Case Note

CRIMINAL LAW—Merger of Sentences: The Legislature Says You Can't Hang 'Em Twice; *Najera v. State*, 214 P.3d 990 (Wyo. 2009)

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Introduction

Historically, few constitutional protections conjured more mutated conceptions in society than double jeopardy.[1] The United States Supreme Court holds that the Double Jeopardy Clause embodies the freedom from successive prosecution and multiple punishments for the same offense.[2] This case note focuses on the freedom from multiple punishments, specifically post-conviction merger of sentences.[3]

The murder of Wild Bill Hickok presents a prime example of double jeopardy confusion in Wyoming's past, albeit from the successive prosecution perspective. In 1877, Jack McCall stumbled into Nuttal and Mann's No. 10 Saloon in Deadwood, South Dakota.[4] McCall unholstered his revolver and shot Wild Bill in the head.[5] Rather than a customary Wild West lynching, the town hastily empaneled a jury and tried McCall.[6] The jury acquitted McCall and he scurried to the Wyoming Territory.[7] The United States Marshall arrested McCall again in Laramie, Wyoming, for a subsequent trial in United States District Court.[8] The jury in the second trial convicted McCall for the same crime he had been acquitted of in the first trial.[9] The double jeopardy concern arose on the eve of

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[1] *See* U.S. Const. amend. V.

[2] North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

[3] *See infra* notes 103–17 (describing the issue and test applied by the Wyoming Supreme Court in Najera v. State, 214 P.3d 990 (Wyo. 2009)). Merger of sentences occurs when a defendant is convicted of two crimes that are indistinguishable from each other, for which he should only serve concurrent sentences. Bilderback v. State, 13 P.3d 249, 253 (Wyo. 2000).

[4] Robert Aitken, *Wild Bill Hickok: The Two Trials of Jack McCall*, 25 No. 2 Litigation 51, 52 (1999).

[5] *Id.*

[6] *Id.*

[7] *Id.* The acquittal surprised most contemporaries, and some historians suggested that the jury in the first trial was actually packed with criminals who conspired to have Wild Bill killed. *Id.*

[8] *Id.* The venue was the district court in Yankton, South Dakota. *Id.*

[9] *Id.* at 53.

the execution when the governor of the Dakota Territory expressed his belief that a person should not have his life twice put in jeopardy for the same offense.[10] The plea for constitutional protection was too late—McCall was executed on March 1, 1877.[11] Although this story reaches back to a fabled time of Wild West lawlessness, and relates to post-conviction merger's slightly more colorful legal counterpart, it illustrates the confusion that crops up in multiple punishment analysis—confusion that continues still today.

In *Najera v. State*, the jury convicted Najera of twelve counts of improper sexual contact with his two adopted minor daughters.[12] Six counts were for sexual assault; the remaining six counts were for felony incest.[13] The trial court sentenced Najera to consecutive sentences for sexual assault and incest.[14] Najera appealed, contending that the convictions for sexual assault and incest should merge for sentencing purposes.[15] The Wyoming Supreme Court agreed and reversed the trial court, holding that the convictions merged and that Najera should serve his sentences concurrently.[16]

This case note advances three arguments to illustrate that the Wyoming Supreme Court must revisit the merger analysis applied in *Najera*. First, the court's application of the merger test parallels a test that the United States Supreme Court overruled.[17] Second, the Wyoming Supreme Court based the policy justification and structure of its merger analysis on Pennsylvania law that was subsequently abandoned.[18] Finally, the correct merger analysis represents a tool of statutory construction used to determine whether the legislature intended to create distinct offenses.[19] The merger analysis applied in *Najera* must be revisited.

BACKGROUND

The foundation of double jeopardy traces its roots back to Grecian and Roman philosophers,[20] but the constitutional protection against double jeopardy

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[10] *Id.*

[11] *Id.* at 66.

[12] 214 P.3d 990, 991 (Wyo. 2009).

[13] *Id.*

[14] *Id.* at 992.

[15] *Id.*

[16] *Id.*

[17] *See infra* notes 44–93.

[18] *See infra* notes 77–84 and accompanying text (discussing the intertwined nature of the Pennsylvania and Wyoming merger doctrines and the subsequent overruling in Pennsylvania).

[19] Garrett v. United States, 471 U.S. 773, 778–79 (1985); Missouri v. Hunter, 459 U.S. 359, 367 (1983); *see infra* notes 176–84 and accompanying text.

[20] *See* Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 285, 285–86 (1963) (discussing the budding concept of double jeopardy as it appeared in Greek and Roman times, specifically in the Justinian Code).

derives specifically from English common law.[21] The American colonies, and their subsequent counterparts in statehood, adopted the basic double jeopardy principles.

Federal Double Jeopardy

The Fifth Amendment to the United States Constitution reads in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[22] The ambiguity of the amendment's language spawned a plethora of interpretations from the United States Supreme Court trickling down to the individual states.[23] In *North Carolina v. Pearce*, the Court declared double jeopardy protection to encompass three distinct categories of danger to life and limb: "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."[24] The federal guarantee against double jeopardy applies to the states through the Fourteenth Amendment.[25]

Blockburger v. United States *and the "Elements" Test*

The double jeopardy protection from multiple punishments encompasses the post-conviction merger of sentences.[26] Merger occurs if the accused receives convictions for two offenses that are not distinct crimes.[27] The determination of whether two statutes constitute distinct offenses requires the application of the elements test.[28] The test catapulted to prominence as articulated in *Blockburger*

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[21] *Najera*, 214 P.3d at 993–94; Duffy v. State, 789 P.2d 821, 847 (Wyo. 1990) (Urbigkit, J., dissenting); *Ex parte* Lange, 85 U.S. 163, 168 (1873) ("[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."); *Sigler*, *supra* note 20, at 286–95 (tracing the necessity and origin of double jeopardy through English common law, back to the fall of Rome; the words "double" and "jeopardy" first appeared in relation to the protection that courts now recognize in the late fifteenth century).

[22] U.S. CONST. amend. V.

[23] *See* State v. Keffer, 860 P.2d 1118, 1129 (Wyo. 1993) (stating that the language of the Double Jeopardy Clause "spawned many more [words] that have been uttered to either explain, defend, or, in some way, mutate the protection accorded against double jeopardy").

[24] 395 U.S. 711, 717 (1969) (citations omitted), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989); *see, e.g.*, Cook v. State, 841 P.2d 1345, 1347 (Wyo. 1992) (discussing the protections afforded by double jeopardy).

[25] *Pearce*, 395 U.S. at 717 (citing Benton v. Maryland, 395 U.S. 784, 794 (1969)) (extending the Fifth Amendment protection against double jeopardy to the states through the Fourteenth Amendment because the protection against double jeopardy was a fundamental part of American constitutional heritage).

[26] *See Najera*, 214 P.3d at 993–94 (describing merger of sentences as a freedom from multiple punishments).

[27] *Id.*

[28] Blockburger v. United States, 284 U.S. 299, 304 (1932); *see, e.g.*, *Najera*, 214 P.3d at 993–94; *Keffer*, 860 P.2d at 1130.

v. United States: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[29] If this test shows each statute requires proof of an element that the other does not, the two statutes encompass distinct crimes.[30] The language behind the *Blockburger* test dates back to the 1871 Massachusetts Supreme Court decision *Morey v. Massachusetts*, which held: "[A] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."[31] In *Blockburger*, the United States Supreme Court applied the "elements" test to an individual who faced multiple convictions under two statutes for one sale of narcotics.[32] The Court reasoned that on the face of the statutes Congress created two separate crimes; one for selling the forbidden drugs not in the original packaging and one for selling the drugs to a person without a prescription.[33] Thus, one sale that violated both statutes allowed the charging and conviction of two separate offenses, because each statute required proof of an element that the other did not.[34]

The *Blockburger* test became the definitive test to determine whether two statutes constitute multiple offenses for every double jeopardy protection.[35] The importance of the predictability and reliability of this test becomes apparent in the context of multiple punishments.[36] *Blockburger* represents a tool of statutory construction that allows a court to arrive at consistent and predictable results.[37] A court will not face conflicting precedents in which two crimes were deemed distinct in one double jeopardy analysis but not in another, because the statutory

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[29] 284 U.S. at 304. Notably, the *Blockburger* decision includes no references to double jeopardy. *Id.* Regardless, the "elements" test articulated in the decision became the primary test for determining whether two offenses are in fact distinct. *See, e.g.*, United States v. Dixon, 509 U.S. 688, 696 (1993); Gore v. United States, 357 U.S. 386, 390–92 (1958). This case note uses the specific term "*Blockburger* test" to refer to the elements test for the sake of making it clear which rule is being applied.

