Determining When Two Offenses Are the Same Under Indiana's Criminal Rule 4

HOWARD W. ANDERSON III*

INTRODUCTION

Both the federal and Indiana state constitutions confer upon criminal defendants the right to a speedy trial after accusation.[1] When a defendant claims that the prosecution has violated either the federal or Indiana state constitutional guarantee of a speedy trial,[2] a court will use the four-factor balancing test announced by the U.S. Supreme Court in *Barker v. Wingo*[3] to determine the validity of this claim. Under this highly fact-sensitive test, the court will consider the length of the delay, the reason for the delay, the prejudice flowing from the delay, and the defendant's assertion of the right to a speedy trial.[4] The Supreme Court preferred this case-by-case determination of when the government must bring a defendant to trial over the establishment of a fixed, constitutionally-mandated time limit in part because of the impossibility of determining "how long is too long [of a delay] in a system where justice is supposed to be swift but deliberate."[5]

While courts must examine speedy trial claims arising under the U.S. Constitution on a case-by-case basis, courts—through their supervisory powers—or legislatures are free, however, to establish fixed periods of time in which the prosecution must bring the defendant to trial.[6] And they have. In fact, so many jurisdictions[7] have adopted speedy trial provisions that litigation concerning speedy trial rights now focuses solely on legislative schemes such as the federal Speedy Trial Act of 1974[8] and court-

---

* J.D. Candidate, 2005, Indiana University School of Law—Bloomington; B.A., 2002, University of Virginia. As with so much else in my life, this Note would not have been possible without the love, encouragement, and support of my partner, will. Thank you.

1. U.S. CONST. amend. VI; IND. CONST. art. I, § 12.

2. Crawford v. State, 669 N.E.2d 141, 145 (Ind. 1996).

3. 407 U.S. 514 (1972).

4. *Id.* at 530. Before a court will weigh these factors, a "presumptively prejudicial" period of time must have passed between the defendant's arrest and trial. *Id.* at 533. Although the passage of one year or more is the general dividing line between ordinary and presumptive prejudicial delay, Brook Dooley, *Thirty-First Annual Review of Criminal Procedure: II. Preliminary Proceedings: Speedy Trial*, 90 GEO. L.J. 1454, 1458 n.1177 (2002) (collecting cases), delay of less than one year can sometimes trigger a *Barker* inquiry depending on the facts of the case. *See, e.g.*, Collins v. State, 321 N.E.2d 868, 871 (Ind. Ct. App. 1975) (finding that a nine-month delay triggered inquiry).

5. *Barker*, 407 U.S. at 521.

6. *Id.* at 530 n.29.

7. WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 18.3(c) (2d ed. 1999) (noting that "all but a few states have adopted statutes or rules of court on the subject of speedy trial").

8. Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. § 3161 (2000)).

promulgated rules[9] to such an extent that one commentator has remarked, "[r]are indeed are cases involving the Sixth Amendment right to a speedy trial."[10]

Indiana is no exception to this trend: Criminal Rule 4 prescribes fixed time limits between the filing of a charge and trial. Section C of the rule provides that "[n]o person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later."[11] If the defendant is held in jail on the charge pending trial, however, Criminal Rule 4(B) provides additional speedy trial rights by requiring a trial within seventy days after a defense motion for a speedy trial.[12] Beeause a violation of the time limits that the rule prescribes "is per se a violation of the accused's constitutional right to a speedy trial,"[13] the only remedy for the defendant is a complete discharge.[14]

Criminal Rule 4 provides only limited exceptions to these time requirements. First, the Rule excludes any delay attributable to the defendant—such as a defense motion for a continuance.[15] Second, the rule excludes periods of delay attributable to court calendar congestion; however, the rule requires that the defendant be brought to trial within a "reasonable time" after a continuance granted pursuant to this exception.[16] Finally, the rule permits the State to extend the time limit when "the court [is] satisfied that there is evidence for the state, which cannot . . . be had [within the time period], that reasonable effort has been made to procure the same, and there is just ground to believe that such evidence can be had within ninety (90) days."[17]

In addition to these exceptions to Criminal Rule 4's time limits, the State can also obtain additional time to prepare its case by simply dismissing the charge against the defendant and later refiling it. Indiana courts have held that the dismissal of a charge tolls both the one-year time limit under Criminal Rule 4(C)[18] and the seventy-day period under Criminal Rule 4(B).[19] Upon the refiling of the dismissed charge, the State will be charged with the days used prior to dismissal; however, if a "new" charge is filed against the defendant at some point following the dismissal of the "old" charge, the speedy trial period under Criminal Rule 4 begins anew.[20]

---

9. *E.g.*, FED. R. CRIM. P. 48(b) (authorizing dismissal of an indictment for undue delay).

10. John Apol et al., *Criminal Procedure*, L. REV. MICH. ST. UNIV.—DETROIT C. OF L., Spring 2002, at 297, 355.

11. IND. R. CRIM. P. 4(C).

12. Court calendar congestion, defense requests for continuances, and other actions by the defendants causing delay do not count against the seventy days. *Id.* at 4(B).

13. State v. Moles, 337 N.E.2d 543, 552 (Ind. Ct. App. 1975). A discharge is not, however, the same as an acquittal for double jeopardy purposes. *See* Hornaday v. State, 639 N.E.2d 303, 311 (Ind. Ct. App. 1994).

14. IND. R. CRIM. P. 4(D); Poore v. State, 685 N.E.2d 36, 41 (Ind. 1997).

15. IND. R. CRIM. P. 4(F). If this delay attributable to the defendant occurs within the last thirty days of the speedy trial period, the rule permits the State to obtain an additional thirty days in which to bring the defendant to trial. *Id.*

16. *Id.* at 4(B), (C).

17. *Id.* at 4(D).

18. Young v. State, 521 N.E.2d 671, 673 (Ind. 1988); State v. Gamblin, 568 N.E.2d 1040, 1042 (Ind. Ct. App. 1991).

19. Goudy v. State, 689 N.E.2d 686, 691 (Ind. 1997).

20. Bentley v. State, 462 N.E.2d 58, 60 (Ind. 1984).

While the distinction between dismissing one charge and later refiling that "same" charge and dismissing one charge and later filing a "new charge" is conceptually easy to comprehend, the application of this theory can be difficult. This is particularly true when the "new" charge arises out of the same criminal episode that formed the basis for the original charge. Indiana courts have struggled to articulate the legal standard that can be used to determine whether a charge is new enough under Criminal Rule 4 for the State to avoid being charged with the time already used in the previous charge. Indiana case law on this point is unclear. Some cases hold that two charges are the same if they both arise out of the "same transaction or occurrence." Others hold that the two charges are the same if they arise out of the "same set of facts," a test that replicates double jeopardy analysis under the U.S. Constitution. Finally, other courts hold that the State cannot file a charge that is "substantially the same" as a time-barred charge.

The purpose of this Note is both to document the conflicting decisions interpreting Criminal Rule 4's time limits and to propose a workable test for determining when two charges are the same under Criminal Rule 4. Part I of this Note will chart the evolution of the test used for this determination. Part II will provide a recent example of the difficulties that this uncertainty has created among Indiana trial courts. Part III will then examine the tests used to secure the double jeopardy protections under both the Indiana and U.S. Constitutions. Part IV will apply Indiana double jeopardy multiple-punishment analysis to Criminal Rule 4 claims and show how this application synthesizes current speedy trial case law. Finally, this Note will conclude that the current articulation of the test for determining when two charges are the same for speedy trial rights should be abandoned in favor of the test used to determine when two charges are the same for double jeopardy purposes—the test put forth in Justice Sullivan's concurrence in *Richardson v. State*.[21]

I. DETERMINING WHEN A NEW CHARGE IS "THE SAME" AS THE ORIGINAL CHARGE

The protection that Criminal Rule 4 provides to defendants has evolved considerably since the Indiana Supreme Court promulgated the Rule. Subpart A of this Part traces the gradual expansion of the reach of the Rule to its high-water mark in *State v. Tharp*.[22] In that case, the court of appeals held that once a charge becomes time barred under the rule, all other charges arising out of the same "transaction or occurrence" are also time barred under the Rule. Subpart B of this Part explores the breadth of protection that this standard provides, focusing on the use of similarly worded tests in Indiana's civil procedure jurisprudence. Finally, subpart C of this Part demonstrates that although Indiana courts profess adherence to the "same transaction" standard, Indiana courts nonetheless permit the State to file charges arising out of the "same transaction" as one of an underlying, time-barred offense.

