8.6 Limits on Successive Prosecution

This section discusses challenges involving pleadings that may be made when the State seeks to re-prosecute a defendant for criminal conduct that already has been the subject of previous proceedings, either in district or superior court. In such cases, check both sets of pleadings to determine whether there is a double jeopardy, statutory joinder, or due process bar to the successive prosecution (discussed below).

A. Double Jeopardy

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

- a second prosecution for the same offense after acquittal;
- a second prosecution for the same offense after conviction (by trial or plea); and
- multiple punishments in a single prosecution for the same offense (*see supra* § 8.5H, One Crime in Multiple Counts (Multiplicity)).

See North Carolina v. Pearce, 395 U.S. 711 (1969); *State v. Brunson*, 327 N.C. 244 (1990) (article 1, section 19 of the N.C. Constitution affords defendants same protections). This section discusses Double Jeopardy restrictions on successive prosecutions. For further discussion of double jeopardy, see *infra* § 13.4B, Motion to Dismiss on Double Jeopardy Grounds.

General test. The test used to determine whether offenses are the "same" for double jeopardy purposes is the same-elements test of *Blockburger v. United States*, 284 U.S. 299 (1932). Under that test, the question is whether each offense requires proof of an element not contained in the other; if not, they are the same offense and double jeopardy bars a successive prosecution.

Lesser offenses. Under the same-elements test of double jeopardy, a lesser offense is considered the "same" as the greater offense. *See Brown v. Ohio*, 432 U.S. 161 (1977). For example, conviction or acquittal of misdemeanor assault with a deadly weapon ordinarily would bar a later prosecution of felony assault with a deadly weapon with intent to kill based on the same act. The double jeopardy bar does not apply simply because the offenses involve the same act; the offenses must meet the same-elements test (although other doctrines, discussed below, may bar successive prosecutions based on the same incident). Thus, conviction of misdemeanor assault with a deadly weapon would not bar, on double jeopardy grounds, a felony prosecution for shooting into occupied property based on the same act.

Proceedings covered. Double jeopardy protections apply to all prosecutions of a criminal nature. Thus, a finding of responsibility or nonresponsibility for an infraction, although considered a noncriminal violation of law, could bar a later criminal prosecution for the "same" offense. *See State v. Hamrick*, 110 N.C. App. 60 (1993) (stating this general rule, but finding no bar to prosecution of death by vehicle charge where charges for misdemeanor death by vehicle and for driving left of center infraction were filed

simultaneously and defendant voluntarily appeared before magistrate and entered plea of responsible for infraction); *State v. Griffin*, 51 N.C. App. 564 (1981) (successive prosecution barred where defendant pled guilty to failing to yield right of way on April 10 and defendant was charged on April 17 with death by vehicle based on same conduct). For a further discussion of *Hamrick* and *Griffin*, see *infra* "Limitations" in this subsection A.

Likewise, acquittal or conviction of criminal contempt will sometimes bar a later criminal prosecution. *See United States v. Dixon*, 509 U.S. 688 (1993) (finding that double jeopardy protections barred later prosecution for assault after defendant had been convicted of criminal contempt for violating domestic violence protective order forbidding same conduct); *State v. Dye*, 139 N.C. App. 148 (2000) (distinguishing *Gilley*, below, court holds that double jeopardy barred later prosecution for domestic criminal trespass after defendant had been adjudicated 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 barred later prosecution for assault on female but not prosecution for domestic criminal trespass, misdemeanor breaking and entering, and kidnapping).

Attachment of jeopardy. In district court, jeopardy attaches once the court begins to hear evidence. *See State v. Brunson*, 327 N.C. 244 (1990). In superior court, jeopardy attaches when the jury is empaneled and sworn. *See State v. Bell*, 205 N.C. 225 (1933). For guilty pleas in either level of court, jeopardy generally attaches when the court accepts the plea. *See State v. Wallace*, 345 N.C. 462 (1997) (jeopardy did not attach where judge rejected guilty plea); *State v. Ross*, 173 N.C. App. 569 (2005) (jeopardy did not attach where record insufficient to show whether guilty plea tendered or accepted), *aff'd per curiam*, 360 N.C. 355 (2006); *see also* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 25.1(d), at 589–99 (3d ed. 2007).