[30] *Blockburger*, 284 U.S. at 304.

[31] 108 Mass. 433, 434 (Mass. 1871).

[32] *Blockburger*, 284 U.S. at 301.

[33] *Id.* at 303.

[34] *Id.* at 304.

[35] United States v. Dixon, 509 U.S. 688, 696 (1993) (citing Brown v. Ohio, 432 U.S. 161, 168–69 (1977)).

[36] *See* Lewis v. United States, 523 U.S. 155, 176–77 (1998) (recognizing that the *Blockburger* test can be easily applied to produce consistent and predictable results).

[37] Missouri v. Hunter, 459 U.S. 359, 367 (1983) (citing Albernaz v. United States, 450 U.S. 333, 341 (1981)).

language will remain the same in each case.[38] In regard to multiple punishments, the Double Jeopardy Clause merely protects the convicted from receiving greater punishment than the legislature intended.[39] The thrust of the *Blockburger* test in merger analysis focuses solely on legislative intent and interpreting the punishment authorized by the legislature.[40] In *Albernaz v. United States*, the United States Supreme Court explained: "[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. *Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution*."[41] Therefore, the statutory text represents the starting point to discern legislative intent in creating separate offenses.[42] The *Blockburger* test begins at the statutory text and reliably discerns the legislative intent to resolve questions of merger.[43]

Grady v. Corbin *and the Improvident Abandonment of* Blockburger

In 1993, the Supreme Court abandoned nearly eighty years of precedent when it expanded the application of the *Blockburger* test beyond the statutory text.[44] In *Grady v. Corbin*, the Court reasoned the *Blockburger* test created substantial double jeopardy risks because the same conduct potentially proved multiple offenses.[45] In an attempt to alleviate the alleged shortcoming of the *Blockburger* test the Court expanded the double jeopardy analysis to examine the conduct or facts that the State sought to prove.[46]

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[38] *Compare* Najera v. State, 214 P.3d 990, 994 (Wyo. 2009) (holding that sexual assault and incest did merge), *with* Owen v. State, 902 P.2d 190, 195 (Wyo. 1995) (holding sexual assault and incest did not merge). *See infra* notes 145–52 (discussing inconsistent results reached in Wyoming concerning incest and sexual assault statutes and the merger doctrine).

[39] Garrett v. United States, 471 U.S. 773, 773 (1985); *Hunter*, 459 U.S. at 366.

[40] *Garrett*, 471 U.S. at 773; *Hunter*, 459 U.S. at 366.

[41] *Albernaz*, 450 U.S. at 344 (emphasis in original), *cited with approval by Hunter*, 459 U.S. at 368.

[42] *See* Duffy v. State, 789 P.2d 821, 831 (Wyo. 1990) (recognizing that the first and easiest place to discern legislative intent is the language of the statute); *Hunter*, 459 U.S. at 367 (citing *Albernaz*, 450 U.S. at 341 (stating that the *Blockburger* test is a rule of statutory construction to discern legislative intent)).

[43] *Duffy*, 789 P.2d at 831 (recognizing that the first and easiest place to discern legislative intent is the language of the statute); *Hunter*, 459 U.S. at 367 (stating that the *Blockburger* test is a rule of statutory construction to discern legislative intent); *see* Lewis v. United States, 523 U.S. 155, 176–77 (1998) (recognizing that the *Blockburger* test can be easily applied to produce consistent and predictable results).

[44] Grady v. Corbin, 495 U.S. 508, 520–21 (1990).

[45] *Id.* The *Grady* decision specifically involved the application of the *Blockburger* test to subsequent prosecutions not multiple punishments; in fact the Court endorsed the use of the *Blockburger* test for multiple punishments. *See id.* at 519.

[46] *Id.* at 524.

In *Grady*, Corbin collided with two vehicles after crossing the center lane on Route 55 in LaGrange, New York.[47] The driver of the second vehicle died after the collision.[48] Corbin received traffic citations for driving while intoxicated and for leaving his lane of travel.[49] Corbin pleaded guilty to the two traffic tickets in municipal court and later faced a vehicular homicide charge.[50] The prosecution attempted to introduce evidence that Corbin was driving intoxicated on the night of the fatal crash in order to prove the reckless conduct element of vehicular homicide.[51] The court ruled that the subsequent prosecution for vehicular homicide after the guilty plea for the traffic tickets violated the double jeopardy protection against subsequent prosecutions after a prior conviction.[52] The United States Supreme Court granted *certiorari*.[53]

The United States Supreme Court recognized that the *Blockburger* test was the correct place to begin the analysis.[54] Despite the prosecution's insistence, the Court refused to conclude the analysis when the *Blockburger* test was not violated.[55] Justice Brennan, writing for the majority of the splintered five-to-four Court, reasoned that the prosecution could not rely on conduct from an already prosecuted offense to prove a necessary element of another crime.[56] The Court refocused the analysis to emphasize "the critical inquiry [on] what conduct the state will prove."[57] The holding expanded double jeopardy analysis beyond the *Blockburger* test to encompass the conduct or facts that the prosecution presents.

In her individual dissent, Justice O'Connor vehemently opposed the expansion of any analysis beyond the statutory text.[58] All four dissenting justices insisted that the *Blockburger* test constituted the reliable and established test for determining whether two offenses are distinct from each other.[59] The test was reliable because it gave effect to the language and intent of the legislature in defining the offenses.[60] If the offenses each contain an element that the other does

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[47] *Id.* at 511.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 511–14.

[51] *Id.*

[52] *Id.* at 514–15.

[53] *Id.*

[54] *Id.* at 516.

[55] *Id.*

[56] *Id.* at 521.

[57] *Id.*

[58] *Id.* at 528–29 (O'Connor, J., dissenting).

[59] *Id.*

[60] *Id.*

not then the crimes are distinct offenses.[61] This application of the *Blockburger* test "best gives effect to the language of the [Double Jeopardy] Clause, which protects individuals from being twice put in jeopardy 'for the same offence,' not for the same conduct or actions."[62] The majority's departure from the *Blockburger* test proved to rest on unstable ground.

United States v. Dixon *and the Return to* Blockburger

Within two years, the federal circuits and United States Supreme Court experienced difficulties in the application of the *Grady* test.[63] In response to the judiciary's uneasiness with the expanded test centering on conduct, the United States Supreme Court disposed of the *Grady* test in *United States v. Dixon*.[64] Writing for the majority, Justice Scalia overruled the conduct test, declaring it lacked constitutional ties and ran contrary to the common law understanding of double jeopardy.[65] The *Dixon* decision reaffirmed the federal courts' reliance on the *Blockburger* test to decide whether two offenses are distinct. However, Wyoming failed to embrace the federal courts' return to the *Blockburger* test.

Double Jeopardy in Wyoming

The Wyoming Constitution contains its own Double Jeopardy Clause: "[N]or shall any person be twice put in jeopardy for the same offense."[66] The Wyoming clause embodies the same protections as the federal Constitution.[67] Individual states retain the power to interpret and apply their constitutions, but their interpretations must comply with the United States Supreme Court's interpretation of the United States Constitution.[68] Accordingly, state courts often use the federal Constitution to guide their interpretations.[69] The Wyoming and

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[61] *Id.*

[62] *Id.*

[63] United States v. Dixon, 509 U.S. 688, 704, 709–10 (1993) (overruling *Grady*, declaring its rule "wrong in principle[,] . . . unstable in application," and "not an accurate expression of the law").

[64] *Id.*

[65] *Id.* at 707–08; *see* Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 603 (2006) (discussing the adoption of the *Blockburger* test as the exclusive test for determining whether two statutes encompass the same offense).

