
13.1 Types and Timing of Pretrial Motions

The discussion in this section deals primarily with motions practice in cases within the original jurisdiction of the superior court—that is, felonies and joined misdemeanors. Although many of the motions discussed here may be filed in misdemeanor cases in district court, the discussion of time limits is written with superior court in mind. Motions practice in district court and misdemeanor appeals in superior court are discussed specifically *infra* in § 13.3, Motions Practice in District Court.

A. Timing

Almost any motion may be made before trial. *See* G.S. 15A-952(a) ("[a]ny defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion"); *State v. Tate*, 300 N.C. 180 (1980) (includes discussion of proper timing for suppression motions). It can be strategically advantageous for various reasons to file motions ahead of trial—to obtain a ruling on an issue that affects how you try the case, to discover additional information, and to prevent the jury from hearing inadmissible, prejudicial evidence that is not easily cured by an instruction that the jury disregard it. On the other hand, waiting until trial begins and jeopardy has attached to raise motions where you are statutorily permitted to do so may preclude retrial and generally will eliminate any right of appeal by the State. *See* G.S. 15A-1432(a); G.S. 15A-1445(a) (State may not appeal where further prosecution would be prohibited by double jeopardy); *see also Tate*, 300 N.C. at 183 (State has right to appeal pretrial grant of suppression motion by superior court); *State v. Shedd*, 117 N.C. App. 122 (1994) (State has right to appeal midtrial dismissal where dismissal was based on discovery violation and not on defendant's factual guilt or innocence). For a further discussion of the State's right to appeal from a superior court ruling, see 2 NORTH CAROLINA DEFENDER MANUAL § 35.2, Appeals by the State (May 2020).

Many motions are subject to time limits and must be filed before trial, or they are considered waived. Time limits for specific motions and requests are discussed below.

B. Motions and Requests after Appointment of Counsel

Request for voluntary discovery. Before filing a formal motion to compel discovery, a defendant must make a written request for voluntary discovery from the prosecutor. *See* G.S. 15A-902(a). There are different triggering events for determining the timeliness of a request for voluntary discovery.

- If the defendant is represented by counsel at the time of a probable cause hearing, the request must be made no later than ten working days after the hearing is held or waived.
- If the defendant is not represented by counsel at the probable cause hearing, or is indicted (or consents to a bill of information) before a probable cause hearing occurs, the request must be made no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), whichever is later.

See G.S. 15A-902(d); *see also supra* § 4.2D, Requests for Discovery (2d ed. 2013).

Motion to compel discovery. If the State fails to reply to a request for voluntary discovery within seven days of the request, or responds inadequately, the defendant may file a motion to compel discovery. *See* G.S. 15A-902(a). Also, if the defendant misses the deadline for requesting voluntary discovery, a safety valve exists; a motion to compel discovery may be filed at any time before trial if the parties so stipulate or for good cause shown. In practice, motions for additional discovery or to compel discovery are often filed whenever the need arises following the initial request for voluntary discovery. *See* G.S. 15A-902(f); *see also supra* § 4.2D, Requests for Discovery (2d ed. 2013); § 4.2E, Motions for Discovery (2d ed. 2013).

Practice note: Some attorneys routinely file a combined "Request for Voluntary Discovery and Alternative Motion for Discovery," in which they ask the court to treat their request as a motion in the event that the State fails to provide voluntary discovery within the time prescribed by law. This relieves counsel of the burden of filing a separate, follow-up motion to compel. A sample is available under "Discovery" in the non-capital trial motions bank at www.ncids.org (select "Training & Resources"). *See also* MAITRI "MIKE" KLINKOSUM, NORTH CAROLINA CRIMINAL DEFENSE MOTIONS MANUAL 140 (4th ed. 2018) (discussing this approach).

