In the
Indiana Supreme Court

Michael T. Schoeff,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
24S-CR-00418

Court of Appeals Case No.
23A-CR-02163

Trial Court Case No.
18C04-2011-F1-000014

Published Order

By order dated December 5, 2024, the Court granted a petition seeking transfer of jurisdiction from the Court of Appeals. After further review, including consideration of the points presented by counsel at oral argument and discussion among the Justices in conference after the oral argument, the Court has determined that it should not assume jurisdiction over this appeal and that the Court of Appeals opinion reported as *Schoeff v. State*, 242 N.E.3d 1080 (Ind. Ct. App. 2024), should be reinstated as Court of Appeals precedent.

Accordingly, the order granting transfer is VACATED and transfer is hereby DENIED. Pursuant to Appellate Rule 58(B), this appeal is at an end.

Done at Indianapolis, Indiana, on 10/28/2025.

Loretta H. Rush
Chief Justice of Indiana

Rush, C.J., and Goff, J., concur.
Massa, J., concurs in the denial of transfer with separate opinion.
Molter, J., concurs in the denial of transfer with separate opinion.
Slaughter, J., dissents from the denial of transfer with separate opinion.

Massa, J., respecting the denial of transfer.

I think Justice Slaughter may well be right when he says "enough," and proposes a simpler approach to a question that has vexed Hoosier judges for decades. *Post* at 1. I am more than open to it in a future case. I write separately to offer a personal and practical perspective that comes from four decades in our criminal justice system, with a front-row seat to the unfortunate consequences of constitutionalizing the issue of "piling on." That effort, in my judgment, was well-meaning. But the cure has been worse than the disease, particularly when we have better treatment options at our disposal.

Consider a fairly recent case of ours, *Hines v State*, 30 N.E.3d 1216 (Ind. 2015). Hines battered his victim in the ribs, pinned her to the wall, then confined her in a headlock for several minutes. He was charged with Confinement and Battery. *Id.* at 1218. He was convicted of both crimes and received eight years. On review, we held that the battery charge had to be "vacated" as a matter of state constitutional law under an "actual evidence" test, like it never happened. *Id.* at 1222. Not "merged for sentencing purposes," as we frequently saw prior to *Richardson v. State,* 717 N.E.2d 32 (Ind. 1999), but "vacated." When all was said and done, Hines' sentence did not change; he still received eight years. *Id.* at 1227. But now his criminal record shows only the confinement conviction for that case and not the battery he clearly committed. Was that juice really worth the squeeze? Three decades of confounding our judges and lawyers to erase an extra line on a criminal history report.

This is why I gladly concurred in *Wadle v. State,*151 N.E.3d 227 (Ind. 2020), as it abrogated *Richardson* in a way that at least got us closer to the more easily applied federal approach Justice Slaughter suggests. And, just last year, I struggled mightily to subsequently refine *Wadle's* holding in *A.W. v. State,* 229 N.E.3d 1060 (Ind. 2024). But as our colleagues on the Court of Appeals continue to remind us, uncertainty persists. The better approach is to give the bench and bar a clear fixed standard on which to rely. Justice Slaughter suggests one, via a return to first principles, with minimal practical consequences for convicted criminals.

Let's not forget what this really is all about: preventing the occasional trial judge from abusing his or her discretion by piling on at sentencing. Two answers occur: First, such abuse is, in my experience, rare, as our judges strive daily to apply the law justly and reasonably. I trust them. And secondly, if a sentence *is* excessive, our appellate courts have the explicit constitutional authority to revise it. That, in my judgment, is preferable to inventing constitutional tests unique to Indiana that elude clear understanding and consistent application. Judges regularly consider the overlapping elements of multiple counts and their compressed duration when fashioning appropriate sentences. They don't need another constitutional test to cabin their discretion, beyond what the Supreme Court of the United States imposed in *U.S. v. Dixon*, 509 U.S. 668 (1993); there's nothing unique about Indiana's double jeopardy clause to suggest a different approach. And this is especially so when, in addition to plenary appellate review of sentences (where an "actual evidence" test might enter the calculus), the legislature has long capped consecutive sentences for multiple crimes committed in a single "episode of criminal conduct," with exceptions for certain violent crimes. *See* Indiana Code Section 35-50-1-2. As Justice Slaughter notes, the legislature is free to impose such limits, but the constitution does not compel it in most circumstances. *Post* at 11.

