

January 1982

Sate Ex Rel. Watson v. Ferguson: Double Jeopardy and the Same Transaction Test

David W. Frame

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

David W. Frame, *Sate Ex Rel. Watson v. Ferguson: Double Jeopardy and the Same Transaction Test*, 84 W. Va. L. Rev. (1982).

Available at: <https://researchrepository.wvu.edu/wvlr/vol84/iss2/8>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

STATE EX REL. WATSON v. FERGUSON: DOUBLE JEOPARDY AND THE SAME TRANSACTION TEST

I. INTRODUCTION

Double jeopardy is the fundamental concept of criminal procedure which provides that a person cannot twice be put in jeopardy of life or limb for the same offense. It existed as early as the Greek and Roman civilizations,¹ found expression in English jurisprudence by the fourteenth century,² and became part of American constitutional law by adoption of the fifth amendment to the United States Constitution.³ Most states, like West Virginia, have similar provisions in their state constitutions.⁴ The remainder of states consider double jeopardy to be part of their common law.⁵ Despite centuries of opportunity to refine this concept, it remains a veritable quagmire of legal doctrine. The controversy and diversity of interpretation center on two questions: (1) when has the defendant been "in jeopardy"?, and (2) what is the "same offense"? In the last two and one-half years the West Virginia Supreme Court of Appeals has attempted to illuminate one aspect of the second question. The sharp division of opinion among members of the court and the admittedly vague language of the opinions make it likely that the law regarding this aspect of double jeopardy will continue to evolve as opportunities for explication arise.

*State ex rel. Watson v. Ferguson*⁶ dealt with the question of whether separate charges for multiple homicides occurring in close proximity in time constitute the "same offense" for double jeopardy purposes, and whether the resolution of this question

¹ *The Digest of Justinian* expresses the concept in these words: "The governor should not permit the same person to be again accused of a crime of which he had been acquitted." Sigler, *A History of Double Jeopardy*, 7 AM. J. L. HIS. 283 (1963).

² *Id.* at 289.

³ U.S. CONST. amend. V provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

⁴ W. VA. CONST. art. III, § 5 provides: "[N]or shall any person, in any criminal case . . . be twice put in jeopardy of life or liberty for the same offense."

⁵ Sigler, *A History of Double Jeopardy*, 7 AM. J. L. HIS. 283, 308 (1963).

⁶ 274 S.E.2d 440 (W. Va. 1980).

in the affirmative would compel a single trial for all charges, a single punishment for all charges, or both.

In *Watson* the defendant was charged with the murders of a woman and three children. The woman and two of the children were killed in their beds in the same bedroom. The other child was killed in a hallway outside of his bedroom. All four deaths were caused by multiple blows from a metal lug wrench. The killings were all accomplished within a short period of time. The defendant moved to have all four charges joined at one proceeding, but the trial judge refused to grant a unitary trial. Convicted on one charge at the first trial, the defendant sought a writ of prohibition to prevent any further trials on the ground that jeopardy attached at the conclusion of the first trial.

The court purportedly analyzed the defendant's position in light of the "same transaction test" adopted earlier in *State ex rel. Dowdy v. Robinson*,⁷ and later clarified in *State ex rel. Johnson v. Hamilton*.⁸ *Dowdy* held that multiple charges would be deemed the "same offense" if they grow out of a single criminal act, occurrence, episode or transaction.⁹ *Johnson* explained that if offenses are deemed to be the "same offense" under this test then multiple prosecution is prohibited although separate punishment may be imposed for separate crimes arising out of a single transaction.¹⁰ In other words, the "same transaction test" formulated in *Dowdy* and *Johnson* only operated to preclude multiple trials, not multiple punishments.

In *Watson* the court considered whether the *Dowdy-Johnson* rule, requiring joinder in a single trial of all offenses arising out of the same criminal transaction, should be considered a constitutional requirement of double jeopardy or merely adopted as a procedural rule. Then, based on the premise that the joinder rule is procedural, the court considered whether the "same transaction" test has any utility as a means of determining what is the "same offense" for double jeopardy purposes.

