The Burger Court Opinion Writing Database

Whalen v. United States

445 U.S. 684 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1980

Re: No. 78-5471, Whalen v. United States

MEMORANDUM TO THE CONFERENCE

I am writing in response to Potter's memorandum in this case. I write at some length to get some thoughts on paper before leaving for the ABA midyear meeting.

I agree with the view expressed in Potter's memorandum that whether punishments are unconstitutionally multiple is entirely a matter of legislative intent. I thought that was the issue on which we took this case. After that, however, Potter and I part company. I am unable to conclude that the "unmistakable message" of § 23-112 is that Congress intended the federal courts when construing the penal provisions of the D.C. Code to adhere strictly to the Blockburger test. For me, the language of the statute leads to precisely the opposite conclusion. Moreover, there are other reasons to think that Congress did not intend rigidly to codify the Blockburger test:

1. The legislative history shows that Congress drafted § 23-122 to overturn decisions of the Court of Appeals for the District of Columbia prohibiting consecutive sentences for offenses arising out of the same transaction even though each offense required proof of a fact which the other did not. See e,g, Ingram v. United States, 353 F. 2d 872 (D.C. Cir. 1965). Congress sought to give trial judges the power to impose "consecutive sentences ... in cases involving brutal, serious offenses." H.Rept. at 114. As I read the legislative history, Congress' sole concern was to assure that certain offenses would, or at least could, be punished consecutively; Congress was not seeking to codify what offenses could not be so punished. Put differently, I do not believe that Congress, in attempting to free sentencing judges from certain unwarranted restrictions, imposed a severe restriction of its own, namely that where the offenses are the same within the Blockburger test, cumulative sentences are impermissible per se.

2. Even if I believed that Congress intended to codify the Blockburger rule, I would not know which Blockburger rule it had in mind: i.e., whether the test is one applied to specific allegations in the indictment or, as the Government has

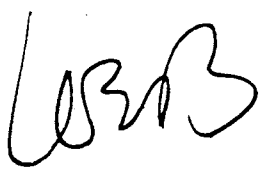
maintained throughout this case and as Blockburger itself suggests, to the statutory elements of the offense. It is certainly true that Harris v. Oklahoma, 433 U.S. 682 (1977), holds that for purposes of enforcing the guarantee against successive prosecutions for the same offense the allegations of the indictment are controlling. But it would only compound past errors to equate a case involving successive prosecutions with a case involving multiple punishments. Moreover, it would be error to assume that Congress in 1970 in drafting § 23-122 anticipated our Harris decision seven years later.

3. Potter's reading of § 23-122 produces an odd result in this case. Here, petitioner was convicted of felony murder (requiring proof of an underlying felony) and second degree murder (requiring proof of intent to kill). These offenses are in no sense the same under the Blockburger test. Does § 23-122 mean that we should apply a mechanical test so that consecutive sentences are permissible -- indeed, required unless the trial judge specifies otherwise -- for those offenses? In this very case, the District of Columbia Court of Appeals held that second degree murder merged into the felony murder. Unless we depart from Potter's reading of § 23-122, we would have to conclude that the D.C. court was in error in this regard. And if we depart from his reading of § 23-122 in that instance, what prevents us from departing in this instance and from applying the general proposition that where a defendant violates two distinct societal interests a court should presume that the legislature intended two distinct punishments.

4. Finally, I fear that reading § 23-122 to forbid separate punishments for rape and felony-murder rape will result in reduced deterrence. Once the crime of rape is consummated, a rapist will find it relatively "inexpensive" to kill his victim! Surely, Congress did not intend that result.

In sum, I continue to believe, as does Potter, that this case turns on what Congress intended. On that question, however, I agree with the determination of the District of Columbia Court of Appeals. For me, the local court's determination that these are separate and distinct offenses is a reasonable one and indeed is the correct one.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1980

RE: No. 78-5471 - Whalen v. United States

Dear Potter:

Thank you for your January 31 memo in lieu of a draft opinion.

I have circulated some views and when the "dust settles" we will know where things stand and the assignment will be made accordingly.

Regards,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 27, 1980

Re: 78-5471 - Whalen v. U.S.

