

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1214

TITLE MISSOURI, Petitioner  
v.

PLACE DANNY HUNTER  
Washington, D.C.

DATE November 10, 1982

PAGES 1 thru 54

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ALDERSON REPORTING

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MISSOURI, :

4                      Petitioner        :

5 v. : No. 81-1214

6 DANNY HUNTER :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, November 10, 1982

10           The above-entitled matter came on for oral argument  
11 before the Supreme Court of the United States at  
12 10:02 a.m.

13 APPEARANCES:

14 PHILIP M. KOPPE, ESQ., Jefferson City, Mo.; on behalf of  
the Petitioner.

15 GARY L. GARDNER, ESQ., Kansas City, Mo.; on behalf of the  
16 Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Missouri against Hunter.

Mr. Koppe, you may proceed whenever you are ready.

ORAL ARGUMENT OF PHILIP M. KOPPE, ESQ.

ON BEHALF OF PETITIONER

MR. KOPPE: Mr. Chief Justice, may it please the Court:

This case represents the culmination of a six-year struggle by the State of Missouri to enforce the multiple punishment provisions of Missouri's armed criminal action statute, a statute which makes it a separate offense punishable by a separate sentence to commit a felony with the use, aid or assistance of a dangerous or deadly weapon.

For the last three years, anyway, it has been an uphill battle. In a series of decisions beginning in January of 1980, the Missouri Supreme Court has ruled that the double jeopardy clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, insofar as it prohibits multiple punishments for the same offense, prevents the state from convicting a defendant for both armed criminal action and the predicate or underlying felony. The court reached its



1 conclusion even though it also concluded that the  
2 legislature intended multiple punishments under both  
3 statutes and even though those punishments were assessed  
4 in a single proceeding.

5           Twice this Court has directed the Missouri  
6 Supreme Court to reconsider these rulings, first in  
7 light of Whalen versus United States, then again in  
8 light of Albernaz versus the Government. On both  
9 occasions, however, the Missouri Supreme Court declined  
10 to take advantage of the opportunity to change its  
11 ruling.

12           As the result of the Missouri Supreme Court's  
13 adherence to what we regard as an erroneous conclusion,  
14 the Missouri Court of Appeals in this case reversed the  
15 Respondent's 15-year concurrent sentence for armed  
16 criminal action, leaving intact a concurrent 10-year  
17 sentence for the predicate felony, which was robbery in  
18 the first degree. Unaffected by the court's holding and  
19 not involved in this case was a consecutive five-year  
20 sentence that the Respondent received pursuant to an  
21 assault conviction arising out of the same transaction.

22           The issue presented by this case, then, is  
23 strictly a legal one, devoid of any procedural  
24 complexities or factual disputes. And that question is  
25 simply whether or not the State, without offending the

1 double jeopardy clause, may impose cumulative  
2 punishments for conduct arising from the same act or  
3 transaction for both a compound or greater offense, in  
4 this case armed criminal action, and also the predicate  
5 or lesser included offense, in this case robbery in the  
6 first degree.

7 QUESTION: Mr. Koppe, has your Supreme Court  
8 ever addressed that question under the state  
9 constitution?

10 MR. KOPPE: The court did, Your Honors, and it  
11 found that the state prohibition against double jeopardy  
12 prohibited only retrial after acquittal. So this issue  
13 was decided solely on the basis of federal  
14 constitutional grounds.

15 QUESTION: Is that case you referred to a  
16 Supreme Court of Missouri case?

17 MR. KOPPE: That's correct. Both cases are  
18 Sours versus State. We refer to them as Sours I and  
19 II. Sours II was on remand after this Court's decision  
20 sending the case back following Whalen.

21 QUESTION: Where is that in the opinion? Is  
22 that in the opinion of the court?

23 MR. KOPPE: That is not in the opinion of the  
24 Court of Appeals, Your Honor. It is in the opinions of  
25 the two Sours cases.

1           QUESTION: But it's not in the opinion that's  
2 before us?

3           MR. KOPPE: Right. The Court of Appeals --

4           QUESTION: Did they pass on this point?

5           MR. KOPPE: The Court of Appeals in deciding  
6 this particular issue I think decided it in about a  
7 single paragraph. It felt --

8           QUESTION: Where is that? I didn't find that,  
9 even.

10          MR. KOPPE: The opinion, the full opinion is  
11 set out in the petition.

12          QUESTION: I know. That's all right. If it's  
13 in there, I look at it. I'll look for it. You don't  
14 have to look for it.

15          MR. KOPPE: Okay. The Court of Appeals did  
16 not treat this issue with any degree of specificity. It  
17 simply cited the two Sours cases and the Haggard cases,  
18 the cases that were decided by the Missouri Supreme  
19 Court en banc. It felt it was bound by those cases.

20          So in order to fully understand the reasoning  
21 behind the Supreme Court's decisions, you must look to  
22 Sours I and II, a case called State versus Haggard,  
23 where the court reconsidered this issue following  
24 Albernaz, and most recently in a case called State  
25 versus Kane, all of which are cited in our brief.

1 All four of those opinions are essentially the  
2 same. They basically state that since the legislature,  
3 whether intentionally or otherwise, has made the  
4 predicate offense, in this case robbery but the  
5 underlying felony, in a sense a lesser included offense  
6 of the compound offense, that that is prohibited by the  
7 double jeopardy clause because it is the same offense  
8 within the meaning of Blockburger.

9 According to the Missouri Supreme Court, when  
10 you apply the Blockburger test you come up short,  
11 because both statutes do not require proof of an element  
12 that the other one does not.

13 QUESTION: Mr. Koppe, your Court of Appeals  
14 chose to vacate the longer of the two concurrent  
15 sentences, didn't they?

16 MR. KOPPE: That's correct.

17 QUESTION: Is there anything in state law that  
18 compels that result, rather than vacating the shorter?

19 MR. KOPPE: Well, the Court of Appeals reached  
20 that decision because in the two Sours cases and in  
21 Haggard that was the procedure. There really wasn't any  
22 explication of why they did that until after this case  
23 was decided.

24 In State versus Kane, which actually followed  
25 Hunter and is the last word on the subject, the Supreme



1 Court indicated that the reason it would vacate the  
2 armed criminal action conviction was because what the  
3 state legislature had attempted to do was pass an  
4 enhancement statute. However, the court reasoned that  
5 the enhancement failed because of the way the statute  
6 was phrased, and the court expressly said that in Kane.

7 And I think that case illustrates more than  
8 anything precisely what this case is about. We're not  
9 really arguing constitutional principles in any real  
10 sense; we're arguing phraseology. Basically, the  
11 State's position here is that the State of Missouri  
12 could have done precisely the same thing, assessed  
13 precisely the same punishment in a single statute --

14 QUESTION: Mr. Koppe, I hate to bother you,  
15 but the third page of the opinion in the second full  
16 paragraph, talking about double jeopardy, as I read it  
17 says: "Under these decisions, Appellant's conviction  
18 for armed criminal action is vacated and the sentence  
19 for that conviction is set aside."

20 MR. KOPPE: That's correct, Your Honor.

21 QUESTION: Well, is that here? Are you  
22 appealing that?

23 MR. KOPPE: That is correct, yes.

24 QUESTION: That's the issue.

25 MR. KOPPE: That's the issue.

1           QUESTION: The issue is whether they can set  
2 it aside?

3           MR. KOPPE: That's correct, on federal double  
4 jeopardy grounds, on the theory that that constitutes  
5 convictions for the same offense within the meaning of  
6 Blockburger.

