

Suppression Motions **Bases and Procedures**

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February 2009 (Updated January 2010)

Grounds to File a Suppression Motion

1. Your case facts have a strong suppression issue and there is case law in support of it.
2. Your case facts are less strong on the suppression issue but there is arguable case law to support suppression. Under these circumstances you should still file a motion to suppress if you will gain benefit for any of the following reasons, or any other reasonable basis that you can support.
You will be able to obtain detailed factual information regarding the case under oath from witnesses and cement their testimony for trial.
You may find additional information regarding the case which would support the filing of additional limiting motions, such as motions in limine.
Your client will have the opportunity to hear the evidence and get more realistic view of the case and also see you fight for them in court.
The case is serious and any to preserve every issue for possible appellate review.
There is no defense except suppression of the evidence, however weak, and your client insists on going to trial.

Types of Evidence That Can Be Suppressed

Identifications of any kind, whether state action occurred or not because it is based on the Fifth Amendment, due process, reliability, not state action.

(If the action conflicts with the new statutory identification procedures, challenge can also be made on the grounds of statutory violation)

Any statements of your client, if they were obtained under any of the following conditions:

1. Statement was obtained prior to your client being Mirandized and the statement was in response to an officer's questions or to a statement made by an officer which the officer knew, or should have known, was likely to have elicited a response and your client was in custody or appeared to be under arrest.
2. Someone working with or for law enforcement, or acting as an agent for law enforcement, elicited the statement from your client after he had been charged and after he had requested an attorney, regardless of whether he was in custody at the time.
3. Your client was interviewed by law enforcement about the pending charge and after he had requested an attorney AND your client did not initiate the contact.
4. Law enforcement continued questioning your client after he invoked his right to remain silent and/or his right to counsel, while still in custody. (The assertion of right to counsel would apply to both in custody and out of custody situations--but only after charges had been taken out).

Physical Evidence Seized

From a stop made without reasonable suspicion or probable cause.

From a search made without probable cause or valid permission to search.

From a search made with a search warrant where the warrant is invalid on its face or is based on false information.

From a search conducted with such outrageous police misconduct as to shock the conscience. (Often most applicable to strip searches).

Informational Evidence Obtained

From a stop and/or search made without reasonable articulable suspicion or probable cause.

From the execution of a search warrant where your client was not named in the warrant and was searched by law enforcement prior to completing the search of the premises and not locating any contraband.

Procedural Requirements of a Suppression Motion

I) SUPERIOR COURT PRE-TRIAL EVIDENCE SUPPRESSION MOTIONS PURSUANT TO §15A-975

A. MOTION REQUIREMENTS

Generally speaking suppression motions, although for the most part constitutionally based, must comply with the terms and conditions set forth under N.C.G.S. §15A-975.

An affidavit of one with knowledge is required. Only a minimal fact basis is necessary and an affidavit of the lawyer based on facts supplied by the State's discovery will suffice, but a brief fact affidavit from the client is also ok. Keep it to a bare minimum so as to not provide the DA with any additional statements of your client and use only if truly necessary. §15A-977(a)

In Superior Court all motions should be written, although in certain circumstances an oral motion will suffice. §15A-951(a)(1) Generally, for suppression motions this is only when newly raised and discovered evidence comes up during a trial. §15A-977(a)

B. MOTION TIMING

The statutes allow a motion to suppress to be made at any time before trial, unless the DA has given notice of an intent to use certain evidence at least 20 working days before the trial date. (§15A-975) (If the DA gives such notice then the defense has only 10 working days to file a suppression motion). However, some statutory case management plans call for motions, including suppression motions, to be filed by an earlier setting than simply before the trial date. (§7A-49.4) You need to be careful not to fall into this trap. If you do fall into this trap, do not simply concede. File the motion anyway, ask to be heard, and be sure to place the words ineffective assistance of counsel in the record. A trial judge can decide to hear a suppression motion even if it is not timely filed under the case management plan or you failed to file the motion within 10 days of the DA's notice. This is particularly true where the DA's notice does not adequately identify the exact evidence or statement the State intends to use.

Additionally, do not concede that a pleading from the Dist. Atty. entitled along the lines of "notice of intent to use evidence" which does not specifically identify to what evidence the notice refers is sufficient to qualify as notice,

triggering the defense suppression timing requirements.

Once a judge has ruled upon a suppression motion, that decision is not reviewable by another trial judge at a later stage in the trial division. State v. Woolridge, 357 N.C. 544, 592 S.E.2d 191 (2003). However, if a judge has initially denied a suppression motion, that trial judge may reconsider the denial of the motion at a later time. This is because suppression motions fall in the category of motions in limine.

If the State, at least twenty working days before the trial date, gives notice of an intent to use:

1. Evidence of a statement of the Defendant, or
2. Evidence of a search made without a search warrant, or
3. Evidence of a search made with a search warrant but without the defendant being present,

then the defendant must file a motion to suppress within ten working days of receiving the notice of the State.

C. MOTION GROUNDS

A suppression motion must state the grounds on which the evidence should be suppressed. Don't be stingy. Cite all possible sources so as to preserve your issues. Generally suppression is required for constitutional reasons under the 4th, 5th, & 6th Amendments to the US Constitution as made applicable to the states by the 14th Amendment and under Article I, sections 19, 20 & 23 of the North Carolina Constitution. Always try to include at least a parallel basis under the NC Constitution to give the courts something to hang on to if for some reason the judge is on your side. For example NC does not recognize the Federal Good Faith Search Warrant exception.

A "good faith" exception to the exclusionary rule applies where evidence is suppressed based upon federal constitutional grounds. United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405, *reh'g denied*, 468 U.S. 1250 (1984); State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986). However, the North Carolina Supreme Court has declined to extend this exception to cases based upon the North Carolina Constitution, State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988), or to cases involving violations of N.C. Gen. Stat. Chapter 15A, State v. Hyleman, 324 N.C. 506, 379 S.E.2d 830 (1989). *See also* State v. McHone, 158 N.C. App. 117, 580 S.E.2d 80 (2003).

Occasionally suppression motions may even be made on First Amendment grounds dealing with delegating police powers to religious institutions. *See* State

v. Pendleton, 339 N.C. 379, 451 S.E.2d 274 (1994) (declaring Campbell University Police Force unconstitutional) and State v. Jordan, 155 N.C. App. 146; 574 S.E.2d 166 (2002), appeal denied by [State v. Jordan, 356 N.C. 687, \(2003\)](#) (declaring Pfeiffer University Police Force unconstitutional).

D. SUPPRESSION MOTION HEARING PROCEDURES

Assuming you have timely filed a motion to suppress which both adequately states a ground for suppression and is supported by an adequate affidavit, then the Court must hold a hearing on the motion and take evidence. N.C.G.S. §15A-977(d). At the hearing the State bears the burden of persuasion under a preponderance of the evidence standard to show that the evidence in question was lawfully obtained unless the search is pursuant to a search warrant.

If the State shows a search was made pursuant to a search warrant, the search is presumed to be valid if made within the parameters of the warrant and the warrant itself is not defective. The defendant bears the burden of demonstrating that the information provided to the magistrate in support of the warrant application is inadequate to support a finding of probable cause necessary to issue a search warrant or that material seized and which is not contraband was outside the scope of the warrant. The standard is would a reasonable and prudent person believe it to be more likely than not that the described contraband will be found at the premises to be searched at the likely time of execution of the search warrant.

A search warrant application may also be challenged upon the grounds that material statements relating to the facts required for the magistrate's decision were made by the applicant falsely, or with a reckless disregard for the truth or falsity of the declaration. If the defendant can establish a reasonable basis that the information relied upon by the magistrate in the application meets this standard, the search warrant is void. Franks v. Delaware, 438 U.S. 154, 164-65 (1978).

