SENTENCES FOR MULTIPLE OFFENSES

By: Lawrence J. Brodeur
Criminal Law Chief
Indiana Prosecuting Attorneys Council

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DOUBLE JEOPARDY

One of the first hurdles to clear in obtaining valid judgments and sentences for multiple offenses is the Double Jeopardy Clauses of the United States Constitution and the Indiana Constitution.

The 5th Amendment to the United States Constitution states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Section 14 of the Indiana Constitution states:

> "No person shall be put in jeopardy twice for the same offence. No person, in any criminal prosecution, shall be compelled to testify against himself."

Double jeopardy analysis, on its best behavior, is confusing, murky and conflicting. At its worst, double jeopardy analysis has been described as "double jeopardy double talk." See, Akhil Reed Amar, *Double Jeopardy Law Made Simple, 106 Yale L.J. 1807 (1997).*

In *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), the United States Supreme Court referred to double jeopardy analysis as follows:

> "The decisional law in the [double jeopardy] area is a veritable Sargasso Sea which would not fail to challenge the most intrepid judicial navigator." 450 U.S. at 343.

The Urban Dictionary defines double jeopardy analysis as, simply, "a cluster."

In spite of this, prosecutors need to have, at least, a "speaking knowledge" of double jeopardy principles to address largely uninformed, unintelligible and unworthy arguments by defense counsel at sentencing hearings.

THE FEDERAL STANDARD

The federal double jeopardy standard, relating to multiple offenses, was established by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

In that case, the United States Supreme Court held that when 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. A single act may violate two criminal statutes. If each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

The *Blockburger* test is often referred to as the "statutory elements test."

INDIANA CONSTITUTIONAL STANDARD

In 1999, the Indiana Supreme Court held that the Double Jeopardy Clause of Article I, Section 14 of the Indiana Constitution provided greater protection to criminals

than did the Double Jeopardy Clause of the 5th Amendment of the Constitution of the United States.

In *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), the Indiana Supreme Court established a two-step analysis for determining double jeopardy claims relating to multiple convictions. The Indiana Supreme Court stated:

> "Synthesizing these considerations, we therefore conclude and hold that two or more offenses are the "same offense" in violation of *Article I, Section 14 of the Indiana Constitution*, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Both of these considerations, the statutory elements test and the actual evidence test, are components of the double jeopardy "same offense" analysis under the Indiana Constitution." 717 N.E.2d at 49, 50.

This two-step Indiana constitutional analysis is often referred to as the "statutory elements test" and the "actual evidence test." The "statutory elements test" is, essentially, the federal double jeopardy analysis articulated by the United States Supreme Court in *Blockburger*.

In *Richardson*, the Indiana Supreme Court defined the "actual evidence test" as follows:

> "Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a 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." 717 N.E.2d at 53.

The actual evidence test articulated in *Richardson* has resulted in a mountain of confusing, conflicting, and ultra fact-sensitive cases. Since *Richardson v. State* was issued, the case has been cited, followed, questioned, explained, and distinguished by the Indiana Appellate Courts in 459 cases (as of June 16, 2013).

DOUBLE JEOPARDY – BURGLARY AND THEFT

There have been a few Indiana Appellate Court cases where the issue of entering judgment of conviction for both Burglary and Theft, relating to a single burglary, has been challenged.

The first such case (post-*Richardson)* was *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002). In that case, on January 25, 1997, the defendant, Richard Vestal, was drinking with his son in Terre Haute. The defendant asked his son if he wanted to make some money and the son said yes. The two then drove to a liquor store in Brazil, Indiana, broke a window and pried open the door with a crowbar. The defendant and his son went inside and helped themselves to whiskey, cases of beer, cartons of cigarettes, miniature bottles of vodka, and almost $100 in cash.

The State charged the defendant, Richard Vestal, with the offenses of Burglary (a Class C felony) and Theft (a Class D felony). The case proceeded to jury trial and the jury found the defendant guilty as charged. The trial court entered judgment of conviction on both charges and sentenced the defendant to an executed term of imprisonment of 8 years on the Burglary conviction and to an executed term of imprisonment of 3 years on the Theft conviction. The trial court ordered that such executed terms of imprisonment be served concurrently.

The defendant appealed, claiming, among other things, that the two convictions and sentences for the offenses of Burglary and Theft violated the Double Jeopardy Clause of the Indiana Constitution. Specifically, the defendant claimed that the two convictions violated the actual evidence test of *Richardson*.