[66] WYO. CONST. art. 1, § 11.

[67] State v. Keffer, 860 P.2d 1118, 1129 (Wyo. 1993) (citing Hopkinson v. State, 64 P.2d 43 (Wyo. 1983), *cert. denied*, 464 U.S. 908 (1983)); Cook v. State, 841 P.2d 1345, 1347 (Wyo. 1992).

[68] O'Boyle v. State, 117 P.3d 401, 408 (Wyo. 2005) (citing Mapp v. Ohio, 367 U.S. 643, 654–55 (1961)).

[69] *Id.* at 408. States "may conclude the scope of the protection provided by their constitution is the same as and parallel to that provided by the federal constitution" and look to the federal law for guidance. *Id.* Wyoming has made such a declaration. *See supra* notes 66–67.

federal Double Jeopardy Clauses closely parallel one another, thus Wyoming's application logically parallels the United States Supreme Court's interpretation of federal law.[70] Therefore, federal double jeopardy jurisprudence continues to shape Wyoming's interpretation.[71]

Wyoming adopted the United States Supreme Court's *Blockburger* test, citing with approval the language and substance of *Blockburger*.[72] The court reasoned that the application of the *Blockburger* test logically extended to multiple punishment analysis.[73]

After the adoption of the *Blockburger* test, the Wyoming Supreme Court expanded the test in both depth and analysis.[74] The court delved deeper than the mere statutory text and expanded the inquiry to examine the conduct and facts proven at trial.[75] The analysis closely resembled the conduct test that the United States Supreme Court applied in *Grady v. Corbin*.[76] The Wyoming Supreme Court based the rationale for this expanded merger analysis on a Pennsylvania Superior Court decision.[77]

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[70] Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527, 550 (1986) ("Most of the court's recent constitutional decisions—particularly those involving individual rights claims based on state provisions with federal analogues—have been analyzed in terms of the Supreme Court doctrine, and they have usually been decided in accordance with federal precedent."). *Compare* WYO. CONST. art. 1, §11 (providing "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"), *with* U.S. CONST. amend. V (stating "nor shall any person be twice put in jeopardy for the same offense").

[71] *See supra* notes 66–70 and accompanying text.

[72] *Keffer*, 860 P.2d at 1130; *see also* Bilderback v. State, 13 P.3d 249, 253 (Wyo. 2000); DeSpain v. State, 865 P.2d 584, 589 (1993).

[73] *Keffer*, 860 P.2d at 1130 (citing Missouri v. Hunter, 459 U.S. 359, 366 (1983)).

[74] *Compare id.* at 1130 (recognizing that the *Blockburger* test does not delve into the evidence presented at trial, but looks only to a comparison of the statutory elements), *with* Rouse v. State, 966 P.2d 967, 970 (Wyo. 1998) (expanding the test for merger of sentences to necessarily include the facts proven at trial).

[75] *Rouse*, 966 P.2d at 969–70.

[76] Najera v. State, 214 P.3d 990, 995 (Wyo. 2009) (Voigt, C.J., specially concurring); *see infra* note 92 (discussing Justice Voigt's uneasiness with the similarities between the Wyoming Supreme Court's merger analysis in *Owen v. State* and *Grady v. Corbin*).

[77] *See, e.g.*, Bilderback v. State, 13 P.3d 249, 255 (Wyo. 2000); *Rouse*, 966 P.2d at 970; Owen v. State, 902 P.2d 190, 193 (Wyo. 1995); Rivera v. State, 840 P.2d 933, 944 (Wyo. 1992), *overruled on other grounds by* Springfield v. State, 860 P.2d 435 (Wyo. 1993). The quoted language from the Pennsylvania Superior Court reads:

> In deciding whether offenses merge, the question is whether the offenses charged "necessarily involve" one another, or whether any additional facts are needed to prove additional offenses once the primary offense has been proven. In deciding merger questions, we focus not only on the similarity of the elements of the crimes, but also, and primarily, on the facts proved at trial, for the question is whether those facts show that in practical effect the defendant committed but a single criminal act.

The Pennsylvania court's analysis in *Whetstine* started with the *Blockburger* test, but then veered off course by establishing that the primary focus for merger of sentences rested on the facts proven at trial.[78] The complex merger analysis required the court to determine whether the defendant committed a single criminal act.[79] If the facts revealed a single criminal act, then only one injury to the sovereign worth punishing existed.[80] Pennsylvania's variation of the conduct test proved no easier to apply than the *Grady* test.[81] Inconsistent and unpredictable results led the Pennsylvania Supreme Court to overrule the conduct test.[82] To replace the *Grady* test the Pennsylvania legislature enacted a statute embodying the fundamental *Blockburger* test.[83] Yet, the Wyoming Supreme Court continued to apply the merger analysis modeled after the overruled Pennsylvania rationale, rather than the *Blockburger* test.[84]

The *Grady* test allowed the court to delve into the evidence and conduct presented at trial, which stands inapposite to not only the Wyoming Supreme Court's initial adoption of the test, but also to the United States Supreme Court's interpretation.[85] The Wyoming and Pennsylvania mutated merger analysis appears to parallel the aborted conduct test announced in the *Grady* decision.[86] The ill-fated *Grady* decision met its demise when the United States Supreme Court overruled it after only three terms of existence, yet Wyoming retained the *Grady* test.[87]

> Additionally, we note that analysis of merger claims traditionally has revolved around the concept of injury to the sovereign; in order to support the imposition of more than one sentence, it must be found that the defendant's conduct constituted more than one injury to the Commonwealth.

Commonwealth v. Whetstine, 496 A.2d 777, 779–80 (Pa. Super. 1985) (citations omitted).

[78] *Whetstine*, 496 A.2d at 779–80.

[79] *Id.*

[80] *Id.*

[81] *See* Bruce A. Antkowiak, *Picking Up the Pieces of the Gordian Knot: Towards A Sensible Merger Methodology*, 41 NEW ENG. L. REV. 259, 268–69 (2007) (discussing the untenable common law merger test that had emerged in Pennsylvania).

[82] *Id.*

[83] *Id.* at 270–71.

[84] *See id.* at 268 (explaining how the Pennsylvania Supreme Court and legislature overruled and codified the expanded test employed in *Whetstine* and prior Pennsylvania merger analysis); *supra* note 77 (illustrating Wyoming cases that have adopted the Pennsylvania merger rationale).

[85] Najera v. State, 214 P.3d 990, 995 (Wyo. 2009) (Voigt, C.J., specially concurring); State v. Keffer, 860 P.2d 1118, 1130 (Wyo. 1993).

[86] *Najera*, 214 P.3d at 995 (Voigt, C.J., specially concurring).

[87] *Id.*; United States v. Dixon, 509 U.S. 688, 704 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990)).

Despite the clear repudiation of the *Grady* test from the United States Supreme Court and the Pennsylvania legal system, both of which returned to the *Blockburger* test, Wyoming adheres to the unpredictable and unreliable *Grady* test to determine questions of merger.[88] In *Rouse*, the Attorney General of Wyoming implored the Wyoming Supreme Court to abandon the *Grady* conduct-based analysis and to return to the constitutional roots of the *Blockburger* test as applied in *United States v. Dixon*.[89] The Wyoming Supreme Court declined the invitation to consider *Dixon*, citing the division in the United States Supreme Court's decision.[90] The Wyoming Supreme Court deferred consideration of *Dixon* "to another, more appropriate day."[91] That day arrived with *Najera v. State*, however the court adhered to the *Grady* test, with only Justice Voigt expressing concern over adhering to overruled precedent.[92]

The Wyoming Supreme Court's application of the *Blockburger* test mirrors that of the abolished *Grady* "conduct" test and for that reason it must be refined.[93] This case note focuses on the juxtaposition between the Wyoming Supreme Court's and the United States Supreme Court's application of the *Blockburger* test.

PRINCIPAL CASE

On April 17, 2006 Najera's youngest adopted daughter divulged to her older sister that Najera sexually abused her the night before.[94] The older sister revealed

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[88] *See supra* note 77 (listing Wyoming cases adhering to the Pennsylvania merger rationale).