Except for search warrants, the State must put on evidence that the evidence sought to be used was lawfully obtained. At the hearing defense counsel should attempt to create a clear record of the fact or lack of facts establishing the officer's probable cause. 15A-977(f) requires the judge to set forth in the record, at the conclusion of the hearing, his findings of fact and conclusions of law. An appellate court is bound by the findings of fact if they are not objected to by the defendant. If they are objected to specifically, then an appellate court is bound by those findings of fact that are adequately supported in the record. If the judge fails to make findings of fact and conclusions of law and no party requests the court to

do so, then the record is presumed to support the judge's ruling. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

An issue of fact as determined by the trial judge is binding upon the Court of Appeals if it is supported by competent evidence in the record. According to the N.C. Supreme Court "Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." Schloss v. Jamison, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962); State v. Perry, 316 N.C. 87, 107, 340 S.E.2d 450, 462 (1986). *See also*, State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992)(Findings of fact are conclusive and binding on reviewing court if supported by substantial evidence). In the absence of any specific findings of fact made by the trial court and without any specific request for the trial court to make findings of fact from the appellant, the Court of Appeals must presume that the trial court found on proper evidence, sufficient facts to support its judgment. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986)(When trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the trial court on proper evidence found facts to support its judgment). Seibold v. City of Kinston, 268 N.C. 615, 151 S.E.2d 654 (1966)(Where trial judge who was authorized to hear and determine without resort to jury the pleas in bar of governmental immunity in action against city and county did not make any findings of fact and there was no request in record that he do so, it was presumed that he found facts on proper evidence sufficient to support judgment.) Henley Paper Co. v. McAllister, 253 N.C. 529, 117 S.E.2d 431 (1960)(Where trial judge, not having been requested to do so, did not record findings of fact and conclusions of law, it would be duty of reviewing court to affirm his decision if such decision found support on any legal ground.) Filmar Racing, Inc. v. Stewart, 141 N.C. App. 668, 541 S.E.2d 733 (2001)(Absent a request by a party, a trial court is not required to make findings of fact when ruling on a motion, but rather, on appeal it is presumed that the trial court found facts sufficient to support its ruling, and if these presumed factual findings are supported by competent evidence, they are conclusive on appeal.) Corbin Russwin, Inc. v. Alexander's Hardware, Inc., 147 N.C. App. 722, 556 SE.2d 592 (2001)(When the trial court does not make findings of fact, an appellate court presumes that there were sufficient facts to support the judgment, and the appellate court then determines whether there is competent evidence to support the presumed findings of fact.) Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976)(It is presumed, when court is not required to find facts and make conclusions of law and does not do so, that court on proper evidence found facts to support its judgment.)

At the conclusion of any suppression hearing, particularly one in which the defense has lost, counsel should request that the Court make findings of fact and conclusions of law if the Court has not done so and then counsel should be certain to specifically object to any findings of fact that are not adequately supported by the evidence and unfavorable to your position.

If after losing a suppression hearing you intend to plead, be sure to preserve your right to appellate review of the denial of your suppression motion by clearly informing the court prior to entry of the plea that you intend to appeal the denial of the suppression motion. The best practice is to include this notice in the plea transcript itself. Failure to inform the Court prior to entry of the plea waives the right to review under NC case law, although the statute seems to say it is ok. It's not. "When a defendant intends to appeal from the denial of a **suppression** motion, he must give notice of his intention to the prosecutor and to the court before **plea** negotiations are finalized; otherwise, he will waive the appeal of right[.]" [State v. Tew](#), 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990), (citing [State v. Reynolds](#), 298 N.C. 380, 259 S.E.2d 843 (1979), cert. denied, 446 U.S. 941, (1980)).

From [State v. Pimental](#), 153 N.C. App. 69; 568 S.E.2d 867 (2002): While [N. C.G.S. § 15A-979\(b\)](#) allows appellate review of the denial of a motion to suppress upon appeal from a judgment entered on a **guilty plea**, "this statutory right to appeal is conditional, not absolute." [State v. McBride](#), 120 N.C. App. 623, 625, 463 S.E.2d at 404 (1995); accord [State v. Brown](#), 142 N.C. App. 491, 492, 543 S.E.2d 192, 193 (2001). Pursuant to this statute, "a defendant bears the burden of notifying the state and the **trial court** during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty." [McBride](#), 120 N.C. App. at 625, 463 S.E.2d at 404 (1995)(citing [State v. Reynolds](#), 298 N.C. 380, 396-97, 259 S.E.2d 843, 853 (1979)). The courts have held that such "notice must be *specifically* given." [McBride](#), 120 N.C. App. 623, 463 S.E.2d 403 (1995)(emphasis in original).

If after losing a suppression motion you proceed to trial, be absolutely certain to object to the introduction of any evidence related to your suppression motion when it is brought up at trial. Failure to do so could completely waive any appellate review of the denial of your motion. [State v. Williams](#), 355 N.C. 501, 565 S.E.2d 609 (2002).

E. COMMON ISSUES WITH SUPPRESSION MOTIONS

Below are set forth some of the most common issues associated with

suppression issues under the several amendments to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, as well as the corresponding sections of the North Carolina Constitution. An exhaustive exploration of these issues is beyond the scope of this paper but some highlights are set forth below. Following this manuscript are several go-by motions based on the various grounds listed herein. As always, the user is cautioned to review and update any case law prior to using the motions.

1. Fourth Amendment Suppression Issues

Under the Fourth Amendment suppression analysis some of the more common problems arise from determination of whether the client was actually seized, or actually searched, and whether the client had any privacy or ownership interest in the area searched and the items seized, the standing question. Additionally, any analysis must look at the level of authorization for the action that the searching authority had. Was it based on reasonable articulable suspicion, a Terry stop, and if so did it exceed the scope permitted under Terry? Or was it based on probable cause and if so was it conducted under exigent circumstances or as a result of an arrest based on probable cause. For a search to be lawful under the Fourth Amendment and Article 1, sections 19 & 20 of the North Carolina Constitution, it must have been conducted pursuant to a warrant or under one or more of several limited exceptions.

Under Terry v. Ohio, 392 U.S. 1 (1968), an officer is authorized to briefly detain, and under a separate analysis conduct an outer clothing pat down for weapons, when under the *totality of the circumstances* a reasonable and prudent officer has a ***reasonable suspicion of particularized criminal activity***. When he does have such suspicion he may briefly detain a person to further investigate and if based on the same reasonable suspicion the objective facts support a probability that the person being detained may be carrying a weapon the officer may conduct a limited frisk of his outer clothing to determine whether he can feel a weapon. Merely because an officer has grounds under Terry to detain a person, it is not automatic that he also has a right to conduct a frisk. Do not just surrender this point.

If the grounds for a Terry detention do not exist, there are no grounds for a patdown search. There is no "officer safety" exception to this requirement. United States v. Burton, 228 F.3d 524 (4th Cir. 2000).

The United States Supreme Court handed down a case that appears to

muddy this issue, at least as far as traffic stops go. However, further reading of the case shows that the Court has conformed to the Terry analysis and remains consistent with its prior decisions. The case is Arizona v. Johnson, ___ U.S. ___, 129 S.Ct. 781, 2009 U.S. LEXIS 868 (January 26, 2009). The holding of this case declares that all persons in a car that is stopped have been seized and are detained as far as the detention standard of Terry. This then allows the application of the second prong of Terry to any passengers, that being if an officer has a reasonable basis to believe the passenger may be armed and dangerous a Terry frisk may be conducted. Essentially all this holding does is make clear that in traffic stop situations all persons in the vehicle have already been detained on a reasonable suspicion basis (assuming the stop holds up to attack on this ground under Brendlin). The analysis then moves to the next level to see if a reasonable basis exists to believe a passenger may be armed or dangerous. There still however is no “officer safety exception” absent the basis for detention under Terry.

If your client has been arrested based on probable cause then the officer may search his person and any surrounding area from which he could conceivably obtain a weapon, including any vehicle out of which he had just alighted. HOWEVER, a recent U.S. Supreme Court case has clarified and restricted to its original holding the search incident to arrest standard articulated by the Supreme Court in Belton v. New York.

Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 2009 U.S. Lexis 3120 (April 21, 2009) involves a significant restriction of the widely adopted search parameters for vehicle searches incident to arrest established by the Supreme Court's decision in Belton v. New York. Prior to the decision in Arizona v. Gant, law enforcement widely believed that for any arrest of a defendant in or near a vehicle under the defendant's control a search of the passenger compartment of the vehicle was automatically justified. The decision in Arizona v. Gant reasserted that the two bases which justify a search incident to arrest exception to the Fourth Amendment of the United States Constitution are the only grounds for such a search. The court set forth those grounds very clearly in Chimel v. California. Those two grounds, either one of which may justify the search of the vehicle incident to arrest, are officer safety or preservation of evidence of the crime for which the defendant was being arrested. Chimel limited the officer safety exception to "the area from within which an arrestee might gain possession of a weapon". The second ground for a search of a vehicle incident to arrest is more akin to a probable cause search. Under this prong, the arresting officers must have a reasonable belief based on the crime for which they are arresting the defendant that further evidence of that crime may be in the vehicle and if not seized may be

subject to destruction by the defendant. The court in Arizona v. Gant actually extended the rationale regarding this prong, no longer requiring that it be subject to possible destruction. According to the court in Gant, "circumstances unique to the automobile context also justified a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might now be in the vehicle"". Thus, when an arrestee is in custody as a result of a charge such as license not in possession, the justification of a search of the vehicle to find further evidence of the crime charged is not present. There is clearly not going to be further evidence found that the driver does not have a license. However, if the arrestee is taken into custody for a charge such as drug possession, it is much more likely that there will be relevant evidence pertaining to that charge found in the vehicle and the search incident to such arrest can be justified.

