Chapter 14
Suppression Motions

A motion to suppress illegally obtained evidence is one of the most effective weapons in a criminal defense lawyer's arsenal. Failing to file a motion to suppress when there are grounds to do so may constitute ineffective assistance of counsel. *See State v. Gerald,* 227 N.C. App. 127 (2013) (counsel was ineffective by failing move to suppress evidence obtained by a "patently unconstitutional seizure"); *State v. Canty*, 224 N.C. App. 514 (2012). There are multiple reasons to file a suppression motion. In addition to suppressing evidence that is harmful to your client, you may be able to:

- obtain detailed information at the suppression hearing from officers or other witnesses who might not otherwise be willing to talk to you;
- obtain impeachment material for use at trial in the form of sworn testimony of witnesses;
- provide your client and the prosecutor an opportunity to hear the evidence and get a more realistic view of the case; and
- earn your client's trust by demonstrating zealous advocacy.

Section 14.1 discusses basic types of evidence subject to exclusion and grounds for exclusion. Sections 14.2 through 14.5 discuss in greater detail those categories of evidence. Section 14.6 discusses general procedures governing suppression motions, including content and timing requirements and the scope of the right to an evidentiary hearing. Section 14.7 covers appeals from suppression motions.

It is beyond the scope of this chapter to review exhaustively the law on all constitutional (or statutory) violations that may result in the suppression of evidence. A fuller discussion of the law on these issues may be found in WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (4th ed. 2015) (hereinafter LAFAVE, CRIMINAL PROCEDURE) (a multi-volume set discussing Fifth and Sixth Amendment issues, among other things); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE

ON THE FOURTH AMENDMENT (5th ed. 2012) (hereinafter LAFAVE, SEARCH AND SEIZURE) (a multi-volume set); and ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (UNC School of Government, 5th ed. 2016) (hereinafter FARB).

This chapter also does not review other constitutional and evidentiary grounds for challenging the admission of evidence, as when the State offers testimonial out-of-court statements in violation of the Confrontation Clause or improper opinion testimony about the identity of a controlled substance without a confirmatory lab test. While such grounds may warrant exclusion of evidence by a motion in limine before trial or objection during trial, they do not involve the suppression of illegally obtained evidence in the sense discussed in this chapter.

For discussion of issues involved with warrantless stops and searches, including reasonable suspicion to stop, grounds to frisk, and numerous other issues in that context, see *infra* Ch. 15, Stops and Warrantless Searches.

14.1 Evidence Subject to Exclusion

A. Categories

There are three basic types of evidence subject to exclusion:

- physical evidence (as well as observations or other information) obtained through a search or seizure;
- confessions or statements; and
- identifications.

See also supra § 12.2A, Suppressing Prior Uncounseled Conviction (2d ed. 2013).

B. Grounds for Exclusion

Various constitutional and statutory provisions govern the above types of evidence, discussed in greater detail in the following sections. As a general matter, if the State obtains evidence in violation of a suspect's constitutional rights, the evidence must be excluded from trial. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. Carter*, 322 N.C. 709 (1988). Violations of statutory rights also may provide the basis for suppression.

The exclusionary rule is codified in North Carolina in Section 15A-974(a) of the North Carolina General Statutes (hereinafter G.S.), which states that evidence must be suppressed if:

(1) its exclusion is required by the Constitution of the United States or the Constitution of North Carolina, or
(2) the evidence is obtained as a result of a "substantial violation" of the Criminal Procedure Act (G.S. Chapter 15A).

The Official Commentary to the statute explains that subdivision (1) of subsection (a) is intended to track case law developed by the United States Supreme Court and the Supreme Court of North Carolina on the reach of constitutional exclusionary rules. The same approach applies to derivative evidence, also called the "fruit of the poisonous tree." If case law interpreting the federal or state constitution prohibits the admission of derivative evidence, so will subdivision (1) of subsection (a) of the statute.

Subdivision (2) of subsection (a) of G.S. 15A-974 goes beyond constitutional requirements and mandates the exclusion of evidence that is obtained in "substantial violation" of state criminal procedure requirements. For a discussion of the meaning of a "substantial violation," see *infra* § 14.5, Substantial Violations of Criminal Procedure Act.

14.2 Warrants and Illegal Searches and Seizures

A. Generally

The primary constitutional grounds for excluding evidence obtained through an illegal search or seizure is the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, section 20 of the North Carolina Constitution.

There are numerous situations in which a search or seizure may violate these provisions. For example, the evidence may have been obtained:

- during a seizure that was not supported by reasonable suspicion or probable cause;
- in a search without probable cause or a valid consent to search;
- through coercive or outrageous police misconduct (in violation of the Fifth Amendment); or
- without a warrant when a warrant was required.

The focus of this section is on the last category: searches and seizures in violation of warrant requirements. Discussed below are some common violations. For a discussion of limits on warrantless searches and seizures, see *infra* Ch. 15, Stops and Warrantless Searches.

B. Search Warrants

Warrant requirement and exceptions. Generally, before entering a person's home or searching his or her car, personal property, or person, the police must obtain a warrant, based on "probable cause" to believe that the evidence being sought is in the place to be searched. *See generally Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (per curiam) ("A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement[.]" (citation omitted)); N.C. CONST. art. I, sec. 20 ("General warrants, whereby any officer or other person may be

commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.").

There are a number of exceptions to the warrant requirement. A warrantless search or entry into a home is permissible, for example, where the officer has probable cause to believe a crime has taken place and where "exigent circumstances," such as the safety of the officer or the possibility of the destruction of evidence, require an immediate search. *See, e.g., Kentucky v. King*, 563 U.S. 452 (2011) (officers' warrantless entry to prevent destruction of evidence was lawful; police did not create exigency through actual or threatened Fourth Amendment violation by banging on door and announcing their presence); *Michigan v. Fisher*, 558 U.S. 45 (2009) (officer's warrantless entry into home did not violate Fourth Amendment where it was reasonable for officer to believe there was an emergency necessitating immediate aid to an occupant).

North Carolina cases have applied the exception in numerous cases. *See State v. Fuller*, 196 N.C. App. 412 (2009) (exigent circumstances supported officers' warrantless entry and search of defendant's mobile home where defendant was a flight risk, had previous convictions for armed robbery and drug offenses, and ran out of view when officers announced their presence); *State v. Frazier*, 142 N.C. App. 361 (2001) (exigent circumstances existed to search defendant's motel room where defendant tried to flee from officers and there was a danger that the controlled substance would be destroyed).

Exigent circumstances combined with probable cause may also justify a warrantless search of a suspect. *See, e.g., State v. Williams*, 209 N.C. App. 255 (2011) (probable cause and exigent circumstances justified warrantless search of defendant's mouth for drugs during investigatory stop of vehicle). Exigent circumstances are limited to situations involving flight of a suspect, protection of the public from imminent harm, and the need to prevent the destruction of evidence. *See United States v. Curry*, 965 F.3d 313, 321–26 (4th Cir. 2020) (discussing limitations).

Additionally, officers may search a person without a warrant incident to a lawful arrest. *See United States v. Robinson*, 414 U.S. 218 (1973); *State v. Goode*, 350 N.C. 247 (1999). *But see State v. Battle*, 202 N.C. App. 376 (2010) (noting limits on search of person incident to arrest and finding roadside strip search incident to arrest unconstitutional in absence of probable cause and exigent circumstances). Vehicle searches, based on probable cause or arrest of a recent occupant of the vehicle, also may be permissible without a search warrant. *See infra* § 15.6, Did the Officer Act within the Scope of the Arrest or Search (discussing grounds for and limits on such searches).

For further discussion of possible exceptions to the warrant requirement for searches, see the general authorities cited at the beginning of this chapter.

Good faith exception for constitutional violations not valid in North Carolina. North Carolina does not recognize a "good faith" exception to the warrant requirement—that is, if the officer believes in good faith that he or she has authority to search under a warrant

(or a nontestimonial identification order), but the officer is mistaken, the evidence still must be excluded. *See State v. Carter*, 322 N.C. 709 (1988) (relying on state constitution, court declines to follow *United States v. Leon*, 468 U.S. 897 (1984), which recognized a good faith exception to the Fourth Amendment exclusionary rule for certain violations)). North Carolina's stance is not affected by the U.S. Supreme Court's decision in *Herring v. United States*, 555 U.S. 135 (2009), holding that exclusion was not required by the U.S. Constitution where an officer arrested the defendant under a mistaken belief that there was an outstanding warrant for the defendant's arrest, and the officer's conduct was not deliberate, reckless, grossly negligent, or owing to systemic negligence.

Carter remains the law in North Carolina, but it is under pressure. In *State v. Banner*, 207 N.C. App. 729 (2010), the N.C. Court of Appeals cited the N.C. Supreme Court's decision in *State v. Garner*, 331 N.C. 491 (1992), and questioned whether the North Carolina courts have abandoned *Carter.* The *Garner* decision, however, dealt with whether the State must show lack of bad faith to rely on the inevitable discovery doctrine, discussed further below, as a basis for rendering lawful an otherwise unlawful action. *Garner* does not affect the continued validity of *Carter* and its rejection of a good faith exception to the warrant requirement.

In 2011, the North Carolina General Assembly created a good faith exception for statutory violations in G.S. 15A-974(a)(2), which states: "Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful." The word "subdivision" refers to subdivision (2) in subsection (a), the portion of the statute that deals with substantial violations of G.S. Chapter 15A. Thus, the statutory good faith exception applies only to statutory violations and not to constitutional ones. This exception may have little practical impact given that suppression is required under (a)(2) only for *substantial* statutory violations; violations that are substantial are most likely not committed in good faith. For a further discussion of statutory violations, see *infra* § 14.5, Substantial Violations of Criminal Procedure Act.

In a section of the legislation not incorporated into the General Statutes, the General Assembly requested that the N.C. Supreme Court reconsider and overrule its decision in *State v. Carter*. *See* 2011 N.C. Sess. Laws Ch. 6, sec. 2 (H 3). However, the holding in *Carter* remains the law until that Court reconsiders it. *See State v. Springs*, ___ N.C. App. ___, 722 S.E.2d 13 (2012) (unpublished) (discussing *Carter* and later decisions and continuing to follow *Carter*); *cf. infra* "Mistake of law" in § 15.3L, Mistaken Belief by Officer (discussing exception recognized by N.C. Supreme Court for good faith misinterpretation of law as basis for stop without warrant). For further discussion of *Carter* and the good faith exception, see Jonathan Holbrook, *Resurrecting the Good Faith Exception in North Carolina?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 14, 2020).

Plain view doctrine and warrants. As a matter of federal constitutional law, a seizure is lawful under the plain view doctrine when the officer is in a place he or she has a right to be and it is immediately apparent to the officer that the items are evidence of a crime or contraband. *See Horton v. California*, 496 U.S. 128 (1990); *State v. Lupek*, 214 N.C.

App. 146 (2011) (evidence not suppressed where officer responded to a call about a dog shooting, went to defendant's house to investigate, and saw a bong in plain view inside the home while standing on the front porch); *State v. Carter*, 200 N.C. App. 47 (2009) (officer did not have authority to seize and search papers on seat of defendant's car under plain view doctrine where it was not immediately apparent that the papers were evidence of crime). North Carolina law includes the additional requirement that when officers are executing a search warrant, evidence in plain view not specified in the warrant must be discovered inadvertently. *See* G.S. 15A-253; *State v. Mickey*, 347 N.C. 508 (1998).

By analogy to the plain view doctrine, North Carolina has also recognized a "plain smell" doctrine (*State v. Corpening*, 200 N.C. App. 311 (2009) (smell of marijuana emanating from vehicle authorized warrantless search)), and a "plain feel" doctrine. *State v. Williams*, 195 N.C. App. 554 (2009) (following *Minnesota v. Dickerson*, 508 U.S. 366 (1993), court holds that officer who is conducting a lawful frisk and immediately develops probable cause that an item he or she feels is contraband may seize it).

Illegal surveillance. Whenever law enforcement officers watch or listen in a place where an individual would have a reasonable expectation of privacy, the law enforcement activity constitutes a Fourth Amendment search and is subject to the usual warrant and probable cause requirements. *See Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206 (2018) (long term monitoring of cell site location data was a search); *United States v. Jones*, 565 U.S. 400 (2012) (government's installation of GPS tracking device on vehicle and its use to monitor vehicle's movements on public streets constitutes a "search"); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of thermal imaging or other technology to gather information that would otherwise require physical intrusion into home or other constitutionally protected area is "search"); *Katz v. United States*, 389 U.S. 347 (1967) (person has reasonable expectation of privacy in phone booth); *cf. State v. Rollins,* 363 N.C. 232 (2009) (communication between prisoner and spouse was not protected by marital communications privilege based on lack of reasonable expectation of privacy in public visiting area of prison); *State v. Terry*, 207 N.C. App. 311 (2010) (defendant did not have reasonable expectation of privacy in conversation with wife at county sheriff's office in interview room where warning signs indicated premises were under surveillance); *State v. Jarrell*, 24 N.C. App. 610 (1975) (no search where police officer hid in attic and watched public areas of restroom; person would have reasonable expectation of privacy in stalls only); *State v. McCray*, 15 N.C. App. 373 (1972) (no error in allowing police officer to testify regarding statements he overheard the defendant make when the defendant was making a phone call while in custody). For additional information on the U.S. Supreme Court's recent surveillance opinions, see Jeff Welty, *The Supreme Court on GPS Tracking: U.S. v. Jones*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 24, 2012). *See also generally* Jeff Welty, *Warrantless Searches of Computers and Other Electronic Devices* (UNC School of Government, Apr. 2011) (collecting cases); Jeff Welty, *Carpenter, Search Warrants, and Court Orders Based on Probable Cause,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 30, 2018); Shea Denning, *Conducting Surveillance and Collecting Location Data in a Post-Carpenter World (Parts I, II, and III),* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (various dates).

