DOUBLE JEOPARDY

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Contents

I. Overview. The protection afforded by the guarantee against double jeopardy includes four scenarios: (1) retrial for the same offense after acquittal; (2) retrial for the same offense after conviction; (3) retrial for the same offense after a prior trial ended without a verdict, as by mistrial; and (4) multiple punishments for the same offense. David S. Rudstein, *Double Jeopardy, A Reference Guide to the United States Constitution* 38 (2004). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ." Green v. United States, 355 U.S. 184, 187 (1957).

II. Sources.

A. Common Law. The protection against double jeopardy was "established in the common law of England long before this Nation's independence." Benton v. Maryland, 395 U.S. 784, 795 (1969). By the eighteenth century, "the guarantee against double jeopardy became firmly entrenched in the common law in the form of the pleas of autrefoits acquit (a former acquittal), autrefoits convict (a former conviction), and pardon." Rudstein, Double Jeopardy, at 4. As William Blackstone explained in his monumental treatise, the plea of autrefoits acquit "is grounded on this universal maxim of the common law, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England *335.

B. Constitutions. "The common law principle that no person can be twice put in jeopardy of life or limb for the same offense is now guaranteed by both the federal and the state constitutions." State v. Allen, 16 N.C. App. 159, 161 (1972).

1. Federal. The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The provision is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). The "persons" protected by the clause include corporations. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Fong Foo v. United States, 369 U.S. 141 (1962). Further, despite its reference to "life or limb," the constitutional guarantee extends to all criminal offenses, including misdemeanors. Breed v. Jones, 421 U.S. 519, 528 (1975); Ex parte Lange, 85 U.S. 163, 173 (1873).

2. State. The North Carolina constitution has no double jeopardy clause. State v. Rambert, 341 N.C. 173, 175 n.1 (1995). The North Carolina Supreme Court has, however, "interpreted the language of the law of the land clause of our state Constitution as guaranteeing the common law doctrine of former jeopardy." State v. Brunson, 327 N.C. 244, 247 (1990); N.C. Const. Art. I, § 19. The principle is now regarded as "an integral part of the Law of the Land clause." State v. Robinson, 375 N.C. 173, 183 (2020). The state constitutional protection against double jeopardy is no broader than that afforded by the federal constitution. State

v. Brunson, 327 N.C. 244, 249 (1990); State v. Gilbert, 139 N.C. App. 657, 666 (2000).

C. Statute. Several state statutes codify double jeopardy protections. These include the following.

- A defendant who has previously been placed in jeopardy for the same offense is entitled to dismissal of charges. G.S. 15A-954(a)(5); State v. Lambert, 53 N.C. App. 799, 801 (1981).
- A defendant is entitled to dismissal of charges if an issue essential to a successful prosecution has previously been adjudicated in the defendant's favor. G.S. 15A-954(a)(7); State v. Spargo, 187 N.C. App. 115, 119 (2007). *See* Section XII, below.
- A defendant tried for one offense may be entitled to dismissal of charges for a joinable offense. G.S. 15A-926(c)(2); State v. Schalow, 379 N.C. 639, 654 (2021). *See* Section XIV, below.
- If an offense occurred in part outside North Carolina, a person may be tried for that offense in this State if he has not been placed in jeopardy for the same offense in another state. G.S. 15A-134; State v. Christian, 288 N.C. App. 50, 52 (2023).
- If a violation of the North Carolina Controlled Substances Act (Chapter 90, Art. 5) is also a violation of federal law or another state's law, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this State. G.S. 90-97; State v. Brunson, 165 N.C. App. 667, 671 (2004). *See* Section XIII, below.
- As for multiple punishments, many statutes include such language as "unless the conduct is covered under some other provision of law providing greater punishment." *E.g.*, G.S. 14-32.4 (assault inflicting serious bodily injury); 14-33(b) (misdemeanor assault). Such language generally precludes cumulative punishment for both a greater and lesser offense. *See* State v. Fields, 374 N.C. 629, 634 (2020); State v. Davis, 364 N.C. 297, 304 (2010). *See* Section XI, below.

III. Jurisdiction. If jurisdiction depends on a valid criminal pleading, jeopardy also requires a valid pleading. State v. Cooke, 248 N.C. 485, 488 (1958); State v. Cofield, 247 N.C. 185, 188 (1957). Stated differently, a defective pleading creates no prior jeopardy, so a defendant may be retried for the same offense upon a proper pleading. State v. Coleman, 253 N.C. 799, 801 (1961); State v. Bond, 21 N.C. App. 434, 435 (1974). This is true for both a trial terminated before verdict and for a prior conviction. Illinois v. Somerville, 410 U.S. 458, 469 (1973); State v. Pakulski, 326 N.C. 434, 439 (1990). As a matter of due process, however, a defendant acquitted upon an invalid pleading may not be retried. Ball v. United States, 163 U.S. 662 (1896); Jeff Welty, Pleading Defects and Double Jeopardy, N. C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept 10, 2015).

In State v. Singleton, 386 N.C. 183 (2024), the North Carolina Supreme Court abandoned the common law rule that jurisdiction is derived from a facially valid indictment. The consequences of this departure are still being explored by the courts. *Singleton* may require reconsideration of the rationale under which retrial was permissible when a previous defective indictment failed to confer jurisdiction.

IV. Proceedings that Trigger Double Jeopardy Protection.

A. Criminal Proceedings. "[J]eopardy describes the risk that is traditionally associated with a criminal prosecution." Breed v. Jones, 421 U.S. 519, 528 (1975). Despite the

language of the Fifth Amendment (i.e., "life or limb"), the protection extends to offenses punishable by fine or imprisonment, including misdemeanors. Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994); Ex parte Lange, 85 U.S. 163, 173 (1873). The only criminal prosecutions that might not implicate double jeopardy are summary proceedings for direct criminal contempt. *See* Rudstein, Double Jeopardy, at 44-45; United States v. Dixon, 509 U.S. 688, 696 (1993).

In determining whether a penalty is criminal or civil, a court asks two questions:

(1) whether the legislature intended to create a civil or criminal penalty, and

(2) whether the statutory scheme is so punitive in purpose or effect as to transform a civil remedy into a criminal penalty. Hudson v. United States, 522 U.S. 93, 99 (1997); State v. Arellano, 165 N.C. App. 609, 612 (2004).

B. Civil Proceedings. Juvenile delinquency adjudications, ostensibly civil, are deemed criminal for purposes of double jeopardy. Breed v. Jones, 421 U.S. 519, 531 (1975); Matter of Vinson, 298 N.C. 640, 650 (1979). Otherwise, the Double Jeopardy Clause does not apply in civil actions, United States v. Halper, 490 U.S. 435, 450 (1989), or to civil sanctions. Hudson, 522 U.S. at 99 (1997). Consequently, subsequent criminal prosecution based on the same conduct is not barred by the prior imposition of civil penalties in the following scenarios:

- Imposition of civil liability for larceny, shoplifting, theft by employee, organized retail theft, embezzlement, obtaining property by false pretense, and other offenses. G.S. 1-538.2. State v. Beckham, 148 N.C. App. 282, 288-89 (2002).
- Immediate driver's license revocation for persons charged with implied consent offenses. G.S. 20-16.5; State v. Oliver, 343 N.C. 202, 210 (1996); State v. Hinchman, 192 N.C. App. 657, 666 (2008).
- One-year disqualification of a commercial driver's license. G.S. 20-17.4; State v. Reid, 148 N.C. App. 548, 554 (2002).
- Pretrial detention of defendants charged with crimes of domestic violence. G.S. 15A-534.1(b); State v. Thompson, 349 N.C. 483, 496 (1998).
- Alcoholic Beverage Control Commission administrative action. G.S. 18B-302; State v. Wilson, 127 N.C. App. 129 (1997).
- Assessment of drug tax by N.C. Department of Revenue. G.S. 105-113.107; State v. Adams, 132 N.C. App. 819 (1999).
- Monetary penalties, occupational debarment for violating federal banking statutes. 12 U.S.C. §§ 84(a)(1) & 375(b); Hudson, 522 U.S. at 103 (1997).