Additionally, if any of the other exceptions to the Fourth Amendment's search requirement are present, a search may be conducted on those grounds. Two examples of such approved search grounds would be probable cause of a crime or an inventory search. In certain circumstances an officer is also permitted to perform a search of a vehicle passenger area "when he has a reasonable suspicion that an individual, whether or not the arrestee, is dangerous and might access the vehicle to gain immediate control of weapons". Michigan v. Long, 463 U. S. 1032 (1983).

For criminal defense analysis, the prerequisites which should be examined in order to determine the lawfulness of a vehicle search incident to arrest are where and under what sort of detention is the defendant, and what is the nature of the crime for which the defendant is being arrested? If the defendant is away from the vehicle and in such custody that he is unlikely to be able to reach into the vehicle, then the search incident to arrest cannot be justified under the officer safety rationale. If the crime for which the defendant has been arrested is not one for which further fruits of the crime are likely to be located in the vehicle then the second rationale for a search incident to arrest is also not present. At least one of the two predicate bases for a search incident to arrest must be present in order to justify a vehicle passenger area search under the search incident to arrest exception. (The trunk area is still off-limits to a search incident to arrest and can only be justified under such other exceptions as a probable cause search or an inventory search).

Other grounds for exceptions to the warrant requirement are consent, exigent circumstances, inevitable discovery, and inventory searches. When contesting the issue of a search done without a warrant, the better practice is not to concede any particular exception issue but rather to make the Court set forth specific facts as to

why the exception supports the search, if it does.

If the basis for the search is consent, your analysis should focus on whether the consent was given knowingly and voluntarily, without coercion or trick. Validity of consent is determined upon an analysis of the totality of the circumstances. U.S. v. Mendenhall, 446 U.S. 544 (1980). In addition was the consent limited or withdrawn at any time prior to the discovery of contraband? A valid consent may be withdrawn at any time up until contraband has been discovered. U.S. v. McFarley, 991 F.2d 1188, 1191 (4th Cir. 1993). Unfortunately, a person is not required to be advised that he has a right not to consent. Ohio v. Robinette, 519 U.S. 33, 39-40 (1996).

If the claimed exception to the search warrant requirement is inevitable discovery the State must show that due to a clearly anticipated and logical sequence of future events the contraband was virtually certain to be discovered in the ordinary course of the investigation. Nix v. Williams, 467 U.S. 431, 444 (1984).

If the claimed exception to the search warrant requirement is an inventory search you should look to see if the item was lawfully taken into custody and thereafter was a standard and routine inventory search conducted. Such searches should be conducted pursuant to a set of policies or procedures that have been previously approved by the seizing agency, an inventory of the contents (usually of impounded vehicles) should be regularly made, and the vehicle stored. A good indication that an inventory search will not stand up is if the search was made at the scene of the seizure by an investigating officer or detective and not by an officer charged with taking the vehicle to the impound lot. Florida v. Wells, 495 U.S. 1, 4-5 (1990). *See also*, U.S. v. Bizzell, 19 F.3d 1524, 1525 n.2 (4th Cir. 1994)(discussing whether standard inventory procedures must be written or may be oral).

Exceptions to the search warrant requirement under the exigent circumstances exception are determined based on a totality of the circumstances test. State v. Worsley, 336 N. C. 268, 282, 443 S.E.2d 68, 75 (1994). There must be a true emergency, as well as probable cause for the search. The emergency can apply to the fact that evidence for which probable cause exists is likely to be destroyed or lost or removed. Minnesota v. Olson, 495 U. S. 91 (1990). Searches of automobiles are routinely done on exigent circumstances bases due to the mobility of automobiles, even those already in obvious police custody. For an application of the exigent circumstances doctrine erroneously applied by the trial court, *see* State v. McKinney, 361 N. C. 53, 61 (2006).

If the evidence was obtained through the use of a search warrant, generally

the best line of attack is to demonstrate the factual inadequacy of the application provided to the issuing magistrate by the officers. Mere conclusions of the officers that they obtained probable cause are not sufficient.

A valid search warrant application must contain "allegations of fact supporting the statement. The statements must be supported by one or more affidavits *particularly setting forth the facts and circumstances establishing probable cause* to believe that the items are in the places or in the possession of the individuals to be searched." [N.C. Gen. Stat. § 15A-244\(2\)](#) (2001) (emphasis added). Although the affidavit is not required to contain all evidentiary details, it should contain those facts material and essential to the case to support the finding of probable cause. [State v. Flowers](#), 12 N.C. App. 487, 183 S.E.2d 820, *cert. denied*, 279 N.C. 728, 184 S.E.2d 885 (1971). The North Carolina Supreme Court has held that affidavits containing only conclusory statements of the affiant's belief that probable cause exists are insufficient to establish probable cause for a search warrant. [State v. Hyleman](#), 324 N.C. 506, 379 S.E.2d 830 (1989); [State v. Campbell](#), 282 N.C. 125, 191 S.E.2d 752 (1972). The clear purpose of these requirements for affidavits supporting search warrants is to allow a magistrate or other judicial official to make an independent determination as to whether probable cause exists for the issuance of the warrant under [N.C. Gen. Stat. § 15A-245\(b\)](#) (2001). [N.C. Gen. Stat. § 15A-245\(a\)](#) requires that a judicial official may consider only information contained in the affidavit, unless such information appears in the record or upon the face of the warrant.

[N.C. Gen. Stat. § 15A-974\(2\)](#) provides that "evidence must be suppressed if...it is obtained as a result of a substantial violation of [[N.C. Gen. Stat. Chapter 15A](#)]. In determining whether a violation is substantial, the court must consider all the circumstances...." This provision does not require the trial court to make findings of fact with respect to its evaluation of the circumstances leading to the conclusion that the violation was substantial. A search warrant application supported only by a conclusory affidavit constitutes a substantial violation of [N.C. Gen. Stat. § 15A-244](#) according to the standard in [N.C. Gen. Stat. § 15A-974\(2\)](#). [Hyleman, supra](#); [State v. Hunter](#), 305 N.C. 106, 286 S.E.2d 535 (1982).

In cases where officers are acting, either on the basis of a warrant or not, on information which turns out not to be correct, there is a present dichotomy between Federal and State constitutional law. Under federal law if the officers acted in reasonable reliance upon information which they reasonably believed to be correct, the "good faith exception" carved out by the United States Supreme Court will apply and the officer's actions will not be invalidated. [Herring v. U. S.](#), ____ U.S. ____, 2009 U.S. LEXIS 581 (07-513)(decided Wednesday, January 14, 2009); [U.](#)

S. v. Leon, 468 U. S. 897 (1984).

However, under North Carolina constitutional law, the "good faith exception" is not recognized. State v. Carter, 322 N. C. 709, 370 S.E.2d 553 (1988). Accordingly, for cases in which the state may rely upon the good faith exception, the basis for a motion to suppress should be grounded in North Carolina constitutional law under Article 1, Section 20 and North Carolina's statutes.

Even if evidence is clearly seized by the police in violation of someone's constitutional rights, unless it is the rights of your client, he will lack standing to object to the use of that evidence against him. A person must have a reasonable expectation of privacy regarding the area searched, and/or a clear possessory interest in the item(s) seized. The United States Court of Appeals for the Fourth Circuit has some really bad decisions for defendants on standing issues. It has been held that the driver of a rental car who is not listed on the rental contract has no standing to object to the search of the car. U.S. v. Wellons, 32 F.3d 117 (4th Cir. 1994). It has also been held that search of a purse belonging to a passenger in a stopped vehicle was permissible as passengers have no expectation of privacy with regard to their items in another's vehicle. U.S. v. Rusher, 966 F.2d 868 (4th Cir. 1992).

However, the recent US Supreme Court decision in Brendlin v. California, 551 U. S. 249 (2007), recognizing that a passenger in a stopped vehicle has standing to contest the basis for the stop, has been a breath of fresh air in this area of case law.

2. Fifth Amendment Suppression issues

The area which most comes into question in a Fifth Amendment analysis is the question of whether the person being questioned is in custody and as such entitled to receive Miranda warnings. If they are not essentially in custody then no warnings need be given. If they are in custody then the warnings must have been given in order to utilize any responses a person made to law enforcement questions. Spontaneous statements made by a person in custody, not attributable as a response to any question, are not protected even if no Miranda warnings were given, unless such statements are made as a result of actions or statements of an officer that were intended to elicit a reaction, or which the officer should have known were likely to result in a statement from the defendant. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980); State v. Young, 65 N.C. App. 346 (1983).