Request for arraignment. An arraignment is a formal opportunity, either in court or by audio-video transmission, for the defendant to be informed of the charges against him or her and to enter a plea of guilty or not guilty. A defendant must file a written request for arraignment no later than 21 days after return of an indictment as a true bill. Where a defendant is not represented by counsel, the request for arraignment must be made within 21 days of *service* of a bill of indictment. *See* G.S. 15A-941(d); G.S. 15A-630. A defendant who fails to request arraignment waives the right to be arraigned, and the court will enter a plea of not guilty. *See* G.S. 15A-941(d); *State v. Lane*, 163 N.C. App. 495 (2004) (defendant waived right to arraignment where record contained no written request for arraignment, and he could not argue error in being required to proceed to trial during

same week as arraignment). For a discussion of whether these deadlines apply to misdemeanors appealed for a trial de novo in superior court, see *infra* § 13.3A, Misdemeanors.

Practice note on significance of arraignment: Important motions deadlines are triggered by the date of arraignment. *See* subsection C., below. To maximize the time available for the filing of motions, counsel should request arraignment in all cases. *See also supra* § 7.4D, Other Limits (discussing restrictions on trial being held during the same week in which arraignment is held). The window closes for certain motions on the date of arraignment, but this date is generally later than the motions deadline without arraignment (21 days after return of the indictment). Further, if you have not received discovery by the scheduled date of arraignment, at which your client must enter a plea, you may have grounds for moving to continue arraignment for production of discovery.

Motion for bond reduction. While there are no statutory time limits on a motion for bond reduction, your client will likely want you to raise this motion as soon as practicable after arrest. *See* G.S. 15A-534; *see also supra* § 1.7, Investigation and Preparation for Bond Reduction Motion (2d ed. 2013).

Motions for experts. To obtain funds for an expert in a noncapital case, an indigent defendant must apply to the court. There are no statutory time limits on when a motion seeking funds for a defense expert may be brought, and developing a threshold showing of need may take time and require discovery. However, a belated request could be viewed skeptically by the court. *See State v. Jones*, 342 N.C. 523 (1996) (motion for expert, filed one day before trial, was one factor court considered in finding no showing of need); *see also supra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases. Also, if you intend to pursue an insanity or other type of mental health defense, you should consider seeking funds for a mental health expert and obtaining an evaluation as soon as practicable because these defenses depend on the defendant's mental state at the time of the offense.

C. Motions before Arraignment

Time restrictions. Under G.S. 15A-952(c), the timing of certain motions in superior court is keyed to arraignment. Such motions must be filed:

- by the time of arraignment if a written request for arraignment has been filed and arraignment is held before the session of court for which the trial is calendared, or
- if arraignment is to be held at the session of court scheduled for trial, then by 5:00 p.m. on the Wednesday before that session of court, or
- if a written request for arraignment has not been filed, then no later than 21 days from the return of the bill of indictment as a true bill.

Applicable motions. The above time restrictions apply to the following motions:

- motions to continue (*see infra* § 13.4A, Motion for Continuance),

- motions to join or sever offenses under G.S. 15A-926(c) or G.S. 15A-927 (*see supra* § 6.1, Joinder and Severance of Offenses; § 6.3, Procedures for Joinder or Severance),
- motions for change of venue under G.S. 15A-957 (*see supra* § 11.3, Change of Venue),
- motions for a special venire under G.S. 15A-958 or G.S. 9-12 (*see supra* § 11.4A, Special Venire),
- motions to dismiss for improper venue (*see supra* § 11.2, Challenging Improper Venue),
- motions challenging the composition of the grand jury under G.S. 15A-955 (*see supra* § 9.2, Challenges to Grand Jury Composition or Selection of Foreperson; § 9.4, Challenges to Grand Jury Procedures),
- motions for a bill of particulars under G.S. 15A-924(b) or 15A-925 (*see supra* § 8.4B, Types of Pleadings and Related Documents), and
- motions attacking non-jurisdictional defects in the pleadings or addressing certain other issues related to the pleadings under G.S. 15A-924 through 15A-927 (*see supra* § 8.6E, Timing of Challenge).

See G.S. 15A-952(b).