C. Revocation Proceedings. Proceedings to revoke probation, parole, or supervised release are not criminal prosecutions. Johnson v. United States, 529 U.S. 694, 700-01 (2000) (supervised release); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (probation); Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (parole). Incarceration of a defendant upon revocation of probation, parole, or supervised release is said to stem from the original judgment. State v. Murchison, 367 N.C. 461, 463 (2014); In re O'Neal, 160 N.C. App. 409, 413 (2003). Hence, there is no double jeopardy bar to prosecuting a defendant subsequently for the same conduct that gave rise to the revocation. State v. Sparks, 362 N.C. 181, 189-90 (2008); State v. Monk, 132 N.C. App. 248, 253 (1999).

V. Attachment of Jeopardy. Obviously, a defendant cannot be placed in jeopardy twice before being placed in jeopardy once before. This is the moment at which jeopardy is said to "attach," and it marks the point after which acquittal, conviction, or mistrial has

double jeopardy consequences. *See* Will v. Hallock, 546 U.S. 345, 354 n.* (2006); State v. Tate, 300 N.C. 180, 182–83 (1980); State v. Fowler, 197 N.C. App. 1, 17 (2009).

A. Jury Trial. In a jury trial, jeopardy attaches when the jury is empaneled and sworn. Martinez v. Illinois, 572 U.S. 833, 839 (2014); State v. Courtney, 372 N.C. 458, 463 (2019).

B. Bench Trial. In a bench trial, jeopardy attaches when the court begins to hear evidence or testimony. Serfass v. United States, 420 U.S. 377, 388 (1975); State v. Brunson, 327 N.C. 244, 247 (1990).

C. Guilty Plea. In a guilty plea case, jeopardy does not attach until the guilty plea is accepted by a court. State v. Ross, 173 N.C. App. 569, 574 (2005), aff'd per curiam, 360 N.C. 355 (2006); State v. Wallace, 345 N.C. 462, 467 (1997); State v. Wood, 164 N.C. App. 601 (2004).

D. Prior Dismissal. A second proceeding is not barred if the first proceeding was terminated before jeopardy attached, as when charges are dismissed before trial, either by the State, State v. Brunson, 327 N.C. 244, 247 (1990); State v. Strickland, 98 N.C. App. 693, 695 (1990), or by the trial court, State v. Payne, 256 N.C. App. 572, 590 (2017); State v. Newman, 186 N.C. App. 382, 386 (2007).

E. Fraudulent Acquittal. In addition, jeopardy has not attached when a defendant has procured an acquittal by fraud; in that case, there has been no real trial, and the defendant was never actually in jeopardy. 6 Wayne R. LaFave et al., Criminal Procedure, § 25.1(d); State v. Craig, 176 N.C. 740, 743 (1918).

VI. Termination of Jeopardy. The double jeopardy bar requires not only a prior attachment of jeopardy (see above) but also some event that terminated the original jeopardy. Richardson v. United States, 468 U.S. 317, 325 (1984); State v. Robinson, 375 N.C. 173, 185 (2020). Stated differently, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may not be retried for the same offense. Sattazahn v. Pennsylvania, 537 U.S. 101, 106 (2003); State v. Courtney, 372 N.C. 458, 462 (2019). Jeopardy may be terminated by acquittal, by conviction, or by mistrial or dismissal interrupting the proceedings. Each scenario is considered more fully below.

A. Continuing Jeopardy. There are two situations where jeopardy is deemed "continuing." In a system allowing for trial de novo (such as in North Carolina), the trial in the lower court and the trial de novo in the higher court are treated as a two-stage continuous proceeding rather than as two separate trials. Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 312 (1984); State v. Smith, 312 N.C. 361, 383 (1984). Continuing jeopardy also occurs if a trial ends without a verdict, as when a mistrial is declared. Richardson v. United States, 468 U.S. 317, 325 (1984); State v. Courtney, 372 N.C. 458, 464 (2019).

B. Mistrial. The declaration of a mistrial does, however, terminate jeopardy when the judge declares a mistrial over a defendant's objection and absent "manifest necessity." Arizona v. Washington, 434 U.S. 497, 505 (1978); State v. Odom, 316 N.C. 306, 310 (1986). The same result is obtained when a prosecutor "goads" a defendant into moving for a mistrial. Oregon v. Kennedy, 456 U.S. 667, 679 (1982); State v. White, 322 N.C. 506, 511 (1988). After jeopardy has attached, a judicial dismissal that contemplates further proceedings is treated as equivalent to a mistrial.

Lee v. United States, 432 U.S. 23, 31 (1977); State v. Schalow, 251 N.C. App. 334, 346-47 (2016). *See* Section X, below.

C. Defendant's Request. The defendant's involvement may denature an otherwise terminal event. *See* United States v. Scott, 437 U.S. 82, 99 (1978); State v. Vestal, 131 N.C. App. 756, 758 (1998). Retrial is not barred by a prior conviction, for example, if the defendant later succeeds in having the conviction overturned on grounds other than insufficiency of evidence. Price v. Georgia, 398 U.S. 323, 326-27 (1970); State v. Britt, 291 N.C. 528, 543 (1977). Similarly, a defendant may be retried for the same offense when, due to the defendant's own request, the trial court grants a mistrial (absent goading by the prosecutor), United States v. Dinitz, 424 U.S. 600, 607 (1976); State v. White, 322 N.C. 506, 510 (1988), or a dismissal (absent insufficient evidence), United States v. Scott, 437 U.S. 82, 100 (1978); State v. Priddy, 115 N.C. App. 547, 551 (1994).

D. Voluntary Dismissal After Mistrial. In State v. Courtney, 372 N.C. 458, 471 (2019), the North Carolina Supreme Court held that, when the defendant's first trial ended with a hung jury (i.e., mistrial) and the State took a voluntary dismissal under G.S. 15A-931, the dismissal was an event that terminated jeopardy, barring retrial.

VII. The Same Offense.

Double jeopardy is implicated when a defendant is subject to retrial for the same offense. U.S. Const. Amend. V ("the same offence"); State v. Cutshall, 278 N.C. 334, 344 (1971) ("the same offense"). "Offense" in this context means a violation of law, either statutory or common law, and includes felonies, misdemeanors, and infractions. *See* Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994) (imprisonment and monetary penalties); Ex parte Lange, 85 U.S. 163, 173 (1873) (felonies, minor crimes, and misdemeanors); State v. Hamrick, 110 N.C. App. 60, 66 (1993) (infractions). Two offenses may be the same either as a matter of law, as where one offense is a lesser included offense of the other, or as a matter of fact, as when multiple charges arise out of the same act or transaction. For a plea of former jeopardy to be good, it must be grounded on the same offense "both in law and in fact." *E.g.*, State v. Applewhite, 386 N.C. 431, 442 (2024); State v. Rambert, 341 N.C. 173, 175 (1995).

A. The Same Offense in Law.

1. The Blockburger Test. Determining whether two offenses are the same in law requires an examination of their elements. State v. Wortham, 318 N.C. 669, 671 (1987). Under the Blockburger test, derived from Blockburger v. United States, 284 U.S. 299 (1932), two offenses are not the same in law if each requires proof of an additional fact that the other does not. *E.g.*, State v. Banks, 367 N.C. 652, 656 (2014). Stated differently, "[i]f at least one essential element of each crime is not an element of the other, the defendant may be prosecuted for both[.]" State v. Parks, 324 N.C. 94, 97 (1989). "The determination is made on a definitional, not a factual basis." State v. Robinson, 368 N.C. 402, 407 (2015) (quoting State v. Weaver, 306 N.C. 629, 635 (1982)). Applying this test, the following offenses, among others have been found not to be the same:

- Statutory rape of a person thirteen, fourteen, or fifteen years old, G.S. 14-27.7A, and second-degree rape, G.S. 14-27.3. State v. Banks, 367 N.C. 652, 659 (2014).
- Attempted murder, G.S. 14-17, and assault with a deadly weapon with intent to kill inflicting serious injury, G.S. 14-32. State v. Tirado, 358 N.C. 551, 579 (2004).

