

Double Jeopardy, Ex Post Facto, and Related Issues

I. Double Jeopardy Protections

The Double Jeopardy Clause of the Fifth Amendment protects against: (1) a second prosecution for the “same offense” after acquittal; (2) a second prosecution for the “same offense” after conviction (by trial or plea); and (3) multiple punishments for the “same offense.” *North Carolina v. Pearce*, 395 U.S. 711 (1969). Article I, Section 19 of the North Carolina Constitution has also been interpreted to protect against double jeopardy. *State v. Rambert*, 341 N.C. 173 (1995).

A. Meaning of Acquittal

An acquittal under the Double Jeopardy Clause includes a dismissal of a charge for insufficient evidence or an appellate court’s reversal of a conviction for insufficient evidence. *Greene v. Massey*, 437 U.S. 19 (1978); *Burks v. United States*, 437 U.S. 1 (1978); *Hudson v. Louisiana*, 450 U.S. 40 (1981). However, in a trial de novo system, a trial after an appeal from the lower court without a determination of the sufficiency of evidence to convict the defendant in the lower court does not violate the Double Jeopardy Clause. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984). Also, a determination that a guilty verdict was against the weight of the evidence does not bar another trial. *Tibbs v. Florida*, 457 U.S. 31 (1982).

II. When Jeopardy Attaches

In district court, jeopardy attaches when the court begins to hear evidence, which occurs when the first witness is sworn. In superior court, jeopardy attaches when the jury is sworn and impaneled. *State v. Brunson*, 327 N.C. 244 (1990); *Serfass v. United States*, 420 U.S. 377 (1975); *Crist v. Bretz*, 437 U.S. 28, 37 at n. 15 (1978); *United States v. Osteen*, 254 F.3d 521 (4th Cir. 2001); G.S. 7B-2414. See also *State v. Coats*, 17 N.C. App. 407 (1973) (continuance to another district court session of a district court trial over defendant’s objection violated double jeopardy).

Double jeopardy does not attach to a guilty plea until it is accepted by a judge. *State v. Wallace*, 345 N.C. 462 (1997) (state’s offer of second-degree murder plea that was rejected by judge did not bar later trial on first-degree murder).

Double jeopardy does not attach to a defendant’s acknowledgement of guilt in a deferred prosecution agreement. *State v. Ross*, 360 N.C. 355 (2006).

III. Offenses Included within Double Jeopardy

A. Criminal offenses.

B. Criminal contempt imposed after a plenary hearing. *United States v. Dixon*, 509 U.S. 688 (1993). The Court in *Dixon* did not decide whether summary criminal contempt is included within double jeopardy (author’s note: it is unlikely to do so).

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C. Infractions. *State v. Hamrick*, 110 N.C. App. 60 (1993).

IV. Punishments Included within Double Jeopardy

Punishments imposed for criminal offenses, criminal contempt imposed after a plenary hearing, and infractions are included within double jeopardy. In addition, some civil remedies may also constitute punishment within double jeopardy. To determine whether a civil remedy is punishment, see *Hudson v. United States*, 522 U.S. 93 (1997). The Court in *Hudson* disavowed the method of analysis used in *Halper v. United States*, 490 U.S. 435 (1989), to determine whether a civil remedy constitutes punishment under the Double Jeopardy Clause that would bar a later criminal prosecution based on the same conduct. Instead, the Court stated that it would use the seven factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The Court noted that these factors must be considered with the particular civil remedy statute at issue (not the actual civil remedy imposed in the case), and “only the clearest proof” will suffice to override legislative intent and transform into a criminal punishment what has been denominated a civil remedy. The Court ruled that civil monetary penalties and occupational debarment imposed against bankers for violating banking laws did not bar later criminal charges based on the same violations.

Sample cases:

State v. Bradley, ___ N.C. App. ___, 640 S.E.2d 432 (6 February 2007) [habitual DWI offense is not unconstitutional under the Double Jeopardy Clause based on the rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Blakely v. Washington*, 542 U.S. 296 (2004)].

State v. Streckfuss, 171 N.C. App. 81 (2005) (seizing defendant’s out-of-state driver’s license in conjunction with pretrial thirty-day revocation under G.S. 20-16.5 was not punishment under Double Jeopardy Clause to bar later prosecution of DWI).

State ex rel. Albright v. Arellano, 165 N.C. App. 609 (2004) (double jeopardy did not bar district attorney’s civil nuisance action under Chapter 19 of General Statutes based on defendants’ prostitution business after defendants had previously been convicted of prostitution offenses).

In re O’Neal, 160 N.C. App. 409 (2003) (no double jeopardy violation when state prosecuted juvenile in juvenile court for simple assault after using that conduct in juvenile probation violation hearing).

State v. Reid, 148 N.C. App. 548 (2002) (pretrial thirty-day disqualification with no limited driving privilege for commercial motor vehicle license was not punishment under Double Jeopardy Clause to bar later prosecution for DWI).

State v. Beckham, 148 N.C. App. 282 (2002). The defendant stole property from a business. In response to a demand for payment by the business under G.S. 1-538.2 (civil liability for larceny, shoplifting, etc.), the defendant paid \$200.00 to the business. The court ruled, applying the standard set out in *Hudson v. United States*, 522 U.S. 93 (1997), that the payment of money to the business did not bar under the Double Jeopardy Clause his later prosecution for larceny of the property.

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State v. Vardiman, 146 N.C. App. 381 (2001), *appeal dismissed*, 355 N.C. 222 (2002) (it is not a double jeopardy violation to use the same prior DWI convictions to prove more than one habitual DWI offense).

State v. Evans, 145 N.C. App. 324 (2001) (thirty-day pretrial impaired driving license revocation (G.S. 20-16.5) is not punishment under United States and North Carolina constitutions and thus does not bar later prosecution of DWI).

State v. Gilbert, 139 N.C. App. 657 (2000) [G.S. 15A-534.1 (only judge may set pretrial release conditions within 48 hours after arrest for domestic violence crime) is not facially violative of North Carolina Constitution's Due Process and Double Jeopardy provisions].

State v. Adams, 132 N.C. App. 819 (1999) [no double jeopardy violation when criminal drug prosecution occurred after payment of drug tax; court is bound by prior state court rulings, *State v. Ballenger*, 123 N.C. App. 179 (1996), *affirmed*, 345 N.C. 626 (1997) and *State v. Creason*, 123 N.C. App. 495 (1996), *affirmed*, 346 N.C. 165 (1997), and court is not bound by conflicting ruling in *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998)]. These cases involve the interpretation of North Carolina's drug tax in light of *Montana Dept. of Revenue v. Kurth*, 511 U.S. 767 (1994).

State v. Thompson, 349 N.C. 483 (1998) [G.S. 15A-534.1(b) is not facially unconstitutional under double jeopardy clause when it requires, for first 48 hours after defendant's arrest, only judge to authorize pretrial release for defendants charged with certain domestic violence offenses].

