DOUBLE JEOPARDY AND RELATED ISSUES

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I. Introduction. The Double Jeopardy Clause of the Fifth Amendment protects against:

- A second prosecution for the "same offense" after an acquittal;
- A second prosecution for the "same offense" after a conviction (by trial or plea); and
- Multiple punishments for the "same offense."

Section 19, Article I, of the North Carolina Constitution also has been interpreted to protect against double jeopardy. State v. Rambert, 341 N.C. 173, 175 (1995). The North Carolina protection confers no greater protections than the federal protection. State v. Brunson, 327 N.C. 244, 249 (1990).

II. The "Same Offense." As noted in Section I above, double jeopardy protects against a second prosecution for the "same offense" after an acquittal or conviction and against multiple punishments for the "same offense." This section explores the meaning of the term "same offense."

A. What Constitutes An "Offense" for Purposes of Double Jeopardy.

1. Crimes. The term "offense" applies to the prosecution of criminal offenses. United States v. Dixon, 509 U.S. 688 (1993).

2. Criminal Contempt. In *United States v. Dixon*, 509 U.S. 688 (1993), the United States Supreme Court held that criminal contempt imposed after a plenary hearing constitutes an "offense" under double jeopardy. S*ee also* State v. Dye, 139 N.C. App. 148, 153 (2000) (prosecution for domestic criminal trespass barred after plenary criminal contempt finding); State v. Gilley, 135 N.C. App. 519, 528-29 (1999) (prosecution for assault on female barred after plenary criminal contempt finding).

However, the *Dixon* Court did not decide whether summary criminal contempt is included within double jeopardy. North Carolina cases have not directly decided this issue. For example, *State v. Yancy*, 4 N.C. 133 (1814), held that a summary contempt finding of assault did not bar a later prosecution of assault, but the holding did not appear to decide that summary contempt is not an "offense" under double jeopardy. Almost all of the cases in other jurisdictions to consider the issue have ruled that summary criminal contempt is not an "offense" under double jeopardy. United States v. Rollerson, 449 F.2d 1000, 1004-05 (D.C. Cir. 1971) (summary contempt finding for throwing water pitcher at prosecutor did not bar later trial for assault on the prosecutor); Ellis v. State, 634 N.E.2d 771, 774 (Ind. Ct. App. 1994) (summary contempt for escaping from courtroom did not bar later prosecution for escape). For a discussion of contempt in general, see Contempt in this Guide under Judicial Administration & Related Matters.

3. Infractions. In *State v. Hamrick,* 110 N.C. App. 60, 66 (1993), the court held that an infraction is an "offense" under double jeopardy.

B. Test for Determining Whether Offenses Are The "Same." To determine whether offenses are the "same" for purposes of double jeopardy one must look at the elements of the offenses. If each offense contains an element that is not contained in the other, the offenses are not the same for purposes of double jeopardy. United States v. Dixon, 509 U.S. 688, 696 (1993); *see also* State v. Fernandez, 346 N.C. 1, 19 (1997); State v. Tirado, 358 N.C. 551, 579 (2004); State v. Garris, 191 N.C. App. 276, 286 (2008). This test is referred to as the *Blockburger* test, because it comes from the Supreme Court's ruling in *Blockburger v. United States*, 284 U.S. 299 (1932).

1. Examples of Different Offenses. To illustrate application of the *Blockburger* test, suppose that Offense 1 contains elements A, B, and C and that Offense 2 contains elements B, C, and D. In this scenario, Offense 1 contains an element not in Offense 2 (element A) and Offense 2 contains an element not in Offense 1 (element D). Thus the offenses are not the same.

For a case example, consider *State v. Tirado*, 358 N.C. 551, 579 (2004). In that case, the court held that double jeopardy did not bar convictions of both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same assault on the victim. The court noted that the elements of use of a deadly weapon and serious injury in the felonious assault are not in attempted first-degree murder, and the element of premeditation and deliberation in attempted first-degree murder is not in felonious assault. Thus, each offense contains at least one element not included in the other. *See generally* JESSICA SMITH, NORTH CAROLINA CRIMES (7th ed. 2012) (Chapter 7 (Assaults) discusses cases involving double jeopardy and multiple convictions of assault and related offenses).

Similarly, in *State v. Etheridge*, 319 N.C. 34, 50-51 (1987), the court held that double jeopardy did not prohibit multiple convictions of: (1) first-degree statutory rape, indecent liberties, and incest based on same act with the same child, and (2) crime against nature, indecent liberties, and second-degree sexual offense based on same act with the same child. The court reasoned that each of these offenses have at least one element that is not included in the other offenses.