The two controlling cases of the United States Supreme Court in this area are Miranda v. Arizona, 384 U.S. 436 (1966) and the Court's reaffirmation of

Miranda in Dickerson v. U.S., 530 U.S. 428, 120 S.Ct. 2326 (2000). In one of the latest cases from the Supreme Court of North Carolina discussing these issues the Court has “clarified” the meaning of custodial interrogation. According to the Court in State v. Garcia, 358 N.C. 382; 597 S.E.2d 724 (2004) Miranda protects individuals from the "inherently compelling pressures" of custodial interrogation. Miranda, 384 U.S. at 467. A person is "in custody" for purposes of Miranda when it is apparent from the "totality of the circumstances" that there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." State v. Buchanan, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (*Buchanan I*); accord California v. Beheler, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 1279, 103 S. Ct. 3517 (1983) (per curiam). Because Miranda warnings are implemented to prevent coerced self-incrimination, Dickerson v. United States, 530 U.S. 428 (2000) ("The coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment. . . not to be compelled to incriminate himself.'") (quoting Miranda, 384 U.S. at 439, custody analysis examines the interrogation subject's point of view, Stansbury v. California, 511 U.S. 318, 323-24 (1994)(per curiam)("Under *Miranda* '[a] policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time'; rather, 'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.'") (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984))_(alterations in original). "The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury, 511 U.S. at 323. The Court must therefore determine whether, based upon the trial court's findings of fact, a reasonable person in defendant's position would have believed that he was under arrest or was restrained in his movement to that significant degree. Buchanan I, 353 N.C. at 339-40, 543 S.E.2d at 828.

According to our Supreme Court’s interpretation an interrogated person must have reasonably believed their freedom of movement was curtailed just as if they were actually under arrest.

3. Sixth Amendment Suppression Issues

In determining whether a statement is subject to suppression under a Sixth Amendment analysis it must be determined whether the client asserted his right to counsel; and if he did so was the statement elicited by officers initiating contact

with the client after the assertion; and was the statement made in regards to questioning about the charge in which the client had asserted his right to counsel? All of these factors must be present to successfully suppress any statements under a Sixth Amendment attack. If the client, after asserting a right to counsel, independently initiated contact with the police any statements made will not be suppressed. Or if officers investigating a new or different charge initiate contact and appropriately warn the client under Miranda, then any statements produced as a result will not be suppressed.

In addition, the rights associated with the assertion of counsel under the Sixth Amendment only attach after formal charges have been taken out against the defendant and they are offense specific. Messiah v. U. S., 377 U. S. 201 (1964); McNeil v. Wisconsin, 501 U. S. 171, 175 (1991); State v. Pope, 333 N. C. 106, 113 (1992); State v. Hall, 131 N.C.App. 427, 435 (1998).

In Michigan v. Jackson, 475 U.S. 625, 89 L.Ed.2d 631 (1986), the defendant had stood mute at his arraignment hearing on murder charges and the court without request had appointed counsel to represent him. Before the defendant had an opportunity to consult with counsel, police officers approached the defendant, advised him of his Miranda rights, questioned him and obtained a confession to the murder. The United States Supreme Court held that the confessions were improperly obtained in violation of the Sixth Amendment. Under Jackson, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." Id. at 636, 89 L.Ed.2d at 642. See also State v. Bromfield, 332 N.C. 24, 40, 418 S.E.2d 491, 499 (1992).

The United States Supreme Court in McNeil v. Wisconsin, 501 U.S. 171 (1991) narrowed the holding in Jackson. The Court rejected the argument that a defendant's assertion of his Sixth Amendment right to counsel automatically results in an invocation of the right to counsel for Fifth Amendment purposes. McNeil, 501 U.S. at 179. The Supreme Court's holding limited the Jackson ruling by declaring that a defendant's right to counsel under the Sixth Amendment is "offense specific." Id. at 501 U.S. 171, 179. As a result, "it cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." Id. See also, State v. Williams, 355 N.C. 501, 565 S.E.2d 609 (2002).

In Montejo v. Louisiana, ___ U.S. ___, 129 S. Ct. 20, 2009 U.S. Lexis 3973 (May 26, 2009), the Supreme Court completely overruled Michigan v. Jackson, declaring that the protections of Miranda, Edwards & Minnick were sufficient. From this case, the rule now appears to be that only if a defendant at some point has affirmatively requested counsel are the police required to desist from further

attempts to contact and question the defendant about the charges for which he requested a lawyer. Additionally, the police can still attempt to contact an in custody defendant and question him about other charges so long as he is advised of his Miranda rights and he does not then again invoke his right to counsel under the Fifth Amendment (since the Sixth Amendment might not apply to those charges if he were not yet actually charged).

II) SUPPRESSION OF IN-COURT AND PRIOR OUT OF COURT IDENTIFICATIONS BASED ON UNDULY SUGGESTIVE PROCEDURES.

Although this area is beyond the scope of this presentation, a brief discussion of possible suppression of in court and out of court identifications based on overly suggestive or prejudicial show ups may be of use to a number of practitioners.

According to the Court of Appeals in State v. Lawson, 159 N.C. App. 534, 583 S.E.2d 354 (2003): "If defendant can show the pretrial identification procedures were so suggestive as to create a substantial likelihood of irreparable misidentification, the identification evidence must be suppressed". State v. Grimes, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1983). While show-up style identifications are disfavored, they "are not *per se* violative of a defendant's due process rights." State v. Turner, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). We use a totality of the circumstances test in making this determination. State v. Fisher, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987). The factors to be considered in this inquiry are:

(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation.

State v. Powell, 321 N.C. 364, 369, 364 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830 (1988). *See also*, State v. Pinchback, 140 N.C.App. 512, 518 (2000).

The recent, and remarkable, decision of the Court of Appeals in State v. Washington, ___N.C.App.___, 665 S.E.2d 799, 811 (2008) which primarily deals with a speedy trial rights issue, also addressed show up identifications. The Court of Appeals reiterated the five factors to consider in determining whether an in court or out of court identification is reliable, as were set forth in Powell and Pinchback. The Court went on in two footnotes to stress its concern over the Durham Police Department practices of conducting show ups and specifically referred to the new Eyewitness Identification Act as a remedy for such problems. The Court made specific note that the defendant had failed to object to the pretrial show up and did not raise it on appeal.

The Eyewitness Identification Act which is codified in N.C.G.S. §15A-284.51 which became effective for all lineup procedures conducted on or after March 1, 2008, has created a number of areas for challenge regarding eyewitness identification procedures. The act requires that any law enforcement lineup

identification be conducted in compliance with the requirements of the act. Those requirements essentially adopted the recommendations of the Actual Innocence Commission which were made to avoid the possibility of wrongful identification. In fact, the legislative preamble to the act presents this goal as one of the legislative purposes.

The act provides detailed instructions which require law enforcement officials conducting a line up identification procedure to meet at least the following requirements:

1. A line up shall be conducted by an independent administrator (a person without any knowledge of the case).
2. Individual or photo shall be presented to witnesses sequentially and removed after it is viewed before the next individual or photo is presented.
3. Before viewing any lineup each witness shall be instructed by the administrator that:
 - The perpetrator might or might not be present in the lineup.
 - The lineup administrator does not know the suspect's identity.
 - The eyewitness should not feel compelled to make an identification.
 - It is as important to exclude innocent persons as it is to identify the perpetrator.
- The investigation will continue whether or not identification is made by the witness.
4. Any photo of the defendant shall be contemporary and resemble appearance at the time of the crime.
5. Fillers must generally resemble eyewitness's description, shall include five fillers per suspect, fillers must differ from photo array to photo array.
6. The suspect must be placed in different positions for each eyewitness.
7. No information concerning arrest may be visible.
8. Any identifying actions performed, must be done by all lineup members.
9. All lineup members must be out of view before the lineup is conducted.
10. Only one suspect may be contained in each lineup.
11. Nothing may be said about a suspect's position "or regarding anything that might influence the... identification."
12. The administrator shall seek and document a clear statement at the time of identification of the confidence of the witness' identification.
13. No one may be present with case knowledge other than the eyewitness and the defendant's attorney.
14. "Unless it is not practical, a video record... shall be made."

N.C.G.S. §15A-284.52 (B) (15) contains a detailed listing of all of the things which must be recorded and preserved in the proper administration of a lineup.

N.C.G.S. §15A-284.52 (D) provides the possible remedies for violation of the act. There is a general directive that the court "shall" consider any failures to comply with these requirements in adjudicating any motions to suppress eyewitness identifications. The act specifically provides that evidence of failure to comply with these procedures is admissible to support claims of eyewitness misidentification, if the proffered evidence is otherwise admissible. And probably most importantly, whenever either side offers evidence of either compliance with or noncompliance with the identification procedures, "the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications". This can obviously be a two edged sword if law enforcement properly conducted the lineup identification procedure.

One of the best ways to improve the chances of having a show up be found to be overly suggestive is to file a motion for a Nontestimonial Identification Order under §15A-281 requiring the State to conduct a neutral line up identification procedure with any witness from whom the state intends to seek an in-court identification of your client. If the motion is granted, and normally it will be, and the witness is unable to identify your client in the neutral setting, then you follow up with a motion to suppress both the anticipated in court identification and any earlier show up identifications. Even if the show up identification is not suppressed you have gained evidence to challenge the credibility of the other identifications, particularly in light of the new statutory scheme for conducting lineups. If the witness(es) are able to pick out the client from the line up you really haven't lost much since they almost certainly would do so in court anyway.

