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State v. Hurst: Does Double Jeopardy Include a Double Standard

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State v. Hurst: Does Double Jeopardy Include a Double Standard?

In the autumn of 1984, a high school student in Fayetteville, North Carolina, threatened a woman with a gun in the parking lot of a shopping center and eventually sped away in the victim's automobile.[1] While the entire incident lasted only a few seconds, the court sentenced the young man to twenty years in prison.[2] In *State v. Hurst*[3] the North Carolina Supreme Court decided that this single incident could give rise to convictions for both armed robbery and felonious larceny, despite the similarity of the crimes and the brevity of the episode.[4] Though a casual observer may consider the question of law to be theoretical, to the defendant and others in his position, its resolution could determine the duration of their prison terms.[5]

This Note examines *State v. Hurst* to determine whether the supreme court complied with the defendant's right to be free from double jeopardy, especially with the protection against multiple punishments for the same offense. After tracing relevant North Carolina case law and discussing possible weaknesses in the majority's reasoning, the Note maintains that the supreme court correctly found that a single incident can support convictions for two separate but similar statutory offenses. Yet, because the court avoided a deeper inquiry and neglected to consult criminal statutes in order to pinpoint legislative intent, this analysis concludes that the supreme court failed to improve sentencing procedures.

The facts in *State v. Hurst* are not complicated. On October 6, 1984, Ms. Colleen Shield approached her automobile outside a shopping center in Fayetteville, North Carolina. She locked her pocketbook and two grocery bags in the trunk of her vehicle. The pocketbook and grocery bags contained personal property valued at more than 400 dollars.[6] As she was getting into the automobile, defendant Charles Hurst appeared, pointed a gun at Shield, and entered the vehicle along with her. Shield managed to escape without physical harm, but Hurst took the car keys from her hand before she fled. Defendant then drove the car away with the articles still in the trunk.[7]

Hurst was tried for robbery with a dangerous weapon and felonious larceny. The jury found defendant guilty on both charges, and the court sentenced

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1. State v. Hurst, 82 N.C. App. 1, 3, 346 S.E.2d 8, 9 (1986), *rev'd*, 320 N.C. 589, 359 S.E.2d 776 (1987).

2. State v. Hurst, 320 N.C. 589, 590, 359 S.E.2d 776, 777 (1987).

3. 320 N.C. 589, 359 S.E.2d 776 (1987).

4. *Hurst*, 320 N.C. at 590, 359 S.E.2d at 777.

5. By combining the two offenses and by considering aggravating factors, the court in *Hurst* imposed a 20 year prison term. *Hurst*, 82 N.C. App. at 21, 346 S.E.2d at 20. The presumptive sentence for armed robbery alone, however, is only 14 years. N.C. GEN. STAT. § 14-87(d) (1986) ("A person convicted of robbery with firearms or other dangerous weapons shall receive a sentence of at least 14 years in the State's prison.").

6. *Hurst*, 320 N.C. at 589, 359 S.E.2d at 777.

7. *Id.* at 589-90, 359 S.E.2d at 777.

him to twenty years in prison.[8] On appeal defendant argued that he could not be punished for both felonious larceny and armed robbery based on the facts of his case.[9] The court of appeals agreed and arrested judgment on the conviction of felonious larceny.[10] Writing for a unanimous court of appeals, Judge Becton did not base the decision on the theory that felonious larceny is a lesser included offense of armed robbery—the court of appeals never reached this issue.[11] Instead, Judge Becton reasoned that the trial court violated the defendant's right to be free from double jeopardy under both the North Carolina and United States Constitutions[12] by punishing him for both armed robbery and felonious larceny of the same goods from the same person at the same time.[13] The court of appeals concluded that when a case involves only a single taking, the legislature did not intend to punish a defendant for both felonious larceny and armed robbery.[14]

The North Carolina Supreme Court granted discretionary review to determine "whether the defendant in this case may be convicted and sentenced for both armed robbery and felonious larceny when both charges are based on the same incident."[15] To resolve this problem, the supreme court addressed two questions: first, whether the State can convict a defendant of two separate crimes based on the same incident; and second, whether felonious larceny is a crime separate and distinct from armed robbery rather than a lesser included offense.

Justice Webb wrote for the majority. In resolving the first issue, he conceded that language from a previous North Carolina Supreme Court opinion indicated that according to double jeopardy principles, the state could not punish a defendant for two similar statutory offenses when the offenses arise from a single incident.[16] Yet, the court dismissed this earlier language as an incorrect

8. *Id.* at 590, 359 S.E.2d at 777.

9. In addition to requesting the court of appeals to arrest judgment on the felonious larceny conviction, defendant presented nine other instances of error by the trial court. *Hurst*, 82 N.C. App. at 4, 346 S.E.2d at 10.

10. *Id.* at 20, 346 S.E.2d at 19.

11. *Id.* at 10, 346 S.E.2d at 13-14.

12. The constitutions of both North Carolina and the United States prohibit double jeopardy. The fifth amendment to the United States Constitution guarantees that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In Benton v. Maryland, 395 U.S. 784 (1969), the Supreme Court held that the double jeopardy prohibition applies to the states through the fourteenth amendment. *Id.* at 794.

Independent of the federal constitution, the North Carolina Constitution guarantees 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. Although the North Carolina Constitution does not expressly grant the right to be free from double jeopardy, the state supreme court has interpreted this section to include such a right. In State v. Crocker, 239 N.C. 446, 80 S.E.2d 243 (1954), the court stated that "[i]t is a fundamental and sacred principle of the common law . . . that no person can be twice put in jeopardy of life or limb for the same offense. . . . While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the 'law of the land' . . . ." *Id.* at 449, 80 S.E.2d at 245.

13. *Hurst*, 82 N.C. App. at 10-20, 346 S.E.2d at 13-19.

14. *Id.* at 20, 346 S.E.2d at 19.

15. *Hurst*, 320 N.C. at 590, 359 S.E.2d at 777.

16. *Id.* at 590-91, 359 S.E.2d at 777. The previous North Carolina case to which Justice Webb

statement of the law.[17] Instead, the majority cited several North Carolina cases in which a defendant was punished for more than one similar statutory crime based on only one transaction.[18] The court therefore concluded that as long as the offenses were legally separate, the State could punish a defendant for more than one similar statutory crime, even though the case involved just one transaction and one investigation.[19]

Having established that defendant was susceptible to punishment for two separate crimes based on a single transaction, the court had to determine whether this case even involved two separate offenses. Thus, the opinion turned to the second issue, whether felonious larceny is a lesser included offense of armed robbery or a crime separate and distinct from armed robbery. After recognizing a conflict between two lines of North Carolina cases,[20] the court restated the applicable doctrine: "[a]n offense is a lesser included offense when all its essential elements are included in the greater offense and proof of all elements in the greater offense will prove all elements of the lesser offense."[21] If an offense contains any essential element which the greater offense does not share, then the offenses are legally distinct.

