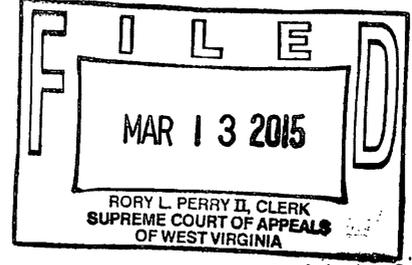


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1255



**PATRICK MIRANDY, Warden,
St. Mary's Correctional Center,**

*Respondent Below,
Petitioner,*

v.

GREGG D. SMITH,

*Petitioner Below,
Respondent.*

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The Circuit Court Erred When It Determined That Respondent's Convictions of Malicious Assault and Wanton Endangerment Involving a Firearm Violated Respondent's Constitutional Rights Under the Double Jeopardy Clauses of the United States and West Virginia Constitutions.

STATEMENT OF THE CASE

In the October Term of Court, 2007, an indictment was returned in the Circuit Court of Ritchie County charging Gregg D. Smith (“Respondent”) with committing on or about September 7, 2007, two counts of Malicious Assault, one count of Wanton Endangerment Involving a Firearm, and one count of Attempted Murder. (App. at 4-6.) Count I states that Respondent “committed the offense of ‘Malicious Assault’, by feloniously, willfully, maliciously, deliberately and unlawfully did wound, one Thomas F. Smith with a hammer with intent to maim, disfigure, disable or kill the said Thomas F. Smith.” (*Id.*) Count II states that Respondent “committed the offense of ‘Malicious Assault’, by feloniously, willfully, maliciously, deliberately and unlawfully did shoot, one Thomas F. Smith with a shotgun with intent to maim, disfigure, disable or kill the said Thomas F. Smith.” (*Id.*) Count III states that Respondent “committed the offense of ‘Wanton Endangerment Involving A Firearm’, wantonly performed an act with a firearm in a manner which created a risk of death or serious bodily injury to, one TLPC with a shotgun.” (*Id.*) Finally, Count IV states that Respondent, “committed the offense of ‘Attempted Murder’ by attempting to feloniously, willfully, maliciously, deliberately and unlawfully slay, kill, and murder Thomas F. Smith, against the peace and dignity of the State.” (*Id.*)

On September 5, 2008, a jury convicted Respondent of all four counts as charged in the indictment. (*Id.* at 7-9.) On April 8, 2009, Respondent was sentenced to two to ten years for each of his convictions for Malicious Assault, a definite term of five years for his conviction of Wanton Endangerment Involving a Firearm, and three to fifteen years for his conviction of Attempted First Degree Murder. (*Id.* at 10-13.) On November 28, 2011, Respondent filed a petition for habeas relief in the Circuit Court of Ritchie County. (*Id.* at 1.) Respondent was

subsequently appointed counsel and an Omnibus Petition was filed on Respondent's behalf on January 22, 2013. (*Id.* at 1; 14-33.) On March 25, 2013, Respondent filed a Motion to Amend Omnibus Petition and an Amended Omnibus Petition. (*Id.* at 34-53.) Respondent claimed four grounds for relief within this petition. Respondent claimed in his first ground for habeas relief that Judge Robert L. Holland, Jr., violated Respondent's right to due process of law by not recusing or disqualifying himself from the proceedings. (*Id.* at 51.) Respondent's remaining grounds for relief allege that he received ineffective assistance of counsel. (*Id.*) Evidentiary hearings were then held on May 22, 2013, and July 24, 2013. (*Id.* at 64.) Respondent also filed on July 24, 2013, a Memorandum of Law in Support of Petition for Writ of Habeas Corpus. (*Id.* at 54-63.) Respondent provided support for his claims regarding due process and ineffective assistance of counsel and additionally provided a section entitled Double Jeopardy which consisted mostly of quoted language from this Court's 1997 decision in *State v. Wright*. (*Id.*)

On November 7, 2013, the circuit court entered an order denying Respondent's claims that he was denied due process of law and received ineffective assistance of counsel. (*Id.* at 64-75.) However, the circuit court found that the State did violate Respondent's constitutional protections against double jeopardy granting Respondent habeas relief on that ground. (*Id.* at 71-75.) The circuit court found that convicting Respondent of both the Malicious Assault of Thomas F. Smith with a shotgun and Wanton Endangerment Involving a Firearm violated Respondent's protections against double jeopardy. (*Id.*) The circuit court found that the evidence at trial demonstrated that Respondent attacked Thomas F. Smith with a hammer, and the two subsequently struggled to the rear of Respondent's car where Respondent had a loaded shotgun. (*Id.* at 71-72.) The circuit court found that there was then a struggle involving the shotgun in which Thomas F. Smith was shot in the leg. (*Id.* at 72.) Finally, the circuit court

found that the State proved that TLPC, a minor, was present during the firing of the shotgun. (*Id.*) The circuit court reasoned that the firing of the shotgun “was a single volative act” which could not support both convictions. (*Id.* at 74.)