Before admitting challenged in court identification testimony, the trial court should conduct a voir dire, find facts, and determine the admissibility of the testimony. However, failure to conduct a voir dire will be deemed harmless where the evidence is clear and convincing that the witness' in court identification originated with the witness' observation at the time of the crime and not from impermissibly suggestive pretrial identification procedure. State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Stenner, 280 N. C. 306, 185 S.E.2d 844 (1971); State v. Flowers, 318 N. C. 208, 216 (1986).

Another line of attack on show ups (which are alleged to be disfavored in numerous appellate opinions---but which are usually upheld in those same opinions after appropriate lip service has been made) is to challenge them as

improperly done line ups of one. This can then trigger the statutory rights under the new act. This can be particularly helpful in getting at least the requested jury instruction which may throw a question on the accuracy of the proceeding in the jury's view. (See the sample request for jury instruction on this issue contained herein).

III) SUPPRESSION OF PRIOR CONVICTIONS AT SENTENCING

§15A-980 allows counsel to move for exclusion of prior criminal convictions of your client on the grounds that he was denied counsel for the prior conviction. This is called suppression under the statute. The burden of persuasion is on the defendant to prove by a preponderance of the evidence that he was denied counsel either explicitly or through a failure to advise. A merely silent record will not support this contention but a silent record and one without counsel showing in the file, as well as testimony from your client that he did not have counsel and did not waive counsel, will usually do the trick.

3. That the defendant was unlawfully seized and defendant's person was unlawfully searched and property was seized, allegedly from the person of the defendant, by officers in violation of the Fourth Amendment to the United States Constitution and in violation of the North Carolina Constitution, Article 1 sections 19 & 20, and that the alleged recovery of items from the defendant's person by officers acting without a search warrant was as a result of an unconstitutional search and seizure.

The legal basis for this motion is supported by the factual circumstances contained in the affidavit of counsel, attached hereto and incorporated by reference.

WHEREFORE, the defendant respectfully requests this Court to suppress the use as evidence of any and all items seized from the defendant or information obtained as a result of the unlawful stop, search and seizure of the defendant.

Respectfully submitted, this the ____ day of February 10.

Paul James
Assistant Public Defender
Forsyth County
Suite 400, 8 West Third St
Winston-Salem, NC 27101
(336) 761-2510

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion to Suppress) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Seventh Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the _____ day of February 10.

Paul James

enforcement across the street from the residence where the package was delivered. The search form was then served on the residence and the unopened package which had been delivered was retrieved from the middle bedroom. The person detained across the street from the residence, prior to the execution of the search warrant, was the defendant. As a result of this detention, officers searched the person of the defendant without his permission and retrieve from his person a cell phone with a number which allegedly matches the number on the mailing label of the package. No contraband was found on the person of the defendant and he was arrested and charged. The only activity observed by law enforcement with regard to the defendant was taking a large, sealed package into the residence and then almost immediately departing the residence without the package. At the time he was detained and then subsequently arrested, the anticipatory search warrant had not been served were executed and the defendant was not on the property when said search warrant was served and executed. Accordingly, the stop, seizure, detention and search of the defendant must be justified by some exception to the fourth amendment and North Carolina constitutional requirements of a warrant. At the time of the seizure of the person of the defendant, law enforcement had absolutely no information regarding the defendant. The only information they had available to determine even the basis for a Terry stop was that the defendant had accepted and taken into the house the sealed package delivered to that address and addressed to Mr._____. Such paucity of information is insufficient to support a reasonable suspicion stop, much less the probable cause required to search the defendant's person and to arrest the defendant. Wherefore the defendant requests this court suppress these as evidence of the cell phone seizure in the defendant's person, any other matters seen from the defendant's person, and any information gained from the unlawful direct arrest of the defendant without probable cause.

The foregoing _____ page(s) of text comprising the body of counsel's affidavit are incorporated by reference with the motion to suppress filed in this matter.

Respectfully submitted, this the _____ day of February 10.

Paul James

Sworn to and subscribed before me

this the _____ day of February 10.

Notary Public

My commission expires:

3. After the defendant was arrested, detectives with the Winston-Salem Police Department obtained a search warrant to examine the contents of the phone. From counsel's review of the search warrant application and based on counsel's error review of the states discovery file, it appears that the factual pieces of information supplied to the magistrate in the search warrant application would fail the veracity test under Franks V. Delaware, 438 U.S. 154 (1978). The first material piece of information supplied to the magistrate indicates "at the time of the seizure, Mr. _____ was founded in constructive possession of approximately 11 pounds of marijuana". However, from the detectives report and other discovery materials of the state, at the time the unopened brown delivery box was seized from the residence the police had delivered it to, Mr. _____ was some distance away from the residence walking up the street and was not in possession of either the box or any of its contents. Additionally, the box was in no way open at the time of this second seizure by the police and its contents would not have been apparent to any observer. (This box had been initially intercepted at the FedEx packaging hub and was discovered by police to contain marijuana. It was resealed and delivered to the address in the ordinary course of shipping and monitored by

the police with an anticipatory search warrant. The residence was searched as soon as the package was delivered but after Mr. _____ had left the residence. At the time of the search of the residence where the box had been delivered, the box was not opened.) Prior to detaining Mr. _____ and seizing the cell phone from his person, the state's discovery indicates that the police had no information regarding Mr. _____ and only observed a person they believed to be him take the delivered box from the front porch of the residence into the residence and thereafter shortly leave the residence without the box. Thus the statement that Mr. _____ was found to be in constructive possession of the box at the time of its seizure containing 11 pounds of marijuana is at best charitably described as an exaggeration.

The second factual statement contained in the application for a search warrant to search the cellular phone contents appears to be completely unsupported by any police reports or state's discovery. That statement is "documents and other information developed in the furtherance of this investigation revealed that the cellular phone described in this affidavit had been utilized to facilitate the interstate transport of marijuana to this city". This vague statement, from the

state's own discovery file, is false. Prior to the initial detention and seizure of the phone from Mr. _____ person, police were unaware of its existence. They also had no actual knowledge that the phone had been utilized by Mr. _____ or any other person or even that it was functional. Additionally, the only information regarding a phone number that the police had was that contained on the return shipping label, which was not the number of the cellular phone taken from Mr._____. Only after the police opened and reviewed the contents of Mr._____ cellular phone did they discover that the phone number listed on the packaging label had apparently connected with Mr._____ phone on three prior occasions. The only way they could have known this information would have been to have searched the phone prior to the issuance of any search warrant. The defendant's property was unlawfully searched and property was seized by officers in violation of the Fourth Amendment to the United States Constitution and in violation of the North Carolina Constitution and the recovery of information from the defendant's seized cellular phone by officers acting with a search warrant, the issuance of which was based upon false statements in the application affidavit, requires any such obtained information be suppressed. Pursuant to Franks V. Delaware, 430 8U. S. 154 (1978)

(holding that where a defendant shows that a search warrant affidavit contains false statements necessary for the finding of probable cause, the search warrant is void), the subsequent search of the content of the defendant's seized cellular phone pursuant to the issuance of a search warrant was unconstitutional and the search warrant void.

4. The factual circumstances set forth in this motion are supported and verified by the affidavit of counsel, attached hereto and incorporated by reference.

WHEREFORE, the defendant respectfully requests this Court to suppress the use as evidence of any and all information seized from the cellular phone taken from the person of the defendant.

Respectfully submitted, this the ____ day of January, 2009.

Paul M. James, III
Assistant Public Defender
Forsyth County
Suite 400, 8 West Third St
Winston-Salem, NC 27101
(336) 761-2510
N.C. Bar #13212

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion to Suppress) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Seventh Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the 3 February 2010.

Paul James

in Winston-Salem. Based on a canine alert on the suspicious package, a search warrant was obtained and the package was opened. It was discovered to contain a large quantity of marijuana. The police resealed the package and obtained an anticipatory search warrant so that when the package was delivered to the address by FedEx the residence would be subject to search. The package was indeed delivered to the address on the shipping label, monitored by police. It was addressed to a person by the name of _____. There was also a phone number listed on the return address label. The package was left by FedEx on the front porch of the residence to which it was addressed, with the police maintaining surveillance. The police report seeing an individual step out from the residence and take the package into the residence. The police reports also indicate that they then observed the same individual leave the residence and begin walking up the street, without the package. The search team then moved into the area and executed a search of the residence. At the time the search team began to move towards the residence to execute the search warrant, other detectives were directed to detain Mr. , the person who was walking up the street. He was in fact detained and eventually arrested. During his detention and arrest, a cellular phone was seized from his person. When the

officers executed a search warrant on the residence, they found the box containing the marijuana in a middle bedroom, unopened. The contraband contents of this box, in its unopened state, would not have been apparent to anyone until the box was actually opened. Mr. did not give permission to be detained, searched, or his cell phone seized. The cellular phone number associated with Mr. phone was not the number listed on the return address label of the package. From review of the state's complete discovery file as produced to counsel, this is the sum information in possession of detectives at the time they submitted the search warrant application for permission to search the cellular phone seized from Mr. . The information known to detectives from their reports and other matters contained in the state's discovery would be insufficient to support the two factual assertions contained in the search warrant application and upon which the magistrate relied.

