

12.2 Consequences of Denial of Counsel

A. Suppressing Prior Uncounseled Conviction

Convictions obtained without counsel. The State may not rely on a prior, uncounseled conviction in a later proceeding—to impeach the defendant, raise the level of an offense, or enhance a sentence—if the defendant was entitled to counsel, had no counsel, and did not waive counsel. *See* G.S. 15A-980; *Custis v. United States*, 511 U.S. 485 (1994); *see also* G.S. 20-179(o) (in sentencing for impaired driving, court may not consider prior impaired driving conviction obtained in violation of right to counsel).

The onus of raising the invalidity of a conviction is on the defendant. If the defendant fails to raise the issue, he or she waives the right to contest the conviction's use in that proceeding. *See State v. Thompson*, 309 N.C. 421, 426 (1983) (“Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal.”); G.S. 15A-980(b) (defendant waives right to suppress use of prior conviction based on denial of counsel if he or she does not move to suppress).

Raising violation in current proceeding. The defendant is entitled to challenge the use of a prior uncounseled conviction in the case in which the State proposes to use it—that is, the defendant may “collaterally” attack the conviction. The courts permit this procedure because the failure to provide counsel to an indigent defendant is considered a unique defect. *See Custis v. United States*, 511 U.S. 485 (1994) (so holding; also noting that earlier cases considered such a violation to be jurisdictional defect that rendered conviction void); *State v. Blocker*, ___ N.C. App. ___, 727 S.E.2d 290, 291 (2012) (“[A] motion to suppress a prior conviction that challenges the voluntary nature of a waiver of counsel for that prior conviction may properly be made before the sentencing judge for a subsequent conviction.”). Other types of violations—for example, a guilty plea that is not knowing or voluntary (known as a *Boykin* violation) or deficient performance of counsel—ordinarily cannot be raised in the proceeding in which the conviction is proposed to be used. The defendant must seek to vacate the conviction by filing a motion for appropriate relief in the case in which the conviction was entered. *See Custis*, 511 U.S. 485; *State v. Hensley*, 156 N.C. App. 634 (2003) (defendant could not collaterally attack, based on deficient performance of counsel, conviction used by State as predicate felony for habitual felon status); *State v. Stafford*, 114 N.C. App. 101 (1994) (defendant could not collaterally attack, based on *Boykin* violation, conviction used by State as predicate felony for habitual impaired driving).

Custis did not specifically address whether a defendant could collaterally attack in the current proceeding a prior conviction obtained in violation of the right to retained counsel. However, the waiver of appointed and retained counsel are closely related, and most questions may be resolved by reference to the record of the previous proceedings without the taking of extensive additional evidence, a point of importance to the *Custis*

court. Thus, a defendant should be able to raise all denial-of-counsel challenges collaterally.

Timing of motion. There appear to be two methods for challenging in the current proceeding the use of a prior conviction. Under one or the other method, a defendant tried in superior court may be able to challenge the use of a prior conviction at the time offered by the State. Unless there are strategic reasons for waiting, however, the safer course is to challenge the conviction's use before trial in superior court. (In misdemeanor cases in district court, a challenge to the use of a prior uncounseled conviction may always be made at trial. *See infra* § 14.6A, Timing of Motion.)

One method for challenging a prior uncounseled conviction is to move to suppress under G.S. 15A-980. That statute authorizes motions to suppress for a denial of counsel in accordance with the requirements for motions to suppress generally. The suppression statutes provide generally that a defendant must move to suppress evidence before trial except in specified circumstances. *See* G.S. 15A-975. It is not clear, however, that the legislature intended to require the defendant to move to suppress an uncounseled conviction before the phase of the proceedings in which the conviction is offered. Thus, if the State intends to offer a prior conviction at sentencing, it may be permissible under G.S. 15A-980 for the defendant to move to suppress at the outset of the sentencing proceeding, after the defendant has been found guilty of the current offense. *See State v. Blocker*, ___ N.C. App. ___, 727 S.E.2d 290 (2012) (after guilty plea and before sentencing, defendant made motion to suppress prior uncounseled conviction; trial judge erred in summarily denying motion as impermissible collateral attack and case remanded for proper determination of motion); *see also* G.S. 15A-1340.14(f) (if motion to suppress prior conviction pursuant to G.S. 15A-980 is made during sentencing stage in felony case, court may grant continuance of sentencing hearing); G.S. 15A-1340.21(c) (stating same for misdemeanor sentencing); G.S. 20-179(o) (in deciding on sentence for impaired driving, court must allow defendant opportunity to present evidence that prior impaired driving conviction was obtained in violation of right to counsel). An even stronger argument can be made that a defendant charged with being a habitual felon may move to suppress an uncounseled conviction at the outset of the habitual felon phase, which is based on a separate indictment from the trial of the underlying felony. *See generally State v. Hensley*, 156 N.C. App. 634, 637–38 (2003) (suggesting that defendant may challenge prior conviction at habitual felon sentencing); *see also* G.S. 14-72(b) (prior conviction may not be used as predicate for habitual misdemeanor larceny unless defendant was represented by counsel or waived counsel).