Dear Bill:

My vote remains to affirm (the original Conference vote). So I join your dissent.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 10, 1979

RE: No. 78-5471 Whalen v. United States

Dear John:

Byron, Thurgood, you and I are in dissent in the above. Would you be willing to undertake the dissent?

Sincerely,

Bill

Mr. Justice Stevens

cc: Mr. Justice White
Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 14, 1980

RE: No. 78-5471 Whalen v. United States

Dear Potter:

I agree with your proposed opinion for the Court. If it is now mine to assign, I, of course, assign it to you and join it.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 31, 1980

Re: No. 78-5471, Whalen v. United States

Dear Chief,

At our Conference discussion of this case, five us us were of the tentative view that the judgment of the District of Columbia Court of Appeals should be affirmed, and you assigned the opinion to me. In working on the opinion, I became convinced that the Court of Appeals was mistaken in the construction it put on the relevant legislation, and that it would be irresponsible for us to defer to that construction of the statutes, since the petitioner's statutory and constitutional claims are inextricably interdependent in this case. Accordingly, I came to the conclusion that the judgment before us should be reversed.

Copies of a Memorandum setting out my views are herewith enclosed.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 31 JAN 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[February —, 1980]

Memorandum of MR. JUSTICE STEWART.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of murder in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. *Whalen* v. *United States*, 379 A. 2d 1152.[1] We brough the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law, — U. S. —.

I

Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code Ann. § 22–2401. It does require proof of a killing

[1] The jury also convicted the petitioner of other felonies, but these convictions were set aside by the District of Columbia Court of Appeals, except for a second-degree murder conviction upon which the petitioner had received a concurrent sentence. The sentence itself was vacated by the appellate court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 6, 1980

Re: No. 78-5471, Whalen v. United States

Dear John,

Thank you for your letter of February 5. It seemed to me wise if not necessary to discuss the constitutional issue to the limited extent indicated in order to show the inherent relationship between it and the issue of statutory construction, and thereby to justify refusal to defer to the construction of the statute by the District of Columbia Court of Appeals. If, however, you have any specific criticisms or questions with respect to my limited discussion of the constitutional issue, please do not hesitate to let me know.

The criticism contained in the second paragraph of your letter is an entirely valid one. I shall be glad to substitute the phrase "an unintentional killing" for the word "murder" in the next to the last sentence of the full paragraph on page 4.

Sincerely yours.

PS.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 13, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-5471, Whalen v. United States

In this recirculation I have taken note of the thoughts some of you have expressed, by incorporating some and responding to others. I have also taken the liberty of recasting the recirculation as a proposed opinion of the Court, inasmuch as it is clear that at least five of us now believe the judgment should be reversed.

P.S.

P.S. The recirculation was prepared and this memorandum dictated before reading Bill Rehnquist's memorandum of today, which has just arrived.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 13 FEB 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[February —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. *Whalen* v. *United States*, 379 A. 2d 1152.[1] We brought the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law. — U. S. —.

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Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code Ann. § 22-2401. It does require proof of a killing

[1] The jury also convicted the petitioner of other felonies, but these convictions were set aside by the District of Columbia Court of Appeals, except for a second-degree murder conviction upon which the petitioner had received a concurrent sentence. The sentence itself was vacated by the appellate court.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 15 FEB 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[February —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. *Whalen* v. *United States,* 379 A. 2d 1152.[1] We brought the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law. —— U. S. ——.

I

Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code Ann. § 22–2401. It does require proof of a killing

[1] The jury also convicted the petitioner of other felonies, but these convictions were set aside by the District of Columbia Court of Appeals, except for a second-degree murder conviction upon which the petitioner had received a concurrent sentence. The sentence itself was vacated by the appellate court.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 28 MAR 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[February —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. *Whalen* v. *United States*, 379 A. 2d 1152.[1] We brought the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law. — U. S. —.

I

Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code Ann. § 22–2401. It does require proof of a killing

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 25 MAR 1980

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[February —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. *Whalen* v. *United States*, 379 A. 2d 1152.[1] We brought the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law. —— U. S. ——.

I

Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code Ann. § 22–2401. It does require proof of a killing

[1] The jury also convicted the petitioner of other felonies, but these convictions were set aside by the District of Columbia Court of Appeals, except for a second-degree murder conviction upon which the petitioner had received a concurrent sentence. The sentence itself was vacated by the appellate court.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 27 MAR 1980

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[February —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. *Whalen* v. *United States*, 379 A. 2d 1152.[1] We brought the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law. — U. S. —.