Molter, J., respecting the denial of transfer.

The State charged Michael Schoeff with two counts. Count I alleged Level 1 felony dealing a controlled substance causing death, and Count II alleged Level 5 felony conspiracy to commit dealing a narcotic drug. The State also alleged he was a habitual offender.

A jury convicted Schoeff on Count II's conspiracy charge but hung on Count I's dealing causing death charge. After the judge entered a judgment of conviction on Count II, Schoeff moved to dismiss Count I. He argued that retrying Count I would violate the Indiana Constitution's prohibition on putting someone "in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. After the trial court denied the motion, a second jury convicted Schoeff on Count I and determined he was a habitual offender. The trial court then entered a judgment of conviction for Count I based on the second jury's verdict, vacated the conviction on Count II to avoid double jeopardy concerns, and sentenced Schoeff to an aggregate forty-four-year sentence.

The Court of Appeals affirmed after rejecting Schoeff's double jeopardy argument that he could not be retried on Count I following the hung jury. *Schoeff v. State*, 242 N.E.3d 1080, 1082 (Ind. Ct. App. 2024). But the three-judge panel issued three opinions. And those opinions reveal uncertainty about how to analyze claims of procedural double jeopardy (repeated prosecution for the same offense) as opposed to substantive double jeopardy (multiple punishments for the same offense). Judge Mathias's opinion for the court explained that while Schoeff argues "the actual-evidence test formulated in *Richardson v. State* establishes a procedural double jeopardy violation," the court believed "the continued viability of that test is uncertain." *Id.* at 1086. That is because our Court overruled *Richardson* in the context of substantive double jeopardy claims, and "we expressly reserve[d] any conclusion on whether to overrule *Richardson*" in the procedural double jeopardy context. *Wadle v. State*, 151 N.E.3d 227, 244 n.15 (Ind. 2020). Judge Tavitas concurred with a separate opinion explaining her view "that the constitutional procedural double jeopardy analysis under *Richardson* is unworkable." *Schoeff*, 242 N.E.3d at 1089 (Tavitas, J., concurring). Judge Weissmann concurred in part and

dissented in part, explaining her view that both the court's opinion and the concurring opinion "misappl[ied] the actual-evidence test from *Richardson v. State*." *Id.* at 1093 (Weissmann, J., concurring in part and dissenting in part).

We granted transfer to clarify the standard for procedural double jeopardy claims. But I join the Court's decision to rescind transfer because I conclude this is a *continuing* jeopardy case rather than a double jeopardy case. Schoeff was retried after the jury could not reach a verdict on Count I. And as the Court of Appeals' majority opinion correctly explains in a footnote, "under the doctrine of continuing jeopardy, retrial following a 'hung jury' does not violate a defendant's double jeopardy rights." *Id.* at 1087 n.5; *accord Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003) ("Normally, a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." (quotations omitted)).

I am mindful of dicta in *Cleary v. State* suggesting that, at least for purposes of the successive prosecution statute, Ind. Code § 35-41-4-3, the analysis may turn on whether the trial judge enters a judgment of conviction on the jury's verdict before a retrial on any counts for which the jury could not reach a verdict. 23 N.E.3d 664, 668 (Ind. 2015) ("It is unequivocal that if the trial court had entered a judgment of conviction for those lesser-included misdemeanors, Indiana Code § 35-41-4-3(a) would have barred the State from retrying Cleary on Counts I, II, and III."). But *Cleary* identifies no support for the proposition that a nonfinal, subsequently vacated judgment has that effect for either the successive prosecution statute or constitutional double jeopardy protections. Instead, as *Cleary* correctly explained later in the opinion, under the continuing jeopardy doctrine "a defendant who is retried following a hung jury is not placed in jeopardy twice for the same offense, because the initial jeopardy that attaches to a charge is simply suspended by the jury's failure to reach a verdict." *Id.* at 673 (quotations omitted).

Because the Court of Appeals appropriately affirmed and this is a case of continuing rather than double jeopardy, transfer is not warranted, and we should await another case to clarify the standard for procedural double jeopardy claims.

Slaughter, J., dissenting from the denial of transfer.