- First-degree murder, G.S. 14-17, and first-degree kidnapping, G.S. 14-39. State v. Tirado, 358 N.C. 551, 591-92 (2004).
- First-degree kidnapping, G.S. 14-39, and assault with a deadly weapon inflicting serious injury, G.S. 14-32. State v. Tirado, 358 N.C. 551, 592 (2004).
- First-degree murder, G.S. 14-17, and felony child abuse, G.S. 14-318.4. State v. Elliott, 344 N.C. 242, 278 (1996).
- First-degree sexual offense, G.S. 14-27.4, and indecent liberties, G.S. 14-202.1. State v. Swann, 322 N.C. 666, 678 (1988).
- First-degree rape, G.S. 14-27.2, and indecent liberties, G.S. 14-202.1. State v. Rhodes, 321 N.C. 102, 106 (1987).
- Second-degree rape/sexual offense, G.S. 14-27.3, 27.5, and custodial sexual offense, G.S. 14-27.7. State v. Raines, 319 N.C. 258, 266 (1987).
- Obstruction of justice and accessory after the fact to murder. State v. Cousin, 233 N.C. App. 523, 537 (2014).
- Possession of ecstasy, G.S. 90-89(3)(a), and possession of ketamine, G.S. 90-91(b)(12), contained in a single pill. State v. Hall, 203 N.C. App. 712, 718 (2010)
- Discharging a weapon into occupied property, G.S. 14-34.1 and assault with a deadly weapon inflicting serious injury, G.S. 14-32. State v. Allah, 168 N.C. App. 190, 196 (2005).
- Armed robbery, G.S. 14-87, and kidnapping, G.S. 14-39. State v. Evans, 125 N.C. App. 301, 304 (1997).

2. **Lesser Included Offenses.** A lesser included offense is a crime that is composed of some but not all of the elements of a more serious crime. State v. Etheridge, 319 N.C. 34, 50 (1987); State v. McGee, 197 N.C. App. 366, 372 (2009). Invariably then, the lesser included offense requires no proof beyond that required for the greater offense, and the two offenses are considered the same in law. Etheridge, 319 N.C. at 50; State v. Edwards, 49 N.C. App. 547, 558 (1980). "If what purports to be two offenses actually is one under the Blockburger test, double jeopardy prohibits successive prosecutions." State v. Gardner, 315 N.C. 444, 454 (1986). The following offenses, among others, have been found to be the same offense in law:
   - Armed robbery, G.S. 14-87, and larceny, G.S. 14-72. State v. White, 322 N.C. 506, 518 (1988).
   - Armed robbery, G.S. 14-87, and assault with a deadly weapon, G.S. 14-33. State v. Hill, 287 N.C. 207, 216 (1975).
   - Manufacture, sale, or delivery of marijuana, G.S. 90-95(a) and trafficking in marijuana by manufacture, sale, or delivery, G.S. 90-95(h)(1). State v. Sanderson, 60 N.C. App. 604, 610 (1983).
   - Assault with a deadly weapon, G.S. 14-32, and assault with a firearm upon a law enforcement officer, G.S. 14-34.2. State v. Partin, 48 N.C. App. 274, 282 (1980).

B. The Same Offense in Fact.

1. **The Same Evidence Test.** Determining whether two offenses are the same in fact requires an examination of the evidence offered in support of each. *See* State v. Rambert, 341 N.C. 173, 175 (1995); State v. Hendricksen, 257 N.C. App. 345, 350 (2018). For offenses to be the same in fact, the same evidence must support a conviction in both cases. State v. Dale, 245 N.C. App. 497, 507 (2016).

This is sometimes referred to as "the same evidence-test." State v. Hicks, 233 N.C. 511, 516 (1951). The test asks two somewhat alternative questions:

(1) Whether the facts alleged in the second indictment if given in evidence would have sustained a conviction under the first indictment, or

(2) Whether the same evidence would support a conviction in each case. State v. Irick, 291 N.C. 480, 502 (1977); State v. Newman, 186 N.C. App. 382, 387 (2007).

When the evidence shows the underlying conduct supporting each charge is separate and distinct, there is no bar to prosecuting a defendant for each count. The following cases are illustrative.

- The defendant's guilty plea to two counts of misdemeanor possession of stolen goods based on two lottery tickets obtained during an armed robbery did not preclude prosecution and punishment for the armed robbery of money and hundreds of additional lottery tickets. State v. Hendricksen, 257 N.C. App. 345, 350-51 (2018).
- The defendant could be sentenced for two counts of manufacturing methamphetamine where two separate manufacturing processes were found at two separate and distinct locations. State v. Maloney, 253 N.C. App. 563, 572 (2017).
- The defendant could be sentenced for both attempted larceny and attempted robbery where each offense involved a different victim. State v. Miller, 245 N.C. App. 313, 317 (2016).
- The defendant could be sentenced for both armed robbery and assault with a deadly weapon where there was a distinct interruption in time between the taking of property from the victim and the assault on the same victim. State v. Ortiz, 238 N.C. App. 508, 515 (2014).
- The defendant could be convicted of two counts of attempted murder and two counts of felonious assault where there were two victims and the defendant assaulted and attempted to kill each one. State v. Washington, 141 N.C. App. 354, 370 (2000).
- The defendant could be convicted of two counts of armed robbery where he took personal property from each of two victims. State v. Wheeler, 70 N.C. App. 191, 195 (1984).

2. Multiple Charges. Granting that the same act or transaction may give rise to multiple charges, there remains the question of how many counts the same course of conduct will support. If a person robs a store by threatening two employees, for example, is that one robbery or two? *See* State v. Potter, 285 N.C. 238, 253 (1974) (one robbery); State v. Ballard, 280 N.C. 479, 490 (1972). Courts may address this issue by considering the unit of prosecution or the continuing offense.

a. Unit of Prosecution. The legislature may so define a statutory offense as to limit the number of counts that may be charged based on a single course of conduct. State v. Smith, 323 N.C. 439, 441 (1988); *cf.* Brittany L. Bromell, Units of Prosecution: Charging Multiple Counts for the Same Conduct, ADMIN. OF JUSTICE BULL., No. 2022/01 (UNC School of Government) (Sept. 2022) *available at* https://www.sog.unc.edu/publications/bulletins/units-prosecution. Thus, determining the allowable unit of prosecution involves statutory construction. The following cases are illustrative:

- Human trafficking under G.S. 14-43.11 is not a continuing offense but each violation is a separate offense. State v. Applewhite, 386 N.C. 431, 435

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- Weapons on campus, G.S. 14-269.2, is committed only once by simultaneous possession of multiple firearms. State v. Conley, 374 N.C. 209, 214 (2020).
- Possession of a stolen firearm, G.S. 14-71.1, is committed only once by simultaneous possession of multiple firearms. State v. Surrett, 217 N.C. App. 89, 99 (2011).
- Larceny of a firearm, G.S. 14-72(b)(4), is committed only once when multiple firearms are stollen during a single larceny. State v. Boykin, 78 N.C. App. 572, 577 (1985).

