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6.1 Joinder and Severance of Offenses

A. Strategic Considerations

If a criminal defendant is charged with multiple offenses, counsel must evaluate whether to seek or oppose joint resolution of the charges. Joinder sometimes is advantageous to a defendant. A good result in one trial may be undone by a later trial, and a defendant tried multiple times for offenses arising out of the same conduct may be prejudiced at sentencing. On the other hand, joinder of offenses is not always helpful. The joinder of factually distinct offenses risks turning the trial into a trial of the defendant's criminal propensity, rather than his or her guilt or innocence of any one offense. Listed below are some strategic considerations that may play a role in deciding whether to seek or oppose joinder.

Advantages of joinder of offenses. The benefits of joinder include the following:

- Generally, if the cases are disposed of at the same time, structured sentencing rules treat the convictions as a single prior conviction for purposes of assigning prior record points for sentencing in subsequent cases. *See infra* § 6.1F, Sentencing Implications of Joinder.
- Joint disposition of offenses may increase the likelihood of concurrent sentences for those offenses or for some other relief from the sentencing court, such as consolidated sentences, mitigated sentences, or suspension of some or all of the sentences.
- The defendant may want a joint trial of charged offenses to resolve his or her situation as quickly as possible and avoid the time, expense, and trauma of multiple trials.
- Sympathetic or compelling evidence presented in one case might increase the chance of a favorable disposition of a jointly tried offense.
- Witnesses for the defense who have knowledge of multiple offenses are more likely to appear and testify if they only have to do so on one occasion.
- The defendant's willingness to group offenses may encourage a better plea offer or sentencing agreement.

Advantages of severance of offenses. Drawbacks to joinder of offenses and advantages of severance may include the following:

- Accumulation of evidence from several cases may be prejudicial.
- The number of charges and complexity of the evidence may confuse the jury.
- Postponing the second and successive trials may benefit the defendant.
- The defendant may want to employ a different defense strategy for each case.
- The defendant may want to testify in one case and not in the other (although the testimony from one case may be admissible in a later case).
- A joint trial may lead to the receipt of otherwise inadmissible evidence.

B. Standard for Joinder of Offenses

Basic requirements. The key question in determining whether joinder is appropriate is whether there is a transactional connection, or a factual nexus, among the charged offenses. G.S. 15A-926(a) provides that offenses, whether felonies, misdemeanors, or both, may be joined for trial if the offenses are based on

- "the same act or transaction," or
- "a series of acts or transactions connected together or constituting parts of a single scheme or plan."

Offenses that meet one of these two criteria are called *joinable offenses*. The law favors trying joinable offenses in a single trial. *See* G.S. 15A-926(c)(1) (defendant's timely motion to join factually related offenses for which he or she has been indicted or charged must be granted unless doing so would defeat the ends of justice); *State v. Manning*, 139 N.C. App. 454 (2000) (public policy favors consolidation of offenses because it expedites administration of justice, reduces congestion, and lessens burden on jurors and witnesses), *aff'd per curiam*, 353 N.C. 449 (2001).

Offenses that are not "joinable" as defined by G.S. 15A-926 should be tried separately. *See State v. Corbett*, 309 N.C. 382 (1983). Even joinable offenses may be severed for trial if joinder would impair the defendant's ability to present a defense. *See infra* § 6.1C, Severance of Joinable Offenses.

Key factors. In deciding whether offenses have a sufficient factual nexus to be joined for trial, courts have considered such factors as:

- temporal proximity;
- geographical proximity;
- similarities among victims;
- whether the same evidence or witnesses will be used to prove both offenses;
- whether the offenses are similar in type or circumstance;
- whether the defendant had a similar motive to commit both offenses; and
- whether a similar modus operandi was used in committing both offenses.

See generally State v. Bracey, 303 N.C. 112 (1981) (on motion for joinder, courts consider similarity in time, place, motive, victims, and circumstance); *State v. Evans*, 99 N.C. App. 88 (1990) (joinder of two burglaries of different apartments in same complex several days apart not abuse of discretion where modus operandi, time, place, and motive all similar). Illustrative cases are discussed *infra* in § 6.1D, Illustrative Cases.

