.C. 225, 287 S.E.2d 810 (1982).

113. *Id.* at 231-35, 287 S.E.2d at 814-16.

additional facts test. A court first had to ask whether the two statutes created separate offenses. If the statutes survived this scrutiny, the court then had to decide whether the general assembly wanted to impose multiple punishments. At this point in the analysis, the intent of the general assembly came to the fore. Even if multiple penalties were possible under the more mechanical additional facts test, a finding that the general assembly did not want to allow cumulative sentencing would preclude their imposition.[114] The decision did not suggest that the general assembly could impose multiple punishments when the two statutes were the same; instead, the court apparently presumed that this was impossible because of existing double jeopardy doctrine.[115] Although the *Gardner* court cited *Perry* for the proposition that legislative intent is determinative, *Perry* really stated that legislative intent is determinative provided that the general assembly did not attempt to do something unconstitutional. Thus, the *Perry* decision indicated adherence to the traditional double jeopardy analysis rather than a shift away from it.

The *Gardner* court also relied on *People v. Robideau*.[116] In *Robideau* the Michigan Supreme Court held that double jeopardy did not preclude punishment for both first degree criminal sexual assault and the felony used to raise the sexual assault to a first degree offense.[117] The North Carolina court echoed the Michigan court's conclusion that the failure to distinguish between single and successive prosecution situations is at the root of the confusion surrounding double jeopardy law.[118]

> Where successive prosecutions are involved, the Double Jeopardy Clause protects the individual's interest in not having to twice "run the gauntlet," in not being subjected to "embarrassment, expense, and ordeal," and in not being compelled "to live in a continuing state of anxiety and insecurity. . . ."
>
> [W]hen the issue is purely one of multiple punishments, . . . [t]he right to be free from vexatious proceedings simply is not present. The only interest of the defendant is in not having more punishment imposed than that intended by the Legislature. . . .[119]

Apparently, this distinction is at the heart of the *Gardner* decision as well. In switching over to the *Hunter* rule, the North Carolina Supreme Court made an implicit statement regarding its view of the nature of the double jeopardy prohibition. According to the court, the clause operates solely as a restraint on the courts and the prosecutors. This leaves the general assembly almost unchecked

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114. *Id.*

115. *See id.* at 234-35, 287 S.E.2d at 815-16.

116. 419 Mich. 458, 355 N.W.2d 592 (1984).

117. *Id.* at 488-90, 355 N.W.2d at 604-05.

118. *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707 (quoting *Robideau*, 419 Mich. at 484-85, 355 N.W.2d at 602-03). The Michigan Supreme Court also claimed that other courts have reached confusing and inconsistent conclusions partly because they mix factual and statutory analysis. *Robideau*, 419 Mich. at 476-80, 355 N.W.2d at 599-600.

119. *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707 (quoting *Robideau*, 419 Mich. at 484-85, 355 N.W.2d at 602-03).

in its ability to define offenses and prescribe sentences.[120]

The *Gardner* decision, however, does not explore this premise or address the arguments that run counter to it. The discussion that it sidestepped is at the core of the double jeopardy debate. By stating that those who disagree with *Hunter* do not understand the double jeopardy clause,[121] the court grossly oversimplified the controversy and confusion that engulf this aspect of fifth amendment law.

A number of commentators agree with the view taken by the *Gardner* court, and have expanded further on its rationale.[122] The first rationale is that the legislature is the branch of government with the power to create and define offenses and set the minimum and maximum sentences for those offenses. According to this view, any effort to limit the legislature's ability to provide for cumulative sentencing would be meaningless and illogical:

> Suppose that an eccentric legislature chose to enact this statute: The sentence for robbery shall be five years imprisonment. Anyone who commits robbery shall be twice convicted and punished. Can it be said that this statute is outside the power of the legislature? . . . [T]he legislature has merely exercised its legitimate penological power in a preposterously roundabout fashion. It could have accomplished exactly the same doubling of the penalties simply by doubling the penalty for robbery.[123]

To those holding this view, the sole purpose of the double jeopardy clause in a single trial situation is to limit the role of the courts and the prosecutors. Partly because any effort to check the legislature would be illusory, supporters of this view contend that the legislature should not be checked by the double jeopardy clause.[124]

The second rationale supporting the *Gardner* rule is that as a natural corollary to its sentencing power, the legislature sets limits on the courts, and prosecutors' authority to punish defendants more than the statutes allow. When a court challenges the legislature's authority to limit the judicial branch's sentencing power, it violates "the constitutional principle of separation of powers."[125] A court arguably would also exceed its authority and intrude on the role of the legislature by declaring that the legislature cannot allow courts to punish cumulatively in one trial.[126] This argument, however, is inconsistent with the asser-

120. The only limitation on the general assembly's ability to do so is that it will not be able to provide for cumulative sentencing over successive prosecutions.

121. *See Gardner*, 315 N.C. at 451-53, 340 S.E.2d at 707-08.

122. *See, e.g.*, Thomas, *supra* note 48; Thomas, *supra* note 4; Comment, *supra* note 3; *see also* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1023-33 (1980) (written prior to *Hunter*, but advocating the view that "the double jeopardy clause operates as a rebuttable presumption against multiple punishment").

123. Comment, *supra* note 3, at 302; *see also* Gore v. United States, 357 U.S. 386, 392-93 (if Congress has the power to provide for certain punishment in one statute, it is irrational to forbid Congress from providing for same punishment in two statutes).

124. *See* Comment, *supra* note 3, at 302.