Under this test felonious larceny and armed robbery are separate and distinct crimes for two reasons. First, larceny requires the taking and carrying away of the property of another.[22] On the other hand, an *attempted* taking

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referred is State v. McGill, 296 N.C. 564, 251 S.E.2d 616 (1979). The pertinent language stated that "[m]ultiple punishment is one facet of the prohibition against double jeopardy. That rule applies '[w]here two or more offenses of the same nature are by statute carved out of the same transaction and are properly the subject of a single investigation.' " *McGill*, 296 N.C. at 568, 251 S.E.2d at 619 (citations omitted). The *Hurst* majority admitted that "if the language in *McGill* is the law, a defendant may not be punished for more than one offense if two or more offenses created by statute arise from one transaction . . . ." *Hurst*, 320 N.C. at 591, 359 S.E.2d at 777.

For a discussion of *McGill*, see *infra* text accompanying notes 38-45.

17. *Hurst*, 320 N.C. at 591, 359 S.E.2d at 777.

18. *Id.* The cases cited by the majority were State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986), State v. Murray, 310 N.C. 541, 313 S.E.2d 523 (1984), and State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980). For discussions of these cases, see *infra* text accompanying notes 46-52, 58-77.

19. *Hurst*, 320 N.C. at 591, 359 S.E.2d at 777.

20. Several cases indicate that larceny is a lesser included offense of armed robbery. State v. Owens, 277 N.C. 697, 702, 178 S.E.2d 442, 445 (1971) (larceny from the person and simple larceny listed as examples of a lesser included offense of robbery with firearms); State v. Swaney, 277 N.C. 602, 612, 178 S.E.2d 399, 405, *cert. denied*, 402 U.S. 1006 (1971) ("An indictment for robbery with firearms will support a conviction of the lesser included offenses of . . . larceny from the person, or simple larceny."); State v. Hatcher, 277 N.C. 380, 390, 177 S.E.2d 892, 899 (1970) (larceny from the person and simple larceny listed as examples of a lesser included offense of robbery with firearms); State v. Parker, 262 N.C. 679, 684, 138 S.E.2d 496, 500 (1964) (same); State v. Wenrich, 251 N.C. 460, 460, 111 S.E.2d 582, 582-83 (1959) (per curiam) (same); State v. Davis, 242 N.C. 476, 478, 87 S.E.2d 906, 908 (1955) (same); State v. Bell, 228 N.C. 659, 663, 46 S.E.2d 834, 837 (1948) (same).

Recent cases, however, hold that the crimes are legally separate offenses. State v. Murray, 310 N.C. 541, 548-49, 313 S.E.2d 523, 529 (1984) (armed robbery and larceny are separate offenses); State v. Beaty, 306 N.C. 491, 501, 293 S.E.2d 760, 767 (1982) (same); State v. Revelle, 301 N.C. 153, 163, 270 S.E.2d 476, 481-82 (1980) (felonious larceny, armed robbery, burglary, and rape are legally separate and distinct crimes).

21. *Hurst*, 320 N.C. at 592, 359 S.E.2d at 778; *see also* State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982) ("[A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense.").

22. *Hurst*, 320 N.C. at 592, 359 S.E.2d at 778. The essential elements of larceny are satisfied

would satisfy the definition of armed robbery.[23] Second, the felonious larceny in this case was based on the goods having a value over 400 dollars.[24] Armed robbery, however, has no monetary threshhold.[25] Thus, satisfaction of the armed robbery elements would not necessarily satisfy the elements of felonious larceny.[26] Due to these differences in elements, the supreme court held that felonious larceny was not a lesser included offense of armed robbery, but was instead a separate and distinct offense.[27] Because *State v. Hurst* involved two separate crimes, and because a defendant could be punished for two crimes based on one incident, convicting Hurst of both armed robbery and felonious larceny was not an error. The supreme court therefore reversed the court of appeals and remanded the case for an order affirming the judgment of the trial court.[28]

Justice Frye authored a dissent in which Chief Justice Exum joined.[29] Frye was not opposed to the holding that felonious larceny and armed robbery were separate crimes,[30] but he clearly disagreed with the preliminary finding that this single incident could give rise to convictions for both felonious larceny and armed robbery. According to Frye, it was not important that the majority found armed robbery and larceny to be distinct crimes. Even if they were separate

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when a defendant (1) takes the property of another; (2) carries the property away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property. *Id.* In addition, N.C. GEN. STAT. § 14-72 (1986), makes larceny a felony if (a) the property has a value greater than $400; (b) the property is any explosive or incendiary device or substance; (c) the property is a firearm; (d) the property is any record or paper in the custody of the North Carolina Archives; (e) the larceny is from the person; or (f) the larceny is committed pursuant to a burglary or breaking and entering.

23. *Hurst*, 320 N.C. at 592, 359 S.E.2d at 778. The statutory elements constituting armed robbery include (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon, implement, or means; (3) whereby the life of a person is endangered or threatened. N.C. GEN. STAT. § 14-87 (1986).

24. *Hurst*, 320 N.C. at 593, 359 S.E.2d at 778.

25. *Id. See* N.C. GEN. STAT. § 14-87 (1986) (no language establishing any requirement that the stolen property have a certain value).

26. *Hurst*, 320 N.C. at 592-93, 359 S.E.2d at 778. If the felonious larceny was based on one of the other premises listed in N.C. GEN. STAT. § 14-72(b), such as larceny of an explosive device, satisfaction of the armed robbery elements would indeed satisfy the felonious larceny elements. Thus, only when the larceny is based on the value of the goods being greater than $400 is the second distinction between armed robbery and felonious larceny valid.

27. *Hurst*, 320 N.C. at 593, 359 S.E.2d at 778. At first glance, the holding may seem unfair because it is based on definitional differences rather than on the facts of the case. In other words, defendant's behavior in this particular case was more than a mere attempt, and the stolen property exceeded $400 in value. In this specific instance, satisfaction of the robbery elements also satisfied the felonious larceny elements.

Yet, the North Carolina Supreme Court has already expressed its disagreement with this criticism. In State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982), the court "[did] not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. . . . The determination is made on a *definitional*, not a factual basis." *Id.* at 635, 295 S.E.2d at 378-79.

28. *Hurst*, 320 N.C. at 593, 359 S.E.2d at 779.

29. *Id.* at 593-96, 359 S.E.2d at 779-80.