Waiver. Failure to timely file any of the above motions constitutes a waiver of the right to file the motion. *See* G.S. 15A-952(e); *State v. Branch*, 306 N.C. 101 (1982) (failure to file continuance motion within time limits of G.S. 15A-952 constituted waiver, and trial court did not abuse discretion in failing to grant defendant relief); *State v. Perry*, 69 N.C. App. 477 (1984) (certain challenges to indictment are waived if not raised by arraignment). The trial court may excuse the waiver, except for failure to move to dismiss for improper venue. G.S. 15A-952(e). The circumstances in which continuance motions may be filed after arraignment are discussed further *infra* in § 13.4A, Motion for Continuance.

Practice note: Continuance motions are commonly filed whenever the need arises. As with discovery requests, counsel should not hesitate to file a written motion to continue when necessary to protect your client's right to a fair trial and effective assistance of counsel without regard to the above deadlines.

D. Motions before Trial

The following motions need not be filed before arraignment but should be filed before trial.

Suppression motions. Motions to suppress under G.S. 15A-974 ordinarily must be filed before trial. *See* G.S. 15A-975(a); *State v. Ford*, 194 N.C. App. 468 (2008) (trial court did not err in denying motion to suppress for defendant's failure to file it before trial); *see also State v. Reavis*, 207 N.C. App. 218 (2010) (upholding denial of suppression motion because defendant failed to make pretrial motion). There are two exceptions to this rule.

The defendant may file a suppression motion during trial if: (i) the defendant did not have a "reasonable opportunity to make the motion before trial"; or (ii) the evidence consists of statements by the defendant, items obtained during a warrantless search, or items obtained during the execution of a search warrant when the defendant was not present *and* the State failed to notify the defendant at least 20 working days before trial of its intent to introduce such evidence. *See* G.S. 15A-975(a), (b); *State v. Fisher*, 321 N.C. 19 (1987) (defendant could raise suppression issue at trial when he was unaware that State intended to introduce certain evidence against him); *State v. Gerald,* 227 N.C. App. 127 (2013) (counsel was ineffective by failing move to make a timely motion to suppress evidence obtained by a "patently unconstitutional seizure"); *State v. Jones*, 157 N.C. App. 110 (2003) (defendant's statement that he thought State's evidence would be stronger did not excuse failure to make suppression motion before trial); *State v. Howie*, 153 N.C. App. 801 (2002) (motion to suppress was exclusive method of challenging evidence regarding contents of defendant's hotel room on ground that search was illegal, and defendant's general objections during trial did not suffice), *habeas corpus granted sub nom.*, *Howie v. Crow*, 2006 WL 3257047 (W.D.N.C. 2006) (finding that defense counsel was ineffective for failing to move to suppress before trial). Where the State notifies the defendant 20 or more working days before trial of its intent to introduce the types of evidence described in G.S. 15A-975(b), the defendant must make the motion within 10 business days of receiving the notice. G.S. 15A-976(b). For a further discussion of deadlines for making a motion to suppress, see *infra* § 14.6A, Timing of Motion (2d ed. 2013).

Motions to recuse trial judge. Motions to recuse must be made at least five days before trial, absent a showing of good cause for delay. *See* G.S. 15A-1223(d); *State v. Pakulski*, 106 N.C. App. 444 (1992) (noting that defendant should file motion as early as possible and may not wait until after trial); *see also infra* § 13.4C, Motion to Recuse Trial Judge.

Notice of defenses, expert testimony, and witnesses. If the State has voluntarily provided or has been ordered to provide discovery in response to the defendant's discovery request, the defendant has a reciprocal obligation on request of the State to give notice of intent to rely on the defenses set out in G.S. 15A-905(c)—that is, alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, and voluntary intoxication. The defendant must give this notice within 20 working days after the case is set for trial or at a later time set by the court. G.S. 15A-905(c) (also requiring information as to the nature and extent of the defense for certain of the listed defenses); *State v. Pender*, 218 N.C. App. 233 (2012) (trial court did not err in denying defendant's request for a jury instruction on voluntary manslaughter based on imperfect self-defense where defendant failed, following request, to provide State with notice of intent to assert self-defense at trial; court also finds that evidence was insufficient to require the instruction). If the defendant intends to rely on the defense of insanity, the defendant must give notice of the defense as provided in G.S. 15A-905(c) or, if the case is not subject to that statute (for example, the defendant has not requested any discovery and has not triggered the State's reciprocal discovery rights), the defendant must give notice of the defense within a reasonable time before trial. G.S. 15A-

959(a); *see also State v. Beach*, 333 N.C. 733 (1993) (noting requirement of filing pretrial notice of insanity defense).