125. Whalen v. United States, 445 U.S. 684, 689 (1980).

126. This argument, however, does not recognize that in the first situation the judicial branch

tion that any double jeopardy limitation on the legislature in a single prosecution context is illusory[127] and is not overtly relied on in the relevant Supreme Court decisions.

Regardless of these rationales, commentators who agree with the *Hunter* rule cannot avoid the clear language of the double jeopardy provision, which expressly forbids two punishments for one offense.[128] To avoid constitutional problems, courts following this doctrine apparently read "twice" as having temporal connotations—that is, they claim that "twice" means "two separate times."[129] In addition, they flexibly interpret the definition of "offense" so that it means exclusively what the legislature intends in each situation.[130] The legislature can divide a single continuous offense into several smaller offenses; it can allow punishment for all such offenses and their lesser included offenses and it can punish the same act in two different statutes providing that the courts can cumulatively punish defendants for precisely the same crime.[131]

Opponents of the *Hunter* rule disagree with it largely on constitutional grounds. They argue that "although the legislative power is broad it cannot make a circle square by definition."[132] As its opponents point out, the *Hunter* rule allows legislatures to do just that by permitting them to define the same offense as two "different" crimes.[133] This, in turn, renders the double jeopardy clause a partially illusory guarantee that retains vitality only in the area of successive prosecutions. A literal reading of the clause results in the inevitable conclusion that the *Hunter* rule conflicts with the fifth amendment's double jeopardy guarantee.

The arguments set forth by the proponents of the *Hunter* rule do not outweigh the constitutional guarantee embodied in the fifth amendment. First, they argue, the limitation that the *Blockburger* rule placed on the legislatures was slight. A legislature could always prescribe a higher penalty in a single statute if the double jeopardy ban thwarted its efforts to achieve the same result in several statutes. In a single prosecution context, the rule merely limited the legislature's

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intrudes on the legislative branch "in a manner that trenches particularly harshly on individual liberty." *Id.* In that situation, individual liberty weighs into the decision to forbid such judicial overreaching. In the *Hunter*-type situation, on the other hand, it is in the defendant's best interest to declare that the double jeopardy clause limits the legislature as well. Nevertheless, as *Hunter* and its progeny reveal, the distinction between these two situations does not mandate a different outcome.

127. *See* Comment, *supra* note 3, at 302.

128. *See* U.S. CONST. amend. V.

129. *See, e.g., Robideau*, 419 Mich. at 484-85, 355 N.W.2d at 602-03; *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707.

130. *See Hunter*, 459 U.S. at 368; Albernaz v. United States, 450 U.S. 333, 344 (1981).

131. Commentators who recognize the need to place restraints on an overzealous legislature find this need satisfied by the eighth amendment's protection against cruel and unusual punishment rather than the double jeopardy provision. *See* U.S. CONST. amend. VIII. For a discussion of this view, see Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 114-15. According to these commentators, the danger inherent in allowing the legislature unlimited power in defining crimes and prescribing sentences is that punishments will be excessive. *Id.* at 114. If a sentence is excessive, it should be held invalid under the eighth amendment rather than under the fifth. *Id.* at 115; *see* Westen, *supra* note 122, at 1024-25.

132. *Robideau*, 419 Mich. at 502, 355 N.W.2d at 611 (Cavanagh, J., dissenting in part).

133. *Id.*

ability to impose penalties in a roundabout, cumbersome way when more direct means were possible. It did not limit the legislature's ability to proscribe crimes; *Blockburger* only demanded that the legislature do so in a constitutional manner.[134] Contrary to the contentions of commentators who agree with the *Hunter* decision,[135] that the limitation is slight does not mean there is no reason for restraining the legislature in a single prosecution situation. Instead, the double jeopardy argument seems more reasonable *because* the legislature has other effective means for carrying out its duties.[136] The double jeopardy clause would be less likely to apply in this context if, instead, it worked to thwart the legislature.

Furthermore, the limit that the clause places on the legislature in a single prosecution context is important. The *Hunter* rule fails to recognize that the defendant in a criminal trial has more at risk than the threat of a prison sentence. As Justice Marshall noted in his dissent in *Hunter*, a defendant is "put in jeopardy" as to each charge.[137] Multiple convictions may increase the possibility that more severe sentences will be imposed and increase the social stigma that follows the defendant.[138] Perhaps the most significant risk is that multiple punishments increase the chance that the defendant will later suffer enhanced punishment under a habitual offender statute.[139] If the defendant is only convicted for one felony, for example, he or she will not be subject to an enhanced penalty if later arrested for another offense. If the legislature is able to prescribe sentences for a single crime, however, one trial could accrue enough convictions to subject the defendant to habitual offender penalties for later offenses.[140] These risks greatly outweigh the limited restrictions the double jeopardy prohibition places on the legislature's power.

Although the eighth amendment's prohibition of cruel and unusual punishment may provide some protection against abuses of the legislature's power to prescribe sentences, it does not obviate the necessity for the double jeopardy guarantee. The Bill of Rights was intended to protect individuals against the excesses of all three branches of government, rather than just one specific branch

134. The legislature has to comport not only with the double jeopardy clause but with other constitutional limitations as well. *See, e.g.*, U.S. CONST. amend. VIII. The eighth amendment limits how much punishment the legislature can permit, while the double jeopardy clause monitors the sentencing procedure itself. Neither, however, greatly hampers the legislature. For a discussion of the limited extent to which the eighth amendment regulates the legislature, see *supra* note 131 and *infra* note 143.

135. *See supra* notes 122-124 and accompanying text.