---

21. 717 N.E.2d 32 (Ind. 1999).
22. 406 N.E.2d 1242 (Ind. Ct. App. 1980).

A. *The Rise of* Tharp*'s Same Transaction Test*

Criminal Rule 4(C)'s dictate that "[n]o person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year [as a result of prosecutorial delay]" clearly prohibits the State from refiling an information identical to one that has become time barred.[23] The Indiana Supreme Court, however, expanded the scope of the protection that this Rule provides in *Small v. State*.[24] In that case, the State had charged the defendant with the forgery of a driver's license, but it failed to bring him to trial within a year. The State then attempted to charge the defendant with counterfeiting a driver's license. The court held that the Indiana Constitution's guarantee of a speedy trial required that once an offense becomes time barred under Criminal Rule 4, all lesser-included offenses to the charge also become time barred.[25]

Several years after *Small*, the protections of Criminal Rule 4(C) grew once again with the *Pillars v. State* decision.[26] In that case, the defendant was originally arrested and charged with assault with intent to kill. The trial court set the case for trial on a date exactly one year after the defendant's arrest; however, as a result of delay attributable to the State, the trial did not begin until nearly three months after the last date permissible under Criminal Rule 4(C).[27] Four days before the trial began, the State amended the information to include one count of threatening to use a deadly weapon and one count of aiming a weapon.[28] In ruling that the two additional counts fell outside the one-year time limit, the court of appeals acknowledged that the new counts were not "*technically* . . . lesser included offenses."[29] Nevertheless, because the assault charge was time barred and because the additional counts represented the "same criminal acts which the State alleged in support of the greater offense of assault with intent to kill[,]"[30] the two additional counts became time barred with the original count.[31]

Small and *Pillars* set the stage for what would represent the apex of defendants' speedy trial rights: *State v. Tharp*.[32] In that case, the State filed an information alleging that Tharp and another codefendant stole frozen food from a grocery store, an information that was dismissed and refiled several times during pretrial litigation.[33] After the theft charge had become time barred but before trial, the State amended the information to include a charge that the defendants conspired to commit theft of frozen

---

23. *See* Johnson v. State, 246 N.E.2d 181 (Ind. 1969).

24. 287 N.E.2d 334, 336 (Ind. 1972).

25. *Id.*

26. 390 N.E.2d 679 (Ind. Ct. App. 1979).

27. *Id.* at 683.

28. *Id.* at 680.

29. *Id.* at 684 (emphasis in original).

30. *Id.*

31. The court noted that its analysis was similar to double jeopardy jurisprudence, which prohibits multiple punishments for the same crime. *Id.* at 684 n.3.

32. 406 N.E.2d 1242 (Ind. Ct. App. 1980).

33. *Id.* at 1243.

food from the grocery store. The amended charge listed the theft that served as the basis for the original charge as the overt act in furtherance of the conspiracy.[34]

In deciding that the discharge of the underlying theft offense also required the dismissal of the conspiracy charge, the court of appeals noted that the purpose of "[t]he general rule banning multiple prosecutions for offenses arising out of the same course of conduct" is to guard against prosecutorial misconduct, to avoid waste, and to protect the defendant from the hardships of trial.[35] Furthermore, the court was unwilling to permit the State to circumvent the defendant's speedy trial rights through indirection.[36] To this end, the court—adopting a test for discharge identically worded to the test used for claim preclusion in civil litigation[37]—prohibited the State from filing or prosecuting any charge that could have been joined[38] against a defendant "growing out of the same transaction, incident, events, or set of facts[,]" that gave rise to the underlying charge once the underlying charge has become time barred under Criminal Rule 4(C).[39] The only exception to this Rule against filing charges arising out of a time-barred transaction that *Tharp* contemplated was where the State "is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence."[40] The court apparently intended this exception to cover those instances in which "a crimc is not completed or not discovered" at the time of the first prosecution.[41]

Although *Tharp*'s "same transaction" test arose in the context of Criminal Rule 4(C), *Fink v. State*[42] adopted this same test for determining when a previously dismissed charge is the same as a newly filed charge under Criminal Rule 4(B). In *Fink*, the State charged the defendant with burglary after the defendant broke into a woman's apartment and held her at knife-point.[43] Because the defendant was held in jail pending his trial, he was eligible to file a motion for a speedy trial, which he did. On the day of trial, which was within Rule 4(B)'s seventy-day limit, the State dismissed the burglary charge and simultaneously filed a new charge based upon the original affidavit of probable cause—criminal confinement of the victim. Although the prosecutor admitted that "'[t]he same crime has been refiled as a charge of criminal

---

34. *Id.*

35. *Id.* at 1246 (quoting State v. Thomas, 400 N.E.2d 897, 904 (Ohio 1980)).

36. *Id.* at 1247.

37. *See infra* Part I.B.

38. The State may join two or more offenses in one information or indictment if they "(1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." IND. CODE ANN. § 35-34-1-9(a) (West 1998).

39. *Tharpe*, 406 N.E.2d at 1246.

40. *Id.* (quoting *Thomas*, 400 N.E.2d at 904).

41. Ashe v. Swenson, 397 U.S. 436, 455 n.7 (1970) (Brennan, J., concurring). This was one of the two citations the *Tharp* court omitted when it quoted from *Thomas*, 400 N.E.2d at 904. The other was *Diaz v. United States*, 223 U.S. 442 (1912), which permitted the trial of a defendant previously convicted of assault and battery with a new charge of the involuntary manslaughter of the battery victim who died after the original prosecution.

42. 469 N.E.2d 466 (Ind. Ct. App. 1984).

43. *Id.* at 467.

confinement,'"[44] the trial court nonetheless ordered a new trial date. The defendant remained in jail until his conviction on that charge, a total of 166 days following his original request for a speedy trial.

On appeal, the court gave particular weight to the fact that the State did not file a new probable cause affidavit with the new charge in deciding that the "the state's dismissal and simultaneous refiling of such related charges [was] one continuous prosecution."[45] The court faulted the State for failing to file the proper charges originally and concluded that the *Tharp* rule governing the relation back of new charges under Criminal Rule 4(C) must also be applied to speedy trial claims under Rule 4(B). The court was concerned that if it did not extend *Tharp* in this way "the state [could] at any time within the year prescribed by C.R. 4(C) abrogate the defendant's speedy trial motion simply by dismissing and refiling identical or related charges . . . ."[46]

In the years following *Fink*, Indiana courts significantly undermined the protections to defendants that *Tharp*'s "same transaction" test provided.[47] Indeed, prior to the 1991 court of appeals decision iu *Gamblin v. State*,[48] it was unclear whether the "same transaction" test remained good law. In *Gamblin*, however, the court of appeals once again found that Criminal Rule 4 prevented the State from bringing additional charges against a defendant.

In that case, the State charged the defendant with three counts of accepting payment with notice of payees' indebtedness to another from three victims.[49] The State dismissed this information and later filed a new nineteen-count information against the defendant. Counts seven through eighteen of the new information charged the defendant with accepting payment from the same three victims and with theft from those victims during the same period covered in the original three-count information.[50] All of the theft charges involved the unauthorized control over the same money involved in the accepting payment counts.[51]

The court found that these new counts involving the same victims were part of the "same transactions or occurrences" [52] as those in the original information. The court,

---

44. *Id.* (quoting the prosecuting attorney).

45. *Id.* at 468.

46. *Id.* at 469. All was not, however, well for the defendant. Although the court ruled that his right to a speedy trial within seventy days was violated, the defendant—acting pro se—failed to object when the trial court scheduled a new court date. "Fact-sensitive by nature, C.R. 4 determinations regarding a defendant's waiver of the right to a speedy trial in such circumstances must proceed on a case-by-case basis[,]" Fink v. State, 471 N.E.2d 1161, 1162 (Ind. Ct. App. 1984). Indiana courts frequently find that defendants waive their speedy trial rights under Criminal Rule 4(B). *E.g.*, Goudy v. State, 689 N.E.2d 686 (Ind. 1998); Wheeler v. State, 662 N.E.2d 192 (Ind. Ct. App. 1996); Randall v. State, 455 N.E.2d 916 (Ind. 1983).

47. *See infra* Part I.C.

48. 568 N.E.2d 1040 (Ind. Ct. App. 1991).

49. This offense has been recodified, with slight changes, at IND. CODE ANN. § 32-28-3-15 (West 2002).

50. *Gamblin*, 568 N.E.2d at 1042.

51. *See* Brief for Appellant, State v. Gamblin, 568 N.E.2d 1040 (Ind. Ct. App. 1991)(No. 82A04-8912-CR-548); Brief for Appellee, State v. Gamblin, 568 N.E.2d 1040 (Ind. Ct. App. 1991)(No. 82A04-8912-CR-548).

