13.2 Procedural Requirements in Superior Court

A. Writing Requirement
B. Filing and Service
C. Ex Parte Motions
D. Required Contents of Motions
E. Right to Evidentiary Hearing
F. Conduct of Evidentiary Hearing
G. Disposition of Motions
H. Renewing Pretrial Motions

13.2 Procedural Requirements in Superior Court

A. Writing Requirement

Generally, pretrial motions in superior court must be in writing. *See* G.S. 15A-951(a)(1); *State v. Parrish*, 73 N.C. App. 662 (1985). Motions made during a hearing or trial need not be in writing. *See* G.S. 15A-951(a)(1); *State v. Marlow*, 310 N.C. 507 (1984) (joinder motion made at trial need not be in writing); *State v. Slade*, 291 N.C. 275 (1976) (joinder motion made at outset of trial may be made orally); *State v. Seay*, 59 N.C. App. 667 (1982) (permitting oral motion for modification of bond). The writing requirement applies to State's motions as well. However, if the State fails to comply with this requirement, counsel probably will have to show prejudice to obtain relief. *See State v. Fink*, 92 N.C. App. 523 (1989) (noting on facts that defendant had not shown prejudice from State's failure to file written joinder motion until after State had made motion orally at pretrial motions hearing); *see also In re R.D.L.*, 191 N.C. App. 526 (2008) (trial court did not err in allowing State's oral motion for joinder in juvenile delinquency case).

B. Filing and Service

Written pretrial motions ordinarily must be filed and served in accordance with G.S. 15A-951(b) and (c). If motions are not properly filed or served, the remedy is to file a motion to vacate any resulting order. *See State v. Sams*, 317 N.C. 230 (1986) (discussing statutory requirements and holding that an order issued without notice where actual notice is required is irregular and thus voidable; however, it is not automatically void and must be attacked by a motion to vacate); *State v. Melvin*, 99 N.C. App. 16 (1990) (where State did not serve motion to continue on attorney of record or effect proof of service, order granting continuance is voidable and may be attacked by motion to vacate).

C. Ex Parte Motions

In some instances it is appropriate and necessary to make an ex parte motion—that is, a motion without notice to the prosecution. The most common situation, approved by the North Carolina appellate courts, involves a motion for funds for an expert. The courts

have allowed motions for experts to be made ex parte because, to show the basis for such a motion, counsel may have to reveal privileged attorney-client communications and trial strategy. *See supra* § 5.5A, Importance of Ex Parte Hearing. For similar reasons, some courts have allowed the defense to move ex parte for the production of records in the hands of third parties. *See supra* § 4.6A, Evidence in Possession of Third Parties (2d ed. 2013). There may also be situations in which although you need to file and serve the motion on the prosecution, you should ask the court to hear the grounds for the motion in camera, without the prosecutor present—for example, if in justifying a motion for a continuance you would have to reveal confidential attorney-client communications.

D. Required Contents of Motions

Grounds for motion. G.S. 15A-951(a)(2) requires that a motion must state the legal grounds for the motion. *See State v. Curmon*, 295 N.C. 453 (1978) (defense motion that alleged violation of unspecified "constitutional rights" did not sufficiently state grounds for motion); *State v. Van Cross*, 293 N.C. 296 (1977) (noting failure of motion for sequestration of witnesses to state grounds); *State v. VanDyke*, 28 N.C. App. 619 (1976) (denial of continuance motion upheld in part because defendant failed to state any legal grounds for motion). Legal grounds for a motion may include:

- case law,
- statutes,
- state constitutional provisions, and
- federal constitutional provisions.

Each ground should be clearly and separately stated. Though not required by statute, counsel may want to support a motion with a memorandum of legal authority.