I

Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code Ann. § 22-2401. It does require proof of a killing

[1] The jury also convicted the petitioner of other felonies, but these convictions were set aside by the District of Columbia Court of Appeals, except for a second-degree murder conviction upon which the petitioner had received a concurrent sentence. The sentence itself was vacated by the appellate court.

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 17, 1980

MEMORANDUM TO THE CONFERENCE

RE: CASES HELD FOR NO. 78-5471, WHALEN V. UNITED STATES

There are two cases that have been held pending the decision in Whalen , as follows:

No. 78-5928 Waller v. United States

This is an appeal from the judgment of the District of Columbia Court of Appeals. The appellant was convicted by a jury in the Superior Court of felony murder and of the underlying felony of attempted armed robbery, D.C. Code Ann. §§22-2401 and 22-2902, and also of several other offenses arising from the same criminal episode. He was sentenced to concurrent terms of imprisonment of twenty years to life for the felony murder, and of ten years for the attempted armed robbery. The evidence showed that he had participated in a burglary in the course of which an accomplice killed one of the victims.

In this Court the apppellant contends (1) that he could not constitutionally be convicted and separately sentenced both for the felony murder offense, and for the underlying felony, (2) that the Court of Appeals mistakenly construed D.C. Code Ann. §22-2401 to impose felony murder liability on one who was only an aider and abettor of the underlying felony, and that, thus construed, the statute was unconstitutionally vague, and (3) that a threat made to a juror and communicated to other jurors deprived him of a trial before an impartial jury. It is the first question to which the Whalen case is pertinent.

At the threshhold, it is evident that an appeal does not lie to this Court. Even assuming that the pertinent provisions of the D.C. Code were properly drawn into question, those provisions are not "statute[s] of any State" within the meaning of §1257(2), Palmore v. United States, 411 U.S. 389, 394-395, and the judgment sustaining their validity is reviewable only by writ of certiorari under §1257(3).

The District of Columbia Court of Appeals held in this case that separate convictions for the felony murder and for the underlying felony were permissible, for reasons akin to those relied on by that court in sustaining the consecutive sentences

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

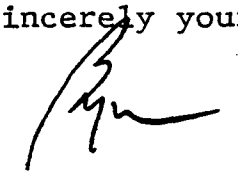
February 7, 1980

Re: 78-5471 - Whalen v. United States

Dear Potter,

Thinking that Congress had not intended consecutive sentences in this case, I voted to reverse, which is the result your memorandum reaches. But I had not considered §23-112 of the District of Columbia Code quoted on page six of your memorandum. I would agree that it seems to read on this case, but I am having trouble reading it as you do. I shall do some more work on the matter within the next week.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 21, 1980

Re: 78-5471 - Whalen v. United States

Dear Potter,

I agree with Harry that one need find no constitutional overtones in this case to justify reviewing the statutory construction conclusions of the District of Columbia Court of Appeals. I also agree that the judgment below was erroneous. But I see no need to indicate that the error is also a constitutional violation of any kind, and I would prefer not to say so. As Bill Rehnquist points out, such an approach might invite mischievious results in the cases from the state courts.

I also agree with Harry that if Congress intended consecutive punishments in this case, there would be no double jeopardy violation and would think it a good idea to say so.

What this adds up to is that I agree with most of your opinion, including your observation that the District of Columbia Code defines a series of felony-murders, each of which necessarily involves a lesser-included offense.

Sincerely yours,

Mr. Justice Stewart

Copies to the Conference

cmc

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 25 MAR 1983

Recirculated: _____

Re: No. 78-5471 - Whalen v. United States

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

Because the District of Columbia Court of Appeals did not take account of §23-112 of the District of Columbia Code, this is one of those exceptional cases in which the judgment of that court is not entitled to the usual deference. Pernell v. Southall Realty, 416 U.S. 363, 369 (1974). This conclusion, in my opinion, need not rest on any constitutional considerations.

