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, and there are several reasons to file a suppression motion. You should do so, of course, when the facts and supporting law are strong. There is also good reason to file a suppression motion when the facts are not as strong but there is law to support the issue you want to raise. 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; and
- provide the client with an opportunity to hear the evidence and get a more realistic view of the case.

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 exhaustively review 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 (West Pub. Co., 2d ed. 1999) (discussing Fifth and Sixth Amendment issues, among other things); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (West Pub. Co., 3d ed. 1996); ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (Institute of Government, 2d ed. 1992). *See also infra* Chapter 15 (limits on 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 Chapter 12 (forthcoming chapter discusses suppression of prior convictions for right-to-counsel violations).

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, 370 S.E.2d 553 (1988). Violations of statutory rights also may provide the basis for suppression.

The exclusionary rule is codified in North Carolina in G.S. 15A-974, 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 the result of a "substantial violation" of the Criminal Procedure Act.

The Official Commentary to the statute explains that part 1 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 part 1 of the statute.

Part 2 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. The meaning of a "substantial violation" is discussed further in Section 14.5 below.

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, § 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 stop that was not supported by reasonable suspicion or probable cause;

- in a search without probable cause or a valid consent to search;
- through 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* Chapter 15.

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) ("A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement").

There are a number of exceptions to the warrant requirement, however. 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 State v. Frazier*, 142 N.C. App. 361, 542 S.E.2d 682 (2001); *State v. Mills*, 104 N.C. App. 724, 411 S.E.2d 193 (1991). Likewise, 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, 512 S.E.2d 414 (1999).

For a 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 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, 370 S.E.2d 553 (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)).

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). North Carolina law includes the additional requirement that when officers are executing a search warrant, evidence in plain view must be discovered inadvertently. *See* G.S. 15A-253; *State v. Mickey*, 347 N.C. 508, 495 S.E.2d 669 (1998).

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 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); *compare State v. McCray*, 15 N.C. App. 373, 190 S.E.2d 267 (1972) (no search where police watched public areas of restroom; person would have reasonable expectation of privacy in stalls only).

Federal and state law prevents either private parties or the government from engaging in eavesdropping or wiretapping without a court order. *See* 18 U.S.C. § 2510 *et. seq*.; G.S. 15A-286 through -298. Violation of wiretapping and eavesdropping laws may be the basis of a suppression motion. *See State v. Shaw*, 103 N.C. App. 268, 404 S.E.2d 887 (1991).

Inevitable Discovery Rule. 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 Costello v. United States*, 365 U.S. 265 (1961); *Nix v. Williams*, 467 U.S. 431 (1984); *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992) (following *Nix*).

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* § 15.1 (discussing circumstances in which a different test may apply, such as when a person's freedom of movement is already restricted or when a person has not submitted to police authority).

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, 424 S.E.2d 120 (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* § 15.2 (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 witnesses the suspect commit a misdemeanor. *See* G.S. 15A-401(b); *State v. Dammons*, 128 N.C. App. 16, 493 S.E.2d 480 (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. 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.

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, 379 S.E.2d 830 (1989) (bare bones, conclusory affidavit insufficient to support finding of probable cause); *accord State v. Bone*, 354 N.C. 1, 550 S.E.2d 482 (2001). 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, 346 S.E.2d 227 (1986) (officer's oral testimony to magistrate could not be considered in determining sufficiency of evidence for issuance of search warrant).

> *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. Severn*, 130 N.C. App. 319, 502 S.E.2d 882 (1998); G.S. 15A-978 (defendant entitled to challenge truthfulness of affidavit supporting search warrant); *see also State v. Martin,* 315 N.C. 667, 340 S.E.2d 326 (1986) (applying *Franks* to arrest warrant); *State v. Pearson,* ___ N.C. App. ___, ___ S.E.2d ___ (June 8, 2002) (same rules apply to affidavit in support of non-testimonial identification order); *State v. Watkins,* 120 N.C. App. 804, 463 S.E.2d 802 (1995) (information fabricated by officer could not serve as basis for reasonable suspicion to stop). 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, 479 S.E.2d 494 (1997) (trial court erred in excluding evidence tending to show that police inaccurately reported informant's information to magistrate).