Federal and state law prevent either private parties or the government from engaging in eavesdropping or wiretapping without a court order. *See* 18 U.S.C. 2510 through 18 U.S.C. 2523; G.S. 15A-286 through G.S. 15A-298. Violation of wiretapping and eavesdropping laws may be the basis of a suppression motion. *See State v. Shaw*, 103 N.C. App. 268 (1991); *see also State v. Price*, 170 N.C. App 57 (2005) (interception of telephone calls does not violate federal or state wiretapping law as long as one of parties to communication gives prior consent; pretrial detainee and other party were deemed to have consented to recording of phone conversation on jail phone when they kept talking after a message gave notice that the call was subject to recording). Violations of other federal laws may not provide a suppression remedy. *See State v. Stitt*, 201 N.C. App. 233 (2009) (even if State did not fully comply with 18 U.S.C. 2703(d) of the Stored Communications Act in obtaining records pertaining to cell phones possessed by defendant, federal law did not provide for suppression remedy). *See generally* Jeffrey B. Welty, *Prosecution and Law Enforcement Access to Information about Electronic Communications*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/05 (UNC School of Government, Oct. 2009).

Inevitable discovery and independent source rules. Although not an exception to the warrant requirement, the "inevitable discovery" rule is an exception to the exclusionary rule. If the police discover evidence as the result of an illegal search but can prove at a suppression hearing that the evidence would inevitably have been discovered by legal means, the evidence may be admitted at trial. *See Nix v. Williams*, 467 U.S. 431 (1984); *State v. Garner*, 331 N.C. 491 (1992) (following *Nix*); *State v. Wells*, 225 N.C. App. 487 (2013) (trial court erred in finding defendant's laptop would have inevitably been discovered).

A closely related exception to the exclusionary rule is the independent source doctrine. This rule applies where police obtained evidence from illegal means but also discover the same evidence by lawful means. Under this doctrine, the evidence may still be admitted as long as the lawful discovery of the evidence (or the decision to issue a search warrant) was not influenced by evidence obtained during the illegal search. *Murray v. United States*, 487 U.S. 533 (1988); *Costello v. United States,* 365 U.S. 265 (1961) (fruit of poisonous tree doctrine does not require exclusion of evidence obtained from an independent source).

C. Arrest Warrants

Generally, a person is "seized" for purposes of the Fourth Amendment when a reasonable person in the suspect's position would not feel free to leave the presence of the officer. *See United States v. Mendenhall*, 446 U.S. 544 (1980); *see also infra* § 15.2, Did the Officer Seize the Defendant? (discussing general test and circumstances in which a different test may apply).

An arrest is one example of a Fourth Amendment "seizure." As a general matter, a person may not be seized or arrested without the issuance of a warrant based on "probable cause" to believe the person seized or arrested committed a crime. *See State v. Farmer*, 333 N.C. 172 (1993). There are a number of exceptions to this rule, however. Thus, an

officer may make a brief investigative stop, known as a *Terry* stop, without a warrant or probable cause if he or she has "reasonable suspicion" of illegal activity. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also infra* § 15.3, Did the Officer have Grounds for the Seizure? (discussing *Terry* stops and other grounds for warrantless seizures). An officer also may arrest a person without a warrant if the officer has probable cause to believe that the suspect has committed a felony or certain misdemeanors or violated a pretrial release order, or witnesses the suspect commit a misdemeanor. *See* G.S. 15A-401(b); *State v. Dammons*, 128 N.C. App. 16 (1997). For a further discussion of possible exceptions to the warrant requirement for arrests and other seizures, see the general authorities cited at the beginning of this chapter.

D. Search Incident to Arrest

For a discussion of whether the officer acted within the scope of arrest when conducting a search, see *infra* § 15.6B, Search Incident to Arrest; § 15.6C, Other Limits on Searches Incident to Arrest. Of particular note is the case of *Arizona v. Gant*, 556 U.S. 332 (2009), which overruled prior U.S. Supreme Court and North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. In *Gant*, the United States Supreme Court held that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted and thus able to obtain a weapon or destroy evidence; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *See also State v. Mbacke*, 365 N.C. 403 (2012) (analogizing the "reasonable to believe" standard in the second prong of *Gant* to the "reasonable suspicion" standard of a *Terry* stop, court finds that arresting officers could have reasonably believed that evidence relevant to offense of arrest of carrying a concealed weapon would be found in defendant's vehicle); *State v. Johnson*, 204 N.C. App. 259 (2010) (applying *Gant* and finding search of defendant's vehicle unconstitutional; defendant was secured in back of police car before search started and it was not reasonable for officers to believe evidence of defendant's revoked license would be found); *State v. Carter*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

The U.S. Supreme Court has further limited the applicability of the search incident to arrest exception regarding cell phones. Under *Riley v. California*, 573 U.S. 373 (2014), a search warrant will generally be required for law enforcement to examine the contents of a suspect's mobile phone and a search incident to arrest will typically not justify the search of such device. For more on *Riley* and cell phone searches, see Jeff Welty, *Supreme Court: Can't Search Cell Phones Incident to Arrest*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 26, 2014).

E. Knock and Talk

Validity of the practice. The "knock and talk" practice is one in which law enforcement officers, acting without a warrant and often without probable cause, knock on the door of a dwelling in order to question its inhabitants and often ask for consent to search their

home. *State v. Smith*, 346 N.C. 794, 800 (1997) ("'Knock and talk' is a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant."). Officers may approach the front door for a "knock and talk" without a warrant on the theory that occupants generally expect, and therefore implicitly consent to, this sort of intrusion onto their property. *State v. Church,* 110 N.C. App. 569, 573–74 (1993); *see generally State v. Corbett*, 516 P.2d 487, 490 (Ore. App. 1973) ("[i]f one has a reasonable expectation that various members of society may enter the property in their personal and business pursuits, he should find it equally likely that the police will do so"). Because the decision to approach an occupant's door to conduct a "knock and talk" is recognized under the Fourth Amendment and therefore is not subject to prior judicial review, this practice has been criticized as one that allows the targeting of minorities or other vulnerable populations. *See* Brian J. Foley, *Policing From the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 340 (2010) (observing that "when police do not have to give reasons for discretionary searches or seizures, conscious and unconscious racism may prevail").

Limitations on the "knock and talk" practice. In *Florida v. Jardines*, 569 U.S. 1 (2013), the U.S. Supreme Court approved of the "knock and talk" practice in general, finding that police, like other members of the public, have an implied license to briefly approach the front door of a residence: "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id*. at 8. North Carolina courts also recognize the technique as valid. *State v. Grice*, 367 N.C. 753, 757 (2015) (so stating).

Despite its general validity, there are meaningful limitations to the "knock and talk" practice.

- A "knock and talk" may violate the Fourth Amendment if an officer enters an occupant's backyard to knock on a defendant's backdoor. *See, e.g., State v. Huddy*, 253 N.C. App. 148, 152 (2017) ("An officer's implied right to knock and talk extends only to the entrance of the home that a 'reasonably respectful citizen' unfamiliar with the home would believe is the appropriate door at which to knock."); *State v. Pasour*, 223 N.C. App. 175 (2012) (police violated Fourth Amendment by entering backyard to knock on backdoor after receiving no response to knocks on front and side doors). *Compare State v. Grice*, 367 N.C. 753 (2015) (where front door was completely obscured and side door appeared to be the main entrance to the home, implicit license allowed knock on side door).
- An officer conducting a "knock and talk" may not seize evidence unless he or she has a "lawful right of access" to the evidence itself. *State v. Grice,* 367 N.C. 753, 756–57 (2015) (reviewing elements of plain view doctrine); *State v. Falls*, 275 N.C. App. 239 (2020) (no lawful right of access to evidence in plain view where officers approached home through the trees instead of the driveway, at night, to conduct knock and talk); *see also State v. Nance*, 149 N.C. App. 734, 742 (the permissibility of knock and talks does not "stand[] for the proposition that law enforcement officers may enter private property without a warrant and seize evidence of a crime").

- The right to approach an occupant's front door to conduct a "knock and talk" does not include free license to search the curtilage for evidence or speak to house guests after the officers have been asked to leave. *State v. Ellis,* 266 N.C. App. 115 (2019) (officers peering into a crawlspace was a search and not justified as a knock and talk); *State v. Stanley*, 259 N.C. App. 708 (2018) (knock and talk at back door was improper despite law enforcement's observation of controlled drug buys at that door; use of back or side door by some people did not give officers implied license to approach back door); *Rogers v. Pendleton*, 249 F.3d 279, 295 (4th Cir. 2001) (questioning house guests, even with reasonable suspicion, was a search of the curtilage that exceeded a mere knock and talk).
- Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 9–10 (2013).

Attorneys also may raise Equal Protection Clause challenges to race-based decisions to initiate "knock and talks." Such challenges might be considered, for example, when it appears that police officers are targeting predominantly minority neighborhoods for "knock and talks." Such challenges should also be raised under article I, section 19 of the N.C. Constitution. For more information on Equal Protection challenges to knock and talks and other police encounters, see ALYSON GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 2.3, Equal Protection Challenges to Police Action (UNC School of Government, 2014).

Consent to search following a "knock and talk." Searches following "knock and talks" are permissible when the occupant freely, voluntarily, and unequivocally consents to the search. Evidence obtained in a consent search will be admitted only when there is "clear and positive testimony that consent was unequivocal and specific and freely given; and . . . [t]he government . . . prove[s] consent was given without duress or coercion, express or implied." *United States v. Miller*, 933 F. Supp. 501, 505 (M.D.N.C. 1996). Consent must be granted intentionally. In *United States v. Johnson*, 333 U.S. 10, 13 (1948), the Supreme Court characterized a defendant's alleged permission to search following a "knock and talk" as a "submission to authority rather than as an understanding and intentional waiver of a constitutional right" and rejected it as nonconsensual. *See also Rogers v. Pendleton*, 249 F.3d 279, 295 (4th Cir. 2001) ("The police do not have a right to arrest citizens for refusing to consent to an illegal search."). Two factors that strengthen a defendant's argument that his or her consent was invalid are a defendant's attempts to prevent officers from entering the home and an officer's coercive tactics, including drawn weapons, raised voices, and intimidating demands. *See* Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 IND. L.J. 1099, 1104 (2009).

F. Adequacy of Affidavit in Support of Probable Cause

All search and arrest warrants must be based on the issuing magistrate's or judge's determination of "probable cause"—for a search warrant, probable cause to believe that the evidence to be seized is in the place to be searched; and for an arrest warrant, probable cause to believe that the suspect to be arrested committed the crime. (A clerk of

court also may issue search and arrest warrants. G.S. 15A-243; G.S. 7A-180; G.S. 7A-181.)

Adequacy of record. A finding of "probable cause" for a search warrant must be supported by sufficient credible facts alleged in a supporting affidavit. *See Aguilar v. Texas*, 378 U.S. 108 (1964); *State v. Hyleman*, 324 N.C. 506 (1989) (bare bones, conclusory affidavit insufficient to support finding of probable cause); *accord State v. Bone*, 354 N.C. 1 (2001); *State v. Taylor*, 191 N.C. App. 587 (2008) (magistrate did not have a substantial basis for finding probable cause to issue search warrant); G.S. 15A-244(3) (describing requirements for search warrant application). This means that only the evidence in the affidavit (or other evidence contemporaneously submitted to the issuing official under oath and made part of the record by the issuing official) may be considered in determining the adequacy of the showing of probable cause for the warrant. *See* G.S. 15A-245(a) (stating requirement); *State v. Teasley*, 82 N.C. App. 150 (1986) (officer's oral testimony to magistrate could not be considered in determining sufficiency of evidence for issuance of search warrant because magistrate did not make the statement part of the record); *see also*, Bob Farb, *The Statutory "Four Corners" Rule When Determining Probable Cause for a Search*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 28, 2016).

Practice note: Because the evidence submitted in support of a search warrant is effectively fixed and not subject to change at a suppression hearing, cases involving search warrants present fruitful opportunities for suppression.

False information. If a defendant establishes by a preponderance of the evidence that an affiant made a false statement knowingly or with reckless disregard for the truth, then that false information must be set aside. If the remainder of the affidavit is insufficient to establish probable cause, then the warrant must be voided and the fruits of the search or arrest excluded from trial. *See Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Moore*, 275 N.C. App. 302 (2020) (applying *Franks* to grant suppression for false and misleading statements); *State v. Severn*, 130 N.C. App. 319 (1998); G.S. 15A-978 (defendant entitled to challenge truthfulness of affidavit supporting search warrant); *see also State v. Martin*, 315 N.C. 667 (1986) (applying *Franks* to arrest warrant); *State v. Pearson*, 356 N.C. 22 (2002) (same rules apply to affidavit in support of nontestimonial identification order); *see also State v. Watkins*, 120 N.C. App. 804 (1995) (information fabricated by one officer and supplied to stopping officer may not be used to show reasonable suspicion, even if stopping officer did not know that the information was fabricated).

A defendant is entitled to introduce evidence at a suppression hearing contesting the truthfulness of the evidence presented to the magistrate. *See* G.S. 15A-978(a); *State v. Monserrate*, 125 N.C. App. 22 (1997) (trial court erred in excluding evidence tending to show that police inaccurately reported informant's information to magistrate).

G. "Fruits" of Illegal Search or Arrest

When evidence is obtained as a result of illegal police conduct, not only must that evidence be suppressed, but also all evidence that is the "fruit" of the illegal conduct. For example, if an illegal entry into a person's home or an illegal arrest results in a confession or admission, the statement must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471 (1963); *Davis v. Mississippi*, 394 U.S. 721 (1969); *State v. Guevara*, 349 N.C. 243 (1998); *State v. Freeman*, 307 N.C. 357 (1983).

Such derivative evidence is admissible only if the "taint" of the constitutional violation is removed. *See Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *State v. Allen*, 332 N.C. 123 (1992) (two-hour lapse between illegal arrest and statement did not purge taint, and confession had to be suppressed); *see also supra* "Inevitable discovery rule" in § 14.2B, Search Warrants (illegally obtained evidence that otherwise would be inadmissible may be admissible under the inevitable discovery rule). Where a person commits a crime subsequent to an illegal seizure, North Carolina has held that evidence of the crime is not subject to suppression. *See State v. Barron*, 202 N.C. App. 686 (2010) (although defendant was arrested without probable cause, his subsequent criminal conduct of giving the officers false identifying information was admissible and not barred by the exclusionary rule).

