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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

North Carolina General Statutes section 15A-931 allows the State to dismiss a charge at any time, without requiring court approval and without providing the defendant a right to be heard. In this case, a jury was empaneled to try the defendant for murder. The jury was unable to reach a verdict and a mistrial was declared. The State subsequently filed a voluntary dismissal pursuant to the statute. Under these circumstances, the question presented is: Was the State's post-mistrial voluntary dismissal of the charge a jeopardy-terminating event that triggered a double jeopardy bar to further prosecution of the defendant years later for the same murder charged in the dismissed indictment?

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"[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States v. Scott*, 437 U.S. 82, 98-99 (1978). It also does not relieve the State from the consequences of its voluntary choice. The North Carolina Supreme Court held that a voluntary dismissal, after a mistrial, entered by the State under North Carolina General Statutes section 15A-931, terminated jeopardy. The dismissal, rather than the mistrial, barred the State from prosecuting Mr. Courtney a second time.

The decision here was based on state law. There is no active conflict that requires resolution by this Court. The decision has limited impact on the criminal justice system beyond the particular, unusual facts presented here. The decision makes clear that a prosecutor, like a defendant, is not free from the consequences of their choice. Because of the limited reach of the opinion below, and because the decision correctly applied double jeopardy principles to state law, Mr. Courtney respectfully requests that this Court deny review.

JURISDICTION

Petitioner seeks a writ pursuant to this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a). As explained more fully below, this Court lacks jurisdiction because the issue below was decided on adequate and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032 (1983).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV, § 1.

Article I, section 19 of the North Carolina Constitution provides, in part, "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."

North Carolina General Statutes section 15A-931: "Voluntary dismissal of criminal charges by the State," provides,

> (a) Except as provided in G.S. 20-138.4,[1] the prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.
>
> (a1) Unless the defendant or the defendant's attorney has been notified otherwise by the prosecutor, a written dismissal of the charges against the defendant filed by the prosecutor shall be served in the same manner prescribed for motions under G.S.

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[1] "The statute referenced herein applies only to implied-consent and impaired driving with license revoked offenses and requires that a voluntary dismissal by the State be accompanied by detailed reasons and other information related to the case. N.C. Gen. Stat. § 20-138.4(a)(1), (b) (2017)." Pet. App. 23, n. 11.

> 15A-951. In addition, the written dismissal shall also be served on the chief officer of the custodial facility when the record reflects that the defendant is in custody.
>
> (b) No statute of limitations is tolled by charges which have been dismissed pursuant to this section.

STATEMENT OF THE CASE

James Harold Courtney, III, was originally indicted on November 30, 2009 for James Deberry's murder. He was tried, but the jury could not reach a verdict. On December 9, 2010, a mistrial was declared. Two status hearings were subsequently held and orders entered continuing the case "for the State to decide whether it intended to re-try defendant." In April 2011, the State dismissed the charge pursuant to North Carolina General Statutes section 15A-931. The dismissal stated there was a hung jury and the State "elected not to re-try case." The State's dismissal noted that a jury had been empaneled and evidence had been introduced. Pet. App. 3a-4a.

During the investigation in 2009, DNA and fingerprints were found at the scene. Neither matched Mr. Courtney. It was only in 2013, two years after the mistrial, that the fingerprints were matched to another individual. A DNA sample was taken from that individual in 2014 and matched to the DNA found at the scene. Police believed Mr. Courtney and this individual had been in contact by phone on the day of the killing. Pet. App. 4a, 63a.

On July 6, 2015, more than four years after his murder charge was dismissed because the prosecutor elected not to retry the case, Mr. Courtney was again indicted for Deberry's murder. Prior to trial on the 2015 indictment, Mr. Courtney

moved to dismiss on double jeopardy grounds. He also moved to dismiss due to a speedy trial violation. Both motions were denied. Pet. App. 4a-5a.