E. "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, 506 S.E.2d 711 (1998); *State v. Freeman*, 307 N.C. 357, 298 S.E.2d 331 (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, 418 S.E.2d 225 (1992) (two-hour lapse between illegal arrest and statement did not purge taint, and confession had to be suppressed).

F. 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, 498 S.E.2d 599 (1998). The question of whether a 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, 536 S.E.2d 1 (2000) (citing *Schneckloth*). The state has the burden of proving voluntariness. *See State v. Crenshaw*, 144 N.C. App. 574, 551 S.E.2d 147 (2001). Also, the search or seizure may not extend beyond the scope of the suspect's consent. *See State v. Pearson, supra* (consent to search vehicle did not imply consent to search person); *see also* G.S. 15A-221, -223. For a further discussion of consent in the context of a warrantless stop or arrest, *see infra* §§ 15.3F, 15.4B.

G. Nontestimonial Identification Orders

Where a suspect is not in police custody and police wish to obtain 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. *See* G.S. 15A-974. If the suspect is in police custody, police must obtain a search warrant. *See State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988). Further, for more intrusive procedures, such as withdrawing blood, a search warrant, supported by probable cause, is required rather than a nontestimonial identification order regardless of whether the person is in custody. *See id.*; *see also* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 186, 411 (Institute of Government 2d ed. 1992) (so interpreting *Carter*).

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, §§ 19, 23 and 24, of the North Carolina Constitution.

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, 212 S.E.2d 92 (1975) (confession made in response to inducement or hope that defendant would obtain relief from charged offense not voluntary); *compare State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2001) (confession not involuntary where induced by promise that if defendant confessed he could see daughter and girlfriend). A court must examine the totality of circumstances in determining whether a confession is involuntary. *See Malloy v. Hogan*, 378 U.S. 1 (1964); *State v. Hicks*, 333 N.C. 467, 428 S.E.2d 167 (1993).

B. *Miranda* Violations

Requirements. 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 associated with formal arrest." *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001) (disavowing former test for custody of whether reasonable person in defendant's position would feel free to leave presence of police).

"Interrogation" is defined as questioning or its functional equivalent—that is, statements intended to elicit an incriminating response by the subject. *See Rhode Island v. Innis*, 446 U.S. 291 (1980).There is no violation of the Fifth Amendment where a suspect makes a "spontaneous" statement to police, not in response to interrogation.

Before any custodial statement, made in response to police interrogation, is admissible at trial, the suspect must execute a voluntary waiver of his or her rights. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Hicks,* 333 N.C. 467, 428 S.E.2d 167 (1993). If a suspect invokes his or her *right to counsel,* the invocation must be honored by police and *all* interrogation must stop regarding *all* crimes until the suspect is provided with counsel. Questioning may resume only if the suspect requests to talk further with police. *See Edwards v. Arizona*, 451 U.S. 477 (1981); *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992). If a suspect invokes his or her *right to silence,* the interrogation likewise must stop; however, some cases suggest that if a suspect invokes the right to silence only, an officer may later reinitiate interrogation in limited circumstances. *See State v. Murphy,* 342 N.C. 813, 467 S.E.2d 428 (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* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.9(f), at 595–99 (West Pub. Co., 2d ed. 1999) (finding it

highly questionable to permit police to reinitiate interrogation about same crime of defendant who has asserted right to remain silent).

In short, you may be able to suppress a statement under the authority of *Miranda* if your client gives a statement while in police custody and he or she:

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

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, 187 S.E.2d 111 (1972); *State v. Burton*, 119 N.C. App. 625, 460 S.E.2d 181 (1995).

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. Brantley,* 129 N.C. App. 725, 501 S.E.2d 676 (1998) (right to statutory warning applies to all juveniles); *State v. Fincher,* 309 N.C. 1, 305 S.E.2d 685 (1983) (seventeen-year-old entitled to statutory juvenile warnings).

If the juvenile is less than 14 years old, a parent, guardian, or attorney must be present when the juvenile is interrogated; otherwise any statement made by the juvenile is inadmissible against him or her. *See* G.S. 7B-2101(b).