30. Justice Frye conceded that the cases relied upon by the majority supported this conclusion. *Id.* at 595, 359 S.E.2d at 780 ("the three cases relied on by the majority support the holding that felonious larceny is not always a lesser included offense of armed robbery . . . .").

offenses, Frye agreed with the court of appeals that the legislature did not intend for the State to punish a defendant for both robbery and larceny based on a single taking from one victim at one time.[31]

The importance of *State v. Hurst*, is not the finding that felonious larceny is a separate crime from armed robbery rather than a lesser included offense. This holding is only a minor development over which the majority and dissent did not vigorously argue.[32] What is noteworthy and disputed about *Hurst* is the larger development—the opinion's initial determination that a single incident can support punishment for two very similar offenses, as long as the crimes are legally separate and distinct. A survey of the precedent leading up to the *Hurst* opinion will clarify the majority position and aid in understanding the merits of the dissenting opinion.

Before discussing North Carolina case law, however, it is necessary to provide a brief overview of double jeopardy principles.[33] The right to be free from double jeopardy, flowing from both the United States and North Carolina Constitutions,[34] guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[35] This clause generally prohibits (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[36] Under the third protection, at issue in *Hurst*, "[t]he test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense."[37] These general statements indicate that the State cannot impose two punishments for the same offense, but the development of a workable concept of "same offense" has been problematic.

State v. McGill,[38] decided in 1979, was the source of the language cited by the court of appeals but dismissed by the supreme court in *Hurst*. In *McGill* defendant was charged with possession of more than one ounce of marijuana and with possession with intent to sell or deliver marijuana.[39] Defendant contended that possession of more than one ounce was a lesser included offense of possession with intent to sell. He also claimed that he would be prejudiced unless the court required the State to choose one of the two offenses upon which to proceed.[40] The supreme court disagreed. Applying the traditional test of com-

31. *Id.* at 595-96, 359 S.E.2d at 780 (Frye, J., dissenting).

32. For a discussion of this issue written prior to the supreme court decision in *Hurst* and calling for legislative amendment of the armed robbery statute, see Braun, *Lesser Included Offenses: A New Piece in the Puzzle*, 8 Campbell Law Observer, Jun. 26, 1987, at 1.

33. For a discussion of double jeopardy principles, see M. FRIEDLAND, DOUBLE JEOPARDY (1969); J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969).

34. *See supra* note 12.

35. U.S. CONST. amend. V.

36. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Gardner, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986).

37. State v. Barefoot, 241 N.C. 650, 654-55, 86 S.E.2d 424, 427 (1955).

38. 296 N.C. 564, 251 S.E.2d 616 (1979).

39. *McGill*, 296 N.C. at 565, 251 S.E.2d at 617.

40. *Id.* at 567, 251 S.E.2d at 618-19. Defendant argued that in lesser included offense cases,

paring essential elements,[41] the court determined that the two crimes each contained one element which was not necessary for proof of the other; thus, possession of more than one ounce of marijuana was not a lesser included offense of possession with intent to sell or deliver marijuana.[42] Furthermore, the court did not require the prosecution to elect one theory, but instead held that the State could proceed on both theories alternatively.[43] The *McGill* court, however, was very careful to qualify its holding:

> [The holding does] not mean, however, that a defendant [can] be punished for both offenses because of possession of the same contraband. Multiple punishment is one facet of the prohibition against double jeopardy. That rule applies "[w]here two or more offenses of the same nature are by statute carved out of the same transaction and are properly the subject of a single investigation."[44]

This language indicated that although a defendant could be prosecuted for two offenses of the same nature, he could only be convicted of one offense if two *similar* crimes arose from the same transaction. Testimony to this principle was the fact that the *McGill* court directed the jury to consider possession of more than one ounce of marijuana if and only if they found the defendant not guilty of possession with intent to sell.[45]

Just one year later, however, the North Carolina Supreme Court ignored this principle and upheld multiple convictions for *similar* crimes based on the same series of events. In *State v. Revelle*[46] defendant broke into the victims' mobile home, robbed the victims at gunpoint, raped their neighbor, and escaped in the victims' automobile.[47] Defendant was tried and convicted of felonious larceny, armed robbery, burglary, and rape.[48] He argued that the trial court violated his right to be free from double jeopardy by convicting him of four felonies based on the same series of events.[49] The supreme court found no error. The court offered two justifications for its decision. First, the court segmented the episode and found that each offense represented a separate action by the

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unless the State was required to choose one offense upon which to proceed, the jury would hear multiple charges against him and infer "greater criminal activity than actually exist[ed]." *Id.*

41. Blockburger v. United States, 284 U.S. 299 (1932), is credited with the development of the traditional test. The Supreme Court established that "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." *Id.* at 304.

The elements comparison has long been followed in North Carolina as well. *See, e.g.*, State v. Birckhead, 256 N.C. 494, 500, 124 S.E.2d 838, 843-44 (1962) ("[I]f *each* statute requires proof of an additional fact not required by the other, the offenses are not the same.").

42. Possession of over an ounce of marijuana required, of course, a showing that the amount in question was greater than one ounce. The elements of possession with intent to sell or deliver, on the other hand, could be satisfied with any amount of marijuana. The elements failed to match. *McGill*, 296 N.C. at 568, 251 S.E.2d at 619.

43. *Id.*

44. *Id.* (quoting State v. Midgett, 214 N.C. 107, 110, 198 S.E. 613, 614 (1938) (citations omitted)).

45. *McGill*, 296 N.C. at 569, 251 S.E.2d at 619-20.

46. 301 N.C. 153, 270 S.E.2d 476 (1980).

47. *Revelle*, 301 N.C. at 155-56, 270 S.E.2d at 478.

48. *Id.* at 156, 270 S.E.2d at 478.

49. *Id.* at 162, 270 S.E.2d at 481.

defendant despite all four charges being based on the same series of events.[50] Second, the court found that felonious larceny, armed robbery, burglary, and rape were legally distinct crimes; no one of them was a lesser included offense of the other.[51] Thus, as long as the evidence supported separate offenses, convicting defendant of four distinct crimes did not place him in double jeopardy, even though the case involved a single series of events and even though three of the four crimes were similar in nature.[52] *Revelle*, therefore, deviated from the *McGill* language and proceeded on a different theory: multiple punishment does not violate double jeopardy protection when the evidence supports two or more separate offenses with independent elements; double jeopardy is violated only when the evidence presented on more than one charge is identical.

State v. Beaty,[53] decided in 1982, presented the supreme court with a previously unanswered question—whether freedom from double jeopardy is violated when the state charges a defendant with two counts of armed robbery for assaulting only one employee but taking property both from the employee and from the business.[54] The court stated that the existence of a single assault was the controlling factor and that the ownership of the stolen property was not significant.[55] Because the facts and elements alleged in each indictment were the same, the supreme court held that defendant could be convicted of armed robbery of either the employee or the business, but not both.[56]

The *Beaty* opinion concluded with dictum which followed the *Revelle* rationale and directly influenced the result in *Hurst*. The dictum concerned a combination of charges which the prosecution chose not to pursue. After listing the essential elements of both armed robbery and larceny, the court maintained that "[a]rmed robbery and larceny are separate crimes. . . . defendant here could have been convicted of one count of armed robbery and one count of larceny, had he been so charged . . . ."[57] Because *Beaty* involved only one incident, the court's observation lent support to the theories that armed robbery and felonious larceny are separate offenses, and freedom from double jeopardy is not violated if the factual setting supports two separate and distinct crimes, regardless of the number of incidents and the similarity of the crimes.