The foregoing three pages of text comprising the body of counsel's affidavit are incorporated by reference with the motion to suppress filed in this matter.

Respectfully submitted, this the ____ day of February 10.

Paul James

Sworn to and subscribed before me
this the ____ day of February 10.

Notary Public
My commission expires:

entry into the defendant's home. The justification alleged by the state in the District Court trial for entry into the home without a warrant was exigent circumstances. The testimony of the officer with regard to the existence of exigent circumstances as testified to in the District Court was insufficient to justify an entry pursuant to the exigent circumstances exception to the warrant requirement of the United States Constitution's Fourth Amendment. No search warrant being obtained, there being no exigent circumstances, and there being no other lawful basis for the entry into defendant's home, the forced entry into the home made by officers and from which information charging the defendant was gained, was unconstitutional and requires suppression of all evidence and actions resulting therefrom. In addition, upon entry of the officers into defendant's home, his person was seized by the officers issuing orders with guns drawn and directing him to place himself on the floor in a prone position. This action was a further seizure of the defendant without lawful basis and in violation of the Fourth Amendment to the United States Constitution and Article 1, Section 19 of the North Carolina Constitution.

3. That the defendant's property was unlawfully entered, searched, and the person of the defendant seized by

officers in violation of the Fourth Amendment to the United States Constitution and in violation of the North Carolina Constitution and that the information obtained in subsequent actions and the orders of the officers, which form the underlying basis for the charge against the defendant in this matter are based entirely on an unconstitutional entry, search and seizure and must be suppressed as the fruit of the poisonous tree.

4. The factual circumstances set forth in this motion are supported and verified by the affidavit of counsel, attached hereto and incorporated by reference.

WHEREFORE, the defendant respectfully requests this Court to suppress the use as evidence of any and all information and actions resulting from the unlawful entry, search and seizure of the defendants home on February ____, 2008.

Respectfully submitted, this the ____ day of September, 2008.

Paul M. James, III
Assistant Public Defender
Forsyth County
Suite 400, 8 West Third St.
Winston-Salem, NC 27101
(336) 761-2510
N.C. Bar #13212

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion to Suppress) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Seventh Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the 3 February 2010.

Paul James

NORTH CAROLINA)
JUSTICE)
FORSYTH COUNTY)

IN THE GENERAL COURT OF
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA)
)
vs.)
DEFENDANT NAME,)
Defendant

AFFIDAVIT IN SUPPORT OF
MOTION TO SUPPRESS

Now comes counsel for the defendant, and makes the following affidavit.

The affiant saith thus:

That on September 10, 2008, I was counsel for the defendant in this matter at the trial of this case in the District Court. During that trial, pursuant to an oral motion to suppress, evidence was tendered by the state regarding a warrantless entry by officers of the Kernersville Police Department into the home of _____ on February __, 2008. An officer of the Kernersville Police Department testified that he received from dispatch an anonymous call indicating there was a domestic disturbance at the residence of Mr. _____ and that a woman at that residence was not being allowed to leave. The officer and another officer responded to the apartment of Mr. _____ and while standing at the front door they heard a male and a female yelling at each other at high volume. Based solely on the anonymous call and the officers hearing yelling between a male and female coming from the apartment, the officers entered the apartment by kicking in the front door. The entry was made with no warrant or other judicial approval. The officers entered the apartment without the permission of either resident, and with their guns drawn. Once in the apartment the officers observed Mr. _____ coming from the back bedroom. The officers were able to see Mr. _____ hands in plain sight, and he was not holding any object which was thought to be a weapon. Nor was he making any suspicious movements or other behavior. The officers, again with their guns drawn, commanded Mr. _____ to lie prone on the floor of his home. When Mr. _____ did not

comply with the directions of the officers, he was physically seized, forced down, and handcuffed. The forced entry of the home and the subsequent forcing of Mr. into a prone position are two separate breaches of the Fourth Amendment to the United States Constitution and Article 1, Section 19 of the North Carolina Constitution. The actions of the officers were not justified pursuant to any exigent circumstances exception to the warrant requirement, and as the officers had no search warrant or other lawful basis for entry into the home, the breach of the home in subsequent seizure of Mr. was unconstitutional and violated Mr. Fourth Amendment rights under the United States Constitution and his rights under Article 1, Section 19 of the North Carolina Constitution. Accordingly, all information, evidence, and subsequent actions, which form the basis for the charge now pending against Mr. , must be suppressed as the fruit of the poisonous tree.

Respectfully submitted, this the 3 February 2010

Paul James
Counsel for the defendant

Sworn to and subscribed before me
this 3 February 2010.

Notary Public

My commission expires:

for the dual purposes of incriminating the defendant and also as the justification for additional searches both with and without a search warrant. All of the items were confiscated by law enforcement officers from the defendant's person, car, and alleged hotel room without defendant's consent or other lawful grounds and were taken in violation of defendant's 4th Amendment rights and his rights under the NC Constitution. The statements the State elicited from the defendant were obtained as a result of the unlawful stop, detention, search and then arrest of the defendant. The police interrogation occurred during the time defendant was in handcuffs and under arrest and prior to his ever being informed by any officer of his Miranda rights.

3. The facts relating to this motion to suppress, as they are set forth in the police reports and other documents contained in the State's file are described hereafter. From these facts defendant contends there are at least 6 separate constitutional violations of his rights under both the US and NC Constitutions, each of which require the suppression of evidence in whole or in part.

4. According to the police reports, based on information previously obtained a search warrant was obtained to search an apartment in Winston Salem, NC. The police went to the

apartment complex and located the apartment to be searched, which was on a third floor level. The police stationed men at both the back and front entrances to the apartment building where the apartment to be searched was located. As the police were making their way up the stairs to the front door of the apartment a black male stepped out of the front door of the apartment and was immediately detained by police, who then entered the apartment pursuant to a warrant. Prior to the police entering the apartment from the front, officers stationed at the back observed the defendant leave the apartment from the back door. These officers stopped the defendant on the common stairwell/walkway of the apartment complex and placed him in handcuffs and took him back inside the apartment.

The defendant was neither named nor described in the search warrant and when he was detained by the police he was outside the apartment to be searched and the search warrant had not been served and the apartment not yet entered. The Defendant in no way consented to his being stopped, detained, or returned to the apartment. Once inside the apartment the defendant was searched, again without any consent or other lawful justification, and alleged contraband was retrieved from his pants pocket. The search conducted was a full blown search and was not a

Terry frisk. This search was conducted without probable cause or other legal justification and was not supported by N.C.G.S. 15A-256 as the apartment had not yet been searched when the defendant was searched and in fact authorities did find evidence named in the search warrant in the apartment when they did search it. After retrieving the alleged contraband defendant was informed he was under arrest for PWISD cocaine. After this officers began asking him questions, which he answered. At no time was he ever informed of his rights under the Miranda decision prior to this questioning. As a result of this questioning and the statements of other occupants of the apartment the police determined that defendant's car was located in the apartment complex parking lot. The police had never seen defendant in, at, or around this car and the search of the car, according to police reports, was based on "probable cause", not as a search incident to arrest.

Defendant's car was searched, again without consent or other lawful basis. As a result of the search, although no contraband was discovered, police removed two apparent hotel room keys to the Sundance hotel and returned to the apartment with them, displaying them to the defendant. According to police reports defendant allegedly spontaneously stated that he had already checked out of the

room at the Sundance. While the apartment and defendant's car were being searched, codefendant, who was living in the apartment and who was named in the search warrant, and who was found with cocaine residue coating his arms, was interviewed by police. According to police Mr. told them that defendant was his supplier and he had been showing Mr. how to cook powder cocaine into crack cocaine. Mr. also told police that defendant had brought in a half kilo of cocaine from Florida. Significantly, only after the keys to the Sundance hotel had been located, did Mr. tell investigators that they "might find what you're looking for and you might not" regarding finding the rest of the cocaine in defendant's hotel room. From the State's reports it appears that Mr. was not even aware of where defendant was staying until the police brought in the room keys to the Sundance. After that he could not state of his own knowledge whether defendant had any drugs in the hotel room. His statement certainly provided no support for any subsequent search since he equivocated as to what might be found in the hotel room. Thereafter, based on information obtained from the stop, detention and questioning of defendant, as well as on items seized from defendant's car, a search warrant for the room at the Sundance hotel was obtained and a search made there. From that search

additional cocaine, and other items of evidence were seized. All of the evidence obtained in this case against the defendant derives from the initial unlawful stop and detention of the defendant. Further information was also obtained from the unlawful questioning of the defendant, and the unlawful search of the defendant's car. Thereafter the search warrant obtained to search the Sundance Hotel room rented by the defendant was completely tainted by the unlawfully obtained information and conclusory statements made throughout the search warrant application. A copy of that search warrant application with the unlawful or improper information highlighted is attached to this motion.