The Indiana Supreme Court rejected the double jeopardy claim by the defendant, stating:

> "We find that there is no reasonable possibility that the jury used the same evidentiary facts to establish the essential elements of both burglary and theft. The evidentiary facts establishing the commission of theft (removing goods and cash from the liquor store with the intent to deprive the owner of its use or value) do not also establish that the defendant broke and entered into the store. Similarly, the evidentiary facts establishing the commission of burglary (discussing desire to get money and then driving from Terre Haute to Brazil in the early morning hours and using a crowbar to break into and enter liquor store) do not also establish that the defendant exerted control over and removed goods and cash from the store." 773 N.E.2d at 807.

The defendant made the interesting argument that the convictions for both the offenses of Burglary and Theft violated the Double Jeopardy Clause of the Indiana Constitution because the final jury instructions essentially required the jury to use the same evidence to prove both offenses.

With respect to the charge of Burglary, the trial court instructed the jury, as follows:

> "The crime of burglary is defined by statute as follows: A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits Burglary, a Class C Felony.
>
> To convict the defendant, Richard Vestal, the State must have proved each of the following elements:

> The defendant
> 1. knowingly or intentionally
> 2. broke and entered
> 3. the building or structure of the Bottle Shop
> 4. with the intent to commit a felony theft in it, to wit: exerted unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, to wit: took one bottle of Jim Beam, 6 ½ 12 pack cases of Budweiser beer, 9 cartons of miscellaneous cigarettes, small bottles of alcohol and $92 in cash."

With respect to the charge of Theft, the trial court instructed the jury, as follows:

> "The crime of theft is defined by statute as follows: A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony. To convict the defendant, Richard Vestal, the State must have proved each of the following elements:
>
> The defendant
> 1. knowingly or intentionally
> 2. exerted unauthorized control
> 3. over property of another person, to wit: one bottle of Jim Beam, 6 ½ 12 pack cases of Budweiser beer, 9 cartons of miscellaneous cigarettes, small bottles of alcohol and $92 in cash
> 4. with intent to deprive the other person of any part of its value or use."

The defendant argued to the Indiana Supreme Court that the instructions enumerating the elements of burglary required that the jury find not only that the defendant broke and entered the liquor store with the intent to commit a Theft, but also that the defendant exerted unauthorized control over specific property, which was the same as the offense of Theft. The Indiana Court of Appeals rejected this argument as well, noting that the words "to wit" in the burglary instruction merely described the

intended theft and did not compel the jury to find the completed theft as an element of burglary.

In *Payne v. State*. 777 N.E.2d 63 (Ind. App. 2002), the Indiana Court of Appeals examined this issue, although in a different vein. In that case, the defendant, Luke Payne, was charged with three (3) counts of Burglary (a Class B felony) and three (3) counts of Theft (a Class D felony). The State also filed the habitual offender sentence enhancement allegation.

The case proceeded to jury trial and the jury convicted the defendant of two (2) counts of Burglary (a Class B felony), two (2) counts of Theft (a Class D felony), one (1) count of Residential Entry (a Class D felony) and the habitual offender sentence enhancement. At sentencing, the trial court "merged" the two convictions for Theft into the two convictions for Burglary. The trial court then sentenced the defendant to concurrent executed terms of imprisonment of 15 years for each of the Burglary convictions and to a concurrent executed term of imprisonment of 3 years for the Residential Entry conviction. The trial court enhanced one of the Burglary convictions by 10 years, due to the habitual offender sentence enhancement. The aggregate term of imprisonment was, therefore, 25 years.

The defendant appealed, alleging that there was insufficient evidence to support the Burglary convictions and that the trial court erred in refusing severance of the charges. Interestingly, the State cross-appealed, claiming that the trial court erred in "merging" the Theft convictions with the Burglary convictions.

The Indiana Court of Appeals rejected the defendant's argument on the severance issue, but agreed that there was insufficient evidence to support one of the Burglary

convictions. Then, in a 2-1 decision, the Indiana Court of Appeals held that the trial court did, in fact, commit reversible error by "merging" the Theft conviction with the remaining valid Burglary conviction. Following the decision in *Vestal v. State*, the Indiana Court of Appeals held that there was no double jeopardy violation preventing the entry of judgment of conviction on the Theft count. The Court of Appeals remanded the case to the trial court, with instructions to enter judgment of conviction and sentence with respect to the Theft conviction.

