A Tale of Two Counts of Possession . . . For One Pill: A Reexamination of the Virginia Court of Appeals's Decision in *Howard v. Commonwealth*

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Introduction

James Melvin Howard was convicted of two separate counts of possession of a controlled substance for having a single pill on his person.[1] Howard was sentenced to five years in a penitentiary—three years for count one of possession and two years for count two.[2]

Officers pulled Howard over in his vehicle for running a stop sign on May 16, 2015.[3] Upon approaching Howard's car, officers claimed they smelled the odor of marijuana.[4] The officers proceeded to search the car.[5] After the officers completed the search, they claimed they smelled marijuana on Howard and proceeded to search him.[6] In Howard's pocket, the officers found a capsule, which lab analysis determined was a mixture of heroin and fentanyl.[7] The Chesapeake Circuit Court convicted Howard of one count of possession of a Schedule I substance and one count of possession of a Schedule II substance under section 18.2-250.[8]

The relevant portion of the statute reads:

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* Antonin Scalia Law School, J.D. expected, 2020.

1 Howard v. Commonwealth, No. 0780-17-1, 2018 WL 2604993, at *1 (Va. Ct. App. June 5, 2018).

2 Virginia Courts Case Information, Chesapeake Circuit, http://ewsocis1.courts.state.va.us/CJISWeb/circuit.jsp (select "Chesapeake Circuit Court" from the drop-down box; click "begin;" in the "Name" box, type in "Howard, James;" then, click "search by name;" finally, select case number "CR16000078-00" for Howard's three-year sentence for possession of heroin or select case number "CR16000078-01" for Howard's two-year sentence for possession of fentanyl).

3 *Howard*, 2018 WL 2604993, at *1.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

> (A) It is unlawful for any person *knowingly or intentionally to possess a controlled substance* unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act . . . .
> (a) Any person who violates this section with respect to *any* controlled substance classified in Schedule I or II of the Drug Control Act shall be guilty of a Class 5 felony . . . .[9]

The Virginia Court of Appeals upheld both convictions.[10] The court reasoned that the plain language of section 18.2-250 allows a defendant to be charged for each controlled substance he possesses, regardless of whether the substances are contained in the same capsule.[11] The court held that the defendant may be convicted of two counts of possession for a single capsule, even if the defendant believed the capsule contained only a single drug.[12] The court reasoned that to satisfy the *mens rea* element of the statute, the Commonwealth only needed to prove that the defendant knew the capsule contained a single controlled substance.[13] If the defendant knew one substance was present, then he could be held liable for multiple substances contained in the same capsule.[14] Although Howard did not raise a double jeopardy argument, in a footnote, the court rejected the notion that the conviction violated the Double Jeopardy Clause.[15] The *Howard* case was a case of first impression in the Virginia Court of Appeals.[16] Because of the ruling in his case, Howard now faces five years of incarceration and has two Class Five felonies on his record.[17]

Howard also has far-reaching effects beyond Mr. Howard's plight. The case notes of the Virginia Annotated Code now contain six references to the *Howard* case for the principles of statutory interpretation, *mens rea*, and legislative intent of the drug possession stat-

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9 VA. CODE ANN. § 18.2-250 (2019) (emphasis added) (Subparts (b)-(c) describe other schedules and penalties. *See infra* pp. 3-4. Part (B) exempts government officials handling drugs as a part of their legal duty).

10 *Howard*, 2018 WL 2604993, at *7.

11 *Id.* at *3.

12 *Id.* at *4-5.

13 *Id.*

14 *Id.*

15 *Id.* at *4 n.2.

16 *Howard*, 2018 WL 2604993, at *6.

17 Virginia Courts Case Information, Chesapeake Circuit *supra* note 2.

ute.[18] In an unpublished opinion, the Board of Immigration Appeals for the U.S. Department of Justice recently rejected a claim that *Howard* governs the Virginia drug possession statute (Section 18.2-250).[19]

The *Howard* decision impacts every defendant in Virginia—and perhaps defendants nationwide—who are charged with possession of drug mixtures.[20] Although *Howard* is not binding precedent since it is an unpublished decision, the decision is potentially persuasive and presents an opportunity for the Supreme Court of Virginia to take up the issue.[21] Additionally, two other states have already faced substantially similar cases, and a potential Supreme Court of Virginia holding in *Howard* would likely serve as persuasive authority when other states and the federal government confront the issue.[22] In fact, in the short time since the *Howard* decision, prosecutors have cited *Howard*'s holding as persuasive authority in briefs filed in cases pending before the Fourth Circuit, Eighth Circuit, and the Supreme Court of Ohio.[23]

This Comment will analyze whether the Supreme Court of Virginia should overturn the decision of the Court of Appeals if Howard chooses to appeal. First, this Comment will examine the treatment of drug possession in Virginia, *Howard* and similar cases in Ohio and North Carolina, *mens rea* in drug possession, double jeopardy in Virginia under *Blockburger v. United States*,[24] and policy for combating the fentanyl crisis. Next, this Comment will analyze the *mens rea*, double jeopardy, and policy arguments applied in *Howard*. This Comment will demonstrate that Section 18.2-250 requires proof of

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18 VA. CODE ANN. § 18.2-250 (2019).

19 *In re* Hassan Bah, 2018 WL 5921074, at *4 (B.I.A. Sept. 18, 2018).

20 In the oral arguments before the court of appeals, the court asked a question about how this case would affect defendants who are found with marijuana laced with PCP. *See* Oral Argument at 2:45-4:30, Howard v. Commonwealth, 2018 WL 2604993 (Va. Ct. App. June 5, 2018), *available at* http://www.courts.state.va.us/courts/cav/oral_arguments/2018/Region%201%20-%20Eastern%20Virginia/mar/0780_17_1.MP3.

21 *In re* Hassan Bah, 2018 WL 5921074, at *4 (B.I.A. Sept. 18, 2018) (citing King v. Blankenship, 636 F.2d 70, 72 (4th Cir. 1980) (stating that unpublished opinions do not create binding precedent).

22 *Howard*, 2018 WL 2604993, at *6-7 (citing State v. Hall, 692 S.E.2d 446, 448, 451 (N.C. Ct. App. 2010), *cert. denied*, 701 S.E.2d 253 (N.C. 2010); State v. Woodard, No. CA2016-09-084, 2017 Ohio App. LEXIS 3052, at *1, *17 (Ohio Ct. App. July 24, 2017)).

23 Brief for the United States at 9, 11-12, United States v. Vanoy, No. 18-3165 (8th Cir. Mar. 13, 2019); Brief of the United States at 24, 25, United States v. Ward, No. 18-4720 (4th Cir. Mar. 1, 2019); Merit Brief of Appellee, The State of Ohio at 14, State v. Pendleton, No. 2019-0181 (Ohio May 7, 2019).

24 284 U.S. 299 (1932).

knowledge of each substance possessed, does not express intent to allow multiple punishments for the same act, and that the *Howard* holdings on the *mens rea* and double jeopardy issues are mutually exclusive. Ultimately, this Comment concludes that the Supreme Court of Virginia must overturn the Court of Appeals' decision in *Howard* because: (1) the decision is contrary to the Supreme Court of Virginia's precedent and the statutory *mens rea* requirement in Section 18.2-250, (2) it fails to achieve policy goals of curbing the fentanyl crisis, and (3) the decision violates the double jeopardy rights of criminal defendants under *Blockburger*.

BACKGROUND

I. DRUG POSSESSION IN VIRGINIA

Section 18.2-250 of the Virginia Code criminalizes knowingly or intentionally possessing a controlled substance without a valid prescription.[25] To prove that the defendant is guilty of possession under Section 18.2-250, the prosecution must show that: (1) the "defendant was aware of the presence and character of the particular substance and [(2)] was intentionally and consciously in possession of [the substance]."[26]

Section 18.2-250 designates the class and applicable penalty for drug possession based on the schedule classification of different controlled substances under the Drug Control Act.[27] Possession of controlled substances classified in Schedules I and II result in a Class 5 felony, except if the substance is cannabis, which results in a Class I misdemeanor.[28] Class 5 felonies are punishable by one to ten years in prison, or less than twelve months in prison and a fine of up to $2,500.[29] Possession of a controlled substance classified in Schedule

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25 VA. CODE ANN. § 18.2-250 (2019).