In construing criminal statutes, courts resolve any ambiguity against the State. State v. Smith, 323 N.C. 439, 442-43 (1988); State v. White, 127 N.C. App. 565, 570 (1997). Once the legislature has defined the offense, "that prescription determines the scope of protection afforded by a prior conviction or acquittal." Sanabria v. United States, 437 U.S. 54, 70 (1978).

b. Continuing Offenses. A continuing offense is "a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period" and is intended to cover successive occurrences. State v. Maloney, 253 N.C. App. 563, 571 (2017). Felony stalking, for example, requires proof of multiple acts. State v. Fox, 216 N.C. App. 144, 151 (2011). Defendants may not be convicted for continuous offenses if the offenses alleged cover the same date range, as this runs afoul of double jeopardy protections. State v. Applewhite, 386 N.C. 431, 441 (2024). The following offenses have been treated as continuing offenses:

- kidnapping, State v. White, 127 N.C. App. 565, 571 (1997).
- assault, State v. Dew, 379 N.C. 64, 72 (2021); State v. Brooks, 138 N.C. App. 185, 189 (2000).
- robbery, State v. Fambrough, 28 N.C. App. 214, 215 (1975).
- larceny, State v. Martin, 47 N.C. App. 223, 232 (1980).
- possession of stolen property, State v. Watson, 80 N.C. App. 103, 106 (1986); State v. Davis, 302 N.C. 370, 374 (1981).
- felony stalking under G.S. 14-177.3A, State v. Fox, 216 N.C. App. 144, 151 (2011)
- keeping or maintaining a dwelling for keeping or selling drugs, G.S. 90-108(a)(7), State v. Grady, 136 N.C. App. 394, 400 (2000).

By contrast, some offenses are categorically discontinuous. Rape, for example, is not a continuing offense, and each act of intercourse will support a separate conviction. State v. Dudley, 319 N.C. 656, 659 (1987); State v. Small, 31 N.C. App. 556, 559 (1976). Similarly, courts treat multiple rapid shots from a single firearm as discontinuous, at least when each shot requires a deliberate pull of the trigger. State v. Rambert, 341 N.C. 173, 177 (1995); State v. Ray, 97 N.C. App. 621, 625 (1990). In determining whether an offense is continuous, relevant factors include the temporal proximity of the acts, changes in location, and intervening events. State v. Dew, 379 N.C. 64, 72 (2021); State v. Calderon, 290 N.C. App. 344, 354 (2023), *disc. review allowed*, 901 S.E.2d 814 (2024).

VIII. A Prior Acquittal.

A. Jury Acquittal. Double jeopardy principles accord absolute finality to a jury acquittal. Indeed, an acquittal is afforded special weight. United States v. DiFrancesco, 449 U.S. 117, 130 (1980); State v. Sanderson, 346 N.C. 669, 676 (1997). The Double Jeopardy Clause prohibits second-guessing an acquittal for any reason, even when a jury returns inconsistent verdicts on the same issue of fact. McElrath v. Georgia, 601 U.S. 87, 97 (2024); State v. Mumford, 364 N.C. 394, 400 (2010). "Accordingly, acquittals are final and unreviewable, even if based in error." State v. Robinson, 375 N.C. 173, 185 (2020); *accord* State v. Payne, 256 N.C. App. 572, 587 (2017).

B. Judicial Acquittal. A judicial determination that the State's evidence is insufficient as a matter of law has the effect of an acquittal. Smith v. Massachusetts, 543 U.S. 462, 467 (2005) (at trial); Burks v. United States, 437 U.S. 1, 18 (1978) (on appeal); State v. Mason, 174 N.C. App. 206, 208 (2005). An acquittal due to insufficient evidence precludes retrial, whether the court's evaluation was correct or not. Evans v. Michigan, 568 U.S. 313, 320 (2013). In North Carolina, this determination may be made at trial upon a defendant's motion to dismiss at the close of the State's evidence. *See* G.S. 15-173 (ruling has force and effect of a not guilty verdict); G.S. 15A-1227 (timing of motion to dismiss for insufficient evidence). Accordingly, if the trial court grants a defendant's midtrial motion to dismiss for insufficient evidence, the defendant may not be retried for the same offense. State v. Morgan, 189 N.C. App. 716, 722 (2008); State v. Murrell, 54 N.C. App. 342, 345 (1981).

When, however, a jury returns a guilty verdict and a trial judge or appellate court sets it aside and enters a judgment of acquittal, the State may appeal to reinstate the verdict. Smith v. Massachusetts, 543 U.S. 462, 467 (2005); State v. Kiselev, 241 N.C. App. 144, 148 (2015). Further, a midtrial dismissal not based on insufficiency of evidence does not bar retrial. Smith v. United States, 599 U.S. 236, 253-54 (2023); State v. Priddy, 115 N.C. App. 547, 551 (1994). Accordingly, a defendant may be retried for the same offense despite a prior dismissal based on:

- a defective criminal pleading; Illinois v. Somerville, 410 U.S. 458, 471 (1973); State v. Whitley, 264 N.C. 742, 745 (1965); State v. Coleman, 253 N.C. 799, 801 (1961); State v. Barnes, 253 N.C. 711, 718 (1961); State v. Goforth, 65 N.C. App. 302, 306 (1983). *See also* Section III, above.
- a variance between pleading and proof. State v. Miller, 271 N.C. 646, 654 (1967); State v. Stinson, 263 N.C. 283, 292 (1965); State v. Chamberlain, 232 N.C. App. 246, 251 (2014); State v. Mason, 174 N.C. App. 206, 208 (2005); State v. Wall, 96 N.C. App. 45, 50 (1989).

C. Implied Acquittal.

1. **By Conviction of Lesser Included Offense.** When a defendant, on trial for a greater offense, is convicted only of a lesser included offense, the defendant is impliedly acquitted and may not be retried for the greater offense. Price v. Georgia, 398 U.S. 323, 329 (1970); State v. Marley, 321 N.C. 415, 424 (1988). An implied acquittal by conviction of a lesser offense requires, however, that a jury reached a final verdict; if the jury hangs on a lesser offense, the defendant may be retried for the greater offense. Blueford v. Arkansas, 566 U.S. 599, 610 (2012); State v. Booker, 306 N.C. 302, 305 (1982); State v. Mays, 158 N.C. App. 563, 576 (2003); State v. Edwards, 150 N.C. App. 544, 549 (2002).
2. **State's Election Rule.** North Carolina courts have also recognized an implied acquittal in the "State's election" rule. Under that rule, a prosecutor's decision to seek conviction for only some of the offenses charged or for only lesser included

offenses becomes binding once jeopardy has attached. State v. Courtney, 372 N.C. 458, 475 (2019); State v. Cole, 262 N.C. App. 466, 474 (2018); State v. Bissette, 142 N.C. App. 669, 675 (2001). But a prosecutor's decision to proceed on one theory does not preclude submission to the jury of the same offense under a different theory (assuming both theories are supported by the pleading and by sufficient evidence at trial). State v. Hales, 344 N.C. 419, 423 (1996).

3. **Sentencing.** The imposition of a particular sentence is not generally regarded as an acquittal of a more severe sentence. Monge v. California, 524 U.S. 721, 729 (1998); State v. Adams, 347 N.C. 48, 61 (1997); State v. Marshburn, 173 N.C. App. 749, 752 (2005). *But see* State v. Safrit, 145 N.C. App. 541, 554 (2001) (prior acquittal of violent habitual felon status precluded retrial based on same prior felony convictions). A defendant who has been sentenced to life in a capital proceeding, however, may not be sentenced to death for the same offense in a later proceeding. Bullington v. Missouri, 451 U.S. 430, 438 (1981); State v. Robinson, 375 N.C. 173, 186 (2020).