136. *See Hunter*, 459 U.S. at 373 (Marshall, J., dissenting) ("The creation of multiple crimes . . . advances no valid state interest that could not just as easily be achieved without bringing multiple charges against the defendant.").

137. *Id.* at 371-72 (Marshall, J., dissenting).

138. *Id.* at 373 (Marshall, J., dissenting).

139. *Id.*; Benton v. Maryland, 395 U.S. 784, 790-91 (1969).

140. This is not always the case, because some states would still count these convictions as one conviction for the purpose of the habitual offender statute. *Benton*, 395 U.S. at 790-91. Other states, however, count each conviction as a separate offense. The North Carolina statute, for example, reads: "Any person who has been convicted of or pled guilty to three felony offenses in any . . . court . . . is declared to be a habitual felon." N.C. GEN. STAT. § 14-7.1 (1986).

of government.[141] It is reasonable to presume that a particular amendment limits all three branches of government unless the amendment limits its own scope. In addition, the double jeopardy clause should limit the legislature as well as the courts and prosecutors. First, all three branches of government have the ability to violate the clause's mandate. Second, the eighth amendment operates against the courts without rendering the double jeopardy guarantee superfluous.[142] Therefore, the existence of the eighth amendment as a limit on the legislature's sentencing power does not make the double jeopardy prohibition unnecessary.[143]

Not all of the objections to the *Hunter* rule stem from its conflict with the Constitution; it has practical problems as well. First, *Hunter* further compli-

141. *See Robideau*, 419 Mich. at 509, 355 N.W.2d at 614 (Cavanagh, J., dissenting in part) (all branches of government are obligated not to abridge constitutional guarantee of double jeopardy); *see* Weems v. United States, 217 U.S. 349, 379 (1910). The Court in *Weems* asserted that the legislature's power is limited only by the provisions of the Constitution, "and what those are the judiciary must judge." *Id.* The *Weems* Court declared a statute unconstitutional on eighth amendment grounds but the Court's language implied that the Constitution as a whole limited the penological power of the legislature. *See id.* at 378-79.

The *Weems* Court flatly rejected the contention that the eighth amendment had "ceased to be a restraint upon legislatures and had become an admonition only to the courts." *Id.* at 376. The same arguments proferred by advocates of this position with respect to double jeopardy law have similar force in eighth amendment jurisprudence. Nevertheless, the Court in *Weems* rejected this contention and found that the Constitution limits the scope of the legislature's sentencing power.

142. This argument could apply to the courts as well as the legislatures since punishment that exceeds the punishment intended by the legislature *is* "cruel and unusual" within the meaning of the eighth amendment. *See* U.S. CONST. amend. VIII. *Cf.* State v. Greer, 270 N.C. 143, 146, 153 S.E.2d 849, 851 (1967) (stating that punishment imposed by a court is not unconstitutional if the statutes permit it). Therefore, the clause arguably is superfluous as it applies to courts and prosecutors in single prosecution situations. In a single trial, the double jeopardy clause arguably should not operate as a restraint at all, yet none of the cases have ever gone so far as to say this.

143. In addition, there are practical considerations. To understand these considerations it is necessary to understand the development of eighth amendment law.

The eighth amendment provides that no "cruel and unusual punishments" shall be imposed upon individuals. U.S. CONST. amend. VIII. Courts originally interpreted the amendment to forbid torture; later, however, the Supreme Court extended the guarantee to preclude the imposition of excessively long sentences. *See* Weems v. United States, 217 U.S. 349 (1910). In reviewing sentences to determine whether they violate the eighth amendment, a court must decide whether a defendant's sentence is proportionate to the gravity of the crime involved. *See* Rummel v. Estelle, 445 U.S. 263, 271-73 (1980); Comment, *The* Dillon *Dilemma: Finding Proportionate Felony-Murder Punishments*, 72 CALIF. L. REV. 1299, 1310-11 (1984). If the statute mandates the imposition of sentences so harsh that they will always be disproportionate, then the statute itself violates the eighth amendment guarantee and must be declared void. *See Weems*, 217 U.S. at 382 (statute invalid because even minimum penalty "repugnant" and disproportionate to crime).

Because of the great deference accorded to the legislature, however, statutes themselves are rarely challenged. Most cases involve challenges that focus on the application of the statute to the situation involved in the case. *Cf. Weems*, 217 U.S. at 377 (most cases discussed based on sentences of courts and not constitutionality of statutes). In North Carolina the deference accorded to the general assembly is so great that it affects the analysis of the constitutionality of a sentence imposed by a court. North Carolina courts have always held that "when the punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense." State v. Bruce, 268 N.C. 174, 184, 150 S.E.2d 216, 224 (1966) (citations omitted); *see* State v. Greer, 270 N.C. 143, 146, 153 S.E.2d 849, 851 (1967) (citing *Bruce*). This rule implies that courts must base their analyses on the assumption that the statutes themselves are constitutional.