Mr. Courtney was retried beginning October 31, 2016. The jury found him guilty of second-degree murder. Mr. Courtney appealed. Pet. App. 5a.

The North Carolina Court of Appeals recognized that the double jeopardy protection at stake was "not defendant's right to have his guilt or innocence decided by a particular tribunal, but his right to avoid successive prosecutions for the same offense." Pet. App. 68a. The court recognized that the State was permitted to retry Mr. Courtney after the mistrial and Mr. Courtney conceded this point. Pet. App. 60a, 62a. However, the court also recognized that the State's voluntary dismissal significantly changed the circumstances. The unanimous panel held

> [W]hen a prosecutor takes a section 15A-931 voluntary dismissal of a criminal charge after jeopardy had attached to it, such a post-jeopardy dismissal is accorded the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes. Further, while the State has the undisputed right to retry a hung charge, we hold that a prosecutor's election instead to dismiss that charge is binding on the State and tantamount to an acquittal.

Pet. App. 61a. Accordingly, the Court of Appeals vacated Mr. Courtney's conviction. Pet. App. 83a. The State sought and obtained review in the North Carolina Supreme Court. Pet. App. 1a.

The North Carolina Supreme Court first "recognize[d], in accordance with double jeopardy principles set out by this Court and the United States Supreme Court, that jeopardy attaches when the jury is empaneled and continues following a mistrial until a terminating event occurs." Pet. App. 2a. It held that "when the

State enters a voluntary dismissal under [N.C. Gen. Stat.] § 15A-931 after jeopardy has attached, jeopardy is terminated in the defendant's favor, regardless of the reason the State gives for entering the dismissal. The State cannot then retry the case without violating a defendant's right to be free from double jeopardy." Pet. App. 2a. The court recognized that the law of the land clause of the North Carolina Constitution contained a prohibition against double jeopardy and that the double jeopardy protection of the United States Constitution applied to the states through the Fourteenth Amendment. Pet. App. 7a; *see also* U.S. Const. amends. V, XIV, N.C. Const. Art. I, § 19.

Justice Hudson, writing for the court, summarized the State's argument, stating the State's position was that jeopardy "never . . . attached because of the mistrial" and alternatively argued that, "even if defendant remained in jeopardy following the mistrial, the State's voluntary dismissal without leave did not terminate that jeopardy." The court rejected both arguments. Pet. App. 2a.

When addressing the State's first contention, Justice Hudson recognized, "There are few if any rules of criminal procedure clearer than the rule that jeopardy attaches when the jury is empaneled and sworn." Pet. App. 9a (quoting *Martinez v. Illinois*, 572 U.S. 833, 839 (2014) and citing *State v. Shuler*, 235 S.E.2d 226, 231 (N.C. 1977)). The court recognized, based on *Richardson v. United States*, 468 U.S. 317 (1984), that jeopardy attaches when a jury is sworn and a hung jury mistrial does not terminate the jeopardy. Pet. App. 10a. The State ultimately "concede[d] that jeopardy attached when the jury was empaneled" but argued "the occurrence of

a hung jury mistrial sets in motion a legal fiction in which the clock is wound back, placing the case back in pre-trial status such that jeopardy is deemed never to have attached." Pet. App. 11a. The court noted the State took a different position in oral argument, stating that "jeopardy 'unattach[ed]." Pet. App. 11a, n. 6.

The State then argued that the North Carolina Supreme Court had previously created a "legal fiction" that deemed jeopardy never to have attached when the trial resulted in a mistrial, "meaning that no jeopardy exists to continue and eventually terminate." Thus, the State contended defendant was returned to "precisely the same position in which he stood before [his 2010] trial." Pet. App. 13a. Based on *Richardson*, the North Carolina Supreme Court rejected these contentions, recognizing "the continuing jeopardy doctrine reaffirmed by *Richardson* provided a rationale for the longstanding practice of permitting retrial following a hung jury mistrial that was consistent with the guarantee of the Double Jeopardy Clause." Pet. App. 15a (citations omitted).