C. Confessions in Violation of Sixth Amendment Right to Counsel

After a suspect has been formally charged and has been appointed counsel (usually at first appearance), the suspect has a Sixth Amendment right to have counsel present at any subsequent interrogation by the police. The police may not initiate contact with a suspect whose Sixth Amendment rights have attached. *See Michigan v. Jackson*, 475 U.S. 625 (1986); *State v. Tucker*, 331 N.C. 12, 414 S.E.2d 548 (1992) (good discussion of Sixth Amendment right to counsel during interrogations). However, if the suspect initiates contact with the police, the police may interrogate him or her. *See Patterson v. Illinois*, 487 U.S. 285 (1988); *State v. Tucker, supra*. In addition, the U.S. Supreme Court has held that the police may reinitiate contact with a defendant if the contact concerns a different case than the one for which the defendant has asserted the Sixth Amendment right to counsel. *See Texas v. Cobb,* 532 U.S. 162 (2001) (Sixth Amendment attaches to offenses that would be considered same offense under the *Blockburger* "element" test).

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, 519 S.E.2d 770 (1999); *see also supra* § 14.2E.

E. Evidence Derived from Illegal Confession

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 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 9.5(a), at 382–83 (West Pub. Co., 2d ed 1999); *Michigan v. Tucker*, 417 U.S. 433 (1974); *see also supra* § 14.2E (evidence derived from illegal search or arrest). However, 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 does not apply. Thus, derivative evidence obtained as the result of an unwarned but otherwise voluntary confession is admissible. *See Oregon v. Elstad*, 470 U.S. 298 (1985) (unwarned confession did not taint later warned confession); *State v. Hicks,* 333 N.C. 467, 428 S.E.2d 167 (1993) (following *Elstad*).

F. Codefendant's Confession

Under the Confrontation Clause of the Sixth Amendment, and Article I, § 24 of the North Carolina Constitution, 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.

If the co-defendants are tried separately, the state ordinarily will be unable to fit the blame-shifting portions of a confession into any hearsay exception. *See Lilly v. Virginia*, 527 U.S. 116 (1999); *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968) (codefendant's confession to police was hearsay, not within any exception, with respect to non-confessing defendant). In a joint trial, the state must "sanitize" the accomplice's confession by removing all direct or indirect references to individuals other than the declarant before admitting the confession 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 "blank" or "deleted" not sufficient redaction); *State v. Gonzalez*, 311 N.C. 80, 316 S.E.2d 229 (1984) (error to admit statement by one co-defendant saying "I didn't do it, they did"); G.S. 15A-927(c) (codifies *Bruton* rule). For further discussion of the *Bruton* rule, *see supra* § 6.2E of this manual on joinder and severance.

14.4 Illegal Identification Procedures

A. Pretrial Identification Procedures

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. Braithwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983).

Suggestiveness of Procedure. A pretrial identification procedure may be improperly 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, 357 S.E.2d 31 (1987) (photo array suggestive where 6 of 10 photos unclear and seventh photo showed deputy in uniform); *State v. Harris, supra* (photo array suggestive where defendant only person wearing cap and scarf); *compare State v. Gaines*, 283 N.C. 33, 194 S.E.2d 839 (1973) (lineup not unduly suggestive even though defendant only juvenile in group)).
- an officer makes comments during the identification procedure that taints the process (*see State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985) (identification procedure tainted by officer telling witness that perpetrator was in lineup); *State v. Headen*, 295 N.C. 437, 245 S.E.2d 706 (1978) (deputy's comments naming defendant as perpetrator tainted identification procedure));
- the defendant is shown alone to the witness in a show-up (*see State v. Capps*, 114 N.C. App. 156, 441 S.E.2d 621 (1994) (witness shown defendant alone in police car); *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)).

To avoid these problems, some have suggested that the police should be required to conduct "double-blind, sequential" lineups. A lineup is double-blind if neither the witness nor the officer conducting the lineup knows who the suspect is. A lineup is sequential if several people are shown one at a time rather than as a group to a witness, which reduces the possibility that the witness will compare the people in the lineup and pick the person who most closely matches the suspect. *See* David Feige, *"I'll Never Forget that Face": The Science and Law of the Double-Blind Sequential Lineup, in* THE CHAMPION, at 28–31 (Jan./Feb. 2002, Nat'l Ass'n of Criminal Defense Lawyers).