Relief sought. A motion must also state the relief that is sought, such as a change of venue, suppression of evidence, etc. *See* G.S. 15A-951(a)(3); *State v. Berry*, 51 N.C. App. 97 (1981) (noting requirement). The motion should state all potential relief being sought. *See generally State v. Fair*, 164 N.C. App. 770 (2004) (trial court did not err in denying defendant's oral request for discovery that was not included in written motion for discovery). Consider requesting alternative relief in addition to any primary relief sought.

Affidavits. The following motions *must* be accompanied by an affidavit setting forth the factual basis for the motion:

- Suppression motions. *See infra* § 14.6C, Contents of Motion; *cf. State v. O'Connor*, 222 N.C. App. 235 (2012) (while trial court may summarily deny suppression motion for failure to attach an affidavit, it has the discretion to refrain from doing so).
- Motions to disqualify a judge. *See* G.S. 15A-1223(c); *State v. Pakulski*, 106 N.C. App. 444 (1992) (motion to recuse denied because, among other things, defendant failed to support motion with affidavit). For a further discussion, see *infra* § 13.4C, Motion to Recuse Trial Judge.

Any motion *may* be accompanied by a factual affidavit, and many motions *should* be accompanied by an affidavit to show the factual basis for the motion. *See State v. Buddington*, 210 N.C. App. 252 (2011) (reversing trial court's order granting motion to dismiss where defendant failed to file an affidavit or otherwise present evidence in support of motion). If you believe that an evidentiary hearing will be necessary or helpful to deciding a motion in your favor, you should attach affidavits that demonstrate any factual issues. *See generally State v. McHone*, 348 N.C. 254 (1998) (in determining whether to grant an evidentiary hearing on a motion for appropriate relief, court should consider not only the motion but also supporting or opposing information presented); *cf. State v. Salinas*, 366 N.C. 119 (2012) (defendant's affidavit in support of motion to suppress has procedural rather than evidentiary function; affidavit assists trial court in determining whether allegations merit a full suppression hearing, but trial court may not rely on allegations in affidavit when making findings of fact).

Affidavits may and often should be attested to by counsel rather than by the defendant. *See State v. Chance*, 130 N.C. App. 107 (1998) (defendant's lawyer can attest to truthfulness of affidavit in support of suppression motion based on information and belief). Counsel should be careful not to concede contested facts in the affidavit. For example, counsel should note that "the officer claims or alleges in his report that defendant did or said [whatever is contested]," rather than positing it as fact.

E. Right to Evidentiary Hearing

Generally. The defendant has a right to an evidentiary hearing on a pretrial motion when there are disputed issues of material fact to be resolved. *See State v. McHone*, 348 N.C. 254 (1998); *State v. Dietz*, 289 N.C. 488 (1976) (no right to evidentiary hearing arises from "conjectural and conclusory" allegations in defendant's affidavit); *State v. Shropshire*, 210 N.C. App. 478 (2011) (no error to deny post-sentencing motion to withdraw plea without conducting an evidentiary hearing where defendant presented no disputed issue of fact); *State v. Hardison*, 126 N.C. App. 52 (1997) (where motion for appropriate relief raises questions of fact, court errs in dismissing motion without conducting evidentiary hearing); *State v. Chaplin*, 122 N.C. App. 659 (1996) (where motion to dismiss for lack of speedy trial raises factual dispute, trial court must hold evidentiary hearing); *State v. Roberts*, 18 N.C. App. 388 (1973) (where record shows substantial unexplained delay in bringing defendant to trial, court required to conduct evidentiary hearing on defendant's motion to dismiss for lack of speedy trial).

If you want an evidentiary hearing, make the request in the motion. In some districts, you may also need to file a separate request or motion for an evidentiary hearing.

Motions to suppress. The court must allow an evidentiary hearing on a motion to suppress if the motion:

- is timely filed,
- alleges a legal basis for the motion, and

- is accompanied by an affidavit setting out facts supporting the ground for suppression.

