

13.4 Miscellaneous Motions

A. Motion for Continuance

Constitutional grounds. A defendant’s right to a continuance is sometimes mandated by the right to effective assistance of counsel and the right to confront one’s accusers under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 19, 23, and 24 of the North Carolina Constitution. “‘It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one’s accusers . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense.’” *State v. Rogers*, 352 N.C. 119, 124 (2000) (quoting *State v. McFadden*, 292 N.C. 609, 616 (1977)). Due process is an additional ground for seeking a continuance. *See McFadden; State v. Taylor*, 354 N.C. 28 (2001) (totality of circumstances considered when determining whether denial of motion to continue was violation of due process).

To show a constitutional violation, a defendant must show that he or she did not have adequate time to confer with counsel and to investigate, prepare, and present a defense. *See Rogers*, 352 N.C. at 125; *State v. Tunstall*, 334 N.C. 320 (1993).

Practice note: In any motion for a continuance, always include the claim that the continuance is constitutionally mandated. If a motion for a continuance is *not* constitutionally based, the motion is addressed to the sound discretion of the trial court. However, if a motion for a continuance raises a constitutional issue, the trial court’s decision is fully reviewable on appeal. *See State v. Call*, 353 N.C. 400 (2001).

Statutory grounds. G.S. 15A-952(g) lists four factors trial judges in superior court and district court should consider in ruling on defense motions for a continuance. These factors are: (1) whether failure to grant a continuance would result in a miscarriage of justice; (2) the complexity of the case; (3) whether there is a child witness involved who would be negatively affected by delay; and (4) whether a party, witness, or lawyer has an obligation of service to the State of North Carolina. In drafting a motion for a continuance, consider the applicability of these four factors.

Other relevant factors. In ruling on motions to continue, courts also have considered: (i) the seriousness of the offense and possible punishment; (ii) the conduct of the State and the defendant (whether either party has engaged in culpable or negligent conduct); and (iii) the effect of a continuance on the availability of witnesses. *See State v. Roper*, 328 N.C. 337 (1991) (discussing relevant factors); *see also State v. Barlowe*, 157 N.C. App. 249, 254 (2003) (finding that trial court erred in denying defendant’s motion for continuance to obtain blood spatter expert and stating that appellate courts should consider the following factors: “(1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant’s case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance”).

Procedure. Pretrial motions for continuance must be in writing (*see* G.S. 15A-951(a)) and should be accompanied by an affidavit stating the factual basis for the motion. *See State v. White*, 129 N.C. App. 52 (1998) (motion to continue properly denied where defendant failed to make record that missing witnesses' testimony would have been helpful), *aff'd per curiam*, 350 N.C. 302 (1999). Motions to continue in superior court are subject to the time limits of G.S. 15A-952, which generally require that a continuance motion be made by arraignment. *See State v. Wright*, 210 N.C. App. 52 (2011) (defendant's failure to file motion to continue in accordance with G.S. 15A-952(c) constituted waiver of the motion); *see also supra* § 13.1, Types and Timing of Pretrial Motions. However, G.S. 15A-952(e) permits the court to grant relief from waiver and hear post-arraignment motions. Further, as shown by the case summaries below, if events subsequent to arraignment provide grounds for a continuance, courts have granted (and may be constitutionally or statutorily required to grant) continuance motions.

Error to deny continuance. In the following cases, the appellate court held that the denial of the defendant's motion for a continuance was erroneous:

State v. Rogers, 352 N.C. 119 (2000) (new lawyers, who were inexperienced in death penalty litigation and who were appointed in capital case to replace retained attorney who had withdrawn about six weeks before trial, were not given adequate time to prepare for trial; failure to grant continuance was constitutional error)

State v. Maher, 305 N.C. 544 (1982) (new attorney, appointed to replace retained counsel who withdrew four days before trial, entitled to continuance)

State v. McFadden, 292 N.C. 609 (1977) (where associate moved to continue trial on trial date because lead counsel was involved in a trial in federal court, denial of motion to continue was error)

State v. Barlowe, 157 N.C. App. 249 (2003) (defendant entitled to continuance to obtain blood spatter expert to respond to State's evidence, which was critical because it was only physical evidence placing defendant at scene and contradicted defendant's testimony; defendant did not unreasonably delay in obtaining discovery and seeking assistance of expert)

Hodges v. Hodges, 156 N.C. App. 404 (2003) (defendant appealed for trial de novo following finding of criminal contempt in district court for violation of domestic violence protective order; denial of defendant's motion to continue trial in superior court was prejudicial error where defendant was incarcerated in another state and unable to appear)

Not error to deny continuance. In the following cases, the appellate courts found no error where trial courts denied defendants' motions for continuances.