Two years later, the North Carolina Supreme Court went beyond dictum

50. *Id.* at 163, 270 S.E.2d at 482 (burglary when defendant entered the mobile home; armed robbery when defendant took property from the victims at gunpoint; rape after the armed robbery; and larceny when defendant took the victims' automobile).

51. The *Revelle* court created some confusion by stating both a legal and a factual justification for its holding. According to one interpretation, *Revelle* was decided not because one incident could give rise to two similar offenses, but because the case actually involved multiple incidents. *See* State v. Hurst, 320 N.C. 589, 594, 359 S.E.2d 776, 779 (1987) (Frye, J., dissenting) ("the two offenses . . . represented separate actions by defendant although all the charges were based on the same series of events. . . . [T]here were two separate takings in *Revelle* . . . .").

52. *Revelle*, 301 N.C. at 163, 270 S.E.2d at 482.

53. 306 N.C. 491, 293 S.E.2d 760 (1982).

54. *Beaty*, 306 N.C. at 499, 293 S.E.2d at 765-66.

55. *Id.* at 499, 293 S.E.2d at 766.

56. *Id.* at 500, 293 S.E.2d at 766.

57. *Id.* at 501, 293 S.E.2d at 767.

and relied directly upon *Revelle* when deciding *State v. Murray*.[58] In *Murray* the State's evidence showed that defendant, along with other men, beat and robbed a warehouse owner as he was leaving his place of employment. Defendant and the other men then drove away in the victim's automobile.[59] The victim died the following morning and a jury found defendant guilty of first degree murder, armed robbery, and felonious larceny of an automobile.[60] Defendant argued that his convictions for both armed robbery and felonious larceny violated his right to be free from double jeopardy.[61] Citing *State v. Revelle*, the court maintained that "even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical."[62] The court then listed the elements of armed robbery and larceny and concluded that at least one essential element of each crime was not an element of the other.[63] Because the case involved separate offenses with different essential elements, defendant was not a victim of double jeopardy when the court punished him for both armed robbery and felonious larceny.[64] The court did not find the similarity of the crimes to be important. Thus, the supreme court apparently adhered to a consistent theory in *Revelle*, *Beaty*, and *Murray*, and completely neglected to give any recognition to the language in *McGill*.[65]

Finally, *State v. Gardner*[66] is vital to a thorough understanding of *State v. Hurst*. In *Gardner*, a 1986 case, the issue was whether the State violated defendant's right to be free from double jeopardy by punishing him for breaking and entering and for felony larceny pursuant to that breaking and entering.[67] Because *Gardner* dealt with a greater and lesser included offense, the *Hurst* court found that it had no application to cases involving separate offenses.[68] Nevertheless, the analytical method introduced in *Gardner* contained additional inquiries which could have been extremely influential if the court had applied the same method in *Hurst*.[69]

In *Gardner* the North Carolina Supreme Court borrowed the approach formulated by the United States Supreme Court in *Missouri v. Hunter*.[70] First, the

58. 310 N.C. 541, 313 S.E.2d 523 (1984).

59. *Murray*, 310 N.C. at 544, 313 S.E.2d at 526.

60. *Id.* at 542-43, 313 S.E.2d at 526.

61. *Id.* at 543, 313 S.E.2d at 526.

62. *Id.* at 548, 313 S.E.2d at 529.

63. *Id.*

64. *Id.*

65. The consistent theory followed in *Revelle*, *Beaty*, and *Murray* is that one incident or transaction can give rise to two similar statutory offenses without violating double jeopardy protection, as long as those offenses are legally distinct crimes. *Revelle*, 301 N.C. at 163, 270 S.E.2d at 481-82.

66. 315 N.C. 444, 340 S.E.2d 701 (1986).

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

68. *Hurst*, 320 N.C. at 591, 359 S.E.2d at 778. The court stated, "If felonious larceny is not a lesser included offense of armed robbery . . . *Gardner* has no application." The court subsequently held that felonious larceny was not a lesser included offense of armed robbery. *Id.* at 593, 359 S.E.2d 778-79.

69. This Note concludes by criticizing the majority for failing to apply the *Gardner* method in *Hurst*. *See infra* text accompanying notes 110-28.

70. 459 U.S. 359 (1983).

Gardner court recognized that breaking and entering was the predicate crime upon which the State charged defendant with felony larceny pursuant to breaking and entering.[71] Traditional analysis would have stopped the inquiry at this point; because the case did not involve two distinct crimes, double jeopardy would allow only one conviction.[72] Yet, the court declared that the traditional test was no longer conclusive; it merely raised a *presumption* that only a single punishment is appropriate.[73] The North Carolina Supreme Court then mimicked federal constitutional law by deciding that a clear indication of legislative intent could rebut the presumption:[74]

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

72. The United States Supreme Court developed the traditional analysis in Blockburger v. United States, 284 U.S. 299 (1932). The issue in *Blockburger* was whether the accused committed two offenses or one offense when his single act violated two sections of the Harrison Anti-Narcotic Act. The Court established what would commonly become known as the *Blockburger* test:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304. The Court in *Blockburger* applied the test and concluded that the single act gave rise to two offenses. *Id.*

The *Blockburger* Court was not the first tribunal to establish this test. The Court cited Gavieres v. United States, 220 U.S. 338 (1911), which in turn had adopted language from the Supreme Court of Massachusetts in Morey v. Commonwealth, 108 Mass. 433 (1871).

Under the *Blockburger* test, the analysis was straightforward. If comparison of the elements resulted in two separate offenses, multiple conviction was allowed. On the other hand, if the test indicated the same offense, double jeopardy prohibited cumulative punishment.

For years, North Carolina followed an approach similar to the *Blockburger* test. *See, e.g.*, State v. Birckhead, 256 N.C. 494, 500, 124 S.E.2d 838, 843 (1962) (the "additional facts test"); but for a discussion of the several variations on this approach in North Carolina, see Comment, *Criminal Law - Multiple Punishment and the Same Evidence Rule*, 8 WAKE FOREST L. REV. 243, 246-58 (1972).

73. The United States Supreme Court's first indication that the *Blockburger* test was not an absolute component of double jeopardy analysis came in Whalen v. United States, 445 U.S. 684 (1980):

> The assumption underlying the [*Blockburger*] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishment *in the absence of a clear indication of contrary legislative intent.*

Id. at 691-92 (emphasis added). The *Whalen* Court nevertheless interpreted the legislative history in that particular case to require strict compliance with the result reached under the *Blockburger* test. *Id.* at 692.