52. *Gamblin*, 568 N.E.2d at 1043.

however, also characterized the new charges as "substantially the same" as the original charges, [53] without explaining whether the two phrases were entirely synonymous.[54] Regardless of whether the court intended this new locution to modify the reach of *Tharp*, the court held that the delay between the filing of, and trial on, the second set of charges must be added to the delay between the filing of and dismissal of the first set of charges. Because delay attributable to the State delayed trial beyond the one-year time limit prescribed by Criminal Rule 4(C), the court of appeals reversed the defendant's convictions on those counts to remedy the violation of his speedy trial right.[55]

B. The Same Transaction Test in Civil Litigation

None of the cases applying *Tharp* explicitly define "same transaction, incident, events, or set of facts." Furthermore, the cases provide little—if any—guidance as to the analytical process used to draw the outer bounds of a "transaction."[56] It is, therefore, instructive to consider Indiana civil procedure, which uses a similarly worded test[57] to determine the effect a final judgment between parties will have on future litigation between them and to determine when a plaintiff may join multiple defendants in an action.

Under Indiana Trial Rule 13(A), a defendant who has a claim against an opposing party "aris[ing] out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction,"[58] to raise it in the answer to the complaint. Two claims arise from the same transaction or occurrence if there is a logical relationship between the events giving rise to each of the claims.[59] A defendant who fails to raise a claim that falls within this rule cannot later raise it in any future litigation between the parties.[60]

In the case of *Estate of McCullough*,[61] the same panel of judges that articulated *Tharp*'s "same transaction" test found that Trial Rule 13(A)'s "same transaction or occurrence" test meant that the plaintiff could not file suit to recover for a claim that was considered a compulsory counterclaim of a previous suit.[62] When the plaintiff's wife died, the plaintiff received a life-estate in one-third of the wife's share in a farm

---

53. *Id.* at 1042 n.6.

54. Note also that *Tharp* speaks of the "same transaction, incident, events, or set of facts," State v. Tharp, 406 N.E.2d 1242, 1246 (Ind. Ct. App. 1980), while *Gamblin* speaks of "transactions *or occurrences*," 568 N.E.2d at 1043 (emphasis added).

55. *Gamblin*, 568 N.E.2d at 1044.

56. *See, e.g.*, *Tharp*, 406 N.E.2d at 1246.

57. I recognize, of course, that logic does not require that a criminal "transaction" be the same as a civil "transaction" as the policy preferences for civil litigation may not be the same as for criminal prosecution. Nevertheless, as the Supreme Court has noted, "[i]f in civil cases . . . the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress the subject, or the government the citizen, by unreasonable prosecutions." *Ex parte* Lange, 85 U.S. 163, 170 (1873).

58. IND. TRIAL R. 13(A).

59. Hayes v. Harris, 479 N.E.2d 1359, 1360 (Ind. Ct. App. 1985).

60. Middelkamp v. Hanewich, 364 N.E.2d 1024 (Ind. Ct. App. 1977).

61. 492 N.E.2d 1093 (Ind. Ct. App. 1986).

62. *Id.* at 1097.

that the two had held as tenants in common while she was alive.[63] Shortly after the devise, the estate filed an action for partition of the property and received a judgment requiring the sale of the property. The hushand bought the estate's share of the farm and, approximately two months after the final judgment in the partition action, filed suit against the estate seeking to recover the estate's share of the mortgage payments the plaintiff made and to recover damages from the estate's refusal to allow the plaintiff to plant crops on the estate's share of the farm prior to partition.[64] The panel concluded without difficulty that the new claims were "were logically related to [and therefore part of the same transaction as] the Estate's partition action[;] . . . all claims between co-tenants, arising as a result of the co-tenancy relationship, should be resolved when partition is sought."[65]

The "same transaction" standard is flexible enough to encompass many types of claims because the focus is "not so much upon their connection as upon their logical relationship."[66] Thus, although the trial rules use this flexible standard to allow a plaintiff to join together as defendants every party against whom she has a claim "arising out of the same transaction, occurrence, or series of transactions or occurrences,"[67] the standard is not broad enough to allow a plaintiff who was involved in two automobile accidents seven hours apart in different counties to join as defendants the other drivers involved in the accidents.[68] It is, however, broad enough to allow a wife to add her father-in-law as a defendant in her divorce proceeding when she claimed an interest in real estate titled to her father-in-law but encumbered with a mortgage to which her husband was a co-signer.[69]

The same transaction standard helps promote "trial convenience, expedite claims, and avoid multiple lawsuits."[70] These goals are quite similar to those of the speedy trial right.[71] In order to achieve these goals, deciding whether two claims arise out of the same transaction should be done "pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, [and] whether they form a convenient trial unit . . . ."[72]

C. The (Apparent) Fall of Tharp*'s Same Transaction Test*

Despite the breadth of the same transaction standard's reach in the civil context, *Gamblin*[73] is the only post-*Fink*[74]case in which an Indiana court has concluded that *Tharp*'s "same transaction" test prevented the filing of additional charges against a

---

63. *Id.* at 1094.

64. *Id.* at 1094–95.

65. *Id.* at 1096.

66. Russell v. Bowman, Heintz, Boscia & Vician, P.C., 744 N.E.2d 467, 472 (Ind. Ct. App. 2001).

67. IND. TRIAL R. 20(A)(2).

68. Grove v. Thomas, 446 N.E.2d 641, 643 (Ind. Ct. App. 1983).

69. Vadas v. Vadas, 728 N.E.2d 250, 257 (Ind. Ct. App. 2000).

70. United of Omaha v. Hieber, 653 N.E.2d 83, 87 (Ind. Ct. App. 1995).

71. *See infra* Part IV.

72. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

73. 568 N.E.2d 1040 (Ind. Ct. App. 1991).

74. 469 N.E.2d 466, 468 (Ind. Ct. App. 1984).

defendant.[75] Nevertheless, none of the cases explicitly overrule—or for that matter even question—*Tharp*.

The first of these post-*Fink* Criminal Rule 4 cases was *Coates v. State*,[76] which the Indiana Supreme Court decided two years before *Gamblin*. While the factual recitation and legal discussion in the case is brief, [77] it appears that the defendant was originally charged with raping and robbing an elderly woman.[78] Ten months after the initial charges, the State filed an additional charge of burglary arising from the same "criminal episode."[79] Without discussing any Indiana case law—including *Tharp*—the

---

75. There could have been an occasion to apply the test in *Butts v. State*, 545 N.E.2d 1120 (Ind. Ct. App. 1989). The defendant in that case was convicted of one count of operating a vehicle with a blood alcohol content of .10% or greater and one count of operating a vehicle while intoxicated. *Id.* at 1121. The second charge was added to the information almost two months after it was originally filed. *Id.* at 1122. The factual recitations the court provided in its decision, and the parties provided in their briefs, do not indicate if the two charges were based on the same period of driving. *See* Brief of Appellant and Brief of Appellee, *Butts*, 545 N.E.2d 1120 (No. 29A02-8903-CR-00082). The court declines to begin counting days under Criminal Rule 4 for the new count from the date of the filing of the original information because it "was not the same charge or a refiling of an identical charge[,] [n]or was the charge in any way included in the definition of a previously filed charge." *Butts*, 545 N.E.2d at 1122. Neither the court nor the parties, however, made any reference to *Tharp* and its progeny whatsoever in discussing the issue. The court did ultimately conclude that each of the counts was time barred under Criminal Rule 4(C), even though the time limit for the counts began on different dates. *Id.* at 1124.

76. 534 N.E.2d 1087 (Ind. 1989).

77. In his appeal to the Indiana Supreme Court, the defendant raised at least fifteen points of error in the trial court. Not suprisingly, the court did not spend very much time addressing any of the issues. In fact, the court disposed of the defendant's Criminal Rule 4 claim in one paragraph. *Id.* at 1090.

78. *Id.* at 1089.

79. *Id.* at 1090. It is not clear from the case whether the defendant burglarized the victim's house before raping and robbing her or whether the charge arose from burglarizing another victim's home. *Id.* at 1089.

