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CRIMINAL PROCEDURE—Consecutive Sentences for Felony Murder and the Underlying Felony: Double Jeopardy or Legislative Intent? *Birr v. State*, 744 P.2d 1117 (Wyo. 1987).

Charles Edward Birr, Fred Schultz and Frank Garcia, agreed to rob Robert and Kathleen Bernard. They planned for Schultz and Garcia to go into the Bernards' house, tie them, and take their money. Birr gave Schultz and Garcia guns, rope, and duct tape and dropped them off at the Bernards' trailer.¹ About 20 minutes later, the three individuals met as planned. Birr saw that Schultz had a knife and that he was wiping blood off of himself. Schultz then told Birr that Garcia and he had killed Robert and Kathleen Bernard.²

On August 27, 1986, Birr pleaded guilty to one count of accessory to felony murder and one count of accessory to aggravated robbery,³ in violation of Wyoming Statutes 6-1-201,⁴ 6-2-101,⁵ and 6-2-401(c).⁶ Before sentencing, Birr moved to merge the offenses. The trial court denied the motion, and on November 4, 1986, Birr received sentences to the Wyoming State Penitentiary for life on the felony murder plea and 20 to 25 years on the aggravated robbery plea. The district court ordered Birr's terms to run consecutively.⁷

On appeal, Birr argued that the consecutive sentences imposed for felony murder and the underlying felony violated the double jeopardy clauses of the United States Constitution and the Wyoming Constitution.⁸

1. *Birr v. State*, 744 P.2d 1117, 1118 (Wyo. 1987).

2. Brief of Appellant at 4, *Birr v. State*, 744 P.2d 1117 (Wyo. 1987) (No. 86-325).

3. *Birr*, 744 P.2d at 1119, 1119 n.5.

4. WYO. STAT. § 6-1-201 (1977, Rev. 1983) provides:

(a) A person who knowingly aids or abets in the commission of a felony, or who counsels, encourages, hires, commands or procures a felony to be committed, is an accessory before the fact.

(b) An accessory before the fact:

(i) May be indicted, informed against, tried and convicted as if he were a principal;

(ii) May be indicted, informed against, tried and convicted either before or after and whether or not the principal offender is indicted, informed against, tried or convicted; and

(iii) Upon conviction, is subject to the same punishment and penalties as are prescribed by law for the punishment of the principal.

5. WYO. STAT. § 6-2-101 (1977, Rev. 1983) provides:

(a) Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, arson, robbery, burglary, escape, resisting arrest or kidnapping, or by administering poison or causing the same to be done, kills any human being is guilty of murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or life imprisonment according to law.

6. WYO. STAT. § 6-2-401(c) (1977, Rev. 1983) provides:

(c) Aggravated robbery is a felony punishable by imprisonment for not less than five (5) years nor more than twenty-five (25) years if in the course of committing the crime of robbery the person:

(i) Intentionally inflicts or attempts to inflict serious bodily injury; or

(ii) Uses or exhibits a deadly weapon or a simulated deadly weapon.

7. *Birr*, 744 P.2d at 1118.

8. *Id.*

The Wyoming Supreme Court disagreed and affirmed the trial court's order imposing consecutive sentences. The court held that aggravated robbery and felony murder constituted distinct offenses, and consecutive sentences did not subject *Birr* to double jeopardy⁹ because the legislature intended separate punishments.¹⁰

The double jeopardy clauses of the United States and Wyoming Constitutions provide three protections. The first protection bars a second prosecution for the same offense after acquittal. The second protection bars a second prosecution for the same offense after conviction.¹¹ The third protection bars multiple punishment for the same offense, unless the legislature intended multiple punishment.¹² The *Birr* opinion just dealt with the third protection that prohibits multiple punishment for the same offense.¹³ The issue in *Birr* was whether the legislature intended for felony murder and the underlying felony to be the same offense for the purposes of punishment.

This casenote focuses on the interpretation of the legislature's intended punishment for felony murder and the underlying felony. To determine whether it is proper to impose consecutive sentences for felony murder and the underlying felony, the primary question is what punishment the legislature intended when it promulgated the statutes. Application of rules of statutory interpretation indicates that given the available information, the court could not properly ascertain legislative intent, and that by default a Wyoming court should not impose consecutive sentences for felony murder and the underlying felony.