The North Carolina Supreme Court noted that the State's reliance on this Court's decision in *United States v. Sanford*, 429 U.S. 14 (1976) for the idea that after a mistrial a defendant is placed back in a pre-trial posture and jeopardy is deemed to have not attached was misplaced. *Sanford* explicitly recognized that jeopardy had attached during the first trial. *Id.* at 15. The North Carolina Supreme Court recognized that *Sanford* was consistent with this Court's later decision in *United States v. Scott*, 437 U.S. 82, 98-99 (1978), which held the government could appeal a "defendant-requested dismissal of charges after jeopardy

had attached." The court found these cases inapplicable here because the State entered the dismissal "unilaterally" rather than at Mr. Courtney's request. Pet. App. 17a.

The court then relied on its prior cases to reject the State's argument that jeopardy did not attach until the jury was empaneled at the second trial. In doing so, the court noted that although it had previously stated the case continued as if there had been "no trial" when a mistrial was declared, it did not say there had been "no jeopardy." Pet. App. 18a. It also recognized that its prior statements regarding the effect of a mistrial were made to explain why the State was permitted to retry a defendant following a properly declared mistrial, as this Court did when discussing the concept of continuing jeopardy. Pet. App. 20a-21a. The North Carolina Supreme Court "reaffirmed that jeopardy continues following a mistrial until the occurrence of a jeopardy-terminating event." Pet. App. 22a.

Having concluded that jeopardy continued after the mistrial, the North Carolina Supreme Court then turned to whether a dismissal under section 15A-931 terminated the jeopardy. Recognizing that there were two statutes addressing dismissals in North Carolina, and that the legislature intended a post-jeopardy dismissal under section 15A-931 to be final, it concluded the State's voluntary dismissal of the charge was "tantamount to an acquittal." It found support for this conclusion in the official commentary to section 15A-931 and in the State's election rule, which prohibits the State from trying a defendant for a greater offense when a

dismissal is entered for the greater offense after jeopardy attached and the State elected to continue on a lesser offense. Pet. App. 23a-30a.

The North Carolina Supreme Court summarized its opinion stating that "[i]nstead of exercising [its] opportunity to retry defendant, the State entered a final dismissal of the charge, unilaterally and irrevocably terminating the prosecution and, with it, defendant's original jeopardy." Pet. App. 30a.

Justices Newby and Ervin dissented. Justice Newby wrote, "Guided by a misapplication of the concept of continuing jeopardy, the majority effectively eliminates a complete, new trial after a mistrial (or reversal on appeal), removing any pretrial proceedings. Under its theory, once jeopardy attaches with the first trial, it continues, affecting everything that occurs thereafter." Pet. App. 31a. The majority applied this Court's two-pronged analysis to determine whether a violation of the Double Jeopardy Clause occurred, asking, "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?" Pet. App. 8a (quoting *Martinez*, 572 U.S. at 838. The dissent created its own test, stating: "the correct fundamental question [was]: After a mistrial, are the parties returned to the same position procedurally as before the original trial?" Pet. App. 34a. The dissent cited no authority for phrasing the issue in this manner.

REASONS FOR DENYING THE WRIT

I. The North Carolina Supreme Court's decision rests on adequate state grounds.

The North Carolina Supreme Court held in this case:

> [W]hen the State enters a voluntary dismissal under [N.C. Gen. Stat.] § 15A-931 after jeopardy has attached, jeopardy is terminated in the defendant's favor, regardless of the reason the State gives for entering the dismissal. The State cannot then retry the case without violating a defendant's right to be free from double jeopardy. When the State dismisses a charge under section 15A-931 after jeopardy has attached, jeopardy terminates.