Mutually exclusive offenses. Even when offenses are mutually exclusive in that a defendant cannot be convicted of both offenses, the defendant may be indicted for and tried jointly for both offenses. However, if joinder of such offenses would unduly confuse the issues, severance may be appropriate, as discussed in the following section. If joinder is allowed and the evidence supports both charges, the jury must be instructed to select and convict the defendant on only one of the mutually exclusive charges. *See State v. Melvin*, 364 N.C. 589 (2010) (trial court erred in failing to instruct the jury that it could convict the defendant of either first-degree murder or accessory after the fact to murder, but not both); *State v. Speckman*, 326 N.C. 576 (1990) (defendant could be tried but not convicted for both embezzlement and obtaining property by false pretenses; the charges are mutually exclusive because embezzlement requires that property be obtained lawfully and then wrongfully converted while obtaining false pretenses requires that property be obtained unlawfully at the outset); *State v. Surcey*, 139 N.C. App. 432 (2000) (defendant could be tried but not convicted of both burglary and shooting into an occupied dwelling because these are mutually exclusive offenses; one requires entry, the other remaining outside the dwelling); *State v. Jewell*, 104 N.C. App. 350 (1991) (holding that accessory after the fact to murder is a joinable offense with aiding and abetting murder even though defendant could not have been convicted of both), *aff'd per curiam*, 331 N.C. 379 (1992). *Cf. State v. Johnson*, 208 N.C. App. 443 (2010) (felony entering into dwelling and discharging a firearm into an occupied dwelling inflicting serious bodily injury were, in circumstances of case, offenses that occurred in succession rather than mutually exclusive ones).

For a further discussion of mutually exclusive offenses, see 2 NORTH CAROLINA DEFENDER MANUAL § 34.7E (Inconsistent Verdicts) (2d ed. 2012).

C. Severance of Joinable Offenses

"Fair determination" requirement. Even when two offenses are potentially joinable in that they have a common factual nexus, the offenses may be severed and tried separately if "necessary to promote a fair determination of the defendant's guilt or innocence of each offense." G.S. 15A-927(b)(1); *see also State v. Corbett*, 309 N.C. 382 (1983) (ultimate issue in deciding whether joinder is proper is whether joinder hindered the defendant's ability to defend against one or more charges); *State v. Moses*, 350 N.C. 741 (1999) (if joinder would hinder or deprive defendant of ability to present defense, motion for joinder of offenses should be denied); *State v. Breeze*, 130 N.C. App. 344 (1998) (to grant motion to consolidate trial, court must first find that the offenses took place within common scheme or plan and then find that consolidation does not hinder the defendant's ability to receive fair trial and present defense).

Key factors. Courts have considered various factors in determining whether joinder would impair a defendant's ability to defend against the charges.

Sometimes joinder may result in the receipt of otherwise inadmissible evidence. *See, e.g.*, *State v. Weathers*, 339 N.C. 441 (1994) (error to join murder charge with charge of failing to appear at murder trial because evidence supporting conviction for murder would be inadmissible at trial on failure to appear; judgment on failure to appear arrested); *State v. Williams*, 113 N.C. App. 686 (1994) (seat belt violation properly severed from DWI trial where, under G.S. 20-135.2A, evidence of seat belt violation was inadmissible in trial of DWI case [result not affected by subsequent amendment to seat belt statute]).