2. Examples of Offenses That Are the Same. For another illustration of the *Blockburger* tests, suppose that Offense 1 contains elements A, B, and C and that Offense 2 contains elements A, B, C, and D. Although offense 2 contains an element that is not in offense 1, the reverse is not true for offense 1; every element of offense 1 is included in offense 2. Thus, the offenses are the same under the *Blockburger* test. *See* State v. Partin, 48 N.C. App. 274, 282 (1980) (punishments for convictions of both assault with a deadly weapon and assault with a firearm on a law enforcement officer violated double jeopardy because they are the same offense under double jeopardy).

a. Greater and Lesser-Included Offenses. Under the *Blockburger* test, a greater and lesser-included offense always are the same for purposes of double jeopardy; with the lesser-included offense, by definition, every element of the lesser-included offense will always be part of the greater offense. Thus, a prosecution for the lesser offense will bar a later prosecution for the greater offense—and vice-versa. Brown v. Ohio, 432 U.S. 161, 169 (1977)

(conviction of temporary taking of motor vehicle barred later prosecution of larceny of that motor vehicle; "whatever the sequence may be, [double jeopardy] forbids successive prosecution and cumulative punishment for a greater and lesser included offense"); Green v. United States, 355 U.S. 184, 190 (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) (per curiam) (conviction of greater offense, murder committed during commission of robbery with a deadly weapon, bars later prosecution of lesser offense, robbery); State v. Broome, 269 N.C. 661, 666 (1967) (defendant was convicted of DUI, first offense, at trial for DUI, third offense; retrial after appellate reversal of conviction was limited to DUI, first 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* State v. Haith, 158 N.C. App. 745, *4 (2003) (unpublished) (DWI is lesser-included offense of habitual DWI and defendant may not be convicted and punished for both). *See also* Ball v. United States, 163 U.S. 662, 670 (1896) (acquittal of an offense is an acquittal of all lesser offenses).

b. Continuing Offenses. One twist on this issue arises with respect to offenses that are continuing in nature. For an offense such as stalking for example, the relevant conduct occurs over a period of time. At least one North Carolina case has held that a second prosecution for stalking will be barred when the time periods of the offenses overlap and thus the same acts could have resulted in a conviction of the same offense. *See* State v. Fox, ___ N.C. App. ___, 721 S.E.2d 673, 678 (2011) (double jeopardy barred second prosecution of felony stalking because the time periods of the course of conduct alleged in both stalking indictments overlapped, and thus the same acts could have resulted in a conviction under either indictment).

III. Punishment. As noted in Section I above, double jeopardy protects against multiple punishments for the same offense. For example, if a defendant is convicted of DWI and later prosecuted for habitual DWI, the defendant cannot be convicted or sentenced for the habitual DWI in addition to the sentence for the DWI. State v. Haith, 158 N.C. App. 745, *4 (2003) (unpublished) (DWI is lesser-included offense of habitual DWI and defendant may not be convicted and punished for both).

A. Civil Sanctions As Punishment. In some circumstances a civil sanction or penalty is deemed to be punishment for purposes of double jeopardy. In *Hudson v. United States*, 522 U.S. 93, 99-100 (1997), the United States Supreme Court set out the analysis to be used when determining whether a civil sanction or penalty is deemed to be a punishment. Basically, the Court held that if the civil sanction or punishment is so punitive in nature, it constitutes punishment for purposes of double jeopardy. The Court adopted a two-part test: First, did the legislature expressly or impliedly indicate that the sanction was criminal or civil? Second, assuming the answer to the first question is civil, is the sanction so

punitive either in purpose or effect to transform the sanction into a criminal punishment?

To answer the second question, the Court stated that it would apply the seven factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963):

- Whether the sanction involves an affirmative disability or restraint
- Whether the sanction has historically been considered as a punishment
- Whether the sanction is imposed only with a finding of scienter
- Whether the sanction's operation will promote the traditional aims of punishment, retribution, and deterrence
- Whether the behavior to which the sanction applies is already a crime
- Whether an alternative purpose to which the sanction may rationally be connected is assignable to it
- Whether the sanction appears excessive in relation to the alternative purpose assigned.

These seven factors must be considered with the particular civil statute at issue, not the actual civil sanction imposed in the case, and "only the clearest proof" will suffice to override legislative intent and transform into a criminal punishment what had been denominated a civil sanction. Hudson v. United States, 522 U.S. 93, 100 (1997) (citation omitted); *see also* Seling v. Young, 531 U.S. 250, 263 (2001) (when law is found to be civil, it cannot be considered punitive "as applied" to a single individual in violation of the double jeopardy and ex post facto clauses; the court must consider the law on its face). The *Hudson* Court held 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.