H. Invalid Consent

A person may consent to a search or a stop by a police officer. However, consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Pearson*, 348 N.C. 272 (1998). The State has the burden of proving voluntariness. *State v. Crenshaw*, 144 N.C. App. 574 (2001). The question of whether consent was voluntary or was the product of duress or coercion is a question of fact to be determined from the totality of the circumstances. *See State v. Steen*, 352 N.C. 227 (2000) (citing *Schneckloth*); *State v. McMillan*, 214 N.C. App. 320 (2011) (court finds defendant's consent voluntary to an oral swab, photographing his injuries, and collection of items of clothing after he voluntarily went to sheriff's office, even though officers told defendant he could consent or be detained four or five hours while officers obtained search warrant); *State v. Boyd*, 207 N.C. App. 632 (2010) (defendant's consent to provide saliva sample for DNA testing voluntarily given, even though the defendant was not told he was being investigated for sexual offenses); *State v. Kuegel*, 195 N.C. App. 310 (2009) (defendant's consent to search his residence was voluntary despite officer's untruthful statements that he had been conducting surveillance of the residence and had obtained evidence of drug dealing).

A search or seizure may not extend beyond the scope of the suspect's consent. *See State v. Stone*, 362 N.C. 50 (2007) (defendant's general consent to search did not authorize officer to pull defendant's pants away from his body and shine flashlight on groin area); *State v. Pearson*, 348 N.C. at 277 (consent to search vehicle did not imply consent to search person); *State v. Schiro*, 219 N.C. App. 105 (2012) (vehicle search based on consent not invalid where officers removed the rear quarter panels from the interior of the

trunk); *see also* G.S. 15A-221 through G.S. 15A-223 (statutory provisions on search and seizure by consent).

For a further discussion of consent in the context of a warrantless stop or arrest, see *infra* § 15.4E, Nature, Length, and Purpose of Detention, and § 15.5D, Consent.

I. Attenuation

Under *Utah v. Strieff*, 579 U.S. ___, 136 S. Ct. 2056 (2016), even evidence obtained during an illegal stop or seizure may be admissible when the connection between police illegality and the discovery of evidence is distant or broken by intervening circumstances. The U.S. Supreme Court identified three factors relevant to the analysis:

- the closeness in time between the illegal act and the discovery of evidence,
- any intervening circumstances, and
- the "purpose and flagrancy" of the law enforcement misconduct.

Strieff involved the impact of an outstanding arrest warrant. The Court held that evidence obtained from an unconstitutional detention was admissible where police discovered a valid, outstanding arrest warrant for the defendant during the encounter—the discovery of the warrant attenuated the evidence from the illegality, in other words. As a result of the ruling, the existence of an outstanding warrant may trigger the attenuation exception and result in the admission of evidence that would otherwise be suppressed. *See* Shea Denning, *Utah v. Strieff and the Attenuation Doctrine,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 6, 2016).

North Carolina courts have adopted the attenuation exception to the exclusionary rule as a matter of Fourth Amendment law. *State v. Hester*, 254 N.C. App. 506 (2017) (new and separate crime was sufficient to attenuate evidence from alleged illegal stop); *State v. Thomas,* 268 N.C. App. 121 (2019) (new crime was sufficient to attenuate illegal search). The North Carolina courts have also recognized limits to the exception. *See State v. Duncan*, 272 N.C. App. 341 (2020) (running from police during illegal search did not constitute separate crime of resisting public officer and was not an intervening circumstance for purposes of attenuation).

Practice note: The question of whether the attenuation doctrine applies to violations of the North Carolina State Constitution is an open one. Consider raising and preserving the argument that the state constitution provides greater protections than the federal constitution on this point, and that attenuation does not apply to state constitutional violations.

J. Nontestimonial Identification Orders

When a suspect is not in police custody and police wish to obtain DNA, hair, fingerprints, or other samples from the person, the police may obtain a nontestimonial identification order from a judge on a showing of less than traditional probable cause—that is, probable

cause to believe that a felony or Class A1 or 1 misdemeanor has been committed, reasonable suspicion to believe the named person committed the offense, and grounds to believe that the procedure will be of material aid in determining whether the person committed the offense. *See* G.S. 15A-273; G.S. 15A-274. If the suspect is in police custody, police must obtain a search warrant. *See State v. Carter*, 322 N.C. 709 (1988). Further, for more intrusive procedures, such as withdrawing blood, a search warrant, supported by probable cause, is required regardless of whether the person is in custody. *See id.*; *see also* FARB at 249 (so interpreting *Carter*). For a discussion of the statutory authorization to take a DNA sample at the time of arrest for certain offenses, see *infra* § 14.4H, DNA Samples at Time of Arrest.

K. Breath and Blood Samples in Implied Consent Cases

The U.S. Supreme Court has held that the warrantless taking of a breath sample is permissible as a search incident to arrest. *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016). A blood or urine sample, by contrast, should be obtained by way of a search warrant unless the defendant consents or exigent circumstances exist. *See Schmerber v. California*, 384 U.S. 757 (1966) (an officer who has probable cause to believe a person has committed an offense involving impaired driving, a clear indication that the blood sample will provide evidence of the defendant's impairment, along with either a search warrant or exigent circumstances, may compel a person to submit to a forced extraction of blood in a reasonable manner); *State v. Fletcher*, 202 N.C. App. 107, 111 (2010) (finding "the exigency surrounding obtaining a blood sample when blood alcohol level is at issue . . . and the evidence of a probability of significant delay if a warrant were obtained" to constitute sufficient evidence of exigent circumstances).

The natural dissipation of alcohol alone does not constitute a per se exigency justifying a warrantless blood draw in all cases under *Missouri v. McNeely,* 569 U.S. 141 (2013). Rather, law enforcement must articulate specific facts and circumstances establishing that obtaining a search warrant was impractical (although the dissipation of alcohol is properly a factor in the exigent circumstances analysis). In *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S. Ct. 2525 (2019), a plurality of the U.S. Supreme Court held that exigent circumstances will normally excuse the warrant requirement when police encounter an unconscious driver suspected of impaired driving.

G.S. 20-139.1(d1) provides that if a person charged with an implied consent offense refuses testing, "any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine." To the extent this statute purports to authorize a blood or urine test based on a standard of less than exigent circumstances, or on exigent circumstances based solely on the dissipation of alcohol, *McNeely* renders it unconstitutional under the Fourth Amendment. *See State v. Romano*, 369 N.C. 678 (finding G.S 20-139.1 unconstitutional as applied to the defendant under *McNeely*); *see also* Shea Denning, *State Supreme Court*

Issues Significant Rulings on HGN Evidence and Blood Draws in DWI Cases, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 14, 2017).

14.3 Illegal Confessions or Admissions

The constitutional bases for excluding illegally obtained confessions or admissions are the Fifth and Sixth Amendments to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, sections 19, 23 and 24, of the North Carolina Constitution. In addition to the general reference sources cited at the beginning of this chapter, see Jeff Welty, *The Law of Interrogation in North Carolina* (UNC School of Government, June 2012).

A. Involuntary Confessions

Due process is violated when police coerce a suspect into making a confession. Coercion may include: (i) physical force; (ii) depriving the suspect of food, sleep, or the ability to communicate with the outside world; or (iii) psychological ploys such as threats or promises. Because it is so suspect, an involuntary confession is inadmissible for any purpose, including impeachment. *See Mincey v. Arizona*, 437 U.S. 385 (1978) (confession obtained from hospitalized suspect in great pain not voluntary and not admissible even to impeach); *State v. Pruitt*, 286 N.C. 442 (1975) (confession made in response to inducement of hope that defendant would obtain relief from charged offense not voluntary); *State v. Lynch,* 271N.C. App. 532 (2020) (reviewing cases and finding confession involuntary where police promised leniency and defendant was not predisposed to admit guilt); *State v. Bordeaux*, 207 N.C. App. 645 (2010) (confession not voluntary where defendant confessed after officers promised to testify on his behalf, engendering hope of more lenient punishment, and suggested defendant might still be able to attend college); *compare State v. Wallace*, 351 N.C. 481 (2000) (confession not involuntary where induced by promise that defendant could see his daughter and girlfriend if he confessed); *State v. Cornelius*, 219 N.C. App. 329 (2012) (confessions obtained from hospitalized suspect on medication not involuntary where hospital records and recorded statements supported findings that suspect was alert and oriented); *State v. Hunter*, 208 N.C. App. 506 (2010) (confession not involuntary although the defendant ingested crack cocaine several hours before interrogation).

A court must examine the totality of the circumstances in determining whether a confession is involuntary. *See Malloy v. Hogan*, 378 U.S. 1 (1964); *Bordeaux*, 207 N.C. App. at 655–66 (applying totality of circumstances test and finding confession involuntary).

B. *Miranda* Violations

Generally. A defendant may be able to suppress a statement under the authority of *Miranda v. Arizona*, 384 U.S. 436 (1966), if he or she gives a statement while in police custody in response to interrogation and:

- was not adequately given *Miranda* warnings;
- did not knowingly and voluntarily waive his or her *Miranda* rights; or
- invoked his or her rights and that invocation was not honored by the police.

Requirements of "custody" and "interrogation." As a means of protecting the Fifth Amendment privilege against self-incrimination, a suspect is constitutionally entitled to receive *Miranda* warnings if he or she (i) is in police custody, and (ii) is interrogated by the police.

"Custody" has been defined as either arrest or "a restraint on freedom of movement of the degree associated with formal arrest." *State v. Buchanan*, 353 N.C. 332 (2001) (disavowing former test for custody of whether reasonable person would feel free to leave presence of police, the test used under the Fourth Amendment for determining whether a seizure occurred); *see also State v. Waring*, 364 N.C. 443 (2010) (defendant not in custody during initial questioning at police station; officer first told defendant that he was "being detained" but "was not under arrest" and defendant then voluntarily went to police station, where he was left alone in unlocked interview room with no guard posted); *State v. Hemphill*, 219 N.C. App. 50 (2012) (interrogation was custodial for *Miranda* purposes where defendant was chased, forced to ground with taser, and handcuffed; court finds defendant not prejudiced by failure to suppress statements); *State v. Allen*, 200 N.C. App. 709 (2009) (defendant at hospital for treatment was not in custody to require *Miranda* warnings when officer questioned him). A person is not necessarily in custody within the meaning of *Miranda* when he is in prison and is removed from the general population for questioning about events that occurred outside prison. See *infra* "Interrogation of pretrial detainees and prisoners" in this subsection B.

The age of a child subjected to police questioning is relevant to the *Miranda* custody analysis if the child's age was known to the officer at the time of police questioning or would have been objectively apparent to a reasonable officer. *J.D.B. v. North Carolina*,564 U.S. 261 (2011). The rationale for this holding is that a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. While *J.D.B.* declined to consider factors other than age, counsel may argue that other personal characteristics, such as low IQ, may similarly affect a person's understanding of his or her freedom of action. *See State v. Quick*, 226 N.C. App. 541 (2013) (State failed to prove that any waiver of *Miranda* rights was knowing and voluntary where defendant was 18 years old, had limited experience with the criminal justice system, there was a period of time between 12:39 p.m. and 12:54 p.m. where there is no evidence as to what occurred, and the interrogation was not recorded).

"Interrogation" is defined as questioning or its functional equivalent—that is, statements or actions that the officers should have known were reasonably likely to elicit an incriminating response by the subject. *See Rhode Island v. Innis*, 446 U.S. 291, 300–02 (1980); *State v. Hensley*, 201 N.C. App. 607 (2010) (officer's conduct and statements to defendant, including saying the conversation was not "on the record," constituted interrogation to require *Miranda* warnings); *compare State v. Stover*, 200 N.C. App. 506

(2009) (court finds that officer asked defendant why he was hanging out the window to ascertain circumstances rather than to elicit incriminating response; additional, unsolicited statements by defendant were not in response to question asked). There is no violation of the Fifth Amendment when a suspect makes a "spontaneous" statement to police, not in response to interrogation. *See, e.g., State v. Jones*, 161 N.C. App. 615 (2003). Factors that are relevant to the determination of whether police interrogated a suspect, or should have known their conduct was likely to elicit an incriminating response, include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion. *State v. Fisher*, 158 N.C. App. 133 (2003), *aff'd per curiam*, 358 N.C. 215 (2004); *see also State v. Herrera*, 195 N.C. App. 181 (2009) (police did not interrogate suspect by placing call to suspect's grandmother in Honduras and allowing him to converse with her on speaker phone in presence of officer and interpreter), *rev'd on other grounds by State v. Ray*, 364 N.C. 272 (2010).

Miranda warnings do not apply to a request for consent to search, in part because a request for consent has been held not to constitute an interrogation under *Miranda*. *See State v. Cummings*, 188 N.C. App. 598 (2008) (defendant's motion to suppress evidence seized as a result of consent search of his car denied although officer obtained consent after defendant had invoked *Miranda* rights).

Waiver. Before any custodial statement, made in response to police interrogation, is admissible at trial, the suspect must knowingly and voluntarily waive his or her rights. *See Miranda v. Arizona*, 384 U.S. 436 (1966). As a practical matter, law enforcement officers generally try to obtain an express waiver of rights from a defendant. *See* FARB at 578–79 (recommending this practice to officers). An express waiver may not be necessary, however. *See North Carolina v. Butler*, 441 U.S. 369 (1979) (so stating). For example, in *Berghuis v. Thompkins*, 560 U.S.370 (2010), the Court found that a suspect who had been given *Miranda* warnings and had remained largely silent during a two hour and forty-five minute interrogation waived his rights by responding to a question. The court did not require an express waiver and found instead that the uncoerced statement constituted an implied waiver. The suspect's silence during the bulk of the interrogation did not invoke his right to remain silent. For additional analysis of the *Berghuis* opinion, see Robert L. Farb, *The United States Supreme Court's Ruling in Berghuis v. Thompkins* (UNC School of Government, June 7, 2010).

Conversely, an express waiver may not be sufficient to show a valid waiver of rights if other evidence, such as evidence of coercion or lack of understanding, shows that the defendant did not waive his or her rights knowingly and voluntarily.