This deference is both natural and reasonable because the legislature is the branch of government that defines offenses. Nevertheless, in spite of any overlap between the eighth amendment and double jeopardy guarantees, the existence of the eighth amendment does not make it unnecessary to apply the double jeopardy principle to restrain the legislature.

cated an already confused area of the law. In contrast, *Blockburger* provided a uniformly applicable, mechanical test for determining whether a defendant could be sentenced twice. By examining either the facts alleged or the elements necessary to prove the crimes, a court could determine whether multiple punishments would result in a double jeopardy violation. The *Hunter* rule, on the other hand, throws the task of determining legislative intent into the hands of the courts. In some situations, intent may clearly be expressed in the statutes themselves[144] and the courts do not have to determine their meaning. When the intent of the legislature is not evident, however, courts must turn to other sources. For example, the courts may examine the "subject, language, and history of the statutes."[145] Furthermore, they may consider the history of the crime being prosecuted and draw some conclusion about the legislature's general intent in that area of the law.[146] Finally, if the legislature's purpose is ambiguous, the courts may apply the *Blockburger* test to determine the legislature's intent.[147] However, neither the Court nor the *Gardner* court lay out any clear guidelines for future courts to follow. The cases do not provide a coherent framework for analysis. They also fail to explain exactly how evident a statute's intent must be for courts to be able to impose multiple penalties.[148]

In addition to further entangling courts "in this Sargasso Sea,"[149] the *Hunter* rule effectively gives them a great deal more discretion by allowing the

144. The statute at issue in *Hunter*, for example, stated that "[t]he punishment imposed pursuant to this subsection [outlawing armed criminal action] 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. REV. STAT. § 571.015 (1986) (previously codified at MO. REV. STAT. § 559.225 (Supp. 1976)).

145. *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712. The *Gardner* court apparently relied on *Robideau*, which rejected the *Blockburger* standard in favor of this test. *See Robideau*, 419 Mich. at 486, 355 N.W.2d at 603. The *Robideau* court explained that its result is the traditional way to analyze the issue. *Id.*

Moreover, language in *Hunter* suggests that this type of approach is acceptable. The *Hunter* Court explained that *Albernaz*, discussed *supra* notes 58-60 and accompanying text, applied the *Blockburger* rule because there had been no indication in the statutes or in the legislative history that the legislature had intended to allow multiple punishment. *See Hunter*, 459 U.S. at 367.

146. *Cf.* Gore v. United States, 357 U.S. 386, 390-91 (1958) (considering Congress' intent to impose harsh penalties when violations of narcotics laws are involved). This standard is potentially even more important than before in a single prosecution situation. *See* Thomas, *supra* note 48, at 56.

147. *See Gardner*, 315 N.C. at 454-55, 340 S.E.2d at 708-09. The *Gardner* court distanced itself from the *Blockburger* test even further, claiming that it is a federal rule that state courts need not apply. *See id.* at 455, 340 S.E.2d at 709. The court apparently did not want to renounce *Blockburger*, but its statement indicates the court's desire not to be bound by some rigid equation in making its determinations. *See infra* note 148, and text accompanying notes 196-97.

148. In *Hunter* the statute itself declared that multiple punishment could be imposed. *See supra* note 144. Therefore, no further investigation was necessary. The *Gardner* court apparently assumed that courts have a great deal of power and discretion in determining legislative intent. The court expressly rejected *Blockburger* as a mandatory rule, while retaining it as one of several factors that the court may consider in evaluating the aim of the legislature. *See Gardner*, 315 N.C. at 455, 340 S.E.2d at 709 (declaring that legislative intent clearly outweighs the *Blockburger* doctrine). Thus, while not breaking with the current United States Supreme Court rule, the North Carolina Supreme Court greatly limited the importance of the *Blockburger* doctrine in single prosecution situations. This, too, is not necessarily inconsistent with *Hunter*. The primary difference in the North Carolina rule is that *Blockburger*, instead of existing as the last factor considered, survives as a single factor that the North Carolina courts may consider.

149. *Gardner*, 315 N.C. at 464, 340 S.E.2d at 714 (Exum, J., dissenting). The *Gardner* case itself illustrates the confusion that may result. *See infra* notes 170-95 and accompanying text.

courts to derive the formulas for themselves. A court can, for example, stress a particular factor or look closely at one aspect of the legislative history to reach and buttress its conclusion. There is also much more room for speculation regarding the intent of the legislature now that the courts have no mechanical test to apply.[150] Most significant of all, the decision of a state supreme court on this topic is virtually unreviewable. As the *Hunter* majority pointed out, the Supreme Court is bound to accept a state court's interpretation of its state statutes.[151] When a state court declares that it is either imposing or refusing to impose multiple punishment because of the legislature's purpose, it effectively insulates its decision from Supreme Court review. This result is especially ironic in light of the Court's articulated purpose of revising double jeopardy law so that it operates as a restraint only on the courts and prosecutors.

A third practical problem is that the rule increases prosecutorial discretion. When the legislature proscribes a certain act in several statutes and permits multiple punishment, the prosecutor gains a great deal of leverage in the plea bargaining process. If five convictions are possible instead of one, it is much easier for a prosecutor to bargain with a defendant by agreeing to drop one or more of the counts brought against the defendant. Because plea bargaining plays such an important role in criminal law, it is possible that prosecutors will want to use this leverage to help secure deals more advantageous to the State. Thus, the *Hunter* rule encourages prosecutors to bring more charges than they intend to prosecute in order to gain a better bargaining position.

In spite of these practical problems, the *Gardner* court adopted the *Hunter* rule. Pursuant to this rule, the North Carolina General Assembly may prescribe multiple punishments under two identical statutes, and it can allow the courts to penalize defendants for both offenses and their lesser included offenses.

The *Gardner* court emphatically stated, however, that this rule does not apply to the felony-murder merger doctrine.[152] In so limiting double jeopardy the court had to change the basis for the merger doctrine. North Carolina case law stated that the underlying felony merged into the first degree murder charge because it was an essential element of the murder charge.[153] Thus, the cases implicitly rested on a double jeopardy rationale. Some cases, such as *State v. Thompson*,[154] expressly justified the merger doctrine as an application of the double jeopardy rule.[155] If it had recognized that the merger rule had been

150. *See infra* notes 196-201 and accompanying text.

