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Double Jeopardy in North Carolina

Joseph L. Hyde

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Joseph L. Hyde is a School of Government faculty member who specializes in criminal law and procedure.

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.[1] "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 . . . ."[2]

II. Sources

A. Common Law

"[T]here can be no doubt that the protection against double jeopardy possesses a long history."[3] The United States Supreme Court has noted that the guarantee dates from Greek and Roman times.[4] And it was "established in the common law of England long before this Nation's independence."[5] 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."[6] As William Blackstone explained in his monumental treatise, the plea of *autrefoits acquit* "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence."[7]

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."[8]

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1. David S. Rudstein, Double Jeopardy: A Reference Guide to the United States Constitution 38 (2004).

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

3. Rudstein, *supra* note 1, at 1. Indeed, the principle is fundamental to any functioning legal system. *See* George C. Thomas III, Double Jeopardy: The History, The Law 1 (1998) ("No legal system can survive without some bar against relitigating the same issue over and over."); *cf.* Owen v. Needham, 160 N.C. 381, 384 (1912) ("the whole administration of the law as a system").

4. 6 Wayne R. LaFave et al., Criminal Procedure § 25.1(b) (4th ed. 2015). One scholar traces the protection to the Code of Hammurabi. *See* Thomas, *supra* note 3, at 1 (1998). *But see* Rudstein, *supra* note 1, at 1 ("The Code of Hammurabi . . . makes no reference to double jeopardy.").

5. Benton v. Maryland, 395 U.S. 784, 795 (1969).

6. Rudstein, *supra* note 1, at 4; *cf. id.* at 9–11.

7. 4 William Blackstone, Commentaries on the Laws of England *335; *cf.* State v. Birmingham, 44 N.C. 120, 121 (1852) (citing Blackstone for "the principle of the common law").

8. State v. Allen, 16 N.C. App. 159, 161 (1972); *accord* State v. Brunson, 327 N.C. 244, 247 (1990) ("[t]wo bases").

1. Federal Constitution

"The Fifth Amendment guarantee against double jeopardy derived from English common law . . . ."[9] The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[10] Until the second half of the twentieth century, the United States Supreme Court held that this guarantee against double jeopardy (like other provisions of the Bill of Rights) applied only to the federal government (i.e., not to the states).[11] In *Benton v. Maryland* (1969), however, the Supreme Court reversed course and held that the Due Process Clause of the Fourteenth Amendment incorporates the double jeopardy provision of the Fifth Amendment, making the protection applicable to the states.[12] The "persons" protected by the Double Jeopardy Clause include corporations.[13] Further, despite its reference to "life or limb," the constitutional guarantee extends to all criminal offenses, including misdemeanors.[14]

2. State Constitution

The North Carolina constitution has no double jeopardy clause.[15] The Fundamental Constitutions of Carolina (1669), drafted by John Locke but never entirely implemented, provided that "[n]o cause shall be twice tried in any one court, upon any reason or pretense whatsoever."[16] Since 1776, the state constitution has prohibited depriving any person of life, liberty, or property but "by the law of the land."[17] These words mean "according to the course of the common law."[18]

North Carolina courts found protection against double jeopardy in the common law long before the rule found a home in the state constitution.[19] As a result, the North Carolina Supreme Court could maintain that the United States Supreme Court's decision in *Benton v. Maryland* (1969), applying the double jeopardy provision of the Fifth Amendment to the states, "added

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9. Crist v. Bretz, 437 U.S. 28, 33 (1978); *cf.* United States v. DiFrancesco, 449 U.S. 117, 134 (1980) ("[O]ur Double Jeopardy Clause was drafted with the common-law protections in mind.").

10. U.S. Const. amend. v. "The word 'limb' having reference to the barbarous punishment, which has now become obsolete, of striking off the hand." State v. Humbles, 241 N.C. 47, 49 (1954) (citing Coke Litt., 227; 3 Inst. 110).

11. *See* Brock v. North Carolina, 344 U.S. 424, 426 (1953); Palko v. Connecticut, 302 U.S. 319, 323 (1937).

12. Benton v. Maryland, 395 U.S. 784, 794 (1969).

13. *See* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Fong Foo v. United States, 369 U.S. 141 (1962).

14. Breed v. Jones, 421 U.S. 519, 528 (1975); *Ex parte* Lange, 85 U.S. 163, 173 (1873).

15. State v. Rambert, 341 N.C. 173, 175 n.1 (1995) (state constitution "does not have a Double Jeopardy Clause"); *cf.* State v. Brunson, 327 N.C. 244, 247 (1990) (state constitution "does not specifically recognize former jeopardy"); State v. Crocker, 239 N.C. 446, 449 (1954) ("[T]he principle is not stated in express terms.").

16. Rudstein, *supra* note 1, at 12; *cf.* Hugh Talmage Lefler & Albert Ray Newsome, North Carolina: The History of a Southern State 39–40 (3d ed. 1973).

17. N.C. Const. of 1776, Declaration of Rights, § 12; N.C. Const. of 1868, art. I, § 17; N.C. Const. of 1971, art. I, § 19; *cf.* State v. Robinson, 375 N.C. 173, 183–84 (2020) ("every version of the North Carolina Constitution").

18. State v. Anonymous, 2 N.C. 28, 33 (1794); *cf.* John v. Orth & Paul Martin Newby, The North Carolina State Constitution 69–70 (2d ed. 2013).

19. *Compare* State v. Mansfield, 207 N.C. 233, 236 (1934) (citing N.C. Const. art. I, § 17), *with* State v. Prince, 63 N.C. 529, 531 (1869) ("a sacred principle of the common law"). *See In re* Spier, 12 N.C. 491, 501 (1828) (Taylor, C.J.) ("[I]t would seem strange that a familiar maxim of the common law, admitted for ages, without denial or controversy, should require a solemn constitutional sanction for the more effectual protection of the citizens.").

nothing to our law."[20] Since the mid-twentieth century, the North Carolina Supreme Court "has interpreted the language of the law of the land clause of our state Constitution as guaranteeing the common law doctrine of former jeopardy."[21] The principle is now regarded as "an integral part of the Law of the Land clause."[22] The state constitutional protection against double jeopardy is no broader than that afforded by the federal constitution.[23]

C. Statute

Several state statutes codify double jeopardy protections. By statute, a defendant is entitled to dismissal upon a determination that the defendant was previously placed in jeopardy for the same offense.[24] Further, when the State takes a voluntary dismissal, the clerk is required to note whether a jury has been impaneled or evidence introduced, the usual benchmarks for the attachment of jeopardy.[25]

Similarly, a defendant is statutorily entitled to dismissal upon a determination that an issue of fact or law essential to a successful prosecution was previously adjudicated in the defendant's favor in a prior action.[26] And under our joinder statutes, a defendant already prosecuted for one offense may be entitled to dismissal of a charge that could have been joined with the previously tried offense.[27]

As for multiple punishments, many statutes include such language as "unless the conduct is covered under some other provision of law providing greater punishment."[28] Such language has generally been held to preclude cumulative punishment for both the greater and lesser offense.[29]

The Double Jeopardy Clause of the Fifth Amendment does not bar reprosecution for the same offense by separate sovereigns.[30] By statute, however, retrial may be barred, as when for a multistate offense the defendant was placed in jeopardy for the same offense in another state,[31] or when the defendant was convicted or acquitted of the same drug offense in another jurisdiction.[32]

Finally, the State's right to appeal is restricted to cases not implicating double jeopardy.[33]

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20. State v. Battle, 279 N.C. 484, 486 (1971).

21. State v. Brunson, 327 N.C. 244, 247 (1990); *see also* State v. Courtney, 372 N.C. 458, 462 (2019); State v. Sanderson, 346 N.C. 669, 676 (1997); State v. Oliver, 343 N.C. 202, 205 (1996).

22. *Robinson*, 375 N.C. at 183; *accord* State v. Crocker, 239 N.C. 446, 449 (1954).

23. *Brunson*, 327 N.C. at 249; State v. Gilbert, 139 N.C. App. 657, 666 (2000); *but see Courtney*, 372 N.C. 458, 471 (arguably recognizing greater protection under state law, as discussed *infra*).

24. Chapter 15A, Section 954(a)(5) of the North Carolina General Statutes [hereinafter G.S.]; *cf.* State v. Lambert, 53 N.C. App. 799, 801 (1981).