Alternatively, the defendant may be able to object to the use of a prior conviction at the time the State seeks to offer it in evidence. *See State v. Thompson*, 309 N.C. 421, 427 (1983) (“The defendant may challenge the evidence of prior convictions prior to trial by motion to suppress or he may challenge the evidence in the first instance at the time of the offer of proof by the State”; decision discusses G.S. 15A-980, which had been enacted but had not yet become effective).

In entering a guilty plea, if the defendant wants to reserve the right to appeal the denial of

a motion to suppress a prior uncounseled conviction, the defendant must expressly reserve that right. *See infra* § 14.7B, Appeal after Guilty Plea.

Proof of violation. To establish that an uncounseled conviction was obtained in violation of the right to counsel, the defendant must show that he or she (i) was entitled to counsel, (ii) had no counsel, and (iii) did not waive counsel. *See* G.S. 15A-980; *see also State v. Jordan*, 174 N.C. App. 479 (2005) (relying on *Parke v. Raley*, 506 U.S. 20 (1992), which addressed a challenge to the validity of a guilty plea, court states that a conviction enjoys a similar “presumption of regularity” against a later challenge based on an alleged violation of the right to counsel; court finds that defendant has burden of proof to show violation and failed to meet that burden where 20-year-old records in case had been routinely destroyed and defendant’s right to counsel had long been recognized at time of case); *accord State v. Hadden*, 175 N.C. App. 492 (2006) (burden on defendant to overcome presumption of regularity).

G.S. 15A-980(c) and cases interpreting it state that the defendant must also show that he or she was indigent. *See State v. Rogers*, 153 N.C. App. 203 (2002) (mere assertion by defendant that he could not afford attorney at time of prior conviction was insufficient to prove indigency); *State v. Brown*, 87 N.C. App. 13 (1987) (State permitted to impeach defendant with prior conviction; defendant failed to prove he was indigent at time of conviction). This requirement is unobjectionable when the defendant claims that he or she was improperly denied the right to appointed counsel. But, the defendant also has a right to be represented by retained counsel, and the courts have found violations when the trial court has required the defendant to proceed pro se without a proper waiver of assistance of all counsel. *See infra* § 12.6D, Withdrawal of Waiver of Counsel.

B. Suppressing Illegally Obtained Evidence

For evidence taken in violation of a defendant’s right to counsel—for example, a statement taken by police in violation of the Fifth Amendment right to counsel or an identification at a police lineup in violation of the Sixth Amendment right to counsel—the defendant may move to suppress the evidence and prevent its use in the current proceeding. *See infra* § 12.4C, Particular Proceedings (discussing stages of case in which defendant has right to counsel and in which violation may require suppression); *see also infra* § 14.3, Illegal Confessions or Admissions; § 14.4F, Right to Counsel at Lineups.

C. Precluding Sentence of Imprisonment

A defendant has a right to counsel in misdemeanor prosecutions if the court imposes an active or suspended sentence of imprisonment. *See Alabama v. Shelton*, 535 U.S. 654 (2002). Accordingly, if the defendant is improperly denied counsel, the court is precluded from imposing either an active or suspended sentence of imprisonment. Further, if the court imposes a suspended sentence of imprisonment in violation of the defendant’s right to counsel, the court may not activate the defendant’s sentence at a probation revocation proceeding regardless of whether the defendant is represented at the revocation proceeding. *See infra* § 12.3B, Misdemeanors.

D. Vacating Uncounseled Conviction

Generally, an uncounseled conviction in violation of the right to counsel is automatically subject to reversal. *See Satterwhite v. Texas*, 486 U.S. 249 (1988) (discussing impact of various types of right-to-counsel violations). Where the evil caused by a denial of counsel is limited to the erroneous admission of evidence—for example, the admission of identification testimony obtained in violation of a defendant’s right to counsel at a post-indictment lineup—a reviewing court may engage in harmless error analysis. *See id.*; *see also Coleman v. Alabama*, 399 U.S. 1 (1970) (remanding case to lower court to determine whether denial of counsel at preliminary hearing was harmless beyond reasonable doubt).