State v. Oliver, 343 N.C. 202 (1996) (no double jeopardy violation when DWI prosecution occurred after ten-day civil license revocation).

State v. Monk, 132 N.C. App. 248 (1999) (double jeopardy clause does not bar criminal prosecution for substantive offense used as basis for revoking defendant's probation).

United States v. Ursery, 518 U.S. 267 (1996) (in rem forfeiture of property generally does not constitute punishment under double jeopardy).

Kansas v. Hendricks, 521 U.S. 346 (1997) (civil commitment of sexual offenders does not constitute punishment under double jeopardy provisions).

In re Phillips, 128 N.C. App. 732 (1998) (school suspension for theft was not punishment to bar later prosecution for that theft). See also *State v. Davis*, 126 N.C. App. 415 (1997) (similar ruling).

State v. Wilson, 127 N.C. App. 129 (1997) (Alcohol Beverage Commission administrative action was not punishment to bar later prosecution for selling beer to person under 21).

United States v. Mayes, 158 F.3d 1215 (11th Cir. 1998) (double jeopardy clause does not bar criminal prosecution for substantive offense used as basis for prison discipline).

United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996) (double jeopardy clause does not bar criminal prosecution for substantive offense used as basis for revoking supervised release for another offense).

Vick v. Williams, 233 F.3d 213 (4th Cir. 2000) (federal habeas petitioner was not entitled to relief for alleged double jeopardy violation involving prosecution of drug offense after imposition of

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drug tax because state appellate court ruling was not contrary to, or involved unreasonable application of, clearly established law, as established by United States Supreme Court).

V. Definition of “Same Offense” under Double Jeopardy Clause

In *United States v. Dixon*, 509 U.S. 688 (1993), the Court reiterated that *Blockburger v. United States*, 284 U.S. 299 (1932), sets out the test whether two offenses are the “same offense” under the Double Jeopardy Clause. Under that test, the question is whether each offense requires proof of an element that is not contained in the other—if not, they are the same offense and double jeopardy bars a *successive* prosecution.

Even if two offenses are the “same offense” under the *Blockburger* test, multiple punishments for the two offenses may be permitted at a *single* prosecution, but only if the legislature clearly has indicated that it intended to permit convictions and punishments for both offenses. *Missouri v. Hunter*, 459 U.S. 359 (1983).

Note, however, that federal and state governments may prosecute a defendant for the same offense. *State v. Myers*, 82 N.C. App. 299 (1986) (state armed robbery prosecution not barred by prior federal armed robbery prosecution for same act); *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959). And two state governments may prosecute a defendant for the same offense. *Heath v. Alabama*, 474 U.S. 82 (1985). But see statutory bars on identical offenses (G.S. 15A-134) and multiple drug prosecutions (G.S. 90-97) discussed later in this outline.

Sample cases:

State v. Crump, ___ N.C. App. ___, 632 S.E.2d 233 (1 August 2006). The defendant was convicted of possessing a firearm by felon for possessing a firearm in 2003. The state used a 1998 conviction of possessing firearm by felon as the underlying felony conviction to prove the 2003 offense. The defendant then pled guilty to habitual felon status. The 1998 conviction was one of the three felony convictions used to prove habitual felon status. The court ruled, relying on *State v. Glasco*, 160 N.C. App. 150 (2003), that there was no double jeopardy violation based on the imposition of multiple punishments. The court rejected the defendant’s “double-counting” double jeopardy argument, which was based on the state’s use of the 1998 conviction to prove the 2003 offense and to prove habitual felon status. The defendant was punished for possessing a firearm in 2003, not for possessing a firearm in 1998. The court also stated that the mere reliance on the 1998 conviction to establish that the defendant was a recidivist for sentencing purposes does not implicate double jeopardy concerns. (2) The court rejected the defendant’s “double-counting” double jeopardy argument that it was impermissible to use the defendant’s 1991 cocaine conviction as the underlying felony to prove the 1998 offense of possessing a firearm by a felon and then derivatively use the 1991 cocaine conviction again because that 1998 offense was then used as the underlying felony of the 2003 offense of possessing a firearm by a felon.

State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687 (2005) (double jeopardy does not bar defendant’s convictions of attempted first-degree murder and assault with deadly weapon with intent to kill inflicting serious injury based on same assault of victim).

State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311 (2005) (double jeopardy did not bar convictions of assault with deadly weapon with intent to kill inflicting serious injury and discharging weapon into occupied property based on same incident).

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State v. Ezell, 159 N.C. App. 103 (2003) (legislature did not intend to authorize, based on single assault, convictions of both (1) assault with deadly weapon with intent to kill inflicting serious injury, and (2) assault inflicting serious bodily injury, and thus convictions of both offenses violate double jeopardy).

State v. Glasco, 160 N.C. App. 150, 585 S.E.2d 257 (2003) (no double jeopardy violation when state used felony conviction to support conviction of possession of firearm by convicted felon and used that same felony conviction to support finding of habitual felon status),

State v. Carpenter, 155 N.C. App. 35 (2002) (habitual misdemeanor assault statute does not violate double jeopardy).

State v. Carter, 153 N.C. App. 756 (2002) (double jeopardy clause does not bar convictions for both felony child abuse and assault with deadly weapon inflicting serious injury, based on same act).

State v. Williams, 149 N.C. App. 795 (2002) (double jeopardy did not bar convictions of both possession of cocaine and possession of drug paraphernalia, even though cocaine was found in drug paraphernalia).

State v. Tew, 149 N.C. App. 456 (2002). The court ruled that the defendant's trial and conviction of assault with a deadly weapon with intent to kill inflicting serious injury after an appellate court had vacated the defendant's conviction of attempted second-degree murder [because the crime does not exist; see *State v. Coble*, 351 N.C. 448 (2000)] did not violate the defendant's statutory or constitutional rights—joinder under G.S. 15A-926(c)(2), collateral estoppel, or double jeopardy.

State v. Haynesworth, 146 N.C. App. 523 (2001) (convictions allowed of both attempted first-degree murder and felonious assault on a law enforcement officer with a firearm).

State v. Peoples, 144 N.C. App. 115 (2000) (convictions allowed of both attempted first-degree murder and felonious assault).

State v. McAllister, 138 N.C. App. 252 (2000) (no double jeopardy violation when defendant was convicted and punished for both second-degree murder and DWI).

State v. Etheridge, 319 N.C. 34 (1987) [court ruled, using *Blockburger* test, that defendant may be convicted at single trial of: (1) first-degree statutory rape, indecent liberties, and incest based on same act with same child, and (2) crime against nature, indecent liberties, and second-degree sexual offense based on same act with same child].

State v. Gardner, 315 N.C. 444 (1986) (punishment is permitted at single trial for both felonious breaking and entering and felonious larceny pursuant to felonious breaking and entering because, assuming the two offenses are "same" under double jeopardy, legislature intended punishment for both; court cited principles set out in *Missouri v. Hunter*).