25. G.S. 15A-931(a); *see also* Section V, *infra*.

26. G.S. 15A-954(a)(7); *see also* Section XII, *infra*.

27. G.S. 15A-926(c)(2); State v. Schalow, 379 N.C. 639, 654 (2021); *see also* Section XIV, *infra*.

28. *E.g.*, G.S. 14-32.4 (assault inflicting serious bodily injury); G.S. 14-33(b) (misdemeanor assault); G.S. 14-62 (burning certain buildings); G.S. 14-72.8 (felony larceny of motor vehicle parts); G.S. 14-132 (disorderly conduct); G.S. 14-202.4 (indecent liberties).

29. *E.g.*, State v. Fields, 374 N.C. 629, 634 (2020); State v. Davis, 364 N.C. 297, 304 (2010); State v. Baldwin, 240 N.C. App. 413, 425 (2015). *But see* State v. Coria, 131 N.C. App. 449, 456 (1998).

30. Gamble v. United States, 587 U.S. 678, 681 (2019); *see also* Section XIII, *infra*.

31. G.S. 15A-134; *cf.* State v. Christian, 288 N.C. App. 50, 52 (2023).

32. G.S. 90-97; *cf.* State v. Brunson, 165 N.C. App. 667, 671 (2004).

33. G.S. 15A-1432(a) (appeal to the superior court); G.S. 15A-1445(a) (appeal to the appellate division).

III. Jurisdiction

At common law, jurisdiction to try a defendant for a criminal offense depended on a facially valid charging instrument.[34] If the pleading was defective, the trial court lacked jurisdiction.[35] In *State v. Singleton* (2024), the North Carolina Supreme Court abandoned the common law rule, adopting the federal court's definition of jurisdiction: the courts' statutory or constitutional power to adjudicate the case.[36] Both conceptions of jurisdiction have double jeopardy consequences.

If jurisdiction depends upon a valid indictment, jeopardy also requires a valid indictment.[37] Stated differently, a defective pleading creates no prior jeopardy, so a defendant may be retried for the same offense upon a proper pleading.[38] This is true both for a trial terminated before verdict and for a prior conviction.[39] As a matter of due process, the rule is different for a prior acquittal.[40]

If jurisdiction depends on the institutional power of the court (as opposed to the pleading), still jeopardy tracks jurisdiction. When a defendant is tried before a court of limited jurisdiction, jeopardy incident to the trial does not extend beyond the jurisdiction of the court.[41] It follows that conviction of a minor offense in an inferior court does not bar prosecution for a higher crime, embracing the former, where the inferior court did not have jurisdiction of the higher crime.[42] This rule is mentioned more often than applied, however, and some scholars have doubted its validity.[43]

IV. Proceedings That Trigger Double Jeopardy Protection

A. Criminal Proceedings

"[J]eopardy describes the risk that is traditionally associated with a criminal prosecution."[44] Despite the language of the Fifth Amendment ("life or limb"), the protection extends to offenses punishable by fine or imprisonment, including misdemeanors.[45] The only criminal prosecutions that might not implicate double jeopardy are summary proceedings for direct criminal contempt.[46]

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34. State v. Willis, 285 N.C. 195, 201 (1974) ("by valid information, warrant, or indictment").

35. *E.g.*, State v. Corey, 373 N.C. 225, 233 (2019) (valid bill of indictment is essential to trial court's jurisdiction).

36. State v. Singleton, 386 N.C. 183, 197 (2024) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)).

37. State v. Cooke, 248 N.C. 485, 488 (1958); State v. Cofield, 247 N.C. 185, 188 (1957).

38. State v. Jernigan, 255 N.C. 732, 736 (1961); State v. Coleman, 253 N.C. 799, 801 (1961); State v. Banks, 247 N.C. 745, 748 (1958); State v. Helms, 247 N.C. 740, 745 (1958); State v. Strickland, 246 N.C. 120, 120 (1957); State v. Coppedge, 244 N.C. 590, 591 (1956); State v. Bond, 21 N.C. App. 434, 435 (1974).

39. Illinois v. Somerville, 410 U.S. 458, 469 (1973); State v. Pakulski, 326 N.C. 434, 439 (1990).

40. Ball v. United States, 163 U.S. 662 (1896); *cf.* Jeff Welty, *Pleading Defects and Double Jeopardy*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Sept. 10, 2015), https://nccriminallaw.sog.unc.edu/pleading-defects-and-double-jeopardy/.

41. Diaz v. United States, 223 U.S. 442, 449 (1912); Grafton v. United States, 206 U.S. 333, 345 (1907).

42. State v. Hill, 287 N.C. 207, 215 (1975); State v. Birckhead, 256 N.C. 494, 498 (1962); State v. Midgett, 214 N.C. 107, 110 (1938).

43. *See* State v. Urban, 31 N.C. App. 531, 536 (1976) (finding no North Carolina precedent applying rule); Anne Bowen Poulin, *Double Jeopardy:* Grady *and* Dowling *Stir the Muddy Waters*, 43 Rutgers L. Rev. 889, 922–23 (1991).

44. Breed v. Jones, 421 U.S. 519, 528 (1975).

45. Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994); *Ex parte* Lange, 85 U.S. 163, 173 (1873).

46. *See* Rudstein, *supra* note 1, at 44–45; *cf.* United States v. Dixon, 509 U.S. 688, 696 (1993) (nonsummary contempt); State v. Robertson, 161 N.C. App. 288, 294 (2003) (different conduct).

B. Civil Proceedings

Juvenile delinquency adjudications, ostensibly civil, are deemed criminal for purposes of double jeopardy.[47] Otherwise, the Double Jeopardy Clause does not apply in civil actions[48] or to civil sanctions.[49] 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;[50]
- immediate driver's license revocation for persons charged with implied consent offenses;[51]
- one-year disqualification of a commercial driver's license;[52]
- pretrial detention of defendants charged with crimes of domestic violence;[53]
- Alcoholic Beverage Control Commission administrative action;[54]
- assessment of drug tax by the N.C. Department of Revenue;[55] and
- monetary penalties and occupational debarment for violating federal banking statutes.[56]

C. Revocation Proceedings

Proceedings to revoke probation, parole, or supervised release are not criminal prosecutions.[57] Incarceration of a defendant upon revocation of probation, parole, or supervised release is said to stem from the original judgment.[58] Hence, there is no double jeopardy bar to prosecuting a defendant later for the same conduct that gave rise to the revocation.[59]

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47. *Breed*, 421 U.S. at 531; *In re* Vinson, 298 N.C. 640, 650 (1979); *In re* O'Neal, 160 N.C. App. 409, 412 (2003); *In re* Phillips, 128 N.C. App. 732, 734 (1998).

48. United States v. Halper, 490 U.S. 435, 450 (1989) (double jeopardy protections "not triggered by litigation between private parties"); *see also* Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 272 (1989).

49. Hudson v. United States, 522 U.S. 93, 99 (1997); Helvering v. Mitchell, 303 U.S. 391, 399 (1938). In determining whether a penalty is criminal or civil, a court asks two questions: (1) whether the legislature intended to create civil or criminal penalty, and (2) whether the statutory scheme is so punitive in purpose or effect as to transform the civil remedy into a criminal penalty. *See Hudson*, 522 U.S. at 99; State v. Arellano, 165 N.C. App. 609, 612 (2004).

50. G.S. 1-538.2; State v. Beckham, 148 N.C. App. 282, 288–89 (2002).

51. G.S. 20-16.5; State v. Oliver, 343 N.C. 202, 210 (1996); State v. Hinchman, 192 N.C. App. 657, 666 (2008); State v. Evans, 145 N.C. App. 324 (2001); State v. Pyatt, 125 N.C. App. 147, 151 (1997).

52. G.S. 20-17.4; State v. McKenzie, 225 N.C. App. 208, *rev'd based on dissent*, 367 N.C. 112 (2013); State v. Reid, 148 N.C. App. 548, 554 (2002).

53. G.S. 15A-534.1(b); State v. Thompson, 349 N.C. 483, 496 (1998) (characterizing the detention as "regulatory"); *cf.* State v. Jarman, 140 N.C. App. 198, 207 (2000) (pretrial house arrest and electronic monitoring).