Risk of Misidentification. In addition to showing that an identification procedure was suggestive, the defendant must show that the procedure created a risk of misidentification. *See State v. Harris,* 308 N.C. 159, 301 S.E.2d 91 (1983); *State v. McCraw,* 300 N.C. 610, 268 S.E.2d 173 (1980); *State v. Breeze*, 130 N.C. App. 344, 503 S.E.2d 141 (1998). In deciding whether the suggestive procedure impermissibly influenced the identification, courts consider five factors: (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, supra* (*citing Neil v. Biggers*, 409 U.S. 188 (1972)).

B. In-Court Identification

An impermissibly suggestive pretrial identification procedure may taint an in-court identification. *See State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986); *State v. Headen*, 295 N.C. 437, 245 S.E.2d 706 (1978). Before admitting an in-court identification that has been challenged, the trial court must conduct a voir dire and determine by clear and convincing evidence that the in-court identification is of independent origin and not the result of an impermissibly suggestive pretrial procedure. *See State v. Flowers, supra*. In determining whether an in-court identification is independent of a flawed pretrial investigation, the court should consider the five factors listed above. *See State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983); *State v. Thompson*, 303 N.C. 169, 277 S.E.2d 431 (1981).

C. Right to Counsel at Lineups

Defendants have a Sixth Amendment right to have counsel present at a lineup that occurs after the defendant has been formally charged. *See Gilbert v. California*, 388 U.S. 263 (1967); *State v. Hunt*, 339 N.C. 622, 457 S.E.2d 276 (1995). If the defendant's right to counsel is not honored, the pretrial identification must be suppressed. *See State v. Hunt, supra*. An in-court identification by a witness who took part in an illegal pretrial lineup 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 id*.

D. Nontestimonial Identification Procedures

A suspect has a right to have counsel present during a nontestimonial identification procedure. *See* G.S. 15A-279(d); G.S. 7A-451(b)(2); *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980). 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. Coplen*, 138 N.C. App. 48, 530 S.E.2d 313 (2000) (refusing to suppress results of identification procedure, as distinguished from statements of defendant, for violation of statutory right to counsel).

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(2).

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. Hyleman, 324 N.C. 506, 379 S.E.2d 830 (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. Wallace, 351 N.C. 481, 528 S.E.2d 326 (2000) (confession admissible despite delay of 19 hours in taking defendant to magistrate for initial appearance; interrogating officer had read suspect *Miranda* rights prior to questioning).

State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (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. Davidson, 131 N.C. App. 276, 506 S.E.2d 743 (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, 507 S.E.2d 301 (1998) (no substantial violation of Criminal Procedure Act where officer administered breathalyzer test outside of his territorial jurisdiction).

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, 268 S.E.2d 510 (1980) (a defendant who should have but did not raise suppression issue before trial waives right to have issue heard); *see also State v. Langdon,* 94 N.C. App. 354, 380 S.E.2d 388 (1989) (motion filed on day case calendared for trial but before jury selection deemed timely).

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," below). *See* G.S. 15A-975(a); *State v. Fisher*, 321 N.C. 19, 361 S.E.2d 551 (1987) (defendant could raise suppression issue at trial when he was unaware state intended to introduce certain evidence against him).

Our appellate courts have strictly construed the requirement that, where possible, suppression motions be made prior to trial. *See, e.g., State v. Hill,* 294 N.C. 320, 240 S.E.2d 794 (1978) (upholding court's denial of untimely suppression motion where court made finding that defendant had reasonable opportunity before trial to make motion); *accord State v. Austin,* 111 N.C. App. 590, 432 S.E.2d 881 (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, 265 S.E.2d 223 (1980) (good discussion of which types of motions must be made prior to 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. Motions in limine are discussed further in Chapter 13, Motions Practice (forthcoming).

Special Timing Rules for Certain Types of Evidence in Superior Court. The following types of evidence are subject to special timing rules:

- 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), -976(b).

If the state gives notice at least twenty (20) working days before trial of its intent to introduce such evidence at trial, then the defendant must move to suppress the evidence within ten (10) working days of receipt of the notice. *See* G.S. 15A-976(b); *see also State v. Davis,* 97 N.C. App. 259, 388 S.E.2d 201 (1990) (where defendant given permission to refile suppression motion in a form meeting procedural requirements, ten-day limit applied to refiling).