Whether a waiver of *Miranda* rights was knowing and voluntary has been the subject of numerous cases, too numerous to cover in this manual. *See, e.g., State v. Quick*, 226 N.C. App. 541 (2013) (State failed to prove that any waiver of *Miranda* rights was knowing and voluntary where defendant was 18 years old, had limited experience with the criminal justice system, there was a period of time between 12:39 p.m. and 12:54 p.m.

where there is no evidence as to what occurred, and the interrogation was not recorded); *State v. Robinson*, 221 N.C. App. 509 (2012) (waiver knowing and voluntary based on totality of circumstances despite defendant's limited mental capacity); *State v. Bordeaux*, 207 N.C. App. 645 (2010) (confession was involuntary where defendant received *Miranda* warnings and waived right to remain silent after officers promised to testify on his behalf, engendering a hope of more lenient punishment, and suggested defendant may still be able to attend college); *State v. Mohamed*, 205 N.C. App. 470 (2010) (the defendant's English skills sufficiently enabled him to understand *Miranda* warnings that were read to him where the defendant complied with officer's instructions, wrote his confession in English, and never asked for an interpreter); *State v. Nguyen*, 178 N.C. App. 447 (2006) (defendant's written waiver of *Miranda* rights knowing and voluntary where police officer acted as interpreter); *State v. Crutchfield*, 160 N.C. App. 528 (2003) (defendant moved to suppress statements made while he was in the hospital and under medication on the theory that he did not knowingly and voluntarily waive *Miranda* rights; denial of motion upheld).

Invocation of right to counsel. If a suspect invokes his or her *right to counsel,* the invocation must be honored by police and *all* in-custody interrogation must stop regarding *all* crimes until the suspect is provided with counsel or, as discussed below, there has been a 14-day break in custody. In-custody questioning may resume before then only if the suspect asks to talk further with police. *See Edwards v. Arizona*, 451 U.S. 477 (1981); *State v. Torres*, 330 N.C. 517 (1992), *overruled on other grounds by State v. Buchanan,* 353 N.C. 332 (2001); *State v. Quick*, 226 N.C. App. 541 (2013) (defendant did not initiate communication with police after his initial request for counsel and thus did not waive right to counsel; defendant talked to police only after they told him an attorney could not help him, which police knew or should have known would be reasonably likely to elicit an incriminating response); *State v. Moses*, 205 N.C. App. 629 (2010) (no error to deny defendant's motion to suppress where defendant initially invoked his right to counsel and later reinitiated conversation with officer, who again advised defendant of *Miranda* rights and obtained a written waiver).

In *Edwards*, the U.S. Supreme Court established that once a defendant asserts the right to counsel at a custodial interrogation, an officer may not conduct a custodial interrogation of the defendant until a lawyer is made available for the interrogation or the defendant initiates further communication with the officer. The rationale behind *Edwards* was that once the defendant invokes the right to counsel, any subsequent waiver of the right to counsel and response to police-initiated custodial interrogation is presumed involuntary. However, in *Maryland v. Shatzer*, 559 U.S. 98 (2010), the U.S. Supreme Court announced a new rule—when there is a break in custody for 14 days or more after a defendant has asserted the right to counsel at a custodial interrogation, an officer may reinitiate custodial interrogation after giving *Miranda* warnings and obtaining a waiver of *Miranda* rights. A two-week break in custody, according to the Court, is sufficient to end the inherently compelling pressures of custodial interrogation. Thus, officers may lawfully approach a defendant, obtain a waiver, and interrogate him or her, even though the defendant told the officers two weeks earlier that he or she did not want to talk to them without having a lawyer present. For further discussion of the

impact of *Shatzer*, see Robert L. Farb, *The United States Supreme Court's Ruling in Maryland v. Shatzer* (UNC School of Government, May 10, 2010). For a discussion of the impact of *Shatzer* on questioning of pretrial detainees, see *infra* "Interrogation of pretrial detainees and prisoners" in this subsection B.

As a general matter, a request for counsel must be unambiguous to halt interrogation. *See Davis v. United States*, 512 U.S. 452 (1994); *State v. Little*, 203 N.C. App. 684 (2010) (suspect did not invoke right to counsel by asking detective whether he needed a lawyer); *State v. Dix*, 194 N.C. App. 151, 156–57 (2008) (under circumstances, suspect's statement "I'm probably gonna have to have a lawyer," did not invoke right to counsel); *compare State v. Torres*, 330 N.C. 517 (1992) (in pre-*Davis* case, the court held that when a defendant makes an ambiguous request for counsel, officer must clarify the defendant's request before continuing with the interrogation [although this aspect of the decision has been superseded by *Davis*, the court's holding that the defendant invoked her right to counsel in the circumstances of the case may remain good law—she twice asked officers whether she needed a lawyer and was advised that she did not need one; in *Dix*, 194 N.C. App. at 157, the court noted that the officers in *Torres* dissuaded the defendant from having counsel during the interrogation]).

For a discussion of the limits on questioning a defendant who is not in custody and who is protected by the Sixth Amendment right to counsel, see *infra* § 14.3C, Confessions in Violation of Sixth Amendment Right to Counsel.

Invocation of right to silence. If a suspect invokes his or her *right to silence*, the interrogation likewise must stop. Some cases suggest that if a suspect invokes the right to silence only, an officer may later reinitiate interrogation without a break in custody in some circumstances. *See State v. Murphy*, 342 N.C. 813 (1996) (finding on facts presented that reinitiation of interrogation violated defendant's Fifth Amendment rights; officers did not "scrupulously honor" defendant's assertion of right to remain silent); *see also* FARB at 579 (discussing issue); 2 LAFAVE CRIMINAL PROCEDURE § 6.9(f), at 939 (finding it "highly questionable" to permit police to reinitiate interrogation about same crime of defendant who has asserted right to remain silent). The suspect must clearly invoke the right to remain silent. *See State v. Fletcher*, 348 N.C. 292 (1998) (incriminating statements admissible where defendant said that after he got some sleep he would lead officers to stolen items, the officers took a break, and then they reinitiated interrogation). Remaining silent does not necessarily constitute an assertion of the right to remain silent. In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the court held that the defendant did not unambiguously assert the right to remain silent where he was mostly silent during two hours and forty-five minutes of interrogation and then made incriminating statements without affirmatively asserting the right to remain silent. *See also State v. Westmoreland*, 314 N.C. 442, 445 (1985) (defendant who remained silent except for occasional brief denials of involvement "only showed that he did not desire to respond to specific questions" and did not thereby assert his right to remain silent); *State v. Bordeaux*, 207 N.C. App. 645 (2010) (following *Berghuis* in dictum).

The defendant's silence itself may be admissible against the defendant where the right is not expressly invoked and when the defendant was not in custody. *See Salinas v. Texas,* 570 U.S. 178 (2013) (where defendant was not in custody and voluntarily answered some questions without invoking his right to silence, his silence in the face of other questions could be used against him at trial); *see also* Jessica Smith, *Use of a Defendant's Pre- and Post-Arrest Silence at Trial*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 13, 2012).

Impeachment exception. A confession that has been suppressed for a *Miranda* violation, if otherwise voluntary under the Due Process Clause, may still be used to impeach a defendant who takes the stand and testifies on his or her own behalf at trial. *See Harris v. New York*, 401 U.S. 222 (1971); *State v. Bryant*, 280 N.C. 551 (1972); *State v. Burton*, 119 N.C. App. 625 (1995). *But see Missouri v. Seibert*, 542 U.S. 600 (2004) (court holds that deliberate withholding of *Miranda* warnings until after defendant confessed rendered inadmissible subsequent incriminating statements made after warnings were given; court expresses disapproval, in footnote 7, of similar tactic to obtain impeachment evidence).

Interrogation of pretrial detainees and prisoners. In *Maryland v. Shatzer*, 559 U.S. 98 (2010), the U.S. Supreme Court announced that when there is a break in custody for 14 days or more after a defendant has asserted the right to counsel at a custodial interrogation, an officer may reinitiate custodial interrogation after giving *Miranda* warnings and obtaining a waiver of *Miranda* rights. The Court also ruled in *Shatzer* that a return to the general prison population by a prisoner serving his or her sentence may constitute a break in custody. The Court reasoned that a defendant who returns to the general prison population regains the degree of control over his or her life that existed before the interrogation. Thus, the inherently compelling pressures of custodial interrogation end when the defendant returns to his or her "normal life" in prison.

In *Howes v. Fields*, 565 U.S. 499 (2012), the U.S. Supreme Court held that incarceration does not always amount to custody for purposes of *Miranda*. In *Fields*, the Court found that the defendant, an inmate who was serving a prison sentence, was not in custody for *Miranda* purposes when he was taken from his cell to a conference room and questioned for five to seven hours about crimes allegedly committed outside of prison. The Court reasoned that questioning a person who is already serving a prison sentence does not generally involve the shock that accompanies arrest, and a person who is already serving a prison sentence is unlikely to be lured into speaking by a longing for prompt release and would be likely to know that law enforcement officers lack the authority to alter his sentence. The Court took note of factors such as: the defendant was told that he could leave and go back to his cell whenever he wanted, the conference room door was sometimes open, and the defendant was not restrained.

In light of *Fields*, the State could argue that officers may reinitiate interrogation of a prisoner without giving *Miranda* warnings and without waiting 14 days as long as the prisoner is questioned in a noncustodial setting. Thus, defense counsel must be prepared to show that the defendant was "in custody while in custody," pointing to factual circumstances such as the setting in which the interrogation takes place and whether the defendant was given the opportunity to return to the general population.

Both *Shatzer* and *Fields* distinguished inmates who are serving a sentence from those in pretrial custody. Under the reasoning of these decisions, a pretrial detainee's return to his or her jail cell following assertion of his *Miranda* rights should not constitute a break in custody permitting reinterrogation; nor should interrogation of a pretrial detainee be considered noncustodial.

Juvenile warnings. Before interrogating a juvenile, law enforcement officers must inform the juvenile of his or her rights under G.S. 7B-2101. In addition to the usual *Miranda* rights, a juvenile must be advised of the right to have a parent or guardian present during questioning.

A "juvenile" is any person under eighteen years of age who is not emancipated, married, or in the military. If the suspect is under eighteen, juvenile rights must be given even though the suspect may be old enough to be prosecuted in superior court. *See State v. Fincher*, 309 N.C. 1 (1983) (seventeen-year-old entitled to statutory juvenile warnings); *State v. Brantley*, 129 N.C. App. 725 (1998) (right to statutory warning applies to all juveniles).

If the juvenile is less than 16 years old, a parent, guardian, custodian, or attorney must be present when the juvenile is interrogated; otherwise any statement made by the juvenile is inadmissible against him or her. A parent, guardian, or custodian of the juvenile present at a juvenile's interrogation must be advised of the juvenile's rights but may not waive any rights on the juvenile's behalf. *See* G.S. 7B-2101(b).

The age of a child subjected to police questioning is also relevant to the *Miranda* custody analysis. *See J.D.B. v. North Carolina*, 564 U.S. 261 (2011), discussed *supra* under "Requirements of 'custody' and 'interrogation'" in this subsection B.

For a further discussion of interrogation of juveniles, see NORTH CAROLINA JUVENILE DEFENDER MANUAL § 11.3, Bases for Motions to Suppress Statement or Admission of Juvenile; § 11.4, Case Law: Motions to Suppress In-Custody Statement of Juvenile (UNC School of Government, Oct. 2017).

Warnings to noncitizens. *See State v. Herrera*, 195 N.C. App. 181 (2009) (violation of Vienna Convention on Consular Relations, requiring notification to arrested foreign national of right to have consul of his or her country notified of arrest, does not provide remedy of suppression of confession), *rev'd on other grounds by State v. Ray*, 364 N.C. 272 (2010).

C. Confessions in Violation of Sixth Amendment Right to Counsel

Generally, the Sixth Amendment right to counsel attaches at the initial appearance before a magistrate—that is, when a defendant has been arrested and taken to a magistrate by law enforcement—and the right exists at any critical stage thereafter, including interrogation. *See Rothgery v. Gillespie County*, 554 U.S. 191 (2008). Thus, following the initial appearance, a defendant has a Sixth Amendment right to have counsel present at

any interrogation by the police, regardless of whether the defendant is in custody. The Sixth Amendment right to counsel may attach before the initial appearance before a magistrate, as when the case begins by indictment, which signals the initiation of adversary criminal proceedings and triggers Sixth Amendment protections. *See Rothgery*, 554 U.S. at 198 (citing *Kirby v. Illinois*, 406 U.S. 682 (1972)). The Sixth Amendment right to counsel is "offense specific"; thus, law-enforcement officers do not violate a defendant's Sixth Amendment rights by questioning an in-custody defendant about crimes unrelated to the charged offense. (Officers still must comply with the Fifth Amendment for any custodial interrogation. *See supra* § 14.3B, *Miranda* Warnings.) If the person is not in custody, but the Sixth Amendment right to counsel has attached, police likewise may ask questions about unrelated crimes. *See McNeil v. Wisconsin*, 501 U.S. 171 (1991); *State v. Williams*, 209 N.C. App. 441 (2011) (no Sixth Amendment violation for officers to speak with defendant about robbery and murder where defendant had not been formally charged with those crimes and was in custody on unrelated charges).

Under an earlier U.S. Supreme Court decision, *Michigan v. Jackson*, 475 U.S. 625 (1986), law enforcement officers were prohibited from initiating contact with a defendant who had exercised his Sixth Amendment rights after they had attached—that is, law enforcement could not question the defendant about the charges, whether he was in or out of custody, if the defendant had requested that the court appoint counsel on the charges. However, in *Montejo v. Louisiana*, 556 U.S. 778 (2009), the U.S. Supreme Court overruled *Michigan v. Jackson* and took a different approach to police questioning after the attachment of Sixth Amendment protections. *Montejo* held that officers may initiate contact with and question a defendant whose Sixth Amendment right has attached, even if the defendant has requested and received appointed counsel in court, provided that officers advise the defendant of the right to counsel (essentially, through *Miranda*-style warnings) and the defendant knowingly and voluntarily waives that right. (Officers still may be prohibited from interrogating an in-custody defendant who has asserted his or her right to counsel under the Fifth Amendment. *See supra* § 14.3B, *Miranda* Warnings.)

The "impeachment exception" (discussed *supra* in § 14.3B, *Miranda* Warnings) applies when the defendant's rights have been violated under the Sixth Amendment. *See Kansas v. Ventris*, 556 U.S. 586 (2009) (defendant's incriminating statement to a jailhouse informant, assumed to have been obtained in violation of the defendant's Sixth Amendment right to counsel, was admissible on rebuttal to impeach the defendant's trial testimony in conflict with the statement).