I agree for the reasons given by the Court that in light of §23-112 and its legislative history, the court below erred in holding that Congress intended to authorize cumulative punishments in this case. But as I see it, the question is one of statutory construction and does not implicate the Double Jeopardy Clause. Had Congress authorized cumulative punishments, as the District of Columbia Court of Appeals held in this case, imposition of such sentences would not violate the Constitution. I agree with Mr. Justice Blackmun and Mr. Justice Rehnquist in this respect.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 14, 1980

Re: No. 78-5471 - Whalen v. United States

Dear Potter:

Please join me.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAR 3 1980

Recirculated: _____

No. 78-5471 - Whalen v. United States

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court and much of its opinion. I write separately primarily to state my understanding of the effect, or what should be the effect, of the Court's holding on general double jeopardy principles.

1) I agree with the Court that it would be inappropriate in this case to accord complete deference to the District of Columbia Court of Appeals' construction of the local legislation at issue. In addition to the reasons offered in the Court's opinion, ante, at 3-5, I would point out that the

p. 3

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court and much of its opinion. I write separately primarily to state my understanding of the effect, or what should be the effect, of the Court's holding on general double jeopardy principles.

(1) I agree with the Court that it would be inappropriate in this case to accord complete deference to the District of Columbia Court of Appeals' construction of the local legislation at issue. In addition to the reasons offered in the Court's opinion, *ante*, at 3–5, I would point out that the conclusions of the Court of Appeals concerning the intent of Congress in enacting the felony murder statute were unsupported by appropriate references to the legislative history. Moreover, that court ignored the effect of § 23–112 of the District of Columbia Code, which I have concluded is dispositive of this case. I view the case, therefore, as one falling within the class of " 'exceptional situations where egregious error has been committed.' " *Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974), quoting from *Griffin* v. *United States*, 336 U. S. 704, 718 (1949), and *Fisher* v. *United States*, 328 U. S. 463, 476 (1946). Where such an error has been committed, this Court is barred neither by Art. III nor past practice from overruling the courts of the District of Columbia on a question of local law. *Pernell*, 416 U. S., at 365–369.

(2) I agree with the Court that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple

STYLISTIC CHANGES

2nd DRAFT

MAR 26 1980

SUPREME COURT OF THE UNITED STATES

No. 78-5471

Thomas W. Whalen, Petitioner, *v.* United States.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court and much of its opinion. I write separately primarily to state my understanding of the effect, or what should be the effect, of the Court's holding on general double jeopardy principles.

(1) I agree with the Court that it would be inappropriate in this case to accord complete deference to the District of Columbia Court of Appeals' construction of the local legislation at issue. In addition to the reasons offered in the Court's opinion, *ante*, at 3–5, I would point out that the conclusions of the Court of Appeals concerning the intent of Congress in enacting the felony murder statute were unsupported by appropriate references to the legislative history. Moreover, that court ignored the effect of § 23–112 of the District of Columbia Code, which I have concluded is dispositive of this case. I view the case, therefore, as one falling within the class of " 'exceptional situations where egregious error has been committed.' " *Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974), quoting from *Griffin* v. *United States*, 336 U. S. 704, 718 (1949), and *Fisher* v. *United States*, 328 U. S. 463, 476 (1946). Where such an error has been committed, this Court is barred neither by Art. III nor past practice from overruling the courts of the District of Columbia on a question of local law. *Pernell*, 416 U. S., at 365–369.

(2) I agree with the Court that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 8, 1980

No. 78-5471 Whalen v. United States

Dear Potter:

I now have had an opportunity to consider your memorandum of January 31, and the exchange of letters it precipitated.

Although I have made no independent study of the legislative history, I am persuaded by your view of it, and particularly by § 23-112. I also agree that we are free to determine the issue of legislative intent. Of course, we may accord deference to the decision of the District of Columbia Court of Appeals. In this case, however, the resolution of the constitutional issue turns on the determination of congressional intent. We have the ultimate authority to decide whether a constitutional right has been violated.

Like John I am not convinced that we need address the constitutional issue to dispose of the case. Your discussion of it does buttress your interpretation of the statutes, as well as your rationale for not deferring to the D.C. Court of Appeals.

To the extent you discuss the constitutional issue, I would have thought that it is the Due Process Clause that is implicated when a federal court imposes punishment in contravention of legislative intent. I have not thought of the Double Jeopardy Clause as deriving from or implicating principles of separation of powers, although - as you state - there certainly is a relationship in view of the power of the legislature to prescribe multiple penalties for the same offense. Furthermore, I am unsure of the extent that you believe the Double Jeopardy Clause places restrictions on a state court's ability to impose mulitiple punishment in a single trial. I will ponder these issues more fully before arriving at a final view of the constitutional issue.