The court ultimately held that the *Dowdy-Johnson* joinder rule is not a constitutional requirement but should be adopted

⁷ 257 S.E.2d 167 (W. Va. 1979). See also Comment, *Double Jeopardy In West Virginia: State ex rel. Dowdy v. Robinson*, 83 W. VA. L. REV. 259 (1980).

⁸ 266 S.E.2d 125 (W. Va. 1980).

⁹ 257 S.E.2d at 170.

¹⁰ 266 S.E.2d at 128.

under the court's inherent rule-making power.¹¹ It also held that based on prior case law, multiple homicides, though occurring in close proximity in time, may be tried and punished separately, if they are not the result of a single volitive act of the defendant.¹² In arriving at its conclusion, the court enunciated two distinct interpretations of the "same transaction" test, one which triggers the newly adopted procedural joinder rule, precluding multiple prosecution and one which triggers the double jeopardy protection against both multiple prosecution and punishment. The court found that under the circumstances the charges against the defendant did not constitute the same transaction for either purpose.

Justice Neely dissented.¹³ On first reading, his sarcastic opinion does not seem to be a serious attempt to analyze the majority opinion, but a closer examination reveals two significant contributions. It points out what Justice Neely considers judicial double-talk. The majority adopts a procedural joinder rule, but refuses to apply it to this case. The dissent also indicates that the facts and circumstances of this particular case may have influenced the outcome more than any concern for consistent legal analysis.

II. PRIOR CASE LAW

The two cases mentioned earlier, *State ex rel. Dowdy v. Robinson*¹⁴ and *State ex rel. Johnson v. Hamilton*,¹⁵ are most significant in setting the stage for the *Watson* decision.

In *Dowdy* the defendant claimed that a new trial was barred by double jeopardy after he was acquitted in mid-trial on the grounds of a fatal variance between the indictment and the proof at trial.¹⁶ The indictment charged him with breaking and

¹¹ *State ex rel. Watson v. Ferguson*, 244 S.E.2d 440, 444 (W. Va. 1980).

¹² *Id.* at 448.

¹³ *Id.* at 449.

¹⁴ 257 S.E.2d 167 (W. Va. 1979).

¹⁵ 266 S.E.2d 125 (W. Va. 1980).

¹⁶ W. VA. CODE § 61-11-14 (1977 Replacement Vol.) provides in pertinent part: "A person acquitted of an offense, on the ground of a variance between the allegations and the proof of the indictment or other accusation . . . may be arraigned again upon a new indictment or other property accusation, and tried and convicted for the same offense notwithstanding such former acquittal." This section was ruled unconstitutional by *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167 (W. Va. 1979).

entering a nightclub at 220-22nd Street, and the proof adduced at trial was that the building broken into was located at 200-22nd Street. Justice Miller, in dissent,¹⁷ argued that the facts only presented the very narrow question of what kind of mid-trial break constituted an *acquittal* barring a second trial for the same offense. Undaunted by Justice Miller's dissent, the majority held that the defendant was acquitted and that the word "acquitted" is "accorded magic" by the United States Supreme Court.¹⁸ Therefore, the only question left for the court was whether the charge was the "same offense." The court then ruled that the term "same offense" as used in the double jeopardy clause of the West Virginia Constitution¹⁹ shall be defined by either the "same evidence test," which provides that offenses are the same unless each offense requires proof of a fact which the other does not,²⁰ and the "same transaction test" which provides that offenses are the same if they grow out of a single criminal act, occurrence, episode or transaction.²¹ The court also adopted the accompanying rule that whichever test affords the defendant the greater protection must be applied.²²

To illustrate the "same transaction test" the *Dowdy* court offered the example of a defendant arrested for kidnapping and robbing his victim at the same time. To illustrate a factual situation in which two charges could not constitute the same offense, the court gave the example of a defendant who murdered one man in Fairmont at 6:00 p.m. and another in Mannington at 6:30 p.m. Murdering two people at the same time was thought to present a closer question.²³

Since the offense charged in the second indictment brought against Dowdy necessarily occurred in the same transaction as the offense in the first indictment, the court held that double jeopardy applied.