Pet. App. 2a. It reached this conclusion by first recognizing that "North Carolina has two statutes governing the State's ability to voluntarily dismiss charges, either with or without leave to reinstate those charges." Pet. App. 23a. A dismissal under section 15A-932 allows for reinstatement of the charges under certain circumstances while a dismissal under section 15A-931 "provides 'a simple and final dismissal which terminates the criminal proceedings under the indictment.'" Pet. App. 25a (quoting *State v. Lamb*, 365 S.E.2d 600, 604 (N.C. 1988) (citing § 15A-931 official cmt.)). The North Carolina Supreme Court recognized that a "key characteristic of a dismissal entered under 15A-931 is its finality." Pet. App. 25a.

The General Assembly was aware a dismissal under section 15A-931 could implicate the double jeopardy protection since the dismissal can be entered at any time. It required the clerk to note if a jury had been empaneled or evidence had been introduced. Pet. App. 26a. The commentary to the statute states, "This section does not itself bar the bringing of new charges. That would be prevented if

there were a statute of limitations which had run, or *if jeopardy had attached when the first charges were dismissed*." Pet. App. 27a (emphasis added in opinion). The North Carolina Supreme Court recognized that the "text of section 15A-931 fully supports the conclusion that the legislature intended a dismissal under this section to have such a degree of finality that double jeopardy protections would come into play." Pet. App. 26a.

The North Carolina Supreme Court found further support for its conclusion that a section 15A-931 dismissal was tantamount to an acquittal in the State's election rule. The election rule provides that when the State elects to pursue a lesser charge at trial after jeopardy has attached, the State has made "a binding election not to pursue the greater degree of offense, and such election was tantamount to an acquittal of [the greater offense]." Pet. App. 28a-29a. The North Carolina Supreme Court concluded, "By making the unilateral choice to enter a final dismissal of defendant's murder charge after jeopardy had attached, the State made a binding decision not to retry the case." Pet. App. 29.

When discussing the impact of a dismissal under North Carolina General Statutes section 15A-931, the North Carolina Supreme Court did not cite any of this Court's cases related to double jeopardy and instead relied on its own cases addressing that statute. *See* Pet. App. 22a-29a. It referenced only one case from this Court: *Klopfer v. North Carolina*, 386 U.S. 213 (1967), which held North

Carolina's prior system of "nol pros" unconstitutional.[2] Pet. App. 22a-29a. Likewise, when discussing the election rule, the North Carolina Supreme Court relied only on its own cases. Both section 15A-931 and the election rule are creatures of North Carolina law that provide an adequate basis for the North Carolina Supreme Court's decision that Mr. Courtney could not be tried a second time for murder. Because there is an adequate state ground for its decision, this Court does not have jurisdiction to review the decision below.

II. Any conflict between the North Carolina Supreme Court's decision in this case and older decisions from other jurisdictions is stale and results from the application of different laws to different facts.

The State contends the North Carolina Supreme Court's decision conflicts with decisions from a number of other jurisdictions which allowed a retrial after a *nolle prosequi* was entered after a hung-jury mistrial. Upon closer review, the alleged conflict is imagined. Any alleged conflict is stale, and the cases are legally and/or factually distinguishable.

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[2] The State indicates that a *nolle prosequi* has the same effect as a dismissal. Pet. 8, n. 1. Yet if the effect is the same in this context, the State's urged interpretation of North Carolina's dismissal procedure would be unconstitutional as the State could unilaterally halt the case and reinitiate the prosecution in the future, leaving a defendant without recourse to obtain a final resolution of the charge—the exact situation held unconstitutional in *Klopfer*. *See Klopfer,* 386 U.S. at 221-22 ("By indefinitely prolonging [his] oppression, as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States."). In contrast to a "nols pros," a section 15A-931 was intended to ensure a final resolution of the charge if jeopardy had attached.

A. Any conflict is stale and does not require action by this Court.

This Court has decided "an exceptionally large number of cases interpreting" the Double Jeopardy clause. *Yeager v. United States*, 557 U.S. 110, 117 (2009). Each additional case has provided guidance on how to apply the Double Jeopardy Clause to the myriad of situations that implicate it.