NOTE: In many ways, this case was merely an intellectual exercise. On remand, the trial court entered judgment of conviction on the Theft count and sentenced the defendant to an executed term of imprisonment of 3 years, to be served concurrently with the executed term of imprisonment of 25 years imposed on the Burglary conviction. When the dust settled, the defendant did not serve one day more or one day less than if there had not been an appeal at all. The defendant remains incarcerated at the Indiana Department of Correction, with an earliest possible release date of March 1, 2014.

The Burglary-Theft double jeopardy issue was again addressed by the Indiana Supreme Court in *Wright v. State*, 828 N.E.2d 904 (Ind. 2005). In that case, the State charged the defendant, Robert Wright, with Burglary (a Class C felony) and Theft (a Class D felony). The case proceeded to bench trial and the trial court found the defendant guilty as charged. At the sentencing hearing, the deputy prosecutor recommended that the trial court "merge" the Theft conviction with the Burglary conviction. The trial court did so and then sentenced the defendant, on the Burglary conviction, to an executed term of imprisonment of 5 years.

The defendant appealed, claiming that there was insufficient evidence to support the Burglary conviction. The State cross-appealed, arguing that the trial court erred by merging the Theft conviction into the Burglary conviction. The Indiana Court of Appeals ruled that there was sufficient evidence to support the Burglary conviction and further ruled that the trial court erred by merging the Theft conviction into the Burglary conviction. The Court of Appeals remanded the case to the trial court with instructions to enter judgment of conviction and sentence on the Theft charge. See, *Wright v. State*, 801 N.E.2d 742 (Ind. App. 2004).

The Indiana Supreme Court granted transfer to address the double jeopardy issue. The Supreme Court held that, regardless of whether it was proper to "merge" the Theft conviction into the Burglary conviction, the trial court did so at the recommendation of the State. Therefore, the Indiana Supreme Court employed the doctrine of invited error and reversed the decision of the Indiana Court of Appeals on this issue.

STATE V. JAMES W. McCORD

In the practice problem for the 2013 Summer Conference (State v. James W. McCord), the defendant was charged with three (3) counts of Burglary (a Class B felony), three counts of Theft (a Class D felony) and one (1) count of Attempted Theft (a Class D felony). If the defendant is convicted of all of these charges, the defense may, at the sentencing hearing, argue that the Double Jeopardy Clause of the Indiana Constitution prohibits the trial court from entering judgment of conviction on the three (3) counts of Theft and the one (1) count of Attempted Theft.

It appears clear, from the cases set forth above, that there is no double jeopardy issue, relating to the convictions for the burglaries and thefts relating to the residences of Bernard Barker and Charles Watson and Susan Atkins (Counts I through V). In fact, it appears to be reversible error for the trial court not to enter judgment of conviction and sentence on those five convictions.

It *may* be a bit of a closer call with respect to the charges of Burglary and Attempted Theft, relating to the residence of Linda Kasabian. The defense may argue that the evidence used by the State to prove the defendant's intent to commit a Theft inside the residence of Linda Kasabian was the fact that the defendant was opening the drawers in the kitchen when the burglary was interrupted by Linda Kasabian. The argument would be that the same evidence (opening the drawers) also proved the substantial step necessary to prove the charge of Attempted Theft.

It is also clear, from the cases set forth above, that if the State suggests or recommends (or, perhaps, even agrees) at the sentencing hearing that the Theft and/or Attempted Theft convictions not be entered, due to double jeopardy concerns, that issue will not be available for correction on appeal.

CONSECUTIVE SENTENCES
SINGLE EPISODE OF CRIMINAL CONDUCT

Prior to 1994, trial courts had substantial discretion to impose consecutive terms of imprisonment for multiple felony convictions. At that time, I.C. 35-50-1-2 stated:

> "(a) Except as provided in subsection (b), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively.

> (b) If, after being arrested for one (1) crime, a person commits another crime:
>
> (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
>
> (2) while the person is released:
>
> (A) upon the person's own recognizance; or
>
> (B) on bond;
>
> the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed."

In 1994, the Indiana General Assembly began its tradition of imposing statutory restriction on the authority of trial judges to impose consecutive terms of imprisonment. 1994 Public Law 164 (S.E.A. 115) added the following language to I.C. 35-50-1-2(a):

> "The court may consider the aggravating and mitigating circumstances in IC 35-38-1-7.1(b) and IC 35-38-1-7.1(c) in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for murder and felony convictions for which a person receives an enhanced penalty because the felony resulted in serious bodily injury if the defendant knowingly or intentionally caused the serious bodily injury, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious felony for which the defendant has been convicted."