7           QUESTION: But he cites two state cases,  
8 right?

9           MR. KOPPE: That's correct. Basically, the  
10 Court of Appeals felt bound by the earlier decisions of  
11 the Missouri Supreme Court, which we cite and discuss in  
12 our brief. Those are Sours versus State, two opinions,  
13 and State versus Haggard. So in order to determine  
14 really the basis for the reversal, you have to look at  
15 those cases. And essentially --

16          QUESTION: May I ask, you said that in one of  
17 those earlier cases, not Sours but the other one, I  
18 think it was, that the Supreme Court of Missouri said  
19 that the legislature had attempted to enact an  
20 enhancement statute.

21          MR. KOPPE: That's correct.

22          QUESTION: Which is certainly the way I would  
23 have read it, very frankly. But it failed because of  
24 the language of the statute. But the legislative intent  
25 was simply an enhancement statute, rather than to create

1 a second offense.

2 MR. KOPPE: Correct. What the court said, and  
3 I know I've cited it in my brief, but basically, when  
4 explaining why they were vacating what they had held to  
5 be the greater offense, was that the attempted  
6 enhancement which they had tried failed because of its  
7 phraseology or the way it was phrased. They expressly  
8 make that statement, and I think that that to me  
9 demonstrates an illustration of again what this case  
10 really hinges on. It hinges on phraseology, because our  
11 argument is that the State in this case could have  
12 passed a single statute and assessed exactly the same  
13 punishment for this particular conduct.

14 And the Missouri Supreme Court in effect so  
15 held. The Missouri Supreme Court flatly stated in the  
16 Kane case that there was nothing unconstitutional with  
17 giving the defendant an additional amount of punishment  
18 because of his use of a weapon to commit a crime.  
19 However --

20 QUESTION: But we are bound by their  
21 interpretation of their own statute, namely that the  
22 legislature didn't pass an enhancement statute, they  
23 passed a statute which imposed a separate penalty for a  
24 separate crime. That's what they concluded the  
25 legislature did.

1                   MR. KOPPE: Well, when they concluded that,  
2 Your Honor, you have to look at the cases they  
3 discussed, and they discussed the two types of cases.  
4 There are cases, for example, emanating from states like  
5 Delaware, Michigan, Maryland, of which this Court is  
6 aware, which also make it a separate offense.

7                   Then there are other states which have simply  
8 added punishment to the sentence for the particular  
9 felony involved, and the court considered that the  
10 latter type of statutes was the true enhancement  
11 statute.

12                  QUESTION: But you're urging us to say that  
13 not only may the legislature pass an enhancement  
14 statute, but it may do exactly what the Supreme Court of  
15 Missouri said it did and said it couldn't, namely impose  
16 a separate penalty.

17                  MR. KOPPE: Well, of course, the reason --

18                  QUESTION: Aren't you saying that the double  
19 jeopardy clause does not prevent a legislature from  
20 doing that?

21                  MR. KOPPE: That's correct, that's correct.  
22 And simply what the Supreme Court was saying was, what  
23 the Missouri Supreme Court was saying is, if the state  
24 legislature had done it in a slightly different fashion,  
25 if it had taken all the punishment and put it in a



1 single sentence -- excuse me, a single statute -- there  
2 wouldn't have been a constitutional violation. And what  
3 we're saying is, if they had put all the punishment in a  
4 single sentence it certainly would have been a less  
5 roundabout way of doing it, but the fact that they chose  
6 to do it in separate statutes raises no -- or shouldn't  
7 raise a constitutional question.

8           Now, it does because they held that the double  
9 jeopardy clause prohibited the legislature in this state  
10 from doing it in this fashion. And in arguing the point  
11 in his brief, counsel for the Respondent in this case  
12 basically says that the role of the double jeopardy  
13 clause in single prosecution cases prevents a state  
14 legislature or Congress from assessing punishment over  
15 two statutes, that it has to do with the distribution of  
16 punishments.

17           And that is essentially what the case is  
18 really about. The Missouri Supreme Court never actually  
19 said it in that fashion, but that's really what their  
20 decision comes down to. And what we're arguing  
21 basically is that this is simply a matter of form over  
22 substance, that this really doesn't raise any  
23 significant constitutional issue, because the sole  
24 question here is one of legislative intent.

25           We are not dealing with a successive

1 prosecution case. If we were dealing with a situation  
2 where the State had attempted not only to assess  
3 multiple punishments under two statutes but to impose  
4 those statutes in two separate proceedings, then you  
5 would have an altogether different issue. Then you  
6 would have a Harris versus Oklahoma problem, Illinois  
7 versus Vitale, a Brown versus Ohio.

8 But in this case the question is what is the  
9 role of the double jeopardy clause insofar as it  
10 prohibits multiple punishments for the same offense.  
11 And of course we felt that the issue was resolved, had  
12 been resolved once and for all in *Albernaz versus United*  
13 *States*, where this Court in its last two sentences of  
14 the opinion says: "The question of what punishment are  
15 constitutionally permissible" -- talking about the  
16 prohibition against multiple punishments for the same  
17 offense -- "The question of what punishments are  
18 constitutionally permissible is not different from the  
19 question of what punishment the legislative branch  
20 intended to be imposed. Where Congress intended, as it  
21 did here, to impose multiple punishment, imposition of  
22 such sentences does not violate the Constitution."

23 Now, the Missouri Supreme Court on remand in  
24 *State versus Haggard* seemed to indicate that these  
25 sentences, if they meant what they said and if binding

1 on the court, would prevent the vacation of the armed  
2 criminal action statute. But essentially what they said  
3 was, this is dicta, we don't have to follow this  
4 opinion.

5 Now, of course, the Delaware Supreme Court on  
6 remand in a similar case also felt it was dicta, but  
7 also thought that it was an evolving rule that it was  
8 therefore obligated or should follow.

9 Our argument of course is that it is not dicta  
10 and, notwithstanding the concurrence in the case which  
11 said that this statement was not supported by either  
12 precedent or logic, we think it's supported by both. To  
13 be sure, I think the opinions of this Court indicate  
14 that in the double jeopardy area -- in some of its  
15 opinions I think it's been described as not exactly  
16 being a model of clarity. Justice Rehnquist referred to  
17 it as the Sargasso Sea.

18 And it is true that the various opinions have  
19 different emphasis. There are dicta running throughout  
20 the opinions. Just when you think you've figured out  
21 what the opinion holds, there is a footnote that makes  
22 you wonder.

23 But nevertheless, this Court in Whalen and  
24 again in Albernaz for really the first time took some  
25 time to attempt to explicate the rationale that

1 underlies the double jeopardy clause in single  
2 prosecution cases, and basically indicated that its  
3 role, its sole role there, was to enforce the  
4 legislative intent because it recognized that the  
5 legislative function to define crimes and prescribe  
6 offenses is not circumscribed by the Fifth Amendment.

7 QUESTION: Mr. Koppe, what if there is a  
8 conviction for first degree robbery and armed criminal  
9 robbery, which there were in this case?

10 MR. KOPPE: Correct.

11 QUESTION: And on appeal the conviction for  
12 first degree robbery is affirmed and the armed criminal  
13 conviction is reversed on evidentiary grounds or  
14 something, so there'll be a new trial. The armed  
15 criminal -- the first degree robbery conviction stands.  
16 Now there's going to be a separate proceeding about the  
17 armed criminal action.

