THE MULTIPLE PUNISHMENT PROTECTION OF THE DOUBLE JEOPARDY CLAUSE: THOMAS V. MORRIS

INTRODUCTION

The United States Court of Appeals for the Eighth Circuit determined that a convicted felon sentenced to consecutive terms of fifteen years and life imprisonment for attempted robbery and felony murder should have been released after serving only eight years.\(^1\) This conclusion may appear to be inconsistent with perceived principles of criminal justice. Yet, regardless of initial impressions, this judgment was rendered by the Eighth Circuit in Thomas v. Morris\(^2\) according to principles of double jeopardy.

The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."\(^3\) Pursuant to the multiple punishment protection of the double jeopardy clause, the Thomas court en banc held that the defendant had legally satisfied one of the alternative sentences imposed for his criminal action, and therefore, he should be freed from further restraint.\(^4\)

The protection from double jeopardy is thought to be "one of the least understood . . . provisions of the Bill of Rights."\(^5\) This notion is well evidenced by the prior history of the en banc Thomas decision; in five previous proceedings, each tribunal considered the double jeopardy issue and each rendered differing conclusions.\(^6\) Not surprisingly, the final decision of the Eighth Circuit in Thomas was achieved by a five to four majority.\(^7\)

\(^1\) Thomas v. Morris, 844 F.2d 1337, 1342 (8th Cir. 1988) (en banc).
\(^2\) Id.
\(^3\) U.S. Const. amend. V. The double jeopardy clause is applied to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 793 (1969). Although the double jeopardy clause itself is brief and somewhat unclear, the Supreme Court has held that it embodies three specific constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).
\(^4\) Thomas, 844 F.2d at 1342.
\(^6\) See Thomas v. Morris, 816 F.2d 364, 370-71 (8th Cir. 1987), withdrawn and vacated, 844 F.2d 1337, 1342 (8th Cir. 1988) (en banc); Thomas v. Morris, No. 84-1760 C(5) slip op. at 3 (E.D. Mo. June 28, 1985); Thomas v. Morris, No. 84-1760 C(5) slip op. at 11 (E.D. Mo. March 29, 1985); Thomas v. State, 665 S.W.2d 621, 625 (Mo. Ct. App. 1983); Thomas, 816 F.2d at 365 (referring to a 1982 unpublished state trial court opinion).
\(^7\) Thomas, 844 F.2d at 1337.
Despite its indecisive history and seemingly unjust result, this Note maintains that Thomas was correctly decided.8 This Note examines multiple punishment precedent involving definitional tests for the “same offense,”9 interpretations of multiple punishment protection,10 and judicial remedies for multiple punishment violations.11 This Note then compares these cases with the en banc court’s analysis and holding in Thomas.12 Finally, this Note asserts that although its reasoning was inadequate, the en banc Thomas court reached a constitutional result.13

FACTS AND HOLDING

On the evening of November 8, 1972, Larry P. Thomas entered an auto parts store and announced, “this is a stick-up.”14 Immediately following, Thomas had a “shootout” with a customer, who died from a resulting gunshot wound.15 A jury in the Circuit Court of the City of St. Louis convicted Thomas of felony murder in the first degree and first degree attempted robbery “by means of a dangerous and deadly weapon.”16 Thomas was sentenced for his crimes on May 25, 1973.17 He received life imprisonment for the felony murder offense

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8. See infra notes 204-323 and accompanying text.
9. See infra notes 96-111 and accompanying text.
10. See infra notes 115-57 and accompanying text.
11. See infra notes 160-81 and accompanying text.
12. See infra notes 209-323 and accompanying text.
13. See infra notes 204-323 and accompanying text.
15. State v. Thomas, 522 S.W.2d 74, 75-77 (Mo. Ct. App. 1975) (finding that Thomas’ confession was properly admitted by the state trial court).
16. Id. at 75 (referring to the 1973 unpublished state trial court opinion in which Thomas was convicted).

Section 560.120 provided:
Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.


Section 560.135 provided in relevant part:
and a fifteen-year sentence for the offense of attempted robbery.18 These sentences were ordered to run consecutively beginning with the fifteen-year sentence.19 In 1975, Thomas’ convictions were affirmed by the Missouri Court of Appeals of the St. Louis District.20

Following this affirmation, in 1977, Thomas moved that his sentences be set aside.21 Thomas’ motion was denied.22 On appeal, the Missouri Court of Appeals vacated this judgment of the trial court and remanded Thomas’ motion for a new hearing.23 Thomas then, on March 27, 1981, filed an amendment to his motion, adding a

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Armed robbery—punishment for robberies.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than five years . . . .


Section 556.150 provided in relevant part:

Attempt to commit offense, punishment.—Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:

(1) If the offense attempted to be committed be such as is punishable by the death of the offender, the person convicted of such attempt shall be punished by imprisonment in the penitentiary for a term not less than two nor exceeding fifteen years . . . .


Section 559.010 provided:

Murder in the first degree.—Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree.


Section 559.030 provided in relevant part:

Trials for murder, verdict and punishment.—Upon the trial of an indictment for murder in the first degree, . . . persons convicted of murder in the first degree shall suffer death, or be punished by imprisonment in the penitentiary during their natural lives . . . .


18. Thomas, 522 S.W.2d at 75 (referring to the 1973 state trial conviction of Thomas). Thomas was sentenced in accordance with the Second Offender Act. Id.


20. Thomas, 522 S.W.2d at 75.

21. Thomas, 844 F.2d at 1338 (referring to the 1977 unpublished state trial court’s dismissal of Thomas’ motion). Thomas made his motion pursuant to rule 27.26 of the Missouri Rules of Court. This rule provided for post conviction relief, and has since been repealed. Mo. R. Ct. 27.26 (repealed 1987). Id.

22. Id.

23. Id. The Missouri Court of Appeals remanded Thomas’ motion on the grounds that all the testimony that was presented before the trial court was not included in the transcript on appeal.
claim of double jeopardy. 24

On June 12, 1981, the Governor of Missouri, Christopher S. Bond, commuted Thomas' fifteen-year sentence. 25 Under this commutation, Thomas' fifteen-year sentence, which would otherwise not have ended until June 28, 1988, ended on June 16, 1981, four days after Governor Bond had signed the commutation. 26

On June 24, 1982, one year after the commutation, the trial court granted Thomas' motion in part by vacating the conviction and the fifteen-year sentence for attempted robbery. 27 The court held that the separate and consecutive sentences for the combined convictions of attempted robbery and felony murder were in violation of the double jeopardy clause. 28 The state court did, however, leave

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24. Thomas, 816 F.2d at 365.
25. Id. Governor Bond failed to explain his reasons for the commutation, which seems unusual, especially since Thomas was ineligible for commutation at the time under section 216.355 of the Missouri Revised Statutes of 1969. Id. at 366-67 n.1. Commutation of a sentence, in criminal law, is the “change of a punishment to one which is less severe.” BLACK'S LAW DICTIONARY 146 (5th ed. 1983).
26. Thomas, 816 F.2d at 366. Thomas had commenced serving the fifteen-year sentence on June 28, 1973, and therefore served approximately eight years of the fifteen-year sentence for attempted robbery before the governor's commutation of the sentence. Thomas, 844 F.2d at 1338. Thus, the Governor substituted a “less severe” eight-year sentence for Thomas' original fifteen-year sentence. Thomas, 816 F.2d at 366.
27. Thomas, 816 F.2d at 365 (referring to the 1982 unpublished state trial court opinion that upheld Thomas' double jeopardy claim). In all other respects, Thomas' motion to set aside was denied. Thomas, 665 S.W.2d at 623 (referring to the 1982 unpublished state trial court opinion).
28. Thomas, 816 F.2d at 365 (referring to the 1982 unpublished state trial court opinion). The Missouri legislature placed a limitation on conviction for multiple offenses by disallowing the conviction of more than one offense if one offense was included in the other, effective January 1, 1979. Mo. REV. STAT. §§ 556.041-.046 (1978). Sections 556.041 and 556.046 provided in relevant part:

556.041. Limitation on conviction for multiple offenses.—When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, by conviction of more than one offense if

(1) One offense is included in the other, as defined in section 556.046.

556.046. Conviction of included offenses.—

1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when required to establish the commission of the offense charged . . .

Id. See also State v. Morgan, 612 S.W.2d 1, 1 (Mo. 1981) (en banc) (per curiam) (prohibiting the imposition of sentences for both felony murder and the underlying felony); State v. Olds, 603 S.W.2d 501, 510 (Mo. 1980) (en banc) (concluding that the Missouri legislature did not intend to allow a court to punish a defendant separately for both felony murder and the underlying felony).

As of October 1, 1984, the Missouri legislature changed its intent with respect to the punishment of felony murder and the underlying felony, allowing the two offenses to be punished cumulatively. MO. REV. STAT. § 565.021(2) (1986). This statute provides that second degree murder, which is deemed to include felony murder, is considered “a
Thomas' life sentence and felony murder conviction intact. The time served by Thomas, preceding the court's vacation of the fifteen-year sentence, was credited to Thomas' life sentence for felony murder. The Eastern District of the Missouri Court of Appeals affirmed this decision of the trial court.

**FEDERAL DISTRICT COURT PROCEEDINGS**

On August 1, 1984, Thomas petitioned the District Court for the Eastern District of Missouri for a writ of habeas corpus. Thomas claimed that his continued confinement resulting from the life sentence for felony murder violated the double jeopardy clause of the fifth amendment. The matter was submitted to a magistrate, who recommended that the district court grant Thomas a writ of habeas corpus. The magistrate concluded that because Thomas had “fully satisfied one sentence, the state court was without power to vacate the same sentence and cause petitioner to serve life imprisonment for the same conviction.”

The magistrate’s recommendation was rejected by the district court on June 28, 1985. The district court based its decision on Missouri v. Hunter, which had held that “[w]ith respect to cumulative sentences imposed in a single trial, the [d]ouble [j]eopardy [c]lause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” The district court therefore reasoned that Thomas was not subjected to greater punishment than intended by the legislature because “the entire time he [had] served for the attempted robbery sentence [had been] duly credited to his life sentence on the felony murder conviction.”

Class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.”