After the 1994 amendment to I.C. 35-50-1-2(a), courts struggled with the meaning of the phrase "episode of criminal conduct" and the extent of the restrictions on consecutive terms of imprisonment imposed by I.C. 35-50-1-2(a). See, e.g., *Trei v. State*, 658 N.E.2d 131 (Ind. App. 1995).

Partly in response to the difficulties with the 1994 legislation, the Indiana General Assembly amended I.C. 35-50-1-2 again in 1995. See, 1995 Public Law 304 (H.E.A. 1336). After the 1995 amendment, I.C. 35-50-1-2 stated:

> "(a) As used in this section, "crime of violence" means the following:
> (1) Murder (IC 35-42-1-1);
> (2) Voluntary Manslaughter (IC 35-42-1-3);
> (3) Involuntary Manslaughter (IC 35-42-1-4);
> (4) Reckless Homicide (IC 35-42-1-5);
> (5) Aggravated Battery (IC 35-42-2-1.5);
> (6) Kidnapping (IC 35-42-3-2);
> (7) Rape (IC 35-42-4-1);
> (8) Criminal Deviate Conduct (IC 35-42-4-2);
> (9) Child Molesting (IC 35-42-4-3);
> (10) Robbery as a Class A felony or a Class B felony (IC 35-42-5-1); or
> (11) Burglary as a Class A felony or a Class B felony (IC 35-43-2-1).
> (b) As used in this section, "episode of criminal conduct" means offenses or a connected series of offenses that are closely related in time, place, and circumstance.
> (c) Except as provided in subsection (d), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the aggravating and mitigating circumstances in IC 35-38-1-7.1(b) and IC 35-38-1-7.1(c) in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.
> (d) If, after being arrested for one (1) crime, a person commits another crime:
> (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
> (2) while the person is released:
> (A) upon the person's own recognizance; or
> (B) on bond;

> the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed."

The Indiana General Assembly has continued to tinker with I.C. 35-50-1-2 since 1995, amending the statute in 1996, 1997, 2001, 2003, 2005, 2006, 2008, 2012 and 2013. These amendments to I.C. 35-50-1-2 were *relatively* minor in scope, and included the addition of some crimes to the listed "crimes of violence" and changes in the language of the statute when there was a change from presumptive sentences to advisory sentences. However, the basic concept of limiting consecutive terms of imprisonment for a single "episode of criminal conduct" remains today.

In *Tedlock v. State*, 656 N.E.2d 273 (Ind. App. 1995), the Indiana Court of Appeals first addressed the meaning of the phrase "episode of criminal conduct" contained in the 1995 amendment to I.C. 35-50-1-2. In defining the word "episode," the Indiana Court of Appeals cited the commentary from ABA Standard 12-2.2(a), which stated:

> "'Episode' means 'an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series.' This would include *simultaneous* robbery of seven individuals, the killing of several people with successive shots from a gun, the successive burning of three pieces of property, or such *contemporaneous* and related crimes as burglary and larceny, or kidnapping and robbery." 656 N.E.2d at 276.

See also, *Massey v. State*, 816 N.E.2d 979 (Ind. App. 2004).

SINGLE EPISODE OF CRIMINAL CONDUCT – BURGLARY AND THEFT

One issue that might be raised by the defense at sentencing for convictions for multiple burglaries and thefts is the argument that the burglaries and thefts were a single episode of criminal conduct and that the consecutive terms of imprisonment that may be imposed are limited by the provisions of I.C. 35-50-1-2(c).

When a defendant is convicted of a number of burglaries, either as a Class A felony or a Class B felony, the consecutive terms of imprisonment for such burglary offenses are not limited by the provisions of I.C. 35-50-1-2(c), because Burglary, as either a Class A felony or a Class B felony, is a listed "crime of violence" in I.C. 35-50-1-2(b) and is, therefore, exempt from the limitations of I.C. 35-50-1-2(c). See also, *Flynn v. State*, 702 N.E.2d 741 (Ind. App. 1998).

However, if the defendant is convicted of multiple burglaries, as a Class C felony, the single episode of criminal conduct limitation of I.C. 35-50-1-2(c) might be in play.