26 Ritter v. Commonwealth, 173 S.E.2d 799, 805 (Va. 1970); *see also* Young v. Commonwealth, 659 S.E.2d 308, 310 (Va. 2008).

27 *See* Drug Control Act, VA. CODE ANN. § 54.1-3400-3472 (2019).

28 VA. CODE ANN. § 18.2-250(A)(a) (2019). However, Virginia's General Assembly recently passed a bill decriminalizing simple possession of marijuana. Laura Taylor, *Va. Lawmakers Pass Bill to Decriminalize Simple Possession of Marijuana*, ABC 13 NEWS, Mar. 8, 2020, https://wset.com/news/at-the-capitol/va-lawmakers-pass-bill-to-decriminalize-marijuana. If the governor signs the law, the penalty simple possession of marijuana will be a civil fine of no more than $25. *Id.*

29 VA. CODE ANN. § 18.2-10(e) (2019).

III results in a Class 1 misdemeanor, punishable by less than twelve months in jail and a fine of up to $2,500.[30] Possession of a controlled substance classified in Schedule IV results in a Class 2 misdemeanor, punishable by less than six months in jail and a fine of up to $1,000.[31] Possession of a controlled substance classified in Schedule V results in a Class 3 misdemeanor, punishable by a fine of up to $500.[32] Finally, possession of a controlled substance classified in Schedule VI results in a Class 4 misdemeanor, punishable by a fine of up to $250.[33]

II. ACTUS REUS OF DRUG POSSESSION

Actual or constructive possession may establish the possession element of Section 18.2-250.[34] Before 1970, to convict a defendant of possession of a controlled substance, the Commonwealth had to prove the defendant had actual and exclusive possession.[35] To show actual and exclusive possession, the Commonwealth had to show that the drugs were either on the defendant's person or in a private area owned exclusively by the defendant.[36] For example, evidence of drugs found in a defendant's shared apartment would not be enough on its own to establish possession.[37]

However, in 1970, the Supreme Court of Virginia in *Ritter v. Commonwealth* held that prosecutors may prove the *actus reus* of possession of a controlled substance by demonstrating either actual or constructive possession.[38] A defendant constructively possesses a controlled substance when the defendant can lawfully exercise dominion or control over the area where the controlled substance was found.[39] For example, in *Ritter*, the court held that the defendant constructively possessed a package containing marijuana the moment the package was placed in the defendant's mailbox.[40] Under the progeny

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30 VA. CODE ANN. §§ 18.2-11(a), 18.2-250(A)(b) (2019).

31 VA. CODE ANN. §§ 18.2-11(b), 18.2-250(A)(b1) (2019).

32 VA. CODE ANN. §§ 18.2-11(c), 18.2-250(A)(b2) (2019).

33 VA. CODE ANN. §§ 18.2-11(d), 18.2-250(A)(c) (2019).

34 Walton v. Commonwealth, 497 S.E.2d 869, 872 (Va. 1998).

35 Tyler v. Commonwealth, 91 S.E. 171, 172 (Va. 1917); *Possession of Narcotic Drugs*, 5 U. RICH. L. REV. 454, 455 (1971) (citing Henderson v. Commonwealth, 107 S.E. 700, 702 (Va. 1921).

36 *See Tyler*, 91 S.E. at 172.

37 *See Id.*

38 *See* Ritter v. Commonwealth, 173 S.E.2d 799, 806 (1970); *Possession of Narcotic Drugs*, *supra* note 35, at 456.

39 *Ritter*, 173 S.E.2d at 806.

40 *Id.* at 807.

of *Ritter*, the Commonwealth may establish the *actus reus* of possession for multiple defendants in joint possession of a living area by showing each defendant had access to the area where the drugs were found.[41]

In *Robbs v. Commonwealth*, the Supreme Court of Virginia held that possession of even a modicum—a small unusable amount—of a controlled substance is sufficient to satisfy the *actus reus* of possession.[42] Thus, in *Robbs*, the court found that a small unusable amount of heroin residue on a bottle cap was sufficient to sustain a conviction.[43]

III. MENS REA OF DRUG POSSESSION

To convict a defendant for drug possession, the Commonwealth must satisfy two distinct *mens rea* requirements.[44] First, the Commonwealth must prove that the defendant *intentionally and consciously* possessed the controlled substance.[45] Second, the Commonwealth must prove that the defendant was aware of the *presence and character* of the substance.[46] The Supreme Court of Virginia has held that knowledge of the presence and character of a substance is an essential element under Section 18.2-250.[47] However, the Court of Appeals of Virginia has tried to limit the scope of this *mens rea* requirement on multiple occasions.[48]

In *Josephs v. Commonwealth*, an officer pulled over a vehicle containing the defendant after noticing it was a rental car from Florida.[49] The officer called in a drug dog to the scene, which alerted

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41 *See* Archer v. Commonwealth, 303 S.E.2d 863 (Va. 1983); *see also* 6B MICHIE'S JURIS., *Drugs & Druggists* § 5 (2019) (citing Eckhart v. Commonwealth, 281 S.E.2d 853, 855 (Va. 1981) (upholding the conviction of possession of marijuana of a woman based on marijuana found in a shared apartment, in an area where both cotenants had access)).

42 *See* Robbs v. Commonwealth, 176 S.E.2d 429, 430-31 (Va. 1970); *see also Quantity of Possession of a Narcotic Necessary for Conviction*, 5 U. RICH. L. REV. 429, 430-31 (1971).

43 *Robbs*, 176 S.E.2d at 430-31.

44 VA. CODE ANN. § 18.2-250(A) (2019).

45 *Id.*

46 VA. CODE ANN. § 18.2-250(A)(c) (2019); Young v. Commonwealth, 659 S.E.2d 308, 310 (Va. 2008).

47 *Young*, 659 S.E.2d at 310-11; *see also* VA. CODE ANN. § 18.2-250(A)(c) (2019).

48 *See*, *e.g.*, Josephs v. Commonwealth, 390 S.E.2d 491, 498-99 (Va. Ct. App. 1990); Sierra v. Commonwealth, 722 S.E.2d 656, 661-62 (Va. Ct. App. 2012).

49 *Josephs*, 390 S.E.2d at 492.

officers to the trunk of the car.[50] Upon opening the trunk, the officers found a total of 130 lbs. of marijuana contained in four separate packages.[51] Josephs who was in the back of the car with her daughter, claimed she had no knowledge of the marijuana in the trunk and was just along for the ride.[52] Josephs identified her luggage in the trunk.[53] The court held that possession of a controlled substance creates a presumption that Josephs knew she possessed the substance.[54] The Court of Appeals of Virginia affirmed the defendant's conviction of possession with intent to distribute (PWID).[55] The court reasoned that the defendant had joint possession of the drugs with the driver, because she not only had access to the trunk, but also placed her luggage there, and therefore was presumed to also have known of the marijuana.[56]

In *Young v. Commonwealth*, the Supreme Court of Virginia held that possession of a controlled substance does not create a presumption of knowledge—reversing the Court of Appeals holding in *Josephs*.[57] The defendant in *Young* was pulled over for failing to stop at an intersection.[58] An officer searched the car and found a prescription pill bottle with a label showing the bottle belonged to the defendant's boyfriend's niece and identified the contents as "OxyContin."[59]

The officer opened the bottle and found six white pills and two blue pills inside.[60] The officer testified that he was unable to determine the nature of the pills by observing them.[61] A subsequent chemical analysis determined the two blue pills contained Morphine, a Schedule II substance, and the six white pills contained Trazodone, a Schedule VI substance.[62] The niece testified that she had left the bottle at her uncle's house by accident and presented a prescription for

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50 *Id.*

51 *Id.*

52 *Id.* at 492-93.

53 *Id.*

54 *Id.* at 498-99.

55 Josephs v. Commonwealth, 390 S.E.2d 491, 492, 499 (Va. Ct. App. 1990).

56 *Id.* The court also found that possession of such a large quantity of drugs gives rise to a presumption of intent to distribute. *Id.* at 499 (citing Hunter v. Commonwealth, 193 S.E.2d 779, 780 (Va. 1973)).