18 MR. KOPPE: Correct.

19 QUESTION: Is it barred?

20 MR. KOPPE: Well, I think that Brown versus  
21 Ohio indicates that there are some instances where  
22 separate trials would not be precluded. I think this  
23 would be one of them. Normally, if the state can  
24 proceed with both cases, it must.

25 I think the rule in Brown, and I will



1 paraphrase it and hope I don't mess it up too badly, but  
2 basically is that where a defendant is tried and  
3 convicted of a crime which includes within it various  
4 incidents, the defendant cannot be then tried again for  
5 a crime which contains one of those incidents.

6 QUESTION: Yes.

7 MR. KOPPE: Where it is possible at the  
8 original proceeding to charge him with both -- and of  
9 course in some cases it may not be possible. In  
10 Jeffers, for example, the Court I think ruled that the  
11 defendant had elected to be tried only on one, and in  
12 fact --

13 QUESTION: Mr. Koppe, how do you answer  
14 Justice White's question? I still don't understand your  
15 answer to Justice White's question.

16 MR. KOPPE: I'll try again.

17 QUESTION: Can he be tried the second time  
18 under your view of the double jeopardy clause?

19 MR. KOPPE: If he's tried for both at one  
20 proceeding and one is set aside.

21 QUESTION: And the Supreme Court reverses the  
22 enhanced offense, the armed conviction, then they send  
23 it back for trial. Can they try him?

24 MR. KOPPE: In that instance I think they can,  
25 right.

1           QUESTION: So there would be two trials for  
2 the same offense.

3           MR. KOPPE: There would be two trials.

4           QUESTION: But then so your rule isn't limited  
5 to multiple punishments for single trials.

6           MR. KOPPE: Well, it isn't limited -- I mean,  
7 it is except in those situations that would be  
8 exceptions to the Brown rule. In other words, there are  
9 exceptions --

10          QUESTION: In those cases you would agree that  
11 for the same offense there can be successive  
12 prosecutions?

13          MR. KOPPE: Correct, that would be our  
14 position. However, the chances of that happening it  
15 seems to me would be very rare.

16          QUESTION: Why?

17          MR. KOPPE: I'm not aware of its happening.

18          QUESTION: Why would they be rare?

19          MR. KOPPE: But regardless, that's correct.

20 In other words, we're not asking for immunity from the  
21 successive prosecution rule in Brown, but Brown does  
22 admit of some exceptions. That's all we're saying.

23          QUESTION: You're only asking for the immunity  
24 from that rule where one of the convictions for the same  
25 offense has been affirmed.

1 MR. KOPPE: Right.

2 QUESTION: May I ask -- excuse me.

3 QUESTION: Go ahead.

4 QUESTION: May I ask a different question.

5 Supposing you have a man who is convicted of both

6 offenses, as is true here. When you have other

7 collateral consequences, such as parole or maybe

8 aggravating circumstances for a death penalty or

9 something like that, is this treated as having been

10 convicted of two felonies or one?

11 MR. KOPPE: For purposes -- in the State of

12 Missouri --

13 QUESTION: Yes.

14 MR. KOPPE: -- state law would make no

15 distinction here. For example, there are various

16 possible collateral consequences. The most obvious is

17 the recidivism statute. However --

18 QUESTION: And this would be two felonies for

19 that purpose?

20 MR. KOPPE: Well, it would not be, for this

21 reason. There are three categories under the Recidivism

22 Act. The first is a prior offender, which requires only

23 one prior. The third category is dangerous, which

24 requires only one prior dangerous. The middle category

25 is persistent, which does require two.

1           However, the statute expressly states that you  
2 may not use more than one arising out of the same  
3 transaction. But that really gets to the argument that  
4 I was making. If there is some constitutional problem  
5 with the state labeling -- and I'm saying this is what  
6 we're talking about, is labels. If there is some  
7 constitutional inhibition based on the state's labeling  
8 of conduct which the state might otherwise have  
9 characterized as one offense, labeling that as two, it  
10 would be because of possible collateral consequences.

11           But what I argue in my brief under subsection  
12 D is this: that we could make this a single crime,  
13 punishable by a single extended sentence, and still  
14 bring into account those collateral consequences. For  
15 example, take the recidivism statute. At the present  
16 time Missouri does not allow you to use two for purposes  
17 of the Persistent or Dangerous Offender Act if they  
18 arise from the same transaction.

19           Suppose, however, that the state were to  
20 tomorrow amend the statute and make no distinction.  
21 Then you might say that the defendant, by receiving two  
22 convictions for this particular course of conduct, is in  
23 a worse position, and he would be. But what I'm saying  
24 is, under the Blockburger rule what the State of  
25 Missouri could do is go back and rewrite the statute and



1 make it a single offense punishable by a single extended  
2 statute -- excuse me -- extended sentence, but then  
3 say: Nothing to the contrary withstanding in the  
4 statute on the Persistent and Dangerous Offender Act, a  
5 conviction which is enhanced because of the defendant's  
6 use of a weapon may serve to implement the provisions of  
7 the Persistent and Dangerous Offender Act.

8           Another possible collateral consequence would  
9 come into effect, for example, if the defendant was  
10 reconvicted and took the stand. The argument would be,  
11 well, now you have two convictions instead of one that  
12 he could be impeached with. Present Missouri law would  
13 allow only impeachment on the basis of actual  
14 convictions. However, once again the state could simply  
15 make it a single sentence and include as part of the  
16 punishment the fact that, nothing withstanding in any  
17 other statutes be -- a sentence which has been enhanced  
18 because of the defendant's use of the weapon, that  
19 enhancement may be used to impeach his credibility.

20           So essentially what I'm saying is, you can  
21 accomplish -- anything that you can accomplish in two  
22 statutes, you can accomplish in one. And so if there's  
23 going to be any inquiry with respect to the punishment  
24 imposed here, it would be whether or not the total  
25 punishment, the total punishment, whether you're talking

1 about direct punishment or collateral consequences,  
2 whether that punishment would be excessive or whether  
3 that punishment would be cruel and unusual.

4 But this -- you know, that involves some other  
5 provision of the Constitution, the Eight Amendment.  
6 That is not the Fifth Amendment. Our argument is  
7 basically that when you're talking about the Fifth  
8 Amendment in single prosecution cases that the role of  
9 the double jeopardy clause acts as a restraint on courts  
10 and prosecutors and protects a defendant against  
11 receiving more punishment than what the legislative  
12 branch intended he receive.

13 Now, when we made this argument in the Supreme  
14 Court basically what they said, among other things, was  
15 that, well, you have created a rule which has immunized  
16 the legislative branch from the double jeopardy clause.  
17 And we think really that that begs the question, because  
18 if the protection, as we argue, is designed to ensure  
19 that a defendant does not receive more punishment than  
20 what the legislature imposed, it really doesn't make any  
21 sense to say, well, you've immunized the legislature  
22 from the scope of the clause, because basically what  
23 we've said is that the clause is designed to protect a  
24 defendant from courts and prosecutorial overreaching.