State v. Taylor, 354 N.C. 28 (2001) (denial of motion to continue in capital case not erroneous where counsel appointed approximately 8 months before trial, had 6 months notice that trial would be capital, and had 28 days notice of trial date)

State v. Tunstall, 334 N.C. 320 (1993) (no error in denying defendant's motion for continuance, even though defendant had been incarcerated in safekeeping at Central Prison until day before trial; no record evidence that attorneys could not have consulted with defendant in 7 months between arrest and safekeeping order when defendant was in local county jail and on pretrial release)

State v. Roper, 328 N.C. 337 (1991) (no error in denying motion to continue where missing witness was not fault of State, and defendant did not show that witness could be found in reasonable time or that testimony would be significant)

State v. Branch, 306 N.C. 101 (1982) (no error in denying defendant's motion for continuance based on need to find witnesses, where defendant's motion did not name missing witnesses or demonstrate likelihood that witnesses could be found within reasonable time)

State v. Banks, 210 N.C. App. 30 (2011) (defendant failed to show requisite prejudice where he was unable to procure independent forensic examination of physical evidence that defendant did not realize, until eve of trial, to be bullet casings found in defendant's room)

State v. Ellis, 205 N.C. App. 650 (2010) (no abuse of discretion in denying defendant's motion to continue to seek expert witness on eyewitness identification where defendant failed to preserve constitutional issue and defendant was not prejudiced by denial of continuance)

State v. Flint, 199 N.C. App. 709 (2009) (no abuse of discretion in denying defendant's motion to continue where defendant never made a motion for discovery, there was no written discovery agreement between the parties, and record did not reflect that additional time was needed to prepare defense)

State v. Collins, 160 N.C. App. 310 (2003), *aff'd per curiam*, 358 N.C. 135 (2004) (no error in denying defendant's motion to continue to locate and subpoena informant where defendant did not show effort to do so during 9 months between arrest and trial)

B. Motion to Dismiss on Double Jeopardy Grounds

The meaning and scope of the prohibition against double jeopardy is the subject of much litigation. Below is a brief discussion of the fundamental principles governing the doctrine. For a further discussion and case summaries, see Robert L. Farb, *Double Jeopardy, Ex Post Facto, and Related Issues* (UNC School of Government, Jan. 2007), available at www.sog.unc.edu/sites/www.sog.unc.edu/files/djoverview.pdf.

Constitutional basis. The Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, prohibits three things: (i) successive prosecution for the same offense after acquittal; (ii) successive prosecution for the same offense after conviction; and (iii) multiple punishment for the same offense. *See North*

Carolina v. Pearce, 395 U.S. 711 (1969); *Smith v. Massachusetts*, 543 U.S. 462 (2005) (trial court barred by double jeopardy from reconsidering its ruling, made at close of State's evidence, finding that defendant was not guilty of charge, which is equivalent of judge's granting of motion to dismiss for insufficient evidence in North Carolina); *see also Bullington v. Missouri*, 451 U.S. 430 (1981) (imposition of life sentence at capital sentencing hearing acts as "acquittal" on question of death sentence). The Law of the Land clause in article I, section 19 of the North Carolina Constitution provides the same protections as the Fifth Amendment. *See State v. Oliver*, 343 N.C. 202 (1996).

Multiple punishments in single prosecution. Pretrial motions to dismiss on double jeopardy grounds typically address situations involving successive prosecutions. The possibility of multiple punishments arising out of a single trial of identical or overlapping offenses is not a ground for pretrial dismissal and instead should be addressed through a post-verdict motion to arrest judgment on one of the identical or overlapping offenses. In other words, the State is permitted to try a defendant simultaneously for identical or overlapping offenses (e.g., larceny and robbery of the same property) and to obtain jury verdicts, but is not permitted to impose separate punishments for two identical or overlapping offenses unless the legislature clearly intended to permit multiple convictions and punishments. *See Missouri v. Hunter*, 459 U.S. 359 (1983) (stating general principle); *State v. Jaynes*, 342 N.C. 249 (1995) (arresting judgment on larceny conviction where conviction merged with robbery conviction obtained in same trial).

Even if offenses are not considered to be identical or overlapping under double jeopardy analysis, multiple punishments may still be barred in light of legislative intent. *See State v. Ezell*, 159 N.C. App. 103 (2003) (the statutory language "[u]nless the conduct is covered under some other provision of law providing greater punishment" indicates legislative intent not to allow multiple punishments for assault inflicting serious bodily injury, the offense covered by the statutory language, and assault with deadly weapon with intent to kill inflicting serious injury, the offense with the greater punishment, in connection with same conduct); *see also State v. Davis*, 364 N.C. 297 (2010) (applying *Ezell's* analysis to hold that defendant could not be sentenced for both second-degree murder and felony death by vehicle based on same conduct; similarly, defendant could not be sentenced for both assault with deadly weapon inflicting serious injury and felony serious injury by vehicle); *State v. Williams*, 201 N.C. App. 161 (2009) (defendant could not be sentenced for both assault inflicting serious bodily injury and assault by strangulation under G.S. 14-32.4 because the statutory language shows legislative intent only to punish offense carrying the higher penalty); *cf. State v. Hines*, 166 N.C. App. 202 (2004) (notwithstanding statutory language prohibiting punishment for offense if conduct was subject to greater punishment under another provision of law, separate sentences for aggravated assault on handicapped person and more serious felony of robbery with dangerous weapon were permissible because one offense involved assault and the other a robbery).