29. Thomas, 844 F.2d at 1338 (referring to the 1982 unpublished state trial court opinion).
30. Id.
31. Thomas, 665 S.W.2d at 623.
32. Thomas, 844 F.2d at 1338. Thomas petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, which provides general remedies in federal court. Id. The primary purpose of this writ is “to release an accused from unlawful imprisonment.” BLACK'S LAW DICTIONARY 363 (5th ed. 1983).
33. Thomas, 844 F.2d at 1338.
34. Thomas v. Morris, No. 84-1760 C(5), slip op. at 11 (E.D. Mo. March 29, 1985). The magistrate also initially concluded that, as statutorily mandated, Thomas had exhausted all available state court remedies before filing a habeas corpus action in federal court. Id. at 3.
35. Id. at 11.
38. Id. at 366.
39. Thomas, No. 84-1760 C(5), slip op. at 3.
Hence, in serving the life sentence, Thomas “suffered no violation of his constitutional rights.”

**Panel Decision**

On appeal, the district court’s dismissal of Thomas’ habeas corpus petition was reversed and remanded by a three-judge panel for the United States Court of Appeals for the Eighth Circuit, with each judge writing a separate opinion. Judges McMillian and Hanson were in agreement that Thomas had satisfied his sentence for the attempted robbery. Both judges concluded that the double jeopardy clause had been violated by the vacation of the completed sentence and by Thomas’ continued confinement under his conviction for felony murder. The two judges could not agree, however, on a remedy that would correct the constitutional violation.

Although Judge Bowman did not believe that the double jeopardy clause had been violated, he nevertheless agreed with Judge Hanson that, if the court was to set aside Thomas’ murder conviction, either retrial or resentencing would correct any possible double jeopardy violation. The two judges reasoned that the holding of *Morris v. Mathews*, in which a defendant’s jeopardy-barred conviction for aggravated murder was reduced to a conviction for murder that was not jeopardy-barred, was a satisfactory cure for Thomas’ multiple punishment violation.

40. *Id.*
41. *Thomas*, 816 F.2d at 370-71; see infra notes 42-48 and accompanying text.
42. *Thomas*, 816 F.2d at 366-71. Thomas legally fulfilled his fifteen-year sentence for attempted robbery because under Missouri law, “the commuted sentence has the same effect and the status of the prisoner is the same as though the sentence had originally been for the commuted term.” *Id.* at 367 (citing State v. Cerny, 248 S.W.2d 844, 845 (Mo. 1952); *Ex parte Reno*, 66 Mo. 266, 269 (1877)).
43. *Thomas*, 816 F.2d at 370-71. Under Missouri law, Thomas could only be punished for either felony murder or the underlying felony, but not both. *Id.* at 368 (citing *Morgan*, 612 S.W.2d at 1). Because Thomas had satisfied one of the imposed sentences, the court no longer had the power to punish Thomas for the alternative sentence without violating the double jeopardy clause. *Id.* at 367-70. See *In re Bradley*, 318 U.S. 50, 52 (1943); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873).
44. *Thomas*, 816 F.2d at 371 (McMillian, J., concurring in part and dissenting in part). Judge McMillian believed that Thomas should be granted the writ of habeas corpus because the double jeopardy violation could not be remedied by either resentencing Thomas or retrying him for the lesser included offense of murder. *Id.*
45. *Id.* at 372 (Bowman, J., dissenting). See infra notes 67-88 and accompanying text.
47. 475 U.S. 237 (1986).
48. *Thomas*, 816 F.2d at 370-72 (citing *Mathews*, 475 U.S. at 246-47). The judges stated that the state court could remedy the double jeopardy violation by substituting the non-jeopardy-barred lesser included offense of murder for the jeopardy-barred felony murder conviction. *Id.* at 371. Thomas could then be resentenced for the offense of murder unless he was able to “demonstrate a reasonable probability that he would
Both the State of Missouri and Thomas petitioned the Eighth Circuit for a rehearing en banc. The petitions were granted. The en banc court began its analysis by examining the effect of Thomas' commuted fifteen-year sentence. Upon consideration, the court held that prior to the state court's vacation of the attempted robbery conviction, Thomas had legally satisfied the fifteen-year sentence for his robbery offense. The en banc court's conclusion was mandated under Missouri law because Thomas had fully served the commuted sentence.

The en banc court then considered the issue of double jeopardy. The court stated that it had not addressed this specific issue before, but that "other courts [had] decided cases which [were] factually similar." Because it was determined that Thomas had satisfied his attempted robbery sentence, the court ruled that his continued imprisonment for the felony murder conviction violated the double jeopardy clause. The court followed the reasoning of Ex parte Lange, In re Bradley, United States v. Edick, Holbrook v. United States, and United States v. Holmes. Each of these cases set forth the principle that once a defendant has satisfied one of two legally alternative punishments, a court no longer has the authority to impose further punishment for the same offense without violating the defendant's double jeopardy rights.

Additionally, the en banc court stated that the panel's proposed not have been convicted of the non-jeopardy barred offense absent the presence of the jeopardy-barred offense." Id. (quoting Mathews, 475 U.S. at 247). The judges noted that if inclusion of the felony murder charge was proved prejudicial by Thomas, he would be permitted a new trial on the non-jeopardy-barred murder offense. Id. at 371 n.3.

49. Thomas, 844 F.2d at 1339.
50. Thomas v. Morris, 820 F.2d at 1434 (8th Cir. 1987).
51. Thomas, 844 F.2d at 1339.
52. Id. at 1340. The state's argument that "the commutation of the [fifteen]-year sentence merely changed Thomas' punishment from [fifteen]-years plus life to a less severe punishment of a life sentence only" was rejected by the en banc court. Id. at 1339. The en banc court stated that no evidence existed to support the state's interpretation of the commutation. Id. at 1339-40.
53. Id. at 1340 (citing State v. Cerny, 248 S.W.2d 844, 845 (Mo. 1952)).
54. Thomas, 844 F.2d at 1340.
55. Id.
56. Id. at 1342.
57. 85 U.S. (18 Wall.) 163 (1873).
58. 318 U.S. 50 (1943).
59. 603 F.2d 772 (9th Cir. 1979).
60. 136 F.2d 649 (8th Cir. 1943).
61. 822 F.2d 481 (5th Cir. 1987).
62. See Lange, 85 U.S. (18 Wall.) at 176; Bradley, 318 U.S. at 52; Edick, 603 F.2d at 775; Holbrook, 136 F.2d at 652; Holmes, 822 F.2d at 490.
remedy for the double jeopardy violation, either retrial or resentencing pursuant to *Mathews*, was invalid. According to the en banc court, the panel failed to recognize the determinative distinction between Thomas' case and *Mathews*. The critical difference in the court's opinion was that Thomas had completed one of the alternative sentences imposed, whereas in *Mathews* the defendant had not satisfied either sentence. As a result, the en banc court concluded that the *Mathews* remedy was unavailable in Thomas' case, and that habeas corpus relief should be granted.

Judge Bowman dissented, and was joined by Judges Gibson, Fagg and Wollman. Judge Bowman stated that the majority's decision to set Thomas free was based on a "series of fortuitous events." The dissenting opinion also took issue with the majority's application of *Lange* and *Bradley* to Thomas' case. The dissent found that the majority's reliance on *Lange* and *Bradley* was "misplaced." Judge Bowman stated that these two cases were applicable only in the situation of "'statutory alternative sentences' for the same offense." Moreover, Judge Bowman disagreed with, what he labeled as, the

63. Thomas, 844 F.2d at 1342.
64. Id.
65. Id.
66. Id.
67. Id. (Bowman, J., dissenting). The dissent submitted by Judge Bowman in the rehearing is basically identical to the dissent he submitted in the panel decision. Compare Thomas, 816 F.2d at 372-75 (Bowman, J., dissenting) with Thomas, 844 F.2d at 1342-46 (Bowman, J., dissenting).
68. Id. at 1342 (Bowman, J., dissenting). Judge Bowman argued that this case was decided on the sequence of events alone; that is, "[b]ecause the governor commuted Thomas' attempted robbery sentence before the state trial court was able to vacate it in accordance with the holding (several years after Thomas' conviction) of the Missouri Supreme Court in *State v. Morgan*," Thomas was set free. Id. Accordingly, under the majority's decision, "Thomas effectively slip[ped] through a judicially manufactured crack in the criminal justice system." Id. at 1343 n.1 (Bowman, J., dissenting).
69. Id. at 1343 (Bowman, J., dissenting).
70. Id.
71. Id. at 1343 n.2 (Bowman, J., dissenting) (quoting Holbrook, 136 F.2d at 653 (Stone, J., concurring)). Judge Bowman stated that *Lange* and *Bradley* were inapplicable to Thomas' case because the defendants in those cases were sentenced to two punishments, while the applicable statute only prescribed one alternative punishment. Id. at 1343. The distinction Judge Bowman pointed to was that Thomas was validly sentenced to two punishments, because it was not until years after his sentencing that the Missouri Supreme Court decided that "he could be sentenced for one or the other, but not both." Id. at 1343 n.2.

Judge Bowman further stated that Thomas' case was distinguishable from *Lange*, *Bradley*, *Edick*, and *Holmes* because the nature of Thomas' sentences (imprisonment) made the sentences interchangeable. Id. at 1344. However, the sentences in *Lange*, *Bradley*, *Edick*, and *Holmes* were not interchangeable because the statutes in *Lange*, *Bradley*, and *Holmes* authorized either a fine or imprisonment and the statute in *Edick* authorized either imprisonment or probation. Id. at 1344, 1344 n.3 (Bowman, J., dissenting).
"dicta" in Holbrook which suggested further applicability of Lange, on which the majority had relied.

The dissent further stated that under North Carolina v. Pearce, when resentencing is necessary subsequent to a new trial, the time which has already been served under the old sentence should be credited to the term of the new sentence. Thus, Judge Bowman reasoned that by crediting the time that Thomas had already served to his life sentence, Thomas would not be "twice punished for the same offense." Furthermore, Judge Bowman postulated that pursuant to Eighth Circuit precedent, the sentencing judge's intention, and not the order of sentencing, should determine which sentence to vacate when two sentences cannot stand together.

Next, Judge Bowman argued that the majority's holding placed decisive weight upon the order in which Thomas' sentences were imposed. If the sentencing judge had ordered Thomas to serve his life sentence prior to serving his fifteen-year sentence, Judge Bowman maintained that Thomas' double jeopardy claim would have been baseless. The dissent cited Bozza v. United States in which the Supreme Court remarked, "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge

72. Holbrook, 136 F.2d at 652. The “dicta” in Holbrook “states that the court may choose which of two consecutive sentences to vacate, in order not to violate the defendant’s double jeopardy rights, only up until the time the defendant has satisfied one of the sentences.” Id.