151. *Hunter*, 459 U.S. at 368 (citing O'Brien v. Skinner, 414 U.S. 524, 531 (1974)).

152. *Gardner*, 315 N.C. at 459-60, 340 S.E.2d at 711.

153. State v. Cherry, 298 N.C. 86, 113, 257 S.E.2d 551, 567 (1979), *cert. denied*, 446 U.S. 941 (1980); State v. Woods, 286 N.C. 612, 633, 213 S.E.2d 214, 228 (1975), *death sentence vacated*, 428 U.S. 903 (1976); *see* State v. Williams, 284 N.C. 67, 75, 199 S.E.2d 409, 414 (1973); State v. Peele, 281 N.C. 253, 260, 188 S.E.2d 326, 331-32 (1972); State v. Bell, 205 N.C. 225, 227-28, 171 S.E. 50, 51-52 (1933).

154. 280 N.C. 202, 185 S.E.2d 666 (1972).

155. *Id.* at 215-16, 185 S.E.2d at 675; *see also* State v. Squire, 292 N.C. 494, 506, 234 S.E.2d 563, 570, *cert. denied*, 434 U.S. 998 (1977) (citing *Thompson*); State v. Edmondson, 70 N.C. App. 426, 429, 320 S.E.2d 315, 317-18 (1984) (analogy between double jeopardy and felony murder "apt" because underlying felony is "a statutorily-created element of the felony murder"), *aff'd*, 316 N.C. 187, 340 S.E.2d 110 (1986).

rooted in double jeopardy, the court in *Gardner* would have had to concede that the general assembly could overrule the doctrine by expressly authorizing multiple penalties in the felony-murder statute.[156] To avoid this result, the court held that it could retain the felony-murder merger doctrine because the rule "is not founded upon the concept of 'lesser-included offense' or upon the concept of 'indispensable element of the offense.' "[157] Instead, the decision purported to find a distinct basis for the rule: "The need to supply the element of malice where, in the strict sense, none existed."[158]

The court's statement, however, does not withstand analysis; the newly asserted rationale for the rule does not alter its actual basis. According to the *Gardner* court, the malice necessary to prove the underlying felony raises the killing to first-degree murder, but the felony itself is not a necessary element of the felony-murder charge.[159] Yet, it is necessary to prove the underlying felony to prove that malice. Thus, the state must prove the felony before it can obtain a felony-murder conviction. "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.' "[160] Because it is impossible to commit a felony murder without committing the felony, the felony is a lesser included offense of the murder. This is true not only when the court states that it has relied on the felony itself, but when it claims to use the "malice" element of the felony to raise the charge to first-degree murder.

The court could not satisfactorily dispute this statement. It ultimately admitted that if the court applied a *factual* analysis, it would have to find that the underlying felony is an element of a felony murder charge. But, the majority argued this is irrelevant in a single prosecution case. In a successive prosecution case, the court explained, a factual analysis would operate to preclude the second trial on double jeopardy grounds. In a single trial, however, courts must look only to the elements set forth in the statutes themselves.[161] Because the court claimed that only malice is statutorily required for the felony murder, no double jeopardy issue arises in these cases.[162] Without a double jeopardy violation, the merger doctrine must rest on independent grounds.

Here again, the court's reasoning is weak. The court apparently overlooked the words of the statute: "A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a

156. The general assembly would still have had to state expressly its intent in order to overrule the merger doctrine. As the *Gardner* court noted, the merger rule is firmly entrenched in North Carolina law. The felony-murder rule does not contain that unambiguous expression of intent to punish cumulatively that is a prerequisite to the imposition of multiple punishments.

157. *Gardner*, 315 N.C. at 458, 340 S.E.2d at 711.

158. *Id.*

159. *See id.*

160. BLACK'S LAW DICTIONARY 812 (5th ed. 1979).

161. *Gardner*, 315 N.C. at 456-58, 340 S.E.2d at 710-12.

162. *Id.*

deadly weapon shall be deemed to be murder in the first degree . . . ."[163] Even if malice is the necessary element of the felony that raises the killing to a felony murder, the murder statute itself requires proof of the underlying offense. Therefore, the felony is a "statutorily-created element of felony murder";[164] a definitional analysis mandates the conclusion that the felony is an element included in the murder charge, and the ban on conviction of both offenses stems from the double jeopardy rule.

Worse, although the court's language suggested some attempt to distinguish the felony-murder merger situation from other instances involving multiple punishment, the court ultimately failed to base the preservation of the merger rule on solid grounds. This is especially evident in the court's discussion of *Whalen*. In *Whalen* the United States Supreme Court expressly found that the double jeopardy clause prohibited the imposition of consecutive sentences for both felony murder and the underlying felony of rape: "It would seriously offend the principle . . . embodied in the Double Jeopardy Clause of the Fifth Amendment if this Court were to [permit the imposition of consecutive sentences]."[165] Although the Court implied that it would permit multiple punishments pursuant to legislative authorization, it held that to impose two sentences in violation of legislative intent would constitute a violation of the double jeopardy guarantee.[166]

The *Gardner* court, however, ignored the words of the Supreme Court and announced that "*Whalen* was decided not on the basis of double jeopardy, but on the basis of legislative intent."[167] This statement indicates that the court did not completely understand the double jeopardy rule set forth in *Hunter*. The *Hunter* rule limits but does not eliminate the scope of the double jeopardy doctrine in a single trial situation. According to the *Hunter* court, the legislature's intent determines whether double jeopardy comes into play in a single trial.[168] Therefore, under *Hunter* a legislature can either authorize multiple punishment in a felony-murder case or prohibit consecutive sentences by insulating the case under the double jeopardy clause. The entire analysis in *Whalen* revolves

163. N.C. GEN. STAT. § 14-17 (1986).

164. State v. Edmondson, 70 N.C. App. 426, 429, 320 S.E.2d 315, 318 (1984).

165. *Whalen*, 445 U.S. at 695. The *Whalen* Court, applying a provision of the Code of the District of Columbia, determined that the guarantee against double jeopardy contained in the fifth amendment prevents federal courts from imposing punishments greater than those prescribed by Congress. *Id.* In this respect, the Court added:

> The fifth amendment guarantee against double jeopardy embodies . . . simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress."