¹⁷ 257 S.E.2d at 171.

¹⁸ See *Sanabria v. United States*, 437 U.S. 54 (1978).

¹⁹ W. VA. CONST. art. III, § 5.

²⁰ This is the federal minimum standard of double jeopardy protection as established in *Brown v. Ohio*, 432 U.S. 161 (1977), and made applicable to the states via the fourteenth amendment to the United States Constitution. *Benton v. Maryland*, 395 U.S. 784 (1969).

²¹ 167 S.E.2d at 170.

²² *Id.*

²³ *Id.*

The court soon had an opportunity to apply the "same transaction test" to a more complicated set of facts. In *Johnson* the defendant was accused of killing a father and son in the same altercation. He unsuccessfully defended against the first charge on grounds of self-defense. After his conviction for the slaying of the son, the defendant sought a writ of prohibition to prevent a trial on the charge of murdering the father. The writ was denied on the technical ground that *Dowdy* did not apply retroactively,²⁴ but the court clearly stated that this was the type of "transaction" contemplated by the "same transaction" test.²⁵ Justice Neely, writing for the majority, took the opportunity to explain that the "same transaction" test only applied to the multiple prosecution aspect of double jeopardy. Charges arising from the "same criminal transaction", required joinder of all offenses at a single trial, but this did not preclude separate punishments being imposed for each offense at the end of this single trial.²⁶

To more explicitly set the stage for the *Watson* case, the following language of the *Johnson* court is significant:

In a case involving murders, such as the one currently under consideration, we hold that in the future a person must be tried for both alleged murders in the same trial unless he moves for severance, but that he may be punished for both murders separately because they are separate and distinct offenses.²⁷

Justice Miller concurred in the result of *Johnson* but disagreed with the legal reasoning. His reasoning in the concurrence became the basis of his majority opinion in *Watson* which will be explained further in the next section.

III. ANALYSIS

The significance of *Watson* can best be analyzed under two headings. The first-heading—"the constitutional-procedural dichotomy"—deals with the implications of whether the *Dowdy-Johnson* joinder rule is a constitutional requirement or merely a procedural rule. The second heading—"the same transaction test"—discusses the inconsistent use of the phrase "the same

²⁴ 266 S.E.2d at 128.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

transaction" and its usefulness in the various contexts in which it is applied.

A. *Constitutional-Procedural Dichotomy*

A dispute exists among members of the West Virginia Supreme Court of Appeals as to whether the *Dowdy-Johnson* joinder rule should be considered a constitutional requirement or a procedural rule. As a foundation for considering the merits of these positions, three premises must be recognized: 1) West Virginia must provide at least the federal minimum standard of double jeopardy protection;²⁸ 2) West Virginia is "clearly free to adopt broader protections under our state constitution than those provided by its federal counterpart;"²⁹ 3) the West Virginia Supreme Court of Appeals may provide such protections by adopting a procedural rule under its inherent rule-making power.³⁰ If the joinder rule is not required under federal constitutional standards, then the relative advantages of providing additional protection as a state constitutional doctrine or as a procedural rule must be weighed.

Does the federal minimum standard of protection require joinder in one trial of all counts of a multiple murder which occurred in the same criminal episode? The Pennsylvania Supreme Court answered this affirmatively in *Commonwealth v. Campana*.³¹ The *Campana* court stated that the United States Supreme Court offered no specific guidance on this question, since its ruling in *Ashe v. Swenson*³² only bars successive prosecution when the ultimate issues of fact are resolved in favor of the defendant at the original trial for one of several charges arising from the same transaction. The dissent in *Campana*, on the other hand, argued that the United States Supreme Court has explicitly ruled on this issue in *Ciucci v. Illinois*,³³ a case which the majority overlooked.

²⁸ Federal standard of double jeopardy is made applicable to the states by the fourteenth amendment to the United States Constitution. *Benton v. Maryland*, 395 U.S. 784 (1969).

²⁹ *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167, 170 (W. Va. 1979), citing *State ex rel. Whitman v. Fox*, 236 S.E.2d 565 (W. Va. 1977).