In Albernaz v. United States, 450 U.S. 333 (1981), the Court applied the *Blockburger* test and found that the case involved separate statutory offenses. *Id.* at 339. Yet, instead of routinely assuming that multiple sentences were permissible, the Court stated that "[t]he *Blockburger* test . . . should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Id.* at 340. Again, however, the Court found nothing in the legislative history mandating a different outcome from the result reached by application of the *Blockburger* test.

Finally, in Missouri v. Hunter, 459 U.S. 359 (1983), the Court conclusively held:

> [when] a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Id. at 368-69. In *Hunter*, because "the Missouri Legislature made its intent crystal clear," defendant was susceptible to punishment for first degree robbery and for armed criminal action even though the statutes proscribed the same conduct under the *Blockburger* rule. *Id.* at 368.

74. In *Gardner* the North Carolina Supreme Court abandoned strict compliance with the elements comparison and adhered to the *Hunter* approach. *Gardner*, 315 N.C. at 453, 340 S.E.2d at 708. Rather than simply comparing the essential elements of the statutory offenses, the court sur-

> Even if the elements of the two statutory crimes are identical and neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended.[75]

As a result of the change in doctrine, the court analyzed legislation to determine if the State could punish defendant for two offenses even though one crime was a lesser included offense of the other. After examining legislative intent and finding that the North Carolina General Assembly intended such a result,[76] the *Gardner* court concluded that punishing the defendant separately for the lesser offense, breaking and entering, and for the greater offense, felony larceny, did not violate double jeopardy protections.[77]

Under normal procedure, North Carolina courts compare the essential elements of the potential offenses. If the comparison points to legally separate offenses, the defendant is susceptible to cumulative punishment regardless of the number of transactions or the similarity of the crimes. According to *Gardner*, when the comparison reveals a greater and lesser included offense, the courts also check legislative intent for an indication that mutilple punishment is nevertheless permissible. Yet, the preceding survey of principle and case law reveals two areas of tension. The first conflict is between the language in *McGill* and the decisions in subsequent cases which failed to adhere to this language; the issue is whether the *Hurst* court should have followed *McGill* instead of the later cases. The second conflict is between the analytical method adopted in *Gardner* and the approach followed in *Hurst*. The remainder of this Note will examine these two conflicts, addressing first the *McGill* issue[78] and second the *Gardner* issue.[79]

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veyed legislative intent to determine if multiple punishment was appropriate. *Id.* at 453-54, 340 S.E.2d at 708.

The underlying reason for this expanded approach hinged on the difference between the two types of double jeopardy protection. In successive-prosecution situations, double jeopardy relieves the defendant of the constant anxiety and worry over whether he will have to endure a second trial for the same conduct. In single-prosecution situations involving multiple punishment, on the other hand, the defendant's interests and the analyses are different:

> Different interests are involved when the issue is purely one of multiple punishments, without the complications of a successive prosecution .... The only interest of the defendant is in not having more punishment imposed than that intended by the Legislature. The intent of the Legislature, therefore, is determinative.

Id. at 452, 340 S.E.2d at 707 (quoting People v. Robideau, 419 Mich. 458, 484-85, 355 N.W.2d 592, 603, *reh'g denied*, 420 Mich. 1201, 362 N.W.2d 219 (1984)). Thus, in single trial settings, the courts violate double jeopardy if they impose more punishment that the legislature intended. *See also* M. FRIEDLAND, *supra* note 33, at 199 (the rule against multiple convictions in a single trial is "more a matter of sentencing policy and of discovering the intent of the legislature than of protecting the accused from unwarranted harassment."); J. SIGLER, *supra* note 33, at 64 ("Every new criminal statute . . . [increases] the number of possible convictions and sentences which a defendant may suffer .... It must be determined whether the legislature 'intended' to increase the penalty for a single criminal deed.").

For a discussion and criticism of North Carolina's adoption of the *Hunter* approach, see Note, *State v. Gardner: North Carolina Sails into the Sargasso Sea*, 65 N.C.L. REV. 1267 (1987).

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

76. *Id.* at 460-63, 340 S.E.2d at 712-13 (the court examined such factors as the number of social norms violated, the placement of the offenses in separate articles within the statute, judicial history, and legislative acquiescence).

77. *Id.* at 463, 340 S.E.2d at 714.

78. The "*McGill* issue" is simply a label describing this Note's analysis of whether a single

The *Hurst* decision was not revolutionary in permitting punishment for more than one similar crime based on a single incident. *Revelle* allowed convictions for felonious larceny, armed robbery, and burglary based on the same series of events.[80] *Murray* allowed convictions for armed robbery and felonious larceny flowing from one incident.[81] *Gardner* even allowed punishment for both an offense and its lesser included offense.[82] Thus, the *Hurst* court was quite consistent in allowing convictions for both armed robbery and felonious larceny based on one incident.

These cases, however, are inconsistent with the language in *McGill*. *McGill*, articulated at least one year before any of these decisions,[83] stated that two offenses of the *same nature* could not be carved out of a single transaction.[84] This apparent inconsistency can be resolved by one of two competing interpretations. The first theory maintains that *McGill* is a sound statement of the law and that the subsequent cases contained clear factual distinctions which warranted a deviation from *McGill*. According to this view, the *Hurst* court should have followed the *McGill* language and allowed only one conviction since *Hurst* did not contain such factual distinctions.[85] The second theory, followed by the majority, is that *McGill* contained incorrect and unnecessary verbiage; that the subsequent cases represent the law; and that the factual setting in *Hurst* is similar enough to these subsequent cases to require the same result.[86]

Under the first theory, advocated by the dissenting opinion in *Hurst*, two crimes of the *same nature* cannot arise from a single incident or transaction,[87] and each of the cases subsequent to *McGill* justifiably deviated from this principle. First, *Revelle* is distinguishable because each stage in the series of events can be viewed as a separate incident. Rather than a single event supporting multiple punishments, *Revelle* was a case of several events giving rise to several convictions.[88] The court even stated that "[e]ach offense represent[ed] a separate action by defendant, although all the charges were based on the same series of events."[89] Second, *Murray* can be differentiated in similar fashion. There, the

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incident can give rise to convictions for two similar offenses without violating double jeopardy protections. *See infra* text accompanying notes 80-106.

79. The "*Gardner* issue" is a label describing this Note's discussion of whether the *Hurst* court (separate offense) should have followed the analysis used in *Gardner* (a lesser included offense and a greater offense). *See infra* text accompanying notes 110-28.

80. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980); *see supra* text accompanying notes 46-52.

81. State v. Murray, 310 N.C. 541, 313 S.E.2d 523 (1984); *see supra* text accompanying notes 58-65.

82. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); *see supra* text accompanying notes 66-77.

83. *McGill* was a 1979 case. The opinion closest in time to *McGill* was *Revelle*, 301 N.C. 153, 270 S.E.2d 476, decided in 1980.