For a further discussion of the impact of *Montejo* on police questioning after attachment of the Sixth Amendment right to counsel. see Robert L. Farb, *The United States Supreme Court Ruling in Montejo v. Louisiana* (UNC School of Government, May 30, 2009).

D. Confession as Fruit of Illegal Arrest

If a suspect is illegally seized in violation of his or her Fourth Amendment rights and, as a result of that seizure, gives a statement, the statement is ordinarily inadmissible as the

"fruit of the poisonous tree." *See Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *State v. Graves*, 135 N.C. App. 216 (1999); *see also supra* § 14.2G, "Fruits" of Illegal Search or Arrest.

E. Evidence Derived from Illegal Confession

Involuntary confessions. An "involuntary" confession—that is, a confession obtained in violation of due process—"taints" any further confession and any evidence obtained as a result of the confession. *See* 3 LAFAVE, CRIMINAL PROCEDURE § 9.5(a), at 527–28; *Michigan v. Tucker*, 417 U.S. 433 (1974); *see also supra* § 14.2G, "Fruits" of Illegal Search or Arrest.

Confessions in violation of *Miranda*. If a confession is obtained in violation of the *Miranda* rule, but is not "involuntary" under the Due Process Clause, the "fruit of the poisonous tree" principle generally does not apply; failure to administer *Miranda* warnings does not automatically create a coercive atmosphere. *See Oregon v. Elstad*, 470 U.S. 298 (1985). Thus, derivative evidence, such as subsequent statements or physical evidence, obtained as the result of an unwarned but otherwise voluntary confession is not barred. *See id.* (unwarned confession did not taint later warned confession); *State v. Hicks*, 333 N.C. 467 (1993) (following *Elstad*); *State v. Goodman*, 165 N.C. App. 865 (2004) (where defendant's statements were obtained in violation of his *Miranda* rights, physical evidence, including a body discovered as a result of statements, did not have to be suppressed); *see also* 3 LAFAVE, CRIMINAL PROCEDURE § 9.5(a), at 528–33 (discussing inapplicability of the fruit of the poisonous tree doctrine to *Miranda* violations).

The U.S. Supreme Court has condemned the "ask first, warn later" two-step interrogation technique in which law enforcement officers interrogate the defendant without giving *Miranda* warnings, obtain a confession, and subsequently give the defendant *Miranda* warnings and ask him or her to repeat the confession. *See Missouri v. Seibert*, 542 U.S. 600 (2004) (confession held inadmissible where detectives deliberately withheld *Miranda* warnings, questioned defendant until she confessed to murder, and then, after a 15- to 20-minute break, gave defendant *Miranda* warnings and led her to repeat prior confession). *Cf. Bobby v. Dixon*, 565 U.S. 23 (2011) (per curiam) (second, warned confession to murder not suppressed where defendant denied involvement in murder during unwarned interrogation and then reversed course and confessed after *Miranda* warnings).

Confessions in violation of Sixth Amendment right to counsel. *See* 3 LAFAVE, CRIMINAL PROCEDURE § 9.5(a), at 532 (taking position that fruit-of-poisonous tree doctrine may still bar evidence discovered as result of statements taken in violation of Sixth Amendment right to counsel).

F. Codefendant's Confession

Generally, one defendant does not have standing to assert constitutional violations in the taking of another defendant's confession and cannot move to suppress the other

defendant's confession on those grounds. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (discussing the privilege against self-incrimination as an individual's substantive right). Still, the portions of an accomplice's confession that are not genuinely self-inculpatory (for example, "I did it"), but are blame-shifting (for example, "he did it" or "we did it"), are ordinarily not admissible against the non-confessing defendant. Any extrajudicial statement, such as a confession to police or to a lay witness, must meet two basic requirements, discussed below, to be admissible against a criminal defendant. If the statement does not meet these requirements, the defendant who is being blamed may make a motion in limine before trial to exclude the statement and object at trial to its introduction.

First, an out-of-court statement must satisfy the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and article I, section 23 of the North Carolina Constitution. An extrajudicial confession that names or blames an accomplice, particularly if made to the police, will ordinarily constitute "testimonial" statements and will be barred by the Confrontation Clause.

Second, the statement must satisfy North Carolina's hearsay and other evidence rules. Blame-shifting confessions typically will not fall within the scope of a hearsay exception under North Carolina's evidence rules. For a discussion of Confrontation Clause and hearsay restrictions on the admission of codefendants' statements, see *supra* § 6.2E, Blame-Shifting and Blame-Spreading Confessions.

If the codefendants are tried separately, the State ordinarily will be unable to introduce the blame-shifting portions of a confession in light of Confrontation Clause and hearsay restrictions. Thus, the defendant may find it advantageous to move for severance where the confession of a codefendant will be prejudicial to the defendant's case. In a joint trial, if the State wants to offer a codefendant's confession against that codefendant, the State must "sanitize" the confession by removing all direct or indirect references to individuals other than the codefendant who made the confession before the confession may be admitted into evidence. *See Bruton v. United States*, 391 U.S. 123 (1968); *Gray v. Maryland*, 523 U.S. 185 (1998) (replacing defendant's name with a blank space or "deleted" not sufficient redaction); *State v. Gonzalez*, 311 N.C. 80 (1984) (error to admit statement by one codefendant saying "I didn't rob anyone, they did"); G.S. 15A-927(c)(1) (codifies *Bruton* rule). For further discussion of the *Bruton* rule on redacting codefendants' statements at joint trials, see *supra* § 6.2E, Blame-Shifting and Blame-Spreading Confessions.

G. Recording of Statements

G.S. 15A-211, enacted in 2007, requires electronic recording of custodial interrogations in homicide investigations at any place of detention. Effective for offenses committed on or after December 1, 2011, the statute was expanded to require electronic recording of custodial interrogations conducted at any place of detention for investigations related to any Class A, B1, or B2 felony and any Class C felony of rape, sex offense, or assault with a

deadly weapon with intent to kill inflicting serious injury. The amended statute also requires electronic recording of all custodial interrogations of juveniles in criminal investigations conducted at any place of detention. The juvenile provision is not limited to specific offenses. The provision does not define "juvenile" and may apply to any person under the age of 18. *See* G.S. 7B-101(14) (defining juvenile for purposes of Juvenile Code as person under age 18); *see also State v. Fincher,* 309 N.C. 1 (1983) (applying statutory juvenile warning requirements to defendants under age 18). For a further discussion of the legislation, see John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01, at 5–6 (UNC School of Government, Jan. 2008), and John Rubin, *2011 Legislation Affecting Criminal Law and Procedure* at 35, no. 63 (UNC School of Government, Dec. 12, 2011).

14.4 Illegal Identification Procedures

A. Pretrial Identification Procedures: Constitutional and Statutory Requirements

A pretrial identification procedure violates due process when (i) the procedure is suggestive, and (ii) the suggestiveness of the procedure results in a strong probability of misidentification. *See Manson v. Brathwaite*, 432 U.S. 98 (1977) (requiring both suggestiveness and unreliability); *Neil v. Biggers*, 409 U.S. 188 (1972) (to same effect); *accord State v. Harris*, 308 N.C. 159 (1983). A violation of due process requires suppression of the pretrial identification and possibly any later identifications.

In 2007, the North Carolina General Assembly recognized the need for uniform, reliable eyewitness identification procedures to reduce the risk of misidentification and enacted the Eyewitness Identification Reform Act. *See* G.S. 15A-284.50 through G.S. 15A-284.53; *see also* John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01, at 2–4 (UNC School of Government, Jan. 2008). While suppression is not mandatory for a violation of statutory requirements, the court must consider noncompliance in adjudicating motions to suppress. G.S. 15A-284.52(d)(1). Therefore, counsel should move to suppress suggestive pretrial identification procedures under the Due Process Clause, article I, section 19 of the North Carolina Constitution, and North Carolina statutes. *See United States v. Greene,* 704 F.3d 298, 305 n.3 (4th Cir. 2013) (in suppressing identification under U.S. Constitution, court notes that some states have provided greater protections for defendants under their state constitutions "based on the last 35 years of social science research into the reliability of eyewitness identifications"). The statutory requirements are discussed first because they provide guidance on the characteristics of a reliable identification procedure.

B. Statutory Requirements for Lineups

Requirements for lineup. Under G.S. 15A-284.52(b), a lineup must meet all of the requirements set out in subdivisions (1) through (15), including:

- the lineup shall be conducted by a neutral administrator, a person who does not know which person is the suspect;
- where an independent administrator is not used, an alternative method must be used that has been approved by the North Carolina Criminal Justice Education and Training Standards Commission, e.g., an automated computer program;
- individuals or photos shall be presented sequentially, one at a time;
- specific instructions must be given to the eyewitness, including that the suspect may not be in the lineup and that it is as important to exclude the innocent as it is to identify the perpetrator;
- at least five fillers must be included and they must resemble the eyewitness's description of the perpetrator.
- the suspect or the photo of the suspect must not stand out from the fillers;
- nothing shall be said to influence the identification;
- the eyewitness shall provide a statement regarding his or her level of confidence in the identification;
- live identification procedures shall be recorded on video (where video is not practical, an audio recording shall be made of live lineups, and a written record of the live lineup shall be made if neither video nor audio is practical);
- for any identification procedure, a detailed record shall be made including all of the information described in G.S. 15A-284.52(b)(15).

Remedies for noncompliance. While suppression does not automatically follow from failure to comply with the requirements of G.S. 15A-284.52(b), the court must consider noncompliance when deciding whether to grant a motion to suppress the identification. Counsel also may argue that noncompliance constitutes a violation of the Due Process Clause and a substantial violation of statutory criminal procedure provisions, requiring exclusion under G.S. 15A-974.

Evidence of noncompliance is admissible at trial to support a claim of misidentification, unless the evidence is otherwise barred. In the event that evidence of noncompliance is presented at trial, the judge must instruct the jury that it may consider such evidence in determining the reliability of the identification. G.S. 15A-284.52(d)(3). *See State v. Stowes*, 220 N.C. App. 330 (2012) (trial court did not exclude evidence for violation of the Eyewitness Identification Reform Act but granted the other statutory relief).

C. Constitutional Requirements

Suggestiveness of procedure. A pretrial identification procedure may be unconstitutionally suggestive if:

- the defendant stands out in the lineup based on his or her size, age, or apparel (*see State v. Pigott*, 320 N.C. 96 (1987) (photo array suggestive where 6 of 10 photos unclear and seventh photo showed deputy in uniform); *State v. Harris*, 308 N.C. 159, 166 (1983) (assuming arguendo that photo array suggestive where defendant was shown wearing cap and scarf similar to ones worn by assailant); *State v. Gaines*, 283

N.C. 33 (1973) (lineup not unduly suggestive even though defendant only juvenile in group));

- an officer makes comments during the identification procedure that taint the process (*see State v. Wilson*, 313 N.C. 516 (1985) (identification procedure tainted by officer suggesting to witness that perpetrator was in lineup); *State v. Headen*, 295 N.C. 437 (1978) (deputy's comments naming defendant as perpetrator tainted identification procedure));
- the defendant is shown alone to the witness in a showup (*see State v. Capps*, 114 N.C. App. 156 (1994) (witness shown defendant alone in police car); *see also Stovall v. Denno*, 388 U.S. 293 (1967) (practice of showing suspect singly for purposes of identification and not as part of lineup has been widely condemned)).

Where law enforcement officers conduct an unduly suggestive procedure, exclusion of the identification is not automatically required under the Due Process Clause. The trial judge must screen the evidence for reliability, discussed below. *Perry v. New Hampshire*, 565 U.S. 228 (2012). Where the suggestive circumstances are not the result of government action, the trial court may admit the identification without performing this preliminary inquiry into the reliability of the identification. "When no improper law enforcement activity is involved . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.* at 233.

Risk of misidentification. In addition to showing that an identification procedure was suggestive, the defendant must show that the procedure created a strong probability of misidentification. *See State v. Harris*, 308 N.C. 159 (1983); *State v. McCraw*, 300 N.C. 610 (1980); *State v. Breeze*, 130 N.C. App. 344 (1998). If there is a substantial likelihood of misidentification, the judge must exclude the evidence. If the indicia of reliability are strong enough to outweigh the corrupting effect of the suggestive circumstances, the identification evidence remains admissible. *Perry v. New Hampshire*, 565 U.S. at 232.

In deciding whether the suggestive procedure impermissibly influenced the identification, the courts consider the totality of the circumstances. Key factors include: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the time of confrontation; and (5) the length of time between the crime and the confrontation. *See, e.g., State v. Harris*, 308 N.C. 159, 164 (1983) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)).

D. Showups

Statutory requirements for showups. Under G.S. 15A-284.52(c1), a showup must meet all of the following requirements:

- a showup may only be used if circumstances exist requiring the immediate display of a suspect to an eyewitness;
- a suspect matching the description of the perpetrator is found close by the scene of the crime, near the time of the crime; or where there is a reasonable belief that the defendant changed his or her appearance around the time of the crime;
- a showup may only be conducted with a live person and not with a photograph; and
- police must photograph the suspect at or near the scene of the crime to make a record of the defendant's appearance at that time.

The statute provides the same remedies for noncompliance with the statutory requirements as with lineups, discussed in B., above. While a violation will not necessarily result in suppression, the trial court must consider the violation in deciding whether to suppress the identification; the violation is admissible at trial to show misidentification (unless barred on other grounds); and if evidence of noncompliance is presented at trial, the jury must be instructed to consider credible evidence of the violation in determining the reliability of any eyewitness identification. G.S. 15A-284.52(d); *see also* Jeff Welty, *Eyewitness Identification Reform Act Extended to Show-Ups*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 27, 2015).

Amended in 2015 to cover showups, the current statute supersedes previous decisions finding that the Eyewitness Identification Reform Act did not regulate showups. *See State v. Rawls*, 207 N.C. App. 415, 420–21 (2010).

Constitutional considerations. The North Carolina courts have recognized that showup procedures, whereby a single suspect is shown to a witness for the purpose of identification, are "inherently suggestive." *State v. Turner*, 305 N.C. 356, 364 (1982); *State v. Oliver*, 302 N.C. 28, 45 (1981). Because of its suggestiveness, the procedure is frowned upon and should be utilized in limited circumstances. *See* FARB at 595 (noting that a showup is a suggestive identification procedure that normally should be avoided but that it may be permissible in an emergency or soon after a crime is committed).

