No. 19-766

# In the Supreme Court of the United States

STATE OF NORTH CAROLINA,
*Petitioner*,
v.
JAMES HAROLD COURTNEY, III,
*Respondent*.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA*

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitutional Provisions**



**Statutes and Rules**

## INTRODUCTION

In this case, the North Carolina Supreme Court ordered the release of James Courtney after a jury convicted him of murder. The court concluded that the Double Jeopardy Clause barred Courtney's prosecution, because the government had previously dismissed charges against him after a first trial ended in a hung jury.

The state supreme court's decision warrants this Court's review. Courtney fails to refute several key points showing that the petition should be granted.

First, the decision below conflicts with rulings in over a dozen jurisdictions. It is true that these cases all arose in different procedural and factual circumstances. But Courtney fails to explain how these variations have any constitutional significance. To the contrary, the cases all embrace the same constitutional principle: the government's voluntary dismissal of a charge after a hung-jury mistrial does not bar a retrial on that charge.

Next, the state supreme court explicitly premised its ruling on the Double Jeopardy Clause. Throughout its decision, the court repeatedly cited the Clause, as well as this Court's decisions interpreting the Clause. Although the court also discussed certain state-law procedures, it did so only to address whether a retrial under those procedures violated the U.S. Constitution. Thus, Courtney is wrong that the decision was based on state law.

Finally, the question presented is significant for the criminal justice system. As this case itself illustrates, the decision below curbs the government's discretion to make charging decisions to advance the ends of justice.

For these reasons, the State of North Carolina respectfully requests that this Court grant the petition and reverse the judgment below.

## ARGUMENT

### I. The Decision Below Conflicts With Rulings In Over A Dozen Jurisdictions.

As the State explained in its petition, the decision below conflicts with rulings by at least six state supreme courts, five state intermediate appellate courts, and five federal courts of appeals. Pet. 6-13. All of these courts have held that, after a hung-jury mistrial, the government may voluntarily dismiss criminal charges and then later retry those charges.

These decisions follow this Court's teachings that after a mistrial, the government, like the defendant, is entitled to reach a "resolution of the case by verdict from the jury." *Richardson v. United States*, 468 U.S. 317, 326 (1984). Therefore, a hung-jury mistrial is a "nonevent" that has no effect on the government's ability to initiate a second trial. *Yeager v. United States*, 557 U.S. 110, 118 (2009). After a mistrial, the case returns to a pretrial stage in which "the prosecutor will be permitted to proceed anew." *United States v. Scott*, 437 U.S. 82, 92 (1978).

In contrast, in the decision below, the North Carolina Supreme Court held that, when the government voluntarily dismisses charges after a hung-jury mistrial, the Double Jeopardy Clause bars the government from retrying those charges. Pet. App. 2a, 23a.

Courtney's attempts to explain away this lopsided split are unavailing. To begin with, Courtney argues that the conflict is "stale" because the cases on the other side of the split span decades. Br. in Opp. 12. However, this long history merely confirms that the decision below departs from well-settled double-jeopardy principles.

Next, Courtney points out that the cases on the other side of the split involved a variety of different procedures and factual scenarios. *Id.* at 12-15. He notes, for example, that in some cases, the government was required to request court approval or show good cause to voluntarily dismiss charges, whereas in others the government could do so unilaterally. *Id.* at 12-13. He also stresses minute factual distinctions, such as the fact that in some cases, the government brought a new indictment instead of reinstating the original indictment. *Id.* at 13-14.

But Courtney cannot explain how these case-specific variations have any constitutional significance. As this Court has stressed, the double-jeopardy analysis turns on the "substance" of an action, not on its form. *Evans v. Michigan*, 568 U.S. 313, 322 (2013). Consistent with this guidance, in all of the cases cited by the State, the courts applied the

same double-jeopardy principles to the specific facts and procedures at issue. And the courts all reached the same overarching legal conclusion: that the Double Jeopardy Clause does not bar the government from re-filing a charge that it had voluntarily dismissed after a hung-jury mistrial.

The uniformity of this conclusion flows directly from the double-jeopardy test established by this Court. That test has two parts: "First, did jeopardy attach to [the defendant]? Second, if so, did the proceeding end in such a manner that the Double Jeopardy Clause bars his retrial?" *Martinez v. Illinois*, 572 U.S. 833, 838 (2014); *see also* Pet. App. 8a (quoting and applying the *Martinez* standard).