73. Thomas, 844 F.2d at 1343 (Bowman, J., dissenting). Judge Bowman cited the concurring opinion in Holbrook, which noted that no other circuit court of appeals up to that date “had found Lange to be applicable beyond its narrow facts.” Id. at 1343 n.2. Hence, Judge Bowman believed Lange to be inapplicable to the factual circumstances of Holbrook as well as to those in Thomas’ case. See id.


75. Thomas, 844 F.2d at 1344 (Bowman, J., dissenting) (citing Pearce, 395 U.S. at 718-19).

76. Thomas, 844 F.2d at 1344 (Bowman, J., dissenting).

77. Id. The Eighth Circuit precedent cited by the dissent includes: United States v. Pietras, 501 F.2d 182, 187-88 (8th Cir.), cert. denied, 419 U.S. 1071 (1974); Jones v. United States, 396 F.2d 66, 69 (8th Cir. 1968), cert. denied, 393 U.S. 1057 (1969); Sawyer v. United States, 312 F.2d 24, 28-29 (8th Cir.), cert. denied, 374 U.S. 837 (1963). In all of these cases, the Eighth Circuit held that when more than one consecutive or concurrent sentence is imposed pursuant to a statute which prohibits multiple punishments for violations of several of its provisions, and these sentences are unexecuted, the court may vacate the shorter sentence and leave the longer sentence intact.

78. Thomas, 844 F.2d at 1344 (Bowman, J., dissenting).

79. Id. (citing Holbrook, 136 F.2d at 652). According to Judge Bowman, had Thomas been ordered to serve his life sentence first, he would not have had a double jeopardy claim because that sentence would not have been satisfied prior to the trial court's vacation of the shorter sentence. Id. at 1344.

80. 330 U.S. 160, 165-67 (1947) (holding that Zachary Bozza, sentenced to only imprisonment for a crime carrying a mandatory minimum sentence of imprisonment and a fine, was not subjected to double jeopardy when five hours after his initial sentencing he was recalled and resented to both imprisonment and a fine).
means immunity for the prisoner.'"81 The dissent also cited Green v. United States,82 wherein the Supreme Court upheld the intention of the sentencing judge rather than the sentencing order by stating that a "‘formal defect in [the sentencing judge’s] procedure should not vitiate his considered judgment.’"83

Judge Bowman further maintained that "[t]he original error in sentencing Thomas was made in good faith reliance on existing Missouri law."84 Hence, "[t]he subsequent change in Missouri law and the ensuing commutation of the attempted robbery sentence should not [have been] available to Thomas as a basis for nullifying the felony murder sentence."85 Additionally, Judge Bowman challenged the distinction between consecutive and concurrent sentencing; he questioned why the "consecutive rather than concurrent nature of Thomas’s prison sentences breathe[d] life into a double jeopardy claim that otherwise would have been dead on arrival."86 Judge Bowman protested that the court advanced no constitutional justification for this "anomaly."87 Finally, the dissenting opinion concluded that if a double jeopardy violation was found, such violation should be remedied pursuant to Mathews by either resentencing or retrial.88

BACKGROUND

Of the three distinct constitutional protections embodied by the double jeopardy clause,89 it has been argued that preventing the imposition of multiple punishments for the same offense was foremost

81. Thomas, 844 F.2d at 1345 (Bowman, J., dissenting) (quoting Bozza, 330 U.S. at 166-67).
82. 365 U.S. 301, 302-06 (1961) In Green, Theodore Green was sentenced to twenty years for one count and twenty-five years for a subsequent count which constituted the same offense. The Court determined that Green was not subjected to double jeopardy when seven years after the initial sentencing it agreed that both sentences should not have been imposed, but allowed the twenty-five year sentence to stand. Id.
83. Thomas, 844 F.2d at 1345 (Bowman, J., dissenting) (quoting Green, 365 U.S. at 306).
84. Id.
85. Id.
86. Id. at 1345-46 (Bowman, J., dissenting). Judge Bowman cited United States v. Leather, 271 F.2d 80, 80, 85-87 (7th Cir. 1959), cert. denied, 363 U.S. 831 (1960), and Hardy v. United States, 292 F.2d 192, 193-95 (8th Cir. 1961), which both held that a prisoner is not excused from serving the longer of two concurrent sentences by completion of the shorter sentence when one sentence must be invalidated for double jeopardy purposes. Id.
87. Id. at 1346 (Bowman, J., dissenting). Judge Bowman found the majority’s opinion to be anomalous in that it resulted in the ability of a court to resentence a defendant after the shorter of two concurrent sentences has already been served and one must be vacated, while leaving a court no authority to resentence if a defendant has completed serving one of two consecutive sentences. Id.
88. Id.
89. See supra note 3.
in the framers’ minds. To better understand this principle of double jeopardy, it is helpful to review the metamorphosis of its application. First, the development of a definitional test to construe what constitutes the "same offense" for constitutional purposes will be reviewed. Next, early interpretations of multiple punishment protection will be examined, followed by more recent interpretations of multiple punishment protection. Finally, circumstances and procedures which permit multiple punishment violations to be corrected without violating the double jeopardy clause will be addressed.

**THE DEVELOPMENT OF A DEFINITION FOR THE "SAME OFFENSE" IN MULTIPLE PUNISHMENT ANALYSIS**

Before the proscription against multiple punishments for the same offense can be applied, one must define the terms of this constitutional protection. In need of a definition is the term "same offense." A definition was offered in *State v. Clark*, in which the Springfield Division of the Missouri Court of Appeals asserted, "where an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the other." Under this test, George Clark’s convictions for transportation and possession of intoxicating liquor were held to constitute one transaction. The court, therefore, concluded that Clark’s two convictions for this same offense could not stand.

A similar definitional test for the "same offense" was offered by the United States Supreme Court in *Blockburger v. United States*.

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90. See Note, Twice in Jeopardy, 75 YALE L.J. 262, 266 n.13 (1965).
91. See infra notes 95-111 and accompanying text.
92. See infra notes 115-37 and accompanying text.
93. See infra notes 142-57 and accompanying text.
94. See infra notes 160-81 and accompanying text.
95. The term “punishment” should also be defined for double jeopardy purposes. See Note, A Definition of Punishment for Implementing the Double Jeopardy Clause’s Multiple-Punishment Prohibition, 90 YALE L.J. 632, 640-41 (1981). This Note asserts that imprisonment and fines are clearly recognized as double jeopardy punishments, but that other sanctions raise difficulties of whether or not they constitute criminal punishment within the confines of the double jeopardy clause.
97. *Id.* at —, 289 S.W. at 965 (citing State v. Huffman, 136 Mo. 58, —, 37 S.W. 797, 798 (1896)).
98. *Id.* at —, 289 S.W. at 964-65.
99. *Id.* at —, 289 S.W. at 965.
100. 284 U.S. 299, 304 (1932). The Blockburger test “originated as a device for determining congressional intent as to cumulative sentencing.” W. LAFAYE & A. SCOTT, CRIMINAL LAW 629 (2d ed. 1986). Although the application of this test has been “checkered,” Blockburger is still considered to be the leading case with respect to determination of the “same offense” for double jeopardy purposes. State v. Morgan, 592
In addressing the issue of whether Harry Blockburger's actions constituted a single offense, the Court stated that "[t]he 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." Because the offenses Blockburger was charged with each required proof of a different element, the Court concluded that Blockburger had been properly convicted of two separate offenses.\footnote{101}

The United States Court of Appeals for the Eighth Circuit reiterated the Blockburger test in Cardarella v. United States.\footnote{102} The Eighth Circuit stated that "the test to be applied to determine whether there are two offenses or only one is whether proof of any additional fact, not constituting an element of one of the offenses, is required to sustain a conviction on the other."\footnote{103} Thus, if no additional proof of a fact is needed for a second conviction, then only one offense should be recognized.\footnote{104} Further, the court maintained that "[i]t is only when [one offense] is a necessary part of the substantive crime that only a single punishment may be imposed."\footnote{105}

In State v. Richardson,\footnote{106} the Missouri Supreme Court addressed the issue of whether Robert Eugene Richardson's conviction for attempted robbery and subsequent prosecution for assault with intent to maim was violative of the double jeopardy clause.\footnote{107} Both offenses arose from Richardson's attempted robbery of Ed's Liquor Store.\footnote{108} The court held that Richardson's constitutional rights had been violated by the prosecution for the assault because the necessary "act toward the commission" of the attempted robbery was the as-

\footnotesize{
\begin{itemize}
  \item S.W.2d 796, 799-800 (Mo.) (en banc), vacated, 449 U.S. 809 (1980), orig. op. aff'd, 612 S.W.2d 1 (Mo. 1981) (en banc).
  \item Blockburger, 284 U.S. at 304.
  \item Id. Blockburger had been convicted of selling morphine, a violation of two separate provisions of the Harrison Narcotic Act. Id. at 300-01.
  \item 375 F.2d 222, 225 (8th Cir.), cert. denied, 389 U.S. 882 (1967).
  \item Id.
  \item Anthony Cardarella had been convicted on a three-count indictment.
  \item 460 S.W.2d 537 (Mo. 1970) (en banc).
  \item Id. at 539.
  \item Id. at 538.
\end{itemize}
}
Hence, the court concluded that the prosecution for the assault had been for the same offense as the prosecution for the attempted robbery.

As Clark and these subsequent cases illustrate, determination of what constitutes the "same offense" must necessarily precede the application of multiple punishment protection. Nonetheless, situations in which a defendant has been convicted of only a single offense also conflict with the double jeopardy clause. Such situations furnished some of the original interpretations of multiple punishment protection.

EARLY INTERPRETATIONS OF THE MULTIPLE PUNISHMENT PROTECTION OF THE DOUBLE JEOPARDY CLAUSE

The United States Supreme Court first announced the protection against multiple punishment in Ex parte Lange. The Court declared that "[i]t is the punishment that would legally follow the second conviction [for the same offense] which is the real danger guarded against by the Constitution." In Lange, Edward Lange had been convicted of an offense punishable by either a fine or imprisonment. The trial judge, however, sentenced Lange to both punishments. After paying the fine and beginning to serve the prison sentence, Lange filed a petition for a writ of habeas corpus challenging the imposition of the cumulative sentences. The Supreme Court granted the writ and discharged Lange, after concluding that because Lange "had fully suffered one of the alternative punishments to which alone the law subjected him," the proscription against multiple punishment exhausted the court's power to punish further.