One common example of the potential receipt of otherwise inadmissible evidence is where the State seeks to join a charge of possession of a firearm by a felon with other charges. The possession charge requires the State to prove a prior felony conviction as an element of the offense, and the evidence of the defendant's prior criminal history might not otherwise be admissible. *See State v. Long*, 721 P.2d 483, 495 (Utah 1986) (refusal to sever is abuse of discretion "because of the unwarranted prejudice inherent in informing the jury that a defendant is a convicted felon"). *Compare State v. Cromartie*, 177 N.C. App. 73 (2006) (joinder of charges of possession of firearm by felon and assault with a deadly weapon with intent to kill inflicting serious injury did not unjustly or prejudicially hinder defendant's ability to defend himself or receive fair hearing); *State v. Hardy*, 67 N.C. App. 122 (1984) (no prejudicial error in consolidating count of possession of firearm by felon with charge of larceny of firearm, although it was not clear from opinion that defendant's prior criminal history would have been admissible in separate trial on larceny charge); *United States v. Daniels*, 770 F.2d 1111 (D.C. Cir. 1985) (joinder did not cause defendant undue prejudice in light of trial judge's "scrupulous regard" for defendant's right to fair trial).

A defendant who seeks severance on this ground should be prepared to meet the argument that limiting instructions would serve to dispel any prejudice from joinder. *Cf. infra* § 6.2G, Effect of Limiting Instructions. If a charge of possession of a firearm by a felon is joined with another charge, counsel may be able to limit the potential prejudice by offering to stipulate that the defendant has been convicted of a felony and requesting that the nature of the prior felony conviction not be allowed into evidence. North Carolina cases have not required the acceptance of such a stipulation. Under the specific facts of a given case, defense counsel may have a more compelling case for acceptance of the stipulation. For instance, where the underlying felony in a firearm by felon prosecution is also a firearms offense, the potential prejudice to the defendant is arguably higher. *Compare Old Chief v. United States*, 519 U.S. 172 (1997) (under federal rules of evidence, stipulation satisfies prior conviction element of possession of firearm by a felon; in those circumstances the risk of prejudice of evidence of the nature of the conviction outweighs its probative value), *with State v. Little*, 191 N.C. App. 655 (2008) (trial court did not err in allowing State to offer evidence about nature of prior felony conviction in lieu of defendant's stipulation to conviction).

Another example of the potential receipt of inadmissible evidence at a trial of joined offenses is where the testimony of a witness is admissible on one charge but not the other. For instance, in *State v. Voltz*, ___ N.C. App. ___, 804 S.E.2d 760 (2017), the trial judge joined charges occurring seven months apart over the defendant's objection. One set of charges alleged sexual assault and strangulation of the victim, and the later set of charges alleged that the defendant had broken and entered the home of a separate witness to look for the victim. That witness was prepared to testify that the victim in the first set of charges had a volatile relationship with a lot of people. This evidence was inadmissible character evidence as to the sexual assault and strangulation charges but, according to the defendant, raised a question about whether a third party had broken into the witness's home. The court rejected that argument, finding that the witness's testimony was inadmissible because it was insufficient, under the standards for evidence of third-party guilt, to show that another person had broken into the witness's home. Notwithstanding the result in *Voltz,* where witness testimony may be necessary to defend one charge but may be barred because it would result in the admission of inadmissible evidence as to another charge, counsel should consider moving for severance.

Courts also have considered whether the defendant's ability to defend against the charges is hindered where the defendant has a separate defense against each charge. *See United States v. Foutz*, 540 F.2d 733, 739 (4th Cir. 1976) (joinder of robberies prejudicial error where defendant had alibi defense to one charge but not to the other; good explanation of how joinder of offenses creates risk of introducing evidence of criminal propensity; court states that jury may have found defendant guilty "under the rationale that with so much smoke there must be fire" and that had the offenses not been joined for trial, these "spillovers" could not have occurred); *Cross v. United States*, 335 F.2d 987 (D.C. Cir. 1964) (where defendant wishes to testify as to one count but not another, joinder of offenses is prejudicial because joinder violates defendant's right to silence on one offense); *cf. State v Huff*, 325 N.C. 1 (1989) (rejecting defendant's contention that joinder of two murders precluded him from presenting an insanity defense in one murder case), *vacated on other grounds*, 497 U.S. 1021 (1990).