[89] Rouse v. State, 966 P.2d 967, 971 (Wyo. 1998). Current Justice William U. Hill was then serving as Wyoming's Attorney General for the *Rouse* case. *See id.* at 967.

[90] *Id.* In *Rouse*, the appellant was charged with aggravated assault and battery, aggravated robbery, and kidnapping resulting from a criminal rampage in which appellant hijacked a semi and tractor trailer rig using multiple forms of weaponry. *Id.* at 968–69. In response to the appellant's merger of sentences argument, the Wyoming Supreme Court found that the facts proven at trial allowed for multiple ways in which the three crimes could have been committed, particularly in light of the multiple acts that led to the charges and convictions. *Id.* at 971. Thus the crimes did not merge for sentencing. *Id.*

[91] *Id.*

[92] *Najera*, 214 P.3d at 995 (Voigt, C.J., specially concurring). In fact, Justice Voigt softly advocates for a reexamination of the merger analysis in numerous cases, which in some cases resembles an attempt to overrule the confusing precedent set by *Rivera*, *Rouse*, *Owen*, and *Bilderback sub silento*. *Id.*; *see* Rathbun v. State, 257 P.3d 29, 32 (Wyo. 2011) (recognizing that the United States Supreme Court settled on the application of the *Blockburger* test to determine whether the double jeopardy bar applies in its *Dixon* decision); Snow v. State, 216 P.3d 505, 511 n.8 (Wyo. 2009). In *Rathbun*, Justice Voigt declared that the Wyoming Court follows the same analysis as the United States Supreme Court in *Dixon*, however especially in the case of merger of sentences, no decision has adhered to *Dixon*, nor dealt with the precedents set by the previous cases. *Rathbun*, 257 P.3d at 32.

[93] *See Najera*, 214 P.3d at 995 (Voigt, C.J., specially concurring) (discussing the similarity between the rule as stated in *Najera* with that of *Grady*); *Snow*, 216 P.3d at 511 n.8 (calling into question the congruence of Wyoming merger jurisprudence and that of *Dixon*).

[94] *Najera*, 214 P.3d at 992.

that Najera sexually abused her in the past.[95] The victims told their mother, who brought them to the doctor's office the next day.[96] Following an examination, the police began investigating.[97]

The jury convicted Najera on twelve felony counts of improper sexual relations with his two adopted daughters.[98] Six counts were for sexual assault, five of which rested on Najera's abuse of his position of authority as the victims' adoptive father.[99] The remaining six counts were for felony incest.[100]

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[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 991.

[99] *Id.* Of the six counts, two (counts I and IV) were for second-degree sexual assault in violation of sections 6-2-303(a)(vi) of the Wyoming statutes; one count (II) for third-degree sexual assault in violation of section 6-2-304(a)(ii); and three counts (III, V, and VI) for third-degree sexual assault in violation of sections 6-2-304(a)(iii) and 6-2-303(a)(vi). *Najera*, 214 P.3d at 991. The second-degree sexual assault stated:

> (a) Any actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituting sexual assault in the first degree:
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> . . . .
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> (v) At the time of the commission of the act the victim is less than twelve (12) years of age and the actor is at least four (4) years older than the victim;
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> . . . .
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> (vi) The actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit;

WYO. STAT. ANN. § 6-2-303 (2005) (revised in 2007). The third-degree sexual assault statute stated:

> (a) An actor commits sexual assault in the third degree if, under circumstances not constituting sexual assault in the first or second degree:
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> . . . .
>
> (ii) The actor is an adult and subjects a victim under the age of fourteen (14) years to sexual contact without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim;
>
> (iii) The actor subjects a victim to sexual contact . . . without inflicting sexual intrusion on the victim and without causing serious bodily injury.

Id. § 6-2-304.

[100] *Najera*, 214 P.3d at 991. The six incest counts (VII-XII) were charged under section 6-4-402 of the Wyoming statutes:

> (a) A person is guilty of incest if he knowingly commits sexual intrusion . . . with an ancestor or descendant or a brother or sister of the whole or half blood. The relationships referred to herein include relationships of:
>
> (i) Parent and child by adoption;
>
> (ii) Blood relationships without regard to legitimacy; and
>
> (iii) Stepparent and stepchild.
>
> (b) Incest is a felony punishable by imprisonment for not more than fifteen (15) years, a fine of not more than ten thousand dollars ($10,000.00), or both.

WYO STAT. ANN. § 6-4-402(a), (b) (2005).

The trial court issued Najera a ten- to twenty-year sentence on each count of second-degree sexual assault to be served concurrently, a ten- to fifteen-year sentence on each count of third-degree sexual assault to be served concurrently with each other and consecutively to the previous convictions, and a three- to five-year sentence on each count of incest to be served concurrently with each other and consecutively with his sentences for all other counts.[101] Najera appealed, contending that the trial court erred in denying his motion for acquittal on five counts of sexual assault and that for charging and sentencing purposes the incest and sexual assault charges should have merged.[102]

The relevant issue in *Najera* was whether the sentences for sexual assault and incest should have merged.[103] Najera contended that each incest count should have merged with the respective sexual assault charge.[104]

The Majority Opinion

Justice Burke, writing for the majority, identified merger of sentences as one component of Najera's right to be free from multiple punishments pursuant to the Double Jeopardy Clause of the Constitution.[105] Accordingly, the Wyoming Supreme Court applied its unique version of the *Blockburger* test.[106] The court recognized that the basic form of the *Blockburger* test mandates that two offenses are distinct when, considering the statutory text, one requires proof of an element that the other does not.[107] Yet for questions of merger, the Wyoming Supreme Court expanded the *Blockburger* test to delve into the facts proven at trial in order to determine whether there was only "a single criminal act or multiple and distinct offenses."[108]

After examining the facts presented at trial, the court determined that the prosecution proved sexual assault based upon an abuse of an authority position by showing Najera's relationship as the adopted father of the victims.[109] That very same paternal relationship was necessary to prove all six counts of incest.[110] All the sexual assault and incest charges required proof of sexual intrusion or sexual

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[101] *Najera*, 214 P.3d at 991.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 993–94.

[105] *Id.* (citing Bilderback v. State, 13 P.3d 249, 253 (Wyo. 2000)); *see* U.S. CONST. amend. V.

[106] *Najera*, 214 P.3d at 993–94 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

[107] *Id.*; *see supra* notes 26–43 (discussing the *Blockburger* test).

[108] *Najera*, 214 P.3d at 994 (quoting *Bilderback*, 13 P.3d at 254) (internal quotation marks omitted).

[109] *Id.*

[110] *Id.*

contact, which the prosecution proved at trial.[111] The court found that the exact same facts were proven to convict Najera under two different statutes.[112] They reasoned that Najera could not have committed sexual assault by abusing his position of authority as a father without committing incest at the same instant.[113] Accordingly, the court merged the sentences for sexual assault that required an abuse of an authority position with the respective incest convictions because the prosecution proved both with the same conduct.[114]

The Wyoming Supreme Court reached the opposite conclusion concerning the remaining sexual assault and incest charges because the State was required to prove that the victim was younger than fourteen for third-degree sexual assault, but not for incest.[115] The court determined that the two offenses clearly required proof of an element that the other did not because one required an age discrepancy and the other required a parental relationship.[116] Thus, the convictions would not merge for the purposes of sentencing.[117]

The Specially Concurring Opinion

In the style of a dissent, Chief Justice Voigt filed a specially concurring opinion only out of respect for stare decisis.[118] He expressed concern that the Wyoming Supreme Court's test for merger of sentences strayed too close to the *Grady* conduct or evidence test, which the United States Supreme Court overruled.[119] Justice Voigt believed *State v. Keffer* correctly stated the law in that the *Blockburger* test should be applied to determine if the crimes have identical statutory elements.[120] According to *Keffer*, the *Blockburger* test requires the determination of distinct offenses solely on the statutory text with no regard to the evidence presented at trial.[121] The *Keffer* court found that the protection given by the Double Jeopardy Clause in respect to multiple punishments should be based on the *Blockburger* test, because the sentencing court should be prevented from prescribing greater

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 995 (Voigt, C.J., specially concurring).