The following civil sanctions or penalties have been held to not constitute punishments for purposes of double jeopardy:

- thirty day pretrial driving license revocation under G.S. 20-16.5, State v. Evans, 145 N.C. App. 324, 334 (2001);
- one-year commercial driver's license disqualification under G.S. 20-17.4(a)(7), State v. McKenzie, ___ N.C. ___, ___ S.E.2d ___ (Oct. 4, 2013), reversing court of appeals opinion for reasons stated in dissenting opinion, ___ N.C. App. ___, 736 S.E.2d 591 (2013);
- satellite-based monitoring, State v. Anderson, 198 N.C. App. 201, 204 (2009);
- civil no contact order for convicted sex offender under G.S. 15A-1340.50, State v. Hunt, ___ N.C. App. ___ 727 S.E.2d 584, 593 (2012);
- in rem forfeiture of property, United States v. Ursery, 518 U.S. 267, 292 (1996);
- civil commitment of sex offenders, Kansas v. Hendricks, 521 U.S. 346, 369 (1997);
- payment of drug tax, State v. Adams, 132 N.C. App. 819, 820 (1999); and
- Alcohol Beverage Commission administrative action, State v. Wilson, 127 N.C. App. 129, 133 (1997).

IV. Covered Prosecutions. As noted in Section I above, double jeopardy protects against a second prosecution for the same offense after an acquittal or conviction. In this context, a prosecution means when the State seeks a conviction of a criminal offense or infraction or a finding of contempt after a plenary hearing. United States v. Dixon, 509 U.S. 688 (1993). However, not all proceedings in the criminal justice system are prosecutions for purposes of double jeopardy. For example, a hearing on revocation of probation, parole, or post-release revocation is not a prosecution. Thus, a revocation based on a violation of a criminal offense does not bar a later prosecution of that offense. State v. Sparks, 362 N.C. 181, 189 (2008); In re O'Neal, 160 N.C. App. 409, 413 (2003).

In order for a prior prosecution to bar a second one, the prior prosecution must have both begun and ended. Both of these events have special meaning in the context of a double jeopardy analysis and are discussed below.

A. When A Prosecution Begins. Jeopardy is said to attach when a prosecution begins. 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, 245 (1990); Serfass v. United States, 420 U.S. 377, 388 (1975); Crist v. Bretz, 437 U.S. 28, 37, n.15 (1978); United States v. Osteen, 254 F.3d 521, 526 (4th Cir. 2001); G.S. 7B-2414.

Double jeopardy does not attach to a guilty plea until it is accepted by a judge. State v. Wallace, 345 N.C. 462, 467 (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 when the State takes a voluntary dismissal before jeopardy had attached. State v. Brunson, 327 N.C. 244, 245 (1990) (jeopardy did not attach in district court when the State dismissed charges before it began to present evidence).

B. When A Prosecution Ends. A prosecution can end with an acquittal or conviction, and in some instances, a dismissal or a mistrial. The sections below explore the relevant rules.

1. Acquittal or Functional Equivalent (Implied Acquittal). An acquittal ends a prosecution. For purposes of double jeopardy, an acquittal includes not only a "not guilty" verdict, but also a trial court's 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, 24 (1978); Burks v. United States, 437 U.S. 1, 18 (1978); Hudson v. Louisiana, 450 U.S. 40, 44 (1981). However, 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, 46 (1982). Under a de novo system, a higher court trial without a determination whether there was sufficient evidence to support the defendant's conviction at the lower court trial does not violate double jeopardy. Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 310 (1984).

2. Conviction. A conviction for double jeopardy purposes occurs when a defendant enters a plea of guilty or no contest that is accepted by a judge, State v. Wallace, 345 N.C. 462, 467 (1997), or when a judge in district court or a jury in superior court enters a verdict of guilty at a trial. Double jeopardy does not attach to a defendant's acknowledgement of guilt in a deferred prosecution agreement when a guilty plea was not

entered and accepted. State v. Ross, 173 N.C. App. 569, 574 (2005), *aff'd*, 360 N.C. 355 (2006) (per curiam). A prayer for judgment continued (PJC) with conditions amounting to punishment is a conviction, but otherwise it is not a conviction unless the State prays judgment and a judge enters a judgment. State v. Maye, 104 N.C. App. 437, 440 (1991) (when a defendant was convicted and a judgment entered for one drug offense, but judgments were not entered for two other drug offenses because PJCs were entered, the court held that it was unable to address the defendant's double jeopardy argument that his "convictions" and "sentencing" for three possession offenses violated double jeopardy). For a discussion of PJCs in general, see Prayer for Judgment Continued in this Guide under Criminal Law.

3. Mistrial. A mistrial is a judicial termination of a trial after jeopardy has attached and before a verdict has been rendered. When a mistrial is declared, whether a second trial is permitted under double jeopardy depends on who moved for a mistrial, whether the defendant consented to it, and the validity of the trial court's order.