Multiple punishments are also effectively barred if the jury returns mutually inconsistent verdicts. *See 2 NORTH CAROLINA DEFENDER MANUAL § 34.7E (Inconsistent Verdicts)* (UNC School of Government, 2d ed. 2012).

Waiver. In cases involving successive prosecutions in superior court, the North Carolina appellate courts have held that a defendant must assert a double jeopardy objection at the time of the second trial or the issue will be waived. *See State v. McKenzie*, 292 N.C. 170 (1977). Our courts have also held that a plea of guilty acts as a waiver of double jeopardy objections. *See State v. Hopkins*, 279 N.C. 473 (1971).

The U.S. Supreme Court has held, however, that if the record before the trial judge at the time of the guilty plea shows that the second prosecution is barred by double jeopardy, a plea of guilty does not waive double jeopardy protections. *See Menna v. New York*, 423 U.S. 61, 62–63 & n.2 (1975) (per curiam) (“Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.”); *United States v. Broce*, 488 U.S. 563 (1989) (interpreting *Menna*, court holds that a defendant does not relinquish a double jeopardy claim by pleading guilty if the presiding judge could have determined on the basis of the pleadings and record at the time of the plea that the second prosecution could not go forward); *United States v. Brown*, 155 F.3d 431 (4th Cir. 1998) (guilty plea does not waive double jeopardy claim if on face of record before trial judge, charge was one that State did not have power to bring); *see also* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.6(a), at 905–21 (3d ed. 2007) (discussing circumstances in which guilty plea does not waive right to review).

In *State v. Corbett*, 191 N.C. App. 1 (2008), *aff’d per curiam*, 362 N.C. 672 (2008), the Court of Appeals noted the right to review recognized by the U.S. Supreme Court in *Menna* but stated that it was bound by the North Carolina Supreme Court’s earlier decision in *Hopkins*. The Court of Appeals concluded that the defendant’s guilty plea waived his right to review on direct appeal of the trial court’s denial of his double jeopardy motion; however, the defendant could file a motion for appropriate relief in superior court pursuant to G.S. 15A-1413. The North Carolina Supreme Court affirmed per curiam without specifically addressing the impact of *Menna*. *See also State v. Rinehart*, 195 N.C. App. 774 (2009) (court holds that defendant who pled guilty had no right to direct appeal of denial of double jeopardy motion notwithstanding reservation of right to appeal; court also distinguishes previous decisions in which it had vacated guilty plea where plea agreement included reservation of right to appeal that was ineffective, holding that defendant’s recourse was to file motion for appropriate relief).

Practice note: *Corbett* makes obtaining review of a trial court’s denial of a double jeopardy claim considerably more complicated. To put the defendant in the best position to obtain review, counsel should make a double jeopardy motion before entering a guilty plea and, if necessary to support the claim, put any supporting evidence on the record. Even if counsel makes such a motion, a defendant is assured of obtaining direct review of a ruling denying the motion *only* by proceeding to trial and, if found guilty, appealing. In advising the defendant about whether to go to trial, counsel should consider the strength of the State’s case, the potential sentence exposure compared to a plea offer by the State, and the strength of the defendant’s double jeopardy claim. For a further discussion of the limited right to appeal following a guilty plea, see 2 NORTH CAROLINA DEFENDER

MANUAL § 35.1D (Defendant's Right to Appeal from Guilty Plea in Superior Court)
(UNC School of Government, 2d ed. 2012).

If the defendant is interested in accepting the State's plea offer, *Corbett* suggests two possibilities. If the trial court denies the double jeopardy motion and the defendant pleads guilty, the best course may be for the defendant to file a motion for appropriate relief (MAR) in the trial court within 10 days of judgment. *See Corbett* (defendant may file a MAR under G.S. 15A-1413, which refers both to MARs within 10 days of judgment and MARs after 10 days). If that MAR is denied, the defendant then may have the right to appeal both the judgment on the guilty plea and the denial of the MAR. Both should be referenced in the notice of appeal. A defendant also could file a MAR after 10 days. If the MAR is before a different judge, he or she should not be bound by the trial judge's earlier ruling, as *Corbett* routes defendants seeking review through MAR proceedings; still, one superior court judge may be reluctant to overrule another. If the post-10-day MAR is denied, the defendant would have to file a petition for certiorari to obtain review. If the state appellate courts do not grant relief, counsel may still seek federal habeas corpus relief, but counsel should pay close attention to the deadlines for habeas corpus applications—generally, one year after the date on which the judgment became final by the conclusion of direct review or the expiration of the time to seek direct review, subject to tolling while state postconviction proceedings are pending. *See* 28 U.S.C. 2244(d).