If the defendant is obligated to provide discovery to the State, the defendant also must give the State notice of expert witnesses and related information within a reasonable time before trial and a list of other witnesses at the beginning of jury selection. G.S. 15A-905(c)(2), (c)(3). If the defendant intends to rely on the defense of alibi, the court may order the defendant to disclose the identity of any alibi witnesses no later than two weeks before trial and may order the State to disclose any rebuttal witnesses no later than one week before trial. G.S. 15A-905(c)(1)a. (also allowing the court to specify different time periods with parties' agreement). In cases in which the State is not entitled to discovery under the discovery statutes, the defendant still must give notice of intent to rely on expert testimony relating to a mental disease, defect, or other condition pertaining to the defendant's mental state within a reasonable time before trial. *See* G.S. 15A-959(b).

The discovery statutes do not set a specific deadline for the defendant to produce the other discovery identified in the statutes (namely, certain documents and tangible objects and reports of examinations and tests). *See* G.S. 15A-905(a), (b). Presumably, the defendant must provide the discovery within a reasonable time or at such time as ordered by the court.

For a further discussion of the defendant's obligation to provide discovery to the State, see *supra* § 4.8, Prosecution's Discovery Rights (2d ed. 2013).

Notice of intent to rely on residual hearsay. The proponent of residual hearsay must give written notice of his or her intent to rely on such hearsay, including the name and address of the declarant. *See* N.C. R. EVID. 804(b)(5). The rule does not explicitly require that notice be given before trial; however, the notice must be sufficient to permit the opponent of the hearsay to prepare to meet the statement. *See State v. Ali*, 329 N.C. 394 (1991) (eleven days before trial sufficient notice under circumstances); *State v. Triplett*, 316 N.C. 1 (1986) (oral notice three weeks before trial followed by written notice on first day of trial deemed sufficient).

Notice of objection to admission of forensic lab reports and demand for testing analyst to appear and testify. The State is barred by the Confrontation Clause of the United States Constitution from introducing hearsay that is testimonial in nature except in certain circumstances. *See Crawford v. Washington*, 541 U.S. 36 (2004) (testimonial statements of a witness who is not subject to cross-examination at trial are barred unless the witness is unavailable and defendant had a prior opportunity to cross-examine the witness or an exception applies); *see also Davis v. Washington*, 547 U.S. 813 (2006) (statements made in response to police interrogation where primary purpose is to assist police in addressing an ongoing emergency are nontestimonial); *Michigan v. Bryant*, 562 U.S. 344 (2011) (analyzing the "primary purpose of an interrogation" and existence of an "ongoing emergency" requirements of *Davis*).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the U.S. Supreme Court held that forensic lab reports—such as those identifying a substance as a controlled substance—are testimonial under the *Crawford* Confrontation Clause rule. Thus, the prosecution may not introduce such a report to prove the truth of its contents and must prove the analysis through a live witness, unless the defendant has waived the right of confrontation.