25 And in this case, unlike many of the others

1 that this Court has had to decide in this area, there is  
2 no question about the legislative intent. Not only does  
3 the statute, like its federal counterpart -- not only  
4 does the statute indicate that the punishment shall be  
5 in addition to the punishment for the underlying felony,  
6 but the Missouri --

7 QUESTION: You want us to interpret the  
8 Missouri statute contrary to what the Missouri court  
9 interpreted it?

10 MR. KOPPE: No, Your Honor. What I'm asking  
11 is that this Court --

12 QUESTION: I thought that's what you just  
13 said.

14 MR. KOPPE: -- interpret it precisely the way  
15 the court has interpreted it. What I was starting to  
16 say was, not only does the statute --

17 QUESTION: Well, you put "precisely" in and  
18 you agree?

19 MR. KOPPE: Right, because what I was saying  
20 is, not only does the statute on its face state that the  
21 punishment is to be in addition to, but the Supreme  
22 Court --

23 QUESTION: And here is a state supreme court  
24 passing upon one of its statutes, without mentioning the  
25 federal Constitution or any other thing, and you want us

1 to upset that, and take your word for what the statute  
2 says over the Supreme Court of Missouri.

3 MR. KOPPE: Well, I was trying to make one  
4 point. I'll make two.

5 QUESTION: Please.

6 MR. KOPPE: What I was starting to say was,  
7 not only does the statute, the armed criminal action  
8 statute, state that the punishment is to be in addition  
9 to, but it has been construed in that fashion at least  
10 on four occasions by the Missouri Supreme Court.

11 Now, with respect to your question, again  
12 getting back to the Court of Appeals' opinion, the Court  
13 of Appeals' authority was state cases, but those state  
14 cases, the two Sours cases and the Haggard cases, were  
15 decided solely on federal constitutional grounds. And  
16 what I am saying is, in order to determine exactly what  
17 the federal question was you need to look at these  
18 cases, these two Sours cases and the Haggard cases.

19 Obviously, if you look no farther than the  
20 Court of Appeals opinion you might be somewhat puzzled,  
21 because it doesn't mention the Constitution. But the  
22 statutes that those cases -- excuse me -- the cases --

23 QUESTION: I didn't know I was required to  
24 look anyplace else for the interpretation of a state law  
25 than to the state court.



1           MR. KOPPE: Well, it isn't the interpretation  
2 of the state law that we're arguing about. It is -- the  
3 Supreme Court in the State of Missouri and the  
4 Respondent, for that matter, all agree on the  
5 interpretation of the state statute. We all agree that  
6 the legislature intended that the defendant receive  
7 punishment under both statutes.

8           The question, however, is can the state  
9 constitutionally enforce that intent.

10          QUESTION: May I ask you another question  
11 about that. I guess the language that troubles the  
12 Missouri Supreme Court is the language, "is also guilty  
13 of the crime of armed criminal action, and upon  
14 conviction" and so forth. If they took those words out  
15 it would be clearly just an enhancement statute.

16          And you mentioned the difficulty of six years  
17 of straightening out the Supreme Court. I just wonder  
18 why you didn't go back to the legislature and say, all  
19 you have to do is strike three or four words out of this  
20 statute and our problem is solved, because it's  
21 perfectly clear that an enhancement statute is  
22 constitutionally unobjectionable.

23          MR. KOPPE: Well, in the first instance, it is  
24 our position that in a sense it is an enhancement  
25 statute. Its effect is exactly the same --

1           QUESTION: So in other words, the effect could  
2 be the same and for prosecutorial purposes for the State  
3 of Missouri you'd be perfectly happy not to define it as  
4 a separate offense, but make it perfectly clear that it  
5 is not only the functional equivalent of an enhancement  
6 statute, but it should be amended to be nothing more  
7 than an enhancement statute.

8           MR. KOPPE: That's correct.

9           QUESTION: And if you did that you'd avoid the  
10 problem that Justice White identified.

11          MR. KOPPE: We would have avoided the problem  
12 altogether. The problem, of course, is in attempting to  
13 get the legislature to pass a particular act in a  
14 particular form.

15          QUESTION: All it is, just a clarifying  
16 amendment, really.

17          MR. KOPPE: Well, as simple as it sounds, I  
18 think as this Court perhaps knows --

19          QUESTION: It's easier to deal with the  
20 Missouri Supreme Court?

21          MR. KOPPE: -- it's easier said than done.

22          QUESTION: There are even more people to  
23 convince in the legislature than on the Supreme Court.

24          MR. KOPPE: That may be true, Your Honor.

25          QUESTION: And it wouldn't help you out very

1 much about past convictions, either.

2 MR. KOPPE: That's the whole point. If you  
3 said, well, what would be the impact, I mean, if we  
4 didn't have in excess of 100 cases where the defendants  
5 lost their armed criminal action convictions, in a sense  
6 it really wouldn't be that big of an impact. The fact  
7 remains, however, that this statute has been in effect  
8 for some six years and, as this Court knows from simply  
9 the cases that are presently pending in certiorari --

10 QUESTION: Of course, the funny thing about  
11 this case is that without the enhancement you have a  
12 life sentence available to the trial judge anyway. In  
13 this particular case you didn't even need the  
14 enhancement statute.

15 MR. KOPPE: That's true.

16 QUESTION: It's sort of a tempest in a  
17 teapot.

18 MR. KOPPE: And if in fact the court had  
19 vacated the ten-year sentence, there wouldn't have been  
20 a problem.

21 QUESTION: They could have done that  
22 consistently with the Missouri court's understanding of  
23 the federal Constitution, even if that may be wrong.

24 MR. KOPPE: That's correct, that's correct.  
25 But again, what it comes down to and what we're saying

1 is, admittedly if the legislature had done this a little  
2 different way there wouldn't have been this problem, we  
3 wouldn't be here; this Court would be listening to  
4 another case.

5           The fact remains, the legislature did it this  
6 way, and so the question is whether in single  
7 prosecution cases the Fifth Amendment's prohibition  
8 against multiple punishments serves as some literary  
9 critique on how the legislature chose to enact the  
10 enhancement statute. In other words, we're saying that  
11 this is an enhancement statute. It may not be fashioned  
12 in the way that you would normally think of as an  
13 enhancement statute, but it accomplishes precisely the  
14 same thing. It accomplishes no more than they could  
15 have accomplished in a single statute.

16           QUESTION: But the other side of that same  
17 argument is, if one construed the Blockburger rule in  
18 the old-fashioned way -- and I understand that the  
19 Albernaz case supports you very strongly -- and said,  
20 well, you just make it an enhancement statute when you  
21 do, that rule of law would have provided no obstacle to  
22 the trial judge giving this man a life sentence, no  
23 obstacle to the appellate court setting aside the  
24 shorter sentence instead of the longer sentence, and no  
25 obstacle to the legislature giving you exactly what you



1 want.

2 MR. KOPPE: Right.

3 QUESTION: So the constitutional rule is no  
4 problem, except when they draft a kind of a strange  
5 statute like this.

6 MR. KOPPE: Right. And of course, at the time  
7 the statute was enacted I think the legislators, if they  
8 considered this question at all, thought that the  
9 Blockburger rule had been satisfied because in the  
10 abstract, in the abstract -- and I think Justice  
11 Rehnquist's opinion in Whalen goes into great detail on  
12 this -- in the abstract it does satisfy the test.

13 However, as applied in any given situation,  
14 obviously whatever felony you prove up is not going to  
15 require any additional elements. But in the abstract,  
16 as in Whalen, for example, which involved felony murder  
17 and I think a rape, the underlying felony did not have  
18 to be rape. It could have been something else. And  
19 likewise, the homicide didn't require a rape.