57 Young v. Commonwealth, 659 S.E.2d 308, 310-11 (Va. 2008).

58 *Id.* at 309.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

Morphine and Trazodone to the court.[63] The trial court convicted the defendant.[64] The court accepted the niece's testimony that the bottle belonged to her but rejected her explanation about how the defendant came into possession of the bottle.[65]

The court of appeals, relying on its holding in *Josephs*, affirmed the conviction and found that "[p]ossession of a controlled drug gives rise to an inference of the defendant's knowledge of its character."[66] The Supreme Court of Virginia rejected this conclusion, holding that the Commonwealth must prove both of the beyond a reasonable doubt the "essential elements of the crime"—that the defendant knowingly and intentionally possessed the substances and that the defendant had knowledge of the substance's nature and character.[67] Although the court stated its rejection of *Josephs'* inference presumption would not have changed the outcome in that case, it nonetheless distinguished those facts from *Young*:

> Unlike the odoriferous contents of the trunk in *Josephs*, the contents of the pill bottle in this case gave no indication of their character. [The officer here], after examining the pills, could not determine their nature without submitting them for laboratory analysis, and there is no reason to infer that the defendant was any better informed. The ambiguous circumstantial evidence concerning the appearance of the bottle and its contents is as consistent with a hypothesis of innocence as it is with that of guilt. It is thus insufficient to support the conviction in this case.[68]

In *Sierra v. Commonwealth*, the Court of Appeals of Virginia cast doubt on the extent to which *Young*'s heightened standard of proof for establishing a defendant's knowledge of a substance's nature and character could be applied.[69] In *Sierra*, Sierra was pulled over for a defective headlight and placed under arrest for DUI.[70] Officers

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[63] Young v. Commonwealth, 659 S.E.2d 308, 309 (Va. 2008).

[64] *Id.*

[65] *Id.*

[66] *Id.* at 310 (quoting Josephs v. Commonwealth, 390 S.E.2d 491, 498-99 (Va. Ct. App. 1990)).

[67] *Id*. at 310-11.

[68] *Id.*

[69] *See* Sierra v. Commonwealth, 722 S.E.2d 656, 661-62 (Va. Ct. App. 2012); *Annual Survey of Virginia Law: Article: Criminal Law and Procedure*, 47 U. RICH. L. REV. 143, 177 (2012).

[70] *Sierra*, 722 S.E.2d at 658.

searched him incident to arrest and found six pills in his pants pocket and two pills in his shirt pocket.[71] Sierra claimed he believed the pills to be Tylenol, because he had received the pills after requesting pain medication for his back pain while performing at a bar the night before.[72]

The officer who found the pills testified that the pills appeared to be prescription pills due to their shape and size.[73] Subsequent chemical analysis showed that two of the pills in the defendant's pocket were Schedule II drugs.[74] The trial court convicted Sierra, finding that the facts demonstrated "it would be obvious that the pills were some sort of prescription and not aspirin, Tylenol, [or] Advil."[75]

The court of appeals affirmed the conviction.[76] The court concluded that the "character" *mens rea* requirement of Section 18.2-250 only requires the Commonwealth to show that the defendant knew he possessed *a* controlled substance, not that the defendant knew *which* controlled substance he possessed.[77] The court held that believing he possessed one controlled substance when he was, in fact, in possession of another, was no defense.[78] The court reasoned:

> The specific type of substance found in a defendant's possession is an *actus reus* element the Commonwealth must prove pursuant to subparts (a)-(c) [the list of schedules and punishments] of Code § 18.2-250(A), but it is not an element to which the *mens rea* requirement found earlier in Code § 18.2-250(A) applies.[79]

The Supreme Court of Virginia and the Court of Appeals of Virginia seem to be playing a thrust and parry game of ping-pong on the stringency of the *mens rea* requirement.[80] The court of appeals in *Josephs* created an inference of knowledge based on a finding of possession.[81] The Supreme Court of Virginia countered by overruling the

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71 *Id.*
72 *Id.*
73 *Id.*
74 *Id*. at 657-58.
75 *Id.*
76 Sierra v. Commonwealth, 722 S.E.2d 656, 657-58 (Va. Ct. App. 2012).
77 *Id.*
78 *Id.*
79 *Id*. at 660.
80 *See* Young v. Commonwealth, 659 S.E.2d 308, 310-311 (Va. 2008); *Sierra*, 722 S.E.2d at 658; Josephs v. Commonwealth, 390 S.E.2d 491, 498-99 (Va. Ct. App. 1990).
81 *Josephs*, 390 S.E.2d at 498-99.

"*Josephs* inference" in *Young*.[82] The court of appeals returned the volley by again limiting the *mens rea* requirement in *Sierra*.[83] The *Howard* case now provides a prime opportunity for the Supreme Court of Virginia to deal a decisive "spike" to the court of appeals' repeated attempts to circumscribe the *mens rea* element in drug possession cases.

IV. DOUBLE JEOPARDY UNDER *BLOCKBURGER* IN VIRGINIA

The Double Jeopardy Clause of the U.S. Constitution has established that a defendant cannot be convicted under multiple statutes for the same activity unless each charged offense requires proof of different elements and the legislature has clearly demonstrated an intent to allow for multiple punishments for the same activities.[84] The common law principle against double jeopardy has its roots in ancient Greece, the Justinian Code, and even an interpretation of the Old Testament passage Nahum 1:9.[85] At common law, the state could not charge a defendant with multiple crimes arising from the same event.[86] "The state could only prosecute for one felony at a time and could not bring a second action based on the same factual occurrences as the first."[87] However, this common law principle has been somewhat weakened in modern American jurisprudence.[88]

The Fifth Amendment to the U.S. Constitution prohibits "any person be[ing] subject for the same offence to be twice put in jeopardy of life or limb."[89] Courts have found that the Double Jeopardy Clause prohibits: "(1) a second prosecution for the same offense after acquit-

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[82] *Young*, 659 S.E.2d at 310-11.

[83] *Sierra*, 722 S.E.2d at 657-58.

[84] *See* Blockburger v. United States, 284 U.S. 299 (1932); *see also* Coleman v. Commonwealth, 539 S.E.2d 732, 733-34 (2001); Gregg v. Commonwealth, 796 S.E.2d 447, 451 (Va. Ct. App. 2017), *aff'd*, 811 S.E.2d 254 (Va. 2018).

[85] Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 285 (1963).

[86] *See Supreme Court Clarifies Position on Sentencing of Narcotics Law Violators*, 6 UTAH L. REV. 274, 274-75 (1958) (citing both Frank E. Horack Jr., *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 820 (1937), and *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee,* 65 YALE L.J. 339, 350 (1956)).

[87] *Supreme Court Clarifies Position on Sentencing of Narcotics Law Violators*, *supra* note 86, at 274-75 (1958) (citing Frank E. Horack Jr., *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 820 (1937))

[88] *See* Blockburger v. United States, 284 U.S. 299 (1932).

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

tal; (2) a second prosecution for the same offense after conviction; and (3) *multiple punishments for the same offense*."[90]

In *Blockburger v. United States*, the Supreme Court set forth the test for determining whether a court has issued multiple punishments for the same offense.[91] Under *Blockburger*, to convict a defendant under two separate statutes stemming from a single act, each statute must require proof of an additional fact which the other does not.[92] Blockburger was convicted of two drug charges arising from a single drug sale: (1) selling drugs without their original package and (2) selling the same drugs to the same person at the same time without a written order.[93] The Court held that the convictions did not violate the Double Jeopardy Clause, because even though both criminal charges arose from the same occurrence, the drug sale, each charge required proof of an element that the other did not.[94]

In *Grady v. Corbin*, the Court expanded double jeopardy protections, holding that "even if two successive prosecutions were not barred by the *Blockburger* test, [a] second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution."[95]

However, the expanded protection against double jeopardy outlined in *Grady* did not last long. Just three years later in *United States v. Dixon*, the Supreme Court expressly overruled *Grady* and reaffirmed that the *Blockburger* test governs all claims of double jeopardy violations for multiple prosecutions based on the same offense.[96] Though a majority of justices in *Dixon* were united in overruling *Grady*, a division over how to apply the *Blockburger* test arose.[97] Justice Scalia's approach focused on the facts comprising the elements of

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[90] Commonwealth v. Gregg, 811 S.E.2d 254, 257 (Va. 2018) (quoting Payne v. Commonwealth, 509 S.E.2d 293, 300 (Va. 1999) (emphasis added)).