54. G.S. 18B-302; State v. Wilson, 127 N.C. App. 129 (1997).

55. G.S. 105-113.107; State v. Crenshaw, 144 N.C. App. 574, 580 (2001); State v. Adams, 132 N.C. App. 819 (1999).

56. 12 U.S.C. §§ 84(a)(1), 375(b); Hudson v. United States, 522 U.S. 93, 103 (1997).

57. 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).

58. State v. Murchison, 367 N.C. 461, 463 (2014); *In re* O'Neal, 160 N.C. App. 409, 413 (2003).

59. 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 first being placed in jeopardy once.[60] 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.[61] A second proceeding is not barred if the first proceeding was ended before jeopardy attached, as when charges are dismissed before trial, either voluntarily by the State[62] or by the trial court.[63]

In a jury trial, jeopardy attaches when the jury is empaneled and sworn.[64] Lower federal courts have held that jeopardy attaches only when the entire jury is empaneled and sworn, including any alternates.[65] Some North Carolina cases recite a more comprehensive test. According to these cases, jeopardy attaches in a jury trial when a defendant is placed on trial "(1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn."[66] Jurisdictional issues aside,[67] it appears the shorter formulation would produce the same result in all cases where the longer rule is stated.[68] Indeed, "the key factor" for determining attachment of jeopardy is the empaneling and swearing of the jury.[69]

In a bench trial, jeopardy attaches when the court begins to hear evidence or testimony.[70]

In a guilty plea case, jeopardy does not attach until the guilty plea is accepted by a court.[71]

In a capital sentencing proceeding, jeopardy attaches only after there has been a finding that no aggravating circumstance is present.[72]

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.[73]

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60. Will v. Hallock, 546 U.S. 345, 354 n.* (2006) (subject to condition that jeopardy attached in a prior proceeding).

61. *See* State v. Tate, 300 N.C. 180, 182–83 (1980); State v. Fowler, 197 N.C. App. 1, 17 (2009).

62. State v. Brunson, 327 N.C. 244, 247 (1990); State v. Strickland, 98 N.C. App. 693, 695 (1990); State v. Shoffner, 62 N.C. App. 245, 250 (1983); State v. Hice, 34 N.C. App. 468, 472 (1977); *cf.* G.S. 15A-931 (voluntary dismissal).

63. State v. Payne, 256 N.C. App. 572, 590 (2017); State v. Pope, 213 N.C. App. 413, 415 (2011); State v. Newman, 186 N.C. App. 382, 386 (2007); State v. Allen, 144 N.C. App. 386, 390 (2001) (dismissal after mistrial was pretrial).

64. Martinez v. Illinois, 572 U.S. 833, 839 (2014); Crist v. Bretz, 437 U.S. 28, 38 (1978); State v. Courtney, 372 N.C. 458, 463 (2019); State v. Hickey, 317 N.C. 457, 466 (1986); State v. Dorman, 225 N.C. App. 599, 618 (2013).

65. LaFave et al., *supra* note 4, § 25.1(d). A jury is not "sworn" until the jury oath is given. *Id.*

66. *E.g.*, State v. Ross, 173 N.C. App. 569, 572 (2005), *aff'd per curiam*, 360 N.C. 355 (2006); *Brunson*, 327 N.C. at 246; State v. Shuler, 293 N.C. 34, 42 (1977); State v. Martin, 222 N.C. App. 213, 219 (2012); State v. Hatcher, 117 N.C. App. 78, 82 (1994); State v. Montalbano, 73 N.C. App. 259, 260 (1985).

67. *See* State v. Cofield, 247 N.C. 185, 188 (1957); *see also* Section III, *supra*.

68. *E.g.*, State v. Ballard, 280 N.C. 479, 484 (1972); State v. Vaughan, 268 N.C. 105, 107 (1966); State v. Birckhead, 256 N.C. 494, 504 (1962).

69. State v. Gilbert, 139 N.C. App. 657, 666 (2000).

70. Serfass v. United States, 420 U.S. 377, 388 (1975); *Brunson*, 327 N.C. at 247; *see also In re* Phillips, 128 N.C. App. 732, 734 (1998) (juvenile proceeding); *In re* Hunt, 46 N.C. App. 732, 735 (1980) (same).

71. *Ross*, 173 N.C. App. at 574; State v. Wallace, 345 N.C. 462, 467 (1997); State v. Neas, 278 N.C. 506, 512 (1971); State v. Wood, 164 N.C. App. 601 (2004).

72. State v. Robinson, 375 N.C. 173, 186 (2020); State v. Sanderson, 346 N.C. 669, 679 (1997).

73. LaFave et al., *supra* note 4, § 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.[74] Stated differently, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, that defendant may not be retried for the same offense.[75] 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 two-tier system allowing for trial de novo in a second-tier court (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.[76] Continuing jeopardy also occurs if a trial ends without a verdict, as when a mistrial is declared.[77]

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."[78] The same result is obtained when a prosecutor "goads" the defendant into moving for a mistrial.[79] After jeopardy has attached, a judicial dismissal that contemplates further proceedings is treated as equivalent to a mistrial.[80]

C. Defendant's Request

A defendant's involvement may, however, denature an otherwise terminal event.[81] Retrial for the same offense 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.[82] 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)[83] or a dismissal (absent insufficient evidence).[84]

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74. Richardson v. United States, 468 U.S. 317, 325 (1984); *Robinson*, 375 N.C. at 185; *cf.* State v. Courtney, 372 N.C. 458, 471 (2019) ("a jeopardy-terminating event").

75. Sattazahn v. Pennsylvania, 537 U.S. 101, 106 (2003); *accord Courtney*, 372 N.C. at 462.

76. Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 312 (1984); *cf.* State v. Smith, 312 N.C. 361, 383 (1984).

77. *Richardson*, 468 U.S. 317, 325; *Courtney*, 372 N.C. at 464.

78. Arizona v. Washington, 434 U.S. 497, 505 (1978); State v. Odom, 316 N.C. 306, 310 (1986).

79. Oregon v. Kennedy, 456 U.S. 667, 679 (1982); State v. White, 322 N.C. 506, 511 (1988).

80. Lee v. United States, 432 U.S. 23, 31 (1977); *cf.* State v. Schalow, 251 N.C. App. 334, 346–47 (2016); *see also* Section X, *infra*.

81. *See* United States v. Scott, 437 U.S. 82, 99 (1978) (The Double Jeopardy Clause "does not relieve a defendant from the consequences of his own voluntary choice."); *cf.* State v. Vestal, 131 N.C. App. 756, 758 (1998) (quoting *Scott*).

82. 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); *see also* Section IX, *infra*.

83. United States v. Dinitz, 424 U.S. 600, 607 (1976); *White*, 322 N.C. at 510.

84. *Scott*, 437 U.S. at 100; State v. Priddy, 115 N.C. App. 547, 551 (1994).

D. Voluntary Dismissal After Mistrial

In *State v. Courtney* (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 Chapter 15A, Section 931 of the North Carolina General Statutes [hereinafter G.S.], the dismissal was an event that terminated jeopardy, barring retrial.[85] The protection announced in *Courtney* is arguably greater than is provided by the Fifth Amendment.[86]

VII. The Same Offense

Double jeopardy is implicated when a defendant is subject to retrial for the same offense.[87] *Offense* in this context means a violation of law, either statutory or common law, and includes felonies, misdemeanors, and infractions.[88] 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.[89] For a plea of former jeopardy to be good, it must be grounded on the same offense "both in law and in fact."[90]

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.[91] Under the Blockburger test,[92] two offenses are not the same in law if each requires proof of an additional fact that the other does not.[93] 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 crimes . . . ."[94] "The determination is made on a *definitional*, not a factual basis."[95]

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85. State v. Courtney, 372 N.C. 458, 471 (2019).

86. *See* LaFave et al., *supra* note 4, § 25.3(a) (discussing *Courtney*, 372 N.C. 458).

87. U.S. Const. amend. V ("the same offence"); State v. Cutshall, 278 N.C. 334, 344 (1971) ("the same offense"); *cf. White*, 322 N.C. at 510 (state constitution "prohibits reprosecution for the same offense").

88. *See* Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994) (imprisonment, monetary penalties); United States v. Dixon, 509 U.S. 688, 696 (1993) (nonsummary criminal contempt); *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).

89. *See* State v. Ward, 301 N.C. 469, 476 (1980) ("It is elementary that a defendant may be charged with more than one offense based on a given course of conduct."); *accord* State v. Fulcher, 294 N.C. 503, 523 (1978); State v. Miller, 245 N.C. App. 313, 317 (2016); State v. Washington, 141 N.C. App. 354, 370 (2000).