20 So in the abstract it did meet the statute,  
21 and of course that's what the Missouri Supreme Court  
22 said at first, and then they basically altered their  
23 method of applying the Blockburger rule. But what we're  
24 saying is that the Blockburger rule is, as this Court  
25 said it was in Iannelli, in Whalen and in Albemaz. In

1 single prosecution cases, anyway, it's simply a rule to  
2 define legislative intent.

3           And basically what we're saying is, it can't  
4 be both. It can't on the one hand be a rule -- not  
5 consistently. It can't on the one hand be a rule which  
6 seeks to ascertain legislative intent and then, when it  
7 finds it, turns it inside out and defeats that intent.  
8 And of course, that's what the Supreme Court of Missouri  
9 used Blockburger for. It applied Blockburger not as  
10 rule of statutory construction, but as a constitutional  
11 litmus test.

12           QUESTION: When you emphasize what you call  
13 the clarity of the intent of the Missouri legislature,  
14 you are aiming, I take it, at the opening left in  
15 Whalen, where the Court said, "In the absence of a clear  
16 indication of contrary legislative intent." And you say  
17 there is a clear indication of contrary legislative  
18 intent here.

19           MR. KOPPE: Right. And there's also a  
20 statement in Whalen that we rely on which says, in  
21 discussing the Blockburger test, after stating that it  
22 is a rule of statutory construction, it says, and where  
23 the offenses are the same under that test -- and that's  
24 what the Missouri Supreme Court said here -- where they  
25 are the same, cumulative sentences are not permitted

1 unless elsewhere specifically authorized by Congress.

2 Well, you substitute the words "state  
3 legislature" for "Congress," and again that holding  
4 supports us in its entirety. But again, the Missouri  
5 Supreme Court elected not to follow that particular  
6 language on the belief that the conclusion urged by the  
7 state would mean that the conclusion urged by the state  
8 would mean that the legislature would have been  
9 immunized from the scope of the double jeopardy clause.  
10 And that we say really begs the question.

11 Thank you.

12 CHIEF JUSTICE BURGER: Mr. Gardner.

13 ORAL ARGUMENT OF GARY L. GARDNER, ESQ.

14 ON BEHALF OF RESPONDENT

15 MR. GARDNER: Mr. Chief Justice, may it please  
16 the Court:

17 The question is whether the multiple  
18 punishment for the same offense protection of the double  
19 jeopardy clause prohibits the imposition of punishment  
20 which the legislature intended under two statutes that  
21 are the same offense, as that constitutional phrase is  
22 defined in Blockburger.

23 QUESTION: Why isn't it -- why do you think  
24 this issue was not decided in Albernaz?

25 MR. GARDNER: Because in Albernaz the two

1 statutes under which punishment was imposed were  
2 separate offenses. That is, they each did not have an  
3 element -- they each did not have a different element.  
4 The two statutes under which punishment was imposed in  
5 this case --

6 QUESTION: Well, that should make it even more  
7 of a violation.

8 MR. GARDNER: More what, sir?

9 QUESTION: Make it even more of a violation of  
10 the double jeopardy clause.

11 Anyway, you think the offenses are just  
12 different. Here they're --

13 MR. GARDNER: Here they are the same; in  
14 Albernaz they were separate offenses, in the sense that  
15 in this case there's no element in the underlying felony  
16 which is not in the greater felony. Because that is the  
17 case, Albernaz is not controlling. It did not require  
18 the Missouri courts to uphold the imposition of  
19 punishment under each of the two statutes.

20 The Missouri courts have made three  
21 determinations about armed criminal action and first  
22 degree robbery. They first determined what the elements  
23 of those two crimes are; secondly, they determined that  
24 they are the same offense; and thirdly, they determined  
25 that the Missouri General Assembly intended for



1 punishment to be imposed under each of the two  
2 statutes.

3           These three determinations are binding upon  
4 this Court. The double jeopardy clause does not tell a  
5 state court what the elements of its state statutes  
6 are. Because it does not, it is not a substantive rule  
7 of law.

8           The double jeopardy clause does not tell a  
9 state court whether two of its state statutes are  
10 separate offenses or the same offense. It only tells a  
11 state court what test to use in making that  
12 determination, and that test is the Blockburger test,  
13 and the double jeopardy --

14           QUESTION: And the Blockburger test is that  
15 the defendant can't receive two sentences, or is it that  
16 he can't be sentenced to more than he could have gotten  
17 on one conviction?

18           MR. GARDNER: It is that he can't receive two  
19 sentences under two statutes which satisfy the test.

20           QUESTION: Here he got concurrent sentences.  
21 Under each conviction, as I understand it, he could have  
22 been given life; is that right?

23           MR. GARDNER: That's right.

24           QUESTION: And instead of which, he got 10 on  
25 one, 15 on the other, but to be concurrent.

1 MR. GARDNER: That's right.

2 The clause prohibits the imposition of  
3 punishment under two statutes, whether the punishment is  
4 concurrent or not, when the two statutes are the same  
5 offense.

6 QUESTION: Mr. Gardner, the Solicitor General  
7 has filed a brief indicating that multiple punishment  
8 only occurs if the punishment exceeds the statutory  
9 maximum for a single offense. Would you like to comment  
10 on the position taken by the Solicitor General?

11 MR. GARDNER: The statutory maximum in each of  
12 these offenses is life imprisonment. Perhaps the only  
13 time, under the Solicitor General's suggestion, there  
14 would be multiple punishment would be, I think, when  
15 there are two consecutive life sentences. But it does  
16 not matter whether the sentences are concurrent or  
17 consecutive or less than the statutory maximum. What  
18 matters is when sentences are imposed under two statutes  
19 that satisfy the Blockburger test, regardless of the  
20 length of the sentence.

21 The three determinations -- the third  
22 determination that the Missouri Supreme Court made which  
23 is binding on this Court is that the Missouri General  
24 Assembly intended for punishment to be imposed under  
25 each of these two statutes. The double jeopardy clause

1 does not tell a state court whether its state  
2 legislature intended for punishment to be imposed under  
3 two statutes --

4 QUESTION: Would you be making the same  
5 argument if he got ten years on each to run  
6 concurrently?

7 MR. GARDNER: Yes, sir, I would. I would make  
8 the same argument if he got three and five --

9 QUESTION: Well, where's the multiple  
10 punishment if he serves only ten years? Where's the  
11 multiple punishment?

12 MR. GARDNER: The multiple punishment is in  
13 the imposition of the sentences.

14 QUESTION: Do you suggest that it may have an  
15 effect on his parole, for example, a negative effect?

16 MR. GARDNER: Well, the armed criminal action  
17 statute prohibits parole for three calendar years. So  
18 --

19 QUESTION: If he's got two of them instead of  
20 one, even though they're concurrent, would that impair  
21 his, or affect his parole in Missouri law?

22 MR. GARDNER: Assuming there wasn't that  
23 restriction on parole eligibility, I don't think it  
24 makes any difference how the two sentences affect his  
25 parole. Parole eligibility, collateral consequences,

1 the length of the sentence, are all essentially  
2 unimportant to the violation. The violation occurs when  
3 sentence is imposed under two statutes that satisfy the  
4 test.