To show a conflict, the State relies on cases going back to 1926. The most recent case it cited was from 2006. The most recent circuit decision the State cited was from 1993. Pet. 8-12. In the intervening time, this Court has decided *Martinez v. Illinois*, 572 US 833 (2014); *Evans v. Michigan*, 568 U.S. 313 (2013); *Yeager v. U.S.*, 557 U.S. 110 (2009); *Richardson v. U.S.*, 468 U.S. 317 (1984); and *U.S. v. Scott*, 437 U.S. 82 (1978), significant double jeopardy cases upon which the North Carolina Supreme Court relied in Mr. Courtney's case. In light of the additional double jeopardy cases decided by this Court since the state and circuit decisions identified by the State, it is not clear that those courts would still decide the cases the same way. The State fails to show there is an active conflict which requires this Court's intervention.

B. The decision below relied on a North Carolina law different from the laws considered in the other appellate courts.

The North Carolina Supreme Court's decision here was based on North Carolina General Statutes section 15A-931 which provides that a prosecutor "may dismiss any charges . . . at any time." Judicial approval is not needed, and no reason has to be given. The decisions in other states depend on their own statutes addressing either a *nolle prosequi* or dismissal. Many of these statutes required

judicial approval or that the *nolle prosequi* be entered in open court. *See* Fed. R. Crim. P. 48 (requiring leave of the court); Miss. Code § 99-15-53 (requiring consent of the court); Ohio Rev. Code § 2941.33 (same); Md. Rule 4-247 (requiring *nolle prosequi* to be entered on the record in open court); Mich. Comp. Laws § 767.29 (same); Va. Code § 19.2-265.3 (providing *nolle prosequi* can only be entered in the discretion of the court). Some statutes require the prosecutor to disclose the reasons for the *nolle prosequi* or to show good cause for the *nolle prosequi*. Mich. Comp. Laws § 767.29; Ohio Rev. Code § 2941.33; Va. Code § 19.2-265.3. Others require the defendant's consent if entered after the case has been submitted to the jury or during trial. Fed. R. Crim. P. 48; Ga. Code § 17-8-3. In one state, a second prosecution for a charge where a *nolle prosequi* was entered "must be instituted in the same term and cannot be reinstated in a subsequent term." *People v. Newell*, 403 N.E.2d 775, 777 (Ill. App. 1980). The dismissal entered here is different than the *nolle prosequi* allowed in other jurisdictions.

The cases cited by the State are also distinguishable. In some of them, the later prosecution was on a different charge than the charge for which a *nolle prosequi* was entered. *Duncan v. State*, 939 So. 2d 772, 776 (Miss. 2006); *United States v. Burns*, 990 F.2d 1426 (4th Cir. 1993); *Ward v. State*, 427 A.2d 1008 (Md. 1981); *In re Weir*, 69 N.W.2d 206, 206-07 (Mich. 1955); *Smith v. State*, 186 So. 203, 205 (Fla. 1939); *see also State v. Woodson*, 658 A.2d 272, 279 (Md. 1995) (finding improperly declared mistrial on lesser count analogous to the cases where a *nolle prosequi* was entered after jeopardy attached on a lesser count in the indictment).

