

Substantive Double Jeopardy Claims under *Wadle/Powell*

The Indiana Constitution's Double Jeopardy Clause only contains a procedural bar, not a substantive bar against double jeopardy. The procedural bar applies only to successive prosecutions, not to multiple punishments. Thus, if you are challenging multiple punishments meted out in the same case, you cannot raise a double jeopardy violation under the Indiana Constitution. You can only raise the claim through the framework outlined below.

- I. Substantive double jeopardy claims primarily fall in two categories:
- (1) when a single criminal act/transaction violates **multiple statutes with common elements**.
 - (2) When a single criminal act/transaction violates **one statute and includes multiple injuries**.

Each category of the statutory double jeopardy claim employs a separate analysis.

- (1) **A single criminal act/transaction violates multiple statutes with common elements** (*Wadle v. State*)

STEP ONE: look at the statutory language itself.

If the language of either statute clearly permits multiple punishments – either expressly or impliedly – **STOP! No double jeopardy violation.**

If the language of either statute does not clearly permit multiple punishments, proceed to Step Two.

STEP TWO: determine whether an offense is (1) an inherently included offense; or (2) a factually included offense; of another.

- (1) how to determine whether an offense is an inherently included offense:

IC 35-38-1-6: a court may not enter a judgment of conviction and sentence for both an offense and an “included offense.” IC 35-31.5-2-168 defines an “included offense” as the following:

- an offense established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged
- an offense that consists of an attempt to commit the offense charged or an offense otherwise included therein
- an offense that differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required

If one offense is an included offense of another, proceed to Step Three.

(2) how to determine whether an offense is a factually included offense: examine only the facts as presented on the face of the charging instrument.

If the charging instrument for an offense includes alleged facts used to support all of the elements of another offense, the other offense is factually included in the “greater” offense.

If the charging instrument is ambiguous as to whether one offense is factually included in another, the court must presume that Step Two has been met, so proceed to Step 3.

If neither offense is an “included offense” of the other – either inherently or as charged – **STOP! No double jeopardy violation.**

STEP THREE: examine facts presented in the charging information and adduced at trial to determine whether the two offenses are the same.

The analysis is substantially similar to the framework courts use to determine whether a party is entitled to an included-offense jury instruction at trial. *See Wright v. State*, 658 N.E.2d 563 (Ind. 1995). The court must examine the facts presented in the charging information and adduced at trial, and decide whether the defendant’s actions were “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.”

If the facts reveal two separate and distinct crimes, **STOP! No double jeopardy violation.**

If the facts reveal only one continuous crime, **there is a double jeopardy violation.**

REMEDY: Where two offenses are deemed alternative (and not cumulative) sanctions, the conviction and sentence for the “included offense” is vacated; only the conviction and sentence for the greater offense remains. Unlike in the past, simply reducing one conviction to a less serious form of the offense in order to eliminate the violation is no longer permissible because this would violate a defendant’s constitutional right to clear notice of the charges against him.

(2) **A single criminal act/transaction violates one statute and includes multiple injuries** (*State v. Powell*)

Unlike in the first category, the issue is not whether one offense is included in the other; of course it is, because it is just one statute. Instead, the issue is whether the same act may be twice punished as two counts of the same offense. Stated differently, whether – and to what extent – the statute permits the fragmentation of a defendant’s criminal act into distinct “units of prosecution.”

STEP ONE: examine the text of the statute.

Two types of statutes: conduct-based statutes and result-based statutes.

- conduct-based statute: an offense defined by certain actions or behavior (operating a vehicle, for example) and the presence of an attendant circumstance (i.e., intoxication). The focus is on the defendant’s actions, not the consequences of his actions. While a specific consequence may enhance the penalty, it is not the gravamen of the offense. The crime is complete once the offender engages in the prohibited conduct, regardless of the outcome. Multiple consequences do not constitute multiple acts since the crime may still be committed without the consequence. **A single discrete incident can be the basis for only one conviction, no matter how many individuals are harmed.**
- Result-based statute: an offense defined by the defendant’s actions and the consequences of those actions. The focus is on the causation of the result. The crime is complete so long as the mens rea and the actus reus is present with respect to each victim. **Multiple consequences support multiple convictions so long as the criminal conduct was present as to each victim.**

If the statute expressly indicates a unit of prosecution, the text controls and the court must follow the Legislature's guidance. **STOP! No further analysis needed.**

If the statute is a result-based statute, multiple consequences support multiple convictions if the mens rea and actus reus are present as to each victim. **STOP! No further analysis needed.**

If the statute is a conduct-based statute, or if the statute is ambiguous, proceed to Step Two.

STEP TWO: examine facts presented in the charging information and adduced at trial to determine whether there is a single offense or distinguishable offenses.

If the facts show the defendant's criminal acts are sufficiently distinct, multiple convictions may stand.

If the facts show that the defendant's actions are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," a court may impose only a single conviction.

Any doubt is resolved in favor of the defendant.