³⁰ W. VA. CONST. art. VIII, §§ 3 & 8; *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440, 444 n.12 (W. Va. 1980).

³¹ 452 Pa. 293, 304 A.2d 432 (1973).

³² 397 U.S. 436 (1969).

³³ 356 U.S. 571 (1958).

In *Ciucci* the petitioner was charged with murdering his wife and three children in close proximity in time. The Court held that the double jeopardy clause did not mandate a unitary trial for all four offenses.³⁴ More recent decisions following *Ciucci* confirm its holding as the controlling federal law on the subject of successive prosecutions for separate offenses arising out of the "same criminal episode."³⁵ The federal minimum standard of double jeopardy protection clearly does not require joinder in a single trial of all offenses arising from the same criminal episode or transaction.

The *Dowdy-Johnson* joinder rule went beyond the federal constitutional requirement to protect criminal defendants against vexatious litigation.³⁶ Justice Miller's attack on the "legal sophistry" of the *Dowdy-Johnson* majority dismisses the second premise of our analysis, namely, that West Virginia is "clearly free to adopt broader protections under our state constitution than those provided by its federal counterpart."³⁷ He sidesteps this issue by stating that "[p]rior to *Johnson* we had considered our state double jeopardy clause to be rather coextensive with the federal concept of double jeopardy embodied in the fifth amendment to the United States Constitution."³⁸

The *Dowdy-Johnson* majority based its extension of protection on what it perceived to be a fundamental aspect of double jeopardy enunciated in *Green v. United States*.³⁹ In *Green* the United States Supreme Court said that "[t]he state with all its resources and power shall not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."⁴⁰ Allowing separate prosecutions for crimes occurring in

³⁴ Justices Burger, Brennan, and Douglas dissented on due process grounds, but only Justice Black dissented on double jeopardy grounds.

³⁵ See, e.g. *Miller v. Oregon*, 405 U.S. 1047 (1972); *Grubb v. Oklahoma*, 409 U.S. 1017 (1972); *Robinson v. Neil*, 409 U.S. 505 (1973) (Justices Douglas, Brennan and Marshall dissented on double jeopardy grounds in all three cases).

³⁶ Justice Brennan's concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 448 (1969), probably contains the best expression of the policy reasons behind the joinder rule. He cites the manifold possibilities of prosecutorial abuse when multiple trials are allowed for crimes arising from the same transaction.

³⁷ *State ex rel. Whitman v. Fox*, 236 S.E.2d 565 (W. Va. 1977).

³⁸ *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440, 441-42 (W. Va. 1980).

³⁹ 355 U.S. 184 (1957).

⁴⁰ *Id.* at 187.

the same transaction creates tempting opportunities for prosecutorial abuse. Expressing the same view, United States Supreme Court Justices Brennan, Douglas and Marshall have consistently dissented from rulings which have not required joinder of all offenses arising from a single criminal episode.⁴¹

Justice Miller, writing for the majority in *Watson*, decries the bifurcation of double jeopardy doctrine brought about by the *Dowdy-Johnson* formulation. Under this formulation the "same offense" concept plays a dual role. One sense of the "same offense" goes to preclusion of multiple prosecution only, while the other goes to the preclusion of both prosecution and punishment. In Justice Miller's opinion if an act constitutes the "same offense" for purposes of precluding multiple prosecutions it must also preclude multiple punishment and vice versa. This view clearly tracks the federal standard, but it is not compelled by logic. The double jeopardy protection in West Virginia need not be coextensive with the federal standard as long as it does not provide less protection. The bifurcated standard of *Dowdy* and *Johnson* provides greater protection to criminal defendants and is, therefore, constitutional as well as logically acceptable.