In other cases, the defendant was reindicted while the original indictment was still pending and tried on the new indictment after the original indictment was dismissed. *Casillas v. State*, 480 S.E.2d 571, 572 (Ga. 1997); *People v. Yarbrough*, 534 N.E.2d 695, 697 (Ill. App. 1989); *Clements v. State*, 390 So. 2d 1131, 1132 (Ala. Crim. App. 1980). One case cited by the State did not involve a mistrial but a reversal on appeal. *Ward*, 427 A.2d at 1009. One case cited involved a *nolle prosequi* that was not formally entered where the judge set aside the conviction in an action initiated over whether the bond should estreat. *State v. Gaskins*, 210 S.E.2d 590, 591 (S.C. 1974). In one case, the defendant consented to or did not object to the *nolle prosequi*, seemingly understanding that a new indictment could be obtained and a new trial could be had. *See Beckwith v. State*, 615 So. 2d 1134, 1148 (Miss. 1992). In other cases, the judge's decision to grant the *nolle prosequi* motion "was the result of [the defendant's] motion to dismiss the indictment." *Cantrell v. Commonwealth*, 279, 373 S.E.2d 328, 333 (Va. App. 1988); *see also People v. Lucas*, 248 P. 691, 692 (1926) (the defendant's motion to dismiss the indictment was allowed and indictment resubmitted to the grand jury).

None of those circumstances are present in Mr. Courtney's case. The case here is simple: In 2009, the State started a prosecution for murder, a jury was empaneled, there was a mistrial in 2010, and the State entered a section 15A-931 final dismissal of the charge on its own initiative – without allowing Mr. Courtney to be heard and without any judicial oversight – ending the prosecution in 2011. Then, four years after it elected not to retry the case, the State reindicted the same

exact charge and started a second prosecution. The North Carolina Supreme Court found that entry of the voluntary dismissal barred the second prosecution based on double jeopardy principles. Pet. App. 20a. Had the State elected to proceed in 2011, a second trial after the mistrial would not have been barred by double jeopardy principles. Instead the State elected to dismiss the charge—terminating the prosecution it had begun and barring the State from initiating a second prosecution on the same charge.

Each case cited by the State turned on the quirks of the applicable procedural rules and the facts of the individual cases. "[A] person [cannot] be threatened with prosecution at the whim of the prosecutor indefinitely." *Newell*, 403 N.E.2d at 777. The State has not shown that if this case had proceeded in the same manner in another jurisdiction, the result would have been different than that reached by the North Carolina Supreme Court.

C. The decision below does not create different double jeopardy rules within the same state.

The decision below has no applicability to a defendant tried by the United States. The consequences of a dismissal taken in federal prosecution may differ from a dismissal taken in a state prosecution. *See* Pet. 13. Having different consequences is not a result of a difference in double jeopardy protection, but rather is a consequence of having different rules and statutes that govern federal and state criminal prosecutions.

A dismissal under North Carolina's statutes is fundamentally different than a dismissal under federal rules. A dismissal under section 15A-931 can be entered

at any time, for any reason, without approval of the court, and without giving the defendant an opportunity to be heard. A dismissal under federal law can only be entered with leave of the court or consent of the defendant if it is during trial. Fed. R. Crim. P. 48. A dismissal under section 15A-931 can be tantamount to an acquittal even though a dismissal under Rule 48 may not be. *See Lee v. United States*, 432 U.S. 23, 30 (1977). Federal and statute statutes are subject to differing interpretations. There is no difference in the applicable double jeopardy principle. Different outcomes in federal and state courts in North Carolina are a result of the statutory language, not a result of conflicting interpretations of the Double Jeopardy Clause.

III. The North Carolina Supreme Court's decision correctly applied cases from this Court.

While the State contends that the North Carolina Supreme Court's decision "clashes" with this Court's decisions, the State admits that this Court "has not specifically decided whether a retrial is barred when the government, rather than the defendant, moves to dismiss a mistried charge." Pet. 14-18. This admission inaccurately implies the prosecutor must move for a dismissal. Under section 15A-931, the State enters the dismissal in open court or files the dismissal with the clerk without any action required by the court. The North Carolina Supreme Court applied its decisions and this Court's decisions to section 15A-931 to correctly conclude that the double jeopardy protection provided by both the state and federal constitutions was violated. The decision in this case was correct.