[91] *See Blockburger*, 284 U.S. 299.

[92] *Id.* at 304; *see also Supreme Court Clarifies Position on Sentencing of Narcotics Law Violators, supra* note 86, at 275-76 (1958) ("The power of Congress to prohibit the several elements of illegal conduct as separate offenses does not violate the double jeopardy principle if more than differing descriptions of the same offense are involved.").

[93] *Id.* at 301, 304.

[94] *Id.* at 304.

[95] Grady v. Corbin, 495 U.S. 508, 510 (1990).

[96] United States v. Dixon, 509 U.S. 688, 704, 711 (1993).

[97] *Id.* at 691-92.

the crime alleged in the indictment.[98] Meanwhile, Justice Rehnquist's approach focused instead on the abstract statutory elements of the crime.[99] Lower courts are divided over whether Scalia's approach or Rehnquist's approach governs the *Blockburger* analysis.[100]

The distinction between the two approaches is made clearer by an analysis of one of the alleged double jeopardy violations in *Dixon*. Alvin Dixon, one of the respondents, was released on bond on the condition that, among other things, he would not commit "any criminal offense."[101] While awaiting trial, Dixon was indicted for PWID.[102] The trial court found Dixon guilty of contempt of the conditions in the bond due to his PWID.[103] Dixon then moved to dismiss the substantive PWID indictment based on double jeopardy grounds.[104] Writing for the majority, Justice Scalia held that the prosecution for PWID after the contempt conviction was barred by *Blockburger*, while Justice Rehnquist argued the prosecution was not barred.[105]

Rehnquist identified the elements of Dixon's contempt conviction as: (1) a court order not to commit a crime and (2) the defendant's commission of a crime.[106] Under this approach, the contempt charge requires proof of a court order, which the PWID charge does not require. Meanwhile, the substantive PWID charge requires proof of possession of a controlled substance with the intent to distribute, which is not required for the contempt charge. Therefore, the charge does not violate *Blockburger* under the Rehnquist approach.[107]

However, Scalia identified the elements of the contempt conviction as: (1) a court order not to commit a crime, and (2) the defendant

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98 *Id.* at 697-98.

99 *Id*. at 713-20 (Rehnquist, J., dissenting).

100 *See*, *e.g.*, Boyd v. Boughton, 798 F.3d 490, 496-97, 501 (7th Cir. 2015); Delgado v. Fla. Dep't of Corr., 659 F.3d 1311, 1322 n.7 (11th Cir. 2011) ("[T]he opinion of Justice Scalia . . . represent[s] the controlling interpretation of Blockburger and the cases listed above, given that there were four dissenting votes in Dixon to retain Grady's full-blown "same conduct" test."); United States v. Hatchett, 245 F.3d 625, 634-37 (7th Cir. 2001).

101 *Id.* at 697-98.

102 *Id.* at 691.

103 United States v. Dixon, 509 U.S. 688, 691-92 (1993).

104 *Id.*

105 *Compare id.* at 698, *with id*. at 713 (Rehnquist, J., dissenting).

106 *Id*. at 716 (Rehnquist, J., dissenting); 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, 586-87 (1994).

107 *Dixon*, 509 U.S. at 715-16 (Rehnquist, J., dissenting).

possessed a controlled substance with intent to distribute.[108] Under Scalia's approach, all of the necessary elements to prove the subsequent substantive PWID charge, as the "lesser-included offense," were contained in the contempt charge.[109] Therefore, Scalia's majority opinion held that Dixon's subsequent PWID charge violated double jeopardy.[110]

The Supreme Court of Virginia has held that the *Blockburger* test does not apply where the plain language of the statute or legislative history demonstrates a clear expression of legislative intent to punish the same action with multiple offenses.[111] However, unless the legislature expressly states an intent to allow for liability under multiple statutes for the same offense, courts apply the *Blockburger* test to determine if the convictions under multiple statutes constitute double jeopardy.[112] Virginia courts apply "the plain meaning of a statute unless the terms are ambiguous or applying the plain language would lead to an absurd result."[113]

V. *HOWARD* AND SIMILAR CASES FROM OHIO AND NORTH CAROLINA

The following section describes how the Court of Appeals of Virginia applied the background principles discussed in the previous sections to the facts in *Howard*. Additionally, the following section describes how the Supreme Court of Ohio and the North Carolina Court of Appeals applied similar principles to fact patterns like the *Howard* case.

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108 *Id*. at 697-98.

109 *Id.* An offense whose elements are contained in another charge, like in this scenario, is commonly referred to as a "lesser included" offense—i.e. the lesser offense is included in the greater. *Id.*

110 *Id.* at 700. Only Justices Scalia and Kennedy adopted Scalia's interpretation of the *Blockburger* test; however, Justices White, Souter, and Stevens agreed that the charge violated Double Jeopardy, arguing that *Grady* should not be overturned. *Id*. at 691, 743-744. Justices Rehnquist, O'Connor, and Thomas argued none of the charges violated Double Jeopardy. *Id.* at 713 (Rehnquist, J., dissenting).

111 Commonwealth v. Gregg, 811 S.E.2d 254, 257 (Va. 2018); *see also, e.g.*, Garrett v. United States, 471 U.S. 773, 779 (1985); Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).

112 *Blockburger*, 284 U.S. at 304; Coleman v. Commonwealth, 539 S.E.2d 732, 734 (Va. 2001); Gregg v. Commonwealth, 796 S.E.2d 447, 451 (Va. Ct. App. 2017), *aff'd*, 811 S.E.2d 254 (Va. 2018).

113 Covel v. Town of Vienna, 694 S.E.2d 609, 614 (Va. 2010) (citing Boynton v. Kilgore, 623 S.E.2d 922, 925-26 (Va. 2006)).

A. Howard v. Commonwealth

1. Facts and Procedural History

As indicated in *infra*, James Howard was pulled over by Virginia police officers for running a stop sign.[114] Upon concluding a search of the car, one of the officers smelled marijuana and searched Howard's person based on the scent.[115] The officer found a capsule containing "a brownish, off-white powdery substance" in Howard's pants pocket.[116] Both the officer and a lab analyst testified that they could not tell from looking at the powder that it contained two separate substances.[117] The lab analysis indicated that the powder contained a mixture of heroin and fentanyl.[118]

The Circuit Court for the City of Chesapeake convicted Howard of one count of possession of a Schedule I narcotic for the heroin and one count of possession of a Schedule II narcotic for the fentanyl.[119]

2. Double Jeopardy and Legislative Intent

The court in *Howard* found that both the legislature's use of the word "a" instead of "any" in Section 18.2-250, as well as the absence of any language limiting the number of charges demonstrated clear legislative intent to permit that a defendant be convicted of multiple counts of possession, even if the substances were contained in the same capsule.[120]

Howard did not claim a violation of double jeopardy in his appeal to the Court of Appeals of Virginia.[121] However, the court reasoned that Howard's statutory interpretation claim was nonetheless like a double jeopardy claim.[122] The court addressed the issue of double

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114 Howard v. Commonwealth, 2018 WL 2604993, at *1 (Va. Ct. App. June 5, 2018).

115 *Id.* at *2

116 *Id.*

117 *Id.* at *3-*4. *See also* Oral Argument at 0:28-0:34, Howard v. Commonwealth, 2018 WL 2604993 (Va. Ct. App. June 5, 2018), *available at* http://www.courts.state.va.us/courts/cav/oral_arguments/2018/Region%201%20-%20Eastern%20Virginia/mar/0780_17_1.MP3 (confirming that the substances were in the same container and were the same color).

118 Howard, 2018 WL 2604993, at *4.

119 *Id.*

120 *Id.* at *8-*9.

121 *Id.* at *12 n.2.