The prohibition against "double jeopardy" for criminal defendants has been a key feature of Indiana's constitution since statehood. It was part of our original 1816 constitution and is repeated, nearly verbatim, in our current constitution: "No person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14 (1851). The provision's syntax reflects its plain meaning. A person is "put in **jeopardy**" when the government subjects him to criminal prosecution. He is "put in jeopardy **twice**" when he faces successive criminal prosecutions. And he is "put in jeopardy twice **for the same offense**" when he faces successive prosecutions for the same crime, i.e., for offenses containing the same statutory or common-law elements. By its terms, in other words, the provision applies only to successive prosecutions, and then only to successive prosecutions involving the same offense. It does not apply when there is only one prosecution—not to the prosecution of multiple crimes in one proceeding, or to multiple punishments arising from one proceeding.

For much of our state's history, we interpreted this provision consistent with its plain meaning. Yet, despite the provision's simplicity, we changed course a generation ago. Beginning with *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), we held this provision also bars successive prosecutions for the same **conduct**, even if that conduct amounted to more than one **offense**. This "modern" approach not only runs afoul of the provision's original understanding but also proves difficult to apply in practice. For the past twenty-five years, we have struggled to find the sweet spot—the right balance between principle and practicality in fashioning a workable double-jeopardy jurisprudence. Since joining the Court, I have gone along with these efforts.

Today, though, I say enough. Enough monkeying with this constitutional guarantee; enough substituting judicial policymaking for principled constitutional adjudication; enough calibrating our caselaw every few years to fix the latest shortcoming. Our uncertain double-jeopardy caselaw has led to pervasive confusion in this important area of law. One might think the Court would treat this confusion as an urgent matter necessitating our clarification sooner than later. Alas, the rest of my colleagues see it

differently. It remains to be seen whether the hoped-for clarification is just around the corner or is, as I fear, always a day away.

The time has come to return our double-jeopardy caselaw to a jurisprudence of original meaning. This appeal gives us the chance to do just that. At first, we granted transfer and sought input from would-be friends of the court. The Marion County Public Defender Agency answered the call with first-rate oral and written advocacy. Yet despite the agency's and our own investment of time in this case, today we renounce our grant of transfer, leaving in place our modern, atextual interpretation of article 1, section 14. Though the court of appeals' majority reached the right result here in affirming the challenged conviction, I would grant transfer to establish that the double-jeopardy clause bars successive prosecutions for the same offense, and it permits successive prosecutions for the same act that amounts to different offenses.

I

The State prosecuted defendant, Michael Schoeff, after he sold fentanyl-laced heroin that killed Mandy Hart. The State charged Schoeff with two crimes: aiding in dealing in a controlled substance resulting in death and conspiracy to commit dealing. Though Schoeff admitted using and dealing drugs, and selling heroin to Hart previously, he denied selling the heroin that killed her.

The State's prosecution spawned two trials. At the first trial, the jury found Schoeff guilty of conspiracy and hung on the aiding charge. After the trial court sentenced Schoeff for conspiracy, the State retried him on the aiding charge, relying on much the same evidence it used at the first trial. The jury convicted Schoeff of the aiding charge at the second trial. At Schoeff's second sentencing, the trial court vacated his conspiracy conviction and sentence, entered a judgment of conviction on aiding, and sentenced him to 44 years' incarceration, an enhanced sentence because he is a habitual offender.

Schoeff appealed. He argued the second trial violated article 1, section 14. In support, he cited *Richardson v. State*, which adopted the "actual evidence" test as another test (along with the "statutory elements" or "same

elements" test) for reviewing double-jeopardy claims. 717 N.E.2d at 49. Under the actual-evidence test, two or more offenses are "the same" offense—and must be tried in the same proceeding—if the State proves the essential elements of these offenses with the same evidence. *Ibid.* Relying on *Richardson*, Schoeff argued that the State, by retrying him for aiding with the same evidence it used to convict him of conspiracy, prosecuted him "twice for the same offense." Thus, Schoeff maintained, his second trial violated double jeopardy, so his aiding conviction must fall.