90. *E.g.*, State v. Applewhite, 386 N.C. 431, 442 (2024); State v. Rambert, 341 N.C. 173, 175 (1995); State v. Harrington, 283 N.C. 527, 532 (1973); State v. Hendricksen, 257 N.C. App. 345, 349 (2018); State v. Kirkwood, 229 N.C. App. 656, 666 (2013); State v. Fox, 216 N.C. App. 144, 148 (2011). The United States Supreme Court has recognized the same concept, if not in precisely the same terms. *See* Sanabria v. United States, 437 U.S. 54, 69–70 (1978).

91. *See* LaFave et al., *supra* note 4, § 25.1(f); State v. Wortham, 318 N.C. 669, 671 (1987) ("a strict analysis of the elements"); State v. Dale, 245 N.C. App. 497, 507 (2016) (if elements differ, offenses are not the same in law).

92. The test is derived from *Blockburger v. United States*, 284 U.S. 299 (1932).

93. *E.g.*, State v. Banks, 367 N.C. 652, 656 (2014); *Hendricksen*, 257 N.C. App. at 348; *see also* State v. Vert, 39 N.C. App. 26, 30 (1978) ("controlling factor" is whether alleged crimes "have different elements").

94. State v. Parks, 324 N.C. 94, 97 (1989); *see also* State v. Partin, 48 N.C. App. 274, 279 (1980).

95. 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);[96]
- attempted first-degree murder (G.S. 14-17) and assault with a deadly weapon with intent to kill inflicting serious injury (G.S. 14-32);[97]
- first-degree murder (G.S. 14-17) and first-degree kidnapping (G.S. 14-39);[98]
- first-degree kidnapping (G.S. 14-39) and assault with a deadly weapon inflicting serious injury (G.S. 14-32);[99]
- first-degree murder (G.S. 14-17) and felony child abuse (G.S. 14-318.4);[100]
- first-degree sexual offense (G.S. 14-27.4) and indecent liberties (G.S. 14-202.1);[101]
- first-degree rape (G.S. 14-27.2) and indecent liberties (G.S. 14-202.1);[102] and
- second-degree rape / sexual offense (G.S. 14-27.3 / G.S. 14-27.5) and custodial sexual offense (G.S. 14-27.7).[103]

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.[104] 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 for double jeopardy purposes.[105] "If what purports to be two offenses actually is one under the Blockburger test, double jeopardy prohibits successive prosecutions."[106]

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);[107]
- armed robbery (G.S. 14-87) and assault with a deadly weapon (G.S. 14-33);[108]

96. *Banks*, 367 N.C. at 659.
97. State v. Tirado, 358 N.C. 551, 579 (2004); State v. Garris, 191 N.C. App. 276, 287 (2008).
98. *Tirado*, 358 N.C. at 591–92; State v. Fernandez, 346 N.C. 1, 20 (1997).
99. *Tirado*, 358 N.C. at 592.
100. State v. Elliott, 344 N.C. 242, 278 (1996).
101. State v. Swann, 322 N.C. 666, 678 (1988).
102. State v. Rhodes, 321 N.C. 102, 106 (1987).
103. State v. Raines, 319 N.C. 258, 266 (1987); *see also* State v. Cousin, 233 N.C. App. 523, 537 (2014) (obstruction of justice and accessory after the fact to murder); State v. Hall, 203 N.C. App. 712, 718 (2010) (possession of ecstasy and possession of ketamine contained in a single pill); State v. Allah, 168 N.C. App. 190, 196 (2005) (discharging a weapon into occupied property and assault with a deadly weapon inflicting serious injury); State v. Evans, 125 N.C. App. 301, 304 (1997) (armed robbery and kidnapping).
104. State v. Etheridge, 319 N.C. 34, 50 (1987); State v. McGee, 197 N.C. App. 366, 372 (2009). Some offenses are declared by statute to be lesser included offenses even without a perfect alignment of elements. *See* G.S. 14-43.3 (felonious restraint is a lesser included offense of kidnapping); State v. Wilson, 128 N.C. App. 688, 694 (1998).
105. *Etheridge*, 319 N.C. at 50; State v. Edwards, 49 N.C. App. 547, 558 (1980). The common law likewise treated greater and lesser included offenses as the same. *See* State v. Birckhead, 256 N.C. 494, 497 (1962).
106. State v. Gardner, 315 N.C. 444, 454 (1986).
107. State v. White, 322 N.C. 506, 518 (1988).
108. State v. Hill, 287 N.C. 207, 216 (1975); State v. Richardson, 279 N.C. 621, 628 (1971).

- 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));[109] and
- assault with a deadly weapon (G.S. 14-32) and assault with a firearm upon a law enforcement officer (G.S. 14-34.2).[110]

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.[111] For offenses to be the same in fact, the same evidence must support a conviction in both cases.[112] This is sometimes referred to as "the same-evidence test."[113] 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.[114]

When an examination of the evidence shows that the underlying conduct supporting each charge is separate and distinct, there is no bar to prosecuting the defendant for each count.[115]

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?[116] Courts may address this issue by considering the *unit of prosecution* or the *continuing offense*.

109. State v. Sanderson, 60 N.C. App. 604, 610 (1983).

110. State v. Partin, 48 N.C. App. 274, 282 (1980).

111. *See* State v. Rambert, 341 N.C. 173, 175 (1995); State v. Hendricksen, 257 N.C. App. 345, 350 (2018); State v. Kirkwood, 229 N.C. App. 656, 666 (2013); State v. Rozier, 69 N.C. App. 38, 55 (1984).

112. State v. Dale, 245 N.C. App. 497, 507 (2016).

113. State v. Hicks, 233 N.C. 511, 516 (1951).

114. State v. Irick, 291 N.C. 480, 502 (1977); State v. Ballard, 280 N.C. 479, 485 (1972); State v. Stinson, 263 N.C. 283, 290 (1965); State v. Newman, 186 N.C. App. 382, 387 (2007); State v. Ray, 97 N.C. App. 621, 624 (1990); State v. Johnson, 23 N.C. App. 52, 55 (1974); State v. Hinton, 21 N.C. App. 42, 45 (1974).

115. *See Hendricksen*, 257 N.C. App. at 350–51 (different property); State v. Maloney, 253 N.C. App. 563, 572 (2017) (two separate processes for manufacturing methamphetamine); State v. Miller, 245 N.C. App. 313, 317 (2016) (different victims); State v. Ortiz, 238 N.C. App. 508, 515 (2014) (different time); State v. Washington, 141 N.C. App. 354, 370 (2000) (different victims); State v. Newkirk, 73 N.C. App. 83, 89 (1985) (different tablet of the same controlled substance); State v. Wheeler, 70 N.C. App. 191, 195 (1984) (different victims).

116. *See* State v. Potter, 285 N.C. 238, 253 (1974) (a single robbery); *Ballard*, 280 N.C. at 490 (same).

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.[117] Thus, determining the allowable unit of prosecution involves statutory construction.[118] In construing criminal statutes, courts resolve any ambiguity against the State.[119] Once the legislature has defined the offense, "that prescription determines the scope of protection afforded by a prior conviction or acquittal."[120]

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.[121] Felony stalking, for example, requires proof of multiple acts.[122] 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.[123] Offenses treated as continuing include kidnapping,[124] assault,[125] robbery,[126] larceny,[127] and possession of stolen property,[128] among others.[129]

By contrast, some offenses are categorically discontinuous. Rape, for example, is not a continuing offense, but each act of intercourse will support a separate conviction.[130] Similarly, courts treat multiple rapid shots from a single firearm as discontinuous, at least when each shot requires a deliberate pull of the trigger.[131] In determining whether an offense is continuous, relevant factors include the temporal proximity of the acts, changes in location, and intervening events.[132]

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117. State v. Smith, 323 N.C. 439, 441 (1988); *see also* State v. Howell, 169 N.C. App. 58, 64 (2005); State v. Boykin, 78 N.C. App. 572, 575 (1985); *cf.* Brittany L. Bromell, *Units of Prosecution: Charging Multiple Counts for the Same Conduct*, Admin. of Just. Bull. No. 2022/01 (UNC School of Government, Sept. 2022), https://www.sog.unc.edu/sites/default/files/reports/2022-08-31 20220160 AoJB_Williams.pdf.