On November 21, 2013, the State filed the “State’s Objection to the Court’s Order Granting Habeas Corpus Relief and Request for Hearing.” (*Id.* at 76-78.) The State argued that the “double jeopardy argument was never raised by Petitioner . . . prior to the evidentiary hearing.” (*Id.* at 76.) The State requested that the circuit court “reconsider [its order] and hold it in abeyance and allow the State of West Virginia to present evidence with regard to the [Respondent’s] argument on double jeopardy.” (*Id.* at 77.) Respondent also filed a “Motion to Amend the Findings and Judgment” subsequent to the circuit court’s order. (*Id.* at 185.) A hearing was held on April 22, 2014. (*Id.*) The State filed the same day a Memorandum of Law requesting that Respondent’s double jeopardy claim be denied because “the elements of malicious assault and wanton endangerment involving a firearm are different in the instant case because you have two different victims.” (*Id.* at 81-83.) “The two victims make a difference and change the elements of each offense.” (*Id.* at 82.)

On November 7, 2014, the circuit entered a “Final Order Granting Habeas Corpus Relief” rejecting Respondent’s claims within his “Motion to Amend the Findings and Judgment” as well as the State’s claims in regard to double jeopardy. (*Id.* at 85-90.) With regard to double jeopardy, the circuit court found that “[a]ll evidence before this court is that the firing of the shotgun that injured Thomas F. Smith and the ‘endangerment’ to his son both grow out of a single volitive act” (*Id.* at 89.) On December 19, 2014, the circuit court entered an Order Dismissing Conviction and Sentence for Malicious Assault. (*Id.* at 91.) Petitioner now takes the instant appeal.

SUMMARY OF THE ARGUMENT

The Double Jeopardy Clause does not prohibit convicting Respondent of Malicious Assault when he shot Thomas F. Smith with a shotgun and Wanton Endangerment when he did so in the presence of a minor, TLPC. 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. Two individuals were victimized by the criminal act of Respondent in this case. The two victims provide each offense with an element of proof that the other does not contain. Therefore, the *Blockburger* test demonstrates that Respondent's firing of the shotgun which injured Thomas F. Smith while in the presence of TLPC can constitute both an offense of wanton endangerment and the offense of malicious assault. The circuit court erred when it concluded otherwise, failing to properly utilize *Blockburger* as spelled out by this Court. Accordingly, the judgment of the Circuit Court of Ritchie County granting Respondent habeas relief must be reversed and Respondent's conviction and sentence for Malicious Assault reinstated.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Rule 19 oral argument as it involves an assignment of error in the application of settled law.

ARGUMENT

I. Standard of Review

“In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review.” Syl. Pt. 1, in part, *Mathena v. Haines*, 219 W. Va. 417, 418, 633 S.E.2d 771, 772 (2006). “We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” *Id.* “[A] double jeopardy claim [is] reviewed *de novo*.” *State v. McGilton*, 229 W. Va. 554, 557, 729 S.E.2d 876, 879 (2012) (quoting Syl. Pt. 1, in part, *State v. Sears*, 196 W.Va. 71, 468 S.E.2d 324 (1996)).

II. The Circuit Court Erred When It Determined That Respondent’s Convictions of Malicious Assault and Wanton Endangerment Involving a Firearm Violated Respondent’s Constitutional Rights Under the Double Jeopardy Clauses of the United States and West Virginia Constitutions.

The circuit court erred when it failed to properly utilize the *Blockburger* test as spelled out by this Court when dealing with the question of whether the same act or transaction constitutes a violation of two distinct statutory provisions. The Double Jeopardy Clause does not prohibit convicting Respondent of Malicious Assault when he shot Thomas F. Smith with a shotgun and Wanton Endangerment when he did so in the presence of TLPC. Consequently, the circuit court erred in determining Respondent’s rights under the Double Jeopardy Clause were violated.