Even if the defendant burglarized another victim's home, Indiana courts have used the "same transaction" language to apply to crimes against two separate victims (although not in the Criminal Rule 4 context). For example, the defendant in *Tingle v. State* started out his evening by taking a car for a joyride and stealing a license plate from another car. 632 N.E.2d 345, 348 (Ind. 1994). The defendant was forced to fix a flat tire on the car shortly after he stole it. Evidently, he did not secure the spare well enough because the lug nuts came off twenty minutes later, forcing the car off of the road. The defendant exited the car, walked to a nearby house to use the telephone and proceeded to rob the owner of the house, several hours after the initial theft of the car and license plate. *Id.*

At the robbery trial, the State introduced evidence of the defendant's theft of the automobile and license plate, crimes for which the defendant was not charged. *Id.* Because the case was tried before the effective date of the Indiana Rules of Evidence, *id.* at 348-49 n.1, the *res gestae* doctrine only allowed the State to introduce evidence of the uncharged crimes "where each of those crimes was part of an uninterrupted transaction." Hardin v. State, 611 N.E.2d 123, 130 (Ind. 1993). The court found that the theft of the car and license plate "were instrumental in getting the boys to the scene of the charged crimes and clearly were part of the same transaction." *Tingle*, 632 N.E.2d at 349.

court declined to interpret Criminal Rule 4(C)'s use of "criminal charge" to mean "all charges stemming from a criminal episode."[80] Instead, the court merely characterized the rule as "establish[ing] time limits within which the State must bring the defendant to trial as to each specific charge."[81]

Because of the court's extremely brief factual recitation, it is difficult to know the factual relationship between the burglary charge and the charges in the original information. It is, therefore, impossible to know whether the *Tharp* court would have considered both charges to have been part of the "same transaction, incident, events, or set of facts."[82] Furthermore, given the Indiana Supreme Court's use of the phrase "each specific charge"[83] and given the failure of that court to even mention *Tharp*'s same transaction test, a judge considering whether a new set of charges was the same as a set of charges that had been previously dismissed may well have concluded that *Tharp* no longer remained controlling authority. Two years later, however, the *Gamblin* court's invocation of *Tharp*'s same transaction test rejuvenated *Tharp*'s authority, even though the court's opinion made no mention of *Coates*.

The Indiana Court of Appeals again acknowledged that *Tharp*'s same transaction test governed the analysis of when two charges are the same for the purposes of Criminal Rule 4 when the court decided *Pruett v. State*.[84] Nevertheless, the result of the case is quite inconsistent with the rule set forth in *Tharp*. It is the irreconcilable tension between what the court says in *Pruett* and what the court does in the case that in large part creates the confusion that this Note attempts to document.

In *Pruett*, two officers observed the defendant exiting a liquor store carrying alcoholic beverages. Suspecting that he was underage, the officers approached the defendant and questioned him about his age. Upon learning that he was only nineteen years old, the officers arrested him. When the officers searched his person, they discovered five hand-rolled cigarettes that later tests confirmed to contain marijuana. The officers also found a bag of small papers that the defendant admitted were coated with Lysergic Acid Diethylamide, otherwise known as LSD. While all of the drugs were contained in one Sucrets© box,[85] he was initially charged only with one count of possession of marijuana and with one count of illegal possession of alcohol by a minor. The defendant pleaded guilty to both charges.[86]

Eleven months after his plea to the original charges—and approximately thirteen months after his initial arrest—the State filed two additional charges against the defendant: one count of possession of LSD and one count of possession of marijuana. The defendant moved to dismiss the counts as time barred under Criminal Rule 4. Although the State voluntarily dismissed the possession of marijuana charge (no doubt on double jeopardy grounds), the court denied the defendant's motion for discharge.[87] The defendant was ultimately convicted of possession of LSD.[88]

---

80. *Coates*, 534 N.E.2d at 1090.
81. *Id.*
82. *Tharp*, 406 N.E.2d at 1246.
83. *Coates*, 534 N.E.2d at 1090.
84. 617 N.E.2d 980, 981-92 (Ind. Ct. App. 1993).
85. *Id.* at 980.
86. *Id.* at 980-81.
87. *Id.* at 981.
88. *Id.*

When the court of appeals considered the applicability of Criminal Rule 4 to his case, the court acknowledged that *Tharp* prohibited the filing of additional charges "growing out of the same transaction, incident, events, or set of facts, when those facts had occurred and were known or should have been known to the State and could have been joined with the [time-barred] initial charge[,]"[89] because the new factually related charges are "viewed as [part of] one continuous prosecution."[90] After quoting the *Tharp* rule, the *Pruett* court proceeded to distinguish the facts in the case from *Tharp*, *Fink*, and *Gamblin*[91]—those cases that found the new charge related back to the original charge.

The manner in which the court used the language of the *Tharp* rule was particularly important. Specifically, the court only used the phrase "same transaction" once in the entire opinion—that is, when it quoted the language from *Tharp* above.[92] Thereafter, the court only focused on the phrase "same set of facts" from the *Tharp* rule, a phrase which appears three times in the opinion.[93] Having made this rhetorical shift, the court then characterized *Coates* as standing for the proposition that "where the State files subsequent charges based upon facts separate and distinct *from those charged in the original information*, the *Tharp* rule is inapplicable."[94] The court then summarily concluded that because the State charged different facts in the two informations—that is, in the first the State charged the defendant had alcohol and marijuana and in the second charged that he had LSD—the new charge "was based upon facts separate and distinct from those charged in the previous counts . . . ."[95] Because the two informations charged different facts, *Tharp* was no bar to the possession of LSD conviction, and the court affirmed the defendant's conviction.[96]

Had this been a civil case in which the officers brought a replevin action to obtain possession of five cigarettes in the box, there is no doubt that a "same transaction" standard would later prevent the officers from maintaining a separate action to recover pieces of paper also found in the box.[97] As previously mentioned, the "same transaction" standard covers all potential claims that one party has against another that form a "convenient trial unit" with the original claim. And it seems almost impossible to imagine a case better than *Pruett* in which judicial economy should demand that the two sets of charges be tried in the same proceeding because, had the defendant not

89. *Id.*

90. *Id.* at 982.

91. *Id.*

92. *Id.* at 981.

93. *See id.* at 981–92.

94. *Id.* at 982 (emphasis added).

95. *Id.* The ease with which the court reached the conclusion that the two informations contained separate facts does not even consider the fact that the State's second information included a charge of possession of marijuana before that charge was dropped. *Id.* at 981. Especially given that the marijuana charges were the same, it seems possible to view the two informations as part of a "continuous prosecution"—at least factually, even if not legally.

96. *Id.* at 982.

97. *See, e.g.*, Jones v. Morris Plan Bank of Portsmouth, 191 S.E. 608 (Va. 1937) (holding that because an acceleration clause in the contract made all payments due and owing upon default, the plaintiff-bank was claim precluded from maintaining an action to recover additional installment payments on a car when it had previously maintained an action to recover two payments).

pleaded guilty to the original charges, the two trials would have shared so much in common. At a minimum, both proceedings would require evidence about the facts that gave probable cause for the officer to arrest the defendant, the chain of custody of the contents of the inventory search, and the statements the defendant made at the time of his arrest. Indeed, all the prosecutor would have had to do to obtain a conviction for the LSD charge, had he brought it in the original proceeding, would have been to do the following: 1) ask, "Officer, was there anything else in the box you took from the defendant's pocket besides the marijuana cigarettes? Are these the same pieces of paper that you found in the box? How do you know?"; 2) establish the chain of custody of the papers; and 3) call a witness competent to testify that the papers in fact contained LSD. In spite of the ease of trying the two cases together, the *Pruett* court concluded that *Tharp*'s same transaction test did not require the State to prosecute both crimes at once because the two crimes were so "separate and distinct."

The next and final case to apply *Tharp* also found that Criminal Rule 4 was no bar to a later prosecution. In *Hawkins v. State*,[98] the defendant and another man robbed a car dealership in Fort Wayne. The men fled the scene in two cars stolen from the lot. Almost three weeks later in neighboring Madison County, a police officer pulled the defendant over after the officer observed the vehicle weaving on the road. Upon discovering that the defendant was driving with a suspended license and after the defendant admitted that the car was not his, the officer impounded the vehicle.[99] The Madison County prosecutor, alleging that the car had been stolen from the car dealership in Fort Wayne, charged the defendant with receiving stolen property.[100] One month later, the Allen County prosecutor filed numerous charges against the defendant stemming from the robbery.[101] The defendant was convicted of all the Allen County charges more than one year after the filing of the Madison County charge, which was ultimately dropped before trial.[102]

Addressing the defendant's argument that Criminal Rule 4 barred any prosecution the Allen County charges once the Madison County charges became time barred, the court of appeals once again acknowledged that *Tharp* stands for the proposition that the State "may not subject the defendant to a 'related' charge growing out of the same transaction, incident, events, or set of facts when those facts had occurred and were known or should have been known . . . and could have been joined with the initial charge."[103] Then, the court cited *Pruett* for the proposition that Criminal Rule 4 permits the State to file a new charge that contains "one or more facts unique to the offense charged"[104] after the original charge has become time barred. Having made this shift, the court proceeded to briefly analyze the facts of the case. It concluded that although

---

98. 794 N.E.2d 1158 (Ind. Ct. App. 2003).