5           QUESTION: Mr. Gardner, I understand you  
6 apparently want to come within the language in a prior  
7 case that talks about multiple punishment for the same  
8 offense. I wonder if you really aren't arguing that the  
9 double jeopardy clause prohibits multiple convictions  
10 for the same offense. That seems to be the heart of  
11 your argument.

12           MR. GARDNER: The Missouri Supreme Court I  
13 think felt that, because it vacated both the conviction  
14 and the sentence. I want to say that the reason the  
15 Court chose to vacate the armed criminal action  
16 conviction and sentence rather than the underlying  
17 felony sentence was purely a matter of remedy. It did  
18 not feel that the Constitution compelled the vacation of  
19 one sentence rather than the other. It had no aversion  
20 to the crime of armed criminal action.

21           It chose to vacate the armed criminal action  
22 sentence because in over 95 percent of the cases it saw  
23 the shorter of the two sentences was imposed on armed  
24 criminal action. This is one of the few unusual cases  
25 where the longer of the two sentences was imposed by the



1 jury and the judge on armed criminal action.

2 QUESTION: Under your view would you concede,  
3 then, that the legislature could enact sentence  
4 enhancement provisions for a single conviction?

5 MR. GARDNER: Yes, it could.

6 The Missouri General Assembly's intent in  
7 enacting the armed criminal action was to authorize the  
8 imposition of punishment, the imposition of additional  
9 punishment for the use of a weapon to commit a felony.  
10 The Missouri Supreme Court recognized that intent, it  
11 recognized the wisdom of that intent. But it directed  
12 the General Assembly how to constitutionally carry out  
13 that intent.

14 QUESTION: What policies do you think are  
15 advanced by prohibiting multiple convictions or multiple  
16 punishments under your view?

17 MR. GARDNER: Well, the policy is that there  
18 shall be no multiple punishment for the same offense,  
19 and when we have two statutes that --

20 QUESTION: Why? What are the interests at  
21 stake? Why not?

22 MR. GARDNER: The Constitution assumes that  
23 out of a multiplicity of statutes, some of them may only  
24 differently describe the same offense.

25 QUESTION: What was the concern of the framers

1 of the Constitution in putting in a double jeopardy  
2 clause?

3 MR. GARDNER: One of their concerns was to  
4 ensure that there was no multiple punishment for the  
5 same offense.

6 QUESTION: Where does it speak about  
7 punishments in the double jeopardy clause?

8 MR. GARDNER: Well, the clause itself doesn't  
9 -- the clause itself says a person shall not be twice  
10 put in jeopardy for the same offense, and this Court has  
11 said that one of the three parts of that clause is that  
12 there shall be no multiple punishment for the same  
13 offense.

14 QUESTION: Where do you find evidence of the  
15 concern of the framers for preventing multiple  
16 punishment for multiple convictions?

17 MR. GARDNER: I think the first draft of the  
18 Fifth Amendment reflects more clearly than the final  
19 draft that that was their concern. I think some of the  
20 comments of the representatives at the convention  
21 reflect more clearly that the concern was for multiple  
22 punishment for the same offense.

23 QUESTION: You say the convention?

24 MR. GARDNER: I meant, Your Honor, when the  
25 states gathered to ratify the Bill of Rights.

1 QUESTION: Weren't they ratified in separate  
2 legislatures throughout the 13 states?

3 MR. GARDNER: I think they were, Your Honor.  
4 I'm thinking of a representative from New York.

5 QUESTION: In the New York debate?

6 MR. GARDNER: Yes.

7 Punishment may not be imposed under two  
8 statutes that are the same offense, even if the  
9 legislature has authorized it, because the double  
10 jeopardy clause is a restraint or a limitation upon the  
11 power of the legislature. The clause limits the power  
12 of the legislature to authorize punishment under two  
13 statutes that are the same offense. It does not limit  
14 the power of the legislature to define a crime or to fix  
15 the punishment for that crime.

16 The Missouri General Assembly defined the  
17 crime of armed criminal action as the use of a weapon to  
18 commit a felony. The Missouri Supreme Court did not  
19 find that crime to be unconstitutional. The Missouri  
20 General Assembly fixed the punishment for armed criminal  
21 action at three years to life imprisonment. The  
22 Missouri Supreme Court did not find that punishment to  
23 be unconstitutional.

24 But the General Assembly authorized the  
25 punishment for armed criminal action to be in addition

1 to the punishment for the underlying felony. This is  
2 the portion --

3 QUESTION: I gather your position would be,  
4 had the sentence for armed criminal action been less  
5 than that imposed for the robbery that it would still be  
6 -- the sentence for the armed criminal action would  
7 still be unconstitutional?

8 MR. GARDNER: That's my position, Your Honor.

9 The only portion of the statute which was held  
10 to be unconstitutional was the multiple punishment  
11 provisions. Sentences for armed criminal action alone  
12 exist in Missouri. Men have been sentenced to serve a  
13 number of years in the penitentiary upon only a  
14 conviction for armed criminal action. But sentences for  
15 both armed criminal action and the underlying felony do  
16 not exist.

17 Because the intent to punish additionally for  
18 the use of a weapon may be constitutionally carried out  
19 in an enhancement statute does not mean that the manner  
20 in which this intent was carried out in the armed  
21 criminal action statute becomes constitutional, and it  
22 does not mean that the multiple punishment for the same  
23 offense protection doesn't exist.

24 QUESTION: Well, carried to a logical extreme,  
25 I suppose if there had been a sentence imposed on the



1 armed criminal action conviction, but suspended, he  
2 never had to serve a day under it, you'd still say it  
3 was unconstitutional?

4 MR. GARDNER: If a sentence was imposed, it  
5 would be.

6 QUESTION: I hate to be technical, but you  
7 keep talking about punishment and the double jeopardy  
8 clause does not say punishment. "Shall not be held to  
9 answer."

10 MR. GARDNER: Well, Your Honor, one of the  
11 three protections of the clause is that there shall be  
12 no multiple punishment for the same offense.

13 QUESTION: Where is that in the Constitution.

14 MR. GARDNER: That is what this Court has said  
15 to be --

16 QUESTION: My question was, where was it in  
17 the Constitution.

18 MR. GARDNER: It comes from the Fifth  
19 Amendment.

20 QUESTION: The Fifth Amendment says "called to  
21 answer," doesn't it? "Shall not be held to answer,"  
22 isn't it?

23 MR. GARDNER: The multiple punishment --

24 QUESTION: Well, you read your copy. Now  
25 we'll read mine.

1           MR. GARDNER: It does. The multiple  
2 punishment words are not in the Fifth Amendment.

3           QUESTION: Right.

4           MR. GARDNER: This Court has said that the  
5 Fifth Amendment means that.

6           QUESTION: Right.

7           MR. GARDNER: The Blockburger test is a rule  
8 of constitutional magnitude which prohibits the  
9 imposition of punishment under two statutes that are the  
10 same offense, even if the legislature intended it. It  
11 is not solely a rule of statutory construction which,  
12 because it serves the discerned legislative intent, may  
13 be overcome by a clear indication of a contrary  
14 legislative intent.

15           It is both a rule of constitutional magnitude  
16 and a rule of statutory construction, but in its role as  
17 a rule of statutory construction it is secondary to and  
18 derivative from the constitutional magnitude rule.

19           QUESTION: Would you say it's a rule of  
20 statutory construction even in the case where the state  
21 supreme court is responsible as the final arbiter of  
22 what a statute means?