"Where successive prosecutions are at stake, the [double jeopardy] guarantee serves a constitutional policy of finality for the defendant's benefit." *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quotation and citation omitted). "There are few if any rules of criminal procedure clearer than the rule that jeopardy attaches when the jury is empaneled and sworn." *Martinez*, 572 U.S. at 839 (quotation and citations omitted). Once a defendant is placed "in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (citation omitted). "The failure of the jury to reach a verdict is not an event which terminates jeopardy." *Richardson*, 468 U.S. at 325. Because a hung jury does not terminate the original jeopardy, that jeopardy continues and a second trial is allowed because jeopardy was not terminated. *Yeager*, 557 U.S. at 112. "A mistrial ruling invariably rests on grounds consistent with reprosecution, *see United States v. Jorn,* 400 U.S. 470, 476 (1971) (plurality opinion), while a dismissal may or may not do so." *Lee*, 432 U.S. at 30.

The State seeks to avoid any double jeopardy implications of its voluntary dismissal by contending that after a mistrial, the entire prosecution begins anew, as if there were no trial at all. Pet. 16. Here, it is the State that strays from this Court's precedent rather than the North Carolina Supreme Court.

The State believes the North Carolina Supreme Court misapplied this Court's precedent related to continuing jeopardy. The dissenting opinion essentially took the same view, noting many times that the majority had "misapplied" concepts and

cases from this Court. Pet. App. 31a, 34a, 46a, 58a. The North Carolina Supreme Court did not misapply this Court's precedent. And, even if it had, this would be an insufficient reason to grant review. S. Ct. R. 10 (stating "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). The North Carolina Supreme Court's decision is a straightforward, commonsense application of broad double jeopardy principles to a distinctive situation arising under a North Carolina statute. It complements this Court's cases rather than clashing with them.

The North Carolina Supreme Court found guidance from *Martinez v. Illinois*, stating this Court "has recognized a two-pronged analysis to determine whether a violation of the Double Jeopardy Clause has occurred: '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?'" Pet. App. 8a (quoting *Martinez*, 572 U.S. at 838). The North Carolina Supreme Court recognized if jeopardy had attached but not terminated, a second trial would be allowed. Pet. App. 7a. The North Carolina Supreme Court recognized, as did this Court, "There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'" *Martinez*, 572 U.S. at 839 (citations omitted).

The North Carolina Supreme Court rejected the State's arguments, that jeopardy either (1) never attached during the first trial or (2) somehow unattached after the mistrial, as contrary to this Court's precedent. First, the court recognized, "it became firmly established by the end of the 19th century that a defendant could

be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal, and this concept has been long established as an integral part of double jeopardy jurisprudence." Pet. App. 11a (quoting *Crist v. Bretz*, 437 U.S. 28, 34 (1978)). It relied on this Court's decision in *Richardson*, which offered an explanation of why a second trial was not barred by a mistrial. Pet. App. 9a-15a. In *Richardson*, this Court recognized that jeopardy attached in a mistrial and remained attached after the mistrial because the mistrial was "not an event that terminates the original jeopardy to which the petitioner was subjected." *Richardson*, 468 U.S. at 325-26. In *Yeager*, this Court explained jeopardy continues after a jury is unable to reach a decision. 557 U.S. at 118. The North Carolina Supreme Court correctly recognized that Mr. Courtney was in jeopardy during the first trial. Pet. App. 13a.

The North Carolina Supreme Court correctly found *Sanford* and *Scott* did not control because in those cases, the defendant requested the dismissal. Pet. App. 15a-17a. The court stated *Sanford* was consistent with the later decision in *Scott*, which held there could be a second trial after "a defendant-requested dismissal of the charges after jeopardy had attached." Pet. App. 17a (citing *Scott*, 437 U.S. at 101). This Court stated, "[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Scott*, 437 U.S. at 98-99. Accordingly, the North Carolina Supreme Court correctly distinguished *Sanford* and *Scott* because the state

unilaterally dismissed the charge here without any request from the defendant to do so.