84. *McGill*, 296 N.C. at 568, 251 S.E.2d at 619.

85. *See Hurst*, 320 N.C. at 594-95, 359 S.E.2d at 779-80 (Frye, J., dissenting) (distinguishing the subsequent cases and arguing that the court of appeals decided correctly).

86. *Hurst*, 320 N.C. at 591, 359 S.E.2d at 777.

87. *McGill*, 296 N.C. at 568, 251 S.E.2d at 619.

88. *Hurst*, 320 N.C. at 594, 359 S.E.2d at 779 (Frye, J., dissenting); *see supra* note 50.

89. *Revelle*, 301 N.C. at 163, 270 S.E.2d at 482.

armed robbery of the victim can be seen as a separate action from the larceny of the victim's automobile. Again, although the crimes are quite similar, they arise from two separate incidents, not one.[90] Third, *Beaty* is distinguishable as well. Not only did the court allow only one conviction,[91] but the case involved two counts of the same crime rather than two separately classified crimes.[92]

Hurst, conversely, is not distinguishable. The case involved the precise circumstances contemplated by the *McGill* language: the State attempted to use one transaction to convict a defendant of armed robbery and larceny, two statutory offenses of the same nature.[93] Thus, if *McGill* is a correct statement of the law, *Revelle*, *Murray*, and *Beaty* can each be considered factual or legal exceptions to the general rule. *Hurst* can be criticized for ignoring *McGill* and following the subsequent cases when the factual setting did not justify such a deviation.

For several reasons, however, the preceding criticism of *Hurst* is unsound. The majority reflected the second theory, finding the *McGill* language to be an incorrect statement of the law and the subsequent cases to embody accepted double jeopardy principles.[94] Close analysis shows that the majority, instead of clinging to the *McGill* verbiage, adhered to a more accurate interpretation of double jeopardy and presented a method less tedious and burdensome than *McGill* would require.

In addition to being dictum,[95] the *McGill* language cannot form the basis of a valid criticism because it is not completely accurate in describing double jeopardy principles. According to *McGill*, freedom from double jeopardy protects a defendant from the use of one transaction to support punishment for *two statutory offenses of the same nature*.[96] Yet, double jeopardy shields a defendant from multiple penalties for *the same offense*.[97] In single trial settings, this guarantee means that a court can impose only that amount of punishment which the legislature prescribed.[98] On numerous occasions, the supreme court has fulfilled this obligation by finding that multiple punishment is permissible as long as the facts support legally separate offenses as defined by the legislature.[99] Neither the

90. *Hurst*, 320 N.C. at 595, 359 S.E.2d at 780 (Frye, J., dissenting).

91. *Beaty*, 306 N.C. at 500, 293 S.E.2d at 766.

92. *Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982) (two counts of armed robbery); *see also Hurst*, 320 N.C. at 595, 359 S.E.2d at 780 (Frye, J., dissenting) ("*Beaty* does not control the instant case because *Beaty* involved only indictments charging armed robbery.").

93. The one transaction was the incident in the parking lot in Fayetteville, North Carolina. *See supra* text accompanying notes 6-7. The two separate statutory offenses of the same nature were armed robbery and felonious larceny. *Hurst*, 320 N.C. at 589, 359 S.E.2d at 777.

94. *Id.* at 591, 359 S.E.2d at 777.

95. *Id.* ("The quoted language was not necessary to a decision in the case."). The actual holding in *McGill* was that the State did not have to choose one theory, but could instead proceed under two statutes. *McGill*, 296 N.C. at 568, 251 S.E.2d at 619.

96. *McGill*, 296 N.C. at 568, 251 S.E.2d at 619.

97. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Gardner, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986); *see also* U.S. CONST. amend. V ("subject for the same offense").

98. *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707 ("The Double Jeopardy Clauses of both the United States and North Carolina Constitutions prohibit a court from imposing more punishment than that intended by the legislature."); *see supra* note 74.

99. *See, e.g.*, State v. Murray, 310 N.C. 541, 313 S.E.2d 523 (1984) (murder, armed robbery, and felonious larceny); State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980) (felonious larceny, armed robbery, burglary, and rape); State v. Harrington, 283 N.C. 527, 196 S.E.2d 742 (possession

singularity of the incident nor the *similarity* of the statutory offenses appears to be important.[100] The case must involve multiple penalties for the exact same offense or a lesser included offense before double jeopardy will intervene.[101]

The court in *McGill* reached back to *State v. Midgett*,[102] a 1938 case, for its theory.[103] *Midgett* specifically stated, however, that "when the same facts constitute two or more offenses . . . the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act."[104] Thus, the majority's analysis more closely adhered to established double jeopardy doctrine. The dissent's theory is not as sound. The supreme court was wise to alleviate any confusion by discrediting the *McGill* language and holding that one transaction can give rise to punishment for two similar statutory offenses.

The criticism also fails by relying on detailed factual distinctions. The dissent complains that since *Revelle* and *Murray* involved multiple takings, multiple convictions were warranted; because *Hurst* involved just one taking, only one conviction is justified.[105] The prosecutor in *Hurst*, however, could have manipulated the facts to form two transactions as well. The initial struggle during which defendant obtained the victim's car keys could be considered armed robbery or attempted armed robbery; the driving away could be considered the felonious larceny.[106] Thus, formulating a doctrine upon the number of transactions

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and transportation of narcotics), *cert. denied*, 414 U.S. 1011 (1973); State v. Thornton, 283 N.C. 513, 196 S.E.2d 701 (1973) (possession and distribution of heroin); State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973) (possession and sale of heroin).

100. The general rule in North Carolina is as follows:

> [t]he plea of former jeopardy, to be good, must be grounded on the "same offense," both in law and in fact, and it is not sufficient that the two offenses grew out of the same transaction.

4 STRONG'S NORTH CAROLINA INDEX, Criminal Law § 26.3 (3d ed. 1976) (footnotes omitted). *See also* State v. Cameron, 283 N.C. 191, 198, 195 S.E.2d 481, 486 (1973) (recognizing the Strong's language as the "basic rule in North Carolina").

For additional cases supporting the general rule that a single incident can give rise to multiple offenses, even though the offenses are very similar, see State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985) (embezzlement and malfeasance of a corporate agent); State v. Thrift, 78 N.C. App. 199, 336 S.E.2d 861 (1985) (trafficking by possession and trafficking by delivery); State v. Lewis, 32 N.C. App. 298, 231 S.E.2d 693 (1977) (possession with intent to deliver a controlled substance and delivery of the same controlled substance); *see also supra* note 99.

101. State v. Murray, 310 N.C. 541, 547, 313 S.E.2d 523, 528 (1984) ("A person's right to be free from double jeopardy is violated not only when he is tried and convicted twice for the same offense but also when one is charged and convicted for two offenses, one of which is a lesser included offense of the other.").