The U.S. Supreme Court has held further that the defendant has a right to confront the analyst who performed the testing and certification; substitute analyst testimony—that is, testimony by an analyst who did not personally perform or observe the testing—has been found to violate *Crawford. Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *see also State v. Locklear*, 363 N.C. 438 (2009) (trial court erred in admitting analyses performed by a forensic pathologist and forensic dentist, who did not testify at trial, through the testimony of a different forensic pathologist who had not performed the analyses). Some post-*Crawford* North Carolina cases have found that substitute analyst testimony did not violate the Confrontation Clause on the rationale that the reports were not admitted for their truth but were instead admitted as the basis of the testifying expert's opinion. *See State v. Mobley*, 200 N.C. App. 570 (2009) (no *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by nontestifying expert); *State v. Hough*, 202 N.C. App. 674 (2010) (no *Crawford* violation where reports by nontestifying analyst as to composition and weight of controlled substances were admitted as basis of testifying expert's opinion and testifying expert performed peer review of reports), *aff'd by an equally divided court*, 367 N.C. 79 (2013) (per curiam). These holdings have been called into doubt by *Williams v. Illinois*, 567 U.S. 50 (2012), in which five United States Supreme Court justices rejected the "basis of opinion" rationale. *See* Jessica Smith, *Confrontation Clause Update: Williams v. Illinois and What It Means for Forensic Reports*, ADMINISTRATION OF JUSTICE BULLETIN No. 2012/03 (UNC School of Government, Sept. 2012).

Following *Williams*, the North Carolina Supreme Court held that substitute analyst testimony does not violate the Confrontation Clause where the testifying analyst provides an independent opinion based on otherwise inadmissible facts or data of a type reasonably relied on by experts in the field. *State v. Ortiz-Zape*, 367 N.C. 1 (2013) (reversing Court of Appeals and finding no Confrontation Clause violation where crime lab analyst testified to her opinion that substance at issue was cocaine based on tests done by another analyst in laboratory); *see also State v. Brewington*, 367 N.C. 29 (2013) (following *Ortiz-Zape* and finding no error where testifying expert gave independent opinion that substance was cocaine); *State v. Hurt*, 367 N.C. 80 (2013) (reversing Court of Appeals per curiam for reasons stated in *Ortiz-Zape* in case involving DNA analysis and finding no violation). *Cf. State v. Craven,*367 N.C. 51 (2013) (distinguishing *Ortiz-Zape* and holding State's expert did not testify to an independent opinion but rather offered impermissible surrogate testimony repeating testimonial out-of-court statements of non-testifying analysts). The U.S. Supreme Court has not yet weighed in on these holdings.

Melendez-Diaz upheld the constitutionality of simple "notice and demand" statutes. Under these statutes, the State gives notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant has a certain amount of time to object in writing to the admission of the evidence without the testimony of the analyst. Following *Melendez-Diaz*, in 2009, the N.C. General Assembly amended several notice and demand statutes and created additional ones as a mechanism for the State to obtain a waiver of the defendant's right to confront the analyst for certain types of evidence, such as forensic lab reports and chemical analyses. If the defendant fails to file a timely "objection and demand," the defendant waives the right to confront and the report may be admitted without the testimony of the analyst. *See State v. Jones*, 221 N.C. App. 236 (2012) (SBI report was properly admitted without analyst being present where State gave notice under G.S. 90-95(g) and defendant filed no objection); *State v. Steele*, 201 N.C. App. 689 (2010) (interpreting version of notice and demand provisions in G.S. 90-95(g) in effect before 2009 amendments and holding that defendant waived right to confront lab analyst where State gave timely notice of intent to introduce lab report identifying substance as cocaine and defendant failed to object). In *Steele*, the defendant argued that counsel was ineffective in failing to object to the admissibility of the lab report; however, the court found that the failure was not prejudicial in light of other evidence of the defendant's guilt, such as his own admission. On other facts, a failure to object and demand the analyst within the prescribed time frame could constitute ineffective assistance of counsel.

Practice note: In a drug prosecution, G.S. 90-95(g) governs notice and demand provisions, while G.S. 20-139.1(c1) governs notice and demand in an impaired driving prosecution. There are important differences between the two statutes. G.S. 90-95(g) provides that if the State serves notice of its intent to admit a lab report without the presence of the analyst at trial at least fifteen days before trial, the defendant must file a written demand for the analyst's presence at trial no later than five days before trial. G.S. 20-139.1(c1) was amended in 2016 to provide that if the State serves the defendant notice at least fifteen days after receiving the analyst report, the defendant must file an objection no later than five days before trial. *See* S.L. 2016-10, sec.1. Here, "trial" is defined as the next court setting following receipt of the State's notice. G.S. 20-139.1(c1) further provides that the defendant's failure to object is binding on all future court dates. Thus, the timeline to file an objection in an impaired driving case is five days before the next court date following receipt of the State's notice, regardless of when the matter is tried. *See also* Shea Denning, *Amendments to Notice and Demand in DWI Cases*, N.C. CRIM. L., UNC SCH. OF GOV'T. BLOG (June 22, 2016).