118. *See* State v. Applewhite, 386 N.C. 431, 435 (2024) (G.S. 14-43.11, human trafficking); State v. Conley, 374 N.C. 209, 214 (2020) (G.S. 14-269.2, weapons on campus); State v. Surrett, 217 N.C. App. 89, 99 (2011) (G.S. 14-71.1, possession of stolen firearm); *Boykin*, 78 N.C. App. at 577 (G.S. 14-72(b)(4), larceny of firearm).

119. *Smith*, 323 N.C. at 442–43; State v. White, 127 N.C. App. 565, 570 (1997).

120. Sanabria v. United States, 437 U.S. 54, 70 (1978); *accord Applewhite*, 386 N.C. at 436.

121. State v. Johnson, 212 N.C. 566, 570 (1937); *accord* State v. Manning, 139 N.C. App. 454, 467 (2000), *aff'd per curiam*, 353 N.C. 449 (2001); State v. Maloney, 253 N.C. App. 563, 571 (2017); State v. Allah, 231 N.C. App. 88, 95 (2013); State v. Shelton, 167 N.C. App. 225, 228 (2004).

122. State v. Fox, 216 N.C. App. 144, 151 (2011).

123. *Applewhite*, 386 N.C. at 441; *cf.* State v. Grady, 136 N.C. App. 394, 400 (2000).

124. *White*, 127 N.C. App. at 571.

125. State v. Dew, 379 N.C. 64, 72 (2021); State v. Brooks, 138 N.C. App. 185, 189 (2000).

126. State v. Fambrough, 28 N.C. App. 214, 215 (1975).

127. State v. Martin, 47 N.C. App. 223, 232 (1980).

128. State v. Davis, 302 N.C. 370, 374 (1981); *see also* State v. Watson, 80 N.C. App. 103, 106 (1986).

129. State v. Fox, 216 N.C. App. 144, 151 (2011) (felony stalking under G.S. 14-177.3A); State v. Grady, 136 N.C. App. 394, 400 (2000) (construing G.S. 90-108(a)(7), keeping or maintaining a dwelling for keeping or selling drugs).

130. State v. Dudley, 319 N.C. 656, 659 (1987); State v. Small, 31 N.C. App. 556, 559 (1976); *see also* State v. Shelton, 167 N.C. App. 225, 228 (2004) (rejecting argument that incest is a continuing offense).

131. State v. Rambert, 341 N.C. 173, 177 (1995); *see also* State v. Ray, 97 N.C. App. 621, 625 (1990).

132. 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.[133] Indeed, an acquittal is afforded special weight.[134] 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.[135] "Accordingly, acquittals are final and unreviewable, even if based in error."[136]

B. Judicial Acquittal

A judicial determination that the State's evidence is insufficient as a matter of law has the effect of an acquittal.[137] An acquittal due to insufficient evidence precludes retrial, whether the court's evaluation was correct or not.[138] 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.[139]

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 guilty verdict.[140] Further, a midtrial dismissal not based on the insufficiency of the evidence does not bar retrial.[141] A defendant may therefore be retried for the same offense notwithstanding a prior dismissal based on a defective criminal pleading[142] or a variance between pleading and proof.[143]

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133. United States v. DiFrancesco, 449 U.S. 117, 130 (1980); State v. Sanderson, 346 N.C. 669, 676 (1997).

134. *DiFrancesco*, 449 U.S. at 130; State v. Silhan, 302 N.C. 223, 268 (1981), *abrogated in part on other grounds by Sanderson*, 346 N.C. at 679.

135. McElrath v. Georgia, 601 U.S. 87, 97 (2024); *cf.* State v. Mumford, 364 N.C. 394, 400 (2010).

136. State v. Robinson, 375 N.C. 173, 185 (2020); *accord* State v. Payne, 256 N.C. App. 572, 587 (2017).

137. Smith v. Massachusetts, 543 U.S. 462, 467 (2005) (at trial); *cf.* Burks v. United States, 437 U.S. 1, 18 (1978) (on appeal); *see also* State v. Mason, 174 N.C. App. 206, 208 (2005); State v. Allen, 144 N.C. App. 386, 388 (2001).

138. Evans v. Michigan, 568 U.S. 313, 320 (2013).

139. *See* G.S. 15-173 ("[T]he judgment has the force and effect of a verdict of 'not guilty.'"); *cf.* G.S. 15A-1227; *see also* State v. Morgan, 189 N.C. App. 716, 722 (2008) (midtrial dismissal based on insufficiency of evidence was acquittal); State v. Murrell, 54 N.C. App. 342, 345 (1981) (same).

140. *Smith*, 543 U.S. at 467; United States v. Wilson, 420 U.S. 332, 352–53 (1975); State v. Kiselev, 241 N.C. App. 144, 148 (2015); State v. Hernandez, 188 N.C. App. 193, 197 (2008).

141. Smith v. United States, 599 U.S. 236, 253–54 (2023); United States v. Scott, 437 U.S. 82, 97 (1978); State v. Priddy, 115 N.C. App. 547, 551 (1994). *But see* State v. Teeter, 165 N.C. App. 680, 685 (2004) (dismissal for fatal variance barred retrial); State v. Vestal, 131 N.C. App. 756, 760 (1998) (dismissal for violation of court order barred retrial).

142. 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); *cf.* Section III, *supra*.

143. 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, that defendant is impliedly acquitted and may not be retried for the greater offense.[144] 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.[145]

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.[146] But a prosecutor's decision to proceed upon 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).[147]

3. Sentencing

The imposition of a particular sentence is not generally regarded as an acquittal of a more severe sentence.[148] 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.[149]

144. Price v. Georgia, 398 U.S. 323, 329 (1970); Green v. United States, 355 U.S. 184, 191 (1957); State v. Marley, 321 N.C. 415, 424 (1988); State v. Wright, 275 N.C. 242, 246 (1969).

145. 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); State v. Hatcher, 117 N.C. App. 78, 85 (1994); *cf.* State v. Bell, 159 N.C. App. 151, 157 (2003) (verdict rejected by trial court did not bar further deliberations).

146. State v. Courtney, 372 N.C. 458, 475 (2019); State v. Jones, 317 N.C. 487, 494 (1986); State v. Cole, 262 N.C. App. 466, 474 (2018); State v. Bissette, 142 N.C. App. 669, 675 (2001).

147. State v. Hales, 344 N.C. 419, 423 (1996); *cf.* State v. Goodson, 101 N.C. App. 665, 668–69 (1991) (State's request to dismiss first-degree murder in order to proceed on second-degree murder did not deprive trial court of jurisdiction).

148. 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 for violent habitual felon status upon same prior felony convictions); *cf.* G.S. 15A-1335; Jessica Smith, *Limitations on a Judge's Authority to Impose a More Severe Sentence After a Defendant's Successful Appeal or Collateral Attack*, Admin. of Just. Bull. 2003/03 (UNC School of Government, July 2003), https://www.sog.unc.edu/sites/default/files/reports/aoj200303.pdf.

149. 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.[150] This is true whether the conviction was based on a jury verdict, bench trial, or guilty plea.[151] In North Carolina, a prayer for judgment continued (PJC) does not constitute a conviction for double jeopardy purposes unless the trial court imposed conditions amounting to punishment.[152] 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.[153] Consequently, double jeopardy protections prohibit prosecuting a defendant for a greater offense following a conviction of a lesser included offense, and vice versa: the sequence is immaterial.[154] 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.[155]

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.[156] Hence, a defendant convicted of assault may be prosecuted for murder if the victim later dies as a result of the assault.[157]

C. Requested Severance

A defendant may also be prosecuted for the same offense following a conviction if the defendant elected to have the two offenses tried separately.[158]

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.[159]

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150. Brown v. Ohio, 432 U.S. 161, 165 (1977); State v. Sparks, 362 N.C. 181, 186 (2008); State v. Tirado, 358 N.C. 551, 578 (2004); State v. Thompson, 349 N.C. 483, 495 (1998); *see also* State v. Lawrence, 264 N.C. 220, 224 (1965).

151. *See* State v. Neas, 278 N.C. 506, 512 (1971) (guilty plea, if accepted, "is the equivalent of a conviction").

152. 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).

153. *See* Section VII.A, *supra*.

154. *Brown*, 432 U.S. at 168.