See G.S. 15A-977; *State v. Breeden*, 306 N.C. 533 (1982) (reversible error for trial court to summarily deny defense motion to suppress that complied with all statutory requirements; court required to conduct hearing and make findings of fact); *State v. Kirkland*, 119 N.C. App. 185 (1995) (error, harmless on these facts, for court to admit evidence without holding hearing on defendant's suppression motion), *aff'd per curiam*, 342 N.C. 891 (1996); *State v. Martin*, 38 N.C. App. 115 (1978) (reversible error to fail to hold hearing on suppression motion).

Pretrial hearing date. It is often desirable to seek a date in advance of trial for an evidentiary hearing on pretrial motions. There is no absolute right to a pretrial hearing, however. Under G.S. 15A-952(f), the court may hear a pretrial motion before or during trial. *See State v. Skeels*, 346 N.C. 147 (1997) (court did not abuse discretion by waiting until trial to rule on pretrial motion to dismiss one of charges against defendant); *State v. Artis*, 316 N.C. 507 (1986) (failure of trial court to set definite date for presentation of evidence not reversible error absent showing of prejudice); *State v. Setzer*, 42 N.C. App. 98 (1979) (court's ruling on pretrial defense motions on day before scheduled trial not reversible error where defendant failed to show prejudice).

As a practical matter, obtaining a date for a hearing on a pretrial motion may be facilitated by informing the prosecutor, trial court administrator, or judge at an administrative setting (under G.S. 7A-49.4(b)) that pretrial motions in a particular case will require an evidentiary hearing and articulating the reasons for seeking a definite date in advance.

***Practice note*:** If counsel requests a date to be set for motions hearings, consider also requesting that the motions deadlines pertinent to the case be extended to a later date in advance of the hearing date. A motion to extend all statutory deadlines for motions in the case is particularly helpful in complex, lengthy, or more serious cases.

F. Conduct of Evidentiary Hearing

Presentation of evidence. It is not always necessary to present live testimony to prevail on a motion. *See State v. Pippin*, 72 N.C. App. 387 (1985) (holding that the court may rule on pretrial motions based on affidavit or oral representations of counsel); Official Commentary to G.S. 15A-952 (noting that some pretrial motions "can be disposed of on affidavit or representations of counsel"). However, if you request a hearing based on disputed issues of material fact, the presentation of evidence will be required. *See State v. Buddington*, 210 N.C. App. 252 (2011) (reversing trial court's order granting motion to dismiss where defendant argued statute was unconstitutional as applied but failed to file an affidavit or otherwise support motion by presenting evidence or clear stipulations to necessary facts). Just as at trial, if a request to present evidence is denied, counsel should make an offer of proof.

For strategic reasons, counsel should be cautious about presenting the testimony of witnesses who also are likely to testify at trial—the State can use evidentiary hearings as a discovery device as well. The defendant's testimony at a suppression hearing, or at any hearing based on an alleged violation of the defendant's constitutional rights, may not be used against the defendant on the issue of guilt. *See Simmons v. United States*, 390 U.S. 377, 394 (1968). However, it may be used to impeach the defendant if he or she testifies at trial. *See State v. Bracey*, 303 N.C. 112 (1981) (although evidence obtained at a suppression hearing may not be used to establish the defendant's guilt, it may be used for impeachment on cross-examination).