Id. at 690. The Court noted that while "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States, . . . [t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Id.* at 690 n.4.

166. *Id.* at 689.

167. *Gardner*, 315 N.C. at 459, 340 S.E.2d at 711.

168. *Hunter*, 459 U.S. at 365-369.

around the double jeopardy rule; the legislature is important because of its role in determining whether there is a double jeopardy violation.

The court's analysis of the merger doctrine ultimately yields almost the same conclusion that there would have been under a proper analysis. If the court had conceded that an underlying felony is included in the felony murder, then the general assembly simply could have amended the statute to state that it intended to allow the courts to impose multiple penalties. As the court interpreted it, however, the merger doctrine is a firmly established common-law rule that does not rest on a double jeopardy rationale. Nevertheless, the court had to admit that the general assembly could still authorize multiple punishments and overrule the common-law doctrine.[169] The only way the court could have prevented this result and forbidden multiple punishments would have been to continue to follow the old double jeopardy rule and conclude that the merger doctrine was constitutionally mandated.

A further weakness in the *Gardner* decision lies in its application of the *Hunter* rule. First, the court's investigation of legislative intent illustrates some problems with the *Hunter* rule. The rule casts away the accepted standard for determining whether multiple punishments are possible in a given situation.[170] Instead, the *Gardner* court had to devise an alternative system of analysis. The court chose what it claimed was "the traditional means of determining the intent of the legislature where the concern is only one of multiple punishments for two convictions in the same trial" by studying the subject, language, and history of the statutes involved.[171]

To begin with, common law made larceny a felony regardless of the value of the stolen property.[172] In 1895 the general assembly changed the common-law rule and made larceny a felony only when the value of the property stolen was greater than twenty dollars.[173] The law, however, further provided that larceny was a felony regardless of value when committed pursuant to a breaking and entering.[174] Later versions of the law retained this provision.[175] The law survives today in the North Carolina General Statutes.[176] The *Gardner* court argued that this history proved that the general assembly had intended to allow multiple punishments. The court's theory was that the provision making larceny a felony regardless of value when it was committed pursuant to a breaking or entering or other named crimes represented an attempt to carve out of the

169. *See Gardner*, 315 N.C. at 459-60, 340 S.E.2d at 711-12.

170. *See supra* notes 44-57 and accompanying text.

171. *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712. The court adopted the same standard articulated in *Robideau*. *See supra* note 145.

172. State v. Cooper, 256 N.C. 372, 373, 124 S.E.2d 91, 92 (1962). *But see infra* text accompanying notes 178-80 (explaining that larcenies still were not all treated equally under common-law standards).

173. Act of March 13, 1895, ch. 285, § 1, 1895 N.C. Pub. L. 365, 365-66 (codified as amended at N.C. GEN. STAT. § 14-72(b) (1986)).

174. *Id.* § 2, 1895 N.C. Pub. L. 365, 366 (codified as amended at N.C. GEN. STAT. § 14-72 (b) (1986)). The current version makes larceny of goods valued in excess of $400 a felony.

175. *See, e.g.*, Act of May 19, 1969, ch. 522, § 2, 1969 N.C. Sess. Laws 447, 447 (codified at N.C. GEN. STAT. 14-72(b) (1986)).

176. N.C. GEN. STAT. § 14-72(b) (1986).

statute certain instances in which the *old* common-law rule applied. That rule had made larceny a felony regardless of the circumstances under which it had been committed. Therefore, the court reasoned that the provision did not constitute a new rule in which the larceny charge was dependent on the breaking or entering.[177]

The court's analysis of the issue is flawed. Even if the statutory provision reflects a desire to retain some remnants of the common-law rule, the analysis does not change. Regardless of the origins of the statute, the current version of the law makes breaking or entering a necessary element of the charge of felony larceny pursuant to breaking or entering. That the higher penalty is possible only in certain circumstances reflects the general assembly's decision to distinguish certain instances of larceny that it felt deserved greater punishment.

More importantly, the court's statement that common-law larceny was a felony regardless of the value of the goods stolen—the statement on which its argument rests—is an extremely misleading characterization of the original rule. The case that *Gardner* cites for this proposition, *State v. Cooper*,[178] does not state that all larcenies were treated equally under common-law standards. Instead, the *Cooper* court explained that, although both grand larceny and petit larceny were felonies, the penalties for the two offenses differed. The punishment for grand larceny was execution; petit larceny, on the other hand, was punishable by whipping or other corporal punishment.[179] What distinguished grand larceny from petit larceny was the value of the goods stolen.[180] Therefore, although the statement that the common law made all larcenies felonies regardless of the value of the goods stolen is accurate, the implication that all larcenies were treated the same is false.