Sometimes joinder of multiple offenses is prejudicial simply because of the volume and complexity of the evidence. *See State v. Williams*, 74 N.C. App. 695 (1985) (joinder of thirteen different charges confused jury). Joinder of even a small number of charges may be confusing to the jury (and prejudicial to the defendant) where each offense raises complex evidentiary issues. For instance, in a sexual assault prosecution where the State intends to offer multiple witnesses about prior bad acts of the defendant under Evidence Rule 404(b), joinder of a firearm by felon offense might overwhelm the jury with limiting instructions as to the uses of different types of evidence (in addition to the potential for prejudice to the defendant).

D. Illustrative Cases

Cases in which joinder found to be proper.

State v. Williams, 355 N.C. 501 (2002) (joinder was proper of fourteen separate charges, including two counts of first-degree murder and two counts of first-degree rape, involving seven victims and a fifteen month time span, where the victims were all prostitutes, African-Americans, and drug users or addicts; defendant used same modus operandi in assaults, using a knife or box cutter and strangling the victims leaving scratch marks; and all of the offenses took place within a one square mile radius)

State v. Chapman, 342 N.C. 330 (1995) (joinder of two murder charges proper, despite two month gap between homicides, because of similarity in circumstances of crimes)

State v. Huff, 325 N.C. 1 (1989) (defendant killed infant son and mother-in-law in same 24-hour period; court found joinder proper because both killings were motivated by fear that defendant's wife would leave him and take custody of son), *vacated on other grounds*, 497 U.S. 1021 (1990)

State v. Avery, 302 N.C. 517 (1981) (assault on jailer, larceny of handgun, larceny of jailer's truck, and murder of police officer the following day properly joined because all offenses related to defendant's escape from jail and desire to avoid recapture)

State v. Jenrette, 236 N.C. App. 616 (2014) (no error to join twelve charges occurring over the course of two months, including drugs, weapons, assaults, and two murder charges where all charges were part of a related series of events; one murder to cover up another murder was a sufficient transactional nexus, and the other charges showed a direct link to the murders)

State v. McCanless, 234 N.C. App. 260 (2014) (joinder was proper of indecent exposure and indecent liberties with a minor charges occurring nine months apart where both victims were minor children, the events occurred at the same department store, and the defendant had the same modus operandi and motive as to each charge)

State v. Guarascio, 205 N.C. App. 548 (2010) (no error to join two misdemeanor charges of impersonating a law enforcement officer in April 2006 with five counts of felony forgery and five counts of misdemeanor impersonating an officer in March 2006; court concluded the circumstances of the offenses were "strikingly similar")

State v. Peterson, 205 N.C. App. 668 (2010) (assault with a deadly weapon with intent to kill inflicting serious injury properly joined with possession of stolen firearms charge, where a firearm that was the basis of the stolen firearms charge was used in the assault; evidence was not complicated and defendant could not show prejudice from joinder)

State v. Anderson, 194 N.C. App. 292 (2008) (twenty felony counts of exploitation of a minor properly joined with defendant's appeal of his misdemeanor peeping charge;

defendant had similar modus operandi in both types of crimes, using the same computer to view pictures of young women during the same time period)

State v. Simmons, 167 N.C. App. 512 (2004) (no error to join common law robbery and first-degree murder charges that involved two different victims and occurred five days apart where the murder resulted from an argument that stemmed from the robbery)

State v. Simpson, 159 N.C. App. 435 (2003) (two charges of obtaining property by false pretenses were properly joined where defendant sold cameras to the same pawn shop dealer on two occasions within a ten day period and the cameras had been stolen at the same time from the same store), *aff'd per curiam*, 357 N.C. 652 (2003)

State v. Bullin, 150 N.C. App. 631 (2002) (joinder of trafficking, conspiracy, and possession with intent to sell or deliver controlled substances was proper when all charges stemmed from one general transaction)

State v. Floyd, 148 N.C. App. 290 (2002) (joinder was proper for the offenses of armed robberies of check cashing businesses, robberies of individuals at gunpoint, robbery at gunpoint of a car, and larceny of a car from a parking lot where the charges stemmed from a two week crime spree)

State v. Breeze, 130 N.C. App. 344 (1998) (twelve robbery charges arising out of ten incidents properly consolidated for trial where robberies occurred in same county over seven week period and victims were all female)

State v. Hammond, 112 N.C. App. 454 (1993) (although incidents of sexual abuse occurred over ten month period, sexual offense and indecent liberties charge properly joined where charges involved same child victim and same surrounding circumstances)

State v. Bruce, 90 N.C. App. 547 (1988) (four sexual abuse charges where victim was same child properly joined, even though events underlying one charge took place six months after events underlying other charges; policy favors consolidation of cases involving same child victim)

Cases in which joinder of offenses found to be improper.