The testimony of a State's witness at a suppression or other pretrial motion hearing could be admissible at trial as substantive evidence if the witness is unavailable to testify at trial. Although the witness's testimony would be considered testimonial under the Confrontation Clause, it could be admissible at trial if the court found that the defendant had an adequate opportunity to cross-examine the witness at the pretrial hearing. *See State v. Ross*, 216 N.C. App. 337 (2011) (holding that victim's testimony at a probable cause hearing provided an adequate prior opportunity to cross-examine that satisfied *Crawford*). Because *Ross* involved a probable cause hearing, at which the defendant arguably had the same motive to cross-examine as at trial, it may have less application to pretrial hearings with a more limited purpose, such as a suppression hearing. *But cf. State v. Rollins*, 226 N.C. App. 129 (2013) (no violation of the defendant's confrontation rights occurred in murder case when the defendant had a chance at the defendant's plea hearing to cross-examine a State's witness who testified to the factual basis for the plea, the defendant successfully appealed the denial of his suppression motion following his guilty plea, the trial court found the witness was unavailable at trial when the witness claimed no recollection of any of the events or her prior testimony at the plea hearing, and the trial court admitted the witness's testimony from the plea hearing at trial; court rejected defendant's argument that he had no motive to cross-examine the witness at the plea hearing). If testimony at a pretrial hearing satisfies *Crawford*, it still would have to be offered for a relevant purpose at trial and would have to satisfy North Carolina's hearsay rules, such as the hearsay exception for former testimony under N.C. Rule of Evidence 804(b)(1). For a further discussion of the impact of *Ross* on the admissibility of testimony from a probable cause hearing, including possible distinctions, see *supra* "Prior opportunity for cross-examination" in § 3.4C, Impact of *Crawford*.

The Confrontation Clause also may not bar the State from introducing an unavailable witness's testimonial statements made before a pretrial hearing if the defendant had an adequate opportunity to cross-examine the witness about the statements at the pretrial hearing. If a witness's statements before a pretrial hearing do not relate to the subject matter of the hearing—for example, the witness's statements are about the alleged crime and not the investigatory actions that are the subject of a hearing on a suppression motion—the defendant likely would *not* be considered to have had an adequate opportunity for cross-examination at the pretrial hearing. Even if admissible under the Confrontation Clause, statements outside a pretrial hearing would also have to satisfy an applicable North Carolina hearsay exception.

Practice note: If the defense requires a law enforcement officer or another person who may serve as a State's witness at trial to be present at the evidentiary hearing, e.g., to explore whether a vehicle was stopped for unlawful reasons, defense counsel should subpoena the officer or witness to the hearing rather than assuming that the State will do so.

Burden of proof. On motions to suppress on constitutional grounds, the State ordinarily has the burden of proving by the preponderance of the evidence that the evidence it seeks to admit was legally obtained. *See, e.g.*, *State v. Williams*, 225 N.C. App. 636 (2013) (burden is initially on defendant to show motion to suppress is timely and in proper form; burden is then on State to demonstrate admissibility of challenged evidence); *State v. Tarlton*, 146 N.C. App. 417, 420 (2001); *State v. Nowell*, 144 N.C. App. 636 (2001) (State has burden to prove warrantless search constitutional once defendant moves to suppress), *aff'd per curiam*, 355 N.C. 273 (2002); *State v. Johnson*, 304 N.C. 680 (1982) (stating preponderance of the evidence standard); *State v. Breeden*, 306 N.C. 533 (1982) (same); *see also infra* § 14.6E, Conduct of Evidentiary Hearing (2d ed. 2013) (discussing State's burden of proof and exceptions in suppressions hearing).

On most other motions, the moving party has the burden of proof. *See, e.g., State v. Farmer*, 138 N.C. App. 127 (2000) (defendant has burden of proof on motion to change venue); *State v. Chaplin*, 122 N.C. App. 659 (1996) (defendant has burden of proof to show violation of speedy trial right, but where delay is exceptionally long burden shifts to the State to explain it); *State v. Johnson*, 317 N.C. 343 (1986) (burden of proof of showing illegality in grand jury selection procedure on defendant); *State v. Ray*, 274 N.C. 556 (1968) (defendant has burden of proving intentional discrimination in grand jury selection).

Rules of evidence. The North Carolina Rules of Evidence generally apply to "proceedings in the courts of this State," which would include hearings on pretrial motions. *See* N.C. R. EVID. 101, "Scope." However, there are some types of pretrial hearings at which formal rules of evidence do *not* apply, including hearings on the following matters:

- the competence or qualification of a person to be a witness,
- bond hearings,
- probation matters,
- sentencing proceedings,
- probable cause hearings
- extradition hearings,
- the existence of a privilege, and
- the admissibility of evidence.