5. The factual circumstances set forth in this motion are supported and verified by the affidavit of counsel, which is based upon counsel's review of the State's file and the search warrant and search warrant application, as well as interviews with the defendant. The affidavit is attached hereto and incorporated by reference.

WHEREFORE, the defendant respectfully requests this Court to suppress the use as evidence of any and all items seized from the person, vehicle or hotel room of the defendant as well as the statements elicited from the defendant while he was in custody and before requesting a lawyer.

Respectfully submitted, this the ____ day of February 10.

Paul M. James, III
Assistant Public Defender
Forsyth County
Suite 400,8 West Third Street
Winston-Salem, NC 27101

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion to Suppress) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Seventh Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the _____ day of February 10.

Paul James

NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
) SUPERIOR COURT DIVISION
FORSYTH COUNTY)
STATE OF NORTH CAROLINA)
vs.) AMENDED AFFIDAVIT IN SUPPORT OF
) MOTION TO SUPPRESS
DEFENDANT NAME)
Defendant

Now comes counsel for the defendant, and makes the following affidavit.

The affiant saith thus:

That I have reviewed the State's file in this matter, including the reports of the investigating officers, and also the search warrant and the affidavit in support of an application for a search warrant. I have also interviewed the defendant. Based on review of those documents and upon information and belief based on said review, the initial stop, detention, search, and questioning of the defendant, as well as the subsequent search warrant application was inadequate to support the searches and the later search warrant issued in this case and further items seized pursuant to the warrantless searches of defendant's person and car, as well as items seized pursuant to the later search warrant were unlawfully and unconstitutionally obtained. Counsel has detailed in the motion to suppress filed herein the factual statements supporting the several bases of this motion to suppress and those same factual statements are incorporated into this affidavit by reference as if fully set forth herein.

Respectfully submitted, this the ____ day of February
10

Paul James, Counsel for
Defendant _____

Sworn to and subscribed before me
this ____ day of February 10.

Notary Public
My commission expires:

NORTH CAROLINA) IN THE GENERAL
) COURT OF JUSTICE
) SUPERIOR COURT DIVISION
FORSYTH COUNTY) _____ CRS _____

STATE OF NORTH CAROLINA)
)
 vs.)
) MOTION TO SUPPRESS
DEFENDANT NAME,)
 Defendant)

Now comes the defendant, by and through counsel, and moves for suppression of evidence pursuant to N.C.G.S. § 15A-972, the 4th Amendment to the United States Constitution and Article 1 sections 19 & 20 of the North Carolina Constitution. In support of this motion the defendant shows unto the Court as follows:

1. Defendant is currently charged with PWISD Marijuana and PWISD Cocaine, Class I & H felonies, respectively.
2. That at the defendant's trial the State will seek to introduce as evidence items allegedly taken from the person of the defendant and obtained through a search of the defendant's person conducted by a WSPD officer without defendant's permission and without a warrant or other lawful justification.
3. That the defendant was unlawfully seized and defendant's person was unlawfully searched and property was seized, allegedly from the person of the defendant, by

officers in violation of the Fourth Amendment to the United States Constitution and in violation of the North Carolina Constitution and that the alleged recovery of items from the defendant's person by officers acting without a search warrant was as a result of an unconstitutional search and seizure.

4. The factual circumstances set forth in this motion are supported and verified by the affidavit of DEFENDANT NAME, attached hereto and incorporated by reference.

WHEREFORE, the defendant respectfully requests this Court to suppress the use as evidence of any and all items seized from the defendant.

Respectfully submitted, this the _____ day of _____, 200__.

Paul M. James, III
Assistant Public Defender
Forsyth County
Suite 400, 8 West Third St
Winston-Salem, NC 27101
(336) 761-2510

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion to Suppress) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Fifth Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the 3 February 2010.

Paul James

NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
) SUPERIOR COURT DIVISION
FORSYTH COUNTY) _____ CRS _____

STATE OF NORTH CAROLINA)
)
 vs.) AFFIDAVIT IN SUPPORT OF
) MOTION TO SUPPRESS
DEFENDANT NAME,)
 Defendant

Now comes the defendant, and makes the following affidavit.

The affiant saith thus:

That on June __, __ I was in a Bojangles restaurant in the process of ordering breakfast when I was accosted at gun point by a WSPD Officer. I was ordered at gun point to remain still and then ordered to empty the contents of my pockets on to the service counter. I had done absolutely nothing illegal or improper and I complied with the Officer's orders only because of his authority as a law enforcement officer and the fact that he was pointing a loaded gun at me at the time. I was never asked for nor gave permission for the officer to detain me nor to require me to empty my pockets and I neither wished to be detained nor to be required to empty my pockets. I was also searched by the officer after emptying my pockets, again without my permission and again against my will.

Respectfully submitted, this the 3 February 2010

DEFENDANT NAME
Defendant

Sworn to and subscribed before me
this 3 February 2010.

Notary Public
My commission expires:

NORTH CAROLINA) IN THE GENERAL
) COURT OF JUSTICE
) SUPERIOR COURT DIVISION
FORSYTH COUNTY) CRS

STATE OF NORTH CAROLINA)
)
 vs.)
) MOTION TO SUPPRESS
DEFENDANT NAME,)
 Defendant)

Now comes the defendant, by and through counsel, and moves for suppression of evidence pursuant to N.C.G.S. § 15A-972, the 5th Amendment to the United States Constitution and Article 1 sections 19 & 23 of the North Carolina Constitution. In support of this motion the defendant shows unto the Court as follows:

1. Defendant is currently charged with three counts of larceny of a motor vehicle, possession of a stolen vehicle, and possession of a firearm by a minor, two Class H felonies and a class 2 misdemeanor.
2. That at the defendant's trial the State will seek to introduce as evidence statements made by the defendant. These statements were made to law enforcement officers in response to questions posed by law enforcement officers. The initial response of the defendant to the officer's question of "whose car is it?" was made prior to any

officer advising the defendant of his rights and after he had been placed in handcuffs and advised that he was under arrest. All subsequent statements of the defendant were made in response to questions asked of him after he had been advised of his juvenile rights. At the time of his arrest the defendant was sixteen years old. Immediately after being advised of his juvenile rights the defendant requested that he be allowed to contact his mother and have her present. He was not allowed to do so and he was asked further questions to which he gave answers. The initial statement of the defendant was unlawfully obtained by questioning the defendant while in custody and under arrest and prior to advising him of his Miranda rights in violation of the Fifth Amendment to the United States Constitution and in violation of the North Carolina Constitution, Article I section 23 and the subsequent statements were obtained in violation of defendant's juvenile rights in that the defendant after being advised had requested that his mother be present and this was not permitted before questioning resumed.

3. The factual circumstances set forth in this motion are supported and verified by the affidavit of DEFENDANT NAME, attached hereto and incorporated by reference.

4. WHEREFORE, the defendant respectfully requests this

Court to suppress the use as evidence of any and all statements made by the defendant.

Respectfully submitted, this the ____day of _____, 200__.

Paul M. James, III
Assistant Public Defender
Suite 400, 8 West Third St
Winston-Salem, NC 27101
(336) 761-2510

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion to Suppress) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Fifth Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the 3 February 2010.

Paul James

questions, which I answered and for which I wrote out a short statement. This is my sworn affidavit consisting of 1 page.

This the _____ day of _____, 200__.

SIGNED:

DEFENDANT NAME

Affiant

Sworn to and subscribed before me
this _____ day of _____, 200__.

Notary Public

My commission expires: _____

NORTH CAROLINA) IN THE GENERAL
) COURT OF JUSTICE
) SUPERIOR COURT DIVISION
FORSYTH COUNTY) _____ CRS _____

STATE OF NORTH CAROLINA)
 vs.)
) MOTION TO SUPPRESS
DEFENDANT NAME,)
 Defendant)

Now comes the defendant, by and through counsel, and moves for suppression of evidence pursuant to N.C.G.S. § 15A-972, the 6th Amendment to the United States Constitution and Article 1 sections 19 & 23 of the North Carolina Constitution. In support of this motion the defendant shows unto the Court as follows:

1. Defendant is currently charged with
2. That at the defendant's trial the State will seek to introduce as evidence certain statements allegedly made by the defendant after being advised of his 5th Amendment Rights under Miranda when interviewed at the detention center by detectives in this case.
3. That at the time of the detectives interview of the defendant at the detention center the defendant had already invoked his Fifth Amendment & Sixth Amendment rights to counsel by stating to the arresting officer, as indicated in that officer's report, that he did not wish to answer questions and that he wanted to speak to a lawyer.