155. *See* Illinois v. Vitale, 447 U.S. 410, 420–21 (1980); State v. Gardner, 315 N.C. 444, 455 (1986).

156. Garrett v. United States, 471 U.S. 773, 792 (1985); Diaz v. United States, 223 U.S. 442, 448–49 (1912).

157. 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).

158. 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).

159. 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.[160] A defendant who pled guilty to reduced charges in district court and appealed to superior court for trial de novo—repudiating the agreement—may therefore be prosecuted on the original charges.[161]

F. Overturned Conviction

As noted above, retrial for the same offense is not barred by a prior conviction when the defendant succeeds in having the conviction overturned on grounds other than insufficiency of evidence.[162] If, however, a conviction is overturned due to the insufficiency of evidence, the defendant may not be retried.[163] When an appellate court finds insufficient evidence of a greater offense, but the verdict indicates that the jury found all the elements of a lesser included offense, the reviewing court may remand for entry of judgment on the lesser included offense.[164]

X. A Prior Mistrial

The protection against double jeopardy embraces a defendant's "valued right" to have the trial completed before a particular tribunal.[165] But retrial is not necessarily barred when a prior trial ended before verdict.[166] 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.[167]

160. 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); *cf.* State v. Johnson, 95 N.C. App. 757, 760 (1989) (prior conviction precluded retrial absent valid reason to set aside plea).

161. State v. Fox, 34 N.C. App. 576, 579 (1977); *cf.* G.S. 7A-271(b); G.S. 15A-1431(b).

162. 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). The cases provide various explanations for this rule, including continuing jeopardy and waiver. The "most reasonable justification" is that on balance, trial error, albeit reversible, does not also entitle the defendant to immunity from prosecution. Burks v. United States, 437 U.S. 1, 15 (1978).

163. *Burks*, 437 U.S. at 18; State v. Mason, 174 N.C. App. 206, 208 (2005); State v. Callahan, 83 N.C. App. 323, 325 (1986). A determination that a guilty verdict was against the weight of the evidence, however, does not bar retrial. Tibbs v. Florida, 457 U.S. 31, 46 (1982).

164. Morris v. Mathews, 475 U.S. 237, 246 (1986); State v. Stokes, 367 N.C. 474, 482 (2014); *cf.* G.S. 15A-1447(c).

165. Arizona v. Washington, 434 U.S. 497, 503 (1978); State v. Schalow, 251 N.C. App. 334, 344 (2016); State v. Jones, 67 N.C. App. 377, 380 (1984); State v. Cooley, 47 N.C. App. 376, 384 (1980).

166. State v. Williams, 51 N.C. App. 613, 617 (1981).

167. Renico v. Lett, 559 U.S. 766, 774 (2010); State v. Bonney, 329 N.C. 61, 73 (1991) ("sound discretion").

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.[168] Most federal courts hold that a defendant's failure to object to a mistrial constitutes tacit consent even absent a specific request for a mistrial.[169] In noncapital cases, this is likewise the rule in North Carolina.[170] This rule is different in capital cases.[171] A mistrial upon the defendant's request will, however, bar retrial if the request was the result of misconduct by the prosecutor intended to goad the defendant into moving for a mistrial.[172]

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.[173]

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."[174] 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."[175] Several North Carolina statutes specifically recognize a trial court's authority to declare a mistrial in these circumstances.[176]

2. Other Circumstances

Absent jury deadlock, the propriety of declaring a mistrial depends on a consideration of all the circumstances, not on mechanical application of an abstract formula.[177] "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 mistrial has been properly declared."[178] Still, the court's power to declare a mistrial must be exercised with caution and only after a careful consideration of all available evidence.[179]

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168. United States v. Dinitz, 424 U.S. 600, 607 (1976); State v. White, 322 N.C. 506, 510 (1988); State v. Powell, 321 N.C. 364, 372 (1988); State v. Major, 84 N.C. App. 421, 424 (1987); State v. Lyons, 77 N.C. App. 565, 566 (1985); State v. Deas, 25 N.C. App. 294, 297 (1975); *cf.* G.S. 15A-1061 (on defendant's motion); *see also* State v. O'Neal, 67 N.C. App. 65, 68 (no basis for retroactive mistrial), *aff'd as modified*, 311 N.C. 747 (1984).

169. LaFave et al., *supra* note 4, § 25.2(a).

170. State v. Odom, 316 N.C. 306, 310 (1986); *cf.* State v. Resendiz-Merlos, 268 N.C. App. 109, 116 (2019) (argument against mistrial amounted to objection).

171. State v. Lachat, 317 N.C. 73, 85 (1986).

172. Oregon v. Kennedy, 456 U.S. 667, 679 (1982); *White*, 322 N.C. at 511 (1988); *see also* State v. Walker, 332 N.C. 520, 539 (1992) (no evidence of misconduct intended to provoke a mistrial); State v. Ward, 127 N.C. App. 115, 122 (1997) (same); *Major*, 84 N.C. App. at 427 (same).

173. Arizona v. Washington, 434 U.S. 497, 505–06 (1978); *Odom*, 316 N.C. at 310.

174. State v. Simpson, 303 N.C. 439, 447 (1981); *cf.* G.S. 15A-1063(2); G.S. 15A-1235(d).

175. *Washington*, 434 U.S. at 509; *accord Odom*, 316 N.C. at 310.

176. *See* G.S. 15A-1063(2) (judge may declare mistrial if it appears there is no reasonable probability of jury's agreement upon a verdict); G.S. 15A-1235(d) (if it appears there is no reasonable possibility of agreement).

177. *See* Illinois v. Somerville, 410 U.S. 458, 462 (1973); State v. Shuler, 293 N.C. 34, 44 (1977).

178. *Simpson*, 303 N.C. at 447 (citing Gori v. United States, 367 U.S. 364 (1961)).

179. State v. Crocker, 239 N.C. 446, 452 (1954); State v. Resendiz-Merlos, 268 N.C. App. 109, 118 (2019); State v. Bidgood, 144 N.C. App. 267, 273 (2001); State v. Chriscoe, 87 N.C. App. 404, 408 (1987).

In North Carolina, the necessity justifying an order of mistrial may be one of two kinds: physical necessity or the necessity of doing justice.[180] Physical necessity occurs when a judge,[181] juror,[182] defendant,[183] or material witness[184] becomes incapacitated by illness during the trial or when the courthouse is inaccessible due to adverse weather conditions.[185] 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.[186]

C. Mistrial Absent Manifest Necessity

The strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence.[187] When, for example, the prosecutor learned about additional evidence (the defendant's bloody clothing) 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 declared over the defendant's objection was without manifest necessity.[188] Similarly, when necessary witnesses for the State fail to appear[189] or refuse to testify,[190] a mistrial declared over a defendant's objection is without manifest necessity.[191]

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.[192] By statute, however, before granting a mistrial, the judge must make findings of fact with respect to the grounds for the mistrial.[193]

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180. *Shuler*, 293 N.C. at 44; State v. Birckhead, 256 N.C. 494, 505–06 (1962).

181. State v. Boykin, 255 N.C. 432, 442 (1961); State v. Johnson, 60 N.C. App. 369, 373 (1983); *cf.* G.S. 15A-1224.

182. 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).

183. State v. Battle, 267 N.C. 513, 518 (1966) (illness of defense attorney).

184. *See Birckhead*, 256 N.C. at 506 (stating general proposition but without specific example).

185. State v. Shoff, 128 N.C. App. 432, 434 (1998); State v. Raynor, 45 N.C. App. 181, 186 (1980).

186. *See* State v. Sanders, 347 N.C. 587, 599 (1998) (juror misconduct); State v. Cutshall, 278 N.C. 334, 346 (1971) (evidence of jury tampering); State v. Montalbano, 73 N.C. App. 259, 263 (1985) (judge's observation of conversation between chief investigator and two jurors); State v. Malone, 65 N.C. App. 782, 786 (1984) (defense attorney called to testify against defendant); State v. Cooley, 47 N.C. App. 376, 388 (1980) (evidence of jury tampering).

187. Arizona v. Washington, 434 U.S. 497, 508 (1978); State v. Grays, 276 N.C. App. 21, 30 (2021).

188. *Grays*, 276 N.C. App. at 34.