BACKGROUND

Federal Case Law

In *Blockburger v. United States*,¹⁴ the United States Supreme Court reviewed consecutive sentences and cumulative fines imposed on Blockburger for violating provisions of the Harrison Narcotic Act.¹⁵ The trial court convicted Blockburger for selling, on two consecutive days, a form of morphine not in the original stamped package or from the original

9. *Id.* at 1122.

10. *Id.* at 1121.

11. *Id.* at 1119 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

12. The legislature can prescribe multiple punishment for the same offense unless the punishment violates the eighth amendment. *Coker v. Georgia*, 433 U.S. 584, 592 (1976). The court, however, cannot impose double punishment unless authorized to do so by the legislature. *Whalen v. United States*, 445 U.S. 684, 689 (1980).

13. *Birr*, 744 P.2d at 1119.

14. 284 U.S. 299 (1932).

15. *Id.* at 300. The Act provided: "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; . . ." Harrison Narcotic Act, ch. 27, 44 Stat. 97 (1926) (codified at 26 U.S.C. § 692 (1926)). The Act also stated: "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue." Harrison Narcotic Act, ch. 1, 38 Stat. 786 (1914) (codified at 26 U.S.C. § 696 (1926)).

stamped package. The trial court also convicted Blockburger for executing one of the sales without a written order by the purchaser. Blockburger argued that since the two sales were made to the same person, he had only committed one offense. Blockburger also contended that the sale charge and the charge for failing to make the sale in pursuance of a written order constituted the same offense.¹⁶

To discern legislative intent, the United States Supreme Court examined the language set forth in the statutes. As to Blockburger's first argument, the Court held that the two sales were distinct and separate and therefore comprised two offenses.¹⁷ The Court reasoned that Congress intended to create a punishable offense for every sale as opposed to a single offense for continuous transactions.¹⁸ Addressing Blockburger's second argument, the Supreme Court held that even though the two violations occurred as the result of one act, Blockburger committed two offenses. The Court stated that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test . . . is whether each provision requires proof of a fact which the other does not."¹⁹ One offense required proof that the defendant sold drugs not in or from the original stamped package. The other offense required proof that the defendant sold drugs absent a written order from the purchaser.²⁰

In a more recent case, *Brown v. Ohio*,²¹ the United States Supreme Court dealt with the protection afforded by the double jeopardy clause against prosecutions under two statutes for the same act.²² In that case, Brown stole a car in eastern Cleveland. Nine days later police apprehended him in Wickliffe, Ohio. A court convicted Brown for joyriding. Brown then returned to East Cleveland for prosecution on charges of auto theft and joyriding. Brown pleaded guilty to the subsequent charges.²³

On appeal, the Supreme Court held that the double jeopardy clause of the fifth amendment protects against cumulative punishment not authorized by the legislature. The Court cited the *Blockburger* test as controlling to determine whether violation of two statutes by a single continuous act permits the imposition of cumulative punishment.²⁴ The Court held that violation of the Ohio joyriding and auto theft statutes constituted the same offense because both required proof of the same facts. Because the elements of the auto theft statute²⁵ included all of the elements in the joyriding statute,²⁶ the Court labeled the provisions as greater and lesser included offenses. The Court concluded that "the greater offense is there-

16. *Blockburger*, 284 U.S. at 301.

17. *Id.* at 301-02.

18. *Id.* at 302.

19. *Id.* at 304.

20. *Id.* at 303-04.

21. 432 U.S. 161 (1977).

22. *Id.* at 162-63.

23. *Id.*

24. *Id.* at 166.

25. *Id.* at 163 n.2.

26. *Id.* at 162 n.1.

fore by definition the 'same' for purposes of double jeopardy" as any lesser included offense.²⁷

In *Whalen v. United States*,²⁸ the United States Supreme Court ruled on a double jeopardy claim involving consecutive sentences for felony murder and the underlying felony of rape. Whalen received a sentence for 20 years to life for first degree murder, and 15 years to life for rape. The trial court ordered the sentences to run consecutively.²⁹