See N.C. R. EVID. 104, "Preliminary Questions," and N.C. R. EVID. 1101, "Applicability of Rules."

The statutes and rules governing the specific type of hearing also may modify the rules of evidence. *See, e.g., supra* § 2.7D, Evidentiary Issues (2d ed. 2013) (discussing rules applicable to hearings on capacity to proceed); § 3.5B, Rules of Evidence (discussing rules applicable to probable cause hearings). *See also* Jessica Smith, *When Do The Rules of Evidence Apply?,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 4, 2012); Jonathan Holbrook, *The Rules When There Are No Rules*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 14, 2020).

Presence of jury. Under N.C. Rule of Evidence 104(c), "Preliminary Questions," hearings on "preliminary matters" are to be conducted out of the presence of the jury if

- required in the interests of justice, or
- the defendant is a witness at the hearing and requests that the hearing be out of the jury's presence.

Ordinarily, you should ask that hearings on motions be conducted outside the presence of the jury because they involve arguments of counsel and potentially inadmissible evidence. Failure to make the request could effectively waive appellate review of the issue of the jury's presence. *See State v. Baker*, 320 N.C. 104 (1987) (upholding court's conducting voir dire on competency of victim/witness in the presence of the jury where defendant never requested that the hearing be held outside the jury's presence); *State v. Hensley*, 120 N.C. App. 313 (1995) (court declines to find plain error in judge's conducting voir dire of witness in presence of jury where defendant failed to object).

Presence of defendant. A defendant has a federal constitutional right, based primarily on the due process clause of the Fourteenth Amendment to the U.S. Constitution, to be present at any pretrial hearing that is substantially related to the fullness of his or her right to defend against the charge. *See United States v. Gagnon*, 470 U.S. 522 (1985) (per curiam). The federal constitutional right to presence is waivable. *Id.* (defendant waived right to be present at in-chambers conference where he knew it was taking place and did not invoke right). A defendant has no state constitutional right to presence until the trial commences. *See, e.g.*, *State v. Golphin*, 352 N.C. 364 (2000) (no state constitutional right to presence at pretrial hearing on change of venue). It is the better practice for the defendant to be present at all pretrial hearings because, among other things, information gained during such hearings may affect trial strategy. For a further discussion of the right to presence, including at pretrial hearings, see 2 NORTH CAROLINA DEFENDER MANUAL § 21.1, Right to Be Present (Jan. 2018).

Transcript. If the hearing on a pretrial motion is held in advance of trial, counsel should obtain the transcript of the hearing for use at trial. An indigent defendant is constitutionally entitled to a free transcript of any hearing necessary to the preparation of his or her defense. *See Britt v. North Carolina*, 404 U.S. 226 (1971); *cf. State v. Brooks*, 287 N.C. 392 (1975) (indigent defendant who appeals for trial de novo in superior court not entitled to transcript of district court proceedings). *See also supra* § 5.8B, Transcripts (discussing right of indigent defendant to assistance at state expense); Phillip R. Dixon,

Jr., Defense Motions and Notices in Superior Court, II.D (UNC School of Government, 2018) (discussing motions for production of transcripts).

G. Disposition of Motions

Obtaining a ruling. It is the responsibility of counsel to obtain a ruling on each motion filed. The lack of a ruling may be regarded as a de facto denial of the motion or even a waiver of the issue. *See State v. Jones*, 295 N.C. 345 (1978) (defendant waived statutory right to discovery by not making any showing in support of motion, not objecting when court found motion abandoned, and not obtaining a ruling on motion); *State v. Freeman*, 280 N.C. 622 (1972) (defendant's motion for change of venue deemed denied when court proceeded to trial without ruling on motion); *State v. Partin*, 48 N.C. App. 274 (1980) (proceeding to trial without ruling on defense motion for change of venue amounted to denial of motion; court held that defendant was required to show prejudice to get relief based on court's failure to rule);.