An unnecessary showup may still be admissible if the witness's identification of the defendant is otherwise reliable. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . ."), *abrogated on other grounds by Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); *see also Turner*, 305 N.C. at 364–65 (upholding admission of identification from showup where, among other things, witness knew defendant from having previously seen him in the neighborhood); *State v. Rawls*, 207 N.C. App. 415 (2010) (finding showup unduly suggestive where an officer told the witness beforehand that "they think they found the guy" and at the showup the defendant was detained and several officers were present; but, holding that there was not a substantial likelihood of irreparable misidentification because, among other things, before the showup the witness had looked directly at the suspect and made eye contact with him from a table's length away during daylight hours and the showup occurred only fifteen

minutes later); *State v. Pinchback*, 140 N.C. App. 512 (2000) (considering the five factors for assessing the reliability of an identification [discussed under "Risk of misidentification" in subsection C., above], court finds that identification was unreliable and should have been suppressed). For a further discussion of showups, see FARB at 595.

E. In-Court Identification

An impermissibly suggestive pretrial identification procedure may taint an in-court identification. *See State v. Flowers*, 318 N.C. 208 (1986); *State v. Headen*, 295 N.C. 437 (1978). Before admitting an in-court identification that has been challenged, the trial court must conduct a voir dire, find facts, and determine that the in-court identification is of independent origin and not the result of an impermissibly suggestive pretrial procedure. *See Flowers*, 318 N.C. at 216 (so holding, but finding that failure to conduct voir dire was harmless error where evidence was clear and convincing that witness's in-court identification originated with the witness's observation of defendant at the time of the crime and not from an impermissibly suggestive pretrial identification procedure). In determining whether an in-court identification is independent of a flawed pretrial investigation, the court should consider the five factors listed under "Risk of misidentification in subsection C, above. *See State v. Harris*, 308 N.C. 159 (1983); *State v. Thompson*, 303 N.C. 169 (1981).

The lack of a pretrial identification procedure does not necessarily make an in-court identification inadmissible. *See State v. Fowler*, 353 N.C. 599 (2001) (fact that victim's first identification of defendant took place in courtroom did not render identification procedure impermissibly suggestive) *State v. Hussey*, 194 N.C. App. 516 (2008) (to same effect). *But see Moore v. Illinois*, 434 U.S. 220, 230 (1977) (in considering an in-court identification, court states that it "is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case"; court does not rule on due process claim and instead finds violation of Sixth Amendment right to have counsel present at identification); 2 LAFAVE, CRIMINAL PROCEDURE § 7.4(h), at 1077–83 (discussing possible ways in which to reduce suggestiveness of in-court identification).

Practice note: Generally, you must make a motion before trial to suppress evidence of pretrial identifications and tainted in-court identifications (*see infra* § 14.6A, Timing of Motion). If your motion is denied, you also must object to the evidence of the pretrial identification procedure when it is introduced and to any in-court identification of the defendant when made to preserve those issues for appeal. *See State v. Hunt*, 324 N.C. 343, 355 (1989) ("[a]ssuming arguendo that defendant's constitutional right of assistance of counsel at the lineup was violated, defendant waived that error by failing to object when the witness later identified him before the jury as the man he had picked out of the lineup"). If you fail to do so, you will waive the objections and will have to meet the much higher standard of plain error on appeal. *See State v. Hammond*, 307 N.C. 662 (1983); *State v. Stowes*, 220 N.C. App. 330, 337 (2012).

F. Right to Counsel at Lineups

Constitutional considerations. Defendants have a Sixth Amendment right to have counsel present at a live lineup that occurs after adversary proceedings have begun. *See Gilbert v. California*, 388 U.S. 263 (1967). The right to counsel attaches after initial appearance or indictment, whichever occurs first. *See Rothgery v. Gillespie County*, 554 U.S. 191 (2008); *see also supra* § 12.4A, When Right to Counsel Attaches (2d ed. 2013).

If the defendant's right to counsel is not honored, the pretrial identification must be suppressed. *See State v. Hunt*, 339 N.C. 622 (1994) (recognizing principle [note that decision was issued before *Rothgery,* when right to counsel was held by North Carolina courts to attach at defendant's first court appearance]). An in-court identification by a witness who took part in a pretrial lineup in violation of the defendant's right to counsel also must be excluded unless the State demonstrates by clear and convincing evidence that the in-court identification is of independent origin and not tainted by the illegal pretrial procedure. *See United States v. Wade*, 388 U.S. 218 (1967); *Hunt*, 339 N.C. at 647. While the accused may waive the right to have counsel present at a live lineup, the State bears the burden of demonstrating by clear and convincing evidence that the right was waived freely, voluntarily, and with full understanding. *See Wade*, 388 U.S. at 240; *State v. Harris*, 279 N.C. 177 (1971).

The Sixth Amendment does not guarantee the right to counsel where a lineup occurs before adversarial proceedings have commenced. *Kirby v. Illinois*, 406 U.S. 682 (1972); *State v. Henderson,* 285 N.C. 1 (1974), *vacated on other grounds,* 428 U.S. 902 (1976); *see also State v. Taylor*, 354 N.C. 28 (2001) (holding in pre-*Rothgery* case in different context that Sixth Amendment right to counsel did not attach with issuance of arrest warrant). *But cf.* FARB at 596 n.156 (noting that U.S. Supreme Court has not yet decided whether the Sixth Amendment right to counsel begins with issuance of arrest warrant before the defendant's initial appearance). The Sixth Amendment also does not guarantee the right to counsel at a photographic identification procedure. *United States v. Ash,* 413 U.S. 300 (1973); *State v. Miller*, 288 N.C. 582 (1975).

Statutory considerations. G.S. 7A-451(b)(2) states that an indigent person is entitled to counsel after formal charges have been preferred for a pretrial identification procedure at which the presence of the accused is required. The North Carolina courts appear to have interpreted this provision as not affording a defendant a greater right to counsel than provided by the Sixth Amendment. *See State v. Henderson*, 285 N.C. 1 (1974), *vacated on other grounds,* 428 U.S. 902 (1976).

The Eyewitness Identification Reform Act does not state that there is a right to counsel at the identification proceedings covered by the act. It recognizes, however, that counsel is not excluded from identification procedures. *See* G.S. 15A-284.52(b)(13) (prohibiting anyone who knows the suspect's identity from being present during the lineup or identification procedure "except the eyewitness and counsel as required by law").

G. Nontestimonial Identification Procedures

Nontestimonial identification procedures, such as the taking of hair samples, may be ordered for suspects who have not been arrested or who have been formally charged and released from custody pending trial. *See* G.S. 15A-271 through G.S. 15A-282; *State v. Irick*, 291 N.C. 480 (1977) (discussing purpose of procedures); c*f. State v. Carter,* 322 N.C. 709 (1988) (probable cause and search warrant required for taking of blood sample unless exigent circumstances permit taking of blood without warrant; nontestimonial identification order not proper for taking of blood sample or for in-custody defendant). A suspect has a statutory right to have counsel present during a nontestimonial identification procedure and must be told about this right before the procedure takes place. *See* G.S. 15A-279(d); *State v. Satterfield*, 300 N.C. 621 (1980); *see also supra* "Nontestimonial identification procedures" in § 12.4C, Particular Proceedings (2d ed. 2013) (discussing right to counsel for such procedures). The statutory right to counsel does not apply to nontestimonial procedures lawfully conducted by law enforcement without a nontestimonial identification order. *See State v. Coplen*, 138 N.C. App. 48 (2000) (upholding denial of motion to suppress results of gunshot residue test that was based on probable cause and exigent circumstances and was conducted without a nontestimonial identification order).

G.S. 15A-279(d) states that any statements made during the proceeding must be suppressed if the defendant does not have counsel present. *See also State v. Page*, 169 N.C. App. 127 (2005) (officer violated statute by failing to advise defendant of right to counsel before conducting gunshot residue test, but violation was not prejudicial because defendant did not identify any statements made during test); *State v. Coplen*, 138 N.C. App. 48 (2000) (refusing to suppress results of identification procedure, as distinguished from statements of defendant, for violation of statutory right to counsel). The results of a nontestimonial identification procedure may be subject to suppression on other grounds, however. *See, e.g., State v. Pearson*, 356 N.C. 22 (2002) (recognizing that results may be suppressed if affidavit does not provide reasonable suspicion for test or was based on falsehoods, but finding no violation in this case); *State v. Carter,* 322 N.C. 709 (1988) (nontestimonial identification order does not authorize taking of blood sample).

H. DNA Samples at Time of Arrest

Statutory authorization exists for taking DNA samples at the time of arrest for certain offenses. *See* G.S. 15A-502.1; G.S. 15A-266.3A; *see also Maryland v. King,* 569 U.S. 435 (2013) (defendant's Fourth Amendment rights were not violated by the taking of a DNA cheek swab as part of booking procedures). The sample must be expunged if, among other reasons, there is no charge filed within the statute of limitations or if there is no conviction or active prosecution for an offense covered under the DNA sampling law within three years of the date of arrest. G.S. 15A-266.3A(h); *see also* "DNA Records" in John Rubin, *Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina* (UNC School of Government, 2020).

Any identification, warrant, or arrest based on a DNA match that occurs after the statutory period for expunction expires is invalid and inadmissible. G.S. 15A-266.3A(m).

14.5 Substantial Violations of Criminal Procedure Act

A. Required Showing

In addition to the above constitutional suppression issues, a defendant may move to suppress evidence that was obtained as a result of a "substantial" violation of the Criminal Procedure Act. In determining whether a violation is substantial, the court must weigh the following four factors:

1. the importance of the particular interest violated;
2. the extent of the deviation from lawful conduct;
3. the extent to which the violation was willful; and
4. the extent to which exclusion will tend to deter future violations of the Criminal Procedure Act.

See G.S. 15A-974(a)(2). In 2011, the N.C. General Assembly created a good faith exception to the exclusionary rule for statutory violations, providing that evidence obtained as a result of a substantial violation will not be suppressed if the person had an objectively reasonable, good faith belief that his or her actions were lawful. For additional discussion of this exception, see *supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing constitutional and statutory issues).

While G.S. 15A-974 refers specifically to violations of the Criminal Procedure Act—that is, G.S. Chapter 15A—the North Carolina courts have recognized that suppression may be the appropriate remedy for other statutory violations, such as violations of G.S. Chapter 20, Motor Vehicles. *See, e.g.,* Shea Denning, *Can I Get a Remedy? Suppression of Chemical Analyses in Implied Consent Cases for Statutory Violations*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 4, 2010) (observing that the North Carolina appellate courts have suppressed chemical analysis results based on violations of Chapter 20).

B. Case Summaries on "Substantial Violations"

In the following cases the courts addressed whether the defendant had made a sufficient showing of a statutory violation to warrant suppression.

State v. Pearson, 356 N.C. 22 (2002) (no substantial violation where officer failed to provide defendant a copy of test results following nontestimonial identification procedure and failed to return an inventory of seized evidence to judge who issued order for procedure)

State v. Wallace, 351 N.C. 481 (2000) (confession admissible despite delay of 19 hours in taking defendant to magistrate for initial appearance; interrogating officer had read suspect *Miranda* rights before questioning)

State v. Hyleman, 324 N.C. 506 (1989) (bare bones search warrant, where allegations of fact failed to comply with requirements of G.S. 15A-244(3), constituted substantial violation of Criminal Procedure Act requiring suppression of evidence seized in search)

State v. Satterfield, 300 N.C. 621 (1980) (failure to remind defendant of right to counsel at nontestimonial identification procedure did not require suppression of identification evidence, although statements made by defendant had to be suppressed)

State v. Downey, 249 N.C. App. 415 (2016) (failure to provide inventory of items seized during search in violation of G.S. 15A-254 did not require suppression; evidence was not seized as a result of a substantial statutory violation)

State v. Portillo, 247 N.C. App. 834, 849 (2016) (three-day delay in presenting the defendant to a judicial official in violation of G.S. 15A-501 was a mere "technical" violation and did not require suppression)

State v. White, 232 N.C. App. 296 (2014) (lack of written checkpoint policy in violation of G.S. 20-16.3A was a substantial violation requiring suppression)

State v. Caudill, 227 N.C. App. 119 (2013) (trial court did not err by denying defendant's motion to suppress statements to officers on grounds that they were obtained in violation of G.S. 15A-501(2), which requires that arrested person be taken before a judicial official without unnecessary delay; delay was not unnecessary and there was no causal relationship between delay and defendant's statements)

State v. Scruggs, 209 N.C. App. 725 (2011) (even if stop and arrest of defendant by campus police officers while off campus violated G.S. 15A-402(f), violation was not substantial; stop and arrest were constitutional and officers were acting under mutual aid agreement with municipality; court cites other cases in which officers were acting just outside territorial jurisdiction and substantial statutory violation was not found)

State v. White, 184 N.C. App. 519 (2007) (G.S. 15A-974(2) did not require suppression of evidence obtained after officers performed unlawful forced entry of residence to execute search warrant because evidence was not discovered as a result of unlawful entry)

State v. McHone, 158 N.C. App. 117 (2003) (suppression required where search warrant issued on the basis of inadequate affidavit that merely concluded probable cause existed, constituting a substantial violation of G.S. 15A-244)

State v. Sumpter, 150 N.C. App. 431 (2002) (no substantial violation under circumstances where officer, in executing search warrant, failed to announce presence before entering residence)

State v. Davidson, 131 N.C. App. 276 (1998) (no substantial violation where search warrant for bank records was served within 48 hours but records were not delivered to officer until after 48 hours had passed)

State v. Pearson, 131 N.C. App. 315 (1998) (no substantial violation of Criminal Procedure Act where officer administered breathalyzer test outside of his territorial jurisdiction [G.S. 20-38.2 now permits officers who are investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction to investigate and seek evidence of the driver's impairment outside the officer's territorial jurisdiction])

State v. Harris, 43 N.C. App. 346 (1979) (no substantial violation where Stokes County deputy saw murder suspect driving just over county line in Forsyth county and made stop)

14.6 Procedures Governing Suppression Motions

A. Timing of Motion

General timing rules in superior court. In superior court, a suppression motion ordinarily must be made before trial. *See* G.S. 15A-975(a); *State v. Satterfield*, 300 N.C. 621 (1980) (a defendant who should have but did not raise suppression issue before trial waives right to have issue heard); *State v. Reavis*, 207 N.C. App. 218 (2010) (motion to suppress untimely where not made until trial and State disclosed evidence in timely manner); *see also State v. Langdon*, 94 N.C. App. 354 (1989) (motion filed on day case calendared for trial but before jury selection deemed timely). *But cf. State v. Hill*, 294 N.C. 320 (1978) (defendant's motion to suppress deemed not timely where filed just before jury selection, the evidence in question was of the type listed in G.S. 15A-975(b), and defendant failed to comply with time limits of G.S. 15A-976(b), discussed below).