The Court began its analysis by noting that consecutive sentences did not violate the double jeopardy clause if the legislature intended cumulative punishment.³⁰ The Court utilized the *Blockburger* test to decipher legislative intent. The Court stated that when two offenses are the same under the *Blockburger* test, consecutive sentences are prohibited unless specially permitted by the legislature.³¹ Therefore, the Court first looked to the language of the statutes and the legislative history. The *Whalen* opinion concluded that Congress did not authorize consecutive sentences because the conviction for felony murder could not be maintained separate from the rape statute. Finally, the Court said that any doubt as to Congress's intent should be resolved by applying the rule of lenity.³² The Supreme Court reversed the decision of the court of appeals and held that consecutive sentences for felony murder and the underlying felony of rape violated the double jeopardy clause.³³

In his *Whalen* dissent, Justice Rehnquist expressed great dissatisfaction with the majority's application of the *Blockburger* rule in the felony murder context.³⁴ He argued that legislative intent cannot be determined by applying the *Blockburger* rule to statutes written as alternative offenses. After Justice Rehnquist criticized *Blockburger*, he argued that it should be applied to all the statutes contained in the felony murder statute and not to the statutes specified in the indictment.³⁵

Regardless of the *Blockburger* test, when the Court finds that the legislature authorized cumulative punishment it will uphold the imposition of consecutive sentences. In *Missouri v. Hunter*,³⁶ the trial court convicted Hunter of violating the Missouri statutes for first degree robbery and armed criminal action.³⁷ The Supreme Court reaffirmed the principle that

27. *Id.* at 168.

28. 445 U.S. 684 (1980).

29. *Id.* at 685.

30. *Id.* at 689.

31. *Id.* at 693.

32. *Id.* at 694.

33. *Id.* at 695.

34. *Id.* at 712 (Rehnquist, J., dissenting). Justice Rehnquist stated: "[W]hen applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties." *Id.* Applied to the statutes in the abstract, proof of one of the underlying offenses is never necessary for a felony murder conviction. When applied to the indictment the underlying felony is necessary for a felony murder conviction. *Id.* at 710-11 (Rehnquist, J., dissenting).

35. *Id.* at 711.

36. 459 U.S. 359 (1983).

37. *Id.* at 361-62.

the double jeopardy clause prohibits prescribing greater punishment than the legislature permitted.³⁸ The Court held that even though first degree armed robbery and armed criminal action constitute the same offense under the *Blockburger* test, the Missouri legislature intended to allow cumulative punishment.³⁹ As refined in *Hunter*, the *Whalen* rule gave priority to the legislature's intent to create separate offenses even though the offenses existed as one offense under the *Blockburger* test. *Hunter* did not overrule *Blockburger*, yet it ignored the *Blockburger* test where the Court deciphered a clear legislative intent to authorize cumulative punishment.⁴⁰

When tools of statutory interpretation fail to indicate clear legislative intent, the court is faced with an ambiguous statute. The Supreme Court has consistently interpreted ambiguous penal statutes strictly against the government and in favor of the defendant.⁴¹ The Court has characterized this construction as the rule of lenity.⁴² The rule of lenity provides that if the court cannot clearly ascertain the intended punishment, the doubt will be resolved against the imposition of multiple punishment.⁴³ The rule of lenity is based on fundamental policies of criminal law. First, every individual deserves fair notice of the law and the resulting punishment if it is violated. Second, because criminal punishment is reflective of societal standards, an individual should be punished according to a legislative act and not judicial construction. Hence, individuals are protected against arbitrary discretion by judges.⁴⁴ If the court imposes greater punishment than permitted by the legislature, then it has exceeded its constitutional power.⁴⁵

In *Simpson v. United States*,⁴⁶ the United States Supreme Court applied the rule of lenity in a case involving cumulative punishment. In that case, Simpson was convicted for armed bank robbery, and for committing a felony with the use of a firearm. The trial court sentenced Simpson to consecutive prison terms. On appeal, Simpson argued that the charges merged for the purposes of sentencing and therefore consecutive sentences were barred.⁴⁷ The Court examined the statutory language and legislative history and determined that Congress did not clearly express its intent on the issue of cumulative punishment. The Court resolved the ambiguity in favor of Simpson and held that consecutive sentences con-

38. *Id.* at 368.

39. The Court relied on the Missouri Supreme Court's interpretation of legislative intent in a prior case. *Id.* In *Sours v. State*, 593 S.W.2d 208, 216 (Mo. 1980), the Missouri Supreme Court held that the convictions for first degree armed robbery and armed criminal action, arising out of the same transaction, violated the double jeopardy clause of Missouri's constitution.

40. *Hunter*, 459 U.S. at 368.