Findings of fact. Findings of fact are specifically required in four situations:

- *Suppression motions*. *See* G.S. 15A-977(f) (so stating); *State v. Ladd*, 308 N.C. 272 (1983) (findings of fact advisable in all cases and required when there is a material conflict in the voir dire evidence); *State v. Chamberlain*, 307 N.C. 130 (1982) (duty of trial court to resolve factual conflicts by making findings of fact); *State v. Clark*, 301 N.C. 176 (1980) (after hearing evidence on admissibility of pretrial identification procedures, court must make findings of fact before allowing in-court identification of defendant); *State v. Neal*, 210 N.C. App. 645 (2011) (by orally denying motion, trial court failed to comply with the statute; remanded for findings of fact resolving material conflicts in the evidence); *State v. Baker*, 208 N.C. App. 376, 380 (2010) (G.S. 15A-977(f) is mandatory "*unless* (1) the trial court provides its rationale from the bench, *and* (2) there are no material conflicts in the evidence at the suppression hearing" (emphasis in original) (citation omitted)); *State v. Rollins*, 200 N.C. App. 105 (2009) (court noted that even when there is no material conflict in the evidence, the better practice is to make findings of fact); *State v. Toney*, 187 N.C. App. 465 (2007) (not reversible error where trial judge orally denied motion to suppress during trial and did not make findings of fact but there was no material conflict in evidence).
- *Admission of residual hearsay*. *See* N.C. R. EVID. 803(24), 804(b)(5); *State v. Smith*, 315 N.C. 76 (1985) (making of findings required before admission of statements under residual hearsay exception); *State v. Dammons*, 121 N.C. App. 61 (1995) (new trial required where court fails to make findings of fact before admission of hearsay statement under residual hearsay exception); *State v. Benfield*, 91 N.C. App. 228 (1988) (applying *Smith* and granting new trial for failure of trial court to make appropriate findings of fact).
- *Admissions of convictions more than ten years old*. *See* N.C. R. EVID. 609(b); *State v. Farris*, 93 N.C. App. 757 (1989) (new trial awarded where trial court permits impeachment by convictions over ten years old without making appropriate findings of fact that probative value outweighed prejudicial effect).

- *Capacity to proceed determinations.* G.S. 15A-1002(b1) requires findings of fact in a court order on capacity to proceed. The statute further provides that the State and defendant may stipulate that the defendant is capable of proceeding but may not stipulate that the defendant lacks capacity to proceed.

In addition to the above statutory requirements, findings of fact generally are required when a motion raises a factual dispute. *See State v. Porter*, 326 N.C. 489 (1990) (findings not required on *Batson* motion where evidence does not raise material question of fact).

For additional discussion on the types of cases in which a trial judge must make findings of fact and conclusions of law, see Albert Diaz, *Findings of Fact and Conclusions of Law*, North Carolina Superior Ct. Judges' Benchbook (UNC School of Government, Jan. 2009).

Remedy for inadequate factual findings. If the trial court has not made findings of fact, or its findings of fact are inadequate, the reviewing court either may reverse the conviction or, more commonly, may remand for further findings of fact. *See State v. Peterson*, 344 N.C. 172 (1996) (remand for findings of fact on voluntariness of waiver of *Miranda* rights).

H. Renewing Pretrial Motions

Motions may be renewed if changed circumstances or new evidence justifies altering an earlier ruling. *See also infra* § 14.6B, Renewal of Motion (2d ed. 2013) (suppression motions).

A judge may always reconsider his or her own prior ruling. *See State v. Adcock*, 310 N.C. 1 (1984) (court permitted to reverse its earlier ruling on admissibility of evidence); *State v. McNeill*, 170 N.C. App. 574 (2005) (trial court did not err by changing its ruling on motion to suppress, which is form of motion in limine).