State v. Weeks, 322 N.C. 152 (1988) (when defendant was convicted of first-degree murder based solely on felony murder theory, defendant may not be punished for the underlying felony). For discussion of punishment for first-degree murder and associated felonies, see Robert L. Farb, *North Carolina Capital Case Law Handbook*.

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State v. Pipkins, 337 N.C. 431 (1994) [punishment is permitted at single trial for both trafficking by possessing cocaine under G.S. 90-95(h)(3) and possessing cocaine under G.S. 90-95(a)(3) because legislature intended punishment for both].

State v. Coria, 131 N.C. App. 449 (1998) (punishment is permitted for both assault with deadly weapon on law enforcement officer and assault with deadly weapon with intent to kill because each contains element that is not in other offense).

State v. Woodberry, 126 N.C. App. 78 (1997) (punishment is permitted for both secret assault and assault with deadly weapon with intent to kill inflicting serious injury—each offense contains element not in the other offense, and legislature intended to allow punishment for each).

Ferguson v. Killens, 129 N.C. App. 131 (1998) (DWI conviction and DMV's revocation of driver's license for refusal to take chemical test are not same offense because each has element that the other does not have).

State v. Morgan, 118 N.C. App. 461 (1995) (punishments for both drug trafficking offense and failure to pay drug tax offense did not violate double jeopardy because each has element that the other does not have).

State v. Cobb, 18 N.C. App. 221 (1973), *reversed on other grounds*, 284 N.C. 576 (1974) (double jeopardy did not bar prosecution for possession of firearm by convicted felon after acquittal of carrying concealed weapon).

State v. Joyner, 26 N.C. App. 447 (1975) (continuous act of speeding occurring in two counties was one offense).

Rutledge v. United States, 517 U.S. 292 (1996) (Congress did not intend punishment for both federal continuing enterprise offense and lesser-included conspiracy offenses).

VI. When Conviction or Acquittal of Lesser Offense Is Bar to Later Prosecution of Greater Offense (or Vice-Versa) under Double Jeopardy Clause

A. General Rule

Under double jeopardy's same-elements test, a lesser-included offense is always considered the "same" as the greater offense. Thus a prosecution for the lesser offense will bar a later prosecution for the greater offense (or vice-versa). *Brown v. Ohio*, 432 U.S. 161 (1977) (conviction of temporary taking of motor vehicle barred later prosecution of larceny of that motor vehicle); *Green v. United States*, 355 U.S. 184 (1957) (defendant was tried for first-degree murder and convicted of second-degree murder, and appellate court granted new trial; defendant may only be tried for second-degree murder at new trial); *Payne v. Virginia*, 468 U.S. 1062 (1984) (conviction of greater offense bars later prosecution of lesser offense). This principle would likely bar a later prosecution of habitual DWI after a prosecution of the underlying DWI, and a later prosecution of habitual misdemeanor assault after a prosecution of the underlying misdemeanor. See also *Ball v. United States*, 163 U.S. 662, 670 (1896) (acquittal of an offense is an acquittal of all lesser offenses).

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B. Exceptions

1. Later events support more serious charge

If a defendant is convicted of felonious assault and then the victim dies, the defendant may be prosecuted for murder. *Diaz v. United States*, 223 U.S. 442 (1912); *State v. Meadows*, 272 N.C. 327 (1968).

2. Defendant's plea to offense over state's objection

A defendant's guilty plea to a lesser offense over the state's objection does not bar the state from prosecuting a greater offense that was pending when the defendant entered the guilty plea. *Ohio v. Johnson*, 467 U.S. 493 (1984). See also *State v. Hamrick*, 110 N.C. App. 60 (1993).

3. Defendant moves to sever or opposes joinder, then enters plea

If a defendant moves to sever offenses or opposes joinder and then pleads guilty to one of the offenses, the state is not barred from prosecuting the remaining offenses. *Jeffers v. United States*, 432 U.S. 137 (1977).

4. Defendant violates plea bargain

A defendant who pleads guilty to a lesser offense as part of a plea bargain and then violates its terms (for example, by refusing to testify for the state at the trial of an accomplice) may be prosecuted for the original charge. *Ricketts v. Adamson*, 483 U.S. 1 (1987).

VII. Double Jeopardy Inapplicable to Sentencing Hearing Except Death Sentence Verdict

The Double Jeopardy Clause does not apply to sentencing hearings, except that a defendant who has been sentenced to life imprisonment in a capital sentencing hearing may not—if granted a new trial or sentencing hearing—be sentenced to death. *Bullington v. Missouri*, 451 U.S. 430 (1981) (double jeopardy bars death penalty at resentencing hearing after defendant received life imprisonment at prior sentencing hearing). See also *Monge v. California*, 524 U.S. 721 (1998) (double jeopardy does not apply to noncapital sentencing hearing); *State v. Jones*, 314 N.C. 644 (1985) (double jeopardy does not apply to finding of aggravating and mitigating factors under Fair Sentencing Act; sentencing judge properly found aggravating factor that was not found at prior sentencing hearing).

Sample cases:

State v. Duke, 360 N.C. 110 (2005) (no double jeopardy violation in submitting aggravating circumstance in capital resentencing hearing that had not been submitted in first capital sentencing hearing in which defendant had received death sentence).

State v. Sanderson, 346 N.C. 669 (1997) [double jeopardy does not bar submission of aggravating circumstance at capital resentencing hearing, even though it was not submitted or found at prior capital sentencing hearing; court relies on *Poland v. Arizona*, 467 U.S. 147 (1986) and disavows contrary statements in *State v. Silhan*, 302 N.C. 223 (1981)].

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State v. Adams, 347 N.C. 48 (1997) (double jeopardy did not bar state from proving aggravating circumstance at capital resentencing hearing, even though state had stipulated at prior hearing that aggravating circumstance did not exist).

VIII. Defendant's Right to Raise Double Jeopardy Issue After Guilty or No Contest Plea

North Carolina case law has provided that a defendant must properly assert a double jeopardy issue at trial to raise the issue on appeal or collateral attack, *State v. McKenzie*, 292 N.C. 170 (1977), and a guilty plea waives a double jeopardy issue. *State v. Hopkins*, 279 N.C. 473 (1971). (These rulings also would apply to a no contest plea.) As a result of two decisions of the United States Supreme Court—*Menna v. New York*, 423 U.S. 61 (1975) and *United States v. Boce*, 488 U.S. 563 (1975)—a guilty plea waives a double jeopardy issue on appeal or collateral attack *except if* the double jeopardy issue can be resolved by examining the face of the criminal pleadings themselves. Thus, if other evidence must be considered, a guilty plea waives a double jeopardy issue on appeal or collateral attack. See, for example, *United States v. Falkowski*, 900 F. Supp. 1207 (D. Alaska 1995), *affirmed*, 97 F.3d 1461 (9th Cir. 1996) (unpublished opinion); *People v. Higgins*, 920 P.2d 898 (Col. App. 1996); and *Thompson v. State*, 23 Kan.App.2d 305, 929 P.2d 803 (1996). See also *United States v. Brown*, 155 F.3d 431 (4th Cir. 1998) (judge erred under *United States v. Boce* in holding evidentiary hearing to determine if defendant's second drug conviction—based on a guilty plea—was barred by double jeopardy, because issue must be resolved solely by examining record of prior proceedings).