41. N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 59.03-.06 (4th ed. 1986).

42. *Bell v. United States*, 349 U.S. 81, 83 (1955).

43. *Id.* at 83-84.

44. *United States v. Bass*, 404 U.S. 336, 348 (1971).

45. *Whalen*, 445 U.S. at 688.

46. 435 U.S. 6 (1977).

47. *Id.* at 9.

stituted double punishment in violation of the double jeopardy clause.⁴⁸ In its conclusion, the *Simpson* opinion emphasized the Supreme Court's reluctance to increase punishments "absent a clear and definite legislative directive."⁴⁹

Wyoming Case Law

The double jeopardy clause of the fifth amendment applies to the states through the fourteenth amendment.⁵⁰ The question of double punishment, however, depends on the state legislature's intent to create such punishment.⁵¹ The analysis employed by the United States Supreme Court in *Blockburger* provides state courts with a method of discerning legislative intent. Because the Supreme Court has not declared *Blockburger* as a constitutional mandate, state courts are not obligated to adhere to the *Blockburger* test. Nevertheless, because most states have little or no legislative history, the *Blockburger* test is a valuable guideline for determining legislative intent.

Although states can provide greater constitutional rights than afforded by the United States Constitution, the Wyoming Supreme Court held that the double jeopardy clause of Wyoming and United States Constitutions provide an equal measure of protection against double jeopardy. In *Vigil v. State*,⁵² the Wyoming Supreme Court addressed the issue of double jeopardy. The state charged Vigil with five counts of assault with a deadly weapon for firing a handgun at a vehicle containing five people. The trial court allowed the jury to return verdicts on all five counts.⁵³ Vigil, however, received only one sentence.⁵⁴ On appeal, the court affirmed all five verdicts and held that the Wyoming Constitution and the United States Constitution "have the same meaning and are coextensive in application."⁵⁵ Therefore, the Wyoming court adopted the United States Supreme Court's analysis of double jeopardy protection.

In 1986, the Wyoming Supreme Court adopted a variation of the *Blockburger* rule, labeled the same-evidence rule, for determining the number of offenses involved in a single transaction.⁵⁶ In *State v. Carter*,⁵⁷ Carter was charged with delivery of a controlled substance and possession with

48. *Id.* at 10-16.

49. *Id.* at 15-16.

50. *Benton v. Maryland*, 395 U.S. 784, 796 (1969).

51. *Brown*, 432 U.S. at 165.

52. 563 P.2d 1344 (Wyo. 1977).

53. *Id.* at 1346.

54. *Id.* at 1349.

55. *Id.* at 1350.

56. The Wyoming Supreme Court first addressed the *Blockburger* test in *Tuggle v. State*, 733 P.2d 610, 611-12 (Wyo. 1987). In that case, *Tuggle* received consecutive sentences for aggravated assault and battery charges involving two different individuals. The court declined to hold that *Tuggle* suffered double punishment for a single offense. *Id.* at 613. The court relied on a rule stated in *Blockburger* that permitted separate punishment if the defendant was convicted for individual acts prohibited by one criminal statute. *Id.* at 612 (citing *Blockburger*, 284 U.S. at 302, which was citing WHARTON'S CRIMINAL LAW § 34 n.3 (11th ed.)). The case did not involve a single criminal act violating separate statutory provisions.

57. 714 P.2d 1217 (Wyo. 1986).

intent to deliver a controlled substance.⁵⁸ Carter attempted to sell marijuana and hash oil. At the time of the arrest, he had completed the marijuana sale, but remained in possession of the hash oil. On appeal, Carter argued that the charges had merged. The court disagreed and held that two offenses existed because separate evidence supported each offense.⁵⁹ First, the marijuana supported delivery, and second, the hash oil supported possession. The state did not use the same evidence to obtain both convictions. Thus, the charges did not violate double jeopardy protection.