Two hypothetical criminal episodes will illustrate the different concepts under the bifurcated system. (1) The police find the defendant weaving down the street in his car, obviously inebriated. In addition to charging him with driving under the influence of alcohol, they charge him with public intoxication. The judge determines, however, that under the circumstances both charges constitute the same offense and he cannot be tried *or* punished twice simply because his misconduct technically falls under two separate statutes. The applicable federal standard of double jeopardy compels this ruling.⁴² (2) The defendant is intoxicated. He disrobes and begins dancing on a barroom table. The proprietor attempts to expel him from the premises. The defendant punches the proprietor in the nose. He is charged with public intoxication, indecent exposure, and assault and battery. Under the *Dowdy-Johnson* "same transaction" test, the offenses must be tried together, although separate punishment

⁴¹ See cases cited note 35 *supra*.

⁴² This is an elementary application of the "same evidence test" because public intoxication does not require proof of an element that is not also an element of driving while under the influence of alcohol. See *Blockburger v. United States*, 284 U.S. 299 (1932); *Brown v. Ohio*, 432 U.S. 161 (1977).

may be imposed for each offense.⁴³ The concepts of double jeopardy represented by these two hypotheticals need not be mutually exclusive.

Watson adopts the "same transaction" test as a procedural rule and rejects it as a constitutional rule. Justice Miller believes that the procedural rule has "a number of important benefits that are lacking in the constitutional rule."⁴⁴ Beyond undefined descriptions of this procedural rule as "flexible" and "broad," there is only one advantage cited that can be substantively examined. "[T]he defendant can still retain his traditional right to move for a severance because of prejudicial joinder, as was permitted in *Johnson*, but since the joinder rule will be procedural in nature, we are not confronted with the problem of the constitutional waiver of double jeopardy that existed under *Johnson*."⁴⁵ This, however, is questionable.

In *Dowdy*, Justice Neely states, "the defendant who on his request is granted separate trials on offenses arising from the same transaction is estopped from asserting double jeopardy."⁴⁶ *Jeffers v. United States*⁴⁷ is cited as authority for this waiver theory. However, it does not appear from the context of *Jeffers* that a procedural joinder rule would necessarily obviate the waiver problem. The motion for joinder by the prosecution in that case was based on Rule 8(a), Federal Rules of Criminal Procedure, which is a procedural rule of permissive joinder,⁴⁸ and the defendant there was held to have waived double jeopardy by moving for a severance. Nevertheless, a number of states have adopted such a procedural rule in lieu of a constitutional standard to protect criminal defendants against prosecutorial harassment.⁴⁹

Analysis of the constitutional-procedural dichotomy may be a purely academic exercise. Justice Neely's dissenting sugges-

⁴³ State ex rel. *Johnson v. Hamilton*, 266 S.E.2d 125, 128 (W. Va. 1980).

⁴⁴ State ex rel. *Watson v. Ferguson*, 274 S.E.2d 440, 443-44 (W. Va. 1980).

⁴⁵ *Id.* at 444.

⁴⁶ 257 S.E.2d at 170.

⁴⁷ 432 U.S. 137 (1977).

⁴⁸ Rule 8(a) is recommended by the majority in *Watson* as "a more workable approach" to the joinder of offenses arising from a single transaction. 274 S.E.2d at 443. In fact the rule adopted by the court is patterned almost verbatim on Rule 8(a). 274 S.E.2d at 444.

⁴⁹ *Id.*

tion that "the same transaction test is either procedural or constitutional depending on the judge who writes the opinion"⁶⁰ may reveal that this latest utterance of the court need not be considered "settled law."

B. *Same Transaction—What Does It Mean?*

As with the *Dowdy* opinion, the most confusing aspect of *Watson* is the inconsistent use of the phrase "same transaction."⁶¹ Over ten years ago, when the phrase was first being applied to double jeopardy analysis, one commentator wrote: "'Transaction' is an amorphous term, and the manner in which it is defined will determine its utility."⁶² It is poorly defined and somewhat overworked in *Watson*.

"Same transaction" seems to have two meanings in *Watson*. First, it is used in the same sense as it is used in *Dowdy*. This is best illustrated by the example of a defendant who is charged with kidnapping and robbing a victim at the same time. Under this "same transaction" test both offenses must be tried together unless the defendant moves for severance. Of course, the defendant may be punished separately for each offense. Second, it is defined as a "single volitive act," meaning a single criminal act directed toward one person. Under this "same transaction" test the defendant can only be tried and punished for the injury to one victim despite the inadvertent harm to others.