Having concluded jeopardy did in fact attach at the first trial, the North Carolina Supreme Court turned to the question of whether it terminated prior to the second trial. *See Illinois v. Somerville*, 410 U.S. 458, 467 (1973) (recognizing that "in cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial"). Mr. Courtney conceded that the mistrial itself did not bar a second trial but contended the voluntary dismissal terminated the jeopardy. Pet. App. 22a-23a. To resolve the question of whether the dismissal was "tantamount to an acquittal," the North Carolina Supreme Court looked to what the state legislature intended when it enacted section 15A-931. Finding the legislature intended an end to the prosecution, it found the dismissal "tantamount to, or the functional equivalent of, an acquittal, which terminated the original jeopardy that had continued following the declaration of a hung jury mistrial in the defendant's case." Pet. App. 29a. Accordingly, any reprosecution of Mr. Courtney violated double jeopardy principles. The North Carolina Supreme Court correctly decided this case.

The State's decision to dismiss the charge – not the hung jury mistrial – prevented a retrial here. Jeopardy continued until the State chose to terminate it by dismissing the charge. The State, like a defendant, is not free from the consequences of its choice. The North Carolina Court Supreme Court did not

misapply this Court's precedent when concluding that a section 15A-931 dismissal terminated jeopardy and barred the State from further prosecuting the charge.

IV. The decision in this case does not have widespread reach.

The State contends that the North Carolina Supreme Court's decision is important because it "significantly affects the criminal justice system." Pet. 19. However, in the almost 50 years since North Carolina enacted section 15A-931, no case presented this issue until this one.[3] Pet. App. 78a (recognizing the question was "an issue of first impression"). The decision does not restrict a prosecutor's discretion. *See* Pet. 19. It makes clear that a prosecutor, like a defendant, is not free from the consequences of their choice. Careful consideration of when to pursue a criminal charge and when to dismiss one does not undermine our criminal justice system, it strengthens it.

While the State contends the North Carolina Supreme Court's decision will impose a price on future defendants, it utterly ignores a defendant's interest in finality in a criminal prosecution—an interest protected by the Double Jeopardy Clause. *Brown*, 432 U.S. at 165. When a defendant has been forced to run the gauntlet once and the State chooses to dismiss the charge after it was unable to muster enough evidence to convince a jury to convict, the State has abandoned the option to retry the defendant. If the State decides its evidence is insufficient to obtain a conviction in front of another jury, it should not be able to defer the prosecution until it musters up additional evidence. As this Court has stated,

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[3] North Carolina General Statutes section 15A-931 was enacted in 1973 as part of a comprehensive bill addressing criminal procedure. 1973 N.C. Sess. Laws 1286.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188 (1957). Accordingly, the Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). The decision in this case does not hamper the prosecutor's discretion—it is the Double Jeopardy Clause that hampers the State's ability to repeatedly retry a defendant when it failed to muster the necessary evidence to obtain a conviction in its first prosecution.

The decision here does not inhibit the State from prosecuting a cold case or from pursuing a new trial when the defendant successfully appeals a conviction. The North Carolina Supreme Court's decision has no applicability beyond the specific facts addressed here—attachment of jeopardy, a mistrial, a voluntary dismissal, and a second prosecution for the same charge. *See* Pet. App. 9a, n. 5. It ensures that a defendant is not "harassed by successive trials" and forced to "marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts" after the State elected not to pursue the charges at a second trial that it had to right to pursue after the defendant already endured a mistrial. *Abbate v. United States*, 359 U.S. 187, 198-99 (1959). The decision here ensures that prosecutors consider carefully whether they have sufficient evidence to

convict a defendant before empaneling a jury and forces them to carefully weigh the evidence before deciding how to proceed after a mistrial when the evidence failed to convince the jury of the defendant's guilt. It also protects the defendant's interest in finality while affording "the prosecutor . . . one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 19, 2020.