189. State v. Resendiz-Merlos, 268 N.C. App. 109, 120 (2019).

190. State v. Chriscoe, 87 N.C. App. 404, 408 (1987).

191. *See also* State v. Schalow, 251 N.C. App. 334, 351 (2016) (holding that mistrial declared over defendant's objection was without manifest necessity where attempted murder indictment failed to allege malice but was sufficient to allege attempted manslaughter, and State requested a mistrial to obtain a valid attempted murder indictment).

192. *Washington*, 434 U.S. at 517; State v. Odom, 316 N.C. 306, 310 (1986).

193. G.S. 15A-1064; *see also Odom*, 316 N.C. at 311 (statutory requirement is mandatory).

XI. Multiple Punishment

The Double Jeopardy Clause protects against multiple punishments for the same offense.[194] For purposes of cumulative punishment, it is necessary to distinguish between single-prosecution and successive-prosecution situations.[195]

A. Single Proceeding

1. Legislative Intent

In the single proceeding context, the protection against cumulative punishments is designed to ensure that 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.[196] There is generally no bar to sentencing a defendant for multiple offenses if each requires proof of a fact that the others do not.[197] By contrast, a defendant generally may not be sentenced for both a greater and a lesser included offense.[198] Courts thus apply the Blockburger test described above.[199]

In this context, however, the Blockburger test is merely a rule of statutory construction.[200] "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."[201] When such a contrary legislative intent appears, a defendant may receive cumulative punishments for the same offense without violating double jeopardy protections.[202] "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."[203]

2. Kidnapping

Double jeopardy protections do not preclude the State from charging multiple offenses based on the same act or transaction and prosecuting those offenses in a single trial.[204] 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.[205] The kidnapping rule is better explained as based on legislative intent in defining the offense of kidnapping.[206]

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194. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Sparks, 362 N.C. 181, 186 (2008).

195. *See* State v. Gardner, 315 N.C. 444, 451 (1986).

196. Ohio v. Johnson, 467 U.S. 493, 499 (1984); State v. Banks, 367 N.C. 652, 655 (2014).

197. State v. Etheridge, 319 N.C. 34, 50 (1987) (citing Blockburger v. United States, 284 U.S. 299 (1932)); *see also Banks*, 367 N.C. at 659 (second-degree rape and statutory rape); State v. Tirado, 358 N.C. 551, 579 (2004) (attempted murder and felony assault); State v. Ray, 274 N.C. App. 240, 245 (2020) (insurance fraud and false pretenses); State v. Cousin, 233 N.C. App. 523, 537 (2014) (obstruction of justice and accessory to murder).

198. 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) (felony serious injury by vehicle and underlying impaired driving); State v. Mulder, 233 N.C. App. 82, 94 (2014) (felony fleeing to elude and underlying speeding and reckless driving).

199. *See* Section VII.A, *supra*.

200. Missouri v. Hunter, 459 U.S. 359, 366 (1983); *Gardner*, 315 N.C. at 455.

201. Whalen v. United States, 445 U.S. 684, 692 (1980); *accord* State v. Baldwin, 240 N.C. App. 413, 424 (2015).

202. State v. Fernandez, 346 N.C. 1, 19 (1997); State v. Elliott, 344 N.C. 242, 277 (1996).

203. *Hunter*, 459 U.S. at 366; *accord Gardner*, 315 N.C. at 453.

204. Ohio v. Johnson, 467 U.S. 493, 500 (1984); State v. Stroud, 345 N.C. 106, 113 (1996).

205. *E.g.*, State v. Fulcher, 294 N.C. 503, 523 (1978); State v. Andrews, 294 N.C. App. 590, 593 (2024).

206. 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.[207] When a defendant is convicted of several offenses and cumulative punishment is not authorized by statute, the court may arrest judgment on some conviction(s).[208] In that case, the guilty verdicts remain on the docket and judgment may be entered if the other conviction is reversed on appeal.[209]

B. Successive Proceedings

1. *Credit*

As noted above, a defendant who succeeds in having a conviction overturned may be retried.[210] If the defendant is convicted upon retrial, however, the protection against multiple punishment requires that credit be given for any sentence already served.[211]

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.[212] Hence, the same prior convictions used to enhance one sentence may be used again to enhance another.[213]

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.[214] The following penalties have been found not to constitute additional criminal punishment:

- satellite-based monitoring,[215]
- permanent no-contact orders for convicted sex offenders,[216]
- civil commitment of sex offenders,[217]

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207. State v. Etheridge, 319 N.C. 34, 50 (1987); State v. Cromartie, 257 N.C. App. 790, 797 (2018); State v. Best, 196 N.C. App. 220, 229 (2009).

208. *See* State v. China, 370 N.C. 627, 637 (2018); State v. Hernandez, 293 N.C. App. 283, 302 (2024).

209. State v. Pakulski, 326 N.C. 434, 439–40 (1990).

210. *See* Section IX, *supra*.

211. North Carolina v. Pearce, 395 U.S. 711, 719–20 (1969); State v. Jones, 294 N.C. 642, 655 (1978).

212. Monge v. California, 524 U.S. 721, 728 (1998); *accord* State v. Marshburn, 173 N.C. App. 749, 752 (2005); *see also* State v. Todd, 313 N.C. 110, 117 (1985) (habitual felon); State v. Williams, 191 N.C. App. 96, 106 (2008) (same prior felony for possession of a firearm by a felon and habitual felon status); State v. Bradley, 181 N.C. App. 557, 560 (2007) (habitual impaired driving); State v. Artis, 181 N.C. App. 601, 604 (2007) (habitual misdemeanor assault).

213. 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).

214. *See* Section IV, *supra*.

215. G.S. 14-208.40A; State v. Wagoner, 199 N.C. App. 321, 332 (2009), *aff'd per curiam*, 364 N.C. 422 (2010); State v. Williams, 207 N.C. App. 499, 505 (2010); *cf.* State v. Bowditch, 364 N.C. 335, 352 (2010) (satellite-based monitoring is civil regulatory scheme and hence does not violate Ex Post Facto Clauses).

216. G.S. 15A-1340.50; State v. Hunt, 221 N.C. App. 48, 63 (2012).

217. Seling v. Young, 531 U.S. 250, 267 (2001); Kansas v. Hendricks, 521 U.S. 346, 369 (1997).

- civil actions of abatement and forfeiture of proceeds,[218]
- driver's license revocations for willful refusal of chemical test,[219] and
- in rem forfeiture of property.[220]

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."[221]

A. As Bar to Prosecution

The doctrine of collateral estoppel (i.e., issue preclusion) is embodied in the Fifth Amendment guarantee against double jeopardy.[222] 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.[223] "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."[224]

It is often difficult to determine on a general verdict whether the issue in question was necessarily decided in the defendant's favor.[225] The determination requires an examination of the entire record of the prior proceeding, including the pleadings, evidence, charge, and other relevant matter.[226] 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.[227] The defendant has the burden of establishing that the issue the defendant seeks to foreclose was actually decided in the prior proceeding.[228]

218. G.S. 19-2.1; State v. Arellano, 165 N.C. App. 609, 616–17 (2004).

219. G.S. 20-16.2; Ferguson v. Killens, 129 N.C. App. 131, 140 (1998).

220. United States v. Ursery, 518 U.S. 346, 369 (1997).

221. 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); State v. Alston, 323 N.C. 614, 616 (1988); State v. Warren, 313 N.C. 254, 264 (1985).

222. Schiro v. Farley, 510 U.S. 222, 232 (1994); *Swenson*, 397 U.S. at 445; State v. McKenzie, 292 N.C. 170, 174 (1977); State v. Ballard, 280 N.C. 479, 490 (1972); State v. Davis, 106 N.C. App. 596, 600 (1992).

223. Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977).

224. State v. Edwards, 310 N.C. 142, 145 (1984); *accord* State v. Jones, 256 N.C. App. 266, 274 (2017); State v. Spargo, 187 N.C. App. 115, 119 (2007); State v. Bell, 164 N.C. App. 83, 90 (2004).

225. *McKenzie*, 292 N.C. at 175.

226. *Schiro*, 510 U.S. at 236; *McKenzie*, 292 N.C. at 174–75; State v. Tew, 149 N.C. App. 456, 460 (2002); State v. Solomon, 117 N.C. App. 701, 704 (1995).

227. *Edwards*, 310 N.C. at 145; *cf.* State v. Alston, 323 N.C. 614, 617 (1988) ("identical evidence").