The court next analyzed judicial treatment of the two statutes.[181] The court first pointed to cases in which breaking or entering and larceny were said to be separate and distinct crimes.[182] The cases cited, however, held only that it was possible to find a defendant guilty of breaking or entering but still acquit that defendant of larceny.[183] Even if the breaking or entering was a lesser in-

177. *Gardner*, 315 N.C. at 461-62, 340 S.E.2d at 712-13.

178. 256 N.C. 372, 124 S.E.2d 91 (1962).

179. *Id.* at 373, 124 S.E.2d at 92.

180. *Id.*

181. This is of questionable importance in light of the court's emphasis on *legislative* intent. Nonetheless, it is a valid avenue of investigation. As the *Gardner* court pointed out, case law may shed some light on the legislature's intent; for, if the courts repeatedly misapplied the statutes, the legislature probably would amend the statutes to make its intent clearer. *See Gardner*, 315 N.C. at 462-63, 340 S.E.2d at 713.

182. *Id.* at 462, 340 S.E.2d at 713.

183. In State v. Brown, 308 N.C. 181, 301 S.E.2d 89 (1983), *overruled on other grounds by* State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985), the court held that this was possible in a single trial. The case rested on the ground that it was not legally inconsistent to find that someone had broken into a building with the intent to steal and yet had not subsequently stolen any items. *Id.* at 184, 301 S.E.2d at 91. Because defendant was tried only once and sentenced only once, no double jeopardy question arose.

This was not the case in State v. Hooker, 145 N.C. 581, 59 S.E. 866 (1907). Defendant in *Hooker* was first acquitted of larceny and then, in a second trial, was convicted of breaking and entering. *Id.* at 582, 59 S.E. at 866. If the larceny charge had been for felonious larceny pursuant to

cluded offense of the larceny charge, this would be possible.

The supreme court also said that North Carolina courts have repeatedly sustained multiple punishments under both statutes.[184] In two of the cases cited for support, however, the multiple punishments were not challenged by the defendants and therefore were not considered on appeal.[185] In the third case, *State v. Greer*,[186] the sentences were challenged, but on eighth amendment rather than double jeopardy grounds. In addition, *Greer* involved charges for several different offenses. In some of the larceny charges, the value of the goods exceeded two hundred dollars.[187] For those offenses, the breaking or entering charges were not necessary to establish felonious larceny. Therefore, it is possible that no double jeopardy violations occurred.

Finally, the court claimed that *State v. Morgan*[188] approved multiple punishments for both offenses.[189] In *Morgan* defendant pled guilty to both felonious breaking or entering and larceny and received consecutive sentences for the crimes. On appeal, he claimed not that the sentences violated the guarantee against double jeopardy but that his punishment was harsh and excessive. In response to this charge, the court noted that defendant had received a sentence of between two and four years for each conviction and that the maximum penalty for each count was ten years. Limiting itself to this issue, the court summarily affirmed the judgments.[190] Thus, the *Gardner* court cited cases that lend little support to the proposition that the general assembly intended to permit multiple punishments.

There is a strong argument that the general assembly intended to allow courts to sentence defendants on both counts. One can draw an inference of this intent, for example, from observing that the penalty for felonious larceny is the same as the penalty for felonious breaking or entering and significantly less than the penalty that can be imposed for other offenses used to raise larceny to a felony offense.[191] The *Gardner* court pointed out this anomaly, claiming it was illogical that a crime would be considered a lesser included offense of another crime that had a smaller penalty attached to it.[192] The court, however, did not develop an even more compelling argument: It is illogical that the general as-

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breaking or entering, and the breaking or entering was deemed to be a lesser included offense of the larceny, then a successive prosecution would have been barred on double jeopardy grounds. *See* Brown v. Ohio, 432 U.S. 161 (1977). The court in *Hooker*, however, did not indicate that the charge was for felonious larceny or that the larceny was dependent on proof of a breaking or entering. The court instead stated that "though some of the facts in [the larceny] case must be used in this case, they are different offenses." *Hooker*, 145 N.C. at 583, 59 S.E. at 866. The two statutes therefore must have passed the additional facts test. *Id.* at 584, 595 S.E. at 867.

184. *Gardner*, 315 N.C. at 462, 340 S.E.2d at 713.

185. State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Aaron, 29 N.C. App. 582, 225 S.E.2d 117, *disc. rev. denied*, 290 N.C. 663, 228 S.E.2d 455 (1976), *cert. denied*, 430 U.S. 908 (1977).

186. 270 N.C. 143, 153 S.E.2d 849 (1967) (per curiam).

187. *Id.* at 144-45, 153 S.E.2d at 849-50.

188. 265 N.C. 597, 144 S.E.2d 633 (1965) (per curiam), *overruled on other grounds by* State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

189. *Gardner*, 315 N.C. at 462, 340 S.E.2d at 713.

190. *Morgan*, 265 N.C. at 598, 144 S.E.2d at 633.

191. *See* N.C. GEN. STAT. §§ 14-52, 14-54, 14-57, 14-72(b)(2) (1986).

192. *Gardner*, 315 N.C. at 463, 340 S.E.2d at 713-14.

sembly would intend for the offense with the greater penalty to merge into the larceny charge whenever the former was used to raise the latter to a felony. If the underlying charge was not used to raise the larceny to a felony, then a defendant could be sentenced for both larceny and the other offense. It seems unlikely that the general assembly would have intended for a greater sentence to be possible when courts convicted individuals of misdemeanor larceny rather than felonious larceny.