“This Court has provided that three separate constitutional protections are contained within the [Double Jeopardy Clause].” *State v. McGilton*, 229 W. Va. 554, 560, 729 S.E.2d 876, 882 (2012) (citing U.S. Const. amend. V; W. Va. Const. art. III, § 5.) “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.” *Id.* at 560, 729 S.E.2d at 882; Syl. Pts. 1-2, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992). The circuit court determined that Respondent’s convictions for Malicious Assault and Wanton Endangerment violated Respondent’s constitutional rights because Respondent’s “firing of the shotgun that injured Thomas F. Smith was a single volative act.” (App. at 74.) The circuit court, however, failed to utilize the proper test in reaching this conclusion.

“[W]here 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.” Syl. Pt. 4, *Gill*, 187 W. Va. 136, 416 S.E.2d 253 (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)); Syl. Pt. 8, *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983)). However, “[t]he test of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), is a rule of statutory construction. The rule is not controlling where there is a clear indication of contrary legislative intent.” Syl. Pt. 5, *Gill*, 187 W. Va. 136, 416 S.E.2d 253. “In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes.” Syl. Pt. 8, in part, *id.* “If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in [*Blockburger*], to determine whether each offense requires an element of proof the other does not.” *Id.* “If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.” *Id.*

The two statutory provisions involved in the instant case define the offenses of Malicious Assault and Wanton Endangerment Involving a Firearm. W. Va. Code § 61-2-9(a); W. Va. Code

§ 61-7-12. This Court considered these two statutes in the double jeopardy context in *State v. Wright*, 200 W. Va. 549, 490 S.E.2d 636 (1997). In *Wright*, the defendant shot and wounded the victim with a .38 caliber derringer outside the victim's residence. *Wright*, 200 W. Va. at 551, 490 S.E.2d at 638. The victim testified that he thought the defendant was trying to kill him while the defendant asserted that the shot was accidental. *Id.* at 551, 490 S.E.2d at 638. The defendant was ultimately convicted of malicious assault, attempted murder, and wanton endangerment. *Id.* The defendant claimed on appeal that his convictions for wanton endangerment and malicious assault were predicated on a single gunshot, making wanton endangerment a lesser-included offense of malicious assault. *Id.* at 552, 490 S.E.2d at 639.

Utilizing the test outlined in *Gill*, this Court first determined that “the language of the wanton endangerment and the malicious assault statutes” revealed “no ‘clear expression of [a legislative] . . . intention to aggregate sentences’ in these matters.” *Id.* at 553, 490 S.E.2d at 640 (quoting Syl. Pt. 8, in part, *Gill*, 187 W. Va. 136, 416 S.E.2d 253). Accordingly, the Court then utilized the *Blockburger* test to determine whether the act in *Wright* constituted a violation of both statutory provisions. The Court found that “[g]iven the circumstances of this case, we find that wanton endangerment is a lesser included offense because it would have been impossible for [the defendant] to have committed malicious assault without first having committed wanton endangerment.” *Id.* at 554, 490 S.E.2d at 641 (emphasis added). While *Wright* would certainly prevent the State from convicting Respondent of wanton endangerment as it relates to Thomas F. Smith, it does not, as explained below, prevent Respondent from being convicted of wanton endangerment when he created a risk of death or serious bodily injury to TLPC.

The circuit court in the instant case properly recognized that this case is distinguishable from *Wright* when it stated that “[b]ased upon the holding in *State v. Wright*, the only question

for this Court is whether the presence of TLPC when the shotgun blast injured Thomas F. Smith is sufficient to uphold the convictions for both Malicious Assault and Wanton Endangerment Involving a Firearm.” (App. at 73.) However, instead of again properly utilizing the *Blockburger* test as this Court did in *Wright*, the circuit court’s order looks to *State v. Collins*, 174 W. Va. 767, 329 S.E.2d 839 (1984), wherein the defendant was convicted of two counts of attempted aggravated robbery involving two clerks at a store. (*Id.*) The circuit court quoted the following language from *Collins*:

It is impossible to conclude from either the common law or W. Va. Code, 61-2-12, that an attempt to rob a store by presenting a firearm and leaving without taking any property can, in light of double jeopardy principles, result in multiple convictions of attempted aggravated robbery for each clerk present in such store.

(App. at 73-74); Syl. Pt. 2, *Collins*, 174 W. Va. at 768, 329 S.E.2d at 840. The circuit court subsequently quotes the following language from this Court’s decision in *State ex rel. Watson v. Ferguson*, 166 W. Va. 337, 352-53, 274 S.E.2d 440, 448 (1980):

Here there is no contention that the multiple homicides occurred as a result of a single volitive act on the part of the defendant, but rather each was killed by sequential acts of the defendant moving from one victim to another, striking them with the tire lug wrench. Thus, where multiple homicides occur even though they are in close proximity in time, if they are not the result of a single volitive act of the defendant, they may be tried and punished separately under the double jeopardy clause of Article III, Section 5 of the West Virginia Constitution.