A divided court of appeals affirmed Schoeff's aiding conviction and sentence in a precedential opinion. *Schoeff v. State*, 242 N.E.3d 1080 (Ind. Ct. App. 2024). The majority applied our actual-evidence test and ultimately affirmed. It found "no reasonable possibility that the evidentiary facts used to establish the . . . conspiracy charge were also used to establish all of the essential elements for the . . . aiding . . . resulting in death charge during either of Schoeff's trials." *Id.* at 1087 (emphasis omitted). Judge Weissmann, dissenting in part, said the majority misapplied the actual-evidence test. *Id.* at 1093 (Weissmann, J., concurring in part and dissenting in part). Schoeff's second trial "was a procedural double jeopardy violation", she believed, because "the State used the same key evidence from the first trial to prove Schoeff guilty" in the second trial. *Ibid.* Schoeff then sought transfer, which we granted at first, 248 N.E.3d 1199 (Ind. 2024), but now undo.

My friend Justice Molter agrees with the denial of transfer because he believes "this is a case of continuing rather than double jeopardy". *Ante*, at 2. His view is not without force, given the procedural posture here (a retrial after a hung jury), but that is not how the lower courts decided this case. Before us, accordingly, is a precedential court of appeals' opinion assessing Schoeff's "procedural double jeopardy rights." *Schoeff*, 242 N.E.3d at 1087. Though the panel ultimately concluded (correctly) that Schoeff's rights were not violated, it did so by analyzing his claim under a double-jeopardy and not a continuing-jeopardy framework.

II

For 120 years, we interpreted our state's double-jeopardy clause to protect against successive prosecutions for the same offense, i.e., for crimes

with the same elements. Then in *Richardson* we expanded article 1, section 14 to include a substantive bar as well: to ban a later prosecution of a different crime if the State did or would rely on the same evidence it used in the first prosecution. And to effect this bar, *Richardson* adopted the actual-evidence test. Because our modern caselaw cannot be squared with article 1, section 14's original meaning, the actual-evidence test is inapt. We should apply a "same elements" test alone to article 1, section 14. Under this test, offenses are not the "same" if each offense contains an element the other does not. This latter test is faithful to the clause's original meaning.

The legislature, of course, can provide (and has provided) greater protection than the constitutional floor for criminal defendants who face subsequent prosecutions. Cf. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 420 n.26 (Ind. 1991) (observing that in takings cases, "[t]he legislature, of course, may order that compensation be paid in excess of th[e] constitutional minimum"). But that prerogative belongs to the legislature, not to us. Our role is to interpret and apply legislative enactments, not to supplement them at our leisure. The same is true of constitutional provisions. Our role is to interpret and uphold the constitution as originally understood. We must not read into its provisions more than their original meaning will bear. I would grant transfer and jettison our "actual evidence" test in favor of the "same elements" test.

A

Article 1, section 14 embodies a narrow constitutional protection, limited to successive prosecutions for the same offense. From 1978 to 1999, we interpreted our state double-jeopardy clause in lockstep with its federal counterpart—as a procedural bar against successive prosecutions for crimes with identical elements. *Elmore v. State*, 382 N.E.2d 893, 896 (Ind. 1978), abrogated by *Richardson*, 717 N.E.2d at 49. Before 1978, "our method of analysis in cases involving multiple count offenders closely paralleled the methodology employed by federal courts for protecting Fifth Amendment guarantees." *Ibid.* We read "same offense" to mean crimes with the same elements—not crimes with different elements arising from a

defendant's single act or transaction. *Ibid.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

This original understanding of "same offense" is reflected in decisions of our Court dating to the mid-nineteenth century, shortly after ratification of the 1851 constitution. *Richardson*, 717 N.E.2d at 44–46 (discussing cases). As early as 1860, we held that a second prosecution arising from "the same identical transaction" as the first was not the same offense because each offense required proof of facts the other did not. *State v. Warner*, 14 Ind. 572, 573 n.1 (1860). In 1879, we expressly rejected a same "transaction" or "conduct" test which, like the actual-evidence test, bars multiple prosecutions arising from the "same state of facts, although they may include several offences." *State v. Elder*, 65 Ind. 282, 284–85, 286–87 (1879). And by 1885, we began applying an elements-based, rather than an evidence-based, test. In *Davidson v. State*, 99 Ind. 366 (1885), we held that the proper test is whether "a material difference" existed between the statutes defining the crimes charged in the first and second trials, not whether the "two prosecutions grew out of, and were based upon, the same transaction". *Id.* at 367, 368. Likewise, in 1907, we examined the elements of each crime charged in double-jeopardy cases, including the "essential element[s] to be established by the evidence, to secure conviction", not the facts supporting them. *State v. Reed*, 81 N.E. 571, 572 (Ind. 1907).