IX. A Prior Conviction. In general, double jeopardy principles protect against a second prosecution for the same offense after conviction. Brown v. Ohio, 432 U.S. 161, 165 (1977); State v. Sparks, 362 N.C. 181, 186 (2008). This is true whether the conviction was based on a jury verdict, bench trial, or guilty plea. *See* State v. Neas, 278 N.C. 506, 512 (1971) (guilty plea, if accepted, "is the equivalent of a conviction."). In North Carolina, a prayer for judgment continued (PJC) is not a conviction for double jeopardy purposes unless the trial court imposes conditions amounting to punishment. State v. Griffin, 246 N.C. 680, 683 (1957); State v. McDonald, 290 N.C. App. 92, 95 (2023); State v. Popp, 197 N.C. App. 226, 228 (2009); State v. Maye, 104 N.C. App. 437, 439 (1991); cf. G.S. 15A-101(4a). Further, unlike a prior acquittal, a prior conviction is not an absolute bar.

A. Lesser Included Offenses. As noted above, greater and lesser included offenses are treated as the same offense. *See* Section VII, above. Hence, a defendant may not be retried for a greater offense following conviction of a lesser included offense, and vice versa: the sequence is immaterial. Brown v. Ohio, 432 U.S. 161, 168 (1977). An underlying offense (as the felony in felony murder) is considered a lesser included offense, though the greater offense may otherwise be proven without it. Illinois v. Vitale, 447 U.S. 410, 420-21 (1980); State v. Gardner, 315 N.C. 444, 455 (1986).F

B. Subsequent Developments. A defendant may, however, be prosecuted for a greater offense, despite a prior conviction for a lesser included offense, when the State was unable to proceed on the greater charge at the outset because additional facts had not occurred or not been discovered. Garrett v. United States, 471 U.S. 773, 792 (1985). Hence, a defendant, convicted of assault, may be prosecuted for murder if the victim later dies as a result of the assault. State v. Meadows, 272 N.C. 327, 332 (1968); State v. Tripp, 286 N.C. App. 737, 742 (2022); State v. Noffsinger, 286 N.C. App. 729, 734 (2022).

C. Severance. A defendant also may be prosecuted for the same offense following a conviction when the defendant elected to have the two offenses tried separately. Jeffers v. United States, 432 U.S. 137, 152 (1977); State v. Alston, 82 N.C. App. 372, 377 (1986), aff'd, 323 N.C. 614 (1988).

D. Guilty Plea. A defendant may be retried for the same offense if the defendant is charged with both a greater and a lesser included offense and, over the State's objection, pleads guilty to the lesser. Ohio v. Johnson, 467 U.S. 493, 501-02 (1984); State v. Hamrick, 110 N.C. App. 60, 67 (1993).

E. Breach of Plea Agreement. If a defendant breaches a plea agreement pursuant to which the defendant pled guilty to a lesser included offense, there is no bar to prosecuting the greater offense. Ricketts v. Adamson, 483 U.S. 1, 11 (1987); State v. Rico, 218 N.C. App. 109, 122 (2012) (Steelman, J., dissenting in part), *rev'd per curiam based on dissent*, 366 N.C. 327 (2012). A defendant who pled guilty to reduced charges in district court and appeals to superior court for trial de novo – repudiating the plea agreement – may therefore be prosecuted on the original charges. State v. Fox, 34 N.C. App. 576, 579 (1977); cf. G.S. 7A-271(b); G.S. 15A-1431(b).

F. Overturned Conviction. As noted above, retrial for the same offense is not barred by a prior conviction when the defendant succeeds in having a conviction overturned on grounds other than insufficiency of evidence. Price v. Georgia, 398 U.S. 323, 326-27 (1970); Ball v. United States, 163 U.S. 662, 672 (1896): State v. Britt, 291 N.C. 528, 543 (1977); State v. Stafford, 274 N.C. 519, 532 (1968). If, however, a conviction is overturned due to the insufficiency of evidence, the defendant may not be retried. Burks v. United States, 437 U.S. 1, 18 (1978); State v. Mason, 174 N.C. App. 206, 208 (2005); State v. Callahan, 83 N.C. App. 323, 325 (1986). When an appellate court finds insufficient evidence of a greater offense, but the verdict indicates that jury found all the elements of a lesser included offense, the reviewing court may remand for entry of judgment on the lesser included offense. Morris v. Mathews, 475 U.S. 237, 246 (1986); State v. Stokes, 367 N.C. 474, 482 (2014); cf. G.S. 15A-1447(c).

X. A Prior Mistrial. The protection against double jeopardy embraces a defendant's "valued right" to have a trial completed before a particular tribunal. Arizona v. Washington, 434 U.S. 497, 503 (1978); State v. Schalow, 251 N.C. App. 334, 344 (2016). But retrial is not necessarily barred when a prior trial ended before verdict. A mistrial declared at the defendant's request or for manifest necessity will not bar retrial. In any event, whether to grant a mistrial lies within the trial court's discretion. Renico v. Lett, 559 U.S. 766, 774 (2010); State v. Bonney, 329 N.C. 61, 73 (1991).

A. Mistrial Upon Defendant's Request. A motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to retrial, even if the motion is necessitated by prosecutorial or judicial error. United States v. Dinitz, 424 U.S. 600, 607 (1976); State v. White, 322 N.C. 506, 510 (1988); State v. Major, 84 N.C. App. 421, 424 (1987); *cf.* G.S. 15A-1061 (motion for mistrial). Most federal courts hold that a defendant's failure to object constitutes tacit consent even absent a specific request for a mistrial. 6 LaFave, Criminal Procedure § 25.2(a). In noncapital cases, this is also the rule in North Carolina. State v. Odom, 316 N.C. 306, 310 (1986); State v. Resendiz-Merlos, 268 N.C. App. 109, 116 (2019). In a capital case, a defendant's failure to object to a mistrial during the first trial does not constitute consent to retrial. State v. Lachat, 317 N.C. 73, 85 (1986).

A mistrial upon the defendant's request will, however, bar retrial when the request was the result of misconduct by the prosecutor intended to goad the defendant into moving for a mistrial. Oregon v. Kennedy, 456 U.S. 667, 679 (1982);

State v. White, 322 N.C. 506, 511 (1988). Several cases have rejected the argument that the prosecutor was intending to provoke a mistrial:

- The prosecutor's improper question of the defendant ("Isn't it true that on the assault on a female conviction you were originally tried on second degree rape?") was not intended to provoke the defendant into moving for a mistrial where the State's evidence against the defendant was substantial. State v. White, 322 N.C. 506, 512 (1988).
- The State's failure to make pretrial disclosure to the defendant that the murder weapon had been tested for fingerprints was not flagrant prosecutorial misconduct intended to provoke the defendant into moving for a mistrial. State v. Walker, 332 N.C. 520, 539 (1992).
- The prosecutor's improper question of a new defense witness referring obliquely to the defendant's prior trial was not intended to provoke the defendant into moving for a mistrial. State v. Major, 84 N.C. App. 421, 427 (1987).

B. Mistrial Upon Manifest Necessity. When a trial court declares a mistrial sua sponte or over the defendant's objection, retrial is not barred so long as the mistrial was declared based on manifest necessity. Arizona v. Washington, 434 U.S. 497, 505-06 (1978); State v. Odom, 316 N.C. 306, 310 (1986).

1. Hung Jury. "It is axiomatic that a jury's failure to reach a verdict due to a deadlock is a 'manifest necessity' justifying the declaration of a mistrial." State v. Simpson, 303 N.C. 439, 447 (1981). Indeed, a mistrial premised on the trial judge's belief that the jury is unable to reach a verdict is considered the "classic basis for a proper mistrial." Arizona v. Washington, 434 U.S. 497, 509 (1978); *accord* State v. Odom, 316 N.C. 306, 310 (1986). Several North Carolina statutes specifically recognize a trial court's authority to declare a mistrial in these circumstances. *See* G.S. 15A-1063(2) (judge may declare a mistrial if it appears there is no reasonable probability of the jury's agreement upon a verdict); G.S. 15A-1235(d) (no reasonable possibility of agreement).