110. Id. at 540. The prosecution admitted that the "acts constituting the assault were the identical acts which were necessary to constitute the offense of attempted robbery." Id. at 539.
111. Id. at 540.
112. See supra notes 96-111 and accompanying text. See also Harris v. Oklahoma, 433 U.S. 682, 682 (1977) (clarifying that the greater offense of felony murder constitutes the same offense as the lesser crime, the underlying felony; therefore, the "[d]ouble [j]eopardy [c]lause bars prosecution for the lesser crime after conviction of the greater one"). Id.
113. See infra notes 115-37 and accompanying text.
114. See infra notes 115-37 and accompanying text.
115. 85 U.S. (18 Wall.) 163, 176 (1873).
116. Id. at 173.
117. Id. at 164. Edward Lange had been convicted of embezzling, purloining, stealing, and appropriating United States mail. Id.
118. Id. at 164.
119. Id. The trial court vacated Lange's former judgment and resentenced him to one year of imprisonment. Id.
120. Id. at 176, 178.
The Supreme Court reaffirmed the holding of Lange in In re Bradley. Similar to Lange, William Bradley was sentenced to both a fine and imprisonment for an offense punishable by alternative sentences of a fine or imprisonment. After Bradley had paid the fine, the trial court attempted to amend its sentencing error by ordering the fine to be returned to Bradley, while retaining the prison sentence. The Supreme Court, however, granted a writ of habeas corpus to Bradley. The Court stated that the "subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity. Since one valid alternative provision of the original sentence had been satisfied, [Bradley] [was] entitled to be freed of further restraint."

The United States Court of Appeals for the Ninth Circuit reached a result similar to that of Lange and Bradley in United States v. Edick. At issue in Edick was the district court's power to resentence Gerald Edick for the second count of a two-count indictment. Both counts had arisen from a single transaction; yet, Edick's actions had violated two separate provisions of the National Firearms Act. Edick had completed serving his sentence for count one. Prior to Edick, the Ninth Circuit had held that the imposition of consecutive sentences for multiple counts arising from a single transaction violating separate provisions of the National Firearms Act was forbidden. Thus, after applying the reasoning of Lange, Bradley, and the Eighth Circuit's reasoning in Holbrook v. United States, the Ninth Circuit concluded in Edick that "the district court lost the power to resentence Edick on count [two] once he had satisfied his sentence on count [one]."

Reminiscent of the decisions in Lange, Bradley, and Edick, the United States Court of Appeals for the Fifth Circuit recently decided

121. 318 U.S. 50, 51 (1943).
122. Id. Bradley had been convicted of contempt for intimidating a witness. Id.
123. Id. at 51-52.
124. Id. at 52.
125. Id.
126. 603 F.2d 772, 778 (9th Cir. 1979).
127. Id. at 773. Gerald Edick had been convicted of possession of a sawed-off shotgun and of possession of this same shotgun unidentified by a serial number. Id.
128. Id. at 773.
129. Id.
130. Id. at 774 (citing United States v. Clements, 471 F.2d 1253, 1258 (9th Cir. 1972).
131. 136 F.2d 649, 652 (8th Cir. 1943). The reasoning in Holbrook is in accord with Lange and Bradley. Holbrook provides that a court has the right to choose which of two contemporaneously-imposed consecutive sentences to vacate when one sentence must be eliminated in order not to subject the defendant to double jeopardy. However, a court only has this right "up to the time that there has been a legal satisfaction of one of the sentences." Id. See infra notes 160-65.
132. Edick, 603 F.2d at 778.
The applicable contempt statute in *Holmes* authorized either a fine or imprisonment. Pursuant to this statute, Paul Holmes had been sentenced to both a fine and imprisonment for contempt. Subsequent to Holmes' payment of the fine and the district court's denial of his motion to vacate his imprisonment sentence, the Fifth Circuit held that Holmes had satisfied one of the legally alternative sentences for his conviction. The Fifth Circuit discharged Holmes from his imprisonment sentence after concluding that further punishment for the same offense would violate the double jeopardy clause.

The constitutional protection against multiple punishments for the same offense therefore mandates that once a defendant has satisfied a legally alternative punishment, the sentencing court is precluded from punishing the defendant further for the same offense. Beyond this mechanical application of the double jeopardy clause, multiple punishment protection has been the subject of additional judicial interpretation.

**MORE RECENT INTERPRETATIONS OF THE MULTIPLE PUNISHMENT PROTECTION OF THE DOUBLE JEOPARDY CLAUSE**

In *Clark, Blockburger, Cardarella, Richardson, and Edick*, once it was established that the multiple offenses being cumulatively punished constituted the same offense, a multiple punishment claim immediately arose. Similarly, in *Lange, Bradley, and Holmes*, a multiple punishment claim was legally recognized as soon as the court realized that, following a conviction for a single offense, more punishments had been imposed than the applicable sentencing statutes allowed. More recently, however, cases have announced that, before addressing any constitutional claim of multiple punishment, it is necessary to inquire into legislative intent. The purpose of this

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133. 822 F.2d 481 (5th Cir. 1987).
134. Id. at 495.
135. Id. at 484.
136. Id. at 485, 498.
137. Id. at 501-02. The court stated that since Holmes had paid the fine, he could not “also be subjected to imprisonment for the same offense, as Congress has not authorized both punishments.” Id. at 498. The court relied heavily upon the reasoning of *Bradley.* Id. at 496-502.
138. *Bradley,* 318 U.S. at 52; *Lange,* 85 U.S. (18 Wall.) at 176; *Holmes,* 822 F.2d at 498; *Edick,* 603 F.2d at 778.
139. See infra notes 142-58 and accompanying text.
140. *Blockburger,* 284 U.S. at 304; *Edick,* 603 F.2d at 778; *Cardarella,* 375 F.2d at 225; *Richardson,* 460 S.W.2d at 539; *Clark,* 220 Mo. App. at —, 289 S.W. at 965.
141. *Bradley,* 318 U.S. at 52; *Lange,* 85 U.S. (18 Wall.) at 175; *Holmes,* 820 F.2d at 497.
142. See infra notes 144-58 and accompanying text.
inquiry is to advance the Supreme Court's practice of "avoiding con-
stitutional decisions where possible." 143

This procedure was promulgated by the United States Supreme Court in Whalen v. United States. 144 In Whalen, the Court proposed that a determination of whether the defendant's sentences constituted multiple punishments could not be made without first establishing what punishments had been authorized by the legislature. 145 The Court reasoned that although the rule of statutory construction in Blockburger was still viable, pronounced legislative intent should take precedence over the application of that rule. 146 In clarifying its position, the Court stated that "where two statutory provisions pro-
scribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." 147

In light of Whalen, the Missouri Supreme Court decided State v. Morgan. 148 Dennis Lee Morgan had been convicted of second degree felony murder, and the underlying felony of stealing more than fifty dollars. 149 The court determined that the felony murder and the underlying felony constituted the same offense. 150 Moreover, pursuant to the Whalen analysis, the court held that the cumulative punishments for both offenses violated Morgan's double jeopardy rights because the legislature did not intend to allow separate and cumulative punishments for felony murder and the underlying felony. 151 The

143 Simpson v. United States, 435 U.S. 6, 11-12 (1978) (holding that before a court decides whether a defendant may be constitutionally sentenced to cumulative punishments for two offenses, the court must first determine whether Congress intended to impose multiple punishments for the two offenses arising from the same criminal transaction). Id.
144 445 U.S. 684, 688 (1980). See also Albernaz v. United States, 450 U.S. 333, 344 (1981) (asserting that "the question of what punishments are constitutionally permissible is not different from the question of what punishments the [l]egislative [b]ranch intended to be imposed").
145 Whalen, 445 U.S. at 688. The defendant had been convicted of the rape and the first degree felony murder of the same victim. Id. at 685-86.
146 Id. at 691-92.
147 Id. at 692.
148 612 S.W.2d 1, 1 (Mo. 1981) (en banc).
149 Id.
150 Id. The prior opinion in this case, State v. Morgan, 592 S.W.2d at 801, which had concluded that felony murder and the underlying felony were the same offense, was readopted by the court. Id.
151 Id. The court adopted the reasoning of State v. Olds, 603 S.W.2d 501 (Mo. 1980) (en banc). In Olds, the court asserted that there was nothing in the Missouri Criminal Code in 1978 to indicate "an intent on the part of the Missouri General Assembly to allow a separate punishment for one offense included in another." Id. at 510. Furthermore, the legislature enacted sections 556.041-.046 of the Revised Statutes of Missouri of 1978, effective January 1, 1979, which placed a limitation on the conviction for multiple offenses. Morgan, 612 S.W.2d at 1. See supra note 28.
court concluded that only one conviction could stand.\textsuperscript{152}

Utilizing its reasoning in \textit{Whalen}, the United States Supreme Court decided \textit{Missouri v. Hunter}.\textsuperscript{153} Danny Hunter had been convicted and sentenced for first degree robbery, assault with malice, and armed criminal action.\textsuperscript{154} The Western District of the Missouri Court of Appeals then reversed the conviction for armed criminal action on the ground that the cumulative punishments for the first degree robbery and the armed criminal action violated the multiple punishment protection of the double jeopardy clause.\textsuperscript{155} In reversing the Missouri Court of Appeals, the United States Supreme Court stated that "[w]ith respect to cumulative sentences imposed in a single trial, the [d]ouble [j]eopardy [c]lause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."\textsuperscript{156} The Court explained that although the two convictions constituted the same offense under \textit{Blockburger}, Hunter's double jeopardy rights had not been violated because the Missouri legislature had specifically authorized such cumulative punishment, and therefore, the "court's task of statutory construction [was] at an end."\textsuperscript{157}

The decisions in \textit{Whalen}, \textit{Morgan}, and \textit{Hunter}, all demonstrate the procedures to be undertaken by a court when presented with a claim of unconstitutional multiple punishment.\textsuperscript{158} When a court determines that a multiple punishment violation actually exists, a court must then decide what remedies are available to cure the double jeopardy violation.\textsuperscript{159}

\textsc{Circumstances and Procedures Which Permit Multiple Punishment Violations to be Corrected Without Further Violation of the Double Jeopardy Clause}

The United States Court of Appeals for the Eighth Circuit faced the question of how to remedy a multiple punishment violation in

\textsuperscript{152} \textit{Morgan}, 612 S.W.2d at 1-2. The court affirmed the judgment and sentence for felony murder, and vacated the judgment and sentence for the underlying felony. \textit{Id.} at 2.