23           MR. GARDNER: Only in a certain very limited  
24 sense. The clause does not tell a state court what the  
25 elements of its statutes are. The clause does not tell

1 a state court whether it's -- but it tells the state  
2 court what test to use once it has found those elements  
3 to determine whether those two statutes are the same  
4 offense or separate offenses.

5           The clause does not tell a state court whether  
6 its state legislature intended for punishment to be  
7 imposed under two statutes. But it does require the  
8 state court to use a certain presumption in determining  
9 that intent.

10           QUESTION: Why do you say that, if it's over  
11 and above the constitutional import of the statute? I  
12 would think that the state court would be perfectly free  
13 to use whatever canons of statutory construction it felt  
14 were desirable, so long as it didn't trench on the  
15 interpretation of the constitutional aspect of the  
16 provision.

17           MR. GARDNER: The canon that I'm referring to  
18 as the presumption that it's required to use is merely  
19 the canon that the state legislature acts with the  
20 Constitution in mind.

21           QUESTION: Well, I take it, though, Mr.  
22 Gardner, if your Supreme Court had taken this very  
23 statute, this very one, and said, well, we construe that  
24 statute to mean that if there's also a conviction for  
25 armed criminal action, that's merely a basis for

1 enhancement of the sentence imposed for the underlying  
2 felony, if they had done that, you couldn't -- you  
3 wouldn't be here, I gather?

4 MR. GARDNER: Yes, sir, I mean that. If they  
5 had done that --

6 QUESTION: You would not be here.

7 MR. GARDNER: -- we would not be here, neither  
8 the state nor I.

9 QUESTION: What if the Supreme Court of  
10 Missouri were to write an opinion saying, we know  
11 perfectly well that our legislature doesn't give a damn  
12 about the United States Constitution and we know that  
13 it's going to try to violate it every chance it gets,  
14 and so we're going to construe all of its acts that way,  
15 realizing that it may well have intended to trench on  
16 constitutional prohibitions.

17 As a rule of statutory construction, the  
18 Supreme Court of Missouri is perfectly free to follow  
19 that rule, isn't it?

20 MR. GARDNER: It is not free -- I think Whalen  
21 is the answer to the question. It is not free to  
22 construe, in the absence of an express declaration of  
23 legislative intent.

24 QUESTION: But Whalen was this Court sitting  
25 as interpreting the intent of Congress, and I would



1 think the Supreme Court of Missouri would have the same  
2 relationship as to intent to the Missouri legislature as  
3 this Court has to Congress.

4 MR. GARDNER: I think a state court is not  
5 free to construe that its state legislature intended for  
6 punishment to be imposed under two statutes that are the  
7 same offense in the absence of an express declaration of  
8 that intent.

9 QUESTION: Let me read you what the Court said  
10 in Whalen, that Mr. Justice Rehnquist has just referred  
11 to: "Accordingly" -- this is at 692 -- "where two  
12 statutory provisions proscribe the same offense, they  
13 are construed not to authorize cumulative punishments in  
14 the absence of a clear indication of contrary  
15 legislative intent."

16 Now, what bearing does that have on your  
17 case?

18 MR. GARDNER: In this case we have the  
19 presence of a clear indication of a contrary legislative  
20 intent, the part in the armed criminal action statute  
21 that authorized guilt of armed criminal action and  
22 punishment in addition to the underlying felony. But  
23 the overcoming of this presumption that the legislature  
24 does not intend to punish under two statutes that are  
25 the same offense does not mean that it is

1 constitutionally permissible to do so, because the  
2 clause is a restraint upon the power of the legislature  
3 to make that authorization, to authorize punishment  
4 under two statutes that are the same offense.

5 QUESTION: Well then, do you think that  
6 statement that I have just read from Whalen is an  
7 erroneous statement of the law?

8 MR. GARDNER: It is not erroneous, Your  
9 Honor. It only goes so far. It doesn't state the  
10 entire law. It applies directly to the situation where  
11 two statutes are the same offense and there's no express  
12 declaration of Congress' intent to punish under each.  
13 As far as that is concerned, the statement is correct.

14 But where you have an express declaration of  
15 an intent to punish under each, the statement doesn't  
16 state all of the law. The rest of the law is that the  
17 authorization cannot be made because the clause is a  
18 restraint upon the power of the legislature to make that  
19 authorization.

20 QUESTION: Having said that, don't you run  
21 into the last two sentences of Albernaz?

22 MR. GARDNER: I sure do.

23 QUESTION: Are they wrong?

24 MR. GARDNER: They're correct in the context  
25 of Albernaz only.

1           QUESTION: Well, I thought Albernaz, the last  
2 page of Albernaz, just embraced what Justice Blackmun  
3 said in Whalen.

4           MR. GARDNER: It did. He's the author of  
5 those two phrases from Whalen. However, you must keep  
6 in mind the facts of Albernaz and the difference between  
7 those facts and the facts of this case.

8           QUESTION: One of the last two sentences of  
9 Albernaz is plainly wrong, of course. It says: The  
10 question of what punishments are constitutionally  
11 permissible is not different from the question of what  
12 punishment the legislative intended to be imposed."  
13 That's plainly wrong insofar as it ignores the Eighth  
14 Amendment, for example, isn't that true?

15          MR. GARDNER: That's correct.

16          QUESTION: And surely that sentence wasn't  
17 necessary to the decision in that case, was it?

18          MR. GARDNER: Which makes the Albernaz opinion  
19 not controlling authority for the Missouri Supreme  
20 Court. It makes the two sentences in Albernaz a general  
21 expression of law which must be understood in the  
22 context of that case, that is the two statutes for  
23 separate offenses. It is correct when you have separate  
24 offenses, because of course there's no prohibition for  
25 punishing under two statutes that are separate

1 offenses.

2           It's just not correct when you have the same  
3 offense, as you have in this case.

4           Missouri claims that in the single prosecution  
5 context the Blockburger test is solely a rule of  
6 statutory construction, limited to assuring that the  
7 courts do not impose more punishment than the  
8 legislature has authorized. On the other hand, it  
9 claims that in the successive prosecution context it's a  
10 rule of constitutional magnitude which prohibits the  
11 imposition of punishment under two statutes even if that  
12 is what the legislature intended.

13           It makes this claim because it believes that  
14 in the successive prosecution context the clause  
15 embodies a policy other than that of avoiding multiple  
16 punishment. Of course, in a reprosecution after an  
17 acquittal the clause embodies a policy of not permitting  
18 the state an opportunity to convict those who have  
19 already been found to be not guilty.

20           But in a reprosecution after a conviction the  
21 clause embodies no policy other than that of avoiding  
22 multiple punishment. In Brown against Ohio this Court  
23 stated that it was avoiding multiple punishment which  
24 came about as the result of a reprosecution after  
25 conviction. It specifically disavowed it was avoiding



1 the repetition of proof or having the defendant undergo  
2 two trials.

3 Missouri's request for you to declare the  
4 Blockburger test to be solely a rule of statutory  
5 construction lays the foundation of the eventual  
6 abolition of the protection against reprosecution after  
7 conviction, in addition to the abolition of the  
8 protection against multiple punishment for the same  
9 offense.

10 In addition to Albernaz and Whalen, Missouri  
11 has cited other decisions of this Court which it claims  
12 to be controlling authority which should have required  
13 the Missouri courts to affirm the armed criminal action  
14 convictions. One of those is Brintley against  
15 Michigan. In Brintley against Michigan this Court  
16 dismissed an appeal for want of a substantial federal  
17 question.