99. *Id.* at 1160.

100. *Id.* at 1162 n.10.

101. *Id.* at 1161. The defendant was charged with two counts of attempted murder and criminal confinement and one count of each of the following: robbery, attempted robbery, carrying a handgun without a license, carrying a handgun with a previous felony conviction within fifteen years, and auto theft (of the other vehicle than the one he was found driving). *Id.* at 1159.

102. *Id.* at 1161.

103. *Id.* at 1162.

104. *Id.* at 1163.

"the Allen County charges were in some way connected to the same incident,"[105] the new charges were not related to the original charge.

The language in the opinion is internally contradictory: on the one hand, the court acknowledges that *Tharp* would bar new charges growing out of the "same . . . incident"[106] once the original charge becomes time barred, but on the other the court concluded that these new charges arising out of the "same incident"[107] fell outside of *Tharp*'s protection. Nevertheless, it seems doubtful that even a liberal application of the "same transaction" test would preclude the second set of charges in this case.[108] Because the crime of receiving stolen property could not have occurred until the defendant "receive[d], retain[ed], or dispose[d] of [the car],"[109] and because the defendant did not steal the car that he was found driving in Madison County,[110] the crime did not occur until some undetermined time after the robbery. Given this, the fact that any county in which the defendant exercises control over the stolen property can file a charge[111] and the fact that the defendant admitted the car was stolen, grouping the two sets of charges into one trial would have only a limited effect on judicial economy—the driving force behind the same transaction or occurrence test in civil litigation.[112]

D. Putting the Criminal Rule 4 Cases Together

The current state of Indiana case law makes the scope of *Tharp*'s protection for defendants unclear. No case that has mentioned *Tharp* has either questioned or disavowed the same transaction test that *Tharp* read into Criminal Rule 4. Despite this fact, *Pruett* and *Tharp* are irreconcilable if the "same transaction" is to be given any meaning remotely resembling a civil transaction. Were *Pruett* the last decision on this issue, an Indiana trial judge attempting to discern the reach of Criminal Rule 4 could decide that *Pruett* reversed *Tharp* sub silencio. The decision in *Gamblin*, however, prevents this outcome. In that case, the court of appeals both avoided the rhetorical emphasis on the "set of facts" language from *Tharp* upon which *Pruett* so heavily relied and injected the phrase "substantially the same" into the Criminal Rule 4 lexicon. *Hawkins* did nothing to alleviate this confusion, as that case permitted additional charges that *Tharp*, *Pruett*, and *Gamblin* would have permitted. And it did so while purporting to follow all three cases. Thus, these cases try—and fail—to create a coherent test that a court can use to decide when "factually-related charges [should be] viewed as one continuous prosecution."[113]

---

105. *Id.*
106. *Id.* at 1162.
107. *See id.* at 1163.
108. *See supra* text accompanying note 56.
109. IND. CODE ANN. § 35-32-2-2 (West 1998).
110. *See Hawkins*, 794 N.E.2d at 1163.
111. § 35-32-2-2.
112. *See* 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1409 (2d ed. 1990).
113. *E.g.*, *Hawkins*, 794 N.E.2d at 1163.

II. APPLYING (OR TRYING TO APPLY) *THARP* AND ITS PROGENY

The uncertainty both as to *Tharp*'s applicability and its scope presents a significant problem for Indiana trial courts. If a trial court erroneously requires the State to proceed on a "new" charge before the expiration of Criminal Rule 4's time limits for the "original" charge, the State may not have enough time to prepare the case, thus causing the State to lose at trial.[114] On the other hand, if the court erroneously treats the "new" charge as "separate and distinct" from the "original" charge—thereby resetting the charge beyond Criminal Rule 4's time limits—the defendant is entitled to have his conviction on the new charge vacated on appeal should the trial court misread the conflicting decisions. In either situation, the defendant cannot later be subject to retrial for that charge.[115]

A recent case of the Monroe County Circuit Court illustrates this problem. On April 16, 2003, the State filed a probable cause affidavit seeking a warrant to arrest Michael Fultz on charges of murder and arson.[116] The State alleged that soon after Fultz murdered his girlfriend, Teresa Farrell, he set her car on fire with her body in it.[117] At the probable cause hearing, however, the duty judge found probable cause to arrest Fultz only on the arson charge.[118] Accordingly, the State filed a one-count information in Division V of the Monroe County Circuit Court charging Fultz with committing arson against Farrell's car.[119] After Fultz was arrested, he was unable to post bond. Fultz claimed the additional speedy trial rights that Indiana affords to incarcerated defendants by filing a Criminal Rule 4(B) motion for speedy trial on April 16.[120] The trial court set his trial date for June 24—a date sixty-eight days after his speedy trial request.[121]

Fultz did not, however, stand trial on that date. On June 18—day sixty-three of incarceration after his speedy trial request[122]—the State dismissed without prejudice the arson charge and simultaneously filed a new one-count information under a

---

114. In the case of a speedy trial request under Criminal Rule 4(B) the State does, however, have another option: releasing the defendant from custody eliminates the seventy-day requirement for trial. Williams v. State, 631 N.E.2d 485, 487 (Ind. 1994). The State is still subject to Criminal Rule 4(C)'s requirement that the State cannot hold the defendant to answer to a charge for more than one year. *Id.*

115. IND. CONST. art. 1, § 14 ("No person shall be put in jeopardy twice for the same offense."); *see also* Jackson v. State, 663 N.E.2d 766, 770 (Ind. 1996) (noting that the violation of Criminal Rule 4 requires that the defendant receive a discharge).

116. Probable Cause Affidavit at 1, Indiana v. Fultz (filed April 16, 2003) (No. 53C03 0304 MC 00529).

117. Transcript of Probable Cause Hearing at 19–20, *In re a Warrant for the Arrest of Michael Fultz* (hearing held April 15, 2003) (No. 53C03 0304 MC 00529).

118. *Id.* at 23.

119. Information in Indiana v. Fultz (filed April 16, 2003) (No. 53C05 0304 FB 00380).

120. *See* Chronological Case Summary of Indiana v. Fultz (entry of April 16, 2003) (No. 53C05 0304 FB 00380).

121. *Id.*

122. *See* Probable Cause Affidavit at 1, Indiana v. Fultz (filed June 18, 2003) (No. 53C06 0306 MC 00864).

different cause number that alleged that Fultz had murdered Theresa Farrell.[123] The probable cause affidavit filed with this new charge was in all respects the same as the original affidavit—typographical mistakes included—except for the additional allegation that a confidential informant, a fellow inmate of Fultz, told the investigating officer that Fultz reported both choking Farrell to death and later burning her body in her car.[124]

The defendant reasserted his request for a speedy trial and argued that the murder charge should be subject to the same speedy trial date as the arson charge; in other words, he sought to have his trial for the murder charge begin within seven days after the charge was filed.[125] The State, not surprisingly, objected to such an early trial because it viewed the murder charge as an entirely new charge.[126] The trial court agreed that the defendant's speedy trial motion for the arson charge attached to the murder charge.[127] The court did not, however, schedule the trial within the five days remaining on the time limit for the arson charge; the court found that the State needed additional time to obtain the report of a forensic expert in Baltimore that it had made reasonable efforts to obtain. The court—invoking a limited exception to Criminal Rule 4(B)'s seventy-day requirement for the commencement of trial[128]—scheduled the trial for September 16, 2003.[129]

The trial court's ruling on the speedy trial motion illustrates the difficulties the jurisprudence surrounding Criminal Rule 4 creates because it seems clear that the two charges represent one continuous prosecution. First, the State sought to charge the defendant with murder originally but was unable to do so because its investigation had not yet discovered enough evidence to establish probable cause. Second, the arson was designed to dispose of the corpse of the murder victim (and the report of the forensics

---

123. Information, *Fultz* (filed June 18, 2003) (No. 53C01 0306 MR 00617, *subsequently amended to* No. 53C05 0306 MR 00617).