State v. Corbett, 309 N.C. 382 (1983) (error to join charges arising out of three separate assaults against different victims that occurred on different nights over period of several weeks where there was no evidence that assaults were part of single scheme; error harmless because evidence of other assaults would have been admissible in separate trials to show identity)

State v. Perry, 142 N.C. App. 177 (2001) (reversible error to join possession of stolen property and credit card fraud cases, arising out of thefts from automobiles in Chapel Hill, with robbery charges arising out of home invasions in Durham; nature of crimes different and accomplices different)

State v. Bowen, 139 N.C. App. 18 (2000) (error to join sexual offenses that occurred over twelve years against different victims and that were not done in a special way or place, although error was not prejudicial; court states that when trial court erroneously allows joinder, appellate court must determine whether there was any prejudice, but court cautions that at trial level a motion for joinder is "controlled by the higher standard" in G.S. 15A-926)

State v. Owens, 135 N.C. App. 456 (1999) (charges were improperly joined where sexual offenses by defendant against girlfriend's three minor daughters occurred over seven years and were different in nature; however, on appeal defendant failed to articulate any resulting prejudice)

State v. Smith, 70 N.C. App. 293 (1984) (defendant's motion for joinder of Scotland County burglary with Robeson County burglaries properly denied; joinder not required simply because charges are of the same type)

State v. Wilson, 57 N.C. App. 444 (1982) (error to join two charges of obtaining money by false pretenses where victims were different and charges arose from two different incidents that occurred almost three weeks apart; same type of crime not sufficient grounds to support joinder)

E. Standard of Review on Appeal

The N.C. appellate courts have stated (1) that the question of whether two charges have a transactional connection and are joinable under G.S. 15A-926(a) is a question of law (*see, e.g*., *State v. Silva*, 304 N.C. 122 (1981)), which is fully reviewable on appeal; and (2) that joinder of offenses is committed to the sound discretion of the trial court and is reviewable under an abuse of discretion standard (*see, e.g*., *State v. Bracey*, 303 N.C. 112 (1981)). In *State v. Corbett*, 309 N.C. 382, 387 (1983), the N.C. Supreme Court said both. "A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. . . . If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law." *See also Silva*, 304 N.C. at 126. These holdings appear somewhat inconsistent with one another, and on appeal you should proceed under both standards.

Where the defendant is contending on appeal that offenses were improperly joined for trial, the defendant has the burden of showing prejudice. *See State v. Williams*, 41 N.C. App. 287, 290 (1979) ("In determining whether a defendant has been prejudiced by joinder pursuant to G.S. 15A-926, the question which must generally be addressed is whether the offenses are so separate in time and place and so distinct in circumstances as to render joinder unjust and prejudicial to the defendant.").

One key component of demonstrating prejudice is to show that evidence of the joined offense would not otherwise be admissible under N.C. Rule of Evidence 404(b). This is not the standard for determining joinder at trial, however. The trial court should not join

offenses simply on the ground that one of the offenses would be admissible under Rule 404(b) in a separate trial of the other offense. *See State v. Bowen*, 139 N.C. App. 18, 30 (2000) (motion for joinder is "controlled by the higher standard" in G.S. 15A-926); *see also State v. Locklear*, 363 N.C. 438, 446 (2009) (explaining that whether offenses may be joined is a separate question from whether evidence of one offense may be admitted at trial of another, though both questions often involve similar considerations); *State v. Owens*, 135 N.C. App. 456, 460 (1999) (charges were improperly joined where sexual offenses by defendant against girlfriend's three minor daughters occurred over seven years and were different in nature; however, court finds that defendant failed to articulate any resulting prejudice, stating that if the offenses had not been joined, then at trial of any one offense, evidence of the other molestations would have been admissible under Rule 404(b)). For additional discussion of reasons offenses should not be joined, see *supra* § 6.1C, Severance of Joinable Offenses.