As an additional tool of statutory interpretation, the Wyoming Supreme Court has adopted the rule of lenity. In *Horn v. State*,⁶⁰ the court applied the rule of lenity. In that case, the trial court convicted Horn of willfully destroying a telephone and removing a telephone belonging to the telephone company.⁶¹ On appeal, Horn claimed that the phone belonged to him and therefore he could not receive a conviction for the offense. The court determined that the statutory language "belonging to" demonstrated ambiguity because Horn rented the phone.⁶² Thus, the court gave meaning to the words most favorable to Horn and reversed the conviction.⁶³

THE PRINCIPAL CASE

In *Birr*, the Wyoming Supreme Court determined whether consecutive sentences for felony murder and the underlying felony violated the double jeopardy clauses of the United States and Wyoming Constitutions.⁶⁴ The court first examined the application of the double jeopardy clauses of the fifth amendment and the Wyoming Constitution.⁶⁵ Citing *Vigil*, the court reiterated that double jeopardy has the same meaning under both constitutions even though they use different language.⁶⁶ Citing *Brown*,⁶⁷ the court concluded that the double jeopardy clause prohibits the court from imposing multiple punishment for the same offense unless authorized by the legislature.⁶⁸

The supreme court used three methods to determine if the legislature intended multiple punishment: the *Blockburger* same-facts rule, an analysis of statutory purpose, and an examination of statutory presumptions. First, the court applied the *Blockburger* test as a method of comparing elements of each crime. The court recognized that courts in various juris-

58. WYO. STAT. § 35-7-1031(a) (1977 & Cum. Supp. 1987) states: "Except as authorized by this act it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."

59. *Carter*, 714 P.2d at 1220.

60. 556 P.2d 925 (Wyo. 1976).

61. *Id.* at 926.

62. *Id.* at 927.

63. *Id.* at 928.

64. *Birr*, 744 P.2d at 1118.

65. WYO. CONST. art. 1, § 11 provides: "[N]or shall any person be twice put in jeopardy for the same offense."

66. *Birr*, 744 P.2d at 1119 (citing *Vigil*, 563 P.2d at 1350).

67. *Brown*, 432 U.S. at 165.

68. *Birr*, 744 P.2d at 1119.

dictions have used the *Blockburger* test as a rule of law. The *Birr* court, however, chose to follow *Hunter*, which employed the *Blockburger* test as a tool of statutory interpretation.⁶⁹ Previous decisions also revealed confusion as to whether the *Blockburger* rule applies to statutory provisions or to the particular facts of the case. In *Birr*, the trial court applied the test to the statutes and to the facts of the case. On appeal, the supreme court upheld that application.⁷⁰

Applying *Blockburger*, the trial court examined each statute to determine if one provision required proof of an additional fact which the other did not. The trial court reasoned that proof of aggravated robbery, unlike felony murder, required proof of the infliction of serious bodily injury, or the use or exhibition of a deadly weapon. The trial court also concluded that proof of felony murder, unlike aggravated robbery, required proof of a killing. Applying the *Blockburger* rule to the specific facts of the case, the trial court explained that felony murder required a showing of the Bernards' deaths, and aggravated robbery required a showing of the use of handguns. The supreme court accepted the trial court's analysis and concluded that the violation of both statutes did not constitute the same offense under *Blockburger*. Therefore, the court presumed that the legislature intended separate punishment.⁷¹

Second, the supreme court looked at the purpose of each statute to determine legislative intent. The court reasoned that the legislature created the felony murder statute to relax the prosecutor's burden of proof when a killing occurs during the commission of a felony. Premeditated malice is assumed by the defendant's willingness to participate in the unlawful conduct.⁷²

The court concluded that the legislature promulgated the felony murder statute to protect life and to suppress the evil of murder. The court found that the felony murder statute protected life, while the aggravated robbery statute protected property. The court relied on *Tuggle v. State* to conclude that if the legislature intended to protect different interests, it also intended separate punishment.⁷³

Third, the *Birr* court noted that felony murder and aggravated robbery are set forth in two separate statutes. To illustrate the significance of this statutory scheme, the court cited *Garrett v. United States*.⁷⁴ The *Garrett* Court declared that the creation of two distinct offenses raised a presumption that the legislature intended cumulative punishment.⁷⁵

69. *Id.* at 1120.

70. *Id.* at 1121.

71. *Id.*

72. *Id.* (citing *Richmond v. State*, 554 P.2d 1217 (Wyo. 1976), *reh'g denied*, 558 P.2d 509 (Wyo. 1977)).

73. *Id.*

74. *Id.* at 1122 (citing *Garrett v. United States*, 471 U.S. 773, 793 (1985)).