124. Probable Cause Affidavit at 7, *Fultz* (No. 53C06 0306 MC 00864).

125. Katy Murphy, *Fultz's Lawyer Still Wants Tuesday Trial*, BLOOMINGTON HERALD-TIMES, June 20, 2003, at A1.

126. *Id.*

127. Katy Murphy, *September Trial Set for Fultz*, BLOOMINGTON HERALD-TIMES, June 21, 2003, at A1. This was, in fact, the second time that a judge had ruled that the two charges were the "same." The local rules for the Monroe County Circuit Court provide that new case filings be randomly assigned to one of the judges of the circuit. MONROE COUNTY CIR. CT. R. 2(B)(1). The clerk of the court randomly assigned Fultz's murder case to Division I of the circuit. Indiana v. Fultz, No. 53C01 0306 MR 00617 (Monroe County Cir. Ct. June 18, 2003). The local rules, however, also provide that if a plaintiff dismisses a case without prejudice and subsequently refiles the same case, the division that exercised jurisdiction over the original case would also exercise jurisdiction over the refiled case. MONROE COUNTY CIR. CT. R. 2(B)(3). The rules define "same case" as "mean[ing] substantially the same cause of action, arising out of the same transaction or occurrence, and between substantially the same parties." *Id.* Division I ruled that the new charge was part of the "same case" that the clerk originally assigned to Division V, and therefore ordered the case transferred back to Division V's docket. Chronological Case Summary, *State of Indiana v. Fultz* (entry of June 19, 2003) (No. 53C01 0306 MR 00617).

128. Criminal Rule 4(D) allows the State up to an additional ninety days of delay if the trial court finds that the State needs additional evidence that it has not obtained despite a reasonable effort and that can be obtained within ninety days.

129. Murphy, *supra* note 127.

expert could in fact determine that the fire was the cause of death). Third, the probable cause affidavit for the murder charge in many (if not most) sections repeats verbatim the information contained in the original affidavit. Fourth, the State, in fact, later amended the new information to include the original arson charge.[130] The difficulty arises in deciding whether the law will view the charges as one continuous prosecution.

Criminal Rule 4 analysis under *Pruett* most certainly would not require the two charges to be treated as one as "each charge is based on one or more facts unique to the offense charged."[131] In other words, the charge of murder requires the State to prove that the defendant killed Farrell,[132] which is not necessary to obtain a conviction for arson, while the charge of arson requires the State to prove that the defendant destroyed Farrell's property by fire,[133] which is not necessary to obtain a conviction for murder. Even assuming, however, that *Pruett* actually applied the "same transaction" test, a court that found that the prosecution for possessing drugs found in one half of a Sucrets© box was not part of the same transaction as the transaction that prompted a prosecution for possessing drugs found in the other half of the box would surely not find the State's allegation of murder and its allegation of arson to arise from the same transaction in this case.[134]

On the other hand, Criminal Rule 4 jurisprudence following *Tharp-Fink-Gamblin* analysis militates in favor of finding that the speedy-trial clock for the murder charge is linked to that of the arson charge. First, Indiana civil procedure would seem to view the two charges as arising out of the same transaction or occurrence, as the two charges are closely related in "time, space, origin, [and] motivation . . . ."[135] The overlap between the facts surrounding the two charges as evidenced by the significant overlap of the two probable cause affidavits—even assuming that a criminal transaction is smaller than a civil "transaction or occurrence"[136]—easily makes the two charges together a

---

130. Chronological Case Summary, *Fultz* (entry of September 3, 2003) (No. 53C05 0306 MR 00617).

131. Pruett v. State, 617 N.E.2d 980, 982 (Ind. Ct. App. 1993).

132. IND. CODE ANN. § 35-42-1-1 (West 1998).

133. *Id.* § 35-43-1-1.

134. The trial court could have possibly invoked the exception that *Tharp* contemplated to its "same transaction" rule—that is, possibly allowing a new prosecution when "'the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.'" State v. Tharp, 406 N.E.2d 1242, 1246 (Ind. Ct. App. 1980) (quoting State v. Thomas, 400 N.E.2d 897, 903 (Ohio 1980)). This would, however, exceed the scope of that exception because the murder had already happened at the time of the original filing, the State knew that it had already occurred, and the State thought that Fultz committed the murder—its investigation just turned out to be less complete than the State thought. *See* State v. Tharp, 406 N.E.2d 1242, 1247 (Ind. Ct. App. 1980). Furthermore, because probable cause only relates to the arrest of an individual, Hicks v. State, 544 N.E.2d 500 (Ind. 1989), the prosecution still could have filed an information alleging the murder of Farrell if it disagreed with the duty judge's assessment of the strength of its case. *See* Schultz v. State, 413 N.E.2d 913, 916 (Ind. 1981) (noting that Indiana courts have "long held that an indictment or information may not be questioned on the ground of insufficient evidence [because] [t]he sufficiency of the evidence is decided at trial").

135. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

136. The two may not vary in size by much, if at all. For example, the defendant in *Benner v. State* was charged with and convicted of one count of murder and one count of

"convenient trial unit."[137] Furthermore, the arson and the murder share a "logical relationship"[138] with one another because Fultz committed the arson to dispose of the murdered victim's corpse (and the victim may not in fact have been dead before the arson). Finally, it appears that the State was "attempt[ing] to do indirectly what the lack of speedy trial prevents it from doing directly":[139] the State wanted to take, and keep, Fultz off of the streets as soon as possible,[140] so it settled for arresting him for arson until it could investigate the murder case further.

Even though the trial court resolved the conflict between *Tharp* and *Pruett* in favor of the "same transaction" test, this outcome did not ultimately prejudice the State because the State's good faith efforts to obtain the report of an out-of-state forensic expert entitled it to additional time under Criminal Rule 4(C). Had the State not made this good faith effort, the trial court's decision would have presented the judge with three unpalatable scenarios. First, the State could have dismissed the arson charge and let an allegedly dangerous man out of jail until it was ready to proceed on the murder charge. Second, the State could have gone to trial without being fully prepared and thus risk an acquittal. Third, the judge could have resolved the conflict between *Tharp* and *Pruett* in favor of the State, which could have resulted in the defendant receiving a discharge on appeal for the violation of Criminal Rule 4 should the court of appeals conclude that *Tharp* remains good law. A definitive resolution of the *Tharp-Pruett* conflict would prevent trial courts from ever being placed in such a position.

III. A BRIEF LOOK AT DOUBLE JEOPARDY JURISPRUDENCE IN INDIANA

As with the guarantee of a speedy trial, both the federal[141] and the Indiana[142] constitutions prohibit the government from trying a defendant twice for the same offense. In the words of Chief Justice Rehnquist, "the decisional law in the area [of the federal constitution's double jeopardy prohibition] is a veritable Sargasso Sea which

---

attempted murder. 580 N.E.2d 210, 211 (Ind. 1991). The defendant committed the two crimes within a short time of one another in one apartment. *Id.* On appeal, the defendant argued that the trial court's refusal to sever the two counts was error. *Id.* at 212. Defendants in Indiana have an absolute right to sever offenses from one information or indictment that "[a]re of the same or similar character." IND. CODE ANN. § 35-34-1-11 (West 1998). In all other cases, the trial court has discretion whether to sever the counts. *Id.* In reviewing the trial court's denial of the defendant's motion to sever, the *Benner* court used an abuse of discretion standard because the counts were joined in one information as "two charges grow[ing] out of the same occurrence[,]" *Benner*, 580 N.E.2d at 212, not as two charges "of the same or similar character."

137. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

138. *See* Russell v. Bowman, Heintz, Boscia & Vician, P.C., 744 N.E.2d 467, 472 (Ind. Ct. App. 2001) (explaining that Indiana courts have used the "logical relationship" test to determine whether events are part of the same transaction or occurrence in civil suits).

139. Hawkins v. State, 794 N.E.2d 1158, 1163 (Ind. Ct. App. 2003).

140. *See* Transcript of Probable Cause Hearing at 24–25, *In re a Warrant for the Arrest of Michael Fultz* (hearing held April 15, 2003) (No. 53C05 0304 FB 00380) (The State successfully argued to increase Fultz's bail to $500,000 surety.).

141. U.S. CONST. amend. V; *see* Benton v. Maryland, 395 U.S. 784, 794 (1969) (applying double jeopardy prohibition of the Fifth Amendment to the states via the Fourteenth Amendment).

142. IND. CONST. art. 1, § 14.

could not fail to challenge the most intrepid judicial navigator."[143] The source of much of the confusion surrounding double jeopardy jurisprudence largely stems from the same confusion surrounding Indiana's Criminal Rule 4: when are two criminal offenses the same?