Waiver in misdemeanor cases. In misdemeanor cases in district court, neither the failure to raise a double jeopardy objection nor a plea of guilty should operate as a waiver on appeal to superior court for a trial de novo. *See supra* § 13.3A, Misdemeanors; *see generally State v. Sparrow*, 276 N.C. 499 (1970) (defendant convicted in district court is entitled to appeal to superior court for trial de novo as matter of right, even if defendant entered guilty plea in district court).

When jeopardy attaches. In superior court, jeopardy attaches when the jury is empanelled or the court accepts a guilty plea. In district court, jeopardy attaches when the court begins to hear evidence or accepts a guilty plea. *See State v. Brunson*, 327 N.C. 244 (1990); *State v. Wallace*, 345 N.C. 462 (1997) (tender of plea does not implicate double jeopardy; where defendant tendered plea to second-degree murder and court rejected it, defendant could be tried for first-degree murder); *State v. Ross*, 173 N.C. App. 569 (2005) (double jeopardy did not attach to defendant's acknowledgement of guilt in a deferred prosecution agreement), *aff'd per curiam*, 360 N.C. 355 (2006). Thus, if an indictment or other pleading is dismissed before the attachment of jeopardy, there is no double jeopardy bar to reinstating the charges. *See Serfass v. United States*, 420 U.S. 377 (1975); *Crist v. Bretz*, 437 U.S. 28 (1978). If a charge is dismissed after jeopardy attaches, double jeopardy principles typically prohibit retrying the defendant. *Compare United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (retrial precluded by double jeopardy principles where defendant is acquitted, charge is dismissed on grounds related to guilt or innocence, or dismissal not requested by defendant) *with United States v. Scott*, 437 U.S. 82 (1978) (retrial permitted where dismissal unrelated to guilt or innocence and government is successful on appeal).

Definition of “same offense.” Both for purposes of multiple punishment and successive prosecution, the constitutional test for the “same offense” is the *Blockburger* element-by-element test. If both offenses contain an element that the other offense does not, then the offenses are distinct. However, if all of the elements of one offense are subsumed within the other (one is a lesser-included offense of the other), or if the two offenses have identical elements, then the offenses are the “same” for double jeopardy purposes. See *Blockburger v. United States*, 284 U.S. 299 (1932); *State v Gardner*, 315 N.C. 444 (1986); see also *United States v. Dixon*, 509 U.S. 688 (1993) (reaffirming *Blockburger*).

The *Blockburger* tests focuses on the elements of the offenses at issue. North Carolina has also employed a “same-evidence” test, which is not a component of the U.S. Supreme Court’s double jeopardy analysis. Thus, the facts in a given case may constitute a double jeopardy violation if the offenses at issue are based on the same evidence. See *State v. Summrell*, 282 N.C. 157 (1972); *State v. Newman*, 186 N.C. App. 382 (2007) (court found no double jeopardy violation under same-evidence test because offenses at issue—assault on a government officer and resisting, delaying, and obstructing an officer—were based on different conduct of the defendant).

Effect of prior conviction and exceptions. Generally, a conviction for a lesser-included offense bars a later trial for a greater offense. See *Brown v. Ohio*, 432 U.S. 161 (1977); see also *Payne v. Virginia*, 468 U.S. 1062 (1984) (per curiam) (conviction of greater offense bars later prosecution of lesser offense).

This bar applies except in limited circumstances, such as an intervening change in the underlying facts (for example, a person seriously injured in an assault dies). See *State v. Meadows*, 272 N.C. 327 (1968) (conviction of felony assault based on shooting of victim did not bar subsequent conviction of manslaughter following victim’s death). But see *State v. Griffin*, 51 N.C. App. 564 (1981) (where defendant pled guilty to failing to yield right-of-way and State subsequently charged defendant with death by vehicle based on the same act, prosecution for death by vehicle barred by double jeopardy even though victim died after plea; court distinguishes *Meadows* because in that case elements of first conviction for felony assault were not elements of second conviction for homicide).

Double jeopardy also does not apply if the defendant acts to sever the charges and then pleads guilty to or proceeds to trial on some of the charges. Thus, in *Ohio v. Johnson*, 467 U.S. 493 (1984), the court held that the defendant’s guilty plea, over the prosecutor’s objection, to two lesser counts of a multi-count indictment did not bar continued prosecution of the greater counts. See also *Jeffers v. United States*, 432 U.S. 137 (1977) (defendant was responsible for successive prosecutions by opposing State’s motion to join offenses for trial; therefore, defendant’s action deprived him of any right under Double Jeopardy Clause against consecutive trials); *State v. Hamrick*, 110 N.C. App. 60 (1993) (State simultaneously filed charges for misdemeanor death by vehicle and infraction of driving left of center, and defendant voluntarily appeared before magistrate and pled responsible to infraction; relying on *Ohio v. Johnson*, court holds that double jeopardy was not bar to prosecution of death by vehicle charge).