The first "same transaction" test in *Watson* parallels the *Dowdy-Johnson* rule with some exceptions. *Watson* purportedly only overrules the *Dowdy-Johnson* rule "[t]o the extent that [*Johnson*] set the rule as a constitutional holding."⁶³ However, *Watson* makes a much more profound change in the test by defying the clear intent of the *Johnson* majority to apply the rule to multiple homicides occurring in close proximity in time.⁶⁴

The *Watson* court adopts the "same transaction" test as a

⁶⁰ State *ex rel.* *Watson v. Ferguson*, 274 S.E.2d 440, 449 (W. Va. 1980).

⁶¹ See Comment, *Double Jeopardy In West Virginia: State ex rel. Dowdy v. Robinson*, 83 W. VA. L. REV. 259 (1980).

⁶² Comment, *Double Jeopardy—Defining the Same Offense*, 32 LA. L. REV. 87, 92 (1971).

⁶³ 274 S.E.2d at 444.

⁶⁴ See text at note 23 *supra*.

procedural rule of joinder then immediately carves out an exception to the rule, namely, it does not apply to multiple murders. The court explains the policy behind this exception by discussing the increased culpability of the defendant when multiple victims are killed, injured or endangered.⁵⁵ Indeed, the logical extension of this exception would be a more general multiple victim exception to the procedural joinder rule. This exception would seemingly remove a large number of cases from the purview of the same transaction test.

The second "same transaction" test in *Watson*⁵⁶—the "single volitive act"—might be described as an exception to the exception. That is, the procedural joinder rule applies to multiple offenses arising from the same transaction *except* when the multiple offenses are murders, and multiple murders permit separate trials for each count *except* when they are the result of a "single volitive act," in which case only a single prosecution and punishment may be imposed upon the defendant.

The "single volitive act" concept is illustrated by the facts of *State v. Houchins*.⁵⁶ In *Houchins* the defendant fired two shots in rapid succession at an assailant. Missing the attacker, the two stray shots hit and killed two bystanders. The defendant successfully defended against a charge for the death of one of the bystanders on the grounds of self-defense. Against her plea of double jeopardy, the defendant was tried for the death of the second bystander and convicted of manslaughter. The West Virginia Supreme Court of Appeals reversed this conviction on double jeopardy grounds saying that the two shootings "were so clearly connected in time and circumstance as well as intent and motive"⁵⁷ that they were indivisible for purposes of prosecution and punishment—they were the "same offense."

The *Houchins* court made it clear that a "single volitive act" was one "directed toward one person."⁵⁸ If the defendant has intentionally endangered more than one victim by a single act—for example, by throwing a bomb into a crowd—the act is not a "single volitive act."⁵⁹

⁵⁵ 274 S.E.2d at 446.

⁵⁶ 102 W. Va. 169, 134 S.E. 740 (1926).

⁵⁷ *Id.* at 175-76, 134 S.E. at 742.

⁵⁸ *Id.* at 176-77, 134 S.E. at 743.

⁵⁹ *Id.* at 179, 134 S.E. at 794.

⁶⁰ 397 U.S. 436 (1969).

In *Houchins* the "same evidence" test permitted separate prosecutions for the two killings. Each offense contained an element which the other did not since the identity of each victim was separate. The court used the "single volitive act" analysis to remedy the obvious injustice of prosecuting the defendant a second time when she had already established a defense which logically precluded her guilt on the other charge.

Since *Houchins* was decided in 1926, the United States Supreme Court has cured this technical failing of the "same evidence" test by incorporating collateral estoppel as a requirement of double jeopardy in *Ashe v. Swenson*.⁶⁰ This means that when an issue is determined by a valid and final judgement, that issue cannot again be litigated between the same parties. In *Houchins* the issue of self defense was resolved in the defendant's favor at the first trial. Collateral estoppel would have precluded an inconsistent verdict at the second trial. Therefore, the second trial should have been prohibited.