If a mistrial is granted based on the defendant's motion or with his or her consent, double jeopardy will generally not bar a second trial unless the defendant's motion was prompted by prosecutorial misconduct that was intended to provoke a motion for mistrial. Oregon v. Kennedy, 456 U.S. 667, 679 (1982); State v. Walker, 332 N.C. 520, 539 (1992); State v. White, 322 N.C. 506, 511 (1988) (*Kennedy* ruling adopted under state constitution); State v. White, 85 N.C. App. 81, 87 (1987). And the same principle likely applies to judicial misconduct. United States v. Dinitz, 424 U.S. 600, 611 (1976) (dicta).

When a trial court declares a mistrial on its own motion or the State's motion and over the defendant's objection, there must be a showing of "manifest necessity." Arizona v. Washington, 434 U.S. 497, 506 (1978); State v. Sanders, 347 N.C. 587, 599 (1998). Federal double jeopardy case law may not require trial court findings to support "manifest necessity" when there is an adequate trial record. Arizona v. Washington, 434 U.S. 497, 517 (1978). However, G.S. 15A-1064 requires a trial judge before granting a mistrial to make findings of fact concerning the grounds for the mistrial, and it is error to fail to do so. For cases deciding whether a second trial will be barred based on this error, see State v. Odom, 316 N.C. 306, 311 (1986) (findings of fact under G.S. 15A-1064 are mandatory but defendant failed to preserve error for review on appeal by failing to object to declaration of mistrial); State v. Lachat, 317 N.C. 73, 85-87 (1986) (where record was unclear as to whether manifest necessity for mistrial existed, failure to make findings of fact barred a second trial despite defendant's lack of objection; *Odom* rule requiring objection should not be applied in capital cases); State v. Pakulski, 319 N.C. 562, 570-71 (1987) (failure to find facts did not bar a second trial where manifest necessity for mistrial clearly appeared on the record); State v. Sanders, 122 N.C. App. 691, 696 (1996) (trial court erred by failing to find facts but defendant did not object and thus failed to preserve issue for review); State v. White, 85 N.C. App. 81, 85 (1987) (where grounds for mistrial clearly appeared on record, trial court's failure to find facts was harmless error), *aff'd*, 322 N.C. 506 (1988).

a. Mistrial Because of Jury Deadlock on Lesser Offense. Suppose that a trial judge submits to the jury the charged offense and lesser-included offenses. Suppose further that 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, even if the jury reported that it was unanimous against guilt of greater offense. There must be a final verdict before there can be an implied acquittal. Blueford v. Arkansas, ___ U.S. ___,132 S. Ct. 2044, 2052 (2012); State v. Booker, 306 N.C. 302, 304-05 (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 held 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, 85 (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, 310 (1993) (holding similar to *Booker*); State v. Herndon, 177 N.C. App. 353, 364 (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).

b. Defendant's Right to Assert Double Jeopardy Violation Based on Erroneous Declaration of a Mistrial. A defendant's failure in a non-capital trial to object to a declaration of a mistrial generally forfeits the right to assert a double jeopardy violation at a later trial or on appellate review, State v. Odom, 316 N.C. 306, 311 (1986), but the failure to object in a capital trial generally does not result in forfeiture. State v. Lachat, 317 N.C. 73, 85 (1986).

4. Dismissals After Jeopardy Has Attached. Section IV.A. above discusses when jeopardy attaches. Whether a dismissal after that point constitutes a jeopardy bar is discussed in the subsections that follow.

As background to this discussion, G.S. 15A-1445(a) provides that the State may appeal a dismissal of a charge only if further prosecution would not be prohibited by the Double Jeopardy Clause. Generally, if a charge is dismissed after jeopardy attaches, the State is barred from retrying the defendant. United States v. Martin Linen Supply Co., 430 U.S. 564, 575-76 (1977); Evans v. Michigan, ___ U.S. ___,133 S. Ct. 1069, 1081 (2013) (if judge enters directed verdict of acquittal for insufficient evidence after trial begins and before jury reaches verdict, even if acquittal is based on mistake of law, erroneous acquittal bars further prosecution under double jeopardy). But sometimes there are exceptions to the general rule, as noted below.

a. Midtrial Dismissal—Generally. The Double Jeopardy Clause does not prohibit reprosecution of a charge that was dismissed midtrial pursuant to a defendant's motion if the dismissal was not based on grounds of factual guilt or innocence. United States v. Scott, 437 U.S. 82, 98-99 (1978) (retrial permitted when defendant successfully moved at close of evidence for dismissal based on defendant being prejudiced by pre-indictment delay); State v.

Priddy, 115 N.C. App. 547, 551 (1994) (State had right to appeal and right to retry defendant when defendant at close of evidence successfully moved to dismiss habitual impaired driving charge on ground that superior court did not have jurisdiction over charge); State v. Shedd, 117 N.C. App. 122, 123 (1994) (State's appeal allowed because dismissal of murder charge for discovery violations was unrelated to factual guilt or innocence).