If, however, the State is responsible for bringing separate proceedings, the defendant's guilty plea to one offense should bar prosecution of the other offenses. Thus, if the State files a misdemeanor impaired driving charge and the defendant pleads guilty, and the State subsequently files a habitual impaired driving charge based on the same driving, double jeopardy would bar the subsequent habitual impaired driving charge. Likewise, if the State has brought charges in district and superior court—for example, misdemeanor impaired driving in district court and habitual impaired driving in superior court based on the same driving—and the defendant pleads guilty to the misdemeanor charge pending in district court, double jeopardy should bar continued prosecution of the habitual impaired driving charge. In that instance, the State, not the defendant, would be responsible for separating the proceedings against the defendant. *See generally* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b), at 91–92 (3d ed. 2007). *But cf. State v. Corbett*, 191 N.C. App. 1 (2008) (defendant was initially charged in citation with misdemeanor impaired driving and was subsequently indicted for misdemeanor and habitual impaired driving based on same incident, but district court case was not dismissed and defendant pled guilty to misdemeanor impaired driving in district court; district court thereafter vacated guilty plea, superior court denied defendant's double jeopardy motion, and defendant pled guilty to habitual impaired driving charge in superior court; without reaching merits, Court of Appeals holds that defendant waived double jeopardy claim on direct appeal, discussed above under "Waiver" in this subsection B., by pleading guilty to habitual impaired driving charge; dissent analyzes why double jeopardy motion should have been granted), *aff'd per curiam*, 362 N.C. 672 (2008).

Covered proceedings. Double jeopardy protections apply to all proceedings of a criminal nature. *See State v. Hamrick*, 110 N.C. App. 60 (1993) (finding of responsibility or nonresponsibility for infraction, although considered a noncriminal matter, could bar later criminal prosecution for "same" offense); *Breed v. Jones*, 421 U.S. 519 (1975) (juvenile adjudication bars successive trial on same offense in adult criminal court); *United States v. Dixon*, 509 U.S. 688 (1993) (criminal contempt was conviction and punishment for double jeopardy purposes and barred later criminal trial for same conduct); *State v. Dye*, 139 N.C. App. 148 (2000) (double jeopardy barred later prosecution for domestic criminal trespass after defendant had been adjudicated to be in criminal contempt for violating domestic violence protective order forbidding similar conduct); *State v. Gilley*, 135 N.C. App. 519 (1999) (criminal contempt proceeding for violation of domestic violence protective order for certain conduct barred later prosecution for assault on female but not for domestic criminal trespass, misdemeanor breaking and entering, and kidnapping).

In some circumstances, a prior conviction also may include a proceeding that resulted in the imposition of a civil or administrative sanction. For a discussion of when a civil sanction is sufficiently "punitive" to preclude further punishment, see *Hudson v. United States*, 522 U.S. 93 (1997) (test focuses on purpose of civil sanction—that is, does it promote traditional aims of punishment, deterrence, and retribution, or are there other purposes rationally assignable to it); *State v. Thompson*, 349 N.C. 483 (1998) (48-hour detention for domestic violence offense was "regulatory" in purpose and did not bar later prosecution on double jeopardy grounds, although detention in this case violated due

process and barred further prosecution); *State v. Oliver*, 343 N.C. 202 (1996) (ten-day revocation of drivers license did not preclude later prosecution for drunk driving); *State v. Hinchman*, 192 N.C. App. 657 (2008) (30-day license revocation for driving while impaired not criminal punishment under double jeopardy clause); *State v. Reid*, 148 N.C. App. 548 (2002) (30-day revocation of commercial driver's license not criminal punishment and did not preclude prosecution for impaired driving). *But see State v. McKenzie*, ___ N.C. App. ___, 736 S.E.2d 591 (2013) (one-year disqualification of commercial driver's license constituted punishment), *writ allowed*, ___ N.C. ___, 736 S.E.2d 184 (2013).

Collateral estoppel. A defendant who is *acquitted* at a first trial may be able to rely on the doctrine of collateral estoppel, embodied in the Fifth Amendment bar against double jeopardy, to preclude a second trial on a factually related crime. Collateral estoppel bars the State from relitigating an issue of fact that has been determined against it. For a further discussion of collateral estoppel, see *supra* § 8.6B, Collateral Estoppel.