A suppression motion may be made at trial in superior court only if:

- the defendant did not have a "reasonable opportunity to make the motion before trial"; or
- the State failed to give notice of certain types of evidence (discussed under "Special timing rules for certain types of evidence in superior court," below, in this subsection A.). *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 State intended to introduce certain evidence against him).

The N.C. appellate courts have strictly construed the requirement that, where possible, suppression motions be made before trial. *See, e.g., State v. Hill*, 294 N.C. 320 (1978) (upholding court's denial of untimely suppression motion where court made finding that defendant had reasonable opportunity before trial to make motion); *State v. Jones*, 157 N.C. App. 110 (2003) (miscalculating strength of State's case is not sufficient excuse for failing to make motion to suppress pretrial); *State v. Austin*, 111 N.C. App. 590 (1993). Therefore, if you know or have good reason to believe that the State intends to rely on evidence that may be the subject of a suppression motion, the safest course is to file a pretrial motion objecting to the admission of the evidence.

The requirement that motions to suppress be filed before trial applies only to motions to suppress made pursuant to G.S. 15A-974 (violation of state or federal constitution or substantial violation of Criminal Procedure Act). Motions to exclude evidence on nonconstitutional evidentiary grounds, such as lack of authentication of evidence or unreliable scientific tests, may be made for the first time at trial. *See State v. Tate*, 300 N.C. 180 (1980) (discussing which types of motions must be made before trial). Again, however, if you know or have good reason to believe that the State intends to rely on evidence that may be subject to exclusion, such as evidence of prior bad acts, you may want to file a motion in limine and seek a ruling before the trial commences. *See supra* § 13.1F, Motions in Limine. For a further discussion of the difference between motions to suppress and other objections to admissibility, see Jeff Welty, *What's a Motion to Suppress?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 21, 2010). *see also* PHIL DIXON, DEFENSE MOTIONS AND NOTICES IN SUPERIOR COURT (UNC School of Government, 2017).

Special timing rules for certain types of evidence in superior court. The following types of evidence are subject to special timing rules for motions to suppress:

- statements by the defendant,
- evidence obtained through a search without a search warrant, and
- evidence obtained pursuant to a search warrant when the defendant was not present during execution of the search warrant.

See G.S. 15A-975(b); G.S. 15A-976(b).

If the State gives notice at least 20 working days before trial of its intent to introduce such evidence at trial, then the defendant must move to suppress the evidence within 10 working days of receipt of the notice. *See* G.S. 15A-976(b); *State v. Paige*, 202 N.C. App. 516 (2010) (defendant's motion to suppress during trial was untimely where the State gave more than 20 working days notice); *State v. Ford*, 194 N.C. App. 468 (2008) (to same effect); *see also State v. Davis*, 97 N.C. App. 259 (1990) (where defendant given permission to refile suppression motion in a form meeting procedural requirements, ten-day limit applied to refiling), *aff'd per curiam*, 327 N.C. 467 (1990).

If the State does not notify the defendant at least 20 working days before trial, then the defendant may move to suppress the types of evidence listed above at trial. *See* G.S. 15A-

975(b); *State v. Patterson,* 335 N.C. 437, 456 (1994) (noting that defendant may move during trial to suppress custodial statement of defendant where State does not provide notice 20 days before trial of intent to offer statement at trial); *State v. Roper*, 328 N.C. 337 (1991) (failure of State to notify defendant that it would seek to admit at trial evidence obtained from consent search of defendant's residence entitled defendant to make suppression motion at trial, but defendant failed to make oral motion in a proper form where he did not specify it was a motion to suppress, request a voir dire, or provide a factual or legal basis); *State v. Battle*, 136 N.C. App. 781 (2000) (failure of State to notify defendant of intent to offer cocaine seized in warrantless search entitled defendant to raise suppression issue at trial).

Practice note: Prosecutors may include in their response to the defendant's discovery request a notice of intent to use the above types of evidence, starting the clock on the 10 working days in which the defendant must file motions to suppress. Examine the form and substance of the State's notice to ensure it appropriately addresses the evidence of the case. Where it does not provide proper notice, consider arguing that the 10 working days limit does not apply if necessary.

Misdemeanor appeals. A defendant who wishes to have evidence suppressed on de novo appeal from a misdemeanor conviction must file a suppression motion before trial in superior court if, as in most cases, the defendant knows of the evidence based on the proceedings in district court. *See* G.S. 15A-975 Official Commentary; *State v. Simmons*, 59 N.C. App. 287 (1982), *overruled on other grounds by State v. Roper*, 328 N.C. 337 (1991). The exceptions set forth in G.S. 15A-975(b) do not apply to misdemeanor appeals—that is, the State is not required to give notice of its intent to introduce the types of evidence listed in the subsection when a misdemeanor is appealed for trial de novo in superior court. The 10-working day deadline therefore does not apply, but the motion still must be filed before trial. *See* G.S. 15A-975(c).

Timing rules in misdemeanor cases in district court. Suppression motions in misdemeanor cases tried in district court (other than impaired driving and other implied-consent offenses, discussed below) are not subject to the time limits applicable to suppression motions in superior court. The governing statute provides that suppression motions should ordinarily be made during trial, although they may be made beforehand. *See* G.S. 15A-973 (motions to suppress in district court). In cases other than implied consent offenses, the motion will usually be made during trial, whenever the challenged evidence arises. Defense counsel may object and ask to conduct a voir dire of the witness regarding the evidence, and the court considers the suppression argument. *See infra* "When evidentiary hearing required" in § 14.6D, Disposition of Motion. On the other hand, filing a written motion and requesting a pretrial hearing is permitted and may have strategic advantages, such as conveying the strength or complexity of legal issues to the prosecutor or judge.

Implied-consent offenses. Offenses involving impaired driving, misdemeanor death by vehicle, and certain other alcohol-related offenses are considered implied-consent offenses. *See* G.S. 20-16.2(a1). The N.C. General Assembly has enacted procedures for

motions practice that are specific to implied-consent offenses. Generally, in cases involving implied-consent offenses, the defendant must move to suppress or dismiss the charges before trial even where the matter is in district court. *See* G.S. 20-38.6(a). The court may summarily deny a motion to suppress made during trial where the defendant knows all facts material to the motion before trial and fails to make the motion before trial. *See* G.S. 20-38.6(d). However, where the defendant discovers facts during the course of the trial that were not known before trial, he or she may move to suppress or dismiss during the course of the trial. Unlike suppression motions made pursuant to G.S. 15A-975, motions to suppress in district court under G.S. 20-38.6 do not require an affidavit or a written motion, only that the motion be made before trial (although if the case is appealed to superior court, a written motion with an affidavit should be filed). For additional procedural requirements in implied-consent cases, see *supra* "Implied-consent offenses" in § 13.3A, Misdemeanors. For a discussion of the appeal procedure for suppression motions in implied consent cases, see *infra* § 14.7A, State's Interlocutory Right to Appeal.

Local practice. Counsel also should be aware of local timing policies in addition to the statutory deadlines. For example, as of the time of this writing, an agreement in Mecklenburg County between the prosecutor's and public defender's office requires that defense counsel file a suppression motion in felony cases in superior court within ten days of arraignment rather than within ten days of notification by the State of its intent to introduce certain evidence. The purpose of this rule is to avoid the unnecessary filing of motions before it is determined whether the case will be resolved through a plea or trial. Local rules of court may similarly extend the statutory motions deadlines.

B. Renewal of Motion

Superior court proceedings. If a motion to suppress is denied before trial, the defendant may renew the motion before or at trial if:

- additional pertinent facts have been discovered, and
- those facts could not have been discovered through due diligence before the previous determination of the motion.

See G.S. 15A-975(c); *State v. Wade*, 198 N.C. App. 257 (2009) (alleged inconsistencies between officers' testimony at suppression hearing and during trial did not constitute additional pertinent information warranting reconsideration of motion); *State v. Moose*, 101 N.C. App. 59 (1990) (previously undiscovered facts may entitle defendant to renew suppression motion at trial; motion not allowed under circumstances because defendant did not allege new facts); *see also supra* § 13.2H, Renewing Pretrial Motions (discussing authority of trial judge to reconsider own pretrial ruling and limitations on one trial judge overruling or modifying the ruling of another).

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

Practice note: The defendant must renew his or her objection to the evidence when the State offers the evidence at trial to preserve the right to appeal the denial of an earlier suppression motion. Otherwise, any objection to use of the evidence may be waived. *See infra* § 14.7C, Renewing Objection at Trial.

Misdemeanor appeals. If a motion to suppress is denied in a misdemeanor case in district court (or if the defendant makes no suppression motion at all), the defendant has the right to make the motion in superior court regardless of whether there are any additional facts to support the motion. *See* G.S. 15A-953 ("no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court"). If the defendant prevails on a suppression motion in district court but is nevertheless convicted, the defendant must timely refile the motion in superior court on appeal for a trial de novo.

C. Contents of Motion

Pretrial motion. A pretrial suppression motion in superior court must:

- be in writing;
- state the legal grounds for the motion; and
- be accompanied by an affidavit setting forth facts that support the legal grounds.

See G.S. 15A-977(a); *State v. Phillips*, 132 N.C. App. 765 (1999) (if motion to suppress fails to allege legal or factual basis for suppressing evidence, it may be summarily dismissed); *State v. Creason*, 123 N.C. App. 495 (1996) (defendant waives right to contest search by not attaching affidavit to suppression motion), *aff'd per curiam*, 346 N.C. 165 (1997); *State v. Williams*, 98 N.C. App. 405 (1990) (upholding trial court's denial of suppression motion accompanied by affidavit that did not support alleged ground for suppression), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431 (1994); *State v. Harris*, 71 N.C. App. 141 (1984) (court may summarily dismiss suppression motion that is not accompanied by affidavit); *State v. Summerlin*, 35 N.C. App. 522 (1978) (noting requirement that suppression motion be in writing). *Cf. State v. O'Connor*, 222 N.C. App. 235 (2012) (while trial court may summarily deny or dismiss a suppression motion for failure to attach a supporting affidavit, it has the discretion to refrain from doing so).

Practice note: The affidavit supporting a motion to suppress need not and generally should not be attested to by the defendant. The defendant's lawyer can attest to the truthfulness of the affidavit based on information and belief. *See State v. Chance*, 130 N.C. App. 107 (1998).

Motion made during trial. A motion to suppress made during trial may be made orally or in writing. *See* G.S. 15A-977(e). An affidavit is not required for a motion that is timely made at trial (*see supra* § 14.6A, Timing of Motion), although the defendant must articulate the legal grounds for suppression. *See State v. Roper*, 328 N.C. 337 (1991)

(overruling case law that suggested an affidavit is required for motions made at trial, but upholding admission of evidence because defendant failed to specify that he was making motion to suppress and failed to state any legal or factual basis for exclusion of evidence).

D. Disposition of Motion

Summary granting of motion. Under G.S. 15A-977(b), the trial court *must* summarily grant a motion to suppress if the motion complies with statutory procedural requirements and

- the motion states grounds that require suppression of the evidence and the State concedes the truth of the allegations, or
- the State stipulates that the evidence that is sought to be suppressed will not be offered in any trial or proceeding against the defendant.

When evidentiary hearing required. The court must allow an evidentiary hearing on a contested motion to suppress if the motion

- is timely filed,
- alleges a legal basis for suppression, and
- is accompanied by an affidavit that sets out facts supporting the ground for suppression.

See G.S. 15A-977(a), (d); *State v. Breeden*, 306 N.C. 533 (1982) (reversible error for trial court to summarily deny suppression motion that complied with all statutory requirements; court required to conduct hearing and make findings of fact), *abrogation by statute on other grounds recognized in State v. Salinas*, 366 N.C. 119 (2012); *State v. Battle*, 136 N.C. App. 781 (2000) (defendant's right to due process and statutory right to make a motion to suppress denied where trial court would not allow defendant to state his grounds or present evidence in support of his motion); *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).

When the defendant's motion to suppress is made during trial, the court must conduct a voir dire hearing outside the presence of the jury before admitting the evidence. *See* G.S. 15A-977(e); *State v. Butler*, 331 N.C. 227 (1992); *State v. James*, 118 N.C. App. 221 (1995).

Summary dismissal. The trial court may summarily dismiss a suppression motion that is untimely filed, fails to adequately state the legal grounds or the factual basis of the claim, or includes an affidavit that does not support the grounds alleged. *See* G.S. 15A-977(c); *State v. Satterfield*, 300 N.C. 621 (1980) (summary denial proper where motion was inadequate); *State v. Blackwood*, 60 N.C. App. 150 (1982) (upholding court's summary

dismissal of motion where accompanying affidavit did not allege facts that would support suppression of evidence); *State v. Smith*, 50 N.C. App. 188 (1980) (upholding trial court's summary dismissal of suppression motion where affidavit did not support motion).

While the burden is on the State in most cases to show that the evidence was properly obtained (*see* "State's burden of proof" in subsection E., below), the burden is on the defendant to demonstrate that he or she has complied with the statutory procedures governing suppression motions. *See State v. Holloway*, 311 N.C. 573 (1984) (noting burden on defendant to show compliance with procedural requirements for suppression motions), *habeas corpus granted sub nom.*, *Holloway v. Woodard*, 655 F. Supp. 1245 (W.D.N.C. 1987); *State v. Satterfield*, 300 N.C. 621 (1980) (same).