A. Double Jeopardy Under the Federal Constitution

In 1932, the United States Supreme Court set forth the current test for determining when two crimes are the "same" for the purposes of the federal constitution in the case of *Blockburger v. United States*.[144] Under the *Blockburger* test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not."[145] This analysis focuses on the statutory elements of the two offenses[146] and is not concerned with the evidence that the State actually presents at trial.[147]

For example, Indiana defines the crime of burglary as "break[ing] and enter[ing] the building or structure of another person, with intent to commit a felony in it."[148] Indiana defines the crime of robbery as "knowingly or intentionally tak[ing] property from another person or from the presence of another person[] . . . by using or threatening the use of force on any person; or . . . by putting any person in fear . . . ."[149] Under *Blockburger* analysis, the State could try a defendant for burglary after trying the defendant for robbery—irrespective of the verdict in the robbery case—because the two crimes are not the "same offense."[150] While a prosecution for robbery requires the State to prove that the defendant took property (an element not required for burglary), a prosecution for burglary requires the State to prove that the defendant entered into the dwelling of another person with the intent to commit a felony (an element not required for robbery). Thus, both robbery and burglary require an element that the other does not; they are not the "same offense."

In this hypothetical, however, the State could not later bring a charge of residential entry against a defendant who had already been tried for burglary. Because residential entry is defined as "knowingly or intentionally break[ing] and enter[ing] the dwelling of another person,"[151] all of its statutory elements are found in the definition of

---

143. Albernaz v. United States, 450 U.S. 333, 343 (1981).

144. 284 U.S. 299 (1932). While the Court has made several attempts to create a new test, none of the other tests it has tried has managed to retain a majority. *See* RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE, 1373-1405 (2001). *Blockburger* has, therefore, governed the analysis by default. *Id.* at 1403.

145. *Blockburger*, 284 U.S. at 304.

146. Brown v. Ohio, 432 U.S. 161, 168 (1977).

147. Grady v. Corbin, 495 U.S. 508, 521 n.12 (1990), *overruled on other grounds by* United States v. Dixon, 509 U.S. 688 (1993).

148. IND. CODE ANN. § 35-43-2-1 (West 1998).

149. IND. CODE ANN. § 35-42-5-1 (West 1998).

150. *See, e.g.*, Benton v. State, 691 N.E.2d 459, 464 (Ind. Ct. App. 1998). Just as *Blockburger* prevents multiple prosecutions for the same offense, it also applies to prevent multiple punishments for the same offense. *Dixon*, 509 U.S. at 703.

151. IND. CODE ANN. § 35-43-2-1.5 (West 1998).

burglary. The two crimes are the same offense for federal double jeopardy purposes,[152] even though burglary requires the State to prove an element not found in the definition of residential entry—intent to commit a felony.[153] Residential entry is, therefore, a lesser-included offense of burglary.

B. Double Jeopardy under the Indiana Constitution

Indiana's constitutional protection against double jeopardy is almost as much of a Sargasso Sea as that of its federal counterpart[154] because of the Indiana Supreme Court's various attempts to give meaning to the Indiana state constitution's prohibition against double jeopardy beginning in *Richardson v. State* in 1999.[155] While double jeopardy analysis under both the federal and state constitutions was the same prior to *Richardson*,[156] that decision announced a decoupling of the federal and state constitutional protections against double jeopardy.[157]

The chain of events, which would culminate in the decision in the case, began when the defendant arrived at a crowded party near a lake.[158] While there, the defendant noticed that another guest had a large amount of money in his billfold. The defendant, along with two other men, rode with the guest in a car to go to another party that same evening. When the car stopped alongside a bridge, everyone exited the car, whereupon then the defendant and the two other men beat and kicked the guest and took his wallet before pushing him over the side of the bridge. At trial, the State obtained convictions

---

152. *See* Vincent v. State, 639 N.E.2d 315, 317 (Ind. Ct. App. 1994).

153. All double jeopardy cases are not, however, as easy as these two examples might suggest. Courts have difficulty applying the *Blockburger* test in so-called "complex crimes," such as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000) ("RICO"), and the Continuing Criminal Enterprise Statute, 21 U.S.C. § 848 (2000) ("CCE"), that incorporate numerous potential predicate crimes (for example, arson) into their statutory definition. Faced with the prospect of trying to use *Blockburger* to determine whether the government can prosecute a defendant for a complex crime after a prosecution for the underlying predicate offenses and whether the government can use different combinations of predicate crimes to obtain multiple convictions against the defendant charged with a complex crime, "the Supreme Court has—for all intents and purposes—thrown up its hands and admitted that current double jeopardy doctrine is inadequate to deal with complex crimes like RICO and CCE." RONALD J. ALLEN ET AL., *supra* note 144, at 1385.

154. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1022 (2003) (characterizing Indiana double jeopardy jurisprudence as a "morass").

155. 717 N.E.2d 32 (Ind. 1999).

156. Elmore v. State, 382 N.E.2d 893, 896 (Ind. 1978); *see also* Jenkins v. State, 695 N.E.2d 158 (Ind. Ct. App. 1998) (analyzing state and federal double jeopardy issue under same standard). Indiana law may analyze multiple prosecutions and multiple punishments differently. *See* Games v. State, 684 N.E.2d 466, 476 n.11 (Ind. 1997) (reserving the question). The federal constitution treats the two situations as the same. *See supra* Part III.A.

157. *Richardson*, 717 N.E.2d at 49.

158. *Id.* at 54.

against the defendant for robbery as a Class C felony[159] and for battery as a Class A misdemeanor[160] as a result of the beating.[161]

On appeal, the defendant argued that because the same beating served as the basis for both the robbery and the assault conviction, his conviction for both offenses violated Indiana's Double Jeopardy Clause,[162] and the Indiana Supreme Court agreed. The court held that the State cannot convict a defendant on two charges when there is "reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense."[163] This approach looks beyond the statutory elements of the offense and, unlike *Blockburger* analysis, focuses on the "actual evidence presented at trial."[164] Because there was a reasonable probability that the actual evidence the State presented at trial made battery a lesser-included offense of robbery (battery as presented at trial + taking of property = robbery), the court vacated the defendant's battery conviction.[165]

While Justice Sullivan joined the opinion, he wrote a concurrence because he felt that the case fell into one of "those limited number of specific situations (deemed 'superceded') where [the Indiana Supreme Court] has been unwilling to impose multiple punishments upon a defendant who commits two crimes at the very same time against the same victim."[166] He thought that Indiana common law prohibited five categories of "multiple punishment":

> Conviction and punishment for a crime which is a lesser-included offense of another crime for which the defendant has been convicted and punished. . . .
>
> Conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished. . . .

---

159. For the elements of robbery as a Class C felony, see *supra* text accompanying note 149.

160. This required the State to prove that the defendant "knowingly or intentionally touch[ed] another person in a rude, insolent, or angry manner . . . [that] resulted in bodily injury to any other person[.]" IND. CODE ANN. § 35-42-2-1(a) (West 1998).

161. *Richardson*, 717 N.E.2d at 54.

162. *Id.*

163. *Id.* at 53. This test would also prohibit the State from prosecuting the two charges in two separate trials, because the douhle jeopardy clause protects against multiple punishments for the same offense (at issue in *Richardson*), as well as multiple trials for the same offense. *Id.* at 37 n.3. Justices Boehm and Selby, however, argue that the Indiana double jeopardy provisions only apply to successive prosecutions, not multiple punishments for the same act in one trial. *Id.* at 71 (Boehm, J., concurring in result). They argue that protection against multiple punishments exists only through Indiana common law and statutory provisions. *Id.* The court of appeals does not, however, seem to analyze the two types of claims differently. *See, e.g.*, Bayes v. State, 779 N.E.2d 77, 80 (Ind. Ct. App. 2002); Alexander v. State, 768 N.E.2d 971, 973 (Ind. Ct. App. 2002).

164. *Richardson*, 717 N.E.2d at 53.

165. *Id.* at 54; *id.* at 72 (Boehm, J., concurring in the result).

166. *Id.* at 55 (Sullivan, J., concurring).

> Conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished. . . .
>
> Conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished. . . .
>
> Conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished.[167]

He placed the *Richardson* defendant in the third category.[168]

In the years since *Richardson*, the analytical framework of Justice Sullivan's concurrence seems to have eclipsed the majority opinion's actual evidence test.[169] In fact, Justice Boehm admonished the Court for continuing to pay lip service to the actual evidence test all the while analyzing double jeopardy claims under Justice Sullivan's five categories. In Justice Boehm's view, the Indiana Supreme Court has "in effect abandoned *Richardson*, and should be explicit in doing this so future trial and appellate courts can follow a consistent methodology in reviewing double jeopardy claims."[170] Regardless of whether the majority or Justice Sullivan's concurrence represents the actual state of Indiana Double Jeopardy law, it is clear that two crimes may be the same offense even though they do not satisfy the *Blockburger* same elements test.