In *Reynolds v. State*, 657 N.E.2d 438 (Ind. App. 1995), the Indiana Court of Appeals addressed the issue of whether three burglaries, committed on the same day and in the same neighborhood, constituted a single episode of criminal conduct, which would limit the authority of the trial court to impose consecutive terms of imprisonment, pursuant to I.C. 35-50-1-2. NOTE: Although the burglaries committed by the defendant in this case were residential burglaries, the single episode of criminal conduct limitation was applicable, as the defendant was sentenced under the 1994 version of I.C. 35-50-1-2, which did NOT specifically exempt the offense of Burglary, as a Class B felony.

On May 6, 1994, the defendant, Ronald Reynolds, and some other criminals, burglarized the home of George and Ruth Blount. Then, the defendant burglarized the

nearby residence of Max Bode. The defendant continued his crime spree that day by burglarizing the residence of Roger Clark. During that third burglary, the defendant was interrupted by a Bartholomew County Sheriff's Department Deputy and ran away.

On September 27, 1994, the defendant entered a plea of guilty to all three (3) counts of Burglary (a Class B felony) and to one count of Resisting Law Enforcement (a Class A misdemeanor). The sentence was left to the discretion of the trial court. The trial court sentenced the defendant to the maximum term of imprisonment of 20 years on each count of Class B felony Burglary and ordered that the terms of imprisonment be served consecutively, for an aggregate term of imprisonment of 60 years.

The defendant appealed the sentence, claiming that the three (3) burglaries constituted a single episode of criminal conduct and, therefore, the trial judge was limited to the presumptive term of imprisonment for a Class A felony, which (at that time) was 25 years. The Indiana Court of Appeals rejected the defendant's argument that the three (3) burglaries of three (3) different residences constituted a single episode of criminal conduct. In reaching this conclusion, the Indiana Court of Appeals stated:

> "According to Reynolds' testimony, he and his companion broke and entered the Bode home, stole items, and left. They broke and entered the Blount home on another street, stole property from that residence and left. They then broke and entered the Clark home and were in the process of taking property therefrom when they encountered a deputy, who ordered them to stop, and they fled. Each burglary took place as a distinct episode to itself; each can be described without referring to details of the others.
> The court did not abuse its discretion in finding the three burglaries not to be a single episode and, therefore, ordering the sentences to be served consecutively." 657 N.E.2d at 441.

A different conclusion was reached by the Indiana Court of Appeals regarding multiple burglaries in *Henson v. State*, 881 N.E.2d 36 (Ind. App. 2008). In that case, on July 26, 2006, in the early morning hours, the defendant, Robert Henson, burglarized the garage belonging to Carl Guide and stole a lawnmower and a set of golf clubs. The defendant then went to a neighboring garage, belonging to Ron Thomas, and broke in and stole a lawnmower, a battery jumper box, a portable radio and a bicycle. The defendant was in the process of breaking into a third garage when he was interrupted and caught by the police.

The defendant, Robert Henson, was charged with two (2) counts of Burglary (a Class C felony) and two (2) counts of Theft (a Class D felony). The case proceeded to bench trial and the trial court found the defendant guilty as charged.

At sentencing, the trial court did not enter judgment of conviction on the Theft charges, due to double jeopardy concerns. With respect to the two (2) counts of Burglary (as a Class C felony), the trial court imposed a term of imprisonment of 6 years on each count and ordered that such terms of imprisonment be served consecutively. The defendant appealed the sentence.

On appeal, the defendant contended that the trial court improperly imposed consecutive terms of imprisonment, in excess of 10 years (the advisory sentence for a Class B felony), because the two burglaries constituted a single episode of criminal conduct. The Indiana Court of Appeals agreed, stating:

> "Here, the defendant burglarized two neighboring garages during the early morning hours of July 26, 2006. We conclude that the burglaries were "closely related in time, place, and circumstance." *Ind. Code 35-50-1-2(b)*. Thus, the burglaries were a single episode of criminal conduct under *Ind. Code 35-50-1-2(c)*." 881 N.E.2d at 39.