122 *Id.*

jeopardy in a footnote.[123] After describing how legislative intent governs in double jeopardy claims, the court stated the following:

> As we noted . . . the clear intent of Code § 18.2-250, as enacted by the General Assembly, is to punish a defendant for any controlled substance that he possesses. Here, appellant possessed a Schedule I narcotic and a Schedule II narcotic—both of which warrant a separate conviction under the statute.[124]

3. Mens Rea Application

The court found that individuals who know they possess one controlled substance are strictly liable for the other controlled substances they possess.[125] Consequently, the court held that because Howard knew he possessed one controlled substance, he was criminally liable for each substance in the capsule regardless of whether he knew the other substances were there.[126]

The court in *Howard* relies on *Sierra* to find that Howard's knowledge that the capsule in his pocket contained a controlled substance satisfies the *mens rea* requirement for both counts of possession.[127] *Sierra* held that the only required knowledge under the *mens rea* element of section 18.2-250 is that an individual knew they possessed *a* controlled substance, not *which* controlled substance they possessed.[128] The *Howard* court argued that since the *Sierra* holding, the legislature amended section 18.2-250, but left the *mens rea* element untouched.[129] The court argues that this indicates legislative intent to allow for knowledge of one controlled substance to satisfy the *mens rea* element relating to all substances possessed.[130]

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123 *Id.* at *4.

124 Howard v. Commonwealth, 2018 WL 2604993, at *4 (Va. Ct. App. June 5, 2018) (internal citations omitted).

125 *Id.* at *7.

126 *Id*.

127 *Id*. at *5.

128 Sierra v. Commonwealth, 722 S.E.2d 656, 662 (Va. Ct. App. 2012).

129 *Howard*, 2018 WL 2604993, at *5.

130 *Id.*

B. State v. Woodward

The court in *Howard* cited two cases with similar fact patterns from other states: *State v. Woodward* in the Supreme Court of Ohio and *State v. Hall* in the North Carolina Court of Appeals.[131]

In *State v. Woodward*, a corrections officer in a prison observed Mr. Woodard passing an item to a fellow inmate.[132] After a confrontation, the officer retrieved the item, which turned out to be a plastic bag filled with a white powder.[133] A chemical test of the powder revealed it was a mixture of "heroin, a schedule I drug, and fentanyl, a schedule II drug."[134] Mr. Woodard was convicted of one count of possession and one count of aggravated possession for having the white powder.[135]

Ohio criminalizes the knowing possession of a controlled substance.[136] If the controlled substance possessed "is a compound, mixture, preparation, or substance included in schedule I or II" then the individual in possession "is guilty of aggravated possession of drugs."[137] However, the Supreme Court of Ohio held in *Woodward* that the possession charge did not merge with the aggravated possession charge.[138] The court reasoned that each offense required a different element, because each charge requires showing possession of a distinct substance.[139]

C. State v. Hall

At trial, Hall was convicted of both possession of a Schedule I substance for ecstasy and possession of a Schedule III substance for ketamine.[140] Hall received a five to six month sentence—all suspended—for the ecstasy, and forty-five days for the ketamine.[141] Hall

131 *Id.* at 6-7 (citing State v. Hall, 692 S.E.2d 446 (N.C. Ct. App. 2010), *cert. denied* 701 S.E.2d 253 (N.C. 2010)); State v. Woodard, No. CA2016-09-084, 2017 Ohio App. LEXIS 3052 (Ohio Ct. App. July 24, 2017).

132 *Woodard*, 2017 Ohio App. LEXIS 3052, at *2.

133 *Id.* at *2.

134 *Id.* at *20.

135 *Id.* at *8.

136 OHIO REV. CODE ANN. § 2925.11(A) (2019).

137 OHIO REV. CODE ANN. § 2925.11(C)(1) (2019).

138 *Id.* at *16.

139 *Id.*

140 *Id.*

141 *Id.*

appealed the convictions.[142] Hall contended that convicting her of both the Schedule I and the Schedule III charge violated her Fifth Amendment right against double jeopardy.[143] Hall compared the multiple counts to the felony murder merger doctrine, in that the multiple counts should merge because they do not contain separate elements.[144] Additionally, Hall's appellate brief compares the facts in the *Hall* case to other cases dealing with defendants convicted of both possession of a controlled substance and possession of a controlled substance with intent to distribute.[145]

However, the North Carolina Court of Appeals upheld both of Hall's convictions, holding that the convictions did not violate double jeopardy.[146] The court distinguished between the cases cited in the appellant's brief, addressing both instances where defendants were charged with possession and cases where the defendant was charged with possession with intent to distribute.[147] The court found that in *Hall*, unlike the cases cited in the appellant's brief, the amount of the substance possessed was irrelevant.[148] The court found that possession of *any amount* of ecstasy and possession of *any amount* of ketamine would be enough to support a count of possession for each substance.[149] Under the court's reasoning, the element for possession of ketamine would be distinct from the element for possession of ecstasy, even though the substances were mixed in the same capsule.[150] Therefore, the court held that two convictions for the same instance satisfied double jeopardy because each charge requires an element that the other does not.[151]

142 *Id.*
143 Brief for Appellant at 24, State v. Hall, 692 S.E.2d 446 (N.C. Ct. App. 2010).
144 *Id.* at 14.
145 *Id.* at 11-12.
146 *Hall*, 692 S.E.2d at 451.
147 *Id.* at 450-51.
148 *Id.*
149 *Id.* at 450.
150 *See id.*
151 State v. Hall, 692 S.E.2d 446, 451 (N.C. Ct. App. 2010).

VI. PUBLIC POLICY OF THE *HOWARD* RULE: THE FENTANYL PROBLEM AND THE EFFICACY OF PROPOSED SOLUTIONS

Opiate abuse, especially fentanyl abuse, is a major problem in the United States.[152] Opiate overdose deaths have increased by 359% since 1999 in the United States.[153] Of the 42,249 opiate overdose deaths in 2016, 17,087 (40.4%) were caused by prescription opiates.[154] "Other synthetic opiates," both prescription and illicit—a category for which fentanyl accounts for a large percentage—were responsible for 19,413 (45.9%) of the opiate overdose deaths in 2016.[155]

Members of Congress call fentanyl abuse the "third wave" of the opiate epidemic.[156] Fentanyl is a synthetic opiate often mixed or "laced" with other drugs, such as heroin, cocaine, and methamphetamine, to increase their euphoric effect.[157] Fentanyl is also a pharmaceutical drug for severe pain relief.[158] The drug is "[fifty] to [a hundred] times more potent than morphine."[159] Fentanyl is so potent, a mere 0.25 milligrams is enough to potentially cause a lethal overdose.[160]

Fentanyl addiction is particularly prevalent in the eastern United States.[161] In 2014, more than eighty-percent of police seizures of fentanyl occurred in only ten states.[162] These states are east of the Mississippi River.[163] Virginia is seventh on the list.[164] Virginia's

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152 *See* Margot Sanger-Katz, *Bleak New Estimates in Drug Epidemic: A Record 72,000 Overdose Deaths in 2017*, N.Y. TIMES (August 15, 2018), https://www.nytimes.com/2018/08/15/upshot/opioids-overdose-deaths-rising-fentanyl.html?searchResultPosition=10.

153 *See Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE (Aug. 2018), https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates.

154 *Id.*

155 *Id.*

156 Nadia Kounang, *This is fentanyl: A visual guide*, CNN (Oct. 27, 2017), https://www.cnn.com/2017/10/24/health/fentanyl-visual-guide/index.html.

157 Sanger-Katz, *supra* note 152.

158 *Fentanyl*, CTR. FOR DISEASE CONTROL AND PREVENTION (August 29, 2017), https://www.cdc.gov/drugoverdose/opioids/fentanyl.html.

159 Kounang, *supra* note 156; *Fentanyl drug profile*, EUROPEAN MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, http://www.emcdda.europa.eu/publications/drug-profiles/fentanyl (last visited Nov. 15, 2018).

160 Nadia Kounang, *What you need to know about fentanyl*, CNN (Nov. 5, 2018, 3:58 PM), https://www.cnn.com/2016/05/10/health/fentanyl-opioid-explainer/.

161 *See Increases in Fentanyl Drug Confiscations and Fentanyl-related Overdose Fatalities*, CTR. FOR DISEASE CONTROL AND PREVENTION (August 29, 2017) https://emergency.cdc.gov/han/han00384.asp.