228. State v. Carter, 357 N.C. 345, 355 (2003); State v. Warren, 313 N.C. 254, 264 (1985); *Edwards*, 310 N.C. at 145; *McKenzie*, 292 N.C. at 175; *Spargo*, 187 N.C. App. at 119.

1. Identity of Parties and Issues

Collateral estoppel requires both (1) an identity of parties and (2) an identity of issues.[229] With regard to parties, either there 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 proceedings.[230] 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.[231]

With regard to 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.[232]

When the issues are not identical, subsequent prosecution is not barred.[233]

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."[234] This is a codification of the common law principle of collateral estoppel as applied in criminal cases.[235]

3. Limitations

"[T]he doctrine of collateral estoppel applies only to an issue of ultimate fact determined by a final judgment."[236] Hence, after a mistrial, the judge is not bound by prior evidentiary rulings.[237] Failure to return a verdict does not have collateral estoppel effect (i.e., does not preclude

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229. State v. O'Rourke, 114 N.C. App. 435, 439 (1994).

230. State v. Brooks, 337 N.C. 132, 147 (1994).

231. State v. Summers, 351 N.C. 620, 623 (2000).

232. *Id.*; *Spargo*, 187 N.C. App. at 120; State v. Safrit, 145 N.C. App. 541, 553 (2001); State v. Parsons, 92 N.C. App. 175, 179 (1988).

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

234. G.S. 15A-954(a)(7).

235. *Spargo*, 187 N.C. App. at 119; *Safrit*, 145 N.C. App. at 552; *Parsons*, 92 N.C. App. at 177.

236. State v. Macon, 227 N.C. App. 152, 157 (2013).

237. State v. Knight, 245 N.C. App. 532, 539 (2016), *aff'd as modified*, 369 N.C. 640 (2017); *Macon*, 227 N.C. App. at 158–59; State v. Harris, 198 N.C. App. 371, 377 (2009); *cf.* State v. Williams, 252 N.C. App. 231, 236 (2017) (absent mistrial, no error in denying defendant's second motion to suppress based on collateral estoppel).

reconsideration), unless the record establishes that the issue was actually and necessarily decided in the defendant's favor.[238] 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.[239]

B. As Exclusionary Rule

When collateral estoppel does not bar retrial, it also does not require an exclusion of evidence.[240] Stated differently, evidence is inadmissible under the Double Jeopardy Clause only when it falls within the scope of the collateral estoppel doctrine.[241] 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.[242] 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.[243]

C. Offensive Collateral Estoppel

The United States Supreme Court has not directly addressed the use of collateral estoppel by the prosecution.[244] Commentators are divided on the propriety of the practice, though it finds some support in out-of-state authority.[245] 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.[246]

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.[247] As a result, state prosecutors are

238. 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); State v. Davis, 106 N.C. App. 596, 600 (1992).

239. Currier v. Virginia, 585 U.S. 493, 501 (2018); Ohio v. Johnson, 467 U.S. 493, 500 n.9 (1984).

240. 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); *cf.* State v. Scott, 331 N.C. 39, 41 (1992) (Rule 403 may bar evidence of prior acquittal).

241. State v. Bell, 164 N.C. App. 83, 89 (2004).

242. State v. Summers, 351 N.C. 620, 626 (2000).

243. *Agee*, 326 N.C. at 551–52 (1990); State v. Jones, 256 N.C. App. 266, 274 (2017); State v. Solomon, 117 N.C. App. 701, 706 (1995); *cf.* Joseph L. Hyde, *When Is Double Jeopardy a Rule of Evidence?*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Mar. 11, 2025), https://nccriminallaw.sog.unc.edu/when-is-double-jeopardy-a-rule-of-evidence/.

244. *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").

245. *See* 5 Wayne R. LaFave et al., Criminal Procedure § 17.4(a) (4th ed. 2015).

246. 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 jurisdiction).

247. *See* Gamble v. United States, 587 U.S. 678, 681 (2019); Heath v. Alabama, 474 U.S. 82, 88 (1985); Abbate v. United States, 359 U.S. 187, 194 (1959); United States v. Lanza, 260 U.S. 377, 382 (1922); State v. Davis, 223 N.C. 54, 56 (1943); State v. Myers, 82 N.C. App. 299, 299–300 (1986).

not bound by a defendant's plea agreement with federal prosecutors.[248] For the same reason, a defendant is not entitled to credit against a state sentence for time spent in federal custody.[249] Similarly, collateral estoppel does not apply where separate sovereigns are involved.[250]

As noted above, however, several statutes may prohibit prosecution when the defendant has been subjected to prosecution for the same offense in another jurisdiction.[251] 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."[252] And for drug offenses (i.e., violations of the Controlled Substances Act, 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."[253]

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.[254] When a defendant is charged with joinable offenses, the defendant's motion for joinder must be granted unless the court finds that granting the motion would defeat the ends of justice.[255] 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.[256]

B. Limitations

The right to joinder is inapplicable if the defendant pled guilty to the previous charge.[257] 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,[258] unless the defendant can show that the prosecution withheld additional charges solely to circumvent

248. State v. Midgett, 78 N.C. App. 387, 389 (1985).
249. State v. Lewis, 231 N.C. App. 438, 445 (2013); *cf. In re* Cobb, 102 N.C. App. 466, 468 (1991) (rejecting challenge to disciplinary action by Board of Chiropractic Examiners based on petition's conviction of federal crimes).
250. State v. Brooks, 337 N.C. 132, 146 (1994).
251. *See* Section II.C, *supra*.
252. G.S. 15A-134; *cf.* State v. Christian, 288 N.C. App. 50, 52 (2023).
253. G.S. 90-97; *cf.* State v. Brunson, 165 N.C. App. 667, 671 (2004).
254. G.S. 15A-926(a); *cf.* State v. Moses, 350 N.C. 741, 750 (1999) (joinder requires "transactional connection").
255. G.S. 15A-926(c)(1).
256. G.S. 15A-926(c)(2).
257. G.S. 15A-926(c)(3).
258. State v. Furr, 292 N.C. 711, 724 (1977).

joinder requirements.[259] 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.[260]

In assessing a claim that the prosecution withheld additional charges to circumvent the joinder statute, "the court must assess the justification offered by the State and determine if legitimate prosecutorial reasons supported the conduct."[261]

XV. Conclusion

Double jeopardy is a fundamental principle of the common law.[262] Though the bar is enshrined in constitutions and codified in statutes, the protection derives much of its force from the respect for precedent that guides Anglo-American judicial decision-making. Akin to res judicata and collateral estoppel, double jeopardy preserves the finality of judgments.[263]

Reflecting its common law origin, jeopardy tracks jurisdiction.[264] Insofar as a defective indictment conferred no jurisdiction, it made sense that it threatened no jeopardy. On the one hand, courts rationalized the rigors of indictment rules as protecting a defendant from double jeopardy.[265] On the other hand, a defendant could be retried after a defective pleading because such a pleading imported no jeopardy to begin with.[266] In *State v. Singleton* (2024), however, the North Carolina Supreme Court severed the link, rejecting the jurisdictional indictment rule and equating the trial court's jurisdiction with constitutional or statutory authority.[267] It remains to be seen whether the former consequences of a defective pleading will survive the reorientation. A decision that makes it harder for a defendant to challenge the pleading might make it easier to avoid reprosecution.

259. State v. Schalow, 379 N.C. 639, 651 (2021); State v. Warren, 313 N.C. 254, 260 (1985).
260. *Warren*, 313 N.C. at 260; *see also* State v. Tew, 149 N.C. App. 456, 460 (2002).
261. *Schalow*, 379 N.C. at 652.
262. *See* State v. Sanders, 347 N.C. 587, 599 (1998); State v. Felton, 330 N.C. 619, 627 (1992); State v. Lachat, 317 N.C. 73, 82 (1986); State v. Shuler, 293 N.C. 34, 42 (1977); State v. Hill, 287 N.C. 207, 214 (1975).
263. Crist v. Bretz, 437 U.S. 28, 33 (1978).
264. *See* Section III, *supra*.
265. *E.g.*, State v. Applewhite, 386 N.C. 431, 439 (2024); *cf.* LeFave et al., *supra* note 244, § 19.2(b).
266. *See* Sections V, VIII, *supra*.
267. *See* State v. Singleton, 386 N.C. 183, 197 (2024).