IX. Defendant's Appeal of Double Jeopardy Issue to Appellate Division

A defendant has no right to a pretrial appeal to the appellate division of a judge's denial of a defendant's motion to dismiss a criminal charge on double jeopardy grounds. A defendant may only raise this issue after conviction. *State v. Shoff*, 342 N.C. 638 (1996).

X. State's Right to Appeal and Retry Charge That Was Dismissed After Jeopardy Had Attached

A. State's Appeal of Midtrial Dismissal of Charge

Sample cases:

State v. Priddy, 115 N.C. App. 547 (1994). At the close of the evidence for habitual impaired driving (G.S. 20-138.5) in superior court, the trial judge ruled that superior court did not have jurisdiction over the offense and dismissed the charge. (The judge erroneously believed that the statute was a punishment enhancement provision for misdemeanor DWI; in fact, the offense is a felony.) The state appealed to the North Carolina Court of Appeals. The court noted that under G.S. 15A-1445(a) that the state may appeal a dismissal of a charge only if further prosecution would not be prohibited by the Double Jeopardy Clause. The court ruled, based on *United States v. Scott*, 437 U.S. 82 (1978), that the Double Jeopardy Clause would not prohibit re prosecution because the trial judge's dismissal was not based on grounds of factual guilt or innocence. Therefore, the state had the right to appeal and also had the right to re prosecute the defendant (the court also ruled that the trial judge's dismissal was error since habitual impaired driving is a felony).

State v. Shedd, 117 N.C. App. 122 (1994). The judge during trial dismissed first-degree murder charges against the defendant because of two discovery violations by the state.

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The court ruled that the state was authorized to appeal the midtrial dismissal without violating the Double Jeopardy Clause because the dismissal was unrelated to a finding of the defendant's factual guilt or innocence. The court cited *State v. Priddy*, 115 N.C. App. 547 (1994); *United States v. Scott*, 437 U.S. 82 (1978).

State v. Vestal, 131 N.C. App. 756 (1998). After the jury had been impaneled and sworn, the trial judge on his own motion dismissed with prejudice the criminal charge against the defendant. (The defendant had not made a motion to dismiss.) The judge ruled that a police department had violated a court order by using, in an undercover operation, drugs that had been forfeited in a prior case and were awaiting destruction. The state gave notice of appeal. G.S. 15A-1445(a) provides that the state may appeal an order dismissing a criminal charge unless the rule against double jeopardy prohibits further prosecution. The court ruled that the state's appeal must be dismissed because the rule against double jeopardy precludes further prosecution in this case. Distinguishing *State v. Priddy*, 115 N.C. App. 547 (1994) (double jeopardy clause did not bar state's right to appeal midtrial dismissal motion made by defendant), the court noted that the defendant in this case did not take an active role in the process that led to the dismissal of the charge against him. Rather, the trial judge's dismissal of the charge on his own motion involuntarily deprived the defendant of his constitutional right to have his trial completed by the jury that had been impaneled and sworn. Thus the rule against double jeopardy barred further prosecution of the defendant for this charge.

B. State's Right to Retry Charge Dismissed Because of Fatal Variance

There is no double jeopardy bar to a second trial when a charge is dismissed because there was a fatal variance between the proof and the allegations in the charge. *State v. Mason*, 174 N.C. App. 206 (2005); *State v. Stinson*, 263 N.C. 283 (1965); *State v. Johnson*, 9 N.C. App. 253 (1970); *State v. Miller*, 271 N.C. 646 (1967).

C. State's Right to Retry Charge Dismissed Because of Defective Indictment

There is no double jeopardy bar to a second trial when a charge is dismissed because an indictment or other criminal pleading is fatally defective. *State v. Whitley*, 264 N.C. 742 (1965); *State v. Jernigan*, 255 N.C. 732 (1961); *State v. Coleman*, 253 N.C. 799 (1961); *State v. Barnes*, 253 N.C. 711 (1961).

D. State's Appeal After Post-Verdict or Post-Trial Dismissal

Sample cases:

State v. Scott, 146 N.C. App. 283 (2001), *reversed on other grounds*, 356 N.C. 591 (2002). The court ruled that it does not violate double jeopardy when the state appeals a superior court judge's granting a defendant's post-trial motion to dismiss for insufficient evidence after the jury had returned a guilty verdict.

State v. Allen, 144 N.C. App. 386 (2001). The defendant was tried for felony child abuse. The trial judge denied the defendant's motions to dismiss the charge for insufficiency of evidence made after the close of the state's evidence and at the close of all the evidence. When the jury was unable to reach a verdict, the judge declared a mistrial. Neither the state nor the defendant made any motions after the mistrial, and court adjourned sine die. Nine days later, the defendant made a motion for appropriate relief that asserted that the

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evidence at trial was insufficient to submit the case to the jury. The trial judge treated the defendant's "motion for appropriate relief" as two motions: (i) a motion to dismiss under G.S. 15A-1227, and (ii) a motion for appropriate relief under G.S. 15A-1414(a). The judge ruled that it should have granted the defendant's motion to dismiss at the close of all the evidence and then dismissed the charge with prejudice. The court ruled that the state had the right to appeal the judge's dismissal of the charge pursuant to the defendant's motion for appropriate relief because double jeopardy did not bar retrial. The court ruled, relying on *United States v. Sanford*, 429 U.S. 14 (1976), that the judge's dismissal of the charge effectively was a pretrial dismissal (that is, before the retrial after the mistrial) because the defendant's motion to dismiss was untimely under G.S. 15A-1227 (because it was not made before the end of the court session) and unauthorized under G.S. 15A-1414(a) (because there was no verdict to permit such a motion). The court also ruled that the judge did not have inherent authority to dismiss the charge.