IV. APPLYING MULTIPLE PUNISHMENT ANALYSIS TO CRIMINAL RULE 4

Indiana case law is clear that a discharge for delay under Criminal Rule 4 is not the same as an acquittal for double jeopardy purposes.[171] Nevertheless, the *Coates-Pruett-Hawkins* line of Criminal Rule 4 cases seems to employ *Blockburger* analysis for determining whether the discharge of one charge affects the prosecutor's ability to file another charge. This is especially pronounced in *Pruett*, as the analysis in that case focused solely on a comparison of the facts appearing in the original information and those in the new information. Under that case, the presence of at least one fact "unique to the offense charged"[172] in both the new and old informations allows the second prosecution to proceed even though the original has become time barred.

Indiana constitutional and common law have found *Blockburger* analysis insufficient to protect the liberty interest of Indiana residents, so Indiana law offers them additional protection. As the United States Supreme Court has said, one of the purposes of the double jeopardy prohibition is to prevent "the State with all its

---

167. *Id.* at 55–57 (emphasis omitted).

168. *Id.* at 55.

169. *See* Joel Schumm, *The Mounting Confusion over Double Jeopardy in Indiana*, RES GESTAE, Oct. 2002, at 27–28 (noting that Guyton v. State, 771 N.E.2d 1141 (Ind. 2002), evaluated double jeopardy claim solely under Justice Sullivan's category analysis).

170. *Guyton*, 717 N.E.2d at 1149 (Boehm, J., concurring).

171. State v. Soucie, 123 N.E.2d 888, 890 (Ind. 1955).

172. Pruett v. State, 617 N.E.2d 980, 982 (Ind. Ct. App. 1993).

resources and power . . . [from making] 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 . . . ."[173] Criminal Rule 4 attempts to minimize the period of time in which the defendant must live in "a state of anxiety and insecurity" by requiring the State to bring the defendant to trial within a certain period of time.[174] This is especially true in cases like *Fultz* or *Hawkins* in which the defendant is unable to obtain release on bond and therefore waits for trial behind jail bars.

The policy considerations behind double jeopardy and the speedy trial right are not, however, completely the same. Long periods between charging and trial increase the burden on the public fisc if the defendant is held in jail pending trial or endanger the public if a dangerous defendant is free to roam the streets pending trial.[175] On the other hand, successive prosecutions allow the State to "rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged."[176] While multiple punishments for the same crime may not raise this problem, multiple punishments for the same crime could permit the imposition of a more lengthy punishment than the statute defining the crime sets as a maximum.[177]

To the extent that there is a difference between the protections from successive prosecution and multiple punishment, it seems that the policies behind the speedy trial right are more similar to those of multiple punishment prohibitions. First, as the heart of a Criminal Rule 4 claim is often that there has been no trial (as in *Fultz*), concerns that the State may be able to have a "trial run" of its case are not applicable. (In cases like *Pruett*, however, this concern is clearly applicable.) Second and perhaps more importantly, because a discharge prohibits the imposition of any punishment for an offense, any sentence on a time-barred charge exceeds the maximum punishment authorized for that crime. Thus, it would seem then that the answer to the question "when are two crimes the same?" should be substantially the same for multiple punishment jurisprudence as for Criminal Rule 4 purposes because the policies that underlie both are so similar.

Because the *Richardson* majority opinion's "actual evidence" test seems to have fallen out of favor with the Indiana Supreme Court and because there will often be no evidence from a trial in the record in a Criminal Rule 4 claim, applying double jeopardy/multiple punishment jurisprudence to Criminal Rule 4 claims should proceed under Justice Sullivan's analytical approach. Subsequent charges after one charge has become time barred should only be permissible to the extent that the defendant could have been sentenced for both the new and old charges in one proceeding. Replacing the current test for determining when two crimes are the same under Criminal Rule 4—whatever that test really is—with Justice Sullivan's approach to multiple punishment jurisprudence would provide clear guidance to trial courts confronting the application of Criminal Rule 4 to two sets of factually-related charges.

---

173. Green v. United States, 355 U.S. 184, 187 (1957).

174. *See* Utterback v. State, 310 N.E.2d 552, 553–54 (Ind. 1974).

175. Barker v. Wingo, 407 U.S. 514, 520–21 (1972).

176. Grady v. Corbin, 495 U.S. 508, 518 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

177. Richardson v. State, 717 N.E.2d 32, 65 (1999) (Boehm, J., concurring in the result).

Additionally, and perhaps most importantly, the Criminal Rule 4 cases that held that the defendant was entitled to avoid prosecution under the new charge fit without much analytical difficulty into one of the five categories presented in Justice Sullivan's concurrence. The first category prevents punishment for a lesser-included offense when the defendant has been convicted of a greater offense. *Small* prevents prosecution of a lesser-included offense after the greater-included offense has become time barred.

Justice Sullivan's second category prevents the defendant from being punished for the very same act twice. In *Pillars*, the court of appeals held that Criminal Rule 4 prevented the State from prosecuting the defendant for the same act for which a charge has become time barred. *Fink* fits in this category as well, although only because the prosecutor admitted that the new charge was the same as the time-barred charge. *Gamblin* also fits in this category, as the victims and the money at issue were identical in both of the informations filed to support the two sets of charges.

Finally, a defendant cannot be sentenced for both conspiracy and a crime when the overt act forming the basis of the conspiracy charge is the same act forming the basis for the other crime. This category directly addresses the factual scenario at issue in *Tharp*, in which the court prevented the State from bringing a charge of conspiracy to commit a time-barred charge.

V. CONCLUSION

The current test for determining when two crimes are the same for Criminal Rule 4 purposes is cloudy at best and conflicted at worst. Part I of this Note traced the expansion of the Criminal Rule 4's definition of a charge from the same literal charge to a definition that includes all possible charges arising out of a single transaction or occurrence, the standard announced in *Tharp*. This same transaction or occurrence standard also exists in Indiana civil procedure, and this Note demonstrated the breadth of that standard's "protection" against a multiplicity of civil suits. Then, this Note demonstrated that *Pruett* reinterpreted *Tharp* to narrow the scope of the protections of Criminal Rule 4. While *Pruett* paid lip service to the same transaction standard in Criminal Rule 4 cases, it actually applied a standard that treats two charges as different so long as each alleges a fact that the other does not—a far cry from the meaning of the same transaction standard in Indiana civil procedure. And a subsequent case, *Gamblin*, treats both *Tharp* and *Pruett* as good law, without acknowledging the fact that the two cases are fundamentally irreconcilable.

Part II of this Note used a recent Indiana trial court case to illustrate the very real difficulties that Indiana trial courts experience in attempting to divine the meaning of Criminal Rule 4's protections in light of the irreconcilable decisions of the Indiana Court of Appeals. And this uncertainty may mean that some prosecutions proceed to trial before the State is fully prepared out of a fear that *Tharp*'s same transaction standard still applies. Or, some guilty defendants may be entitled to a discharge on appeal because the trial courts misread the conflicting case law by deciding that *Pruett* implicitly overturned *Tharp*. A definitive statement of the scope of Criminal Rule 4's protections would prevent either of these unsavory possibilities.

Part III of this Note demonstrated how *Pruett*'s focus on the "same set of facts" language in *Tharp* mirrors the standard that courts use to determine whether two charges are the same for the purposes of the U.S. Constitution's Double Jeopardy Clause. Part III of this Note also, however, demonstrated that while federal constitutional law may use the "same set of facts" to determine whether a defendant has

been punished twice for the same crime, Indiana law offers more protection against multiple punishments. Justice Sullivan's concurrence in *Richardson* lists the five categories of cases in which Indiana common law protects defendants against multiple punishments for the same crime.

Part IV of this Note shows how Indiana cases involving Criminal Rule 4 fit into the categories of cases in which Justice Sullivan organizes Indiana's common law prohibition against multiple punishments for the same crime. Further, Part IV demonstrates that the policy considerations applicable to double jeopardy law largely apply in the context of the speedy trial right. Because of the similarity in the policy reasons behind both rights, this Note suggests that Indiana adopt Justice Sullivan's five-category analysis for deciding when two charges are the "same charge" under Indiana's Criminal Rule 4.

Whether the ultimate standard for Criminal Rule 4's protections be *Tharp*, *Pruett*, Justice Sullivan's five categories, or something else entirely, the standard must be clear. Indiana courts should resolve to determine the standard now.