[119] *Id.* (citing the development of Wyoming's test for merger of sentences in *Bilderback v. State*, 13 P.3d 249 (Wyo. 2000); *Rouse v. State*, 966 P.2d 967 (Wyo. 1998); and *Owen v. State*, 902 P.2d 190 (Wyo. 1995) while comparing the Wyoming test to the "evidence or conduct" test of *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688, 704 (1993)).

[120] *Id.*

[121] *Id.*

punishment than the legislature intended.[122] Justice Voigt concluded that incest and sexual assault each contained an element that the other did not, which implied that the legislature intended for the imposition of multiple punishments regardless of whether the two separate offenses were based on the same conduct.[123] Accordingly, Najera could have been sentenced on each and every count for which the jury convicted him.[124]

ANALYSIS

The Wyoming Supreme Court must revisit the merger analysis applied in *Najera* for three reasons. First, the court's application of the *Blockburger* test parallels the *Grady* conduct or evidence test that the United States Supreme Court overruled in *Dixon*.[125] Specifically, the application of the *Blockburger* test should not delve into the evidence presented at trial.[126] Second, the base judicial rationale behind the Wyoming Supreme Court's merger analysis proved untenable in Pennsylvania, which led to its abandonment.[127] The Pennsylvania Supreme Court and ultimately the Pennsylvania legislature returned to the *Blockburger* test.[128] Finally, the *Blockburger* test represents first and foremost a tool of statutory construction used to determine whether the legislature intended to create one or multiple distinct offenses.[129] The *Blockburger* test starts at the easiest place to discern legislative intent: what the legislature wrote in the statute.[130] A return to the *Blockburger* test prevents the unpredictable and unreliable results created by the *Grady* conduct test.[131]

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[122] *Id.* (citing State v. Keffer, 860 P.2d 1118, 1130 (Wyo. 1993)).

[123] *Id.*

[124] *Id.*

[125] *Id.*; Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688, 704 (1993).

[126] *Najera*, 214 P.3d at 995 (citing *Keffer*, 860 P.2d at 1129).

[127] *See* Antkowiak, *supra* note 81, at 268 (explaining how the Pennsylvania Supreme Court and legislature overruled the expanded standard of review employed in *Whetstine* and prior Pennsylvania merger analysis and codified the *Blockburger* analysis); *supra* notes 77–84 (discussing the intertwined nature of the Pennsylvania and Wyoming merger doctrines and the subsequent overruling in Pennsylvania).

[128] *See supra* notes 75–78.

[129] *See* Garrett v. United States, 471 U.S. 773 (1985); Missouri v. Hunter, 459 U.S. 359 (1983).

[130] Duffy v. State, 789 P.2d 821, 831(Wyo. 1990) (recognizing that the first and easiest place to discern legislative intent is the language of the statute); *Hunter*, 459 U.S. at 367 (citing Albernaz v. United States, 450 U.S. 333, 341 (1981)) (stating that the *Blockburger* test is a rule of statutory construction to discern legislative intent); *see infra* notes 163–66.

[131] United States v. Dixon, 509 U.S. 688, 704, 709–10 (1993) (overruling *Grady*, declaring its rule "wrong in principle[,] . . . unstable in application," and "not an accurate expression of the law"); *see supra* notes 63–65.

Returning to the Traditional Blockburger *Test*

Najera's twelve convictions for sexual assault and incest arose out of six discrete acts, meaning that each instance of sexual assault simultaneously accompanied an act of incest.[132] The Wyoming Supreme Court found no way for Najera to commit sexual assault based on his position as the adopted father of the victims without committing incest at the very same instant.[133] Thus, the Wyoming Supreme Court merged the crimes on the basis that the State used the same conduct or evidence to prove both the familial relationship and the position of authority.[134] However, the proper focus of the *Blockburger* test must not extend beyond the statutory text.[135]

Applying the Blockburger *Test to the Statutory Text of the Wyoming Incest and Sexual Assault Statutes Reveals Two Distinct Crimes*

Comparing the basic statutory text between the sexual assault and incest statutes reveals that the statutes encompass separate offenses.[136] Sexual assault requires either sexual intrusion or sexual contact and the presence of one of various elements, none of which *require* a familial relationship.[137] Incest requires sexual intrusion or sexual contact and a familial relationship.[138] The text of the statutes creates two separate and distinct offenses because each statute requires proof of an element that the other does not.[139] The analysis presented above represents the simplest form of comparison between the two statutes; however, the result remains the same when the *Blockburger* test is applied to the crimes as charged.

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[132] *See* Najera v. State, 214 P.3d 990, 991 (2009).

[133] *Id.* at 994.

[134] *Id.*

[135] State v. Keffer, 860 P.2d 1118, 1130 (Wyo. 1993); *see* Grady v. Corbin, 495 U.S. 508, 528–29 (1990) (O'Connor, J., dissenting) (stating that the *Blockburger* analysis traditionally applies to the statutory text only), *overruled by* United States v. Dixon, 509 U.S. 688, 704 (1993). In response to Justice Brennan and the Court's abandonment of pure statutory *Blockburger* analysis Justice O'Connor went on to declare: "I would adhere to the *Blockburger* rule that successive prosecutions under two different statutes do not constitute double jeopardy if each statutory crime contains an element that the other does not, regardless of the overlap between the proof required for each prosecution in the particular case." *Grady*, 495 U.S. at 528–29.

[136] Owen v. State, 902 P.2d 190, 195 (Wyo. 1995) (reasoning that sexual assault and incest are "separate and distinct offenses"); Kallas v. State, 704 P.2d 693, 695 (Wyo. 1985) (stating that although the elements of sexual assault and incest overlap to a certain degree the elements are not identical); *see supra* notes 90–100 and accompanying text (comparing and quoting the statutory text as charged).

[137] WYO. STAT. ANN. §§ 6-2-303(a)(vi), -304(a)(iii) (2005); *see supra* note 99 (quoting statutory text in full).

[138] WYO. STAT. ANN. § 6-4-402(a) (2005); *see supra* note 100 (quoting the statutory text).

[139] *Compare* WYO. STAT. ANN. §§ 6-2-303(a)(vi), -304(a)(iii) (2005) (requiring an abuse of an authority position as an element of sexual assault), *with id.* § 6-4-402(a) (requiring a familial relationship as an element of incest).

As charged, both sexual assault and incest required sexual contact or intrusion; but sexual assault required the abuse of a position of authority, which incest did not; incest required a specific familial relationship, which sexual assault did not.[140] Therefore the statutes each contain separate elements that the other does not and the *Blockburger* test reveals two distinct offenses.[141] A position of authority by no means necessitates a familial relationship, even though a familial relationship might be inextricably linked to a position of authority.[142] The *Blockburger* test produces a consistent and reliable result.[143] An ambiguous conclusion arises when the court delves into the facts presented at trial.[144]

Inconsistent Results Under Wyoming's Merger Analysis

Expanding merger analysis to the facts presented at trial, mimics the *Grady* evidence or conduct test, which has been overruled by the United States Supreme Court.[145] The Wyoming Supreme Court held that Najera could not have committed incest and sexual assault as charged through any other course of conduct when the sexual assault charge was based on the abuse of his position as the adoptive father of the victims.[146] In order to reach this holding, the Wyoming

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[140] Najera v. State, 214 P.3d 990, 991 (2009).

[141] *Compare* WYO. STAT. ANN. §§ 6-2-303(a)(vi), -304(a)(iii) (2005) (requiring an abuse of an authority position as an element of sexual assault), *with id.* § 6-4-402(a) (requiring a familial relationship as an element of incest). *See Blockburger*, 284 U.S. at 304 (holding that two statutes are different when each contains an element that the other does not).

[142] WYO. STAT. ANN. § 6-2-301 (2005) (defining "position of authority" as a "position occupied by a parent, guardian, relative, household member, teacher, employer, custodian or any other person who, by reason of his position, is able to exercise significant influence over a person").