Our historical double-jeopardy precedent has close parallels to the federal, elements-based double-jeopardy standard. As we described things in 1932, "[t]he courts of this state . . . have leaned more strongly to the 'identity of offense' test, which is that the second charge must be for the same identical act and crime as" the first. *Durke v. State*, 183 N.E. 97, 100 (Ind. 1932) (citation omitted). The "obvious similarity" between our home-grown "identity of offense" test and the federal double-jeopardy standard was an open secret. *Elmore*, 382 N.E.2d at 896. Though our courts "only occasionally" cited federal double-jeopardy precedent, "the vast majority of our cases have reached results in harmony with the dictates of the [federal] Double Jeopardy Clause." *Id.* at 895.

Richardson itself acknowledged that this elements-based approach is well rooted in our precedent. "[W]hen the *Elmore* Court [in 1978] merged

our state double jeopardy analysis with the federal double jeopardy analysis," the Court said, "it was not a radical departure from our then-existing state constitutional analysis." *Richardson*, 717 N.E.2d at 48. Even so, *Richardson* held that "same offense" means not just statutorily identical crimes, but also separate crimes arising from the same act or conduct and proven at trial by the same evidence. *Id.* at 49. *Richardson* thus looked "beyond" the original meaning of "offense" because, the Court said, the term "same offense" has "become a term of art." *Id.* at 39. The *Richardson* majority concluded that "Indiana's Double Jeopardy Clause was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." *Id.* at 49. And so it adopted the actual-evidence test to implement its newfound right. *Ibid.*

Our actual-evidence test "looks to whether two or more offenses are the same based on the evidence actually presented at trial, rather than engaging in a strict comparative analysis of the statutory elements." *Wadle v. State*, 151 N.E.3d 227, 239 (Ind. 2020) (emphasis omitted). As *Richardson* explained:

> 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.

In practice, the actual-evidence test proved "unworkable", as we noted just last year in *A.W. v. State*, 229 N.E.3d 1060, 1062 (Ind. 2024). The test "generated more confusion than clarity" and bred "inconsistent" and "illogical" results. *Wadle*, 151 N.E.3d at 241. The resulting chaos "forc[ed] the Court to retreat from" *Richardson* in *Wadle*. *Ibid*. *Wadle* held that our double-jeopardy clause "protects only against successive prosecutions for the same offense", *id.* at 245, not multiple punishments for one criminal act or

transaction, *id.* at 246. In doing so, we preserved a "substantive bar to double jeopardy", but rooted it in Indiana's statutes and common law—defining what rights pertain in a **single** criminal proceeding. *Id.* at 246–47. And we renounced and replaced the actual-evidence test in this "substantive" context. *Ibid*. But, relevant here, we left for another day whether the actual-evidence test should continue to govern article 1, section 14's "procedural" bar against successive prosecutions. *Id.* at 244 n.15.

Today this question is squarely before us, yet we deny transfer and opt to punt resolution of this issue to another case at another time. My principal objection to our kicking the can is not that our unwieldy actual-evidence test continues to confound litigants and lower courts, e.g., *id.* at 240–44, though this concern is reason enough to change course sooner than later. My principal objection, rather, is that this test cannot be squared with the original meaning of article 1, section 14, to which I turn next.

B

The original meaning of our double-jeopardy clause protects against successive prosecutions for the same offense—that is, for crimes with the same elements. What follows is that *Richardson*'s actual-evidence test has no place in our article 1, section 14 jurisprudence. To align article 1, section 14 with its original meaning, I would hold that offenses are not the "same" if each offense contains one or more distinct statutory elements.