Effect of mistrial. Double jeopardy precludes the retrial of a defendant following a mistrial unless the trial court makes specific findings that the mistrial was a “manifest necessity.” See *State v. Lachat*, 317 N.C. 73 (1986) (second trial violated double jeopardy where trial court made no findings explaining prior mistrial). In a noncapital case, a defendant ordinarily must object to mistrial or the jeopardy argument is waived. See *State v. Odom*, 316 N.C. 306 (1986); *State v. Hargrove*, 206 N.C. App. 591 (2010). *Cf. Lachat*, 317 N.C. at 85–86 (objection not required in capital case to preserve double jeopardy argument). In a noncapital case, a hung jury creates a manifest necessity for a mistrial, and retrial is permitted. See *State v. Booker*, 306 N.C. 302 (1982). *Cf. G.S. 15A-2000(b)* (if jury deadlocks during deliberations in a capital sentencing hearing, judge must impose life sentence). Other reasons also may justify a mistrial. See, e.g., *State v. Cummings*, 169 N.C. App. 249 (2005) (second trial did not violate double jeopardy where initial judge declared mistrial based on his familiarity with the case and defendant made no objection). Where prosecutorial misconduct forces a mistrial, a second trial may be barred even when the defendant moves for or consents to the mistrial. See *Oregon v. Kennedy*, 456 U.S. 667 (1982); *State v. White*, 322 N.C. 506 (1988) (double jeopardy bars retrial where prosecutor intentionally provokes mistrial).

For a further discussion of the effect of a mistrial, see 2 NORTH CAROLINA DEFENDER MANUAL § 31.9 (Double Jeopardy and Mistrials) (UNC School of Government, 2d ed. 2012).

Effect of successful appeal. Double jeopardy does not preclude retrying a defendant who wins on appeal unless the reviewing court found the evidence legally insufficient to support the conviction. A finding of legal insufficiency by the appellate court is equivalent to an acquittal and will bar retrial. See *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Tibbs v. Florida*, 457 U.S. 31 (1982).

If a retrial or resentencing is permissible, principles of due process generally preclude the State from imposing a more severe punishment on the defendant following remand

(effectively penalizing the defendant for exercising his or her right to appeal), unless events that occur between the first and second trial justify a greater sentence. *See North Carolina v. Pearce*, 395 U.S. 711 (1969); *see also Alabama v. Smith*, 490 U.S. 794 (1989) (reaffirming *Pearce* rule, but holding that presumption of vindictiveness does not arise where a sentence imposed after remand and a trial was more severe than the initial sentence imposed after a guilty plea). North Carolina's statute is stricter on this issue, prohibiting greater punishment following remand regardless of any intervening factors and regardless of whether the defendant pled guilty or went to trial initially. *See* G.S. 15A-1335 & Official Commentary ("When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, [that] is more severe than the prior sentence . . ."). Exceptions to this statutory restriction exist, however, which counsel should carefully consider in advising a client whether to appeal. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 35.5 (Resentencing after Successful Appellate or Post-Conviction Review) (UNC School of Government, 2d ed. 2012).

State's right to appeal. The Double Jeopardy Clause limits the State's right to appeal from adverse rulings in criminal cases. If retrial would violate the Double Jeopardy Clause, the State cannot appeal a dismissal. *See* G.S. 15A-1445(a) (limiting right to appeal from superior court); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *State v. Morgan*, 189 N.C. App. 716 (2008) (State had no right to appeal to superior court where district court judge dismissed driving while impaired charge based on insufficiency of the evidence, although district court judge's dismissal hinged on an erroneous finding that affidavits offered by the State were inadmissible); *State v. Scott*, 146 N.C. App. 283 (2001) (State had right to appeal where trial court dismissed driving while impaired charge for insufficient evidence *after* jury finding of guilt, as reversal would simply reinstate jury's verdict), *rev'd on other grounds*, 356 N.C. 591 (2002); *see also State v. Starkey*, 177 N.C. App. 264 (2006) (construing statutory provisions authorizing appeals, court finds that State had no right to appeal from trial court's grant of appropriate relief dismissing habitual felon charge); *State v. Vestal*, 131 N.C. App. 756, 757 n.1 (1998) (defendant's failure to raise double jeopardy issue on appeal did not relieve appellate court of duty to determine whether a jurisdictional basis exists for State's appeal).

There are two situations in which the State may appeal a dismissal in superior court: (i) where the charge is dismissed before jeopardy attaches (*see State v. Brunson*, 327 N.C. 244 (1990)); and (ii) where a midtrial dismissal is both sought by the defendant and unrelated to the guilt or innocence of the defendant (*see United States v. Scott*, 437 U.S. 82 (1978); *Vestal*, 131 N.C. App. at 760; *State v. Priddy*, 115 N.C. App. 547 (1994)). *See also* G.S. 15A-1432 (limiting circumstances in which State may appeal from district court).

For further discussion of the limitations on the State's right to appeal, see 2 NORTH CAROLINA DEFENDER MANUAL § 35.2A (State's Right to Appeal from District Court Judgment), § 35.2C (State's Right to Appeal from Superior Court Judgment) (UNC

School of Government, 2d ed. 2012).