[143] *See* Lewis v. United States, 523 U.S. 155, 176–77 (1998) (recognizing that the *Blockburger* test produces consistent and predictable results); *but see* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1218–21 (2004) (noting that courts sometimes apply the *Blockburger* test inconsistently). However, when applied uniformly, the *Blockburger* test advances the predictability noted in *Lewis*. *Lewis*, 523 U.S. at 176–77; *see also* State v. Kurzawa, 509 N.W.2d 712, 722 (Wis. 1994) (stating "*Blockburger's* emphasis on the statutory elements is simple and objective" and that the test provides certainty); Sara Barton, Comment, *Grady v. Corbin: An Unsuccessful Effort to Define "Same Offense,"* 25 GA. L. REV. 143, 166 (1990) (recognizing the predictable definition of "same offense" produced by *Blockburger*).

[144] *Compare* Owen v. State, 902 P.2d 190, 195 (Wyo. 1995) (holding sexual assault and incest did not merge), *with Najera*, 214 P.3d at 994 (holding that sexual assault and incest did merge). *See infra* notes 139–41 (discussing previous Wyoming case law, which held the elements of sexual assault and incest are not the same).

[145] *See* Grady v. Corbin, 495 U.S. 508, 521 (1990) (holding that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted"), *overruled by* United States v. Dixon, 509 U.S. 688, 704 (1993). Accordingly, the Wyoming Supreme Court parallels this analysis because the court relied on appellant's conduct as the adopted father of the victim to find that the offenses of incest and second-degree sexual assault constituted the same offense. *See supra* note 92.

[146] *Najera*, 214 P.3d at 994.

Supreme Court delved past the statutory text and into the facts with which the prosecution proved Najera's sexual assault.[147] The parallel between the application of the merger test in *Najera* and the conduct test of *Grady* calls into question the constitutionality of the Wyoming Supreme Court's merger analysis.[148]

A comparison of the holdings in *Owen v. State* and *Najera* reveal the problems created by the *Grady* conduct test. In *Owen*, sexual assault and incest constituted separate offenses for which no merger occurred; conversely in *Najera*, sexual assault and incest merged.[149] The Wyoming Supreme Court quipped that the *Najera* decision presented "a mirror image" of *Owen*, yet the underlying question remained whether sexual assault and incest merge.[150] The Wyoming Supreme Court inexplicably answered inconsistently.[151] If the court applies the *Blockburger* test to the statutory text of the sexual assault and incest statutes, the two crimes will not merge and the result will be consistent.[152]

Despite the Wyoming Supreme Court's reliance on merger analysis resembling the *Grady* conduct test, it once recognized the *Blockburger* test as the sole test.[153] The application of the *Blockburger* test in *Keffer* called for merely a consideration and comparison of the statutory text to determine whether the statutes constitute two separate and distinct offenses.[154] The Wyoming Supreme Court stated in

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[147] *Id.*

[148] *See id.* at 995 (Voigt, C.J., specially concurring) (stating concern that the Wyoming Supreme Court has moved away from the application of the statutory elements test of *Blockburger* to the overruled test of *Grady*); Snow v. State, 216 P.3d 505, 511 n.8 (Wyo. 2009) (calling into question the contradiction between Wyoming merger of sentences jurisprudence with that of *Dixon*). *Compare Najera*, 214 P.3d at 994 (majority opinion) (discussing the Wyoming merger of sentences rule reaching beyond the statutory elements to focus on the facts proven at trial), *with* Kathryn A. Pamenter, *United States v. Dixon: The Supreme Court Returns to the Traditional Standard for Double Jeopardy Clause Analysis*, 69 NOTRE DAME L. REV. 575, 581–82 (1994) (discussing the requirements the overruled *Grady* test imposed upon the courts analysis; namely that the *Blockburger* test is the first prong of the test and then whether the conduct of the two offenses was the same is the second prong).

[149] *Najera*, 214 P.3d at 994; Owen v. State, 902 P.2d 190, 195 (Wyo. 1995). In *Owen*, the appellant was charged with incest and sexual assault inflicted upon his daughter. 902 P.2d at 192. Owen contended that the counts should merge for sentencing purposes, however the Wyoming Supreme Court ruled otherwise: "[The] family relationship element prevents the incest conviction from merging into the second-degree sexual assault conviction since a family relationship was not a necessary element for the sexual assault." *Id.* at 195. The court reached a wholly opposite conclusion in *Najera*. 214 P.3d at 994.

[150] *Najera*, 214 P.3d at 994.

[151] *Compare Owen*, 902 P.2d at 195 (holding sexual assault and incest did not merge), *with Najera*, 214 P.3d at 994 (holding that sexual assault and incest did merge).

[152] *See Owen*, 902 P.2d at 195 (Wyo. 1995) (reasoning that sexual assault and incest are "separate and distinct offenses"); *supra* notes 136–44 (applying the *Blockburger* test to the incest and sexual assault statutes in detail).

[153] State v. Keffer, 860 P.2d 1118, 1130 (Wyo. 1993).

[154] *Id.*

Keffer when deciding whether two offenses should merge: "[The] determination is made solely upon a comparison of the statutory elements."[155] This analysis mirrors that of *Dixon*, which overruled the conduct test espoused in *Grady*.[156] The United States Supreme Court refuted the *Grady* conduct test on the basis that the test lacked historical and most importantly, constitutional roots in comparison with *Blockburger*.[157] Furthermore, *Grady's* conduct test produced inconsistent results with prior jurisprudence and traditional common law double jeopardy analysis.[158] The Wyoming Supreme Court must recognize the clear repudiation of the conduct test by the United States Supreme Court and revert back to the consistent and reliable *Blockburger* test.

Harmonizing United States v. Dixon *with* Najera v. State

In *Dixon*, the United States Supreme Court faced a situation similar to that of the Wyoming Supreme Court in *Najera*. The United States Supreme Court granted *certiorari* to consider two subsequent prosecution double jeopardy issues.[159] Both defendants were held in contempt of court for violating a court order and then subsequently charged with the very crimes that violated that order.[160] Justice Scalia, in comparing the necessary elements for contempt and threatening to kidnap or injure a person or damage his property, wrote:

> Conviction of the contempt required willful violation of the [civil protection order]—which conviction for [threatening to kidnap or injure a person or damage his property] did not; and conviction under [threatening to kidnap or injure a person

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[155] *Id.*

[156] United States v. Dixon, 509 U.S. 688, 696 (1993).

[157] *Id.* at 704.

[158] *Id.*; *see supra* notes 149–52 (exposing the inconsistent results the Wyoming Supreme Court reached regarding the merger of incest and sexual assault).

[159] *Dixon*, 509 U.S. at 691–94.

[160] *Id.* Alivin Dixon was arrested for second-degree murder and was released on bond on the court ordered condition that he was not to commit "any criminal offense." *Id.* He was then arrested for possession of cocaine with intent to distribute. *Id.* Dixon was found guilty of criminal contempt and sentenced to 180 days in jail. *Id.* Subsequently, Dixon moved to dismiss his cocaine charge on double jeopardy grounds, which the trial court granted. *Id.* Michael Foster allegedly attacked his wife, Ana Foster, repeatedly. *Id.* Ana Foster sought a civil protection order, which the court granted. *Id.* The order required that Michael Foster not "molest, assault, or in any manner threaten or physically abuse" Ana Foster. *Id.* Multiple incidents led to Michael Foster being convicted on four counts of criminal contempt for alleged threats and assaults. *Id.* The United States Attorney later charged Michael Foster with criminal charges based on the four incidents that led him to be in contempt of court. *Id.* Michael Foster moved to dismiss, which the trial court denied and Foster appealed. *Id.* The two cases were consolidated by the District of Columbia Court of Appeals which ruled that the subsequent prosecutions were barred according the United States Supreme Court's rule in *Grady*. *Id.*

> or damage his property] required that the threat be a threat to kidnap, to inflict bodily injury, or to damage property—which conviction for the contempt (for violating the [civil protection order] provision that Foster not "in any manner threaten") did not.[161]

In *Dixon*, it would have been impossible for Michael Foster to threaten to kidnap, injure, or damage the property of Ana Foster, without necessarily being held in contempt because he threatened Ana Foster "in any manner."[162] In other words, the requirement that Michael Foster not threaten Ana Foster "in any manner" completely subsumes a specific threat to kidnap, injure, or damage property.[163] This analysis parallels the proposition put forth by the Wyoming Supreme Court in *Najera*, which evidenced the impossibility of Najera abusing his authority as the adopted father of the victims to commit sexual assault without also committing incest.[164] The position of authority element of sexual assault completely subsumes the familial relationship element of incest.[165] The United States Supreme Court held that in this situation the *Blockburger* test was not violated, which represents an entirely different result than the Wyoming Supreme Court reached in *Najera*.[166] The analysis presented above only results in an inconsistent result when a court applies the *Grady* conduct test. When faced with the question of whether certain conduct mandated merger, the United States Supreme Court found the conduct irrelevant; the *Blockburger* test only concerns the statutory text.[167] The Wyoming Supreme Court, however, reached the opposite conclusion by holding that the conduct the prosecution proved mandated the merger of two offenses that passed the *Blockburger* test.[168] The Wyoming Supreme Court's merger analysis produces unreliable results and represents a stance completely contrary to that held by the United States Supreme Court; for these reasons the merger analysis must be revised.