The single episode of criminal conduct issue might also be a sentencing restriction in cases wherein the defendant is convicted of multiple "crimes of violence" and multiple crimes that are not listed as crimes of violence in I.C. 35-50-1-2(b). In such a circumstance, the Indiana Appellate Courts have held that the consecutive terms of imprisonment limitation of I.C. 35-50-1-2(c) does not prohibit consecutive terms of imprisonment among crimes of violence, nor does it prohibit consecutive terms of imprisonment between a conviction for a crime of violence and a conviction for a crime that is not a crime of violence. However, the limitation does apply between and among crimes that are not listed crimes of violence. See, *Ellis v. State*, 736 N.E.2d 731 (Ind. 2000); *McCarthy v. State*, 751 N.E.2d 753 (Ind. App. 2001).

In a case involving multiple convictions for Burglary (as a Class B felony) and multiple convictions for Theft (as a Class D felony), the trial court may impose consecutive terms of imprisonment for each Class B felony Burglary. In addition, the trial court may impose consecutive terms of imprisonment for each Theft (Class D felony) conviction and its related Burglary conviction. However, if the actions of the defendant constitute a single episode of criminal conduct, the sentencing scheme will be limited such that the consecutive terms of imprisonment for the Theft convictions may not exceed a total of 4 years (the advisory term of imprisonment for a Class C felony).

THE SINGLE LARCENY RULE

In cases involving multiple convictions for Theft (Class D felony), the single larceny rule may be yet another roadblock to multiple convictions and sentences.

The single larceny rule has been long entrenched in Indiana law. In *Furnace v. State*, 153 Ind. 93, 54 N.E. 441 (1899), the Indiana Supreme Court recognized the single larceny rule and held that the charging document filed by the State was improper. The charges filed by the State alleged the theft of property from several individuals. The Indiana Supreme Court ruled that, due to the single larceny rule, the charging document charged but one offense in that it essentially charged a single act or transaction in violation of the law against larceny.

The single larceny rule operates when several articles of property are stolen at the same time, from the same place, belonging to the same person or to several persons. In such a circumstance, there is but a single larceny. The rationale behind the rule is that the taking of several articles at the same time from the same place is pursuant to a single intent and design. Under the single larceny rule, there is only one offense committed. Therefore, there can be only one judgment and one sentence. See, *Stout v. State*, 479 N.E.2d 563 (Ind. 1985); *Holt v. State*, 178 Ind. App. 631, 383 N.E.2d 467 (1978).

The single larceny rule has been applied in several factual scenarios. In *Raines v. State*, 514 N.E.2d 298 (Ind. 1987), the defendant was charged, in separate counts of an Information, with stealing scuba equipment and stealing a Toyota truck. The scuba equipment and the Toyota truck belonged to separate roommates, who both resided at the address from which the property was stolen. The Indiana Supreme Court held that the single larceny rule prevented judgment of conviction and sentence on both charges of Theft, because there was only one crime.

In *Smith v. State*, 770 N.E.2d 290 (Ind. 2002), the defendant, John Smith, stole a checkbook. Over the course of the next three hours, the defendant forged six checks,

payable to himself, and deposited the proceeds of the forged checks over $17,000) into his own checking account. It was not too difficult for the police to trace the money.

The State charged the defendant, John Smith, was six (6) counts of Forgery for the six checks written, and six (6) counts of Theft, for stealing the proceeds of the six checks. On appeal, the Indiana Supreme Court held that the single larceny rule applied to the six (6) counts of Theft and vacated the convictions and sentences for all but one of such Theft counts.

The most recent example of the operation of the single larceny rule is the case of *Keller v. State,* _____ N.E.2d _____ (Ind. App. 2013 – decided April 4, 2013). In that case, the defendant, Sterlen Keller, was convicted of one count of Burglary (a Class B felony), one count of Auto Theft (a Class D felony) nine counts of Theft (a Class D felony) and one count of Failure to Report a Dead Body (a Class A misdemeanor). The charges arose from the defendant stealing property from an Orange County farmer, Robert Collier.

NOTE: Robert Collier's badly decomposed body was located on his farm on October 9, 2011. The defendant, Sterlen Keller, was charged with but found not guilty of the murder of Robert Collier.

On appeal, the defendant claimed, among other things, that some of the Theft convictions should be vacated, pursuant to the single larceny rule. The Indiana Court of Appeals examined all of the theft convictions and held that the evidence presented on some of those theft convictions clearly indicated that the defendant stole property from the victim, Robert Collier, on different dates. For those convictions, the single larceny rule did not apply. However, for those theft convictions in which there was not evidence

presented of exactly when the defendant stole the property from the victim, the Indiana Court of Appeals held that the single larceny rule did apply to limit the number of convictions. As a result, the Indiana Court of Appeals vacated the convictions and sentences for a number of the theft convictions.