162 *Id.*

163 *Id.*

fentanyl seizures made up 222 of the 3,790 seizures among the top ten states.[165] Ohio, where *Woodward* was decided, was number one on the list with 1,245 fentanyl seizures in 2014.[166] However, North Carolina, where *Hall* was decided, did not make the top-ten.[167]

Fentanyl is used medically to manage chronic and acute pain, especially for pain associated with later stages of cancer.[168] Medical forms of fentanyl include patches for absorption through the skin, lozenges, injections, and even lollipops.[169] Illicit or "street" fentanyl typically comes in the form of a white or light yellow, salt-like powder, a capsule, tablet, or a small piece of paper placed under the tongue.[170] Fentanyl, as a synthetic opiate, is manufactured in a lab.[171] Fentanyl is also cheaper and easier to obtain than heroin.[172]

Heroin, on the other hand, is extracted from the seed of the opium poppy plant.[173] Unlike medicinal fentanyl, heroin has no approved medical use.[174] It typically comes in the form of "white or brown powder, or as a black, tacky substance known as 'black tar' heroin."[175] "Black tar" heroin originates in Mexico and is popular in the western United States.[176] The powder form of heroin typically comes from Columbia and is more common in the eastern United States.[177]

Most black-market fentanyl is typically made in China and shipped to Mexico, where it is "cut"—laced or mixed—with other

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164 *Id.*

165 *Id.*

166 *Id*.

167 *See Increases in Fentanyl Drug Confiscations and Fentanyl-related Overdose Fatalities*, CTR. FOR DISEASE CONTROL AND PREVENTION (August 29, 2017), https://emergency.cdc.gov/han/han00384.asp.

168 *Id.*

169 Kounang, *supra* note 160.

170 *Id.*

171 *See Increases in Fentanyl Drug Confiscations and Fentanyl-related Overdose Fatalities*, CTR. FOR DISEASE CONTROL AND PREVENTION (August 29, 2017), https://emergency.cdc.gov/han/han00384.asp.

172 Sanger-Katz, *supra* note 152.

173 *Fentanyl vs. Heroin: The Similarities and Differences Between Two Powerful Opioids*, AMERICAN ADDICTION CENTERS, https://americanaddictioncenters.org/fentanyl-treatment/similarities (last visited Nov. 15, 2018).

174 *Id.*

175 *Id.*

176 Philippe Bourgois, et al., *The Textures of Heroin: User Perspectives on "Black Tar" and Powder Heroin in Two US Cities*, 48(4) J. PSYCHOACTIVE DRUGS, 270-78 (Sep-Oct. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5027195/.

177 *Id.*

drugs such as heroin.[178] The drug cocktails are then smuggled into the United States or shipped through the U.S. postal service.[179] Drug cocktails containing a variety of opiates are often referred to on the street as "grey death" due to their potency and cement-like color.[180] Producers of drugs often lace heroin with fentanyl with or without the knowledge of the drug user.[181] Many addicts and middle-man dealers in the United States may not know and are even unable to recognize when the heroin they purchase contains fentanyl.[182]

Inelastic demand for heroin makes the "tax" of increased criminalization of the drug ineffective at curbing demand.[183] When heroin criminalization is increased, the price goes up for consumers because of the increased risk dealers face in bringing the drug to consumers.[184] The increased cost to drug dealers—the increased risk of criminal liability—is essentially offset by the increased benefits through the higher premiums charged for the increased risk.[185] Therefore, increased criminalization does little to disincentivize and reduce the supply of drugs.[186] At the same time, the demand and quantity purchased does not decrease significantly because of consumers' addiction to the drug.[187] The consumers, drug users, are willing to pay the higher price, due to the physical and psychological dependence on the drugs.[188] Because of the nature of addiction, increasing the criminalization of heroin does not have the same deterrent effect as with other crimes, such as murder and robbery.[189]

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178 U.S. DRUG ENFORCEMENT ADMINISTRATION, FENTANYL: A BRIEFING GUIDE FOR FIRST RESPONDERS, https://www.nvfc.org/wp-content/uploads/2018/03/Fentanyl-Briefing-Guide-for-First-Responders.pdf (last visited Nov. 15, 2018); Kounang, *supra* note 156.

179 U.S. DRUG ENFORCEMENT ADMINISTRATION, *supra* note 178.

180 Michael Nedlemen, *'Grey death': The powerful street drug that's puzzling authorities*, CNN (May 13, 2017, 2:25 PM), https://www.cnn.com/2016/05/10/health/fentanyl-opioid-explainer/.

181 *Increases in Fentanyl Drug Confiscations and Fentanyl-related Overdose Fatalities*, CTR. FOR DISEASE CONTROL AND PREVENTION (August 29, 2017), https://emergency.cdc.gov/han/han00384.asp.

182 *Id.*

183 Mark A. Deininger, *The Economics of Heroin: Key to Optimizing the Legal Response*, 10 GA. L. REV. 565, 585-87 (1976).

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *See* Deininger, *supra* note 183.

ANALYSIS

The Supreme Court of Virginia should overturn the *Howard* decision. First, the *Howard* decision is inconsistent with the legislative intent and prior caselaw interpretation of the *mens rea* requirement concerning drug possession. The appellate court in *Howard* relies heavily on *Sierra* to support the *mens rea* holding. However, *Sierra* does not support the principle that defendants are liable for each illicit drug they possess if they only knew they possessed one illicit drug but not the others. Even though *Sierra* does not require a defendant to know which type of substance he possessed, the holding still requires the Commonwealth to show the defendant had knowledge of each substance. Additionally, the *Howard* court's holding contradicts the Supreme Court of Virginia's *mens rea* precedent for drug possession under *Young*.

Second, if the Supreme Court of Virginia adopts the *Howard* court's theory of *mens rea*, Howard's conviction for both substances is double jeopardy under *Blockburger*, because the two counts of possession require the same elements. Further, the drug possession statute does not contain any indication of legislative intent to allow for the Commonwealth to get around the *Blockburger* test. Therefore, convicting Howard of both counts of possession under the *Howard* theory of *mens rea* puts Howard in double jeopardy.

Finally, the opiate abuse policy concerns the Court of Appeals of Virginia cited do not support the ruling in *Howard*. Addicts are often unaware when drugs are laced with fentanyl and increasing criminalization of heroin and other opiates fails to curb demand. Increased criminalization of drugs often increases the profitability of drug dealing. Even if the *Howard* ruling did achieve the intended policy goals, policy concerns are under a legislative, not judicial, prerogative.

I. FAILURE TO PROVE KNOWLEDGE BEYOND A REASONABLE DOUBT

The Commonwealth in *Howard* did not satisfy the *mens rea* requirement in the drug possession statute. The court of appeals's holding in *Howard* was contrary to the Supreme Court of Virginia's holding in *Young*. Therefore, the Supreme Court of Virginia should overturn *Howard*.

In *Young*, the Supreme Court of Virginia required the Commonwealth to prove that the defendant knew of the presence and character of the substance instead of presuming that possession equaled knowledge.[190] In *Young*, the court found that because the arresting officer could not identify the blue pills as heroin until after submitting them for chemical analysis, "there [was] no reason to infer that the defendant was any better informed."[191] Similarly, in *Howard*, the Court should also find that because the officer could not identify that the brownish powder contained fentanyl in addition to heroin, "there is no reason to infer that the defendant was any better informed."[192]

Empirical evidence further suggests that defendants in a similar position to Howard likely do not know that the heroin they possess is also laced with fentanyl.[193] Studies show that many addicts, and even middle-man drug dealers, cannot accurately tell the difference between pure heroin and fentanyl-laced heroin.[194] If law enforcement could not visually tell the difference between heroin and fentanyl-laced heroin, then it is highly likely that neither could Howard.

Further, the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant knew of both the presence and character of the substance they possess.[195] In *Young*, the Supreme Court of Virginia found that the Commonwealth failed to meet this burden when it could not prove the required *mens rea* of drug possession, and overturned the conviction.[196] Similarly, if the defendant in *Howard* files an appeal, the Supreme Court of Virginia should find the Commonwealth failed to meet that same burden, and overturn Howard's conviction.