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[161] *Id.* at 702 (illustrating the separate elements between the two statutes).

[162] *Id.*

[163] *Id.*

[164] Najera v. State, 214 P.3d 990, 994 (Wyo. 2009).

[165] *Id.*

[166] *Najera*, 214 P.3d at 994; *Dixon*, 509 U.S. at 703. Furthermore, Chief Justice Rehnquist criticized Justice Scalia for what the Chief Justice saw as a departure from the most basic application of the *Blockburger* test. *Dixon*, 509 U.S. at 716 (Rehnquist, C.J., concurring in part and dissenting in part). The Chief Justice argued that the *Blockburger* analysis should not delve past the general elements of criminal intent which are: (i) a court order made known to the defendant, and (ii) willful violation of that order; however, Justice Scalia focused on the specific elements of the order as charged, such as the prohibition against "threatening in any manner." *Id.* at 716–17. This analysis would be congruent with that discussed *supra* at notes 140–44 and accompanying text.

[167] *Dixon*, 509 U.S. at 702.

[168] *Najera*, 214 P.3d at 995 (Voigt, C.J., specially concurring).

Pennsylvania Merger Doctrine Overruled

Wyoming's merger of sentences doctrine heavily relies on language quoted from a Pennsylvania Superior Court decision.[169] That court held that merger analysis must expand beyond the statutory elements to encompass primarily the facts proven at trial to reveal whether the defendant only committed a single criminal act.[170] Accordingly, the analysis focuses on the concept of an "injury to the sovereign."[171] If the single criminal act violates multiple statutes, but only results in one injury to the state, then the offenses merge.[172] Pennsylvania courts struggled with the application of this convoluted test, much as Wyoming courts do.[173]

Frustrated with the inconsistent and difficult application of the complex merger analysis, the Pennsylvania Supreme Court overturned the common law merger doctrine stating: "The two-part merger analysis, therefore, is not an analysis at all, but merely a mask for the reality that there is no cohesive, complete set of rules for determining when merger should occur."[174] The Pennsylvania legislature took the reins and codified the essence of the merger rule announced by the Pennsylvania Supreme Court's decision in *L. Williams*.[175] The Pennsylvania

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[169] Commonwealth v. Whetstine, 496 A.2d 777 (Pa. Super. Ct. 1985); *see, e.g.*, Bilderback v. State, 13 P.3d 249, 253 (Wyo. 2000); Rouse v. State, 966 P.2d 967, 970 (Wyo. 1998); Owen v. State, 902 P.2d 190, 193 (Wyo. 1995); Rivera v. State, 840 P.2d 933, 944 (1992), *overruled on other grounds by* Springfield v. State, 860 P.2d 435, (Wyo. 1993); Amrein v. State, 836 P.2d 862, 872 (Wyo. 1992) (Thomas, J., dissenting).

[170] *Whetstine*, 496 A.2d at 779–80; *see supra* note 77 (providing the block quote from *Whetstine*).

[171] *Whetstine*, 496 A.2d at 779–80.

[172] *Id.*

[173] *Compare Najera*, 214 P.3d at 994 (majority opinion) (holding that sexual assault and incest merge for purposes of sentencing), *with Owen*, 902 P.2d at 195 (finding sexual assault and incest constituted separate and distinct crimes that should not merge). Note, however, the difference in *Owen* was that the charges for sexual assault were based on the age differential between the Owen and his daughter. *Owen*, 902 P.2d at 193. The one sexual assault charge in *Najera* that did not merge with incest was the third-degree sexual assault charge based on age, similar to *Owen*. *Najera*, 214 P.3d at 994. Still, the ambiguity and inconsistent results spawn from the expanded analysis that delves into the facts proven at trial rather than merely applying the *Blockburger* test to the statutory text. *Id.* at 995 (Voigt, C.J., concurring).

[174] Commonwealth v. L. Williams, 559 A.2d 25, 29 (Pa. 1989). The court held that even though the same facts gave rise to convictions under two statutes, the sentences would not merge because the crimes did not have a lesser/greater included offense relationship. *Id.*; *see* Antkowiak, *supra* note 81, at 268 (explaining that the decision in *L. Williams* did away with the need to look into "amorphous facts or injuries that exist outside the statute").

[175] 42 PA. CONS. STAT. ANN. § 9765 (2011). The Pennsylvania merger statute reads:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act *and all of the statutory elements of one offense are included in the statutory elements of the other offense*. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

Id. (emphasis added).

legislature and courts moved away from the entangled analysis centering on the facts proven at trial back to the traditional *Blockburger* elements analysis reaffirmed by the United States Supreme Court in *Dixon*.[176] The Wyoming Supreme Court's oft-quoted rationale for an extended analysis delving into the facts proven at trial bewildered the court system that spawned it, leading to a repudiation of the rule and a statutory reorientation to the *Blockburger* test.

Prioritizing Legislative Intent

The importance of the *Blockburger* test rests in the legislature's role in defining crime and punishment.[177] The United States Supreme Court aptly summed up the role of the court in multiple punishment cases: "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[178] A court may not merge sentences where the legislature provides for separate punishments.[179] A prominent section of legal commentators even advocates severing the multiple punishment prong from double jeopardy entirely, because the focus should be on the legislature's intended definition of the crime rather than a constitutional protection.[180] The *Blockburger* test must be applied to the statutory text to afford the correct deference to legislative power and intent.

The statutory text represents the first and easiest place to determine legislative intent.[181] Under the proper application of the *Blockburger* test, incest and sexual assault constitute different crimes, as each requires proof of an element that the other does not.[182] The Wyoming Supreme Court's decision in *Najera* merged the sentences for the crimes of sexual assault and incest due to the incorrect application of the *Blockburger* test, which delved into the facts and evidence

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[176] Antkowiak, *supra* note 81, at 271 (proclaiming the Pennsylvania merger statute embodies *Blockburger*).

[177] *See* Duffy v. State, 789 P.2d 821, 826 (Wyo. 1990) (recognizing the legislature's role in defining separate crimes); *accord* Brown v. Ohio, 432 U.S. 161, 165 (1977).

[178] Missouri v. Hunter, 459 U.S. 359, 366 (1983); *see* Cook v. State, 841 P.2d 1345, 1349 (Wyo. 1992) (quoting *Hunter*, 459 U.S. at 366).

[179] *See* Poulin, *supra* note 65, at 595–96 (referencing the focus on legislative intent for questions of merger of sentences).

[180] *Id.*; Antkowiak, *supra* note 81, at 263.

[181] *See Duffy*, 789 P.2d at 831 (recognizing that the first and easiest place to discern legislative intent is the language of the statute); *Hunter*, 459 U.S. at 367 (stating that the *Blockburger* test is a rule of statutory construction to discern legislative intent).