Waiver and guilty pleas. If the defendant pleads guilty in superior court, he or she ordinarily will be unable to raise a double jeopardy claim on appeal. *See State v. Hopkins*, 279 N.C. 473 (1971); *see also State v. McKenzie*, 292 N.C. 170 (1977) (defendant waived double jeopardy claim by failing to raise claim at trial level). *But see United States v. Broce*, 488 U.S. 563 (1989) (plea of guilty does not waive claim that charge, judged on its face, is one that State may not constitutionally prosecute); *Thomas v. Kerby*, 44 F.3d 884 (10th Cir. 1995) (recognizing exception created by *Broce*).

A guilty plea in district court probably does not constitute a waiver of the defendant's right to argue double jeopardy on appeal for a trial de novo in superior court, but no cases have specifically addressed the issue. *See generally State v. Sparrow*, 276 N.C. 499 (1970) (defendant convicted in district court entitled to appeal to superior court for trial de novo as matter of right, even if defendant entered guilty plea in district court); G.S. 15A-953 (except for motion to dismiss for improper venue, "no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court").

Limitations. The bar on re-prosecution of offenses that are considered the "same" for double jeopardy purposes is not absolute. There are some limitations.

First, if subsequent events provide the basis for new charges (for example, the victim dies after prosecution for assault), the defendant may be charged with those offenses notwithstanding a prior trial or plea to a lesser offense. *See State v. Meadows*, 272 N.C. 327 (1968). *But see State v. Griffin*, 51 N.C. App. 564 (1981) (entry of guilty plea to traffic violation barred later prosecution for death by vehicle even though victim died after plea).

Second, the double jeopardy bar does not necessarily apply if the defendant acts to sever the charges and then pleads guilty to one of them.

- In *Ohio v. Johnson*, 467 U.S. 493 (1984), the defendant pled guilty to one count of a multi-count indictment. The plea did not bar continued prosecution of the other counts. *See also State v. Hamrick*, 110 N.C. App. 60 (1993) (applying *Ohio v. Johnson* and finding no bar to prosecution of death by vehicle charge where charges for misdemeanor death by vehicle and driving left of center infraction were filed simultaneously and defendant voluntarily appeared before magistrate and entered plea of responsible to infraction).
- If the defendant successfully moves to sever offenses or opposes joinder, and then pleads guilty to one of the offenses, double jeopardy would not bar prosecution of the remaining offenses. *See Jeffers v. United States*, 432 U.S. 137 (1977) (defendant was solely responsible for severing offenses and so could not raise double jeopardy as bar).

In contrast, if the State schedules two offenses for different court dates, and the defendant is not responsible for severing the offenses, a defendant's guilty plea to the first-scheduled offense should bar a later prosecution for the same offense. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b), at 91–92 (3d ed. 2007).

B. Collateral Estoppel

Double jeopardy includes a collateral estoppel component. A defendant who is *acquitted* in a first trial may be able to rely on the constitutional doctrine of collateral estoppel to bar a second trial on a factually related crime. Collateral estoppel 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), the defendant was acquitted of the robbery of "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 "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 dismisses indictment for manslaughter of fetus on basis that unborn child is 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); G.S. 15A-954(a)(7) (codifying constitutional requirement, statute provides that court must dismiss charge if "issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties").

The term "acquittal" includes a not guilty verdict or dismissal for insufficient evidence. For double jeopardy purposes, an acquittal also includes an implied acquittal of a greater offense. For example, if the defendant is charged with assault with a deadly weapon with intent to kill and is convicted of assault with a deadly weapon, the defendant is deemed to be acquitted of the greater offense. *See Green v. United States*, 355 U.S. 184 (1957); *State v. McKenzie*, 292 N.C. 170 (1977); *State v. Broome*, 269 N.C. 661 (1967).

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 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).

C. Failure to Join

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. *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). Our statutory right to dismissal is broader than double jeopardy protections because it bars subsequent prosecutions of related offenses, not merely the same or lesser offenses. 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.

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 and that the defendant could have moved to join. *See* G.S. 15A-926(c)(2) (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 may want to make an explicit part of any plea agreement that the State will not prosecute any other charges related to the transaction or occurrence. Third, the court may deny a motion to dismiss if the court finds that the prosecution did not have sufficient evidence to try the successor charge at

the time of trial or the ends of justice would be defeated by granting the motion. *See* G.S. 15A-926(c)(2); *State v. Warren*, 313 N.C. 254 (1985) (no error in denial of motion to dismiss burglary and larceny charges brought after trial of related murder when insufficient evidence of those offenses existed at time of murder trial; delay in charging additional offenses was not for purpose of circumventing statutory joinder requirements).