2. Other Circumstances. Absent jury deadlock, the propriety of declaring a mistrial depends on the circumstances, not on mechanical application of any abstract formula. Illinois v. Somerville, 410 U.S. 458, 462 (1973); State v. Shuler, 293 N.C. 34, 44 (1977). "Each double jeopardy claim must be considered in light of the particular facts of the case; there is no specific limit to the number of times a defendant may be retried" after a proper mistrial. State v. Simpson, 303 N.C. 439, 447 (1981) (citing Gori v. United States, 367 U.S. 364 (1961)). Still, the court's power to declare a mistrial must be exercised with caution and only after careful consideration of all evidence. State v. Crocker, 239 N.C. 446, 452 (1954); State v. Resendiz-Merlos, 268 N.C. App. 109, 118 (2019).

In North Carolina, the necessity justifying an order of mistrial may be one of two kinds: physical necessity or the necessity of doing justice. State v. Shuler, 293 N.C. 34, 44 (1977); State v. Birckhead, 256 N.C. 494, 505-06 (1962).

a. Physical Necessity. Examples of physical necessity include:

- When a judge becomes incapacitated by illness during the trial. State v. Boykin, 255 N.C. 432, 442 (1961); State v. Johnson, 60 N.C. App. 369, 373 (1983); *cf.* G.S. 15A-1224 (judge may declare mistrial if judge is unable to continue presiding at trial due to sickness, etc.).
- When a juror becomes incapacitated by illness. State v. Pfeifer, 266 N.C. 790, 791 (1966); State v. Ledbetter, 4 N.C. App. 303, 308 (1969); *cf.* State v. Mathis, 258 N.C. App. 651, 659 (2018) (impending absence of one juror

and judge's lack of confidence in an alternate).
- When a defendant becomes incapacitated by illness. State v. Battle, 267 N.C. 513, 518 (1966) (illness of defense attorney).
- When a material witness becomes incapacitated by illness. *See* State v. Birckhead, 256 N.C. 494, 506 (1962) (stating general proposition but without specific example).
- When the courthouse becomes inaccessible due to adverse weather conditions. *See* State v. Shoff, 128 N.C. App. 432, 434 (1998) (three to six inches of snow and several jurors unable to get to courthouse); State v. Raynor, 45 N.C. App. 181, 186 (1980) (five inches of snow previously and two to three more inches of snow expected, one juror ill with the flu).

b. Necessity of Doing Justice. The necessity of doing justice arises from a judge's duty to guard the administration of justice from fraudulent practices, particularly incidents that would render impossible a fair and impartial trial under the law. State v. Sanders, 347 N.C. 587, 599 (1998). Examples of a mistrial supported by the necessity of doing justice include:
- When, during a capital sentencing proceeding, jurors indicated they were not deliberating as instructed, one juror was threatened and berated by other jurors, and one juror admitted to discussing the case with outside parties, a mistrial was justified based on juror misconduct. State v. Sanders, 347 N.C. 587, 599 (1998).
- When, during a weekend recess of the defendant's capital trial, one juror was observed traveling to a rendezvous with the defendant, there was evidence of jury tampering to justify a mistrial. State v. Cutshall, 278 N.C. 334, 346 (1971).
- When the judge observed an improper conversation between jurors and the chief investigating officer and the charges against the defendant involved alleged assaults on police officers, mistrial was warranted to preserve the impartiality of the jury and credibility of the verdict. State v. Montalbano, 73 N.C. App. 259, 263 (1985).
- When one of the defendant's attorneys was called to testify for the State and the testimony was prejudicial to the defendant, the attorney's conduct prejudiced a fair consideration of the issues warranting a mistrial. State v. Malone, 65 N.C. App. 782, 786 (1984).
- When an investigation ordered by the presiding judge revealed that someone was paying jurors to vote for the defendant's acquittal, there was evidence of jury tampering to justify a mistrial. State v. Cooley, 47 N.C. App. 376, 388 (1980); *cf.* G.S. 15A-1062 (authorizing mistrial for misconduct by the defendant resulting in prejudice to the State case).

C. Mistrial Absent Manifest Necessity. The strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence. Arizona v. Washington, 434 U.S. 497, 508 (1978); State v. Grays, 276 N.C. App. 21, 30 (2021). There was no manifest necessity for a mistrial in the following cases:
- When the prosecutor learned about additional evidence (the defendant's bloody clothes) only after the first witness had testified at trial, the evidence had not been disclosed to the defendant prior to trial, and the prosecutor requested a mistrial to allow time for the State Bureau of Investigation to conduct a forensic examination of the evidence, a mistrial granted over the defendant's objection was without manifest necessity. State v. Grays, 276 N.C. App. 21, 34 (2021).

- When State's witnesses – the indecent liberties victim, her mother, and her sister – failed to appear at trial and could not be located, and the prosecutor requested a mistrial because the absence of necessary witnesses made it impossible for the trial to proceed in conformity with law, a mistrial declared over the defendant's objection was without manifest necessity. State v. Resendiz-Merlos, 268 N.C. App. 109, 120 (2019).
- When the State's key witness – the "mildly retarded" victim of second-degree sexual offense who was also the defendant's step-daughter – was called to the stand and refused to respond to questioning, and the prosecutor moved for a mistrial based on unspecified "misconduct," a mistrial declared over the defendant's objection was without manifest necessity. State v. Chriscoe, 87 N.C. App. 404, 408 (1987).
- When an attempted murder indictment failed to allege malice, and the State requested a mistrial to obtain a valid indictment for attempted murder, the indictment was sufficient to allege attempted manslaughter, and a mistrial declared over the defendant's objection was without manifest necessity. State v. Schalow, 251 N.C. App. 334, 351 (2016).

D. Findings of Fact. The Fifth Amendment does not require a judge to make explicit findings justifying a mistrial when the basis appears on the record. Arizona v. Washington, 434 U.S. 497, 517 (1978); State v. Odom, 316 N.C. 306, 310 (1986). By statute, however, before granting a mistrial, the judge must make findings of fact on the record with respect to the grounds for the mistrial. G.S. 15A-1064. The statutory requirement for making of findings of fact is mandatory, and the failure to make such findings would be error. State v. Odom, 316 N.C. 306, 311 (1986).

XI. Multiple Punishment.

The Double Jeopardy Clause protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Sparks, 362 N.C. 181, 186 (2008). For purposes of cumulative punishment, it is necessary to distinguish between single-prosecution and successive-prosecution situations. *See* State v. Gardner, 315 N.C. 444, 451 (1986).

A. Single Proceeding.

1. Legislative Intent. In the single proceeding context, the protection against cumulative punishments is designed to ensure the courts' sentencing discretion is confined to the limits established by the legislature; hence, the question whether punishments are multiple is essentially one of legislative intent. Ohio v. Johnson, 467 U.S. 493, 499 (1984); State v. Banks, 367 N.C. 652, 655 (2014). There is generally no bar to sentencing a defendant for multiple offenses if each requires proof of a fact that the others do not. State v. Etheridge, 319 N.C. 34, 50 (1987). Hence, a defendant may be sentenced for both:

- Second-degree rape and statutory rape, State v. Banks, 367 N.C. 652, 659 (2014).
- Attempted murder and felony assault, State v. Tirado, 358 N.C. 551, 579 (2004).
- Insurance fraud and false pretenses, State v. Ray, 274 N.C. App. 240, 245 (2020).
- Obstruction of justice and accessory after the fact to murder, State v. Cousin, 233 N.C. App. 523, 537 (2014).

By contrast, a defendant generally may not be sentenced for both a greater and a lesser included offense. *See* State v. Hernandez, 293 N.C. App. 283, 302

(2024) (first-degree kidnapping and underlying sexual offense); State v. Harper, 291 N.C. App. 246, 251 (2023) (impaired driving and felony serious injury by vehicle); State v. Mulder, 233 N.C. App. 82, 94 (2014) (felony fleeing to elude and underlying speeding). Courts thus apply the Blockburger test described above. *See* Section VII, above.