This policy, which the "single volitive act" concept served in *Houchins*, is now served by the collateral estoppel concept of *Ashe v. Swenson*. The wisdom of this rule is unquestioned. However, the language of both *Houchins* and *Watson* seems to go beyond protection against vexatious prosecution of defendants already proven innocent. These cases also preclude separate prosecution and punishment for more than one charge when the defendant is convicted of one murder, and he has inadvertently caused another death by the same act.⁶¹ The wisdom of this rule is debatable.

The clearest example of this aspect of the "single volitive act" is when a person shoots another with criminal intent to cause his death, the bullet passes through the intended victim and strikes and kills an unintended victim. The defendant can only be tried and punished for one murder under the "single volitive act" concept of *Watson* and *Houchins*.

This concept defies the policy illustrated by our statutory

⁶¹ *Houchins* said, ". . . when the killing of two or more persons is the result of the same act, the same volition, but one offense is committed, and a conviction or acquittal of the killing of the one may be pleaded as a defense in a subsequent prosecution for the killing of the other." [emphasis added]. 102 W. Va. at 176, 134 S.E. at 743. The language of *Watson* clearly implies that the principle will apply regardless of acquittal or conviction on the first charge.

felony murder rule,⁶² namely, that some crimes are so inherently dangerous that a person who commits them is conclusively presumed to have consciously disregarded the possibility of harm to victims other than the primary victim.⁶³ The felon is, therefore, guilty of first degree murder for any death occurring during the commission of certain felonies—rape, robbery, burglary or arson. It seems that under the “single volitive act” concept, the defendant would be conclusively presumed to be innocent of any degree of criminal intent toward a third person when he directs deadly force toward one person only. These concepts are at opposite poles, although arguably the crime most likely to result in unintended injury is murder.

If the court intends to limit application of the “single volitive act” to cases where the defendant is acquitted of the first charge, then the rule is superfluous because of collateral estoppel. If the court intends to extend it to cases where the defendant kills more than one person while intending only to kill one person, then the rule is in conflict with the presumption that unintended harm is inevitably foreseeable during the commission of certain dangerous crimes.

IV. CONCLUSION

The court's third attempt in just over two years to iron out the wrinkles in double jeopardy law is far less than satisfactory, and we can probably anticipate further developments in the near future. Providing for joinder of offenses arising from a single transaction is a positive development. The court's exception to this rule in dealing with a multiple murder suspect is a departure from *Johnson*, which explicitly said that “in the future [the suspect in a case of multiple murders occurring in

⁶² W. VA. CODE § 61-2-1 (1977 Replacement Vol.) provides that “[m]urder [murder means homicide. *State v. Sims*, 248 S.E.2d 834 (W. Va. 1978)] . . . in the commission of, or attempt to commit arson, rape, robbery or burglary, is murder of the first degree.”

⁶³ See *State v. Sims*, 248 S.E.2d 834 (W. Va. 1978). The felony murder rule has been criticized in recent years because it imputes the highest degree of moral culpability (i.e. the intent necessary to convict of first degree murder) regardless of the actual foreseeability of inadvertent harm under the particular circumstances. Nevertheless, the underlying presumption, that certain crimes inherently create a foreseeable risk of unintended harm, is not unreasonable. If the felony-murder rule represents one extreme of this policy, the “single volitive act” concept represents the other. The one seemingly too strict, the other too lenient.

the same transaction] must be tried for both alleged murders in the same trial unless he moves for severance."⁶⁴ The rationale for this multiple murder exception is the increased culpability of a criminal who injures or endangers multiple victims. The logical extension of this exception would be a general multiple victim exception to the joinder rule.

The advantages of a procedural joinder rule, vis-a-vis the constitutional rule which had been adopted by the court earlier, may be negligible. The inconsistent use of the phrase "same transaction" perpetuates the confusion that has attended the development of this doctrine. The ruling that multiple murders are the "same offense" if they result from a single volitive act seems to be a poorly considered attempt to supplement the "same evidence" test in determining what is the "same offense." The double jeopardy concepts treated in this opinion are likely to evolve as quickly as cases arise to justify reconsideration.

David W. Frame

⁶⁴ 266 S.E.2d at 128.