Generally, a superior court judge may not modify or reverse the order of another superior court judge. The same principle applies to one district court judge modifying or reversing another district court judge's order. *See State v. Cummings*, 169 N.C. App. 249 (2005). A judge may modify or reverse the pretrial ruling of another judge, however, if a change of circumstances requires a modification or if the ruling pertains to the procedure and conduct of the trial, matters within the trial judge's purview. *See State v. Woolridge*, 357 N.C. 544 (2003) (first judge granted defendant's suppression motion and second judge reversed ruling by granting State's "motion to reexamine the evidence"; second judge should not have acted on motion, as it presented same question of law and there was no change in circumstances because the prosecution's evidence was essentially the same as at the first hearing); *State v. Stokes*, 308 N.C. 634 (1983) (preliminary ruling on defense motion for individual voir dire is interlocutory and may be reversed by judge who ultimately presides over case); *State v. Duvall*, 304 N.C. 557 (1981) (ruling on special venire is interlocutory order and may be modified by trial judge); *State v. Turner*, 34 N.C. App. 78 (1977) (trial court's order that defendant be tried at a particular session of court or else the charges would be dismissed was

an interlocutory order that could be modified by another judge if circumstances changed); *see also generally* Michael Crowell, *One Trial Judge Overruling Another*, North Carolina Superior Court Judges' Benchbook (UNC School of Government, Jan. 2015) (noting that limitations on a second judge's reconsideration of a decision of another judge do not apply when the second judge is being asked to decide a different legal issue).

If you present a motion to a second judge that a previous judge has ruled on, you should advise the second judge of the earlier motion and ruling and be prepared to present evidence of a change in circumstances or other basis that justifies reconsideration.

For a discussion of renewing motions following a mistrial, see 2 NORTH CAROLINA DEFENDER MANUAL § 31.10B, Rulings from Previous Trials (Dec. 2018).

Practice note on preserving the record: If a defense motion is denied before trial, counsel should (i) renew the motion at trial; and (ii) object to the admission of any challenged evidence when it is presented at trial. Failure to object when challenged evidence is offered at trial may waive any right to appellate review. *See State v. Hill*, 347 N.C. 275 (1997) (defendant required to contemporaneously object to admission of evidence after motion in limine denied); *State v. Conaway*, 339 N.C. 487 (1995) (to same effect); *see also State v. Mitchell*, 342 N.C. 797 (1996) (right to severance lost where defendant fails to renew severance motion at close of all the evidence); G.S. 15A-927(a)(2) (motion to sever must be renewed at end of evidence).

North Carolina Evidence Rule 103(a) states: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." However, the North Carolina appellate courts have declared this provision of the rule unconstitutional on grounds that it conflicts with N.C. Rule of Appellate Procedure 10(b)(1) [now, 10(a)(1)] and contravenes the exclusive authority of the North Carolina Supreme Court to prescribe rules of procedure for the appellate division. *State v. Oglesby*, 361 N.C. 550 (2007). The law therefore remains that to preserve the matter for appeal, a defendant must object to the admission of evidence at trial despite a previous ruling denying a pretrial motion to suppress or exclude evidence. The State has argued in some cases that this objection requirement also applies when the court has denied a defense motion to exclude evidence based on a discovery violation. *See State v. Herrera*, 195 N.C. App. 181 (2009) (assuming, arguendo, that objection requirement applies but not ruling on argument), *abrogation on other grounds recognized by State v. Flaugher*, 214 N.C. App. 370 (2011). Accordingly, counsel should ***always*** object at trial when the State offers evidence that has been the subject of a pretrial motion to suppress or exclude, regardless of the specific grounds asserted in the motion.

An objection at a hearing outside the presence of the jury is not sufficient even when the hearing is held during trial; the objection must be made at each point during the trial when the evidence is actually offered. *See State v. Ray*, 364 N.C 272 (2010); *State v. Flaugher*, 214 N.C. App. 370 (2011).