F. Sentencing Implications of Joinder

Use of joined offense at sentencing in future case. Under structured sentencing, criminal defendants are assigned a prior record level based primarily on their prior criminal record. G.S. 15A-1340.14(d) provides that for purposes of determining a defendant's prior record level, if a defendant is convicted of more than one offense in superior court during a calendar week, or more than one offense in district court during a single session, only the most serious offense is used. This is a powerful incentive for a defendant to have offenses heard together. *Cf. State v. Fuller*, 179 N.C. App. 61 (2006) (trial judge did not err in assigning points to two convictions obtained on same day in same county when one conviction was in district court and the other was in superior court).

Note, however, that the N.C. appellate courts have held that when offenses are resolved during a single week of superior court (or, presumably, during a single session of district court), even when joined for disposition, one offense can be used to establish prior record level and another can be used as a predicate felony for habitual felon status. *See State v. McCrae*, 124 N.C. App. 664 (1996). A different rule also exists for convictions of driving while impaired that occur on the same day. Each conviction is a separate aggravating factor for DWI sentencing under G.S. 20-179, and each may be used as predicate offenses in any later habitual impaired driving prosecution. *See State v. Mayo*, ___ N.C. App. ___, 807 S.E.2d 654 (2017). Under the reasoning of *Mayo*, convictions of joined assault offenses may count as separate predicate convictions in a later prosecution for habitual misdemeanor assault. *See also State v. Smith*, 139 N.C. App. 209 (2000) (defendant had two assault on female convictions from same day; court approved of one being used as a predicate offense for habitual assault, the other for prior record level points).

A conviction obtained on the same day or term as another conviction, if not joined, has also been found to support a recidivist determination for purposes of sex-offender registration and satellite-based monitoring. *See State v. Bishop*, ___ N.C. App. ___, 805 S.E.2d 367 (2017) (defendant pled guilty to separate offense after being found guilty at

trial; trial conviction counted for recidivist purposes for conviction on guilty plea). However, if the offenses are joined for trial or plea, one conviction cannot be counted as a prior conviction to establish recidivist status for the other conviction. *State v. Springle*, 244 N.C. App. 760, 767 n.3 (2016) (simultaneous convictions could not be counted as a prior conviction for recidivist purposes).

Use of joined offense at sentencing in current case. North Carolina's Fair Sentencing Act, repealed effective October 1, 1994, restricted the use of joined or joinable convictions, as well as the facts underlying such convictions, as aggravating factors at sentencing in the current case. Those restrictions likely no longer exist under structured sentencing. A number of cases have interpreted structured sentencing as allowing evidence in support of a joined conviction to be used as an aggravating factor at sentencing for the other conviction. *See State v. Tucker*, 357 N.C. 633 (2003); *State v. Demos*, 148 N.C. App. 343 (2002); *see also State v. Wiggins*, 161 N.C. App. 583 (2003) (allowing as aggravating factor evidence of a joinable offense with which the defendant was not charged).

There remain some hurdles to the use of joined convictions at sentencing in the current case. Contemporaneous convictions may not be used in calculating the defendant's prior record level. *See State v. West*, 180 N.C. App. 664, 669 (2006) (stating that "assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly"). Evidence necessary to prove an element of a conviction may not be used as an aggravating factor for that conviction. *See* G.S. 15A-1340.16(d) (so stating).

If the State wants to use evidence in support of a joined conviction as an aggravating factor for another conviction in the case, it still must comply with the procedures in G.S. 15A-1340.16 on giving notice of its intent to seek aggravating factors and, unless admitted by the defendant, proving them.