However, if a trial court during a trial dismisses a charge *sua sponte*, double jeopardy bars a retrial unless manifest necessity supported the dismissal. In *State v. Vestal*, 131 N.C. App. 756, 760 (1998), after the jury had been impaneled and sworn, the trial court on its own motion dismissed a criminal charge because the police department had violated a court order requiring the destruction of drugs that the police later improperly used in an undercover operation. The court of appeals dismissed the State's appeal of the trial court's dismissal because double jeopardy prohibited a reprosecution. The trial court's dismissal deprived the defendant of his constitutional right to have the trial completed by the jury. Note that if there had been manifest necessity for the trial court's dismissal, then reprosecution would have been permitted. However, it is almost certain in this case that manifest necessity did not support the trial court's dismissal, so the ruling of the court of appeals was correct even though the court did not address the manifest necessity issue.

b. **Midtrial Dismissal for Fatal Variance.** There is no double jeopardy bar to a second trial with a correctly-alleged pleading after the first charge was dismissed on the defendant's motion at trial or on appeal because there was a fatal variance between the charge's allegations and the evidence. State v. Mason, 174 N.C. App. 206, 208 (2005); State v. Wall, 96 N.C. App. 45, 50 (1989); State v. Johnson, 9 N.C. App. 253, 255 (1970); State v. Miller, 271 N.C. 646, 654 (1967); State v. Stinson, 263 N.C. 283, 292 (1965).

c. **Dismissal for Defective Criminal Pleading.** There is no double jeopardy bar to a second trial with a correctly-alleged pleading after the first charge was dismissed on the defendant's motion at trial or on appeal because an indictment or other criminal pleading was fatally defective. State v. Goforth, 65 N.C. App. 302, 306 (1983); State v. Whitley, 264 N.C. 742, 744 (1965); State v. Coleman, 253 N.C. 799, 801 (1961); State v. Barnes, 253 N.C. 711, 718 (1961). There also is no double jeopardy bar even if the State requested the mistrial, assuming there was no prosecutor manipulation—for example, if the State made the mistrial motion only because its case was going badly. Illinois v. Somerville, 410 U.S. 458, 471 (1973) (mistrial granted on prosecutor's motion based on fatally defective indictment and over defendant's objection did not bar second trial; manifest necessity supported mistrial).

d. **Dismissal By Trial Court for Insufficient Evidence After Jury Returned Guilty Verdict.** The State may appeal a trial court's post-verdict dismissal for insufficient evidence of a charge for which the jury had returned a guilty verdict, because double

jeopardy does not bar an appellate court from reinstating the jury's guilty verdict if it rules there was sufficient evidence to support the verdict. United States v. Wilson, 420 U.S. 332, 352-53 (1975); State v. Scott, 146 N.C. App. 283, 286 (2001), *rev'd on other grounds*, 356 N.C. 591 (2002); State v. Allen, 144 N.C. App. 386, 388-89 (2001).

V. Covered Sentencing Hearings. The Double Jeopardy Clause does not apply to sentencing hearings, except that

(1) a defendant who has been sentenced to life imprisonment in a capital sentencing hearing and has been granted a new trial or sentencing hearing may not be sentenced to death in a later proceeding; and
(2) a defendant for any offense is entitled to credit on a second sentence after retrial for any time served for the original sentence.

Bullington v. Missouri, 451 U.S. 430, 446 (1981) (double jeopardy bars death penalty at resentencing hearing after defendant received life imprisonment at prior sentencing hearing); North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969). *See also* Monge v. California, 524 U.S. 721, 734 (1998) (double jeopardy does not apply to noncapital sentencing hearing); State v. Jones, 314 N.C. 644, 648-49 (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).

For an analysis of due process and G.S. 15A-1335 issues involved with a longer sentence after appeal or collateral attack, see 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 2003/03 (UNC School of Government, July 2003), http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200303.pdf.

VI. Exceptions to the Double Jeopardy Bars. As noted in Section I above, double jeopardy protects against a second prosecution for the same offense after an acquittal or conviction and against multiple punishments for the same offense. There are, however, several important exceptions to those rules.