In this context, however, the Blockburger test is merely a rule of statutory construction. Missouri v. Hunter, 459 U.S. 359, 366 (1983); State v. Gardner, 315 N.C. 444, 455 (1986). "Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." Whalen v. United States, 445 U.S. 684, 692 (1980); *accord* State v. Baldwin, 240 N.C. App. 413, 424 (2015). When such a contrary legislative intent appears, a defendant may receive cumulative punishments for the same offense without violating double jeopardy protections. State v. Fernandez, 346 N.C. 1, 19 (1997); State v. Elliott, 344 N.C. 242, 277 (1996). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366 (1983); *accord* State v. Gardner, 315 N.C. 444, 453 (1986).

2. **Kidnapping.** Some North Carolina cases cite double jeopardy in support of the rule that kidnapping requires evidence of restraint beyond that inherent in another felony to warrant a conviction for both. *E.g.*, State v. Fulcher, 294 N.C. 503, 523 (1978); State v. Andrews, 294 N.C. App. 590, 593 (2024). The rule is better explained as based on legislative intent in defining the offense of kidnapping. *See* State v. Beatty, 347 N.C. 555, 558 (1998).
3. **Arrest of Judgment.** The consolidation of multiple convictions does not alleviate double jeopardy concerns because separate convictions may still give rise to collateral consequences. State v. Etheridge, 319 N.C. 34, 50 (1987); State v. Cromartie, 257 N.C. App. 790, 797 (2018). When a defendant is convicted of several offenses and cumulative punishment is not authorized by statute, a court may arrest judgment on some of the convictions. *See* State v. China, 370 N.C. 627, 637 (2018); State v. Hernandez, 293 N.C. App. 283, 302 (2024). In that case, the guilty verdicts remain on the docket and judgment may be entered if the other conviction is later reversed on appeal. State v. Pakulski, 326 N.C. 434, 439-40 (1990).

B. Successive Proceedings.

1. **Credit.** As noted above, a defendant who succeeds in having a conviction overturned may be retried. *See* Section IX, above. If the defendant is convicted upon retrial, however, the protection against multiple punishment requires that credit be given for any sentence already served. North Carolina v. Pearce, 395 U.S. 711, 719-20 (1969); State v. Jones, 294 N.C. 642, 655 (1978).
2. **Sentence Enhancement.** A sentence enhancement based on prior convictions is not viewed as an additional penalty for prior conduct but as a stiffened penalty for the latest crime. Monge v. California, 524 U.S. 721, 728 (1998); State v. Marshburn, 173 N.C. App. 749, 752 (2005). Hence, the prohibition on double jeopardy is not violated by:
   - Sentencing a defendant as an habitual felon. State v. Todd, 313 N.C. 110, 117 (1985).

- Using the same prior felony conviction to support a conviction for possession of a firearm by a felony and habitual felon status. State v. Williams, 191 N.C. App. 96, 106 (2008).
- Sentencing a defendant for habitual impaired driving. State v. Bradley, 181 N.C. App. 557, 560 (2007).
- Sentencing a defendant for habitual misdemeanor assault. State v. Artis, 181 N.C. App. 601, 604 (2007).

The same prior convictions used to enhance one sentence may be used again to enhance another. State v. Creason, 123 N.C. App. 495, 501 (1996), aff'd per curiam, 346 N.C. 165 (1997); State v. Smith, 112 N.C. App. 512, 517 (1993).

3. Civil Penalties. In addition, a defendant may be subjected to civil penalties based on the same conduct that gave rise to criminal prosecution. The analysis of whether a penalty is properly deemed civil, and hence outside of double jeopardy protection, mirrors that applicable to civil sanctions imposed prior to criminal prosecution. *See* Section IV, above. The following penalties have been found not to constitute additional criminal punishment:

- Satellite-based monitoring; G.S. 14-208.40A; State v. Wagoner, 199 N.C. App. 321, 332 (2009), *aff'd per curiam*, 364 N.C. 422 (2010).
- Permanent no contact order for convicted sex offender; G.S. 15A-1340.50; State v. Hunt, 221 N.C. App. 48, 63 (2012).
- Civil commitment of sex offenders; Seling v. Young, 531 U.S. 250, 267 (2001); Kansas v. Hendricks, 521 U.S. 346, 369 (1997).
- Civil action of abatement and forfeiture of proceeds; G.S. 19-2.1; State v. Arellano, 165 N.C. App. 609, 616–17 (2004).
- Driver's license revocation for willful refusal of chemical test; G.S. 20-16.2; Ferguson v. Killens, 129 N.C. App. 131, 140 (1998).
- In rem forfeiture of property. United States v. Ursery, 518 U.S. 346, 369 (1997).

XII. Collateral Estoppel. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970); *accord* State v. Adams, 347 N.C. 48, 61 (1997); State v. Brooks, 337 N.C. 132, 147 (1994).

A. As Bar to Prosecution. The doctrine of collateral estoppel (i.e., issue preclusion) is embodied in the Fifth Amendment guarantee against double jeopardy. Schiro v. Farley, 510 U.S. 222, 232 (1994); State v. McKenzie, 292 N.C. 170, 174 (1977); State v. Davis, 106 N.C. App. 596, 600 (1992). Hence, an acquittal bars not only a later trial for the same offense, but also a later trial for a different offense, if the later trial requires relitigation of factual issues already resolved in the defendant's favor in the prior trial. Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977). "Subsequent prosecution is barred," however, "only if the jury could not rationally have based its verdict on an issue other than the one the defendant seeks to foreclose." State v. Edwards, 310 N.C. 142, 145 (1984); *accord* State v. Jones, 256 N.C. App. 266, 274 (2017).

It is often difficult to determine on a general verdict whether the issue in question was necessarily decided in the defendant's favor. State v. McKenzie, 292 N.C. 170, 175 (1977). The determination requires an examination of the entire record of the prior proceeding, including the pleadings, evidence, charge, and other relevant matter. Schiro v. Farley, 510 U.S. 222, 236 (1994); State v. McKenzie, 292 N.C. 170, 174-75 (1977); State v. Tew, 149 N.C. App. 456, 460 (2002). The determinative

factor is not the introduction of the same evidence, but rather whether it is absolutely necessary to a conviction in the second proceeding that the second jury find against the defendant on an issue upon which the first jury found in the defendant's favor. State v. Edwards, 310 N.C. 142, 145 (1984); State v. Alston, 323 N.C. 614, 617 (1988). The defendant has the burden of establishing that the issue sought to be foreclosed was actually decided in the prior proceeding. State v. Carter, 357 N.C. 345, 355 (2003); State v. Spargo, 187 N.C. App. 115, 119 (2007).

1. **Identity of Parties and Issues.** Collateral estoppel requires both (1) an identity of parties and (2) an identity of issues. State v. O'Rourke, 114 N.C. App. 435, 439 (1994). With regard to the parties, there either must be an identity of parties or the party against whom the defense is asserted must have been in privity with a party in the prior proceeding. State v. Brooks, 337 N.C. 132, 147 (1994). In general, privity involves a person so identified in interest with another that the person represents the same legal right, and courts will look beyond the nominal party to the real party or parties in interest. State v. Summers, 351 N.C. 620, 623 (2000).

   With regard to the issues, the North Carolina Supreme Court has recognized a four-factor test:

   (1) the issues must be the same as those involved in the prior action,
   (2) the issues must have been raised and actually litigated in the prior action,
   (3) the issues must have been material and relevant to the disposition of the prior action, and
   (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment. State v. Summers, 351 N.C. 620, 623 (2000); State v. Spargo, 187 N.C. App. 115, 120 (2007).