It is the State's burden to prove proper notice was given to the defendant and there is a presumption against waiver of constitutional rights. *State v. Whittington*, 221 N.C. App. 403 (2012); *rev'd on other grounds*, 367 N.C. 186 (2014). Closely examine the timing, form, and substance of any notice by the State. Where the notice fails to comply with statutory requirements, the defendant may be entitled to insist on the personal attendance of the analyst even where no objection was filed or, alternatively, to prohibit admission of the analyst's report.

If the defendant was served notice before obtaining representation and failed to file an objection in time (or where the defendant was formerly represented by counsel who was served notice and failed to file a timely demand), consider filing a demand and arguing against waiver of the defendant's Confrontation Clause rights as a matter of due process and fundamental fairness.

Various statutes govern the admissibility of a laboratory report, affidavit, or statement to provide that they "shall" (prior law used "may") be admissible without the necessity of testimony if the defendant or attorney fails to file a written objection. These statutes are: G.S. 8-58.20(f) (forensic evidence); G.S. 8-58.20(g) (chain of custody); G.S. 20-139.1(c1) (chemical analysis of blood or urine); G.S. 20-139.1(c3) (chain of custody); G.S. 20-139.1(e1) (chemical analyst's affidavit in district court); G.S. 90-95(g) (chemical analysis for controlled substance); and G.S. 90-95(g1) (chain of custody).

Various statutes also authorize court costs for expert witnesses providing testimony about chemical or forensic analyses at trial. G.S. 7A-304(a)(11) (expert witness employed by State Crime Laboratory) and G.S. 7A-304(a)(12) (expert witness employed by crime laboratory operated by local government or governments) require a district or superior court judge, on conviction, to order the defendant to pay $600 to be remitted to the Department of Justice or local government unit in a case in which the expert witness testified about a completed chemical analysis under G.S. 20-139.1 or a forensic analysis under G.S. 8-58.20. This fee is in addition to any costs assessed under G.S. 7A-304(a)(7), (8), (9a) or (9b). Defenders may want to challenge the fee on the ground that it chills the right to confront and may want to review any legislative history for this provision.

For a further discussion of these statutes and this developing area of law, see Jessica Smith, *Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/02 (UNC School of Government, Apr. 2010). Table 1 on page 23 of the bulletin sets out North Carolina's notice and demand statutes and the time requirements for the prosecution's notice and the defendant's objection/demand (although the chart does not account for the 2016 changes to notice and demand in DWI cases discussed above). For a discussion of the applicability of the Confrontation Clause to pretrial hearings, see *infra* § 13.2F, Conduct of Evidentiary Hearing.

Demand for speedy trial. Although a motion alleging that the defendant has been denied his or her constitutional right to a speedy trial may be made at any time, one of the factors the court will consider in assessing whether there has been a constitutional violation is whether the defendant has previously demanded a speedy trial. For further discussion, see *supra* § 7.3, Post-Accusation Delay.

Motion to sever co-defendant's trial. There is no statutory requirement that a motion to sever a co-defendant's trial be made before trial. However, a pretrial motion is much more likely to be granted since granting a motion to sever during trial creates a mistrial. *See* G.S. 15A-927(a); *see also supra* § 6.2 Joinder and Severance of Defendants, and § 6.3, Procedures for Joinder or Severance.

Motion for use of prior convictions more than 10 years old. Rule 609 of the North Carolina Rules of Evidence provides that convictions more than 10 years old are not admissible unless the proponent of the evidence gives written advance notice of intent to use the older convictions and the court determines that the older convictions are more probative than prejudicial. The rule does not specify a timeline by which such notice must be given; instead, the statute requires that the proponent of the evidence give the opposing party sufficient written notice that allows the opposing party a "fair opportunity to contest" the evidence. Filing the motion at a reasonable time before trial would likely meet this deadline.