The "cardinal principle of constitutional construction [is] that words are to be considered as used in their ordinary sense." *Ajabu v. State*, 693 N.E.2d 921, 929 (Ind. 1998) (alteration in original) (quoting *Tucker v. State*, 35 N.E.2d 270, 291 (Ind. 1941)). Just as we interpret statutes according to their plain meaning upon enactment, see *Calvary Temple Church of Evansville, Inc. v. Kirsch*, 251 N.E.3d 1056, 1059 (Ind. 2025), we interpret constitutional provisions likewise, *Ajabu*, 693 N.E.2d at 929. One way we do so is by consulting general-language dictionaries contemporaneous to the disputed provision's enactment. *Ibid.* Indiana's 1816 constitution contained our first double-jeopardy clause: "in all criminal prosecutions, the accused . . . shall not . . . be twice put in jeopardy for the same offence." Ind. Const. art I, § 13 (1816). The 1816 framers adopted this clause with no debate or comment. Later, the framers of our current 1851 constitution modified the

clause only slightly: "No person shall be put in jeopardy twice for the same offense." Ind. Const. art 1, § 14. Like their forebears, the 1851 framers adopted this provision without debate or comment.

The original meaning of both double-jeopardy clauses protects a defendant from successive prosecutions for crimes with the same elements. The current clause, by its terms, bars successive prosecutions "for the same offense", *ibid*., not for the same act or conduct. General-language dictionaries from the mid-nineteenth century confirm that "offense" refers to crimes, defined by statute or at common law, not acts or transactions that might violate the law in multiple ways.

For example, Webster's 1848 dictionary defined "offense" as a "crime" or a "violation of law". Noah Webster, *An American Dictionary of the English Language* 689 (1848), https://perma.cc/5DQV-2HM2. And it defined "crime" as an "act which violates a law" and noted "crime" is a synonym of "offense". *Id.* at 246. Webster's 1854 edition similarly defined "offense" as a "crime" or "transgression of law." Noah Webster, *An American Dictionary of the English Language* 768 (1854), https://perma.cc/YXV8-9AFZ. "Crime", in turn, was defined as an "act which violates a law". *Id.* at 283. And "transgression" meant "the violation of a law", an "offense", or a "crime". *Id.* at 1167.

These definitions match their original meaning in 1816, when we adopted our first constitution. Webster's 1806 edition defined "offense" as a "crime". Noah Webster, *A Compendious Dictionary of the English Language* 207 (1806), https://perma.cc/35LD-58AD. And "crime" meant "a violation of the law" or a "public offense". *Id.* at 72. Samuel Johnson's 1815 dictionary likewise defined "offence" as a "[c]rime". Samuel Johnson, *A Dictionary of the English Language* 601 (14th ed. 1815), https://perma.cc/N66D-PN8U. And "crime" meant an "offence". *Id.* at 226.

For purposes of article 1, section 14, then, "offense" is synonymous with "crime" and is a separate, discrete violation of the criminal law. Nothing in these definitions suggests "offense" refers to a criminal act or transaction that might constitute multiple "crimes" or violations of law.

Crimes are defined by their elements. Though these elements were once set at common law, they are defined now by the legislature, which retains inherent and exclusive authority "to define crimes and fix punishments." *Powell v. State*, 151 N.E.3d 256, 263 (Ind. 2020) (citing *State v. Clark*, 217 N.E.2d 588, 590–91 (Ind. 1966)). If a defendant's conduct violates two (or more) laws, each violation is a crime—an "offense"—under the original meaning of article 1, section 14. And if each offense contains an element the other does not—if it is possible, in other words, to violate one and not the other—they are different "offenses", and the double-jeopardy clause does not bar the later prosecution.

This understanding of "offense" predates Indiana's statehood. The original meaning of "offence" as used in the Fifth Amendment to the federal constitution, ratified in 1791, is a crime defined by statute or at common law. "[T]he language of the [Double Jeopardy] Clause . . . protects individuals from being twice put in jeopardy 'for the same offence,' not for the same conduct or actions". *Gamble v. United States*, 587 U.S. 678, 683 (2019) (emphasis omitted) (quoting *Grady v. Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting)). "And the term '[o]ffence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Ibid.* (alteration in original) (citing eighteenth-century dictionaries). This meaning was well settled when Indiana adopted our current constitution in 1851. Just a year later, the Supreme Court held: "The constitutional provision is not, that no person shall be subject, for the same act, to be twice put in jeopardy of life or limb; but for the same offence, the same violation of law, no person's life or limb shall be twice put in jeopardy." *Moore v. Illinois*, 55 U.S. 13, 17 (1852).