A. When Multiple Punishments Are Permitted for "Same Offense" At a Single Prosecution. As noted in Section I above, double jeopardy protects against multiple prosecutions for the same offense. However, multiple punishments for two offenses may be permitted at a *single* prosecution, even if they are the "same offense" under the *Blockburger* test, if the legislature clearly has indicated that it intended to permit convictions and punishments for both offenses. Double jeopardy plays only a limited role in deciding whether cumulative punishments may be imposed at a single prosecution; that role being only to prohibit the sentencing court from imposing greater punishments than the legislature intended. Missouri v. Hunter, 459 U.S. 359, 368-69 (1983); State v. Gardner, 315 N.C. 444, 463 (1986) (convictions and punishments in single trial for both felony breaking or entering and felony larceny pursuant to breaking or entering is not prohibited by double jeopardy provisions of either United States or North Carolina constitutions); State v. Pipkins, 337 N.C. 431, 434 (1994) (convictions and punishments for trafficking cocaine by possession and felonious possession of cocaine is not prohibited).

In *Gardner*, cited above, the court stated that the traditional method of determining legislative intent includes examination of the subject, language, and history of the pertinent statutory provisions involving the two (or more) offenses. The court noted that the defendant's conduct violated two separate and distinct social norms, the breaking into or entering the property of another then stealing and carrying away of another's property. For this and other reasons (statutes located in separate articles of Chapter 14, legislature acquiescence to court opinions permitting separate punishment, etc.), it held that the legislature intended that both offenses can be separately punished at a single trial.

B. Separate Sovereignties. Federal and state governments are separate sovereignties and each may prosecute a defendant for the same offense. State v. Myers, 82 N.C. App. 299, 299-300 (1986) (state armed robbery prosecution not barred by prior federal armed robbery prosecution for same act); Abbate v. United States, 359 U.S. 187, 195-96 (1959); Bartkus v. Illinois, 359 U.S. 121, 138-39 (1959). States are also separate sovereignties that may prosecute a defendant for the same offense. Heath v. Alabama, 474 U.S. 82, 93 (1985).

1. Statutory Limitations on Prosecution By Separate Sovereignties. There are two statutory bars that limit prosecutions that may otherwise be permitted by separate sovereignties under double jeopardy.

a. Drug Charges. G.S. 90-97 provides that if a violation of Article 5 of Chapter 90 of the General Statutes (various drug offenses) is a violation of federal law or another state's law, a conviction or acquittal under federal or other state's law for the same act is a bar to prosecution in North Carolina state courts. *State v. Brunson*, 165 N.C. App. 667 (2004), provides a useful guide to interpreting G.S. 90-97. In *Brunson,* an undercover 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 of cocaine for the three transactions. He pled guilty to one count in federal court. 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 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 was prosecuted at the federal and state level. The court also ruled, however, that G.S. 90-97 did not bar the state prosecution of the trafficking conspiracy charges because the defendant was not charged with conspiracy in federal court.

b. Offenses That Straddle Jurisdictions. Under G.S. 15A-134, if an offense occurs partly in North Carolina and partly outside North Carolina, a person charged with the offense may be tried in North Carolina only if he or she has not been placed in jeopardy for the identical offense in the other state.

C. Greater and Lesser Offenses. As noted in Section II.B.2.a. above, greater and lesser offenses are considered to be the "same offense" for purposes of double jeopardy. However, there are several circumstances when a prosecution for a lesser offense does not bar a prosecution for the greater offense.

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, 448-49 (1912); State v. Meadows, 272 N.C. 327, 332-33 (1968).

2. Defendant's Guilty 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, 502 (1984); *see also* State v. Hamrick, 110 N.C. App. 60, 66-67 (1993).

3. 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, 11-12 (1987).

D. When Defendant's Actions Regarding Joinder or Severance Remove The Bar. If a defendant successfully moves to sever offenses or to oppose joinder and then pleads guilty to one of the offenses, the State is not barred under double jeopardy from prosecuting the remaining offenses. Jeffers v. United States, 432 U.S. 137, 152-54 (1977).

VII. Related Issues

A. Legislative Intent As A Bar for Offenses That Are Not The "Same." Double jeopardy only bars multiple prosecutions and punishments for the "same offense." However, even if offenses are not the "same offense," legislative intent expressed in statutory provisions may bar multiple punishments. For example, several assault statutes begin with or contain the language, "[u]nless . . . conduct is covered under some other provision of law providing greater punishment," that may bar multiple punishments. *See* State v. Williams, 201 N.C. App. 161, 173-74 (2009) (even though assault by strangulation (Class H felony) and assault inflicting serious bodily injury (Class F felony) require proof of different elements so as to be distinct crimes under double jeopardy, the statutory language "unless . . . conduct is covered" reflects a legislative intent that a defendant only be sentenced for the offense requiring greater punishment). There are some North Carolina appellate court cases that may cause confusion on this issue. In *State v. Coria*, 131 N.C. App. 449, 456-57 (1998), the court held that the defendant was properly convicted and punished for assault with a deadly weapon on a law enforcement officer under G.S. 14-34.2 (Class F felony) and assault with a deadly weapon with intent to kill under G.S. 14-32(c) (Class E felony) because each offense had an element not in the other, and therefore there was no double jeopardy violation to punish for both offenses. However, the court did not mention that G.S. 14-34.2 contains the "unless . . . conduct is covered" language. For a more extensive discussion of this issue and other cases, see pages JESSICA SMITH, NORTH CAROLINA CRIMES 116-17 (7th ed. 2012).