In a case where the defendant is convicted of multiple burglaries and thefts at multiple residences, it appears likely that the single larceny rule will, generally, not be applied to the Theft convictions. That is so, because the thefts did not occur at the same place and the same time. However, if a single burglary resulted in more than one theft associated with that burglary, the single larceny rule may well limit the number of theft convictions to one, even if the property stolen belonged to more than one individual.

CRIMINAL GANG SENTENCE ENHANCEMENT

In 2006, the Indiana General Assembly passed I.C. 35-50-2-15, which established a sentence enhancement for committing a felony while a member of a criminal gang and at the direction of or in affiliation with a criminal gang. That statute states, in relevant part, as follows:

> "(d) If the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person knowingly or intentionally was a member of a criminal gang while committing the felony offense and committed the felony offense at the direction of or in affiliation with a criminal gang as described in subsection (b), the court shall:
>
> > (1) sentence the person to an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony, if the person is sentenced for only one (1) felony; or
> > (2) sentence the person to an additional fixed term of imprisonment equal to the longest sentence imposed for the underlying felonies, if the person is being sentenced for more than one (1) felony.

> (e) A sentence imposed under this section shall run consecutively to the underlying sentence.
> (f) A term of imprisonment imposed under this section may not be suspended."

Since 2006, there have been no published Indiana Appellate Court decisions relating to the criminal gang sentence enhancement. There have been a few unpublished Memorandum Decisions, upholding the sufficiency of the evidence presented with respect to this sentence enhancement. However, this statute remains largely untested at the appellate level.

It appears likely that the criminal gang sentence enhancement could not be used in conjunction with the general habitual offender sentence enhancement of I.C. 35-50-2-8. The Indiana Appellate Courts have consistently held that, *absent explicit legislative direction*, the use of "double enhancements" is prohibited. See, e.g., *State v. Downey*, 770 N.E.2d 794 (Ind. 2002); *Goodman v. State*, 863 N.E.2d 898 (Ind. App. 2007).

DOCTRINE OF AMELIORATION

The doctrine of amelioration holds, essentially, that if, while a criminal case is pending, the Indiana General Assembly passes legislation reducing the penalty for the crime with which the defendant is charged, the defendant may take advantage of and be sentenced under the new reduced penalty provisions. This doctrine was initially adopted by the Indiana Supreme Court in *Lewandowski v. State*, 271 Ind. 4, 389 N.E.2d 706 (1979). However, the doctrine of amelioration does not apply where the legislation has a specific savings clause expressly stating an intention that any crime committed before the

effective date of the ameliorative amendment should be prosecuted and sentenced under prior law. *Vicory v. State*, 272 Ind. 683, 400 N.E.2d 1380 (1980).

During the 2013 legislative session, the Indiana General Assembly passed Public Law 158-2013 (H.E.A. 1006), making significant changes to the Indiana Criminal Code. Public Law 158-2013 does not contain a savings clause. Therefore, even though the provisions of this new statute currently do not take effect until July 1, 2014, the doctrine of amelioration may create some issues for prosecutors.

APPELLATE RULE 7(B)

Indiana Appellate Rule 7 was amended by the Indiana Supreme Court in 2002 and the amended provisions of the rule became effective on January 1, 2003. Indiana Appellate Rule 7 currently states:

> "A. Availability. – A defendant in a Criminal Appeal may appeal the defendant's sentence. The State may not initiate an appeal of a sentence, but may cross-appeal where provided by law.
> B. Scope of Review. – The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Prior to January 1, 2003, the Indiana Appellate Courts could only modify a sentence if the Court determined that the sentence imposed was "manifestly unreasonable." Since January 1, 2003, the Indiana Appellate Courts have reviewed sentences to determine if "the sentence is inappropriate in light of the nature of the offense and the character of the defendant." Not surprisingly, since January 1, 2003, there has been an explosion of litigation regarding the appropriateness of a defendant's

sentence. In fact, since January 1, 2003, the Indiana Appellate Courts have reviewed a defendant's sentence, pursuant to Indiana Appellate Rule 7(B) in over 2,000 cases.

The Indiana Supreme Court has held that the defendant has the burden of persuading the appellate court that the sentence imposed is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006). The principal role of appellate review under Indiana Appellate Rule 7(B) is to "leaven the outliers" and to identify some guiding principles for trial courts and those charged with the improvement of the sentencing statutes. The goal of Indiana Appellate Rule 7(B) is NOT to achieve a perceived "correct" sentence in each case. *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008).