This linguistic history, reflected in our own caselaw and in Supreme Court caselaw interpreting the federal counterpart, shows that the common understanding of the double-jeopardy clause at its enactment was to bar successive attempts to convict a defendant of offenses having the same elements. The clause, though, does not bar prosecuting a defendant multiple times for separate offenses—those the legislature defined distinctly—even if the offenses arise from the same act or episode. What follows is that the actual-evidence test must go. In its place, we should adopt a same-elements test asking "whether each offense contains an element not

contained in the other; if not, they are the same offence and double jeopardy bars" a successive prosecution. *United States v. Dixon*, 509 U.S. 688, 696 (1993) (different spellings in original). But if each offense charged contains at least one unique element, there is no double-jeopardy violation. *Ibid.*

C

This is not to say the double-jeopardy clause is a dead letter. It provides unyielding protection where it applies, barring successive prosecutions for the same offense—what amounts to an immunity from a later prosecution, not just an immunity from liability in the later prosecution. See, e.g., *Wadle*, 151 N.E.3d at 245. This constitutional minimum ensures the State cannot make "repeated attempts to convict an accused", *ibid.* (emphasis omitted) (quoting *Thompson v. State*, 290 N.E.2d 724, 726 (Ind. 1972)), which might otherwise subject a defendant "'to embarrassment, expense and ordeal,' effectively 'compelling him to live in a continuing state of anxiety and insecurity'", *ibid.* (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)). Permitting the State to "hon[e] its trial strategies and perfect[] its evidence" through successive trials might result in innocent persons going to prison. *Ibid.* (quoting *Tibbs v. Florida*, 457 U.S. 31, 41 (1982)).

And a criminal defendant need not rely on the constitution alone. Our legislature affords legal protections above the constitutional floor. One statute bars trial courts from entering a judgment of conviction and sentence within the same prosecution for an "included offense", Ind. Code § 35-38-1-6, which includes (among other things) "an attempt to commit the offense charged or an offense otherwise included", *id*. § 35-31.5-2-168. Another statute bars certain successive prosecutions, including successive prosecutions for charges the State should have brought (but did not bring) in the first trial. "A prosecution is barred if all of the following exist:"

> (1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.
>
> (2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under [IC 35-41-4-3].

(3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

Id. § 35-41-4-4. Nothing in article 1, section 14 compels these added protections for criminal defendants or prevents the legislature from enacting even more protections on top of these. But these added protections are a matter of legislative grace, not constitutional right.

Nor does article 1, section 14 protect a criminal defendant from a prolific legislature or a zealous prosecutor. The provision does not bar the legislature from "piling on", i.e., from expanding the criminal code to define additional crimes covering the same act or episode. And it does not limit prosecutorial discretion to charging a defendant expansively in a single proceeding, even if the discrete crimes charged arise from what is a single act or episode.

The limited scope of this constitutional provision does not permit courts to expand the provision's reach by implementing our own views of what is fair and just. To the extent our Court interprets Indiana's double-jeopardy clause to afford greater protection than the clause's original meaning requires, we superimpose our own values for those of the People who ratified our state's organic law. Beyond the limits that article 1, section 14 places on what crimes can be charged in what proceedings—limits for courts to enforce—it is up to the legislature to define crimes, prescribe a prosecutor's power to charge them, and specify the sentence a court may impose. The political branches are where policymaking happens. The courts' role, in contrast, is simply to interpret and apply the law consistent with its text and original meaning.

* * *

Ours is not the only court to have strayed from the original meaning of double jeopardy. In 1990, the Supreme Court expanded its interpretation of the Fifth Amendment to include an actual-evidence component of double jeopardy, *Grady*, 495 U.S. at 510, just as we would do nine years later in *Richardson*. Yet in 1993, the Supreme Court overruled itself and returned to the clause's original meaning. *Dixon*, 509 U.S. at 704. Unfortunately, it has taken us longer than the Supreme Court to correct our own errant

course. Because *Richardson*'s actual-evidence test does not accord with the original meaning of article 1, section 14, I would grant transfer, abandon this aspect of *Richardson*, and keep the same-elements test, which applies our double-jeopardy clause consistent with its original meaning.

For these reasons, I respectfully dissent from our denial of transfer.