Sincerely,

Lewis

Mr. Justice Stewart

Copies to the Conference

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 14, 1980

78-5471 Whalen v. United States

Dear Potter:

Please join me.

Sincerely,

L. Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 1, 1980

Re: No. 78-5471 Whalen v. United States

Dear Potter:

Since I was one of the five at Conference who expressed the view that the judgment of the District of Columbia Court of Appeals should be affirmed in this case, I take this opportunity to respond somewhat tentatively to your letter of January 31st, in which you say that your work on the draft opinion convinced you that the judgment should be reversed, and attached a memorandum in support of that result.

My understanding of our earlier deference to the courts of the District of Columbia on construction of Acts of Congress applying only the District, which you cite on page 3 of your memorandum, was that it was a prudential principle only up until 1970. After all, an Act of Congress was being construed, and presumably this Court has the final say as to what a law passed by Congress means. But in 1970 Congress enacted the "District of Columbia Court Reform and Criminal Procedure Act of 1970", described and discussed at some length in Byron's opinion in Palmore v. United States, 411 U.S. 387 (1973). That Act went a long way, for purposes of our jurisdiction, towards making the District of Columbia analogous to a state, and the highest court of the District of Columbia analagous to the highest court of a state. All that Palmore actually held was that Congress under its constitutional authority to legislate for the District of Columbia could provide for trying local criminal cases before judges who are not accorded life tenure and protection against reduction in salary. But in order to reach the merits, Palmore concluded that, while the plain language of the 1970 amendment to 28 U.S.C. § 1257 provided that the District of Columbia Court of Appeals should be treated as the "highest court of a State", Congress had not with similar specificity provided that the words "statute of any State" as used in § 1257(2) are to include the provisions of the District of Columbia Code. But this was a

jurisdictional holding, justified at least in part by the language in Palmore that "we are particularly prone to accord 'strict construction of statutes authorizing appeal' to this court." 411 U.S., at 396. I do not think that position is inconsistent with a much greater degree of deference to the District of Columbia Court of Appeals' construction of local Acts of Congress than would have been required by the cases such as Fisher v. United States, 328 U.S. 463, cited on page 3 of your Memorandum. It may be that § 23-112 of the District of Columbia Code, which your Memorandum cites and quotes at page 6, is a part of the District of Columbia Court Reorganization Act passed in the same year, and if so it might offer a formula for sentencing of universal application upon which this Court was entitled to second-guess the District of Columbia Court of Appeals.

It is not clear from your Memorandum that this is the case, and I have obviously not researched the point myself. But, tentatively at least, even assuming that I agreed with all of the language relating to the Double Jeopardy Clause contained in your Memorandum, I would want to see a fuller exploration of the relationship between § 23-112 and the Court Reorganization Act before I would be willing to join the Memorandum which you circulated if it becomes an opinion of the Court.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 13, 1980

Re: No. 78-5471 - Whalen v. United States

Dear Potter:

Lewis' comments contained in his letter of February 8th, following the circulations of John, Byron, and the Chief in response to your memorandum of February 1st, have prompted me to again review the issues in the case as I see them, and again -- perhaps to the dismay of all of you -- comment briefly, two aspects of this case not covered in my letter to you of February 1st.

As I recall the vote at Conference was five to four, and since it was to affirm the District of Columbia Court of Appeals it must necessarily have embraced a rejection both of the statutory and constitutional claims. Your memorandum, of course, as I understand it, basically accepts the statutory claim, but your letter to the Chief of January 31st transmitting your proposed memorandum opinion describes the "petitioner's statutory and constitutional claims" as being "inextricably interdependent in this case".

I recognize, of course, that dictum in Brown v. Ohio, 432 U.S. at 165, indicates that, "[w]here consecutive sentences are imposed at a criminal trial," the Double Jeopardy Clause insures "that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." As an abstract proposition, this may well be true. As a practical matter, however, numerous checks prevent a federal court from exceeding "its legislative authorization" long before the Double Jeopardy Clause would come into play. Given a misapplication of a federal statute by a lower court, I think we have always felt obligated to decide the case on statutory grounds before considering any constitutional issue at all.