\textsuperscript{153} 459 U.S. 359, 368-69 (1983).

\textsuperscript{154} \textit{Id.} at 361. Hunter had entered an A \& P supermarket and "ordered the manager, at gunpoint, to open two safes." \textit{Id.} at 360-61. Hunter then struck the manager twice with the butt of his revolver. Before escaping from the store, Hunter also fired a shot at a police officer. \textit{Id.} at 361.

\textsuperscript{155} \textit{Id.} at 362-63.

\textsuperscript{156} \textit{Id.} at 366.

\textsuperscript{157} \textit{Id.} at 368-69. The Court stated that "[l]egislatures, not courts, prescribe the scope of punishments." \textit{Id.} at 368.

\textsuperscript{158} \textit{See Hunter}, 459 U.S. at 358; \textit{Whalen}, 445 U.S. at 691-92; \textit{Morgan}, 612 S.W.2d at 1.

\textsuperscript{159} \textit{See infra} notes 160-82 and accompanying text.
Archie James Holbrook and Fern Eugene Moore had received consecutive sentences for two offenses which constituted the same crime. Each had been convicted of violating two separate provisions of a federal bank robbery statute by participation in a single criminal action. The trial court had imposed on each defendant a twenty-year sentence for the violation of the first provision, to be followed by a five-year sentence for the violation of the second provision. To cure the multiple punishment violation, the Eighth Circuit chose to vacate the five-year sentences of Holbrook and Moore. The court reasoned that because both sentences were unexecuted, the court should decide which of the two sentences to eliminate in order to avoid double punishment.

In Hardy v. United States, the Eighth Circuit addressed the multiple punishment remedy applicable to a defendant sentenced to concurrent sentences for the same offense. Yancy Douglas Hardy had been sentenced to a twenty-year term and a ten-year term to be served concurrently for the violation of two separate provisions of a federal bank robbery statute. After serving ten years, Hardy moved to vacate the twenty-year sentence as being illegal. Hardy claimed that the district court had no right to vacate his ten-year sentence since it had already been served, and that “consequently only

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160. Holbrook, 136 F.2d at 652.
161. Id. at 650-51.
162. Id. at 650.
163. Id.
164. Id. at 652. The court stated that retaining the longer sentence would better represent the measure of punishment intended by the sentencing judge. Id. at 651-52.
165. Id. at 652. The court distinguished Holbrook from Lange and Bradley. Id. In both of those cases, the defendant was freed because he had satisfied one of the alternative sentences imposed. Id. Neither Holbrook nor Moore however, had satisfied either alternative sentence; therefore, the court reasoned that it was free to amend the sentencing errors. Id.
166. 292 F.2d 192 (8th Cir. 1961). See also United States v. Leather, 271 F.2d 80, 89, 86-87 (7th Cir. 1979), cert. denied 363 U.S. 831 (1960) (holding that when one of two concurrent sentences must be invalidated, completion of the time sufficient to satisfy the length of the shorter sentence does not excuse the defendant from serving the longer sentence).
167. Id. at 193-95. See Thomas, Multiple Punishments for the Same Offense: The Analysis After Missouri v. Hunter, 62 Wash. U.L.Q. 79, 120-23 (1984) (asserting that many courts consider concurrent sentences to be multiple punishments). But see Thomas, Sentencing Problems Under the Multiple Punishment Doctrine, 31 Vill. L. Rev. 1351, 1361-78 (1986) (asserting that under the “concurrent sentence theory,” some courts do not consider concurrent sentences to be multiple punishments because the “existence of the lesser sentence does not increase the length of the other sentence”).
168. Id. at 193. Concurrent sentences consist of “[t]wo or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term specified.” BLACK'S LAW DICTIONARY 153 (5th ed. 1983).
169. Id. at 193. The district court denied Hardy's motion, but vacated Hardy's ten-year sentence on its own motion. Id.
the [twenty]-year sentence was capable of being set aside."\textsuperscript{170} The Eighth Circuit agreed that Hardy was guilty of only a single offense, but held that the vacation of the ten-year sentence instead of the twenty-year sentence was a valid remedy for the sentencing error.\textsuperscript{171}

The United States Supreme Court also addressed the issue of multiple punishment remedies in \textit{North Carolina v. Pearce}.\textsuperscript{172} This proceeding involved two separate cases in which Clifton Pierce and William Rice had each been convicted and sentenced for criminal action, but subsequently, both convictions were set aside on constitutional error.\textsuperscript{173} Neither defendant had satisfied the sentence which had been imposed for his offense.\textsuperscript{174} On retrial, both were convicted and sentenced to a longer sentence than had been originally imposed, yet Pierce was given full credit for the time he had spent in prison under the original sentence, while Rice received no credit for the time he had previously served.\textsuperscript{175} The Court held that the constitutional guarantee against double jeopardy mandated that time be "credited" for punishment already served when resentencing is required following a retrial and conviction for the same offense.\textsuperscript{176}

A different approach to curing double jeopardy violations was taken by the Supreme Court in \textit{Morris v. Mathews}.\textsuperscript{177} In that case, James Michael Mathews had been convicted of both aggravated robbery and aggravated murder.\textsuperscript{178} The Supreme Court found that the conviction for aggravated murder, which followed the conviction for aggravated robbery, violated Mathews' double jeopardy rights.\textsuperscript{179}

\textsuperscript{170} \textit{Id.} at 194.
\textsuperscript{171} \textit{Id.} at 194-95. The Eighth Circuit upheld the right of the district court to vacate the shorter concurrent sentence, even though Hardy by that time had completed serving a period of time which satisfied the length of the shorter sentence. \textit{Id.}
\textsuperscript{172} 395 U.S. 711, 715-16 (1969).
\textsuperscript{173} \textit{Id.} at 713-14. Clifton Pierce had been convicted of assault with the attempt to commit rape. His sentence was set aside due to an unconstitutional involuntary confession. \textit{Id.} at 113. The other defendant, William Rice, had been convicted of second degree burglary. His conviction was set aside because he was denied his constitutional right to counsel. \textit{Id.} at 714.
\textsuperscript{174} \textit{Id.} at 713-16.
\textsuperscript{175} \textit{Id.} at 713-14. The Supreme Court stated that the double jeopardy clause did not preclude the court from retrying the defendants for the same offense after the original conviction had been set aside on an error. \textit{Id.} at 719-20.
\textsuperscript{176} \textit{Id.} at 718-19. The Court also held that, following a reconviction for the same offense, there was no constitutional limitation on the imposition of a more severe sentence than had been originally imposed as long as objective reasons for the more severe sentence appeared in the record. \textit{Id.} at 723-26. Accordingly, the Court affirmed the district courts' holdings that, in each case, the longer sentence on retrial was unconstitutional because the prosecution had offered no justification for the imposition of a more severe sentence. \textit{Id.} at 726. Thus, the Court affirmed the district courts' grants of habeas corpus petitions to Pearce and Rice. \textit{Id.}
\textsuperscript{177} 475 U.S. 237 (1986).
\textsuperscript{178} \textit{Id.} at 240-41.
\textsuperscript{179} \textit{Id.} at 244. Under Illinois v. Vitale, 447 U.S. 410 (1980), Mathews' double jeop-
The Court also concluded that in the original proceeding the jury had necessarily found Mathews to be guilty of the non-jeopardy-barred lesser included offense of murder.\(^ {180}\) Therefore, the Court held that reducing the jeopardy-barred conviction of aggravated murder to the non-jeopardy-barred lesser included offense of murder would remedy the double jeopardy violation, provided that Mathews was unable to demonstrate "a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense."\(^ {181}\)

As illustrated by Holbrook, Hardy, Pearce, and Mathews, various circumstances and procedures permit multiple punishment violations to be remedied without further violation of the defendant's double jeopardy rights.\(^ {182}\) These cases demonstrate that the applicability of a particular multiple punishment remedy is fact dependent upon the specific case in which a remedy is sought.\(^ {183}\)

**SUMMARY OF MULTIPLE PUNISHMENT PROTECTION**

The double jeopardy clause protects against the imposition of multiple punishments for the same offense.\(^ {184}\) Thus, in analyzing the constitutionality of cumulatively imposed punishments, a court must first decide whether the actions being punished constitute the same offense.\(^ {185}\) This determination may be made by applying the well-established *Blockburger* rule,\(^ {186}\) or any other definitional test promulgated by the jurisdiction in which the court resides.\(^ {187}\)

\(\text{aridy rights were violated by the cumulative convictions for aggravated murder and aggravated robbery because the lesser offense, aggravated robbery, required no proof other than that which was necessary for the conviction of the greater offense, aggravated murder. Thus, the two offenses were the same for double jeopardy purposes. Mathews, 475 U.S. at 242 (relying on Vitale, 447 U.S. at 417).}\)

\(^{180}\) *Id.* at 244. In finding Mathews guilty of aggravated murder, the "jury necessarily found that he 'purposely cause[d] the death of another,' which is the definition of murder" in Ohio. *Id.* (quoting OHIO REV. CODE ANN. § 2903.03 (1982)).

\(^{181}\) *Id.* at 246-47. The offense of murder was not jeopardy-barred because, for constitutional purposes, it does not constitute the "same offense" as aggravated robbery. See id.

\(^{182}\) Mathews, 475 U.S. at 246-47; Pearce, 395 U.S. at 718-19; Hardy, 292 F.2d at 194-95; Holbrook, 136 F.2d at 652.

\(^{183}\) See supra notes 160-81 and accompanying text.

\(^{184}\) See supra note 3 and accompanying text.

\(^{185}\) See supra notes 95-112 and accompanying text.

\(^{186}\) See supra notes 100-02 and accompanying text.