G. Bars to Successive Prosecutions

Statutory right to dismissal of joinable offenses. G.S. 15A-926(c) provides that a defendant who has been tried for an offense may move to dismiss a successor charge of any joinable offense, and this motion to dismiss must be granted unless certain exceptions apply. *See also* G.S. 15A-926 Official Commentary (statute was intended to bar successive trials of offenses absent some reason for separate trials); 2 ABA STANDARDS FOR CRIMINAL JUSTICE Standard 13-2.3 & Commentary (2d ed. 1980). For example, if a defendant is tried for felony breaking and entering, the defendant has a statutory right to dismissal of a later larceny charge that the prosecution could have joined with the earlier offense. North Carolina's statutory right to dismissal is broader than double jeopardy protections, discussed below, because it bars subsequent prosecutions of related offenses, not just the same or lesser offenses.

There are a number of limits to this right, however. First, the statute applies only to charges brought after the first trial. It creates no right to dismissal with respect to joinable

charges that were pending at the time of the first trial. *See* G.S. 15A-926(c)(2)a., b. (no right to dismissal if defendant fails to move to join charges, thus waiving right to joinder, or if defendant makes such a motion and motion is denied). Second, the right to dismissal of a successor charge does not apply if the defendant pled guilty or no contest to the previous charge. *See* G.S. 15A-926(c)(3). If defense counsel has concerns about this possibility, counsel should make an explicit part of any plea agreement that the State will not prosecute any other charges related to the transaction or occurrence. (Language in a plea transcript explicitly stating that the defendant enters the plea in lieu of any and all related charges will suffice and is advisable to include in any plea agreement). Third, the court may deny a motion to dismiss if it finds that the prosecution did not have sufficient evidence to try the successor charge at the time of trial or that the ends of justice would be defeated by granting the motion. *See* G.S. 15A-926(c)(2)c.

Case law has further limited the right. In *State. v. Furr*, 292 N.C. 711 (1977), the N.C. Supreme Court held that the right to dismissal applies only where the defendant has been indicted for the joinable offenses at the time of the first trial. This holding effectively eviscerated the statutory right to dismissal because G.S. 15A-926(c)(2), discussed above, provides for no right to dismissal of a pending charge that the defendant failed to move to join or unsuccessfully moved to join. In a later case, *State v. Warren*, 313 N.C. 254 (1985), the N.C. Supreme Court rolled back *Furr,* recognizing that the joinder statute applies to successor charges that were not pending at the time of trial and that would have been joinable had the State filed them. The Court added, however, that a defendant who has been tried for an offense is entitled to dismissal of joinable offenses only if the sole reason that the State withheld indictment on the offenses was to circumvent the statutory joinder requirements. The Court ameliorated the potential strictness of this requirement by stating that the defendant may meet this burden by showing that the State had substantial evidence of the successor charge at the time of the first trial or that the State's evidence at a second trial would be the same as at the first trial. In *Warren*, the Court found that the defendant failed to make such a showing and that there were valid reasons for the State's failure to seek an indictment charging larceny and burglary before the defendant was tried on a related murder charge. *See also State v. Tew*, 149 N.C. App. 456 (2002) (relying on *Warren*, court found that State did not circumvent statutory joinder requirements and trial court did not err in denying defendant's motion to dismiss successor felony assault charge; defendant had originally been convicted of attempted second-degree murder, and N.C. Supreme Court vacated the conviction on the rationale, not established at the time of the charge, that the offense of attempted second-degree murder did not exist).

Double jeopardy. The Double Jeopardy Clause also may provide some protection against a subsequent prosecution of an offense not joined in an earlier trial. It protects against a second prosecution for the *same offense* after acquittal or conviction. A dismissal during trial for insufficiency of the evidence is an acquittal for double jeopardy purposes. See *Martinez v. Illinois*, 572 U.S. ___, 134 S. Ct. 2070 (2014). Two crimes constitute the "same offense" for double jeopardy purposes when they have the same elements or when the elements of one are subsumed within the elements of the other (in essence, one is a lesser offense of the other). *See Blockburger v. United States*, 284 U.S. 299 (1932).