Motion for Evidence Rule 412 hearing. Rule 412 of the North Carolina Rules of Evidence requires a motion and hearing outside the presence of the jury before a witness may be questioned on prior sexual behavior in order for the court to determine the relevance of the evidence. The request for hearing may be made before or during trial, but the better practice is to file the motion pretrial.

Other pretrial motions. As a practical matter, the following motions must be made and ruled on before trial, or they will be wholly or partially moot:

- motions for full recordation,
- motions to record the race of prospective jurors,
- motions for partial or full individual voir dire, and
- motions to sequester witnesses.

E. Motions not Subject to Time Limits

Certain Motions to Dismiss. Motions to dismiss the charges based on the grounds listed below may be made either before or during trial (*see* G.S. 15A-952(d); G.S. 15A-954):

- the statute alleged to have been violated is unconstitutional on its face or as applied to the defendant,
- the statute of limitations has run,
- the defendant has been denied the constitutional right to a speedy trial (*but cf.* "Demand for speedy trial" in subsection D., above),
- the defendant's constitutional rights have been flagrantly violated, resulting in irreparable prejudice that requires dismissal,
- there has been a violation of double jeopardy (*see infra* § 13.4B, Motion to Dismiss on Double Jeopardy Grounds),
- the defendant has been charged with the same offense in another North Carolina court that has jurisdiction and those charges are still pending and valid,
- an issue of law or fact essential to prosecution has been adjudicated in favor of the defendant in a prior action between the parties (res judicata),
- the court lacks jurisdiction over the charged offense,
- the defendant has been granted immunity from prosecution, and
- the pleadings fail to charge an offense as provided in G.S. 15A-924(e).

The advantage of waiting until the trial has begun to raise the above motions is that jeopardy will have attached and the State may not be able to retry the defendant. Note, however, that with respect to most of the above grounds for dismissal, a pretrial ruling in the defendant's favor will require dismissal with prejudice so there may be no tactical reason to delay in filing the motion.

Motion questioning capacity to proceed. A motion questioning the defendant's capacity may be raised at any time, before or during trial, by the defense, court, or prosecutor. *See* G.S. 15A-1002(a). The issue of the defendant's capacity depends on the mental state of the defendant at the time of the proceedings. If you believe your client is incapable of standing trial, he or she should be evaluated close enough to the time of trial that the evaluation is considered relevant and reliable. *See State v. Silvers*, 323 N.C. 646 (1989); *see also supra* § 2.1D, Time of Determination. A court may be less receptive, however, if the request appears to be made at the last minute. *See State v. Washington*, 283 N.C. 175 (1973) (characterizing as "belated" a motion for initial examination two weeks before trial); *State v. Wolfe*, 157 N.C. App. 22 (2003) (no error in denying defendant's motion to continue to determine defendant's capacity to proceed where defense counsel raised the issue during jury selection and trial court had already ruled on the question of capacity following an evaluation).

Waiver. Some of the above motions may be made even after trial, such as motions alleging that the court lacks jurisdiction. *See State v. Wallace*, 351 N.C. 481, 503–04 (2000) (jurisdictional challenge to indictment may be raised at any time, including for first time on appeal). Most of the other motions must be made before or at trial, or they are waived. *See, e.g.*, *State v. Grooms*, 353 N.C. 50 (2000) (defendant waived appellate review of speedy trial claim where defense counsel never asserted right during or before trial); *State v. White*, 134 N.C. App. 338 (1999) (defendant's failure to raise double jeopardy claim at trial precluded relying on issue on appeal), *habeas corpus granted sub nom.*, *White v. Hall*, 2010 WL 2572654 (E.D.N.C. 2010).