An examination of the cases cited by Lewis in his Brown opinion at the aforequoted passage and in your memorandum at the top of page 4 indicates to me, at least, that this Court has never resorted to the Double Jeopardy Clause in a case like this one, where the central issue is whether Congress intended two statutory offenses to result in cumulative sentences. In Gore v. United States, 357 U.S. 386 (1958), Blockburger v. United States, 284 U.S. 299 (1932), and Ebeling v. Morgan, 237 U.S. 625 (1915), this Court concluded that various statutes did define separate offenses, and therefore did authorize separate punishments. It did so, however, purely as a matter of statutory interpretation and without relevant mention of the Double Jeopardy Clause. Similarly, in Bell v. United States, 349 U.S. 81 (1955) and United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952), this Court concluded that certain statutes did not authorize cumulative punishments, again without finding it necessary to mention the Double Jeopardy Clause.

As for Ex parte Lange, 18 Wall. 163 (1873), and North Carolina v. Pearce, 395 U.S. 711 (1969), those cases dealt with duplicative punishments imposed for a violation of a single statute, not consecutive sentences based on separate statutes. Thus, in Lange the defendant was convicted of stealing mail bags under a statute that authorized punishment of a fine or imprisonment. He initially was sentenced to pay a fine and to serve one year in prison and immediately paid the fine. Five days after the initial sentencing the district court, apparently recognizing its error, resentenced the defendant to imprisonment only. This Court held that the second sentence was invalid since the defendant already had satisfied the statute completely by paying the fine. Similarly, in Pearce, your opinion for the Court considered the constitutional rules governing resentencing after a defendant's original conviction and sentence had been vacated on appeal. In neither Lange nor Pearce did this Court engage in any statutory interpretation whatsoever. Clearly, the Double Jeopardy Clause played a different role in those cases than it does in this case.

You seem to suggest in your memorandum that the "interdependence" of the statutory and constitutional grounds justifies your decision to afford less deference to the lower court's reading of the statute than would otherwise be required of this Court. But the statutory and constitutional issues are interdependent only in the sense that a constitutional violation might result from a misreading of the statutes in question. Such interdependence, I would suggest, is hardly unique to the Double Jeopardy Clause. We have all seen many petitions for certiorari to state courts where the petitioner argues that the lower court's misreading of a local statute deprived him of due process or equal protection. At some conceptual level these contentions have a modicum of merit, yet we have not taken to second-guessing the state courts in their interpretations of

local legislation. In such cases the issue is not whether the lower court "misread" the statute, but rather who gets to do the reading in the first place.

The Court has held, not on double jeopardy grounds but on due process grounds, that where a state court makes a one hundred eighty degree turn in its interpretation of a state statute, a resulting conviction may run afoul of the United States Constitution. See Bouie v. City of Columbia, 378 U.S. 347 (1964). But where the highest court of a state simply construes a statute for the first time in a manner which is broader than might have been expected from a literal reading of the language, we have held that there was no such federal constitutional infirmity. Rose v. Locke, 423 U.S. 44 (1975). While I don't claim to have done added research based on the 1970 Court Reorganization Act referred to in my earlier letter, I see no reason to second-guess the D. C. Court of Appeals in its interpretation of this "local" legislation.

In short, while I continue to believe that we should defer to the D.C. Court of Appeals in this matter as if it were the highest court of a state, should that position not prevail I can see no reason to mention the constitutional issue at all. Assuming that the Blockburger test is not satisfied--a proposition that the Chief has noted is by no means free from doubt, a doubt which I share--I believe that the proper course for this Court would be to follow the lead of Bell and C.I.T. Credit and to dispose of the case purely on statutory grounds. We would then be applying 23-112 to interpret an Act of Congress differently than did the District of Columbia Court of Appeals, and accordingly decide that Congress had not authorized consecutive sentences. This would lead to a reversal on statutory grounds, not different in principle than when Congress authorizes a maximum sentence of ten years and a lower federal court upholds or imposes a sentence of twenty years.