E. Conduct of Evidentiary Hearing

Generally. A hearing on a motion to suppress made pursuant to G.S. 15A-974 must be conducted out of the presence of the jury. *See* G.S. 15A-977(e); N.C. R. EVID. 104(c). Testimony at a suppression hearing must be under oath. *See* G.S. 15A-977(d); *State v. Dorsey*, 60 N.C. App. 595 (1983) (testimony presented by defendant at hearing must be under oath); *see also State v. Salinas*, 366 N.C. 119 (2012) (trial judge may not rely on allegations in defendant's affidavit as evidence to support findings of fact).

State's burden of proof. Once the defendant properly raises a suppression issue, the State ordinarily has the burden of proving by a preponderance of the evidence that the challenged evidence is admissible. *See, e.g.*, *State v. Johnson*, 304 N.C. 680 (1982) (stating preponderance of the evidence standard); *State v. Breeden*, 306 N.C. 533, 539 (1982) (reversible error for court to deny defense motion to suppress "for failure of proof"), *abrogation by statute on other grounds recognized in State v. Salinas*, 366 N.C. 119 (2012); *State v. Tarlton*, 146 N.C. App. 417 (2001) (burden on State to show admissibility of challenged evidence); *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); *see also State v. Williams*, 225 N.C. App. 636 (2013) (while the party who bears the burden of proof typically presents evidence first, that defendant presented evidence first at suppression hearing did not itself establish that burden of proof was shifted to defendant).

There is a partial exception when police acted under a warrant. Unless its invalidity appears on the face of the record, a warrant is presumed valid, and the defendant has the burden to show otherwise. Thus, a defendant has the burden of proof on a *Franks* claim—that is, a claim that an affiant made a knowingly or recklessly false statement to obtain a warrant. *See State v. Walker*, 70 N.C. App. 403 (1984) (defendant must rebut presumption of validity); *see also supra* § 14.2F, Adequacy of Affidavit in Support of Probable Cause. However, the State would still have the burden of establishing the adequacy of the probable cause allegations in the search warrant affidavit itself. *See State v. Hicks*, 60 N.C. App. 116 (1982); *see also State v. Kornegay*, 313 N.C. 1 (1985) (affidavit part of warrant).

Hearsay at suppression hearing. Hearsay evidence that would be inadmissible at trial is admissible in a suppression hearing. *See* N.C. R. EVID. 104(a) (on preliminary questions of admissibility court is not bound by rules of evidence except with respect to privileges); *State v. Melvin*, 32 N.C. App. 772 (1977) (hearsay statements by officer about what joint occupant said in consenting to search of premises admissible at voir dire hearing to determine validity of consent). Additionally, most courts that have considered the issue have ruled that *Crawford v. Washington*, 541 U.S. 36 (2004), which generally bars admission of testimonial hearsay statements made out of court unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine, does not apply to suppression or preliminary hearings. *See, e.g., People v. Felder*, 129 P.3d 1072 (Colo. Ct. App. 2005); *see also* Jessica Smith, *Does Crawford Apply in Pretrial Proceedings,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 31, 2015).

Defendant's testimony at suppression hearing. The State may not offer the testimony of the defendant from a suppression hearing as evidence of guilt at the defendant's trial; the rationale behind this rule is that the defendant should not have to jeopardize one constitutional right, the privilege against self-incrimination, to protect others. *See Simmons v. United States*, 390 U.S. 377, 394 (1968). However, where a defendant waives his privilege against self-incrimination by taking the stand at trial, the State may use the defendant's suppression hearing testimony to impeach the defendant. *See State v. Bracey*, 303 N.C. 112 (1981).

Right to disclosure of identity of confidential informant. A defendant is entitled to disclosure of a confidential informant's identity, usually for purposes of trial, if necessary to defend against the merits of the charge or otherwise essential to a fair determination of the case. *See Roviaro v. United States*, 353 U.S. 53 (1957); *State v. Watson*, 303 N.C. 533 (1981); *see also* JOHN RUBIN, THE ENTRAPMENT DEFENSE IN NORTH CAROLINA 49–51 (Institute of Government, 2001) (discussing cases in which court has ordered disclosure of confidential informant's identity in entrapment and other cases).

A defendant is generally not constitutionally entitled to disclosure of the identity of a confidential informant for a pretrial hearing to challenge the validity of a search or arrest. *See McCray v. Illinois*, 386 U.S. 300 (1967). A defendant is statutorily entitled, however, to disclosure of the identity of an informant in the following circumstances: (a) the defendant is contesting the truthfulness of the testimony presented to establish probable cause, (b) the search (or arrest underlying a search incident to arrest) was without a warrant, and (c) there is no independent corroboration of the informant's existence. *See* G.S. 15A-978(b).

For a further discussion of disclosure of confidential informants, see *supra* § 4.6D, Identity of Informants.

F. Required Findings

Findings of fact. As a general rule, following a hearing on a suppression motion in superior court, the trial court must set forth in the record findings of fact and conclusions

of law. *See* G.S. 15A-977(f); *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. Biggs*, 289 N.C. 522 (1976) (new trial awarded where court admitted defendant's statements without making finding that defendant had knowingly and intelligently waived his right to counsel before making statements); *State v. Rollins*, 200 N.C. App. 105, 110 (2009) (error not to make findings); *cf. State v. Munsey*, 342 N.C. 882 (1996) (if there is no conflict in the evidence on a fact, it is not error to fail to find that fact); *State v. Ladd*, 308 N.C. 272 (1983) (if conflicts in evidence are immaterial and have no effect on inadmissibility, not error to omit factual findings, although it is better practice to make factual findings).

For a further discussion of the rules on making findings of fact, *see supra* § 13.2G, Disposition of Motions (discussing general rules regarding pretrial motions).

Remand as remedy for inadequate fact finding. If the superior court fails to make adequate findings, the appellate court may either reverse the conviction and order a new trial or, more commonly, remand to the trial court for further findings of fact. *See State v. Smith*, 346 N.C. 794 (1997) (court remands for findings of fact on voluntariness of consent to search); *State v. Booker*, 306 N.C. 302 (1982) (remand to superior court for proper findings of fact to resolve conflict in evidence adduced at suppression hearing); *State v. Neal*, 210 N.C. App.645 (2011) (reversing denial of motion to suppress and remanding for further findings of fact rather than new trial where trial court failed to make findings of fact to resolve material conflict in evidence); *State v. Rollins*, 200 N.C. App. 105 (2009) (remand for new suppression hearing where superior court failed to provide basis for denial of defendant's motion).

14.7 Appeal of Suppression Motions

A. State's Interlocutory Right to Appeal

From superior court's ruling. One of the few instances in which the State has the right to appeal in a criminal case is when a pretrial suppression motion is granted in superior court. The State may only appeal the granting of a pretrial suppression motion if the prosecutor certifies that the appeal is not taken for the purpose of delay and the suppressed evidence is essential to the case. *See* G.S. 15A-979(c). The burden is on the State to show it has complied with the statutory prerequisites for appeal. *See State v. Judd*, 128 N.C. App. 328 (1998) (finding that Court of Appeals had no jurisdiction to hear State's appeal where there was no indication in record that prosecutor followed requirements of G.S. 15A-979(c)); *State v. Blandin*, 60 N.C. App. 271 (1983) (State's appeal dismissed where prosecutor did not timely file certificate); *see also State v. Oates*, 366 N.C. 264 (2012) (describing time frame in which State must file notice of appeal from trial court's ruling on suppression motion). *But cf. State v. Romano*, 268 N.C. App. 440 (2019) ("*Romano II*") (State was not precluded from proceeding to trial without

suppressed evidence despite its earlier representation in appeal of grant of motion to suppress that the evidence was critical to its case).

From district court's ruling. With the exception of the preliminary granting of a suppression motion in an implied-consent case, discussed below, the State has no right to appeal a district court judge's granting of a motion to suppress even if the motion to suppress was heard before trial. *See* G.S. 15A-1432 (describing grounds for appeal by State from district to superior court). Although rare, the State may be able to file a writ of certiorari in superior court, under Rule 19 of the General Rules of Practice for the Superior and District Courts, to obtain review of a pretrial ruling by a district court on a motion to suppress. If the motion to suppress is granted during trial in district court, however, the State may have insufficient evidence to withstand a motion for nonsuit, which is not reviewable.

If the district court suppresses evidence at a probable cause hearing in a felony case (*see supra* § 3.5B, Rules of Evidence) and the State thereafter indicts the defendant, the district court's ruling has no legal effect and the defendant must timely refile the suppression motion in superior court. *See State v. Lay*, 56 N.C. App. 796 (1982).

Implied-consent cases. The Motor Vehicle Driver Protection Act of 2006 created an interlocutory right to appeal for the State in the context of suppression motions. Following a hearing on the defendant's motion to suppress evidence in district court, the district court judge must make written findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. *See* G.S. 20-38.6(f). Where the judge indicates that the motion should be granted, the State may appeal to superior court within a reasonable time. *See* G.S. 20-38.7(a); *State v. Fowler*, 197 N.C. App. 1 (2009) (time by which the State must give notice of appeal depends on the circumstances of each case); *State v. Palmer*, 197 N.C. App. 201 (2009) (G.S. 15A-1432(b) may be used as a procedural guideline for giving notice of appeal but is not binding). No final order may be entered until the State has either appealed or indicated that it does not intend to do so. *See* G.S. 20-38.6(f). If the State appeals, the superior court must consider the merits of the motion and then remand to district court for entry of judgment. Where the superior court affirms the district court's preliminary indication that the evidence should be suppressed and remands for entry of judgment, the State may not appeal from the remand order or from the district court's final judgment suppressing the evidence. *See Fowler*, 197 N.C. App. at 18*; State v. Rackley*, 200 N.C. App. 433 (2009) (following *Fowler*); *see also* Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after State v. Fowler and State v. Palmer*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/06 (UNC School of Government, Dec. 2009).

B. Appeal after Guilty Plea

Superior court. Generally, a plea of guilty acts as a waiver of the defendant's right to appeal adverse rulings on pretrial motions in superior court. An exception exists for adverse rulings on suppression motions. A defendant may plead guilty and preserve the right to appeal from the denial of a suppression motion. *See* G.S. 15A-979(b); *see also*

State v. Davis, 227 N.C. App. 572 (2013) (where defendant reserves right to appeal on guilty plea, defendant may appeal order denying motion to suppress uncounseled convictions under G.S. 15A-980).

To preserve the right of appeal, the defendant must expressly communicate his intent to appeal the denial of the suppression motion to the prosecutor and the court at the time of the guilty plea. *See State v. Stevens*, 151 N.C. App. 561 (2002) (defendant waived right to appeal from denial of suppression motion where he entered plea of guilty without notifying court and prosecution of intent to appeal); *State v. Brown*, 142 N.C. App. 491 (2001); *State v. McBride*, 120 N.C. App. 623 (1995), *aff'd per curiam*, 344 N.C. 623 (1996); *cf*. *State v. Brown*, 217 N.C. App. 566, 570 (2011) (defendant gave sufficient notice of intent to appeal denial of motion to suppress by stating at close of State's evidence and before changing not guilty to guilty plea that defendant "would like to preserve any appellate issues that may stem from the motions in this trial"; trial court understood motion defendant wished to appeal and reentered findings of fact on defendant's motion to suppress).

To be safe, the conditional nature of the guilty plea should be put on the record before the plea is entered and should appear in the written transcript of plea. The defendant must appeal from the judgment of conviction itself after the guilty plea, not from the denial of the motion to suppress. *See State v. Miller*, 205 N.C. App. 724 (2010) (defendant's appeal dismissed for lack of jurisdiction where defendant failed to appeal from final judgment of conviction).

For a further discussion, see "Preserving right to appeal from denial of suppression motion" in 2 NORTH CAROLINA DEFENDER MANUAL § 23.6B, Appeal from Superior Court (June 2018).

District court. A guilty plea in district court does not act as a waiver of a defendant's right to make a motion to suppress on appeal for trial de novo in superior court. *See* G.S. 15A-979 Official Commentary (right to trial de novo guarantees defendant right to renew motions in superior court even after guilty plea in district court); *see generally* G.S. 7A-290; *State v. Sparrow*, 276 N.C. 499 (1970) (defendant convicted in district court is entitled to appeal to superior court for trial de novo as matter of right, even if defendant entered guilty plea in district court).

C. Renewing Objection at Trial

To preserve the right to appeal the denial of a suppression motion in superior court, counsel must contemporaneously object when the evidence is offered at trial. *See State v. Golphin*, 352 N.C. 364 (2000) (since motion to suppress is type of motion in limine, counsel must object to admission of evidence at time offered at trial to preserve right to appeal); *see also generally State v. Ray*, 364 N.C. 272 (2010) (abrogating *State v. Herrera*, 195 N.C. App. 181 (2009), and holding that defendant must make contemporaneous objection when evidence is offered at trial, not just at hearing outside presence of jury before actual offer of evidence); *State v. Hill*, 347 N.C. 275 (1997)

(defendant required to contemporaneously object to admission of evidence after motion in limine denied). In objecting, counsel should indicate that the objection is based on the previous motion to suppress.

D. Grounds for Appeal

A defendant may not assert on appeal a new theory for suppression that was not asserted at trial in superior court. *See State v. Benson*, 323 N.C. 318 (1988) (defendant may not "swap horses" on appeal), *abrogation on other grounds recognized in State v. Hooper*, 358 N.C. 122 (2004); *State v. Hernandez*, 227 N.C. App. 601 (2013) (defendants failed to preserve challenge to vehicle stop based on stop being impermissibly extended where theory on appeal differed from theory argued at trial court, that is, that anonymous tip was insufficient to support stop); *State v. Smarr*, 146 N.C. App. 44 (2001) (to same effect). Thus, trial counsel should raise all possible grounds for suppressing evidence when making the motion. *See also State v. Phillips*, 151 N.C. App. 185 (2002) (State's abandonment of argument at trial level that defendant did not have standing waived appellate review of issue); *State v. Cooke*, 306 N.C. 132 (1982) (State may not assert on appeal ground against suppression that it did not assert at trial level). *But see State v. Hester*, 254 N.C. App. 506, 516 (2017) (noting that the bar on asserting a new theory on appeal applies only to the party carrying the burden on appeal; a party arguing for the trial court's ruling to be upheld may "run *any* horse" on appeal in support of the trial court's judgment) (emphasis in original) (citations omitted).