\(^{187}\) See supra notes 96-99, 103-11 and accompanying text. See also Note, *Multiple Prosecutions and Punishments Under RICO: A Chip Off the Old "Blockburger",* 52 U. CIN. L. REV. 467, 473 (1983) (asserting that the Blockburger test is the principal method of statutory construction which courts utilize in determining whether a defendant is being cumulatively punished for the same offense); Note, *Twice in Jeopardy, 75 YALE L.J. 262, 269-77 (1965)* (asserting that courts use two approaches, the evidentiary and the behavioral, to develop offense-defining tests for double jeopardy purposes).
punishment protection is equally applicable in cases when the defendant was convicted of only a single offense, but nonetheless was sentenced to multiple punishments.\textsuperscript{188}

After establishing that the actions being cumulatively punished constitute the same offense or that multiple punishments were imposed for the conviction of a single offense, a court may address the issue of double punishment.\textsuperscript{189} In accordance with judicial interpretation, a court must look to the intent of the legislature or to the applicable statutory language prescribing punishment to determine if a double jeopardy violation exists.\textsuperscript{190}

Once a multiple punishment violation is established, a court must then consider a possible remedy.\textsuperscript{191} Depending upon the particular circumstances of the case, granting relief from further punishment or applying a judicial cure for the violation completes the constitutional procedure necessary to uphold the multiple punishment protection of the double jeopardy clause.\textsuperscript{192}

ANALYSIS

In \textit{Thomas v. Morris},\textsuperscript{193} the United States Court of Appeals for the Eighth Circuit determined that Thomas had fully served his fifteen-year sentence for attempted robbery and that the continued confinement of Thomas for his felony murder conviction violated the double jeopardy clause.\textsuperscript{194} As a result, the en banc court concluded that Thomas should be granted a writ of habeas corpus.\textsuperscript{195} The court based its decision on the resolution of two issues.\textsuperscript{196}

First, the en banc court considered the effect of the governor's commutation of Thomas' attempted robbery sentence which had been made prior to the trial court's vacation of that sentence.\textsuperscript{197} In accordance with Missouri law, the en banc court held that Thomas had legally satisfied the sentence for attempted robbery as a result of the commutation.\textsuperscript{198}

Utilizing this determination, the en banc court next addressed the issue of double jeopardy.\textsuperscript{199} Because Thomas had satisfied one of

\begin{itemize}
\item The en banc court's decision in the case of Thomas v. Morris
\item The legal principle of double jeopardy and its application
\end{itemize}
the two sentences imposed, the court concluded that further punish-
ment violated Thomas' double jeopardy rights.²⁰⁰ The court, how-
ever, failed to indicate the specific facts of Thomas which necessarily gave raise to Thomas' double jeopardy claim.²⁰¹ Instead, the court reached its decision by following the reasoning of cases it believed to be "factually similar" to Thomas,²⁰² without actually illustrating all of the similar facts it alleged.²⁰³

The en banc court's opinion is consistent with former multiple punishment precedents.²⁰⁴ However, an examination of the decision reveals that while the court reached the correct result, the court failed to articulate sufficient reasoning to logically attain its conclusion.²⁰⁵ The court did properly apply multiple punishment protection to the facts of Thomas.²⁰⁶ Moreover, the court did correctly recognize that no judicial cure would remedy the double jeopardy violation, other than a writ of habeas corpus.²⁰⁷ Nonetheless, the court's decision lacked the initial determination that the offenses Thomas was charged with constituted the same offense for constitutional purposes.²⁰⁸

DETERMINATION OF THE "SAME OFFENSE" FOR MULTIPLE PUNISHMENT ANALYSIS

Pursuant to multiple punishment protection, the double jeopardy clause dictates that the alleged double punishment be for the same offense.²⁰⁹ Hence, a determination of the "same offense" is a prereq-
usite to multiple punishment analysis.²¹⁰ The en banc court in Thomas failed to make this determination.²¹¹

No reasoning was offered by the en banc court to explain why Thomas' double jeopardy claim existed.²¹² One may postulate that the en banc court relied upon the panel decision's holding that Thomas' cumulative sentences violated his double jeopardy rights as

²⁰⁰. Id. at 1342.  
²⁰¹. See infra notes 209-12 and accompanying text.  
²⁰². Thomas, 844 F.2d at 1340-42 (citing In re Bradley, 318 U.S. 50 (1943); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Holmes, 822 F.2d 481 (5th Cir. 1987); United States v. Edick, 603 F.2d 772 (9th Cir. 1979); Holbrook v. United States, 136 F.2d 649 (8th Cir. 1943)).  
²⁰³. See infra notes 212-22 and accompanying text.  
²⁰⁴. See infra notes 247-57 and accompanying text.  
²⁰⁵. See infra notes 209-45 and accompanying text.  
²⁰⁶. See infra notes 247-57 and accompanying text.  
²⁰⁷. See infra notes 275-322 and accompanying text.  
²⁰⁸. See infra notes 209-45 and accompanying text.  
²⁰⁹. See U.S. Const. amend. V.  
²¹⁰. See supra notes 95-111 and accompanying text.  
²¹¹. See Thomas, 844 F.2d at 1339-42.  
²¹². Id.
dictated by State v. Morgan. Yet, reliance on Morgan alone, would have been inconsistent with the reasoning of the en banc opinion.

Eight years after Thomas' sentencing, the Morgan court established that felony murder and the underlying felony were punishable by statutory alternative sentences. The en banc court in Thomas, however, based its decision on Ex parte Lange and its progeny, claiming this line of cases to be "factually similar" to Thomas. In Lange, the sentences imposed were known to be statutory alternative punishments at the time of sentencing. It follows that, in order for the facts in Thomas to be analogous to those in Lange, it would have been necessary for Thomas' sentencing judge to have had constructive knowledge on the date of sentencing that the punishments imposed on Thomas were statutory alternatives.

The dissent to the en banc opinion referred to this discrepancy by claiming that Lange was inapplicable to the facts of Thomas since "the Missouri Supreme Court [in Morgan] [had] decide[d] long after the fact [of Thomas' sentencing] that he could be sentenced for one [offense] or the other, but not both." In reality, and contrary to the dissent, felony murder and the underlying felony were punishable only by statutory alternative sentences at the time of Thomas' sentencing due to existing multiple punishment precedents. Thus, this determination should have been articulated by the en banc Thomas court through reliance on those precedents which established the origin of Thomas' double jeopardy claim. Had the en banc court made this determination, further reliance on Morgan would have added support to Thomas' complaint.

Although the Morgan court was required to ascertain the intent of the legislature in order to determine whether felony murder and the underlying felony could be punished cumulatively, Thomas' sentencing judge needed to have only considered the existing definitional tests for the "same offense" to have made the identical deter-

213. Thomas v. Morris, 816 F.2d 364, 368 (8th Cir. 1987) (citing State v. Morgan, 612 S.W.2d 1 (Mo. 1981) (en banc)). Although it may appear that the en banc court necessarily adopted the panel decision's explanation as to why Thomas had a double jeopardy claim, the court in fact withdrew and vacated the panel decision's opinion. See Thomas, 844 F.2d at 1337 n.1.
214. See infra notes 215-19 and accompanying text.
215. 612 S.W.2d 1, 1 (Mo. 1981) (en banc).
216. 85 U.S. (18 Wall.) 163 (1873).
217. Thomas, 844 F.2d at 1340-42.
219. See Thomas, 844 F.2d at 1343-44 (Bowman, J., dissenting).
220. Thomas, 844 F.2d at 1343 n.2 (Bowman, J., dissenting).
221. See infra notes 224-39 and accompanying text.
222. See supra notes 96-111 and accompanying text.
223. See supra note 215 and accompanying text.
224. Morgan, 612 S.W.2d at 1.
These definitional tests could have been found in *State v. Clark,* *Blockburger v. United States,* *Cardarella v. United States,* and *State v. Richardson.*

Employing the definitional test offered in *Clark,* Thomas' sentencing judge could have readily established that the imposition of cumulative punishments for felony murder and the underlying felony violated the double jeopardy clause. As the *Clark* test illustrates, because the "offense [of attempted robbery was] a necessary element in and constitute[d] an essential part of [the felony murder offense], and both [were] in fact but one transaction, a conviction or acquittal of one [was] a bar to the other." Accordingly, Thomas was sentenced to unconstitutional double punishment.

The Supreme Court in *Blockburger* also presented a definitional test, as restated in *Cardarella,* which would have established the constitutional error in Thomas' sentencing. Thomas violated two separate statutory provisions for the offenses of attempted robbery and felony murder, but since no "proof of any additional fact, not constituting an element of one of the offenses, [was] required to sustain a conviction on the other," only one offense should have been recognized. Moreover, following the reasoning of the *Cardarella* court, because the attempted robbery offense was a "necessary part" of the felony murder offense only one punishment should have been imposed.

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225. *See infra* notes 226-39 and accompanying text. The cases of *Whalen v. United States,* 445 U.S. 684, 692 (1980), and *Simpson v. United States,* 435 U.S. 6, 11-12 (1978), which both require a court to establish the intent of the legislature before determining the constitutionality of multiple punishments, were nonexistent at the time of Thomas' sentencing.


228. 375 F.2d 222, 225 (8th Cir.), cert. denied, 389 U.S. 822 (1967).

229. 460 S.W.2d 537, 539-40 (Mo. 1970) (en banc).

230. Motion for Rehearing By the Panel, And Suggestion the Court En Banc Hear the Case at 3, *Thomas,* 844 F.2d at 1337 (No. 85-1934EM) [hereinafter Appellant’s Motion for Rehearing].

231. *Clark,* 220 Mo. App. at —, 289 S.W. at 965. *See supra* notes 96-97 and accompanying text. According to the felony murder statute under which Thomas was charged, Thomas' felony offense of attempted robbery was necessarily an element in, and essential part of, his felony murder offense. *See* MO. REV. STAT. § 559.010 (1969); *supra* note 17.

232. *See supra* note 231 and accompanying text.

233. *See infra* notes 234-36 and accompanying text.


235. *Cardarella,* 375 F.2d at 225. *See supra* notes 103-04 and accompanying text. According to the Missouri felony murder statute under which Thomas was charged, the same proof of facts - the felonious intent to commit robbery - was required to convict Thomas for both attempted robbery and felony murder. *See* MO. REV. STAT. § 559.010 (1969); *supra* note 17.