Sincerely,

Mr. Justice Stewart
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 19, 1980

Re: No. 78-5471 Whalen v. United States

Dear Potter:

I shall await Byron's circulation in Illinois v. Vitale before deciding to write separately in dissent in this case along the lines of our previous correspondence.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 10, 1980

Re: No. 78-5471 - Whalen v. United States

Dear Potter:

In due course, I anticipate circulating a dissent from your opinion in this case.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

pp 3, 6-9, 11-12

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 20 MAR 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

Historians have traced the origins of our constitutional guarantee against double jeopardy back to the days of Demosthenes, who stated that "[T]he laws forbid the same man to be tried twice on the same issue. . . ." 1 Demosthenes 589 (Vince trans., 4th ed. 1970). Despite its roots in antiquity, however, this guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinions, including ones authored by me, are replete with *mea culpas* occasioned by shifts in assumptions and emphasis. Compare, *e. g.*, *United States* v. *Jenkins*, 420 U. S. 358 (1975), with *United States* v. *Scott*, 437 U. S. 82 (1978) (overruling *Jenkins*). See also *Burks* v. *United States*, 437 U. S. 1, 9 (1978) (Our holdings on this subject "can hardly be characterized as models of consistency and clarity."). Although today's decision takes a tentative step toward recognizing what I believe to be the proper role for this Court in determining the permissibility of multiple punishments, it ultimately compounds the confusion that has plagued us in the double-jeopardy area.

I

In recent years we have stated in the manner of "black letter law" that the Double Jeopardy Clause serves three primary purposes. First, it protects against a second prose-

P 1-3, 6-10, 13, 14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

2nd DRAFT

Circulated: _____

Recirculated: 1 APR 1980

SUPREME COURT OF THE UNITED STATES

No. 78-5471

Thomas W. Whalen, Petitioner, v. United States. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Historians have traced the origins of our constitutional guarantee against double jeopardy back to the days of Demosthenes, who stated that "[T]he laws forbid the same man to be tried twice on the same issue. . . ." 1 Demosthenes 589 (Vince trans., 4th ed. 1970). Despite its roots in antiquity, however, this guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinions, including ones authored by me, are replete with *mea culpas* occasioned by shifts in assumptions and emphasis. Compare, *e. g.*, *United States* v. *Jenkins*, 420 U. S. 358 (1975), with *United States* v. *Scott*, 437 U. S. 82 (1978) (overruling *Jenkins*). See also *Burks* v. *United States*, 437 U. S. 1, 9 (1978) (Our holdings on this subject "can hardly be characterized as models of consistency and clarity."). Although today's decision takes a tentative step toward recognizing what I believe to be the proper role for this Court in determining the permissibility of multiple punishments, it ultimately compounds the confusion that has plagued us in the double-jeopardy area.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 10, 1979

Re: 78-5471 - Whalen v. United States

Dear Bill:

I shall be happy to undertake the dissent in this case.

Respectfully,

John

Mr. Justice Brennan

Copies to Mr. Justice White
Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 5, 1980

Re: 78-5471 - Whalen v. United States

Dear Potter:

Your discovery of § 23-112 surely reinforces the conclusion that Congress did not intend to impose consecutive sentences for felony murder and the felony that made proof of intent unnecessary--especially since felony murder was originally a capital offense. I can join an opinion using § 23-112 as a predicate for reversing on statutory grounds. I am not, however, prepared to agree with everything you say about the constitutional issue, and I am not yet convinced that it is necessary to address the constitutional issue to dispose of the case.

Although I have certain other problems, my principal concern is with the next to the last sentence in the full paragraph on page 4. If you could substitute the word "accidental killing" for the word "murder," I believe I would have no problem with it. As it now stands, the sentence is ambiguous because the word "murder" might mean either an "intentional killing" or "rape plus an accidental killing." If it has the former meaning, the sentence is of course true but does not relate to this case. If it has the latter meaning, then you are saying that Congress may authorize cumulative punishments for (1) rape, and (2) rape plus an accidental killing. I would agree that Congress may provide, as it did in the bank robbery statute, for enhanced punishment in the second case and I suppose--if the statute were perfectly clear--that Congress could make an enhanced punishment more than twice as severe as the punishment for the basic offense. But, as you have demonstrated, it did no such thing here.

Respectfully,

John

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 14, 1980

Re: 78-5471 - Whalen v. United States

Dear Potter:

Please join me.

Respectfully,

Mr. Justice Stewart

Copies to the Conference