75. The United States Supreme Court most recently applied the *Blockburger* test in *Garrett*. In that case, Garrett pleaded guilty and received punishment in the Western District of Washington for importation of marijuana. Two months later in the Northern District of Florida, a court convicted and sentenced Garrett for engaging in a continuing criminal enterprise (CCE). The sentence for the CCE conviction ran consecutively to the sentence

ANALYSIS

The central focus of *Birr* is the determination of legislative intent.⁷⁶ Because Wyoming has no legislative history, the court's task is difficult. By applying the *Blockburger* test, and examining the surrounding circumstances, a Wyoming court can only *presume* legislative intent. Legislative intent establishes the parameters of double jeopardy protection against the imposition of consecutive sentences for the same offense. Yet, if the court is unable to ascertain intent, then the court is faced with a statutory ambiguity. Because the court is not at liberty to guess what the legislature intended, the ambiguity must be resolved in favor of lenity.

To determine legislative intent, the *Birr* court used the *Blockburger* test as a method of statutory interpretation. In his *Whalen* dissent, Justice Rehnquist criticized the *Blockburger* test on the basis that it does not indicate legislative intent when a court examines a statute containing alternative grounds for violation. Justice Rehnquist stated that the result is purely arbitrary because it depends on how a court chooses to utilize *Blockburger*.⁷⁷ Under the Rehnquist approach, a court may apply *Blockburger* in the abstract by looking only to the wording of the felony murder statute and the statutes defining the alternative felonies. Under this application, proof of felony murder does not require proof of any *one* of the seven alternative felonies listed in that statute. Conversely, if a court applies *Blockburger* to the statutes specified in the indictment, then proof of felony murder necessarily includes proof of that particular alternative felony. As an example, a defendant can only commit a killing in the course of an aggravated robbery by committing aggravated robbery.

Although Justice Rehnquist questioned the validity of the *Blockburger* test, he also argued that the Supreme Court should only apply it to the statutes in the abstract and not in relation to the indictment. Rehnquist argued that the statutory language is more indicative of legislative intent than the wording of the indictment.⁷⁸ Justice Rehnquist based his argument on the assumption that a legislature cannot anticipate which alternative felony will be specified in an indictment.

from the Washington proceeding. A conviction under the CCE statute is based on proof of three elements in addition to proof of predicate offenses that demonstrate continuing criminal conduct. Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 848 (1970). In that case, the CCE conviction partially relied on evidence presented against Garrett in Washington. *Garrett*, 471 U.S. at 776. Garrett argued that each of the predicate offenses constituted a lesser included offense and therefore a different prosecution for the greater offense amounted to double jeopardy. *Id.* at 778. The Court held that the *Blockburger* rule did not control because of clear legislative intent permitting cumulative punishment. *Id.* at 779. Thus, the Court affirmed the punishment. *Id.* at 795.

76. The practical effect of the *Birr* decision may be inconsequential. Under Wyoming law, an individual serving a life sentence is not eligible for parole. WYO. STAT. § 7-13-402(a) (1977, Rev. 1987) (providing that "The Board may grant a parole to any person imprisoned in any institution under sentence, except a life sentence . . ."). Unless a defendant's life sentence is commuted, the consecutive sentence for the underlying felony will not affect a defendant's aggregate punishment. WYO. CONST. art. 4, § 5 (governor's power to commute sentences).

77. *Whalen*, 445 U.S. at 712 (Rehnquist, J., dissenting).

78. *Id.* at 711 (Rehnquist, J., dissenting).

The majority in *Whalen* examined the indictment to determine which alternative felony statute established the felony murder conviction. The Court labeled the charge a "killing in the course of a rape."⁷⁹ This approach, adopted by the *Whalen* majority, allowed the Court to apply *Blockburger* to the statutory provisions for felony murder and rape. The *Whalen* majority's approach is preferable because it gives the legislature credit for anticipating the effect of the statutes it enacted. Every legislature must understand that the felony murder indictment involves a felony murder statute and one of the specified alternative felonies. This conclusion is evident from the fact that the legislature placed particular felonies in the felony murder statute. Therefore, the analysis used by the *Whalen* majority leads to a more persuasive determination of legislative intent.