[182] *Compare* WYO. STAT. ANN. §§ 6-2-303(a)(vi), -304(a)(iii) (2005) (requiring an abuse of an authority position as an element of sexual assault), *with id.* § 6-4-402(a) (requiring a familial relationship as an element of incest). *See supra* notes 136–44 and accompanying text (applying the *Blockburger* test to the statutory text of sexual assault and incest).

proven at trial.[183] Even if the extended merger analysis espoused in *Najera*, *Rouse*, and *Owen* controlled, legislative intent still prevails.[184] The Wyoming Supreme Court is no stranger to the role of legislative intent in multiple punishment cases; however, by adhering to the ill-adopted merger analysis resembling the *Grady* test, the court destroys any effect of legislative intent because it delves past the statutory text.[185]

The Wyoming Legislature probably never intended sexual assault and incest charges to merge. Unfortunately in Wyoming, little legislative history exists to guide the statutory construction.[186] To discern legislative intent, Wyoming courts resort first to the plain language of the statute to reveal the object and purpose of the statutes.[187] In the absence of clear legislative intent, the court applies the *Blockburger* test.[188] The underlying presumption is that the legislature does not intend to punish the same offense under two statutes.[189]

The plain language of the incest and sexual assault statutes does not authorize cumulative punishments explicitly.[190] Instead, the statutes clearly serve two distinct objects and purposes. The Wyoming Supreme Court recognized the peculiar and unique emotional injury of incest, which revolves around the requisite familial relationship in addition to the physical sexual intrusion.[191] Whereas, sexual assault based on an abuse of a position of authority protects those vulnerable to the persuasion of another holding a position of power.[192] Thus, the Wyoming courts have expressed different interpretations of the object and purpose behind the

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[183] Najera v. State, 214 P.3d 990, 994 (Wyo. 2009).

[184] *Hunter*, 459 U.S. at 368 (recognizing even if it is possible to construe two statutes to be the same offense under the *Blockburger* test, the Double Jeopardy Clause does not automatically bar multiple punishments in a single trial); *accord* Howard v. State, 762 P.2d 28, 32 (Wyo. 1988); Poulin, *supra* note 65, at 1225 (recognizing that the *Blockburger* test can be overcome by a clear and unambiguous statement of legislative intent); *see, e.g.*, *Najera*, 214 P.3d at 993–94 (describing the scope of the *Blockburger* test to encompass the facts proven at trial).

[185] *Duffy*, 789 P.2d at 831 (holding the *Blockburger* test to be one of mere statutory construction that should not consider the facts of any particular case); *see, e.g.*, Cook v. State, 841 P.2d 1345, 1348–49 (Wyo. 1992) (explaining a three-part analysis to multiple punishment double jeopardy questions centered around the *Blockburger* test).

[186] *Duffy*, 789 P.2d at 830.

[187] *Cook*, 841 P.2d at 1351 (citing Schultz v. State, 751 P.2d 367, 370 (Wyo. 1988)); *Hunter*, 459 U.S. at 368–69 (recognizing that clear legislative intent permitting multiple punishments overrides the *Blockburger* test).

[188] *Cook*, 841 P.2d at 1348.

[189] *Id.* (citing Whalen v. United States, 445 U.S. 686, 691–92 (1980)).

[190] WYO. STAT. ANN. §§ 6-2-303(a)(vi), -304(a)(iii), -402(a) (2005); *see supra* notes 99–100 (quoting statutory text).

[191] Owen v. State, 902 P.2d 190, 195 (Wyo. 1995); Kallas v. State, 704 P.2d 693, 695 (Wyo. 1985) (explaining the specific thrust of incest to be the family relationship).

[192] Scadden v. State, 732 P.2d 1036, 1040–41 (Wyo. 1987).

particular statutes. The incest statute criminalizes familial sexual relationships, while sexual assault (specifically as charged) protects a person vulnerable to the persuasion of another with a position of authority from sexual intrusion or contact.

The fact that the legislature housed the two statutes in different sections of the criminal code further corroborates this interpretation.[193] The sexual assault statutes reside in the chapter "offenses against the person," specifically under the article "sexual assault."[194] In contrast, the chapter entitled, "offenses against morals, decency and family," contains the incest statute.[195] The placement of the statutes further supports the interpretation that incest protects against improper familial relations and that sexual assault forbids unwanted sexual relations based on differing degrees of coercion.

Furthermore, sexual assault and incest trigger varying penalties. Second-degree sexual assault carries a minimum prison sentence of two years with a maximum of twenty, while third-degree sexual assault brings a sentence not to exceed fifteen years.[196] Incest, on the other hand, comes with a punishment not to exceed imprisonment for more than fifteen years, a fine of not more than $10,000, or both.[197] Although similarities exist between the incest and third-degree sexual assault prison sentences, the incest penalty was formerly a maximum of five years imprisonment, a $5000 fine, or both.[198] In 2007, the legislature doubled the fine and tripled the maximum imprisonment.[199] In contrast, the penalty for third-degree sexual assault was not increased, nor was there any mention within the legislation increasing the incest penalty to mirror the sexual assault statutes.[200]

The legislature used different language in crafting the elements of sexual assault and incest. The two statutes protect different societal interests as evidenced by their inclusion in separate parts of the criminal code. Finally, the crimes carry different sentences. Construing all these factors in the whole, it would appear

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[193] *See* WYO. STAT. ANN. tit. 6, Crimes and Offenses (2005); *see also Cook*, 841 P.2d at 1352 (analyzing where the legislature codified robbery to help discern the object and purpose behind the crime); Duffy v. State, 789 P.2d 821, 832 (Wyo. 1990) (recognizing that the legislature's decision to place two statutes in different sections indicates the intent to allow separate punishments).

[194] *See* WYO. STAT. ANN. tit. 6 Crimes and Offenses, Ch. 2 Offenses Against the Person, art. 3 Sexual Assault (2005).

[195] *See id.* tit. 6 Crimes and Offenses, Ch. 4 Offenses Against Morals, Decency and Family, Art. 4 Offenses Against the Family.

[196] *Id.* § 6-2-306(a)(i), (ii).

[197] *Id.* § 6-4-402(b).

[198] 2007 Wyo. Sess. Laws 40 (modifying the penalties for incest found in section 6-4-402(b) of the Wyoming Statutes).

[199] *Id.*

[200] *Id.*

that the legislature intended to impose separate punishments for both sexual assault and incest. The *Blockburger* test honors this legislative intent.[201] Therefore, multiple punishments are properly authorized for Najera's transgressions.

CONCLUSION

The analysis in this note aims to simplify at least one aspect of the Double Jeopardy Clause. For cases concerning merger of sentences, the *Blockburger* test must focus solely on the statutory text.[202] The Wyoming merger analysis strayed too close to the overruled precedent of *Grady* by expanding the focus to encompass the facts proven at trial.[203] Furthermore, the rationale upon which the Wyoming Supreme Court based the foundation of their merger analysis created judicial havoc in Pennsylvania, which led to its abandonment and replacement with the *Blockburger* test.[204] When the *Blockburger* test focuses solely on the statutory language, the court gives the correct deference to the legislature's role in authorizing multiple punishments.[205] By expanding merger analysis to the facts proven at trial, the court sidestepped and ignored the legislature's almost explicit indication that incest and sexual assault represent different crimes.[206] A return to the *Blockburger* analysis will establish consistency and reliability in a murky and infirm area of the law.[207] If courts shoot from the hip and ignore legislative intent, this area of the law will devolve back to the crude Wild West style of justice that prevailed in Jack McCall's execution.

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[201] *But see* Mark E. Nolan, Comment, *Diverging Views on the Merger of Criminal Offenses: Colorado has Veered Off Course*, 66 U. COLO. L. REV. 523, 550–53 (1995) (recognizing that the *Blockburger* test is the correct place to begin merger analysis, but in the absence of clear and unambiguous legislative intent the court should be hesitant to infer it).

[202] *See supra* notes 26–43 and accompanying text (discussing the *Blockburger* test).

[203] *See supra* notes 74–87 and accompanying text (discussing the similarities of Wyoming's analysis to that of *Grady*).

[204] *See supra* notes 77–84 and accompanying text (discussing the Pennsylvania courts overruling the two-part fact focused merger test).

[205] *See supra* notes 35–43 and accompanying text (discussing the importance of legislative intent in defining multiple punishments).

[206] *See supra* notes 177–201 and accompanying text (prioritizing the legislature's intent).

[207] *See supra* notes 35–43, 143, 152 (applying the *Blockburger* test will produce consistent results).