The court of appeals in *Howard* relies on *Sierra* to find that Howard's knowledge that the capsule in his pocket contained a controlled substance satisfies the *mens rea* for both counts of possession.[197] *Sierra* held that the *mens rea* element of Section 18.2-250 requires only knowledge that an individual knew they possessed *a* controlled

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190 Young v. Commonwealth, 659 S.E.2d 308, 310 (Va. 2008).

191 *Id.* at 311.

192 *Id.*

193 *See* Daniel Ciccarone et al., *Heroin Uncertainties: Exploring Users' Perceptions of Fentanyl-Adulterated and –Substituted 'Heroin'*, 46 INT'L J. OF DRUG POL'Y 147, 149, 152 (2017).

194 *Id.*

195 Ritter v. Commonwealth, 173 S.E.2d 799, 805 (Va. 1970); *see also Young*, 659 S.E.2d at 310.

196 *Young*, 659 S.E.2d at 311.

197 Howard v. Commonwealth, 2018 WL 2604993, at *6 (Va. Ct. App. June 5, 2018).

substance, not *which* controlled substance they possessed.[198] However, the *Howard* court's reliance on *Sierra* in upholding Howard's conviction is flawed in two ways. First, under the *Sierra* court's interpretation of the *mens rea* element, to convict a defendant for multiple substances, the Commonwealth must prove the defendant had knowledge of each controlled substance possessed.[199] Second, the *Howard* decision is inconsistent with the Supreme Court's holding in *Young*.

Under the *Sierra* court's interpretation of the statute, the defendant must still have knowledge of "a controlled substance."[200] The statute requires the Commonwealth to prove, as an essential element, that the defendant knew of the character of the substance the defendant is charged with possessing.[201] To convict a defendant for each count charged under Section 18.2-250, the Commonwealth must prove each element in each count beyond a reasonable doubt.[202] Showing the defendant had knowledge that he possessed one controlled substance does not necessarily demonstrate he had knowledge of the character of two substances.

Therefore, even if the *mens rea* element only requires proof the defendant knew that the substance possessed was a controlled substance, the Commonwealth must satisfy that *mens rea* element for each charge. While the Commonwealth need not prove the defendant knew the exact quantity of a controlled substance possessed by a defendant or which controlled substance the defendant possessed, the Commonwealth must prove knowledge of an additional drug to obtain an additional conviction. Otherwise, the court holds a defendant strictly liable for *every* drug he possessed so long as he had knowledge he possessed *one* drug. This strict liability standard contradicts the plain language of the drug possession statute and the Supreme Court of Virginia's holdings on the *mens rea* of possession.

The *Howard* court argues that requiring the Commonwealth to prove the defendant knew the capsule contained more than one substance to convict the defendant of multiple counts of possession incentivizes drug lacing.[203] The court is concerned that requiring proof of *mens rea* for each count makes it more likely for defendants to not be

198 Sierra v. Commonwealth, 722 S.E.2d 656, 658 (Va. Ct. App. 2012).

199 *See id.*

200 *Id.*

201 *See Ritter*, 173 S.E.2d at 805; *see also Young*, 659 S.E.2d at 310.

202 *See* Yarborough v. Commonwealth, 441 S.E.2d 342, 344 (Va. 1994).

203 Howard v. Commonwealth, 2018 WL 2604993, at *5 (Va. Ct. App. June 5, 2018).

prosecuted for the full nature of their crime, and consequently more drugs would begin to be mixed.[204] The court stated:

> [t]he more drugs the capsule contained that appellant has in his possession, the more this [c]ourt is required to reverse each of appellant's convictions, according to appellant's argument. It would be ironic indeed if the fact that he was in possession of two controlled substances, instead of one, enabled him to succeed in getting his convictions overturned.[205]

In essence, the court believes adopting Howard's *mens rea* theory would allow defendants to claim that they did not have knowledge of each controlled substance in the cocktail and, therefore, will more easily avoid any criminal liability for the entire cocktail.[206] However, this fear is unfounded, because one substance in a cocktail may be more easily identified than the others. For example, in Howard's case, it is likely he knew he possessed heroin, but not fentanyl, because the dosage of fentanyl in cocktails is microscopic and empirical evidence suggests most users are unaware of the fentanyl in the cocktail.[207] The same principles apply to the court of appeals's hypothetical question raised during oral argument about marijuana laced with PCP in *Howard*.[208] It is more likely a defendant would be aware that he possessed marijuana, because of the size, smell, and color, than the PCP laced in it, because of its small and salt-like character. Because it was not readily apparent from looking at the laced drugs in *Howard* and in the hypothetical posed by the court of appeals that each defendant possessed more than one drug, the Commonwealth should bear the burden to show the defendant knowingly possessed two distinct drugs.

In short, the court's concern that requiring the Commonwealth to prove the *mens rea* for each count of possession will make it more

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204 *See* Oral Argument at 2:44-4:30, Howard v. Commonwealth, 2018 WL 2604993 (Va. Ct. App. June 5, 2018), *available at* http://www.courts.state.va.us/courts/cav/oral_arguments/2018/Region%201%20-%20Eastern%20Virginia/mar/0780_17_1.MP3.

205 Howard, 2018 WL 2604993, at *4.

206 *See id.*

207 *See An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POLICY ALLIANCE, 17 (Nov. 2017), http://drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf.

208 Oral Argument at 2:44-4:30, Howard v. Commonwealth, 2018 WL 2604993 (Va. Ct. App. June 5, 2018), *available at* http://www.courts.state.va.us/courts/cav/oral_arguments/2018/Region%201%20-%20Eastern%20Virginia/mar/0780_17_1.MP3.

difficult to prove the first count of possession is unpersuasive. Although it would be more difficult for the Commonwealth to prove the *mens rea* element of the subsequent counts of possession, the Commonwealth ought to bear that higher burden where it is less likely the defendant knew the mixed nature of the drug. To subject a defendant to additional punishment, the Commonwealth should have to prove knowledge of an additional drug. Requiring a *mens rea* showing for each count of possession does not make the first count of possession any harder to prove, only the subsequent counts. The Commonwealth must prove the defendant had knowledge he possessed multiple controlled substances to secure convictions for multiple counts under Section 18.2-250.

II. CONVICTIONS FOR TWO COUNTS OF POSSESSION FOR LACED DRUGS VIOLATES DOUBLE JEOPARDY UNDER *BLOCKBURGER*

The plain language of Section 18.2-250 does not express legislative intent to allow a defendant to be convicted of multiple counts of possession for one pill ("act").[209] The statute does not contain any language expressing clear legislative intent unlike Virginia's involuntary manslaughter statute. The involuntary manslaughter statute states, "The provisions of this section shall not preclude prosecution under any other homicide statute."[210] However, the relevant portion of the Section 18.2-250 reads:

> (A) It is unlawful for any person *knowingly or intentionally to possess a controlled substance* unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act . . . .
>
> (a) Any person who violates this section with respect to *any* controlled substance classified in Schedule I or II of the Drug Control Act shall be guilty of a Class 5 felony . . . .[211]

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209 *See* VA. CODE ANN. § 18.2-250 (2019).

210 *See* VA. CODE ANN. §§ 18.2-36.1(c), 18.2-250 (2019).

211 VA. CODE ANN. § 18.2-250 (2019) (emphasis added) (Subparts (b)-(c) describe other schedules and penalties. *See infra* 3-4. Part (B) exempts government officials handling drugs as a part of their legal duty).

Holding that a conviction of two counts for possession of a laced substance both satisfies the *mens rea* requirement and satisfies *Blockburger*'s lesser-included double jeopardy requirement is logically impossible. As discussed above, the plain language of Section 18.2-250 does not express clear legislative intent to allow the Commonwealth to convict a defendant of two counts of possession, because the defendant possessed a mixture of substances in one pill.[212] Therefore, the *Blockburger* "same elements" test applies.[213]

If the Supreme Court of Virginia adopts the court of appeals's theory of general *mens rea* for any controlled substance, then each count of possession requires the Commonwealth to prove identical elements stemming from the same factual occurrence.[214] By making a defendant liable for all substances contained in a mixture when he only knows of one, the court in *Howard* eliminated the only potentially distinct element of the two counts—the *mens rea* element. Therefore, the court of appeals's application of the *mens rea* requirement violates the Double Jeopardy Clause.