XI. Mistrial Declared Because Jury Deadlocked on Lesser Offense Does Not Bar Reprosecution for Greater Offense

Assume that a judge submits to the jury the charged offense and lesser-included offenses. A mistrial is declared, but the jury indicates that it was deadlocked on one of the lesser-included offenses. In such a case, double jeopardy does not bar reprosecution of the charged offense. There must be a final verdict before there can be an implied acquittal. *State v. Booker*, 306 N.C. 302 (1982) (judge submitted first-degree murder and second-degree murder; jury indicated in a note that it was deadlocked on second-degree murder and judge ordered mistrial; court ruled that this was not an implied acquittal of first-degree murder, and double jeopardy did not bar reprosecution of first-degree murder); *State v. Hatcher*, 117 N.C. App. 78 (1994) (mistrial on charged offense does not bar submission of lesser offense at retrial even though lesser offenses were not submitted at first trial); *State v. Williams*, 110 N.C. App. 306 (1993) (ruling similar to *Booker*); *State v. Herndon*, 177 N.C. App. 353 (2006) (jury's note about its agreement on issue in first trial ending in hung jury did not under collateral estoppel or double jeopardy bar relitigation of issue in second trial).

For additional discuss of double jeopardy issues involved with mistrials, see outline in this manual entitled *Mistrial*.

XII. Due Process Issues When Increased Sentence After Retrial or Trial De Novo

A. Increased Sentence After Retrial in Superior Court

Although the Double Jeopardy Clause does not prohibit an increased sentence after a retrial, the Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969) ruled that the Due Process Clause requires an increased sentence must be justified by the defendant's misconduct occurring after the original sentence was imposed. However, North Carolina statutory law imposes a more severe restriction than *Pearce* on an increased sentence after retrial. G.S. 15A-1335 provides that when a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, a judge may not impose a new sentence for the same offense, or for a different offense based on the same conduct, that is more severe. For cases interpreting this statute, see *State v. Hemby*, 333 N.C. 331 (1993); *State v. Nixon*, 119 N.C. App. 571 (1995); *State v. Harris*, 115 N.C. App. 42 (1994); *State v. Pakulski*, 106 N.C. App. 444 (1992); *State v. Kirkpatrick*, 89 N.C. App. 353 (1988).

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Reference: Jessica Smith, "Limitations on a Judge's Authority to Impose a More Severe Sentence After a Defendant's Successful Appeal or Collateral Attack," Administration of Justice Bulletin No. 2003/03 (July 2003), available online at <http://ncinfo.iog.unc.edu/programs/crimlaw/aoj200303.pdf>.

B. Increased Sentence After Trial De Novo in Superior Court

There is no constitutional prohibition on increasing a defendant's sentence after a conviction in superior court on appeal for trial de novo from district court, absent proof of actual vindictiveness for the defendant's asserting the right to trial de novo. *Colten v. Kentucky*, 407 U.S. 104 (1972) (ruling in *North Carolina v. Pearce* inapplicable to increased sentence in trial de novo system); *State v. Sparrow*, 276 N.C. 499 (1970) (similar ruling, even though decided before *Colten*). However, the North Carolina Court of Appeals in *State v. Midgett*, 78 N.C. App. 387 (1985), without discussing the *Colten* and *Sparrow* rulings, inappropriately relied on *Wasman v. United States*, 468 U.S. 559 (1984) and stated that there is a presumption of vindictiveness when a defendant receives an increased sentence in superior court after trial de novo. Therefore, the state or sentencing judge must offer a reason for the increased sentence. The court's statements in *Midgett* are inconsistent with *Colten* and are therefore incorrect.

XIII. Due Process Issues in Instituting More Serious Charge after Appeal for Trial De Novo in Superior Court

If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for trial de novo in superior court, the state's later indictment of the defendant for felonious assault arising out of the same incident creates a presumption of vindictiveness under the Due Process Clause. *Blackledge v. Perry*, 417 U.S. 21 (1974). See also *Thigpen v. Roberts*, 468 U.S. 27 (1984) (prosecution of manslaughter was barred under *Blackledge* when charge was brought after conviction of misdemeanor traffic offenses in lower court and appeal for trial de novo in higher court; court stated in footnote 6 that state may attempt to rebut presumption of vindictiveness); *State v. Mayes*, 31 N.C. App. 694 (1976) (prosecution of felonious assault was barred under *Blackledge* when charge was brought after conviction of misdemeanor assault in district court and appeal for trial de novo in superior court).

XIV. Statutory Bars to Multiple Prosecutions

A. Drug Prosecution in North Carolina After Prosecution for Same Act in Federal Court or Other State Court (G.S. 90-97) and Prosecution of Criminal Offense in North Carolina after Another State's Prosecution of Identical Offense (G.S. 15A-134)

G.S. 90-97 provides that if a violation of Article 5 (North Carolina Controlled Substances Act) of Chapter 90 of the General Statutes is a violation of a federal law or the law of another state, a conviction or acquittal under the federal law or the law of another state for the same act is a bar to prosecution in North Carolina state court.

Sample case:

State v. Brunson, 165 N.C. App. 667 (2004). An undercover law enforcement officer made three separate purchases of cocaine from the defendant over a one month period; at least one other person was involved with the defendant. The defendant was charged in federal court with three counts of unlawful distribution

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of cocaine for the three transactions. He pled guilty in federal court on one count. The state then brought charges based on the same acts. The defendant was convicted of nine counts of trafficking cocaine and three counts of trafficking conspiracy. The court ruled that G.S. 90-97 (if state drug law is violation of federal law, conviction or acquittal under federal law for the “same act” is bar to state prosecution) barred the state prosecution of the nine counts of trafficking cocaine. The court rejected the state’s argument that an elemental analysis of federal and state offenses should be used to determine whether the state prosecution is barred. The court instead focused on the underlying actions for which the defendant is prosecuted at the federal and state level. The court also ruled, however, that G.S. 90-97 did not bar the prosecution of the trafficking conspiracy charges because the defendant was not charged with conspiracy in federal court.

G.S. 15A-134 provides that if a charged offense occurred partly in North Carolina and partly in another state, a person charged with that offense may be tried in North Carolina if he or she has not been placed in jeopardy for the identical offense in the other state.

B. State’s Failure to Join Related Offense; G.S. 15A-926(c)

G.S. 15A-926(c)(2) provides that a defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense. The motion to dismiss must be made before the second trial, and must be granted unless (a) a motion for joinder of these offenses had been previously denied; (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)(3) provides that the right to joinder under G.S. 15A-926(c) is inapplicable when the defendant has pleaded guilty or no contest to the previous charge.

Sample cases:

State v. Warren, 313 N.C. 254 (1985) [no error in state’s bringing burglary and larceny charges after trial for related murder when there was insufficient evidence at time of murder trial to charge burglary and larceny offenses; see G.S. 15A-926(c)(2)c.].

State v. Jones, 50 N.C. App. 263 (1981) [defendant waived right to dismissal of joinable offenses tried separately when defendant failed to make motion for joinder of all pending joinable offenses; see G.S. 15A-926(c)(1) and -926(c)(2)b.].

XV. Collateral Estoppel under Double Jeopardy Clause

Collateral estoppel is a component of double jeopardy. When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in a future prosecution. *Ashe v. Swenson*, 397 U.S. 436 (1970) (when defendant was acquitted of the robbery of one of six poker players, and identity of the defendant was the single issue in dispute, later prosecution for the robbery of a different poker player was barred by collateral estoppel component of double jeopardy).