236. *Cardarella,* 375 F.2d at 225. *See supra* note 106 and accompanying text.
Finally, the reasoning in *Richardson* represented another definitional test available to Thomas' sentencing judge. Application of this test would have evidenced the illegality of Thomas' cumulative sentences since the necessary "act toward the commission" of the felony murder was the attempted robbery. Therefore, the sentencing judge should have known that Thomas was sentenced to unconstitutional multiple punishments.

According to *Clark*, *Blockburger*, *Cardarella*, and *Richardson*, the offenses that Thomas was charged with constituted the "same offense." This determination could have been made before Thomas was sentenced to cumulative punishments. Indeed, if Thomas' sentencing judge had made this determination, certainly Thomas would not have been twice convicted for the "same offense," nor would he have been sentenced to multiple punishments.

The en banc *Thomas* court, however, neglected to indicate that the initial sentencing itself, rather than the *Morgan* decision, originated Thomas' double jeopardy claim. Demonstrating that Thomas' sentencing error was made at the time of his sentencing would have established the factual similarity between *Thomas* and *Lange*. The en banc court alluded to this similarity, but failed to demonstrate its existence. Notwithstanding this omission in the en banc court's reasoning, the majority properly applied multiple punishment protection to the facts of *Thomas*.

APPLICATION OF MULTIPLE PUNISHMENT PROTECTION

Because Thomas had been sentenced to two punishments for actions constituting the same offense, he was entitled to the multiple

the Missouri felony murder statute which Thomas was charged, Thomas' felony offense of attempted robbery was a necessary part of his felony murder offense. See Mo. Rev. Stat. § 559.010 (1969); *supra* note 17.

237. See Appellant's Motion for Rehearing at 3, *Thomas*, 844 F.2d at 1337.
238. *Richardson*, 469 S.W.2d at 539. See *supra* notes 108-10 and accompanying text. Under the Missouri felony murder statute which Thomas was charged, Thomas' act of attempted robbery was necessary for the commission of felony murder. See Mo. Rev. Stat. § 559.010 (1969); *supra* note 17.

239. Appellant's Motion for Rehearing at 3, *Thomas*, 844 F.2d at 1337.
240. See *supra* notes 230-39 and accompanying text.
241. See Appellant's Motion for Rehearing at 3, *Thomas*, 844 F.2d at 1337.
242. See *supra* notes 224-39 and accompanying text.
243. *See Thomas*, 844 F.2d at 1339-42. The earlier panel decision held that Thomas had a double jeopardy claim pursuant to *Morgan*. *Thomas*, 816 F.2d at 368 (relying on *Morgan*, 612 S.W.2d at 1). Although the en banc court made no mention of *Morgan*, it seems logical to conclude that the court reasoned that Thomas' double jeopardy claim existed due to *Morgan* since the court offered no other explanation. See *Thomas*, 844 F.2d at 1339-42.
244. See *supra* notes 216-19, 224-39 and accompanying text.
245. *See Thomas*, 844 F.2d at 1340-42.
246. See *infra* notes 247-74 and accompanying text.
punishment protection provided by the double jeopardy clause.\textsuperscript{247} The en banc court in \textit{Thomas} relied on \textit{Lange, In re Bradley},\textsuperscript{248} \textit{United States v. Edick},\textsuperscript{249} and \textit{United States v. Holmes},\textsuperscript{250} in administering Thomas this constitutional relief.\textsuperscript{251} 

In each of these cases the defendant, similar to Thomas, had been sentenced to two punishments after committing only one offense.\textsuperscript{252} Moreover, each defendant, like Thomas, had satisfied one of the alternative sentences before any attempt was made to correct the sentencing error.\textsuperscript{253} Therefore, as the courts in \textit{Lange, Bradley, Edick,} and \textit{Holmes} had concluded,\textsuperscript{254} the en banc \textit{Thomas} court held that the continued confinement of Thomas violated the double jeopardy clause.\textsuperscript{255} Because Thomas had satisfied the entire sentence, the court no longer had the power to punish him.\textsuperscript{256} Furthermore, this interpretation of multiple punishment protection, recognized for over a century, mandated that Thomas be set free.\textsuperscript{257} 

In addition to the precedents relied upon by the majority, cases which offer more recent interpretations of multiple punishment protection also support the en banc \textit{Thomas} decision.\textsuperscript{258} Thomas' case was correctly decided in light of \textit{Whalen v. United States},\textsuperscript{259} \textit{State v. Morgan},\textsuperscript{260} and \textit{Missouri v. Hunter}.\textsuperscript{261} 

The Supreme Court in \textit{Whalen} determined that, unless the legis-
lature had clearly authorized cumulative punishments for statutory offenses arising from the same transaction, issues of multiple punishment should be resolved by using the rule of statutory construction contained in *Blockburger.*\(^2\)

Employing this determination, the *Morgan* court discovered that not only did *Blockburger* proscribe the imposition of cumulative punishments for felony murder and the underlying felony, but the Missouri legislature in 1978 had codified the prohibition of such cumulative punishments.\(^2\)

Therefore, *Blockburger* established the illegality of Thomas' cumulative punishments at the time of his sentencing,\(^2\) and the ensuing codification of Missouri legislative intent reinforced Thomas' sentencing error.\(^2\)

Moreover, the Missouri legislature in 1978 had not clearly authorized cumulative punishments for felony murder and the underlying felony at the time of Thomas' sentencing.\(^2\)

As asserted in *Hunter*, only when a "legislature specifically authorize[d] cumulative punishment under two statutes" may a court impose cumulative punishments for statutory offenses that are considered to be the "same offense" under *Blockburger.*\(^\)\(^2\)

It should be noted, as articulated by the dissent to the en banc opinion, that the Missouri legislature has changed its intentions with respect to the imposition of cumulative punishments for felony murder and the underlying felony.\(^2\)

After Thomas' double jeopardy claim had vested,\(^2\) the Missouri legislature in 1984 authorized the imposition of cumulative sentences for both felony murder and the underlying felony.\(^2\)

Irrespective of this 1984 change in Missouri law, Thomas' double jeopardy rights were violated at the time of his sentencing.\(^2\)

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\(^1\) Whalen, 445 U.S. at 691-92.

\(^2\) Morgan, 612 S.W.2d at 1.

\(^3\) See supra notes 100-01 and accompanying text.

\(^4\) See **Mo. Rev. Stat.** §§ 556.041-556.046 (1978) (limiting the conviction for multiple offenses if one offense is included in the other); supra note 28.

\(^5\) See **Mo. Rev. Stat.** §§ 560.120, 560.135, 556.150, 559.010, 559.030 (1969); supra note 17. Thomas was prosecuted and sentenced pursuant to these statutes, yet none of them contain any legislative intent or directive allowing a defendant to be separately punished for each offense if one of the offenses was determined to be a lesser included offense of the other. Notice of Appeal to the Missouri Court of Appeals, State v. Thomas, No. 72-2632 (June 4, 1973). Furthermore, nothing existed in the Missouri Criminal Code at the time of Thomas' sentencing in 1973 which indicated a legislative intent to allow a separate punishment for one offense which is included in another.

\(^6\) Hunter, 459 U.S. at 368-69.

\(^7\) See **Thomas**, 844 F.2d at 1343 n.1 (Bowman, J., dissenting).

\(^8\) See id. at 1340-42. Thomas' double jeopardy claim vested in 1981, after he had satisfied one alternative punishment for his criminal action. Thomas satisfied this punishment after the governor commuted his fifteen-year sentence for attempted robbery, and he completed serving the commuted sentence. Id.

\(^9\) See **Mo. Rev. Stat.** § 565.021(2) (1986); supra note 28.

\(^10\) See supra notes 224-39 and accompanying text.
subsequent codification of Missouri legislative intent in 1978 which limited the conviction for multiple offenses, confirmed Thomas' sentencing error.\textsuperscript{272} Thus, the en banc \textit{Thomas} court properly applied the multiple punishment protection found in \textit{Lange} and its progeny to uphold Thomas' constitutional rights.\textsuperscript{273} Further, the court correctly recognized that no judicial remedy for the double jeopardy violation, other than a writ of habeas corpus, applied to \textit{Thomas}.\textsuperscript{274}

\textbf{Consideration of a Judicial Remedy for the Multiple Punishment Violation}

The specific relief necessary to remedy a double jeopardy violation depends upon the factual circumstances of the case in which relief is sought.\textsuperscript{275} Cases which illustrate some of the varied judicial remedies that serve to cure double jeopardy violations include \textit{Holbrook v. United States},\textsuperscript{276} \textit{Hardy v. United States},\textsuperscript{277} \textit{North Carolina v. Pearce},\textsuperscript{278} \textit{Morris v. Mathews},\textsuperscript{279} \textit{Sawyer v. United States},\textsuperscript{280} \textit{Jones v. United States},\textsuperscript{281} \textit{United States v. Pietras},\textsuperscript{282} \textit{Bozza v. United States},\textsuperscript{283} and \textit{Green v. United States}.\textsuperscript{284} In \textit{Thomas}, the en banc court administered Thomas' relief from unconstitutional double punishment by releasing him from further restraint.\textsuperscript{285} The en banc court ruled that Thomas had fully served one alternative punishment for his criminal action, and as a result, the court correctly recognized that no judicial remedy, other than habeas corpus relief, would serve to correct his sentencing error.\textsuperscript{286}

One judicial remedy, utilized to cure the multiple punishment violation in \textit{Holbrook}, involved the vacation of the shorter of two consecutive sentences imposed for the same offense.\textsuperscript{287} The \textit{Holbrook} court stated that "up to the time that there has been a legal satisfaction of one of the sentences" a court may choose which of "the two consecutive sentences, contemporaneously imposed and both unexec-
cuted, [to] eliminat[e] in order not to subject the defendant to the possibility of double punishment.\textsuperscript{288} Unlike the defendants in Holbrook who had not satisfied either sentence prior to the court's correction of their sentencing errors,\textsuperscript{289} Thomas had satisfied the shorter of his two consecutive sentences before the trial court attempted to have it vacated.\textsuperscript{290} Thus, the en banc Thomas court correctly followed the reasoning of Holbrook in freeing Thomas\textsuperscript{291} since the Holbrook multiple punishment remedy was inapplicable to the facts of Thomas.\textsuperscript{292}