Criminal pleadings. For a discussion of the interrelationship between criminal pleadings and double jeopardy issues, see *supra* § 8.6, Limits on Successive Prosecution. Also consult the following:

- Robert L. Farb, *Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues* (UNC School of Government, Feb. 2010), available at www.sog.unc.edu/sites/www.sog.unc.edu/files/pleadjep.pdf;
- Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/03 (UNC School of Government, July 2008), available at www.sog.unc.edu/sites/www.sog.unc.edu/files/aojb0803_000.pdf.

C. Motion to Recuse Trial Judge

Constitutional basis. Due process requires the trial judge to be absolutely impartial. See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”(citation omitted)); *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 602 (1993) (“One of the essential elements of due process is a fair hearing by a fair tribunal. In order to provide a fair hearing, due process demands an impartial decision maker.”).

North Carolina provisions. G.S. 15A-1223 and Canon 3 of the N.C. Code of Judicial Conduct both address the disqualification of a judge presiding over a criminal trial when a claim of partiality is raised.

A defendant may move that the trial judge disqualify himself or herself from a hearing or trial if the judge is: (i) prejudiced against either party; (ii) closely related by blood or marriage to the defendant; (iii) for any other reason unable to perform the duties required of him or her; or (iv) a witness for or against one of the parties in the case. See G.S. 15A-1223(b), (e). A motion to disqualify must be in writing, accompanied by a factual affidavit, and filed no less than five days before trial, unless the grounds for disqualification are discovered after that time or other good cause exists. See G.S. 15A-1223(c), (d); *State v. Moffitt*, 185 N.C. App. 308 (2007) (defendant failed to make motion in writing and failed to demonstrate grounds for disqualification). It is not clear whether this deadline applies to motions in district court, so if you know in advance who the trial judge will be and are aware of facts warranting recusal, the safest course may be to file a motion to recuse at least five days before trial. Compare G.S. 15A-953 (motions should ordinarily be made upon arraignment or during course of trial in district court), with G.S. 15A-1101 (except for certain provisions, trial procedure in district court is in accordance with Subchapter XII of Ch. 15A, which includes timing requirements for motions to recuse).

Canon 3C.(1)(a) of the N.C. Code of Judicial Conduct provides that on the motion of any party, a judge should disqualify himself or herself in a proceeding in which his or her impartiality may reasonably be questioned, including but not limited to instances where

he or she has a personal bias or prejudice concerning a party. For other instances requiring disqualification, such as kinship or financial interest in the matter in controversy, see N.C. CODE OF JUD. CONDUCT Canon 3C.(1)(b)–(d).

Burden on moving party. Case law states that a party moving to disqualify a judge must “demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that the judge would be unable to rule impartially.” *State v. Fie*, 320 N.C. 626, 627 (1987); accord *State v. Honaker*, 111 N.C. App. 216 (1993). A mere allegation of bias or prejudice is not enough to compel recusal. *State v. Moffitt*, 185 N.C. App. 308 (2007). The standard for recusal is whether there are reasonable grounds to question the judge’s objectivity. If a reasonable person, knowing all the facts, would have doubts about the judge’s ability to be impartial, the judge should recuse himself or herself or refer the recusal issue to another judge. See *State v. Poole*, 305 N.C. 308 (1982). If the allegations in the motion to recuse are such that findings of fact are required, the trial judge should not rule on the motion but should refer the matter to another judge for hearing. *N.C. Nat’l Bank v. Gillespie*, 291 N.C. 303 (1976) (citing *Ponder v. Davis*, 233 N.C. 699 (1951)).

Case summaries. The following cases address recusal motions.

State v. Scott, 343 N.C. 313 (1996) (trial judge did not err in hearing and denying recusal motion in murder case where defendant alleged that judge and defendant had been friends, that judge had expressed doubts about victim’s credibility in earlier case, and that judge had relatives who worked as prosecutor and probation officer; judge attested that he had never discussed the case with either relative).

State v. Vick, 341 N.C. 569 (1995) (judge’s acceptance of verdict in previous case of co-defendant, without a showing that verdict was improper, is not grounds for recusal; judge’s finding of mitigating factor that codefendant was acting under duress did not itself suggest partiality)

State v. Fie, 320 N.C. 626 (1987) (trial judge should have been recused where judge presided over trial of co-defendant and following trial wrote letter to DA asking DA to indict defendant)

State v. Moffitt, 185 N.C. App. 308 (2007) (trial judge did not err in refusing to recuse himself when he was the same judge who had sentenced defendant before defendant successfully appealed sentence and was aware of a plea arrangement that defendant had rejected; defendant failed to comply with procedural requirements for making recusal motion and made no showing of any bias or prejudice by judge against defendant).