If the state does not notify the defendant at least twenty working days before trial, then the defendant may move to suppress the above types of evidence at trial. *See* G.S. 15A-975(b); *State v. Patterson,* 335 N.C. 437, 439 S.E.2d 578 (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, 402 S.E.2d 600 (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); *State v. Battle,* 136 N.C. App. 781, 525 S.E.2d 850 (2000) (failure of state to notify defendant of intent to offer cocaine seized in warrantless search entitled defendant to raise suppression issue at trial).

Note: Beware that prosecutors may include in their response to the defendant's discovery request a notice of intent to use the above types of evidence.

Misdemeanor Appeals. A defendant who wishes to have evidence suppressed on *de novo* appeal from a misdemeanor conviction must file a suppression motion prior to trial in superior court if, as in most cases, the defendant knows of the evidence based on the proceedings in district court. *See State v. Simmons*, 59 N.C. App. 287, 296 S.E.2d 805 (1982). 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 above types of evidence when a misdemeanor is appealed for trial de novo in superior court. *See* G.S. 15A-975(c); *State v. Golden*, 96 N.C. App. 249, 385 S.E.2d 346 (1989) (notice requirements do not apply to misdemeanor appeals).

Timing Rules in Misdemeanor Cases in District Court. Suppression motions in misdemeanor cases tried in district court 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 misdemeanor cases in district court). Usually defense counsel will want to wait until the trial is under way in district court before moving to suppress because, if the judge grants the motion, the state may not have sufficient evidence to withstand a nonsuit motion. For example, in an impaired driving case, if the defendant is contesting the grounds for the stop, counsel will often want to wait until the stopping officer takes the stand and then request the judge to allow counsel to conduct a voir dire of the officer regarding the reasons for the stop. *See infra* § 14.6D, "When Evidentiary Hearing Required" (defendant has right to voir dire hearing before admission of evidence when suppression motion made at trial).

Local Practice. Counsel also should be aware of local timing rules. For example, under an agreement in Mecklenburg County between the prosecutor's and public defender's office, defense counsel must 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.

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. Watkins*, 120 N.C. App. 804, 463 S.E.2d 802 (1995) (defendant entitled to new suppression hearing based on newly discovered evidence that "anonymous tip" relied on by police had been fabricated); *State v. Moose*, 101 N.C. App. 59, 398 S.E.2d 898 (1990) (previously undiscovered facts may entitle defendant to renew suppression motion at trial).

A similar standard has been applied to a hearing at a second trial when the suppression motion was denied at the first trial. *See State v. Melvin*, 99 N.C. App. 16, 392 S.E.2d 740 (1990) (defendant must show that additional evidence has arisen since hearing at first trial before being entitled to hearing at second trial); *State v. Thompson*, 52 N.C. App. 629, 279 S.E.2d 125 (1981) (at hearing on suppression motion before second trial, court concludes that no additional evidence warranted reconsideration of earlier ruling).

Note: The defendant must renew his or her objection to the evidence when the state offers it 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.

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 must:

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

See G.S. 15A-977(a); *State v. Summerlin*, 35 N.C. App. 522, 241 S.E.2d 732 (1978) (noting requirement that suppression motion be in writing); *State v. Phillips*, 132 N.C. App. 765, 513 S.E.2d 568 (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, 473 S.E.2d 771 (1996) (defendant waives right to contest search by not attaching affidavit to suppression motion); *State v. Harris*, 71 N.C. App. 141, 321 S.E.2d 480 (1984) (court may summarily dismiss suppression motion that is not accompanied by affidavit); *State v. Williams*, 98 N.C. App. 405, 390 S.E.2d 729 (1990) (upholding trial court's denial of suppression motion accompanied by affidavit that did not support alleged ground for suppression).

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, 502 S.E.2d 22 (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 for when motion may be made at trial), although the defendant must articulate the legal grounds for suppression. *See State v. Roper*, 328 N.C. 337, 402 S.E.2d 600 (1991) (court upholds trial court's admission of evidence where 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 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 State v. Breeden, 306 N.C. 533, 293 S.E.2d 788 (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); *State v. Kirkland*, 119 N.C. App. 185, 457 S.E.2d 766 (1995) (error, harmless on these facts, for court to admit evidence without holding hearing on defendant's suppression motion), *aff'd,* 342 N.C.