   When the issues are not identical, subsequent prosecution is not barred. Hence, retrial was permitted in the following circumstances:

   - Prior acquittal for possession of a firearm by a felon did not preclude later trial on armed robbery, State v. Alston, 323 N.C. 614, 616 (1988).
   - Prior conviction for manslaughter did not preclude later trial on burglary, State v. Warren, 313 N.C. 254, 264 (1985).
   - Prior acquittal of false pretenses did not preclude later trial for false pretenses occurring at a different time, State v. Spargo, 187 N.C. App. 115, 122 (2007).
   - Prior acquittal for assault on a government official did not preclude later trial for resist, delay, or obstruct, State v. Newman, 186 N.C. App. 382, 389 (2007).
   - Prior acquittal for attempted murder did not preclude later trial on assault with intent to kill. State v. Tew, 149 N.C. App. 456, 461 (2002).
   - Prior acquittal of armed robbery did not preclude later trial on accessory after the fact, State v. Cox, 37 N.C. App. 356, 360 (1978).

2. **Codification.** By statute, a defendant upon motion is entitled to a dismissal of charges if the trial court determines that "[a]n issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties." G.S. 15A-954(a)(7). This is a codification of the common law principle of collateral estoppel as applied in criminal cases. State v. Spargo, 187 N.C. App. 115, 119 (2007).
3. **Limitations.** "[T]he doctrine of collateral estoppel applies only to an issue of ultimate fact determined by a final judgment." State v. Macon, 227 N.C. App. 152, 157 (2013). Hence, after a mistrial, the judge is not bound by prior evidentiary rulings. State v. Knight, 245 N.C. App. 532, 539 (2016), aff'd as modified, 369

N.C. 640 (2017); State v. Macon, 227 N.C. App. 152, 158-59 (2013); State v. Harris, 198 N.C. App. 371, 377 (2009). Absent a mistrial, at least one case has found no error in the trial court's denying a defendant's second motion to suppress based on collateral estoppel. State v. Williams, 252 N.C. App. 231, 236 (2017).

Failure to return a verdict does not have collateral estoppel effect unless the record establishes that the issue was actually and necessarily decided in the defendant's favor. Schiro v. Farley, 510 U.S. 222, 236 (1994); State v. Allen, 360 N.C. 297, 313 (2006); State v. Herndon, 177 N.C. App. 353, 364 (2006). Further, collateral estoppel does not apply when the defendant, rather than the prosecution, is responsible for related charges not being tried together in a single trial. Currier v. Virginia, 585 U.S. 493, 501 (2018); Ohio v. Johnson, 467 U.S. 493, 500 n.9 (1984).

B. As Exclusionary Rule. When collateral estoppel does not bar retrial, it also does not require an exclusion of evidence. Dowling v. United States, 493 U.S. 342, 348 (1990); State v. Agee, 326 N.C. 542, 551 (1990); State v. Lippard, 223 N.C. 167, 170 (1943). Stated differently, evidence is inadmissible under the Double Jeopardy Clause only when it falls within the scope of the collateral estoppel doctrine. State v. Bell, 164 N.C. App. 83, 89 (2004). Accordingly, a prior determination that the defendant did not willfully refuse to submit to a breath test precluded relitigation of the issue in a subsequent trial for impaired driving. State v. Summers, 351 N.C. 620, 626 (2000). A prior acquittal will not, however, bar the admission of evidence of the underlying conduct when the evidence is introduced at a later trial in order to establish the context or chain of circumstances of a different offense. State v. Agee, 326 N.C. 542, 551-52 (1990); State v. Jones, 256 N.C. App. 266, 274 (2017); State v. Solomon, 117 N.C. App. 701, 706 (1995); *see* also Joseph L. Hyde, When is Double Jeopardy a Rule of Evidence?, N. C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 11, 2025).

C. Offensive Collateral Estoppel. The United States Supreme Court has not directly addressed the use of collateral estoppel by the prosecution. *Cf.* United States v. Dixon, 509 U.S. 688 n.15 (1993) (noting in dicta that "a conviction in the first prosecution would not excuse the Government from proving the same facts the second time"). But several North Carolina cases have allowed the State to preclude relitigation in a later trial of an issue previously decided in the State's favor. *See e.g.*, State v. Cornelius, 219 N.C. App. 329, 338 (2012) (no error in instruction that defendant had already been convicted of underlying felony); State v. Dial, 122 N.C. App. 298, 306 (1996) (no error in accepting prior finding of territorial jurisdiction).

XIII. Separate Sovereigns. Under the dual sovereignty doctrine, a defendant may be prosecuted for the same offense by both federal and state authorities, by two different states, or by state and tribal authorities without violating constitutional prohibitions on double jeopardy. *See* Gamble v. United States, 587 U.S. 678, 681 (2019); Heath v. Alabama, 474 U.S. 82, 88 (1985); State v. Myers, 82 N.C. App. 299, 299-300 (1986). As a result, state prosecutors are not bound by a defendant's plea agreement with federal prosecutors. State v. Midgett, 78 N.C. App. 387, 389 (1985). For the same reason, a defendant is not entitled to credit against a state sentence for time spent in federal custody. State v. Lewis, 231 N.C. App. 438, 445 (2013). Similarly, collateral estoppel does not apply where separate sovereigns are involved. State v. Brooks, 337 N.C. 132, 146 (1994).

As noted above, however, several statutes provide greater protection than is required by the Fifth Amendment. *See* Section II, above. In particular, if an offense occurred in part within and in part outside North Carolina, a person charged with that offense "may be tried in this State if he has not been placed in jeopardy for the identical offense in another state." G.S. 15A-134; State v. Christian, 288 N.C. App. 50, 52 (2023). And for drug offenses (i.e., violations of G.S. Chapter 90, Article 5), "a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this State." G.S. 90-97; State v. Brunson, 165 N.C. App. 667, 671 (2004).

XIV. Joinder.

A. Application. By statute, two or more offenses may be joined for trial when the offenses are based on the same act or transaction. G.S. 15A-926(a); State v. Moses, 350 N.C. 741, 750 (1999). When a defendant is charged with joinable offenses, the defendant's motion for joinder must be granted unless the court finds that the ends of justice will be defeated if the motion is granted. G.S. 15A-926(c)(1). A defendant who has been tried for one offense may thereafter move to dismiss a joinable offense. The motion must be made prior to the second trial and must be granted unless

"a. A motion for joinder of these offenses was previously denied, or

"b. The court finds that the right of joinder has been waived, or

"c. The court finds that because the prosecutor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted." G.S. 15A-926(c)(2).

B. Limitations. The right to joinder is inapplicable if the defendant pled guilty to the previous charge. G.S. 15A-926(c)(3). In addition, a defendant is not entitled to dismissal for failure to join offenses if the defendant had not been indicted on the additional charges at the time of the first trial, State v. Furr, 292 N.C. 711, 724 (1977), unless the defendant can show that the prosecution withheld additional charges solely to circumvent joinder requirements. State v. Schalow, 379 N.C. 639, 651 (2021); State v. Warren, 313 N.C. 254, 260 (1985). The North Carolina Supreme Court has recognized two circumstances that would support but not compel a determination that the prosecutor withheld charges to circumvent joinder requirements:

(1) A showing that during the first trial the prosecutor was aware of substantial evidence that the defendant had committed the crimes for which the defendant was later indicted; and

(2) A showing that the State's evidence at the second trial would be the same as the evidence presented at the first. State v. Warren, 313 N.C. 254, 260 (1985); *see also* State v. Tew, 149 N.C. App. 456, 460 (2002).

In assessing a claim that the prosecution withheld additional charges to circumvent the statute, "the court must assess the justification offered by the State and determine if legitimate prosecutorial reasons supported the conduct." State v. Schalow, 379 N.C. 639, 652 (2021).