Under this framework, the outcome of any case that involves a government's voluntary dismissal after a hung-jury mistrial should be the same. First, in such cases, there is no question that jeopardy has attached. *See Martinez*, 572 U.S. at 838-39. Second, by definition, these proceedings all ended in the same "manner." *Id.* at 838. The common question posed by these cases is therefore whether a voluntary dismissal after a hung-jury mistrial is the type of proceeding that "end[s] in such a manner that the Double Jeopardy Clause bars [the defendant's] retrial." *Id.*

In over a dozen jurisdictions, courts have answered this question no. As these courts recognize, a "procedural dismissal" is not a finding on the "ultimate question of guilt or innocence." *Evans*, 568 U.S. at 319. But the North Carolina Supreme Court held to the contrary. It held that a voluntary dismissal bars a retrial because it is "tantamount to an

acquittal." Pet. App. 23a. This clear conflict turns on differing views on the scope of the Double Jeopardy Clause—not, as Courtney claims, on the specific procedures that the government invoked to dismiss the charges. *See* Br. in Opp. 12-15.

Indeed, this Court has often examined state-law procedures when it has explored the scope of federal double-jeopardy protections. *See*, *e.g.*, *Smalis v. Pennsylvania*, 476 U.S. 140, 146 (1986) (holding that a "demurrer" under Pennsylvania law was an acquittal for double-jeopardy purposes); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984) (holding that Massachusetts's two-tier trial system complied with Double Jeopardy Clause); *Illinois v. Somerville*, 410 U.S. 458, 460 (1973) (holding that Illinois law regarding defective indictments contributed to manifest necessity for a mistrial). Thus, as this Court has recognized, state procedural variations pose no obstacle to this Court's review.[1]

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[1] The State of Arizona has recently filed a petition on a related double-jeopardy question. *See* Pet. for Writ. of Cert., *Arizona v. Martin*, No. 19-605. Both Arizona's and North Carolina's petitions raise the general issue of what actions are equivalent to an acquittal for double-jeopardy purposes. But the specific questions in the two cases are distinct. Arizona's petition asks whether the Double Jeopardy Clause bars retrial after a jury hangs on a greater offense and convicts on a lesser offense, but the conviction on the lesser offense is overturned on appeal. *Id.* at i. The petition here involves the more straightforward situation of a voluntary dismissal after a hung-jury mistrial.

The existence of multiple petitions raising overlapping issues on the scope of the Double Jeopardy Clause shows the need for this Court to resolve confusion in this area of law.

## II. The North Carolina Supreme Court Based Its Ruling On The Double Jeopardy Clause.

Courtney next claims that review is not warranted because the decision below rested on independent state-law grounds. Br. in Opp. 9-11. This argument misconstrues the state supreme court's ruling. The decision below was explicitly based on "the Double Jeopardy Clause of the United States Constitution"—not on state law. Pet. App. 5a.

Throughout its decision, the state supreme court repeatedly invoked the Double Jeopardy Clause. The court cited the Clause by name well over a dozen times. *See, e.g.*, Pet. App. 5a, 6a, 7a, 8a, 9a, 12a, 15a, 22a, 28a, 30a.[2]

The state supreme court also made clear that its ruling was based on this Court's decisions. For example, the court cited as controlling this Court's two-step framework for deciding whether retrial is allowed under the Double Jeopardy Clause. Pet. App. 8a, 9a (quoting *Martinez*, 572 U.S. at 838). Applying that framework, the court reasoned that "the continuing jeopardy principle embraced by the United States Supreme Court in *Richardson*" barred retrial in this case. Pet. App. 11a n.6; *see also* Pet. App. 10a-

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[2] The North Carolina Constitution does not expressly ban double jeopardy. Instead, the state supreme court has construed the state constitution's "law of the land" clause to implicitly include protections that mirror certain federal constitutional rights, including the right against double jeopardy. *State v. Brunson*, 393 S.E.2d 860, 863 (N.C. 1990); *see* N.C. Const. Art. I, § 19. Thus, when the decision below cites the "Double Jeopardy Clause," it can only be referring to the U.S. Constitution.

12a. The court justified this holding by extensively discussing this Court's leading double-jeopardy precedents. *See* Pet. App. 11a, 15a-16a, 17a. And when the court did discuss state cases, it did so only to explain why those cases did not control the federal double-jeopardy analysis. *See* Pet. App. 17a-21a.

Thus, the state supreme court did not purport to make an independent ruling under the state constitution. *See* Pet. App. 7a-8a. Indeed, Courtney does not claim otherwise. *See* Br. in Opp. 9-11.[3]

Instead, Courtney claims that the decision below was based on North Carolina's voluntary-dismissal statute. He is incorrect. The state supreme court did not hold that a retrial was barred by that statute. It made an unqualified ruling that a retrial was barred by "the Double Jeopardy Clause." Pet. App. 9a; s*ee also* Pet. App. 2a, 7a-9a, 23a, 30a.