If by opposing joinder or moving to sever the defendant is responsible for separate trials of offenses that are the "same" for double jeopardy purposes, the State is not barred from bringing successive prosecutions. *See Jeffers v. United States*, 432 U.S. 137 (1977) (while earlier conviction of conspiracy to distribute narcotics was a lesser included offense of engaging in a continuing criminal enterprise to violate drug laws, consecutive trials were not barred under Double Jeopardy Clause because defendant opposed motion to join charges and was solely responsible for successive prosecutions); *State v. Alston*, 82 N.C. App. 372 (1986) (State not collaterally estopped from prosecuting defendant for robbery with a firearm following acquittal of possession of firearm by a felon charge; no double jeopardy claim where separate trials resulted from defendant's motion to sever charges), *aff'd on other grounds*, 323 N.C. 614 (1988) (court finds a rational jury could have based its verdict in the possession trial on an issue other than possession of a firearm during the armed robbery; court does not reach constitutional question).

Collateral estoppel. A defendant who is *acquitted* in 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 successive trial on a factually related crime. Collateral estoppel is also known as "issue preclusion", and bars the State from relitigating an issue of fact that has previously been determined against it. For example, in *Ashe v. Swenson*, 397 U.S. 436 (1970), armed masked men interrupted a poker game and robbed each of the six poker players. The defendant was acquitted of the robbery of Player A in a case in which the only issue of fact was the defendant's presence at the scene. The Court held that the State was collaterally estopped from a subsequent prosecution of the defendant for the robbery of Player B because the issue of his presence had already been decided adversely against the State. *See also State v. McKenzie*, 292 N.C. 170 (1977) (acquittal of DWI precludes State from relitigating issue at defendant's subsequent involuntary manslaughter trial); *State v. Parsons*, 92 N.C. App. 175 (1988) (trial court dismissed indictment for manslaughter of fetus on basis that unborn child was not "person" within meaning of statute and thus indictment did not state crime; State barred by collateral estoppel from bringing second indictment changing term "fetus" to "unborn child" because issue had already been litigated).

The application of collateral estoppel is contingent on the previous resolution of the *same* issue. The test is whether a second conviction would *require* the jury to find against the defendant on an issue already decided by a valid and final judgment in his or her favor. *See Dowling v. United States*, 493 U.S. 342 (1990) (acquittal of robbery of victim in her home no bar to showing that defendant was among the group in the house, as the acquittal need not have been based on issue of defendant's presence); *State v. Edwards*, 310 N.C. 142 (1984) (acquittal of larceny charge no bar to prosecution for breaking or entering with intent to commit larceny); *State v. Tew*, 149 N.C. App. 456 (2002) (acquittal of attempted first-degree murder did not bar prosecution for assault with a deadly weapon with intent to kill inflicting serious injury because the jury need not have decided that the defendant lacked the intent to kill). The moving party bears the burden of persuasion in establishing a collateral estoppel claim. *Edwards,* 310 N.C. at 145. Where the defendant consents to separate trials, he or she has waived any claims to issue-preclusion under the Double Jeopardy clause. *Currier v. Virginia*, ___ U.S. ___, 138 S. Ct. 2144 (2018) (defendant who agrees to severance waives double jeopardy protections

against relitigation of issues decided by the previous trial; plurality of court would have held issue-preclusion claims inconsistent with text and history of Double Jeopardy Clause).

In some instances, North Carolina courts have approved the use of collateral estoppel by the State against the defendant. *See State v. Williams*, ___ N.C. App. ___, 796 S.E.2d 823 (2017) (applying collateral estoppel to deny defendant's motion to suppress in a second trial for drugs when the issue of the lawfulness of the search was the same and was fully litigated before the first trial). *But see* 2 NORTH CAROLINA DEFENDER MANUAL §31.10B (Rulings from Previous Trials) (2d ed. 2012) (discussing whether pretrial rulings are binding after mistrial).