891, 467 S.E.2d 242 (1996); *State v. Martin*, 38 N.C. App. 115, 247 S.E.2d 303 (1975) (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 State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992); *State v. James*, 118 N.C. App. 221, 454 S.E.2d 858 (1995).

Summary Dismissal. The trial court may summarily dismiss a suppression motion that is untimely filed or fails to adequately state the legal grounds or the factual basis of the claim. *See* G.S. 15A-977(c); *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980) (summary denial proper where motion was inadequate); *State v. Blackwood*, 60 N.C. App. 150, 298 S.E.2d 196 (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, 272 S.E.2d 621 (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* 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, 319 S.E.2d 261 (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, 268 S.E.2d 510 (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. Bracey*, 60 N.C. App. 595, 298 S.E.2d 282 (1983) (testimony presented by defendant at hearing must be under oath).

State's Burden of Proof. Once the defendant properly raises a suppression issue, the state has the burden of proving by a preponderance of the evidence that the challenged evidence is admissible. *See State v. Johnson*, 304 N.C. 680, 285 S.E.2d 792 (1982) (stating preponderance of the evidence standard); *State v. Breeden*, 306 N.C. 533, 293 S.E.2d 788 (1982) (reversible error for court to deny defense motion to suppress "for failure of proof").

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 would have the burden of proof on a *Franks* claim—that is, that an affiant made a knowingly or recklessly false statement to obtain a warrant. *See State v. Walker*, 70 N.C. App. 403, 320 S.E.2d 31 (1984); *see also supra* § 14.2D (discussing *Franks* claims). 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, 298 S.E.2d 180 (1982); *see also State v. Kornegay,* 313 N.C. 1, 326 S.E.2d 881 (1985) (affidavit part of warrant).

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 (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, 277 S.E.2d 390 (1981).

Right to Disclosure of Identity of Confidential Informant. A defendant is entitled to disclosure of a confidential informant, 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, 279 S.E.2d 580 (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 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).

F. Required Findings

Findings of Fact. 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, 297 S.E.2d 540 (1982) (duty of trial court to resolve factual conflicts by making findings of fact); *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (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, 223 S.E.2d 371 (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); *cf. State v. Munsey*, 342 N.C. 882, 467 S.E.2d 425 (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, 302 S.E.2d 164 (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).

Remand as Remedy for Inadequate Fact Finding. If the superior court fails to make adequate findings, the appellate court may either reverse or remand to the trial court for further findings of fact. *See State v. Smith*, 346 N.C. 794, 488 S.E.2d 210 (1997) (court remands for findings of fact on voluntariness of consent to search); *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982) (remand to superior court for proper findings of fact to resolve conflict in evidence adduced at suppression hearing); *State v. Ingram,* 20 N.C. App. 35, 200 S.E.2d 417 (1973) (remand for evidentiary hearing and findings of fact).

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, 494 S.E.2d 605 (1998); *see also State v. Blandin*, 60 N.C. App. 271, 298 S.E.2d 759 (1983) (state's appeal dismissed where prosecutor did not timely file certificate).

From District Court's Ruling. 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). 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 for district court's authority at probable cause hearings) 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, 290 S.E.2d 405 (1982).

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). 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. Brown*, 142 N.C. App. 491, 543 S.E.2d 192 (2001); *State v. McBride*, 120 N.C. App. 623, 463 S.E.2d 403, *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996). 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.

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 State v. Sparrow,* 276 N.C. 499 173 S.E.2d 897 (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, 533 S.E.2d 168 (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. Hill*, 347 N.C. 275, 493 S.E.2d 264 (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, 372 S.E.2d 517 (1988) (defendant may not "swap horses" on appeal); *accord State v. Smarr*, 146 N.C. App. 144, 551 S.E.2d 881 (2001). Thus, trial counsel should raise all possible grounds for suppressing evidence when making the motion. *See also State v. Phillips,* ___ N.C. App. ___, ___ S.E.2d ___ (July 2, 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, 291 S.E.2d 618 (1982) (state may not assert on appeal ground against suppression that it did not assert at trial level).