(App. at 74). The circuit court then concluded that the Respondent’s firing of the shotgun in this case was a single violative act which precluded him from being convicted for both Malicious Wounding and Wanton Endangerment. (*Id.*)

The circuit court’s use of *Collins* and *Watson* is unpersuasive and further fails to provide any reason to deviate from the *Blockburger* test. First, contrary to the circuit’s order in the instant case, *Collins* demonstrated why *Blockburger* was not appropriate in that case. “[I]t is doubtful that the *Blockburger* test can be appropriately utilized to ascertain legislative intent

where a single statute is in issue” *Collins*, 174 W. Va. at 771, 329 S.E.2d at 843; *see also McGilton*, 229 W. Va. at 563-64, 729 S.E.2d at 885-86 (*Blockburger* test does not apply when dealing with multiple charges under the same statutory provision). Moreover, in regard to the issue of multiple victims, “this Court framed the issue in *Collins* as to whether: ‘only one count of attempted aggravated robbery could be charged because the property sought to be taken belonged to only one owner, the Village Mart.’” *State v. Myers*, 229 W. Va. 238, 249, 728 S.E.2d 122, 133 (2012). Additionally, *Watson* is of limited value since it ultimately held that multiple homicides may be tried and punished separately even if committed in close proximity in time. *Watson*, 166 W. Va. at 352, 274 S.E.2d at 448. Additionally, *Watson* contains language contrary to the circuit court’s conclusion in this case. “We do not conceive that in fashioning a double jeopardy policy in regard to what is the ‘same offense’ that we can ignore the fact that multiple victims have been the subject of the defendant’s acts.” *Id.* at 348, 274 S.E.2d at 446. “There can be little doubt that one function of a criminal justice system is to enable those individuals who have been victimized by the criminal acts of another to find some individual vindication of the harm done to each.” *Id.*

Two individuals were victimized by the criminal act of Respondent in this case. Given these circumstances, the *Blockburger* test demonstrates that Respondent’s firing of the shotgun which injured Thomas F. Smith while in the presence of TLPC can constitute both an offense of wanton endangerment and the offense of malicious assault. Respondent’s Malicious Assault conviction required the jury to find that Respondent by feloniously, willfully, maliciously, deliberately and unlawfully wounded Thomas F. Smith with a shotgun with the intent to maim, disfigure, disable or kill Thomas F. Smith while Respondent’s conviction for Wanton Endangerment Involving a Firearm required the jury to find that Respondent wantonly performed

an act with a firearm in a manner which created a risk of death or serious bodily injury to TLPC. (App. at 4-5) The two victims provide each offense with an element of proof that the other does not contain. *See State v. Goins*, 231 W. Va. 617, 622, 748 S.E.2d 813, 818 (2013) (“[F]or double jeopardy analysis, when the unit of prosecution prohibits conduct specifically against a ‘victim’ or ‘another,’ a single incident of the prohibited conduct may be punished as a separate offense for each person present.”). Therefore, the Wanton Endangerment conviction in this case does not constitute a lesser-included offense of Malicious Assault since “it requires the inclusion of an element not required in the greater offense.” Syl. Pt. 1, in part, *State v. Neider*, 170 W. Va. 662, 663, 295 S.E.2d 902, 903 (1982) (quoting Syl. Pt. 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981). “Once the determination is made that statutory offenses are separate under the *Blockburger* test by virtue of the fact that each provision requires proof of an additional fact which the other does not, then multiple punishments are appropriate.” *State v. Zaccagnini*, 172 W. Va. at 502, 308 S.E.2d at 142.

This Court stated that “[t]he intent is clear that [by enacting W. Va. Code 61-7-12] the Legislature wanted to assure lengthy prison sentences for gun-toting offenders.” *State v. Sears*, 196 W. Va. 71, 78, 468 S.E.2d 324, 331 (1996). In this case, the Double Jeopardy Clause does not prohibit convicting Respondent of Malicious Assault when he shot Thomas F. Smith with a shotgun, and Wanton Endangerment when he did so in the presence of TLPC. The circuit court erred when it concluded otherwise, failing to properly utilize *Blockburger* as spelled out by this Court.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Ritchie County granting Respondent habeas relief must be reversed and Respondent's conviction and sentence for Malicious Assault reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Derek A. Knopp, Assistant Attorney General and counsel for Patrick Mirandy, Warden, hereby verify that I have served a true copy of "Petitioner's Brief" upon counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 13th day of March, 2015, addressed as follows:

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