It *appears*, from a review of sentences that have been modified by the Indiana Appellate Courts, that the two largest categories of crimes that have been subject to sentence modification, pursuant to Indiana Appellate Rule 7(B), are sex offenses against children and controlled substances offenses. However, the Indiana Appellate Courts have, from time to time, reduced sentences in cases involving the crime of Burglary.

In *Freeney v. State*, 874 N.E.2d 382 (Ind. App. 2007), the defendant, Nathan Freeney, entered into a plea agreement whereby the defendant agreed to plead guilty to ten (10) counts of Burglary (as a Class B felony). The State agreed to dismiss the other thirty-three (33) felony charges and sentencing was left to the discretion of the trial court. The trial court sentenced the defendant to an aggregate executed term of imprisonment of 40 years.

On appeal, the Indiana Court of Appeals reduced the defendant's sentence, pursuant to Indiana Appellate Rule 7(B), to an aggregate term of imprisonment of 14 years, with 10 years to serve at the Indiana Department of Correction, 2 years to serve

with the Tippecanoe County Community Corrections, and with 2 years suspended to probation. In reducing the defendant's sentence, the Indiana Court of Appeals noted that the defendant was 18 years old at the time of the offenses and had no prior criminal history. The Court of Appeals also stated that there was nothing egregious about the burglaries, as no violence or threat of violence was involved.

NOTE: The defendant, Nathan Freeney, was released from the Indiana Department of Correction on April 15, 2013.

In *Knight v. State*, 930 N.E.2d 20 (Ind. 2010), the defendant pled guilty to eleven (11) charges (Burglary/Robbery) and was sentenced to an aggregate executed term of imprisonment of 70 years. Pursuant to Indiana Appellate Rule 7(B), the Indiana Supreme Court found such sentence to be inappropriate and reduced the defendant's sentence to an aggregate executed term of imprisonment of 40 years.

NOTE: The defendant is currently incarcerated at the Indiana State Prison, with an earliest possible release date of October 21, 2026.

When the Indiana Court of Appeals reduces a defendant's sentence, pursuant to Indiana Appellate Rule 7(B), the Court of Appeals often does so in non-published Memorandum Decisions. Some examples, relating to burglary offenses, are set forth below:

1. Thornton v. State – decided March 31, 2010

   The defendant was convicted of two (2) counts of Burglary (a Class B felony) and four (4) counts of Theft (a Class D felony) and sentenced to an aggregate executed term of imprisonment of 24 years. The Indiana Court of Appeals found this sentence to be inappropriate and reduced the defendant's sentence to a total of

20 years, with 8 years suspended and 12 years to serve (10 years at the Indiana Department of Correction, followed by 2 years on community corrections).

NOTE: The defendant was released from the Indiana Department of Correction on June 4, 2011.

2. Ellis v. State – decided May 18, 2009

The defendant was convicted of numerous counts of Burglary, Robbery and Criminal Confinement and sentenced to an aggregate executed term of imprisonment of 70 years. The Indiana Court of Appeals found this sentence to be inappropriate and reduced the defendant's sentence to total term of imprisonment of 36 years, with 4 years suspended to probation.

NOTE: The defendant is currently incarcerated at the Indiana State Prison, with an earliest possible release date of November 1, 2024.

3. Powell v. State – decided March 23, 2009

The defendant was convicted of four (4) counts of Burglary (a Class B felony) and sentenced to an aggregate executed term of imprisonment of 80 years. The Indiana Court of Appeals found this sentence to be inappropriate and reduced the defendant's sentence to an aggregate executed term of imprisonment of 36 years.

NOTE: The defendant is currently incarcerated at the Wabash Level 4 Facility. Because the defendant was sentenced to an additional term of imprisonment of 40 years for an unrelated Burglary, the defendant's earliest possible release date is November 23, 2051. At that time, the defendant will be 70 years of age.

4. Cassidy v. State – decided February 25, 2009

The defendant pled guilty to Burglary (a Class B felony) and was sentenced to 10 years, with 2 years suspended and 8 years to serve. The Indiana Court of Appeals found this sentence to be inappropriate and reduced the defendant's sentence to an executed term of imprisonment of 6 years.

NOTE: The defendant was released from the Indiana Department of Correction on May 4, 2013.