In light of the court's recent decision in *Gardner*, however, the defendant may also lose his double jeopardy protection in the greater and lesser included offense situation if the court determines that the legislature intended multiple penalties. *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709.

102. 214 N.C. 107, 198 S.E. 613 (1938).

103. *McGill*, 296 N.C. at 568, 251 S.E.2d at 619.

104. *Midgett*, 214 N.C. at 110, 198 S.E. at 615 (quoting Dowdy v. State, 158 Tenn. 364, 13 S.W.2d 794 (1929)). The authority of *Midgett* in North Carolina can be questioned since it relied on a Tennessee case for a portion of its analysis.

105. *Hurst*, 320 N.C. at 594-95, 359 S.E.2d at 779-80 (Frye, J., dissenting). The dissent placed great emphasis on the number of takings while the majority stressed the number of incidents. The dissent apparently ignored the idea that several takings can be part of a single incident. Multiple takings does not necessarily mean multiple incidents.

106. *Murray* presented a very similar scenario. There, defendant first beat the victim and then

or takings would be senseless if it depended on the skill of the prosecutor in drafting the charge. The majority promulgated a more straightforward and less trivial procedure: if the facts support legally separate and distinct crimes, multiple penalties are appropriate regardless of the number of transactions or the similarity of the offenses.

The North Carolina Supreme Court was prudent in discarding the *McGill* language, reaffirming that one transaction could support more than one similar crime as long as the offenses were legally distinct, and deciding *Hurst* according to the accurate interpretation of double jeopardy guarantees. Yet, this conclusion does not give the court of appeals or the dissent in *Hurst* enough credit. The court of appeals, with which the dissent agreed,[107] placed primary emphasis not on *McGill*, but on the *Gardner* approach and legislative intent.[108] The appellate court did not broadly assert that one incident could *never* support two similar crimes. The lower court was much more fact specific, and its study of legislative intent, as in *Gardner*, was much more detailed. The court of appeals simply argued that under the individual facts of this case, one taking from one person at one time, the legislature did not intend to punish for crimes as similar as armed robbery and felonious larceny.[109] The majority never reached this result because it assumed that in cases of legally separate offenses, a detailed exploration of legislative intent was unnecessary. Thus, the majority may still be criticized for neglecting to thoroughly analyze the defendant's predicament. This discussion will therefore proceed to the second issue: whether the *Hurst* court should have followed the *Gardner* approach.

In single prosecution settings, the courts comply with double jeopardy guarantees by imposing only the amount of punishment intended by the legislature.[110] Both *Gardner* and *Hurst* complied with this requirement by comparing the essential elements of the charged crimes to determine if the case consisted of legally separate crimes.[111] When this comparison revealed that one crime was a

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drove away in the victim's automobile with codefendants. *Murray*, 310 N.C. at 544, 313 S.E.2d at 526. If *Murray* can be interpreted to involve two separate events, then *Hurst* certainly can be interpreted to involve two incidents as well, if the prosecutor wanted to stretch his theory.

107. *Hurst*, 320 N.C. at 595-96, 359 S.E.2d at 780 (Frye, J., dissenting) (in his dissent, Justice Frye referred to the court of appeals' opinion as "a well-reasoned and unanimous decision" which Frye would affirm.).

108. The court of appeals devoted approximately nine pages to a discussion grounded in the *Gardner* approach, *Hurst*, 82 N.C. App. at 10-19, 346 S.E.2d at 14-18, but devoted just over one page to *McGill*. *Id.* at 19-20, 346 S.E.2d at 18-19. Thus, the court of appeals did not rely on *McGill* as binding authority on double jeopardy doctrine. The appellate court argued that wholly apart from a separate versus same offense analysis, the legislature did not intend to allow punishment for crimes as similar as armed robbery and felonious larceny when the facts showed only a single taking from one person at one time.

109. The court of appeals declared that defendant's right to be free from double jeopardy "was violated by his punishment under two statutes which the legislature intended to be mutually exclusive under facts such as those in the case at bar." *Hurst*, 82 N.C. App. at 10, 346 S.E.2d at 14.

The dissent also claimed that the cases relied on by the majority "do not answer the question of whether the legislature intended that a person should be punished for both felonious larceny and armed robbery for a single taking from a single victim at one time. . . . [T]he legislature did not so intend." *Hurst*, 320 N.C. at 595, 359 S.E.2d at 780 (Frye, J., dissenting).

110. *See supra* notes 74 & 98.

111. *Gardner*, 315 N.C. at 454, 340 S.E.2d at 708-09; *Hurst*, 320 N.C. at 592, 359 S.E.2d at 778.

lesser included offense of the other, the *Gardner* court only presumed that double jeopardy prohibited multiple punishment.[112] The court made the further effort to carefully check the criminal statutes to see if this presumption could "be rebutted by a clear indication of legislative intent."[113] In *Hurst*, on the other hand, when this comparison revealed that each crime was separate and distinct, the supreme court ended the inquiry and routinely assumed that the legislature intended to impose multiple penalties.[114] The *Hurst* court failed to probe thoroughly legislative intent for an indication that the general assembly contemplated singular punishment even though the facts technically gave rise to separate offenses. The court provided no clear reason for this dual approach. The opinion simply stated that if felonious larceny was not a lesser included offense of armed robbery, *Gardner* did not apply.[115]

Perhaps *Gardner* should apply. The North Carolina Supreme Court has apparently imposed a double standard: when one incident supports separate offenses, the State can automatically convict the defendant of both crimes with no further inquiry;[116] but if the facts give rise to a greater offense and a lesser included offense, the court vigorously pursues legislative intent to see if multiple punishment is nevertheless possible.[117] While advocates of strict criminal sentencing may applaud such a double standard, criminal defendants can rightfully balk at the result. The supreme court gladly consults legislative intent in the same offense setting in order to *increase* prison time; but when the case involves separate offenses, the court is unwilling to delve into the statute to determine if *less* punishment was intended. Not only does this dual approach seem unfair, but it is inconsistent with previous North Carolina decisions.[118] It is also consis-

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

113. *Id.*

114. *Hurst*, 320 N.C. at 591, 359 S.E.2d at 777 ("If a defendant is convicted of two crimes based on the same incident and neither crime is a lesser included offense of the other, he may be sentenced for both crimes.").

115. *Id.* at 591, 359 S.E.2d at 778.

116. *Id.*

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

118. A fundamental concern is whether separate offenses are so different from greater and lesser included offenses that they warrant a different analysis. Six years ago, the North Carolina Supreme Court indicated that the treatment should be the same. In State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982), after comparing the essential elements, the court held that larceny and possession of the property stolen in the larceny were separate crimes. *Id.* at 231, 287 S.E.2d at 814. Though defendant could have been punished for both offenses, the court continued its inquiry. The *Perry* court concluded that a "review of the legislative history and case law background against which [the] possession statutes were enacted . . . [lead to the conclusion that] the Legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole." *Id.* at 235, 287 S.E.2d at 816.