F. Motions in Limine

A motion in limine is a written motion, usually made on the eve of a jury trial, requesting that "certain inadmissible evidence not be referred to or offered at trial." *See* BLACK'S LAW DICTIONARY 1218–19 (11th ed. 2019). The purpose of such motions is to prevent the jury from learning about potentially prejudicial evidence, obviating the need for a jury instruction to disregard improperly admitted evidence. *See State v. Fearing*, 315 N.C. 167 (1985) (noting that motions in limine typically are employed to prevent the admission at trial of evidence that is irrelevant, inadmissible, or prejudicial); *State v. Tate*, 300 N.C. 180 (1980) (explaining motions in limine). Examples might include motions:

- to exclude 404(b) or other bad character evidence;
- to exclude inflammatory photographs or exhibits;
- challenging the admissibility of hearsay under the N.C. Rules of Evidence and, where applicable, under the Confrontation Clause to the U.S. Constitution and *Crawford v. Washington*, 541 U.S. 36 (2004);

- challenging a witness's competence to testify;
- to prohibit reference to a defendant's silence;
- to exclude evidence not disclosed in accordance with discovery requirements (as provided by G.S. 15A-910(a));
- to exclude unreliable tests or demonstrations, or testimony pertaining to such tests or demonstrations; and
- to exclude or redact irrelevant, prejudicial, or otherwise inadmissible evidence.

While there is a tactical advantage in raising motions in limine before the trial begins to prevent the jury from learning of the existence of unfavorable evidence, if a motion is ruled on before jeopardy attaches, the State may be able to obtain alternative evidence before the trial gets underway and may have the right to appeal the adverse ruling. *See Tate*, 300 N.C. 180 (where defendant's pretrial motion to suppress results of scientific test was granted before trial, State had right to appeal).

A motion to suppress is a specific type of motion in limine. *Id*. at 182. As with other motions in limine, if a pretrial motion to suppress is denied, defense counsel must renew the objection to introduction of the evidence at trial; otherwise, the objection is waived. *See infra* § 13.2H, Renewing Pretrial Motions. Unlike other motions in limine, however, a motion to suppress ordinarily must be made before trial or it is waived. *See supra* § 13.1D, Motions before Trial.

Practice note: There is no requirement that a motion in limine be written (other than suppression motions, which normally must be written and filed pretrial). Counsel should consider the strategic implication of filing a written motion before trial versus making an oral motion at the beginning of trial. The State will often make oral motions in limine at the start of trial, and counsel should anticipate any potential grounds for such motions by the State.

G. Unavailability of Pretrial Motion to Dismiss for Insufficient Evidence

Under North Carolina law, motions to dismiss based on insufficient evidence cannot be made pretrial because only those defenses, objections, or requests that are capable of being determined without the trial of the general issue may be resolved by pretrial motion. *See State v. Fowler*, 197 N.C. App. 1, 28 (2009) ("court can *only* consider a motion to dismiss for insufficient evidence *after* the State has had an opportunity to present all of its evidence to the trier of fact *during* trial" (emphasis in original)); *see also State v. Seward*, 362 N.C. 210, 216 (2008) (once the grand jury has determined the sufficiency of evidence to support a charge, a trial judge "may not pass on the sufficiency of that evidence again until after the State has had an opportunity to present its case-in-chief"); *State v. Joe*, 213 N.C. App. 148 (2011) (trial court's consideration of defendant's pretrial motion to dismiss for insufficient evidence was invited error by State; State invited consideration and participated in the evidentiary hearing on the motion without any objection), *rev'd*, 365 N.C. 538 (2012) (trial court had no authority on own motion to dismiss charges); *see generally* 2 NORTH CAROLINA DEFENDER MANUAL Ch. 30, Motions to Dismiss Based on Insufficient Evidence (Nov. 2018).

Although the defendant cannot obtain a pretrial ruling on the sufficiency of the State's evidence, counsel may be able to frame a motion in terms of a ground on which the court could issue a dispositive pretrial ruling (for example, a motion to dismiss on constitutional or jurisdictional grounds). *See, e.g.*, *State v. Buddington*, 210 N.C. App. 252 (2011) (noting that defendant's pretrial motion to dismiss was based on constitutional grounds, not on a challenge to the sufficiency of the evidence). Other pretrial motions may provide functionally equivalent relief—for example, a suppression motion that would exclude evidence essential to prosecution of the case.