It is unclear whether the state may apply the principle of collateral estoppel against a defendant. See, for example, *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994) (rejecting government’s

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use of collateral estoppel against the defendant at retrial; court discusses other federal cases that have issued contrary rulings); *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998). But see *State v. Ellis*, 262 N.C. 446 (1964) (determination of paternity may not be relitigated by defendant in later prosecution for nonsupport of illegitimate child); *State v. Dial*, 122 N.C. App. 298 (1996) (jury's special verdict finding North Carolina had jurisdiction to try criminal charge, accepted by judge before declaring mistrial at murder trial, was res judicata and barred defendant from relitigating that issue at retrial); *State v. Lewis*, 311 N.C. 727 (1984) (conviction of nonsupport of minor children collaterally estopped defendant from relitigating paternity in later child enforcement agency's civil action for indemnification of support payments made for minor children).

The defendant has the burden of proving the collateral estoppel issue. *State v. Warren*, 313 N.C. 254 (1985); *State v. McKenzie*, 292 N.C. 170 (1977).

Sample cases:

State v. Bell, 164 N.C. App. 83 (2004) (acquittal of assault on government officer in district court did not bar under Rule 404(b) or collateral estoppel admission of evidence of assault in superior court trial de novo of obstructing public officer).

State v. Safrit, 145 N.C. App. 541 (2001) (not guilty verdict in violent habitual felon hearing barred state, on collateral estoppel grounds, from trying defendant in later violent habitual felon hearing based on the same two prior convictions used in prior violent habitual felon hearing).

State v. Adams, 347 N.C. 48 (1997) (although mitigating circumstance was found at first capital sentencing hearing, collateral estoppel did not bar relitigation of the circumstance at later capital sentencing hearing).

State v. Brooks, 337 N.C. 132 (1994) (federal court's suppression of evidence did not bar admission of same evidence in state court).

State v. Agee, 326 N.C. 542 (1990) [collateral estoppel did not bar admission of evidence of defendant's marijuana possession, for which defendant was acquitted, at later trial for possession of LSD; court relies on *Dowling v. United States*, 493 U.S. 342 (1990)]. However, note the later case of *State v. Scott*, 331 N.C. 39 (1992) [acquittal bars admission of evidence under Rule 404(b) as a matter of state evidence principles; *Agee* distinguished].

State v. Alston, 323 N.C. 614 (1988) (acquittal of possession of firearm by convicted felon did not collaterally estop state from proving defendant's possession of firearm at later armed robbery trial when jury that acquitted defendant could have found defendant's non-possession of firearm occurred three hours after robbery).

State v. Edwards, 310 N.C. 142 (1984) (acquittal of felonious larceny did not collaterally estop state from proving felonious breaking or entering at later trial).

State v. McKenzie, 292 N.C. 170 (1977) (acquittal of driving under the influence of intoxicating liquor collaterally estopped state from using that conduct in later prosecution of involuntary manslaughter).

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State v. Solomon, 117 N.C. App. 701 (1995) (acquittal of possession of marijuana and drug paraphernalia found in cigarette case did not bar later prosecution for possession of cocaine found in cigarette case, based on record before court).

State v. Cox, 37 N.C. App. 356 (1978) (acquittal of armed robbery did not bar later trial of accessory after the fact of armed robbery).

State v. Summers, 351 N.C. 620 (2000) (state was estopped from relitigating issue of whether defendant willfully refused to submit to breath test following judicial determination of issue in appeal of administrative revocation of defendant's driver's license). See also *Brower v. Killens*, 122 N.C. App. 685 (1996); *State v. O'Rourke*, 114 N.C. App. 435 (1994); *Gibson v. Faulkner*, 132 N.C. App. 728 (1999).

XVI. Summary of *United States v. Dixon* and Related Cases

The following detailed discussion of *United States v. Dixon* and *State v. Gilley* provides a useful review of the current state of significant double jeopardy issues.

United States v. Dixon, 509 U.S. 688 (1993). This case involved double jeopardy issues in unrelated trials with two different defendants.

Defendant Dixon. Defendant Dixon was arrested for second-degree murder and released on bond, which specified that he was not to commit “any criminal offense” and warned him that a violation of any condition of pretrial release would subject him, among other things, to prosecution for criminal contempt. Defendant Dixon was later arrested and charged with possession of cocaine with intent to distribute. Based on the violation of his pretrial release condition, he was convicted of criminal contempt based on proof beyond a reasonable doubt that he had committed the drug offense. He later moved to dismiss the cocaine charge on double jeopardy grounds.

Defendant Foster. After defendant Foster had committed physical attacks on his estranged wife, she obtained from a court a civil protection order (CPO), which required that he not “molest, assault, or in any manner threaten or physically abuse” her. She later filed motions to hold Foster in contempt for three separate threats (on November 12, 1987, and March 26, 1988, and May 17, 1988) and two assaults (on November 6, 1987 and May 21, 1988). Her counsel prosecuted the action for contempt (although the Court noted that the United States Attorney’s Office—the crimes were committed in the District of Columbia—was apparently aware of the action). The trial judge noted that for the assault charges, she must prove as an element, first that there was a civil protection order (CPO), and second, that Foster committed a criminal assault. Foster was acquitted of criminal contempt for the three threats violations (described above) but was convicted of criminal contempt for the two assaults (described above). The United States Attorney’s Office later obtained an indictment charging Foster with simple assault on November 6, 1987 (Count I); threatening to injure her on November 12, 1987 and March 26 and May 17, 1988 (Counts II-IV); and assault with intent to kill on May 21, 1988 (Count V). Defendant Foster moved to dismiss all counts based on double jeopardy and also on collateral estoppel grounds for Counts II-IV (since he had been acquitted of those charges in the criminal contempt proceeding).

Court’s Rulings

1. *Plenary Criminal Contempt Is Included within Double Jeopardy.* The Court ruled that the Double Jeopardy Clause applies to a prosecution of a criminal charge after a defendant has been tried in plenary proceedings for criminal contempt for violating a pretrial release order that prohibited the defendant from committing “any criminal offense.” (The Court specifically did not decide if the Double Jeopardy Clause applies to summary criminal contempt.)

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The Court applied to each defendant the *Blockburger* [*Blockburger v. United States*, 284 U.S. 299 (1932)] test, also known as the same-elements test, which determines whether each offense contains an element not contained in the other; if not, they are the “same offence” and double jeopardy bars additional punishment and successive prosecution. [But remember there is a different rule for multiple punishments at a *single trial*; see *Missouri v. Hunter*, 459 U.S. 359 (1983).]

Defendant Dixon. The Court ruled under the *Blockburger* test that defendant Dixon’s drug offense did not include any element not contained in his previous criminal contempt offense, and therefore his subsequent prosecution for the drug offense was barred under the Double Jeopardy Clause.