B. Joinder. G.S. 15A-926, which authorizes transactionally-based offenses to be joined for trial against a defendant, provides a defendant with a ground for dismissal under certain circumstances of an offense that was not joined for trial.

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 motion for joinder of these offenses had been previously denied;
- the court finds that the right of joinder has been waived, State v. Jones, 50 N.C. App. 263, 265-66 (1981) (defendant waived right to dismissal of joinable offenses tried separately when defendant failed to make motion to join all pending joinable offenses); or
- the court finds that because the prosecutor did not have sufficient evidence to try the 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, State v. Warren, 313 N.C. 254, 263 (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).

G.S. 15A-926(c)(3) provides that the right to joinder under G.S. 15A-926(c) is inapplicable when the defendant has pled guilty or no contest to the previous charge.

C. Collateral Estoppel.

1. Collateral Estoppel As a Component of Double Jeopardy. Collateral estoppel (also known as issue preclusion) "bars successive litigation of an issue of fact or law that is actually litigated and determined by a valid and final judgment, and [the issue] is essential to the judgment." Bobby v. Bies, 556 U.S. 825, 834 (2009) (internal quotation omitted). Collateral estoppel is a component of double jeopardy that may effectively bar the State from a later prosecution or relitigation of an issue previously found favorably to the defendant. *Compare* Ashe v. Swenson, 397 U.S. 436, 446-47 (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), *with* Bobby v. Bies, 556 U.S. 825, 835-36 (2009) (*Ashe* ruling was inapplicable to post-conviction hearing deciding whether defendant was mentally retarded and thus ineligible for death penalty, because statements concerning Bies's mental capacity by state appellate courts on direct appeal of conviction and death sentence were not necessary to judgments affirming his death sentence).

a. North Carolina Cases Applying Collateral Estoppel. North Carolina cases have applied collateral estoppel and held that:

- a not guilty verdict in a habitual or violent habitual felon hearing bars the State from trying the defendant in a later habitual or violent hearing using the same convictions

litigated in the prior hearing, State v. Safrit, 145 N.C. App. 541, 554 (2001);

- a not guilty verdict of an offense in district court bars the State from using the conduct underlying that offense in a later trial in superior court for involuntary manslaughter, State v. McKenzie, 292 N.C. 170, 175 (1977) (acquittal of DUI in district court would bar the use of that offense to prove involuntary manslaughter, although defendant failed to raise issue at superior court trial); and
- the State is barred in a DWI trial from relitigating the issue of whether defendant willfully refused to submit to a breath test following an adverse judicial determination at a civil hearing, in which Attorney General represented the State, of the same issue in an appeal of administrative revocation of defendant's driver's license, State v. Summers, 351 N.C. 620, 626 (2000).

b. North Carolina Cases Not Applying Collateral Estoppel. Declining to apply collateral estoppel, North Carolina cases have held that:

- an acquittal of possession of firearm by felon does not collaterally estop the State from proving the defendant's possession of a firearm at a later armed robbery trial when the jury that acquits the defendant could have found that the defendant's non-possession of the firearm had occurred three hours after the robbery, State v. Alston, 323 N.C. 614, 616-17 (1988);
- although a mitigating circumstance is found at first capital sentencing hearing, collateral estoppel does not bar relitigation of the circumstance at later capital sentencing hearing, State v. Adams, 347 N.C. 48, 59-60 (1997) (relying on Poland v. Arizona, 476 U.S. 147 (1986));
- an acquittal of assault on a government officer in district court does not bar under collateral estoppel the admission of evidence of the assault in superior court trial de novo of obstructing public officer when there are multiple explanations for the acquittal so that the district court did not necessarily decide the issue adversely to the State that was also at issue in the superior court trial, State v. Bell, 164 N.C. App. 83, 92 (2004);
- the State was not collaterally estopped from prosecuting several counts of obtaining property by false pretenses after a trial judge had dismissed other counts of false pretenses for insufficient evidence at a prior trial; it was not absolutely necessary to the defendant's convictions in the second trial that the second jury find against the defendant on an issue on which the first jury—or, in this case, the judge—found in his favor, State v. Spargo, 187 N.C. App. 115, 122 (2007); and

- an acquittal of felonious larceny does not collaterally estop the State at a later trial from proving felonious breaking or entering with the intent to commit larceny, State v. Edwards, 310 N.C. 142, 146 (1984).

c. State Statute Codifying Collateral Estoppel for Defendant. G.S. 15A-954(a)(7) provides that a court, on the defendant's motion, must dismiss charges in a criminal pleading if it determines that "[a]n issue of fact or law essential to a successful prosecution ha[d] been previously adjudicated in favor of the defendant in a prior action between the parties."

d. Defendant's Burden. "When raising a claim of collateral estoppel, the defendant bears the burden of showing that the issue he [or she] seeks to foreclose was *necessarily* resolved in [the defendant's] favor at the prior proceeding." State v. Warren, 313 N.C. 254, 264 (1985); State v. McKenzie, 292 N.C. 170, 175 (1977).