The arguments by the court of appeals in *Howard* and *Sierra*, that the *actus reus* of drug possession is the possession of each specific substance, and therefore convicting a defendant of two counts of possession for different substances does not violate double jeopardy, is flawed for two reasons.[215] First, the section of the code describing the elements of the offense, including the *actus reus*, is independent of any mention of the specific schedule or substance.[216] Section 18.2-250 reads in part: "It is unlawful for any person knowingly or intentionally to possess a controlled substance. . . ."[217] Later, in subsections (a)-(c), the statute lays out penalties associated with violating the section; for example: "Any person who violates this section with respect to any controlled substance classified in Schedule I or II of the Drug Control Act shall be guilty of a Class 5 felony. . . ."[218] The sections referring to specific schedules are mere penalties, not lists of the elements of the

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212 *See* VA. CODE ANN. § 18.2-250 (2019).

213 *See*, *e.g.*, Garrett v. United States, 471 U.S. 773, 779 (1985); Missouri v. Hunter, 459 U.S. 359, 368-69 (1983); Commonwealth v. Gregg, 811 S.E.2d 254, 257 (Va. 2018).

214 *See* Howard v. Commonwealth, No. 0780-17-1, 2018 WL 2604993, at *7 (Va. Ct. App. June 5, 2018).

215 State v. Hall, 692 S.E.2d 446, 448 (N.C. Ct. App. 2010).

216 *Howard*, 2018 WL 2604993, at *4 (citing Sierra v. Commonwealth, 722 S.E.2d 656, 660 (Va. App. 2012)).

217 VA. CODE ANN. § 18.2-250(A) (2019).

218 *Id.*

crime. The elements of drug possession are "[1] knowingly or intentionally [2] possessing *a controlled substance*."[219]

Second, the *Howard* court argues that the *mens rea* requirement does not refer to which specific controlled substance the defendant possessed, but the *actus reus* requirement does, even though the *mens rea* is an adjectival modifier of, and contained in the same clause as, the *actus reus*.[220] It is strange and convenient for the court to hold that the *actus reus* of a crime refers to the specific controlled substance, but *mens rea* contained in the same sentence, modifying the *actus reus*, refers to controlled substances generally.[221] The *Howard* court cannot have it both ways. Either the *actus reus* and *mens rea* both refer to the specific substance possessed, or they both refer to possession of "a controlled substance."[222] Given the placement of the elements and the penalties that follow, it is more likely the latter is true. Regardless, the *Howard* holdings on *mens rea* and *actus reus* are mutually exclusive. Therefore, the Supreme Court of Virginia must either overturn Howard's conviction based on the flawed *mens rea* reasoning or hold that the conviction violates double jeopardy.

III. PUBLIC POLICY GOALS OF CURBING THE FENTANYL CRISIS ARE NOT MET IN *HOWARD*

Finally, the Court in *Howard* cited the policy concerns for curbing the fentanyl crisis in upholding Howard's convictions.[223] However, the *Howard* ruling does not aid in achieving this goal. Additionally, policy concerns are for the legislature, not the courts, to address.

As mentioned above, drug addicts, and even middle-man dealers, often do not know when the heroin they purchase is laced with fentanyl.[224] Harsher punishments on either the drug dealer or the addict are unlikely to be successful due to the inelastic demand of heroin and, by the same reasoning, of fentanyl, because the demand for these drugs is based on physical and psychological dependence on the drugs.[225] Therefore, in seeking to curb widespread drug abuse

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219 *Id*. (emphasis added).

220 *Howard*, 2018 WL 2604993, at *4-6.

221 *See* VA. CODE ANN. § 18.2-250 (2019).

222 *Id*.

223 *Howard*, 2018 WL 2604993, at *3-7.

224 *See* Ciccarone et al., *supra* note 193.

225 *See* Deininger, *supra* note 183.

with harsher punishments, the court may, in fact, be fanning the flames of the very acts it intends to prevent. However, even if the policy of the *Howard* ruling did help combat the opiate crisis, courts may not forgo basic constitutional due process rights, such as the right against double jeopardy, nor may they alter legislative *mens rea* requirements to meet policy concerns.

Further, policy solutions to the fentanyl crisis and drug abuse should be addressed by the legislature, not by the courts.[226] Alternative solutions to curbing the fentanyl crisis may include increased training with overdose revival drugs such as Naxalone, or treating drug abuse as an addiction as opposed to increased criminalization.[227] Given that nearly half of opiate overdose deaths are caused by prescription opiates, another possible solution may include making safer alternatives to opiates, such as medical cannabis, available for medical use.[228] Medical marijuana has played a significant role in curbing the opiate epidemic.[229] States that have legalized cannabis for medical use experienced a significant slowing in the national trend of increasing opiate use rates.[230]

Currently, Virginia only allows for use of two oils, cannabidiol and THCA, derived from cannabis, as opposed to full medical cannabis access.[231] Perhaps if Virginia joined the other thirty-three states and the District of Columbia, which currently allow medical access to the full range of chemicals that cannabis has to offer, fentanyl crises would be curbed in the Commonwealth.[232] However, the efficacy of this and other proposed solutions is a topic for another comment.[233]

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226 *See*, *e.g.*, Infants v. Virginia Housing Authority, 272 S.E.2d 649, 656 (Va. 1980) ("[E]conomics, sociology and public policy . . . [are] considerations belong[ing] exclusively in the legislative domain.").

227 David J. Hickton & Soo C. Song, *Integrating Public Safety and Public Health to Reduce Overdose Deaths*, 64 U.S. ATT'YS BULL. 3, 4-5 (2016).

228 Richard Harris, *Opioid Use Lower In States That Eased Marijuana Laws*, HEALTH SHOTS (Apr. 2, 2018, 11:45 AM), https://www.npr.org/sections/health-shots/2018/04/02/598787768/opioid-use-lower-in-states-that-eased-marijuana-laws.

229 *Id.*

230 *Id.*

231 *See* VA. CODE ANN. §§ 54.1-3408.3, 54.1-3442.7 (2019).

232 *State Marijuana Laws in 2019 Map*, GOVERNING THE STATES AND LOCALITIES, http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html (last visited Feb. 15, 2020). "Virginia enacted laws decades ago allowing for the possession of marijuana if individuals received prescriptions from doctors. Federal law, however, prohibits doctors from prescribing marijuana, rendering those laws invalid. Doctors can only write a recommendation for medical marijuana, which is different than a prescription." *Id.*

233 *See* Hickton & Song, *supra* note 227; Ciccarone et al., *supra* note 193.

Suffice it to say that allowing drug users to be convicted of multiple crimes for possession of laced substances will not aid in curbing the opiate crisis as the court hopes.[234]

CONCLUSION

The Supreme Court of Virginia must overturn the court of appeals's decision in *Howard*. The court in *Howard* erred in holding that a showing of requisite *mens rea* for one substance in a pill satisfied the *mens rea* requirement for another substance in the same pill. Also, the legislature did not express clear intent to allow for a defendant to be convicted of two crimes for possession of one pill containing a mixture of drugs. Therefore, the *Howard* decision constituted double jeopardy under *Blockburger* and violated the defendant's constitutional rights. The court of appeals's holdings in *Howard* on *mens rea* and double jeopardy are mutually exclusive. Finally, the court's policy argument has little weight, nor should public policy be determinative of the extent of the constitutionally guaranteed right of due process.

There is little legal or policy justification for holding a defendant liable for two counts of possession for having a mixture of two substances in a single pill, without first proving knowledge of the presence and character of both substances. The Supreme Court of Virginia should reaffirm the precedent set in *Young* by reversing the Court of Appeals of Virginia's decision in *Howard*, because it is inconsistent with the Supreme Court of Virginia's precedent. In the words of a wise judge: "it would be a harsh rule, indeed, that would charge [a defendant] with knowingly possessing that which it required a microscope to identify."[235]

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234 *See* Ciccarone et al., *supra* note 193.

235 Pelham v. State, 298 S.W.2d 171 (Tex. Crim. App. 1957); *Quantity of Possession of a Narcotic Necessary for Conviction*, *supra* note 42, at 430-31.