Of course, Courtney is right that the state supreme court examined whether North Carolina's voluntary-dismissal procedure was "an event that terminated jeopardy" under the Double Jeopardy Clause. Pet. App. 23a. But state procedures are often relevant when this Court reviews a double-jeopardy claim arising from a state prosecution. *See*, *e.g.*, *Smalis*, 476 U.S. at 146; *Lydon*, 466 U.S. at 307; *Somerville*, 410 U.S. at 460. As these cases recognize, the fact that this Court must often examine state-law procedures to

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[3] The North Carolina Supreme Court has explicitly held that the state constitution does not confer greater protections against double jeopardy than the U.S. Constitution. *Brunson*, 393 S.E.2d at 864 ("We do not accept defendant's contention that the law of this state confers greater former jeopardy protection upon defendants than the federal law does.").

decide double-jeopardy questions does not diminish the fact that the ultimate authority on these questions is the Double Jeopardy Clause.

The same is true here. When the North Carolina Supreme Court examined the voluntary dismissal statute, its stated aim was to determine whether the dismissal was "a jeopardy-terminating event for purposes of the Double Jeopardy Clause."[4] Pet. App. 27a-28a. Although the court speculated that the state legislature might have "contemplated" that a dismissal under the statute would have double jeopardy implications, the court did not hold that retrial was barred by the statute. Pet. App. 26a. It held that a retrial was barred by "the Double Jeopardy Clause." Pet. App. 9a.

Thus, Courtney is wrong to argue that the voluntary dismissal statute provided an independent state-law basis for the decision below. Indeed, as the state supreme court recognized, the statute was enacted explicitly to comply with this Court's precedents. Pet. App. 27a. Specifically, in *Klopfer v. North Carolina*, this Court held that a previous North Carolina procedure violated the Sixth Amendment's guarantee to a speedy trial. 386 U.S. 213 (1967). Under that procedure, the government could leave charges pending indefinitely by taking an indictment off the calendar. *Klopfer*, 386 U.S. at 214. After this

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[4] Courtney's argument that the decision below was based on North Carolina's "election rule" fails for the same reason. The court examined that rule in the context of its effect on the double-jeopardy analysis. It did not rely on the rule as an independent basis for its decision. *See* Pet. App. 28a-29a.

Court struck down this procedure in *Klopfer*, the North Carolina legislature enacted the voluntary dismissal statute to comply with the Sixth Amendment's speedy-trial guarantee. *See* N.C. Gen. Stat. § 15A-931 (2017) (official cmt.) (citing *Klopfer,* 386 U.S. 213). The statute did not purport to establish double-jeopardy rules at all, let alone rules that go beyond what the Double Jeopardy Clause requires.

In sum, Courtney's reliance on North Carolina's voluntary dismissal statute is misplaced. When the court discussed the statute, it did so only to address whether a retrial under the statute violated the U.S. Constitution. That constitutional ruling is properly subject to this Court's review.

## III. The Question Presented Is Significant For The Criminal Justice System.

In a final attempt to discourage this Court's review, Courtney argues that the constitutional question here is not significant. Br. in Opp. 21-22. This argument slights the important ways in which the ruling below limits the government's discretion to dismiss or reinstate charges to advance justice.

As then-Judge Warren Burger observed, "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or . . . whether to dismiss a proceeding once brought." *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967). This exercise of discretion is no less important after a mistrial than at a case's outset. After a mistrial, the government must balance the need for

finality against the "public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

The decision below destabilizes this balancing process. It forces the government to choose between pressing on with an immediate reprosecution, or forever losing the opportunity to hold the defendant accountable. The decision thus unduly slights the public's interest in allowing the government to exercise its discretion to advance justice.

These concerns are far from theoretical. In this case, for example, a jury convicted Courtney of murder based on forensic evidence that emerged only after his first trial ended in a hung jury. Pet. App. 3a-5a. Thus, as this case itself shows, the decision below may impede the government's ability to solve cold cases.

Moreover, the state supreme court's decision has already prevented the State from seeking justice in other cases. For example, in *State v. Jacobs*, a North Carolina jury convicted John Jacobs of committing a sex offense on a child, but in the same trial the jury hung on three counts of child rape. 798 S.E.2d 532, 534 (N.C. Ct. App. 2017). After the state intermediate appellate court unanimously affirmed Jacobs' conviction, *id.* at 533, the State voluntarily dismissed the child rape charges. However, the state supreme court later reversed the court of appeals based on a procedural violation. *State v. Jacobs*, 811 S.E.2d 579, 580 (N.C. 2018). Because of the decision at issue here, the State was barred from reinstating the child rape charges it had voluntarily dismissed.

As this example shows, the decision below has already curbed the government's discretion to advance "the public interest in just judgments." *Arizona v. Washington*, 434 U.S. 497, 510 (1978). This development only confirms that the question presented here is both significant and likely to recur.

## CONCLUSION

The Court should grant certiorari and reverse the decision of the North Carolina Supreme Court.

Respectfully submitted,

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