18 That case is not controlling authority for the  
19 same reason that Albernaz is not controlling authority:  
20 The two statutes in Michigan were construed to be, by  
21 the Michigan court, to be separate offenses, not the  
22 same offense. Therefore, in dismissing the appeal in  
23 Brintley against Michigan this Court was merely applying  
24 an established principle to a particular fact situation,  
25 the principle being the punishment may be imposed for

1 two statutes that are separate offenses, the particular  
2 situation being the two Michigan statutes being  
3 construed to be separate offenses.

4 In conclusion, to declare the Blockburger test  
5 to be solely a rule of statutory construction is to  
6 abandon to the legislature this Court's constitutional  
7 duty to determine the meaning of the constitutional  
8 phrase "the same offense." If it is solely a rule of  
9 statutory construction, then it is the legislature that  
10 determines the meaning of the constitutional phrase "the  
11 same offense."

12 By merely declaring its intent to punish under  
13 two statutes that otherwise would be the same offense,  
14 the legislature can make those statutes to be not the  
15 same offense. By declaring the multiple punishment  
16 provision of the armed criminal action statute to be in  
17 violation of the double jeopardy clause, this Court can  
18 bring the legislative power to the judgment of the  
19 superior power of the Constitution and yet still  
20 recognize the power of the legislature to define crimes  
21 and fix punishment.

22 Thank you.

23 CHIEF JUSTICE BURGER: Very well.

24 Do you have anything further, Mr. Koppe?

25 MR. KOPPE: If I haven't exhausted my rebuttal

1 time.

2 CHIEF JUSTICE BURGER: You have three  
3 minutes.

4 MR. KOPPE: Thank you.

5 REBUTTAL ARGUMENT OF PHILIP M. KOPPE, ESQ.,  
6 ON BEHALF OF PETITIONER

7 MR. KOPPE: Well, just one thing I did mean to  
8 add, and that simply is I think, as I argued in my  
9 opening remarks, this issue is simply a case of form  
10 over substance, and I think the punishments assessed in  
11 this case illustrate this better than anything else.  
12 Basically, what the Respondent says is that the double  
13 jeopardy clause as applied to single prosecution cases  
14 prevents the legislature from distributing punishment it  
15 might otherwise have assessed over two statutes.

16 Now, what possible rationale could there be  
17 for that? Look at this particular case. If the state  
18 legislature had done the statute the way the Missouri  
19 Supreme Court says they should have, what they would  
20 have done was allowed the assessment of an additional  
21 term of years onto the original robbery sentence. If  
22 they had accomplished that, what the Defendant would  
23 have received was a ten-year sentence for robbery,  
24 enhanced by 15 years, making a total of 25 years.

25 But since the statutes assess the punishment

1 separately, the judge was given the discretion to run  
2 those sentences concurrently. The Defendant received  
3 the benefit of those concurrent sentences and wound up  
4 with 15 years. He's actually in a better position than  
5 he would have been had --

6 QUESTION: But under the other statute you  
7 propose he could have also imposed the same sentence.  
8 Nothing in the statute -- none of these statutes limit  
9 the discretion of the judge, except he has to give at  
10 least three years under one and five years under the  
11 other.

12 MR. KOPPE: That's true.

13 QUESTION: So really, he could have done -- he  
14 had total freedom under either this statute or the  
15 substitute you propose.

16 MR. KOPPE: Well, except that his freedom was  
17 constrained by what the jury returned. He could not  
18 have assessed a penalty in excess of whatever it was the  
19 jury -- the jury in this instance decided the  
20 punishment. He had the discretion --

21 QUESTION: Well, but the jury had to find him  
22 guilty of robbery in order to find him guilty of armed  
23 criminal --

24 MR. KOPPE: Right, and the jury assessed the  
25 punishment under both statutes, and the judge's



1 discretion was limited to either running the sentences  
2 concurrently or consecutively. He also had the  
3 discretion, of course, to reduce the sentences,  
4 discretion that is very rarely utilized.

5 QUESTION: Do you rely at all on the clarity  
6 of the statement of the intent of the legislature to  
7 define two separate -- to have an enhancement situation  
8 where he can add to the penalty? Does it make any --  
9 would it make any difference if you had two statutory  
10 provisions buried in different parts of the criminal  
11 code, nobody found until a particular trial, and the  
12 prosecutor thought he'd like to get a severe punishment  
13 in a particular case and so he tried to prosecute under  
14 both statutes, but there was nothing to show what the  
15 legislature thought? Then say, the Court might say,  
16 well, as a matter of state law, as Justice Rehnquist  
17 suggested, we construe the intent of the legislature to  
18 be we want double punishment whenever there are two  
19 descriptions of the same offense that can be found in  
20 the code. That would be permissible, I suppose?

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1           MR. KOPPE: I think that would be permissible,  
2 and I think some states, in reliance on this Court's  
3 opinion in Alverness, have done precisely that. For  
4 example, looking at the punishment scheme to find  
5 legislative intent. But this Court's inquiry is --

6           QUESTION: So there is no real requirement of  
7 any -- there is no federal requirement about the way the  
8 state legislature must express its intent. Whenever  
9 there are two descriptions of the same offense, multiple  
10 punishment is constitutionally permissible.

11           MR. KOPPE: That would certainly be our  
12 position. In response to Judge Rehnquist's question, I  
13 don't think the court was -- the state court is  
14 constitutionally compelled to use the Block River rule,  
15 and in this case they didn't have to use any rule. The  
16 intent was clear, and we submit this does not raise a  
17 Fifth Amendment issue --

18           QUESTION: But your position would be the same  
19 even if the intent were not clear, is what I'm trying to  
20 suggest.

21           MR. KOPPE: Well, if the intent were -- if the  
22 intent were --

23           QUESTION: As long as the state supreme court  
24 says that's the rule in this state.

25           MR. KOPPE: That's correct. In other words,

1 we wouldn't take the position if the Supreme Court had  
2 said we find no intent to punish under both statutes --

3 QUESTION: No, of course not.

4 MR. KOPPE: -- and yet but we're going to  
5 allow that. We -- I don't agree that wouldn't raise a  
6 Fifth Amendment problem. I think it would. I wouldn't  
7 be here arguing that they could punish under both  
8 statutes unless there was this intent found by the  
9 highest state court. We have it here, and therefore I  
10 submit that this is -- raises no constitutional question  
11 under the Fifth Amendment.

12 .Thank you.

13 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
14 The case is submitted.

15 (Whereupon, at 11:00 o'clock p.m., the case in  
16 the above-entitled matter was submitted.)

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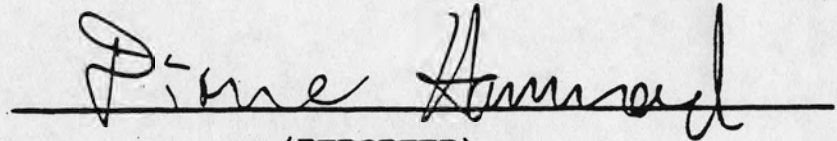
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Missouri, Petitioner v. Danny Hunter-NO. 81-1214

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BY

A handwritten signature in cursive script, appearing to read "P. H. Anderson", is written over a horizontal line.

(REPORTER)



