

STATE OF NORTH CAROLINA  
CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO.

STATE OF NORTH CAROLINA

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**MOTION TO DISMISS**

v.

(Collateral Estoppel)

**Defendant**

**NOW COMES**, the Defendant, by and through undersigned counsel, Anton M. Lebedev, and moves this Honorable Cumberland County Criminal Superior Court pursuant to section 15A-954(a)(5)& (7) of the North Carolina General Statutes to dismiss his criminal charge with prejudice. In support of his motion, Defendant alleges the following:

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

1. Defendant is charged with allegedly knowingly violating a domestic violence protective order in this matter.
2. On 17 August 2021, Defendant was charged with willfully violating the same domestic violence protective order on the same occasion in Wake County Criminal Superior Court as a condition of probation.
3. On 7 June 2021, a hearing took place. The same complaining witness, testified.
4. At the conclusion of the full hearing, the Wake County Superior Court determined that the Defendant did not violate the domestic violence protective order "willfully".

**ARGUMENT**

As our Supreme Court has stated, "[t]he doctrine of collateral estoppel was held to be a part of the constitutional guarantee against double jeopardy in Ashe v. Swenson, 397 U.S. 436 25 L.Ed.2d 469 (1970)." State v. Edwards 310 N.C. 142, 145 (1984). "Under the doctrine of collateral estoppel, an issue of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit. Subsequent prosecution is barred only if the [trier of fact] could not rationally have based its [decision] on an issue other

than the one the defendant seeks to foreclose." Id. The prior proceeding must have necessarily determined the factual issue; the mere possibility that the issue was resolved does not prevent relitigation of the issue. Id. The burden of persuasion on a collateral estoppel defense rests with the defendant. State v. Solomon, 117 N.C. App. 701, 704, 453 S.E.2d 201, 204, disc. review denied, 340 N.C. 117, 456 S.E.2d 325 (1995).

"The application of the common law doctrine of collateral estoppel to criminal cases has been codified by N.C. Gen. Stat. § 15A-954(a)(7) ...." State v. Safrit, 145 N.C.App. 541, 552, 551 S.E.2d 516, 524 (2001) . N.C. Gen.Stat. § 15A-954(a)(7) requires dismissal of criminal charges when "[a]n 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."<sup>1</sup> Collateral estoppel therefore, requires an "identity of issues." State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) . Our Supreme Court has articulated a four-part test for determining whether an "identity of issues" exists: (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment. Id.

In this case, the Wake County probation violation matter and this matter involved the same parties: the State of North Carolina and The issues in the two proceedings are also identical: whether the Defendant knowingly or willfully violated a domestic violence protective order on the same occasion. Id. In fact, the violation report from Wake County referenced the arrest warrant in this case. To revoke the Defendant's probation, the State was required to prove the exact elements of the exact offense charged in this case under a lesser burden of proof. See N.C. Gen. Stat. § 15A-1343(b)(1); N.C. Gen. Stat. § 15A-1343(b)(1); see also State v. Lee, 232 N.C. App. 256 (2014) (sufficient notice to allow revocation when framed as a new criminal offense violation, even though charges were still pending when alleged). Indeed, the Defendant was not alleged to have committed any other new criminal acts besides the one at issue in this case.

As the Wake County Superior Court already determined that the Defendant did not violate the protective order "willfully" <sup>2</sup>, further litigation of this matter is

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<sup>1</sup> Analogously, N.C. Gen. Stat. § 15A-954(a)(5) requires dismissal of charges when the "defendant has previously been placed in jeopardy of the same offense."

<sup>2</sup> The fact that the Defendant is charged with "knowingly" violating a protective order in this matter and the fact that the Defendant was determined to have not "willfully" violated the protective order in the Wake County matter is irrelevant; these terms are functionally equivalent

precluded by collateral estoppel and this criminal action must be dismissed with prejudice. Edwards, 310 N.C. at 145; N.C. Gen. Stat. § 15A-954(a)(7); see also State v. Bradley, 626 P.2d 403 (Or. App. 1981) (concluding as a matter of Oregon state statute that an express finding of fact at a probation violation hearing would be binding on the state at a later criminal trial); People v. Kondo, 366 N.E.2d 990, 992-93 (Ill.App.Ct. 1977) (same); State v. Chase, 588 A.2d 120, 122-23 (R.I. 1991) (same); Ex parte Tarver, 725 S.W.2d 195, 200 (Tex.Crim.App. 1986) (same); Lucido v. Superior Court, 51 Cal.3d 335, 342, 795 P.2d 1223, 1225, 272 Cal.Rptr. 767, 769 (1990) (same).<sup>3</sup>

Likewise, further litigation is also precluded by double jeopardy. See United States v. Dixon, 509 U.S. 688 (1993) (prosecution for contempt of court for drug possession barred second prosecution for PWID cocaine); State v. Dye, 139 N.C. App. 148 (2000) (contempt prosecution for going to ex-husband's residence barred second prosecution for trespassing); State v. Gilley, 135 N.C. App. 519 (1999) (adjudication for criminal contempt based on violating domestic violence protective precluded prosecution for assault on a female but not for kidnapping, because kidnapping offense required proof of elements beyond what was covered in the contempt hearing).

### CONCLUSION


**WHEREFORE**, Defendant respectfully requests that this Honorable Court dismisses his criminal charge with prejudice, and grants him any and all other relief that it deems just and proper given the circumstances at hand.

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in this context. See State v. Harris, 724 S.E.2d 633, 637-638 (N.C. Ct. App. 2012) (holding that indictment stating the defendant acted "willfully" sufficed to allege the requisite "knowing" element contained in the language of the statute (citing State v. Falkner, 108 S.E. 756, 758 (1921) (holding that the absence of the term "knowingly" from an indictment which stated that the defendant "did . . . willfully . . . possess [cocaine] with intent to sell or deliver . . ." did not render the indictment invalid given that the allegations in the indictment sufficiently tracked the applicable statutory language and that the allegation that the defendant acted "willfully" implied that knowing conduct had occurred))).

<sup>3</sup> A probation violation hearing is tantamount to a criminal contempt proceeding, but with different potential penalties. See N.C. Gen. Stat. § 15A-1344(e1)

Respectfully submitted, this the 2<sup>nd</sup> day of August, 2021.



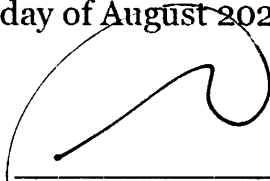
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**CERTIFICATE OF SERVICE**

I, Anton M. Lebedev, do hereby certify that the foregoing *Motion to Dismiss (Collateral Estoppel)* was served upon the Cumberland County District Attorney, by mailing a copy of the same to:

Respectfully submitted, this the 2nd day of August 2021.



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