As in *Whalen*, the *Birr* court dealt with two statutory provisions that applied to one act. The *Whalen* Court applied the *Blockburger* test, and then utilized the greater and lesser included offense analysis.⁸⁰ Following the analysis in *Whalen*, aggravated robbery requires no proof greater than the proof required for felony murder. The *Birr* court correctly determined that proof of aggravated robbery did not require proof of a killing. The court erred, however, by concluding that proof of felony murder did not necessarily include proof of aggravated robbery.⁸¹ Both convictions required proof of an intentional infliction or an attempted infliction of serious bodily injury, or the use or exhibition of a deadly weapon. Furthermore, the premeditation requirement for first degree murder is satisfied by proof of the underlying felony. Thus, as an example of greater and lesser included offenses, felony murder and aggravated robbery are the same offense for the purpose of double jeopardy protection.

Courts may also establish legislative intent by ascertaining the purpose of each statute. The *Birr* court stated that the purpose of the felony murder statute is to deter accidental or negligent killings during the commission of the specified felonies.⁸² As a result, the prosecutor is relieved from the burden of proving premeditated malice. This purpose, however, does not indicate whether the legislature intended the punishment for the underlying felony to be included within, or in addition to, the punishment for felony murder.

In addition, the *Birr* court examined the purpose of the aggravated robbery statute. The court stated that because the legislature intended to suppress different evils, it also intended cumulative punishment. To support this conclusion, the court compared the interest in life protected by the felony murder statute and the interest in property protected by the aggravated robbery statute.⁸³ The supreme court's analysis, however, does not clearly demonstrate that the legislature intended consecutive sentences for felony murder and aggravated robbery. The court failed to

79. *Id.* at 694 n.8.

80. *Id.* at 691-94. The *Whalen* Court used the greater and lesser included offense analysis adopted in *Brown. Id.* at 692 (relying on *Brown*, 432 U.S. at 168).

81. *Birr*, 744 P.2d at 1121.

82. *Id.* (citing *Richmond*, 554 P.2d at 1232).

83. *Id.*

acknowledge that the aggravated robbery statute also protects life. This protection is evident because aggravated robbery requires proof of at least a threat of physical harm to a person.⁸⁴

In contrast to aggravated robbery, the language of the kidnapping statute seems to indicate that a sentence under the felony murder statute should not run consecutively. The kidnapping statute is the only alternative statute that expressly refers to the felony murder statute. It states that kidnapping is punishable by a minimum of 20 years or a maximum of life in prison "except as provided in" the felony murder statute.⁸⁵ This phrase suggests that the legislature intended alternative, but not additional punishment when kidnapping is the basis for a felony murder conviction. In the aggravated robbery context, the underlying felony does not go unpunished merely because its punishment is subsumed in the felony murder sentence. Yet the felony murder statute does not provide conclusive guidance for either position. Because the felony murder and aggravated robbery statutes lend no persuasive indication of legislative intent, statutory ambiguity is properly resolved under the rule of lenity.

In its final statement, the Wyoming Supreme Court held that the legislature is presumed to permit cumulative sentences when two distinct offenses are created.⁸⁶ Despite the fact that the Wyoming legislature created separate statutes, it also integrated several offenses in the felony murder statute. Nevertheless, merely because several statutes are integrated as one does not establish that the legislature intended a single punishment. As a result, courts are faced with two equally plausible yet irreconcilable interpretations. These opposing interpretations indicate a manifestly ambiguous statute. The *Birr* court presumed legislative intent from this statutory ambiguity. The ambiguity is correctly settled in the defendant's favor by applying the rule of lenity.

CONCLUSION

Although the *Birr* court utilized a standard formulated by the United States Supreme Court to discern legislative intent, the court's analysis failed. In its analysis, the court did not conclusively determine legislative intent. When rules of statutory construction fail to discern legislative intent, courts must construe those statutes in favor of the defendant. While such a result is in accordance with United States Supreme Court standards and the defendant's presumption of innocence, the Wyoming Supreme Court ignored this well established principle. By neglecting to apply the statutory rule of construction in favor of lenity, the court subjected *Birr* to consecutive sentences in violation of the double jeopardy clause.

MICHAEL S. RANKIN

84. WYO. STAT. § 6-2-401(c) (1977, Rev. 1983) (stated in full, *supra* note 6).

85. WYO. STAT. § 6-2-201(d) (1977, Rev. 1983) states: "[K]idnapping is a felony punishable by imprisonment for not less than twenty (20) years or for life except as provided in W.S. 6-2-101."

86. *Birr*, 744 P.2d at 1122 (citing *Garrett*, 471 U.S. at 793).