Defendant Foster. The Court ruled that the subsequent prosecution for Count I (simple assault) was barred because it was based on the prior criminal contempt conviction for violating the CPO provision forbidding him from committing simple assault. The Court ruled that the subsequent prosecution for Counts II-IV was not barred, because the criminal contempt prosecution required proof of an element (knowledge of CPO) that Counts II-IV did not, and Counts II-IV required proof of element (threat to kidnap, threat to inflict bodily injury, or threat to damage property) that the conviction for criminal contempt based on the CPO (Foster must not “in any manner threaten”) did not. The Court ruled that Count V was not barred, because the criminal contempt prosecution required proof of an element (knowledge of CPO) that Count V did not, and Count V required proof of an element (specific intent to kill) that the conviction for criminal contempt did not (it only required proof of simple assault). [Note that collateral estoppel principles, not decided in this case, may effectively bar the subsequent prosecution of Counts II-IV, because defendant Foster was acquitted of criminal contempt for elements included within those offenses; see, for example, *State v. McKenzie*, 292 N.C. 170 (1977).]

2. *Court Overrules Grady v. Corbin.* The Court overruled *Grady v. Corbin*, 495 U.S. 508 (1990). [The *Grady* ruling had prohibited a subsequent prosecution if, to establish an element of an offense charged in that prosecution, the prosecutor had to prove conduct that constituted an offense for which the defendant had already been prosecuted.]

The Court’s overruling of *Grady v. Corbin* affects prior North Carolina case law as follows. The court’s result in *State v. Hamrick*, 110 N.C. App. 60 (1993) remains correct. In *Hamrick*, the defendant on May 1, 1990 was involved in an automobile accident with another vehicle, and the operator of that vehicle died. The defendant was charged the same day with the infraction of driving left of center and in a separate criminal summons with misdemeanor death by vehicle, based on the left-of-center violation. On May 18, 1990, the defendant pled responsible before a magistrate to the left-of-center infraction. On May 30, 1990 in district court, the defendant moved to dismiss the misdemeanor death by vehicle charge on double jeopardy grounds. Without discussing *Grady*, the court of appeals ruled that the plea to the left-of-center infraction did not bar prosecution of remaining pending charge of misdemeanor death by vehicle, based on the ruling in *Ohio v. Johnson*, 467 U.S. 493 (1984) (defendant’s plea of guilty over prosecutor’s objection to one count of multi-count indictment did not bar state’s prosecution of greater offense in indictment). The ruling in *Hamrick* also is correct under the *Blockburger* test, because the driving left of center violation contains an element (driving left of center) that is not required to be proven in misdemeanor death by vehicle (any motor vehicle violation is sufficient) and misdemeanor death by vehicle contains an element (the death of the person resulting from the violation) that is not an element of driving left of center.

The Court’s ruling (overruling *Grady v. Corbin*) effectively overruled *State v. Griffin*, 51 N.C. App. 564 (1981) (defendant was involved in accident with another vehicle and was charged with failing to yield right-of-way, and pled guilty that same day; later, the driver of the other vehicle died from injuries received in the accident; the defendant was then charged with death by vehicle; court upheld dismissal of that charge on double jeopardy grounds). *Griffin* had relied on dicta in *Illinois v. Vitale*, 447 U.S. 410 (1980) that clearly was disavowed in this case, *United*

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States v. Dixon. In any event, the *Griffin* ruling appeared to be incorrect when it was decided, because double jeopardy principles do not apply when a defendant pleads guilty to a lesser offense when the greater offense could not be charged (for example, because the victim had not died yet); see *Diaz v. United States*, 223 U.S. 442 (1912); *Garrett v. United States*, 471 U.S. 773 (1985); and *State v. Meadows*, 272 N.C. 327 (1968).

State v. Dye, 139 N.C. App. 148 (2000). The defendant and her husband divorced and several years later entered into a civil consent order that the defendant “shall not come to the residence of [the husband].” The defendant later came to the husband’s residence. After a hearing, a judge found the defendant in criminal contempt “for going to the residence of [the husband].” Thereafter, the defendant was prosecuted for and convicted of domestic criminal trespass based on the same incident that had resulted in the criminal contempt finding. The court ruled, relying on its double jeopardy analysis in *State v. Gilley*, 135 N.C. App. 519 (1999) (there must be a comparison of the elements of the offense actually considered to have been violated in the criminal contempt proceeding with the elements of the substantive offense), that double jeopardy barred the prosecution for domestic criminal trespass. The court ruled that the phrase “shall not come to the residence” in the consent order was equivalent to the domestic criminal trespass element of “enter[ing] . . . upon the premises” for purposes of double jeopardy. The court distinguished its ruling in *Gilley* (contempt for violating order that defendant “stay away” from residence did not bar later prosecution for domestic criminal trespass).

State v. Gilley, 135 N.C. App. 519 (1999). The defendant, after a plenary hearing, was found in criminal contempt for violating a domestic violence protective order (DVPO) that provided that (1) the defendant shall not assault, threaten, abuse, follow, harass, or in any way interfere with a named female or her minor children who are currently in her custody; and (2) the defendant shall stay away from her residence. The adjudication of contempt was based on events that later were the subject of criminal prosecution and convictions of kidnapping, misdemeanor breaking or entering, domestic criminal trespass, and assault on a female (the female named in the DVPO was the victim of all these offenses) There was no transcript of the contempt hearing, and the contempt order simply recited that the defendant willfully failed to comply with the DVPO and was in criminal contempt. The court stated that it must assume, for the purpose of deciding the double jeopardy issues, that all the prohibited conduct in the DVPO was the basis of the adjudication of criminal contempt.

The court discussed and interpreted the double jeopardy rulings in *United States v. Dixon*, 509 U.S. 688 (1993). The court determined that the *Dixon* ruling requires that a court must consider the specific offenses at issue in the contempt proceeding and compare the elements of those offenses with the elements of the later-charged criminal offenses.

The court ruled that the finding of criminal contempt barred the later prosecution of assault on a female because the DVPO prohibited the defendant, a male, from assaulting the named female. All the elements in the contempt adjudication were included in the later prosecution of assault on a female. (Note: The court noted that a later prosecution for assault with a deadly weapon might not be barred because the DVPO and the criminal contempt adjudication on which it was based did not include an assault *with a deadly weapon*. See a similar ruling in *Dixon*).

The court ruled that the criminal contempt adjudication did not bar the later prosecutions of first-degree kidnapping, misdemeanor breaking or entering, and domestic criminal trespass. All the elements of these offenses were not included in the criminal contempt adjudication for violating the DVPO. (1) The DVPO prohibited the defendant from interfering with and following the named female. The court ruled that the order’s language did not encompass the elements of first-degree kidnapping. For example, the elements of confinement and the purpose to do serious bodily harm or to terrorize were not set out in the DVPO. (2) Misdemeanor breaking or entering

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requires a wrongful breaking or entering into a building. The court noted that the DVPO simply required that the defendant “stay away from the parties’ residence.” (3) The DVPO directed the defendant to “stay away” from the marital residence, while domestic criminal trespass prohibits a person from entering after being forbidden to do so or remaining on the premises occupied by a present or former spouse.