State v. McRae, 163 N.C. App. 359 (2004) (defendant failed to show bias or prejudice where same judge who presided over defendant’s murder trial presided over retrospective hearing on capacity to proceed)

State v. White, 129 N.C. App. 52 (1998) (judge who imposed probation condition that defendant challenged as unconstitutional not required to recuse himself from probation revocation hearing), *aff'd per curiam*, 350 N.C. 302 (1999)

State v. Monserrate, 125 N.C. App. 22 (1997) (no statutory requirement that judge who issues search warrant must recuse himself or herself regarding hearing challenging validity of warrant, but better practice is to do so)

State v. Honaker, 111 N.C. App. 216 (1993) (defendant who alleged that judge made biased comment, necessitating recusal, has burden of producing record or other evidence proving that judge made remark and context of remark)

State v. Kennedy, 110 N.C. App. 302, 305 (1993) (“[t]he ‘bias, prejudice or interest’ which requires a trial judge to be recused from a trial has reference to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him”; although a judge may have strong feelings about particular crimes—it was alleged that the judge’s wife had been seriously injured by an impaired driver—such allegations, without more, did not show the requisite bias or prejudice and did not disqualify superior court judge from presiding over trial)

In re Nakell, 104 N.C. App. 638 (1991) (stating that where judge is embroiled in personal dispute with defendant, maintaining appearance of absolute impartiality and fairness may require judge to recuse himself)

Other resources. For additional information on recusal motions, see Michael Crowell, *Recusal*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/03 (UNC School of Government, Sept. 2009), available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0903.pdf>.

D. Motion to Dismiss for Vindictive or Selective Prosecution

Because of the broad charging discretion allowed prosecutors, it may be difficult to prevail on a motion to dismiss a charge based on vindictive or selective prosecution. Below is a short outline of the law underlying each claim.

Vindictive prosecution. Due process prohibits the State from prosecuting a defendant, or seeking enhanced punishment against a defendant, as a sanction for that defendant’s exercise of his or her rights. For example, a prosecution that is intended to punish a person for exercising his or her right to appeal, or his or her right to reject a plea offer and go to trial, may be considered unconstitutionally vindictive. A defendant is constitutionally entitled to dismissal of a charge if the defendant can show: (1) that the prosecution of the defendant’s case was actually motivated by a desire to punish the defendant for doing what the law clearly permits the defendant to do; or (2) the circumstances surrounding the prosecution are such that a vindictive motive may be presumed, and the State has failed to affirmatively overcome the presumption of vindictiveness. See *United States v. Goodwin*, 457 U.S. 368 (1982); *Blackledge v. Perry*, 417 U.S. 21 (1974); see also *supra* § 8.6D, Due Process (discussing presumption of

vindictiveness when State files felony charges after defendant appeals misdemeanor conviction).

Selective prosecution. As a general matter, prosecutors have broad discretion to decide which cases to prosecute and what crimes to charge. *See State v. Rorie*, 348 N.C. 266 (1998) (district attorney has broad discretion to decide in homicide case whether to try defendant for first-degree murder, second-degree murder, or manslaughter); *accord State v. Lawson*, 310 N.C. 632 (1984); *see also* G.S. 15A-2004 (giving prosecutor discretion whether to seek death penalty for first-degree murder even if evidence of an aggravating circumstance exists). However, it is unconstitutional under the Due Process and Equal Protection Clauses for a prosecutor to select cases based on race, religion, or other arbitrary classification. *See Oyer v. Boyles*, 368 U.S. 448 (1962); *State v. Garner*, 340 N.C. 573 (1995); *State v. Cherry*, 298 N.C. 86 (1979); *see also* G.S. 15A-2010 (under North Carolina Racial Justice Act, “[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race”).

To prevail on a selective prosecution claim, the defendant must demonstrate that the prosecution of his or her case was motivated by discriminatory intent and had discriminatory effect. *See Wayte v. United States*, 470 U.S. 598 (1985). The leading case on selective prosecution based on race is *United States v. Armstrong*, 517 U.S. 456 (1996). In *Armstrong*, the defendant alleged that African-American people in California were being selectively prosecuted for more serious drug offenses. *Armstrong* held that to show discriminatory effect, and thus make out a selective prosecution claim, the defendant had to prove that similarly situated individuals of a different race were not being prosecuted. *Id.* at 465. As a practical matter, this is difficult to prove and typically requires discovery of police and prosecutor’s investigative files. To obtain discovery, the defendant has to make a “credible showing” that similarly situated individuals of a different race could have been but were not prosecuted. *Id.* at 468.

E. Postconviction Motions

This chapter does not address motions available after conviction. Additional resources are shown below.

Motions to withdraw guilty plea. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 23.4E (Defendant’s Right to Withdraw Plea) (UNC School of Government, 2d ed. 2012).

Motions to set bond during appeal. *See supra* § 1.10, Release Pending Appeal.

Motions for appropriate relief and writs. *See* 2 NORTH CAROLINA DEFENDER MANUAL Ch. 35 (Appeals, Post-Conviction Litigation, and Writs) (UNC School of Government, 2d ed. 2012).

Postconviction discovery. *See supra* § 4.1F, Postconviction cases.

Expunctions and other relief from a conviction. See John Rubin, *Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina* (UNC School of Government 2012), available at www.sog.unc.edu/node/2588.