A similar judicial remedy was applied to a multiple punishment violation in Hardy.\textsuperscript{293} The Hardy court affirmed the vacation of the shorter of two concurrent sentences imposed for the same offense, even though Hardy had already served a period equal to the length of the shorter sentence.\textsuperscript{294} The court determined that since the sentences were concurrent, the longer sentence was the term of Hardy's punishment.\textsuperscript{295} Moreover, with concurrent sentencing, as opposed to consecutive sentencing,\textsuperscript{296} a court cannot say that either sentence should be served first.\textsuperscript{297} Therefore, Hardy, unlike Thomas,\textsuperscript{298} had not satisfied the judgment prior to the court's vacation of the shorter sentence.\textsuperscript{299} Due to this simple distinction between concurrent and consecutive sentencing, which the dissent to the en banc Thomas decision referred to as hypertechnical,\textsuperscript{300} Hardy is inapposite on its facts to Thomas.\textsuperscript{301} Furthermore, the Hardy multiple punishment remedy was not applicable to Thomas' sentencing error.\textsuperscript{302}

\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} Thomas, 844 F.2d at 1339-40.
\textsuperscript{291} Id. at 1341-42.
\textsuperscript{292} See supra notes 287-90 and accompanying text.
\textsuperscript{293} Hardy, 292 F.2d at 194-95.
\textsuperscript{294} Id.
\textsuperscript{295} Id.
\textsuperscript{296} See supra notes 19 and 168.
\textsuperscript{297} See supra notes 293-99 and accompanying text.
\textsuperscript{298} See supra notes 287-90 and accompanying text.
\textsuperscript{299} See supra notes 287-90 and accompanying text.
\textsuperscript{300} Thomas, 844 F.2d at 1337 [hereinafter Appellant's Response].
\textsuperscript{301} Thomas, 844 F.2d at 1339-40.
\textsuperscript{302} See Hardy, 292 F.2d at 194-95.
\textsuperscript{303} Thomas, 844 F.2d at 1345 (Bowman, J., dissenting). Judge Bowman stated that the en banc court created an "anomaly" by utilizing the distinction between concurrent and consecutive sentences to authorize a sentencing judge to vacate one of two concurrent prison sentences after the shorter of the two has already been served, but not granting the authority to choose which sentence to vacate if the sentences are consecutive. Id. at 1346 (Bowman, J., dissenting). The en banc Thomas court, however, created no such "anomaly." Instead, the court recognized the distinction between concurrent and consecutive sentencing, and correctly applied the law of consecutive sentencing. See id. at 1341-42.
\textsuperscript{304} See supra notes 293-99 and accompanying text.
Another distinct multiple punishment remedy was presented in *Pearce*, wherein the Supreme Court held that the double jeopardy clause mandates that time already served for an offense be "credited" to the new sentence following retrial, conviction, and resentencing for the same offense.\(^3\) This judicial remedy was also inapplicable to Thomas' case because Thomas had not been retried, convicted, and resentenced for the same offense.\(^4\) Instead, Thomas, unlike the defendants in *Pearce*,\(^5\) had satisfied the judgment for his criminal action before any attempt was made to correct the multiple punishment violation in his case.\(^6\) Hence, to merely credit Thomas' fully served sentence for his robbery offense to his sentence for felony murder, as suggested by the dissent to the en banc *Thomas* decision,\(^7\) is to ignore the constitutional proscription against multiple punishments for the same offense.\(^8\)

Contained in *Mathews* was yet another multiple punishment remedy, which provided that the reduction of a jeopardy-barred conviction for aggravated murder to a non-jeopardy-barred lesser included offense of murder was an adequate cure for a double jeopardy violation.\(^9\) This remedy, however, as aptly stated by the en banc *Thomas* court, was not applicable to Thomas' case because "Thomas had fully satisfied the sentence for attempted robbery," while "the defendant in *Mathews* had not fully satisfied either the sentence for the aggravated robbery or the sentence for the felony murder."\(^10\) This distinction, as the en banc *Thomas* court found, was determinative\(^11\) since the application of the *Mathews* remedy to Thomas' case would again violate his double jeopardy rights by subjecting him to more than one punishment for the same offense.\(^12\)

Finally, another judicial remedy for multiple punishment violations found in *Sawyer*, *Jones*, *Pietras*, *Bozza*, and *Green* established that the intention of the sentencing judge, rather than any error made in sentencing, should determine which sentence to vacate when

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304. See *Thomas*, 844 F.2d at 1337-39.
307. Id. at 1344 (Bowman, J., dissenting).
308. See supra notes 305-06 and accompanying text. The proscription against multiple punishments for the same offense mandates that once a defendant has legally satisfied a valid alternative sentence for a single offense, a court no longer has the power to impose further punishment. See *Bradley*, 318 U.S. at 52; *Lange*, 85 U.S. (18 Wall.) at 176; *Holmes*, 822 F.2d at 498; *Edick*, 603 F.2d at 778.
311. Id.
the imposed sentences cannot stand together.\textsuperscript{313} The dissent to the en banc \textit{Thomas} decision urged the applicability of these precedents to \textit{Thomas}.\textsuperscript{314} In each of these cases, however, none of the defendants, prior to the application of a multiple punishment remedy, had satisfied his judgment by fully serving one of the sentences.\textsuperscript{315} Because \textit{Thomas} had fully served one sentence and had thus satisfied the judgment before the trial court attempted to amend \textit{Thomas}' sentencing error,\textsuperscript{316} the multiple punishment remedy presented in \textit{Sawyer}, \textit{Jones}, \textit{Pietras}, \textit{Bozza}, and \textit{Green} was inapplicable to \textit{Thomas}.\textsuperscript{317}

The en banc \textit{Thomas} court correctly remedied \textit{Thomas}' sentencing error by ordering that he be issued a writ of habeas corpus.\textsuperscript{318} Although the en banc court only refuted the applicability of the Matthews multiple punishment remedy to \textit{Thomas},\textsuperscript{319} the en banc \textit{Thomas} court's reliance on \textit{Lange} and its progeny implied the inapplicability of any other multiple punishment remedies.\textsuperscript{320} The multiple punishment protection prescribed in \textit{Lange} provides that once a defendant has fully satisfied a valid alternative punishment for a single offense the court's power to punish the defendant further is eliminated.\textsuperscript{321} Accordingly, since \textit{Thomas} had fully satisfied the sentence for his robbery offense prior to the vacation of that sentence by the trial court,\textsuperscript{322} no multiple punishment remedy was applicable to \textit{Thomas} other than the multiple punishment protection prescribed in \textit{Lange}, which mandated that \textit{Thomas} be set free.\textsuperscript{323}

\textbf{CONCLUSION}

The United States Supreme Court has stated that "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence,"\textsuperscript{324} Since the Supreme Court made this statement over a century ago, multiple punishment protection has spawned varying interpretations.

\textsuperscript{313} \textit{Green}, 365 U.S. at 306; \textit{Bozza}, 330 U.S. at 166-67; \textit{Pietras}, 501 F.2d at 188; \textit{Jones}, 396 F.2d at 69; \textit{Sawyer}, 312 F.2d at 28-39. \textit{See supra} notes 77, 80-83 and accompanying text.
\textsuperscript{314} \textit{See Thomas}, 844 F.2d at 1344-45 (Bowman, J., dissenting).
\textsuperscript{315} \textit{Green}, 365 U.S. at 302-05; \textit{Bozza}, 330 U.S. at 165-67; \textit{Pietras}, 501 F.2d at 184-87; \textit{Jones}, 396 F.2d at 67; \textit{Sawyer}, 312 F.2d at 29.
\textsuperscript{316} \textit{See Thomas}, 844 F.2d at 1342.
\textsuperscript{317} Appellant's Response at 4-10, \textit{Thomas}, 844 F.2d at 1337.
\textsuperscript{318} \textit{Thomas}, 844 F.2d at 1342.
\textsuperscript{319} \textit{Id}.
\textsuperscript{320} \textit{See id.} at 1340-42.
\textsuperscript{321} \textit{Lange}, 85 U.S. (18 Wall.) at 176.
\textsuperscript{322} \textit{Thomas}, 844 F.2d at 1339-40.
\textsuperscript{323} \textit{See supra} notes 248-57 and accompanying text.
\textsuperscript{324} \textit{Ex parte Lange}, 85 U.S. (18 Wall.) 163, 168 (1873).
Larry P. Thomas' multiple punishment claim in *Thomas v. Morris*\(^{325}\) necessitated the application of several of these interpretations to produce a constitutional result.

While the en banc *Thomas* court failed to initially determine that Thomas' offenses of felony murder and attempted robbery constituted the same offense on the date of his sentencing, the court nevertheless reached a sound decision. Because Thomas had legally satisfied one punishment prior to judicial amendment of his sentencing, the en banc *Thomas* court, pursuant to multiple punishment protection, correctly granted Thomas a writ of habeas corpus. The dissent in *Thomas* would have its dislike of these consequences override the majority's strict application of existing law. However, such judicial bending of the law in order to achieve a desired result ultimately tends to be destructive of the law itself.\(^{326}\)

Hence, the result in *Thomas* may be unsettling, but a review of the en banc judgment demonstrates that it is consistent with multiple punishment precedents which provide definitional tests for the "same offense," interpretations of multiple punishment protection, and judicial remedies for multiple punishment violations. An analysis of this type is necessary to uphold each individual's double jeopardy rights. Though the en banc *Thomas* court's decision followed five proceedings which inconclusively dealt with Thomas' multiple punishment claim, the fifth amendment's guarantee against double jeopardy was definitively upheld.\(^{327}\)

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325. 844 F.2d 1337, 1339 (8th Cir. 1988) (en banc).
327. Subsequent to the preparation of this Casenote, the United States Supreme Court granted certiorari to review the Eighth Circuit en banc *Thomas* decision. On June 19, 1989, in a five-to-four decision, the Supreme Court reversed and remanded the case for dismissal of Thomas's habeas corpus petition. The Court held that the state court remedy, which consisted of vacating Thomas's fifteen-year sentence and crediting his time served against his life sentence, fully vindicated Thomas' double jeopardy rights because Thomas was not subjected to greater punishment than the legislature intended. See Jones v. Thomas, 488 U.S. — (1989), 57 U.S.L.W. 4762 (U.S. June 19, 1989). Because the reasoning of the Supreme Court's opinion follows that of Judge Bowman's dissent in the Eighth Circuit *Thomas* decision, this author disagrees with the Court's decision for the reasons stated in this Casenote.