Justice Exum, however, made a strong argument to the contrary. At the time the statutes were adopted, he noted, both state and federal double jeopardy doctrine prohibited the imposition of multiple punishments for an offense and its lesser included offense. Therefore, "our legislature would not have thought it had the power to authorize punishment for both . . . ."[193] It seems quite reasonable to presume that the two statutes conformed to the then existing constitutional standards.[194] Because this presumption is not rebutted by any direct evidence of legislative intent to the contrary,[195] it is at least unclear that the general assembly possessed a contrary intent.

At best, then, the *Gardner* court allowed multiple punishments pursuant to ambiguous evidence of legislative intent. In addition, the method by which it determined intent was much more makeshift than the prior additional facts test. The court greatly increased its ability and discretion in reviewing statutes for double jeopardy purposes. In the absence of express legislative authorization of multiple punishments, North Carolina courts apparently review the history of the statutes, the history of the common-law rule, judicial interpretation of the statutes, and the results of a *Blockburger* additional facts analysis. Presumably, the subject, language, and history of the statute are fairly significant factors in the analysis.[196] There are, however, no clearly delineated rules to guide North Carolina courts in their consideration of these topics. Courts are left to weigh and balance these factors as they please. This is further illustrated by the *Gardner* court's declaration that *Blockburger* established a federal rule "neither binding on state courts nor conclusive."[197] Nor does this statement constitute a radical departure from recent United States Supreme Court doctrine. The *Blockburger* test already has been relegated to a secondary position in the single prosecution/double jeopardy analysis. The statement nevertheless signifies an effort on the part of the court to free itself further from rigid guidelines in this area.

Because *Gardner* leaves so much to the discretion of both the general assembly and the courts, it is unclear what the result of the new double jeopardy

193. *Id.* at 471, 340 S.E.2d at 718 (Exum, J., dissenting).

194. *See* State v. Freeland, 316 N.C. 13, 23, 340 S.E.2d 35, 41 (1986) (although *Gardner* overruled *Midyette* and established a new standard in North Carolina, statutes enacted or revised prior to *Gardner* must be interpreted with the assumption that the legislature was complying with the old standard). *Freeland* is discussed *infra* text accompanying notes 198-201.

195. *See Gardner*, 315 N.C. at 471-72, 340 S.E.2d at 718-19 (Exum, J., dissenting).

196. *See* State v. Freeland, 316 N.C. 13, 21-22, 340 S.E.2d 35, 40 (1986); *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712.

197. *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709.

rule will be. Cases decided after *Gardner* shed little light on the situation. They have all followed *State v. Freeland*,[198] which applied "the *Gardner* test for determining legislative intent by examining the subject, language, and history of the statutes"[199] and concluded that the general assembly did not intend to permit multiple punishments for first-degree rape and first-degree sexual assault, along with first-degree kidnapping.[200] Ironically, the *Freeland* facts paralleled the situation in *Gardner*—one of the first two charges had been used to raise the kidnapping to a first-degree offense. In *Freeland*, however, the supreme court reached a contrary result. It based its decision largely on a "significant" fact that had been overlooked by the *Gardner* court in its consideration of the felonious larceny and felonious breaking and entering charges. When the statutes were enacted and when they were amended, *Midyette*'s holding that the State could not in a single trial do what double jeopardy law prohibited in successive trials was still good law. Therefore, the *Freeland* court assumed that the statutes did not permit multiple punishments.[201]

Subsequent cases dealing with the rape and sexual assault statutes have followed *Freeland*. Only one of these, *State v. Belton*,[202] referred to the inconsistency of the rationales on which *Freeland* and *Gardner* were based. The court failed to explain the difference in result; instead, it merely noted that in *Gardner* "this Court reached a different result in the context of a breaking and larceny case on the basis of what this Court perceived to be a different legislative intent."[203] Because the court did not criticize the *Gardner* court's reasoning, it is not clear whether the presumption applied to the statutes involved in *Freeland* will modify the power of the courts to interpret legislative intent.

The *Gardner* court failed in its attempt to clarify North Carolina double jeopardy law. The court first adopted a rule that contravenes the constitutional rights of defendants. In its place the court substituted a new standard for determining whether multiple punishments may be imposed. The new standard succeeds in its effort to increase legislative discretion by eliminating part of the constitutional barrier of the fifth amendment. The general assembly's penological power, however, was already quite broad, and the increase is not significant.

In increasing the general assembly's power, the court increased its own as well. The court took the *Hunter* requirement of a "clear and unambiguous" expression of legislative intent and interpreted it to allow courts to look beyond a legislature's expression of that intent. State courts may now examine a statute's legislative history in determining whether multiple punishments are permissible. This enables courts to impose cumulative punishments even when the general assembly has not expressly authorized it. The *Gardner* decision opens the door to consecutive sentencing even wider than necessary under *Hunter*.

198. 316 N.C. 13, 340 S.E.2d 35 (1986).
199. *Id.* at 21-22, 340 S.E.2d at 40.
200. *Id.* at 23-24, 340 S.E.2d at 40-41.
201. *Id.* at 22-24, 340 S.E.2d at 40-41.
202. 318 N.C. 141, 347 S.E.2d 755 (1986).
203. *Id.* at 160-61 n.10, 347 S.E.2d at 767 n.10.

Finally, the court's new standard has further entangled the courts in the confusion that marks this area of the law. This confusion is evident when one looks at cases such as *Freeland*, which apply *Gardner's* ambiguous "subject, language, and history" test to reach conclusions that are inconsistent with *Gardner*. Even if the North Carolina courts retain the *Hunter* rule, the state supreme court should formulate a new criterion that is both easier to apply and better effectuates the purpose behind giving the general assembly the authority to permit multiple punishments in a single trial.

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