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).

D. Due Process

If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for a trial de novo in superior court, a subsequent indictment of the defendant for a felony assault arising out of the same incident is presumed to be vindictive and therefore in violation of Due Process. This rule bars prosecution of the more serious offense regardless of whether it meets the same-elements test for double jeopardy purposes. *See Blackledge v. Perry*, 417 U.S. 21 (1974) (Due Process bars indictment for more serious offense regardless of whether prosecutor acted in good or bad faith); *see also Thigpen v. Roberts*, 468 U.S. 27 (1984) (following *Blackledge*); *State v. Bissette*, 142 N.C. App. 669 (2001) (*Blackledge* barred filing of felony charge after appeal of misdemeanor conviction for trial de novo; State also was barred from refiling misdemeanor charge because State elected at commencement of trial on felony charge to dismiss misdemeanor charge); *State v. Mayes*, 31 N.C. App. 694 (1976) (recognizing that showing of actual vindictiveness not required).

Can the State rebut this presumption of vindictiveness? The only situation in which the U.S. Supreme Court has found that the presumption may be rebutted is when subsequent events form the basis for new charges (for example, the victim dies after appeal). *See Blackledge*, 417 U.S. at 29 n.7; *Thigpen*, 468 U.S. at 32 n.6. What other circumstances, if any, would be sufficient to rebut the presumption is unclear.

If the defendant appeals from a plea of guilty in district court, offenses that were dismissed as part of any plea agreement, including felonies, may be charged in superior court. *See State v. Fox*, 34 N.C. App. 576 (1977) (State may indict defendant on felony breaking and entering and felony larceny where defendant was initially charged with those offenses but pled guilty to misdemeanor breaking and entering pursuant to a plea agreement in district court and then appealed to superior court for trial de novo). If, however, the defendant is charged with a misdemeanor, pleads guilty in district court without any plea agreement, and then appeals, *Blackledge* bars the State from initiating felony charges based on the same conduct.

The State is not barred on appeal of a misdemeanor for a trial de novo from seeking a greater sentence for that misdemeanor than the district court imposed. *See Colten v. Kentucky*, 407 U.S. 104 (1972); *State v. Burbank*, 59 N.C. App. 543 (1982); *cf.* G.S. 15A-1335 (when conviction or sentence in superior court is set aside on direct review or collateral attack, court may not impose more severe sentence for same offense or for different offense based on same conduct); Jessica Smith, *Limitations on a Judge's Authority to Impose a More Severe Sentence After a Defendant's Successful Appeal or Collateral Attack*, ADMINISTRATION OF JUSTICE BULLETIN No. 2003/03 (UNC School of Government, July 2003), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200303.pdf. [*Legislative note:* Effective for resentencing hearings held on or after December 1, 2013, S.L. 2013-385 (H 182) amends G,S. 15A-1335 (resentencing after appellate review) to provide that the statute does not apply when a defendant on direct review or collateral attack succeeds in having a guilty plea vacated.]

E. Timing of Challenge

When the prosecution has failed to allege an offense properly as described in previous sections, the defendant may wish to wait until trial to move to dismiss the charges. *See supra* § 8.2, Misdemeanors Tried in District Court; § 8.4, Felonies and Misdemeanors Initiated in Superior Court; § 8.5, Common Pleading Defects in Superior Court.

In the situations described in this section § 8.6, there is less reason to wait to file a motion to dismiss. In all of the situations described here, the defendant has already been tried for one offense and the prosecution is seeking to try the defendant for another, related offense. If the defendant's motion to dismiss is successful, the prosecution should be barred from pursuing the charge.

If the case is in superior court, the following time limits apply: (1) the motions do not appear to be subject to G.S. 15A-952(b), which requires that certain motions be filed before arraignment; (2) if the motion to dismiss is for lack of joinder, G.S. 15A-926(c)(2)

requires that it be filed before trial; (3) if the motion to dismiss is based on constitutional grounds, G.S. 15A-954(c) provides that it may be raised at any time; however, such motions may be waived by the failure to raise them at the trial level. *See State v. Frogge*, 351 N.C. 576 (2000) (defendant argued that prosecution was vindictive and moved to dismiss indictment; court finds that defendant waived motion by failing to make motion in trial court). For more on timing of motions, see *infra* Chapter 13, Motions Practice.