XVII. Ex Post Facto Issues

The ex post facto provisions of the United States and North Carolina constitutions prohibit: (1) the enactment of a statute that makes criminal an act that was not a crime when it was committed; (2) changing the elements of an offense after it was committed and to the defendant’s disadvantage; (3) increasing the punishment for a crime after the act constituting the crime was committed [*State v. Detter*, 298 N.C. 604 (1979)]; and (4) eliminating a defense to a crime that existed when the crime was committed or altering the sufficiency of evidence to convict.

Generally, changes in rules of evidence or criminal procedure do not violate ex post facto provisions. *In re Stedman*, 305 N.C. 92 (1982) (citing several United States Supreme Court cases, court rules that statute allowing fingerprinting of juvenile after commission of offense did not violate ex post facto); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Hopt v. Utah*, 110 U.S. 574 (1884); *Thompson v. Missouri*, 171 U.S. 380 (1898). But see *Carmell v. Texas*, 529 U.S. 513 (2000) (Texas statute violated Ex Post Facto Clause by eliminating corroboration-of-witness rule to convict defendant by testimony alone).

While ex post facto provisions only involve legislative enactments, the Fifth and Fourteenth Amendments also prohibit the retrospective application of unforeseeable judicial modifications of criminal law to the detriment of a defendant. *State v. Vance*, 328 N.C. 613 (1991) (abrogating year-and-a-day rule for murder prospectively only); *State v. Barnes*, 345 N.C. 184 (1997); *State v. Robinson*, 335 N.C. 146 (1993).

Sample cases:

State v. Wolfe, 157 N.C. App. 22 (2003). The defendant was convicted of second-degree murder and found to be a violent habitual felon. The court ruled, relying on *State v. Mason*, 126 N.C. App. 318 (1997), that the reclassification of a felony offense after it was committed so it became a violent felony under the violent habitual offender statute did not violate the Ex Post Facto Clause. Thus, although the defendant’s 1987 voluntary manslaughter was a Class F felony, it had been reclassified as a Class D felony thereafter and was properly considered as a violent felony. (Author’s note: Class A through E felonies are violent felonies.) See G.S. 14-7.7(b)(2).

State v. Wiley, 355 N.C. 592 (2002). The court ruled, relying on *State v. Taylor*, 128 N.C. App. 394, *aff’d per curiam*, 349 N.C. 219 (1998) and other cases, that the application of a legislative amendment, effective for first-degree murders committed on or after May 1, 1994, to a juvenile adjudication occurring before May 1, 1994, used as a prior violent felony conviction under G.S. 15A-2000(e)(3) (prior violent felony conviction), did not violate the Ex Post Facto Clause.

Price v. Beck, 153 N.C. App. 763 (2002). Inmate, serving a sentence of life imprisonment for a Class B felony imposed under the Fair Sentencing Act (as well as a consecutive prison term for a kidnapping conviction), alleged that the Parole Commission had incorrectly calculated his parole eligibility by failing to include good time and gain time credits toward the minimum term (twenty years) of his Class B felony sentence. The court ruled that the Secretary of Correction did not abuse his discretion in not promulgating regulations concerning good time and gain time

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deductions from sentences for Class A, B, and C felonies under the FSA. Based on *Robbins v. Freeman*, 127 N.C. 162 (1997) (requiring that parole eligibility for prisoner serving consecutive sentences be calculated as if inmate was serving single sentence; court reversed agency policy of calculating parole eligibility separately for each sentence), the prisoner's parole eligibility was recalculated. The recalculation resulted in a longer term of imprisonment before the inmate became parole eligible. The court, citing *Rogers v. Tennessee*, 532 U.S. 451 (2001), and *Glenn v. Johnson*, 761 F.2d 192 (4th Cir. 1985), rejected the inmate's argument that the recalculation violated ex post facto or due process provisions.

State v. Taylor, 349 N.C. 219 (1998), *affirming per curiam*, 128 N.C. App. 394 (1998) [The court affirmed per curiam the opinion of the North Carolina Court of Appeals, which is summarized as follows: The defendant was convicted of second-degree rape, which was committed on March 19, 1995. The trial judge, in sentencing the defendant under the Structured Sentencing Act, found as an aggravating factor under G.S. 15A-1340.16(d)(18a) that the defendant had been previously adjudicated delinquent for an offense that would be a Class C felony if committed by an adult. The adjudication of delinquency occurred in 1993. The legislature enacted this aggravating factor, effective October 1, 1994. Relying on *Collins v. Youngblood*, 497 U.S. 37 (1990), the court ruled that the use of this aggravating factor did not violate the Ex Post Facto Clause].

State v. Todd, 313 N.C. 110 (1985) (enactment of habitual felon law did not violate ex post facto provisions).

State v. Mason, 126 N.C. App. 318 (1997) (using convictions that were later reclassified as more serious felonies in establishing violent habitual status felony did not violate ex post facto provisions; defendant's status as violent habitual felon serves only to enhance punishment for predicate substantive felony, not to punish defendant for prior felonies).

State v. Cobb, 18 N.C. App. 221 (1973), *reversed on other grounds*, 284 N.C. 576 (1974) (defendant was convicted of a felony on October 6, 1970, the crime of possession of a firearm by convicted felon was enacted (G.S. 14-415.1) on October 1, 1971, and defendant violated G.S. 14-415.1 on July 31, 1972—court ruled that there was no ex post facto violation).

Kansas v. Hendricks, 521 U.S. 346 (1997) (civil commitment of sexual offenders after a prison term is not punishment and therefore is not subject to ex post facto provisions).

In re Rogers, 63 N.C. App. 705 (1983) (change in release procedures for involuntarily committed person is not subject to ex post facto provisions). See also *In re Hayes*, 111 N.C. App. 384 (1993) (similar ruling).

Lynce v. Mathis, 519 U.S. 433 (1997) (retroactive cancellation of provisional early release credits awarded to alleviate prison overcrowding violated ex post facto provisions).

Stogner v. California, 539 U.S. 607 (2003). The Court ruled that legislation that extended the statute of limitations for certain kinds of sex offenses violated the Ex Post Facto Clause when it revived the prosecution of offenses that had already been barred by the prior version of the statute of limitations for those offenses.

Smith v. Doe, 538 U.S. 84 (2003). The Court ruled that Alaska's sex offender registration law is not punitive and thus its retroactive application to a person convicted before its enactment does not violate the Ex Post Facto Clause. (See the Court's analysis of the factors used to determine that the law was not punitive.)