2. State's Offensive Use of Collateral Estoppel. The State's use of collateral estoppel (commonly known as offensive collateral estoppel) and the related principle of res judicata has been recognized under certain circumstances in North Carolina cases. (For the distinction between collateral estoppel and res judicata, see State v. Parsons, 92 N.C. App. 175, 177 (1988).) The source of these legal concepts—when advocated by the State—is the common law, not the Double Jeopardy Clause, because the clause only protects a defendant's rights.

North Carolina case law has recognized the State's use of collateral estoppel in limited circumstances. In *State v. Cornelius*, ___ N.C. App. ___, 723 S.E.2d 783 (2012), for example, the defendant was charged with felony-murder and an underlying felony of burglary. At the first trial the jury found the defendant guilty of burglary but could not reach a verdict on felony-murder. The trial court entered a PJC on the burglary and declared a mistrial as to felony-murder. At the retrial, the trial judge instructed the jury with respect to felony murder that "because it has previously been determined beyond a reasonable doubt in a prior criminal proceeding that Mr. Cornelius committed first degree burglary . . . . you should consider that this element [of felony-murder (that defendant committed the felony of first degree burglary)] has been proven to you beyond a reasonable doubt." ___ N.C. App. at ___, 723 S.E.2d at 787. The court held that the trial court did not err by allowing offensive collateral estoppel to establish the underlying felony for the defendant's felony-murder conviction. Citing *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), the court ruled that the trial court's instruction was proper. ___ N.C. App. at ___, 723 S.E.2d at 789.

In another case, *State v. Lewis*, 311 N.C. 727, 734 (1984), the court held that a conviction of nonsupport of minor children collaterally estopped the defendant from relitigating paternity in a later child enforcement agency's civil action for indemnification of support payments made for minor children. And in a third case, *State v. Ellis*, 262 N.C. 446,

449 (1964), the court held that the determination of paternity may not be relitigated by a defendant in a later prosecution for nonsupport of illegitimate child.

The United States Supreme Court has not directly ruled on the constitutionality of offensive collateral estoppel, although it has expressed doubt about it in dicta. United States v. Dixon, 509 U.S. 688, 710 n.15 (1993) ("[A] conviction in the first prosecution would not excuse the Government from proving the same facts a second time."). See also the discussion of United States Supreme Court case law in *State v. Cornelius*, ___ N.C. App. ___, 723 S.E.2d 783, 788 (2012). It is unclear whether the Court would uphold the use of offensive collateral estoppel in light of a defendant's Sixth Amendment rights to a jury trial and to confront witnesses.

VIII. Procedural Issues

A. At Trial. G.S. 15A-954(a)(5) provides that a trial court on the defendant's motion must dismiss the charges in a criminal pleading if it determines that the defendant has previously been placed in jeopardy for the same offense. G.S. 15A-954(c) provides that the motion to dismiss may be made at any time at trial, but the motion is typically made before the beginning of the second trial.

B. Collateral Attack. A defendant must properly assert a double jeopardy issue at the second trial to raise the issue on appeal or collateral attack. State v. McKenzie, 292 N.C. 170, 176-77 (1977).

C. Effect of Guilty Plea. A guilty (or no contest) plea waives a double jeopardy issue. State v. Hopkins, 279 N.C. 473, 476 (1971). However, as a result of two United States Supreme Court decisions—Menna v. New York, 423 U.S. 61 (1975) (per curiam) and United States v. Boce, 488 U.S. 563, 574-76 (1989)—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, the *Hopkins* ruling would appear to have been modified by *Menna* and *Boce*. See State v. Corbett, 191 N.C. App. 1, 5 (court recognized that *Menna* and *Hopkins* appear to be in conflict, but it was bound to follow *Hopkins*), *aff'd per curiam*, 362 N.C. 672 (2008). On the other hand, if other evidence must be considered, a guilty plea waives a double jeopardy issue on appeal or collateral attack. United States v. Brown, 155 F.3d 431, 435 (4th Cir. 1998) (judge erred under *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).

D. No Pretrial Right to Appeal Denial of Double Jeopardy Motion. 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 a conviction. State v. Shoff, 342 N.C. 638 (1996) (per curiam).