The *Hurst* majority claimed that the *Gardner* method applied only in cases of greater and lesser included offense. Yet, the *Perry* court in 1982 explored legislative intent even after an elements comparison indicated legally distinct offenses. *See also* State v. Andrews, 306 N.C. 144, 148, 291 S.E.2d 581, 584 (even though larceny and possession were separate and distinct, the legislature did not intend to punish an individual for both offenses; additional conviction vacated), *cert. denied*, 459 U.S. 946 (1982) State v. McCoy, 79 N.C. App. 273, 278, 339 S.E.2d 419, 423 (1986) (legislature did not intend to punish defendant for both felonious larceny and felonious possession of stolen property); State v. Dow, 70 N.C. App. 82, 87, 318 S.E.2d 883, 887 (1984) (same); State v. Demott, 26 N.C. App. 14, 20, 214 S.E.2d 781, 785 (1975) (although defendant could have been convicted under several sections of the prostitution statute, the legislature did not intend cumulative punishment).

tent with the line of federal cases from which *Gardner* adopted the expanded approach.[119]

Unfortunately, the additional inquiry could become an empty gesture. As in the past, the court could easily conclude that when the legislature deliberately defined two offenses, it intended to impose two punishments. Yet, attention should be paid to the court of appeals in *Hurst*.[120] The appellate court avoided the double standard and followed the expanded method by diligently exploring legislative intent. The court found that "[t]he *Gardner* factors, as applied to the case at bar, strongly suggest that the legislature did not intend to allow multiple punishment under the circumstances of this case."[121] Since the supreme court has committed itself to the pursuit of legislative intent as part of double jeopardy doctrine,[122] it should avoid the double standard and be willing to either increase or decrease punishment. The courts should thoroughly consult legislative intent both in situations involving a greater and a lesser included offense, and in situations involving legally separate and distinct offenses.[123]

State v. Hurst can be praised for several reasons. It settled the conflict over whether felonious larceny is a lesser included offense of armed robbery.[124] It also reaffirmed a broad double jeopardy principle by holding that a single incident can give rise to more than one statutory offense, even if the crimes are of the same nature.[125] While these uncertainties were creatures of the supreme

119. The North Carolina Supreme Court borrowed the *Gardner* approach from a line of federal cases culminating in Missouri v. Hunter, 459 U.S. 359 (1983). *See supra* notes 72 & 73. In one case, Albernaz v. United States, 450 U.S. 333 (1981), the United States Supreme Court found separate offenses after applying the *Blockburger* test, but still searched legislative history for an indication that the legislature intended only a single punishment. *Albernaz*, 450 U.S. at 339; *see supra* note 73. Therefore, in adopting the federal approach, the North Carolina Supreme Court should realize that the United States Supreme Court has surveyed legislative intent even in cases in which the comparison of essential elements showed separate offenses. For a discussion of the federal cases along with suggestions for determining legislative intent, see Thomas, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 62-90 (1985).

It appears that prior to *Hurst*, neither the North Carolina nor the United States Supreme Court recognized a difference between separate offense cases and same offense cases when exploring legislative intent.

120. State v. Hurst, 82 N.C. App. 1, 346 S.E.2d 8 (1986), *rev'd*, 320 N.C. 589, 359 S.E.2d 776 (1987).

121. *Id.* at 19, 346 S.E.2d at 18. *Gardner* factors refer to the methods of determining legislative intent. One of the *Gardner* factors is the number of social norms violated. The court of appeals found that both armed robbery and larceny violated the same norm, stealing another's property. A second *Gardner* factor is legislative activity. Here, the court of appeals held that the legislature "did not intend to change the well-established prohibition against punishment for both larceny and armed robbery of the same property from a single victim." *Id.* at 14, 346 S.E.2d at 16. A third *Gardner* factor is statutory placement. The court of appeals noted that both armed robbery and larceny were listed in the same subchapter. Thus, the appellate court determined that the intent of the legislature was to allow only a single punishment despite the existence of two distinct crimes. *Id.* at 19, 346 S.E.2d at 18.

122. *Gardner*, at 444, 340 S.E.2d at 707.

123. The purpose of this Note is not to question North Carolina's initial decision to abandon a strict elements comparison and begin examining legislative intent. For a discussion of this issue, see Note, *supra* note 74, at 1280-87. The point of this analysis is simply to show that if the court wishes to probe legislative intent, it should do so in both of these situations.

124. The holding in *Hurst* was that felonious larceny and armed robbery are separate and distinct crimes. *Hurst*, 320 N.C. at 593, 359 S.E.2d at 778-79.

125. *Id.* at 591, 359 S.E.2d at 778.

court's own inconsistency,[126] it was better to recognize and to decide the issues than to leave them unresolved.

Yet, the majority in *Hurst* should be criticized for concentrating so heavily on the *McGill* language. In its concern over the correct interpretation of a broad double jeopardy principle,[127] the court neglected to apply the entire double jeopardy approach. Unlike cases involving a greater and lesser included offense the court did not attempt to pinpoint legislative intent. As a general proposition, it is true that one incident can support two similar crimes, as long as the crimes are legally distinct; but the court should still analyze specific separate offense cases to determine if the general assembly contemplated only a single penalty. Using legislative intent to inflict greater punishment while refusing to recognize legislative intent as a mitigating influence puts the criminal defendant in a "no win" situation. This judicially imposed double standard should be eliminated.

Though consistent inquiry into the mindset of the general assembly may impose a slight burden on the courts, the supreme court has already expressed its willingness to carry that burden by its ruling in *Gardner*. After all, in the area of multiple punishment for the same offense, the "intent of the Legislature . . . is determinative."[128] If so, the North Carolina Supreme Court should not intensely search for legislative intent in some cases while assuming it in others. The additional burden of a consistent and complete inquiry would not be without benefits. Criminal sentencing would be more equitable because punishment could be either increased or decreased. In addition, attorneys and lower courts would have a more predictable methodology to guide them; they would know that legislative history is a consideration and could plan their arguments accordingly.

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126. See *supra* note 20 for opposing North Carolina cases.

127. This particular principle was whether, in the abstract, one incident could support punishment for two similar crimes.

128. *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707 (quoting People v. Robideau, 419 Mich. 458, 355 N.W.2d 592, *reh'g denied*, 420 Mich. 1201, 362 N.W.2d 219 (1984)). The *Gardner* court stated that defendant's only interest in single trial situations was in not having more punishment imposed than the amount intended by the legislature. Therefore, legislative intent is paramount whenever multiple punishment is a possibility. *Id.* at 452, 340 S.E.2d at 707; *see supra* note 74. It should follow that legislative intent is paramount and should be thoroughly consulted in all single trial situations where multiple punishment is a possibility, whether the single trial involves separate offenses or a greater and lesser included offense.