4. The detectives who conducted the interview of the defendant at the detention center where the statements in question were obtained, were investigating the charges presently facing the defendant and upon which he had been arrested.

5. The defendant did not in any manner, either directly or indirectly, make any contact with the detectives requesting that they come to see him prior to the interview.

6. The statements taken from the defendant by detectives who interviewed him at the detention center were obtained in violation of the defendant's rights to counsel under the Sixth Amendment to the United States Constitution and under the Constitution of North Carolina, Article I, sections 19 & 23.

7. The factual circumstances set forth in this motion are supported and verified by the affidavit of counsel which affidavit is based upon information obtained from the police reports in this case, the State's Discovery file, and counsel's interviews with the defendant. The affidavit of counsel is attached hereto and incorporated by reference in support of this motion.

WHEREFORE, the defendant respectfully requests this Court to suppress the use as evidence of any and all

statements taken from the defendant in the interview of the defendant conducted by detectives in this case at the detention center after the defendant's arrest.

Respectfully submitted, this the ____ day of February 10.

Paul M. James, III
Assistant Public Defender
Forsyth County
Suite 400, 8 West Third St
Winston-Salem, NC 27101
(336) 761-2510
N.C. Bar #13212

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion to Suppress) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Fifth Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the ____ day of February 10.

Paul James

NORTH CAROLINA)	IN THE GENERAL COURT OF JUSTICE
)	SUPERIOR COURT DIVISION
FORSYTH COUNTY)	_____ CRS _____
STATE OF NORTH CAROLINA)	
vs.)	AFFIDAVIT IN SUPPORT OF
)	MOTION TO SUPPRESS
DEFENDANT NAME,)	
Defendant	

Now comes counsel for the defendant, and makes the following affidavit.

The affiant saith thus:

That I have reviewed the reports of the arresting officers in this case and the Discovery file of the District Attorney. That I have further interviewed the defendant in this case with regard to the allegations set forth in the motion. In reviewing these information sources, from the information provided, it is clear that the defendant was interviewed by detectives after he had been arrested and after he had invoked his right to counsel. It is also clear that although the interviewing detectives again Mirandized the defendant, he had made no effort to contact any law enforcement personnel to request any interview. These facts being the case, the statements taken by detectives at the detention center from the defendant after he had been arrested and after he had invoked his right to counsel were taken in violation of defendant's Sixth Amendment Right under the U.S. Constitution and also in violation of his rights under Article I, sections 19 & 23 of the North Carolina Constitution.

Respectfully submitted, this the 3 February 2010

Paul James, counsel for the
Defendant

Sworn to and subscribed before me
this 3 February 2010.

Notary Public My commission expires:

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF FORSYTH

STATE OF NORTH CAROLINA

V.

DEFENDANT NAME,

Defendant.

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)

MOTION TO SUPPRESS

NOW COMES the defendant, by and through his attorney, and moves this Court pursuant to the 4th, 5th, 6th, and 14th Amendments of the United States Constitution; Article I §§ 19, 20, and 23; and North Carolina General Statutes 15A-971 et. seq. and 15A-284.50 et. seq., to suppress both the in-court and out-of-court identification by witnesses in this matter who have previously been involved in a “show up” procedure seeking identification of the defendant by said witnesses, as such identification procedures were so unnecessarily suggestive as to create a substantial likelihood of irreparable misidentification and were further obtained in deliberate disregard of the identification procedures required by the Eyewitness Identification Reform Act. As a result any in-court identification would not be independent in origin from the impermissible out-of-court identification. In support of this motion, the defendant, shows unto the Court as follows:

1. The defendant in this case is charged with:
2. At the defendant’s trial, from the State’s discovery, it appears likely the State will attempt to elicit from one or more witnesses an in court identification of the defendant as the perpetrator of the crimes charged.
3. At the defendant’s trial, from the State’s discovery, it further appears likely the State will attempt to elicit from one or more witnesses testimony regarding their identification of the defendant as the perpetrator of the crimes charged from an earlier out of court identification procedure commonly referred to as a “show up identification”.
4. The “show up” identification procedure conducted with witnesses in this matter consisted of bringing each such witness to a location where the defendant was detained in law enforcement custody and asking each such witness if the person clearly detained in police custody, that being the defendant, is the person who the witness believes to be involved in the crimes charged. No other individuals were with or around the defendant at the time and the attention of each such witness was focused by law enforcement officers solely on the defendant.
5. On March 1, 2008 the Eyewitness Identification Reform Act, set forth in N.C.G.S. §15A-284.50 et seq became law in North Carolina. The avowed purpose of the act as codified in N.C.G.S. §15A-284.51 was declared as follows: “The purpose of this Article is to help solve crime, convict the

- guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects”.
6. The police “show up” procedure does not comply with or confirm to any of the identification procedures contained in the Act. The Act further states in N.C.G.S. §15A-284.52(b) “Line ups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements.” The statute is not discretionary and none of the procedures utilized in the act are contained in the present police “show up” procedure as employed in this case. The act in essence requires that any person asked to make a possible suspect identification be required to look at a minimum of six pictures or persons displayed to them sequentially by a person with no knowledge of the case and that the pictures or persons displayed in addition to the defendant match as closely as possible any prior description of the suspect as provided by the witness and also ensuring that the defendant does not “unduly stand out from the fillers”.
 7. Witnesses taking part in the show up procedure in this case were directed to view only a single person clearly being held in police custody and such viewing occurred at night under poorly lit conditions and while the defendant was restrained and surrounded by uniformed armed police officers.

Prior to the legislature’s enactment of the Eyewitness Identification Reform Act, the North Carolina Supreme Court had previously criticized the practice of show ups as “inherently suggestive and unnecessary” State v. Turner, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). To determine whether such a procedure violated a defendant’s right to due process, prior to the legislature’s enactment of N.C.G.S. §15A-284.50 et seq., and required suppression, our Supreme Court adopted the following test:

In evaluating [*6] the propriety of a show-up identification under the Due Process Clause, this Court must determine if the totality of the surrounding circumstances created a "substantial likelihood of irreparable misidentification" by the witness. *Id.* "An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *Id.* The reliability of a show-up identification is determined by examining the following five factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation. State v. Powell, 321 N.C. 364, 369, 364 S.E.2d 332, 335 (1988).

The test as set forth in Powell should now be considered in light of the Legislature's action in attempting to improve the accuracy of eyewitness identifications conducted in the far less prejudicial settings of a photo line up or live line up situation. From the Legislature's own stated purpose in the adoption of the Eyewitness Identification Reform Act, even using relatively neutral previous line up procedures there has been a frequent likelihood of "substantial likelihood of irreparable misidentification" from those procedures. How much greater is such substantial likelihood from the highly charged atmosphere of a crime scene where a witness is directed to look at a single individual in custody.

However, evening applying the five factor test set forth in Powell to the facts of this case results in the a clear determination that under the totality of the circumstances there is a "substantial likelihood of irreparable misidentification" and suppression is thereby required.

The five factors as applied in this case show as follows:

- (1) The opportunity of the witness to view the criminal at the time of the crime. In this case the two witnesses were at a 2nd story hotel room looking down in to a parking lot at approximately 9 PM when it was dark and they had no particular reason to be attracted to the person below. They were also at least 100 feet from the person they were viewing,
- (2) The witness' degree of attention. As described above the witnesses had no reason to pay close attention to the person until they apparently saw him running from the hotel entrance and at that time they only observed him for several seconds.
- (3) The accuracy of the witness' prior description of the criminal. The only description reported by officers prior to the show up being conducted is a black male wearing a jean jacket and a blue ski mask.
- (4) The level of certainty demonstrated at the confrontation. Both witnesses had told officers they could identify the truck and the suspect prior to being taken to the show up. They were transported together by Officer ____ and as they approached the scene they both identified the truck as being the vehicle they had seen and they then both identified the defendant as the suspect they had seen. They never got out of the police car and there is no indication of how close they were driven or what the lighting conditions wer. However, it was at least sometime past 9:20 PM at night. The desk clerk who had been the one robbed and who had interacted with the suspect in a lighted area for some period of time had been previously transported to the scene by Officer ____ but had been unable to identify either the defendant or the suspect.
- (5) The time between the crime and confrontation. The robbery was reported at 8:54 PM on ____, 2009. The show up procedure, although no time is reported in the discovery, must have occurred no less than 30 minutes later, simply from the events reported in the discovery which proceed the conducting of the second show up where the identification was made.

Based on an analysis of the totality of the circumstances in this case and taking into consideration the Legislature's enactment of the Eyewitness Identification Reform Act and the purposes behind its adoption, as well as considering the fact that the Act had been in effect for more than a year at the time this investigation was undertaken, the show up

identifications made in this case must be suppressed as there is “substantial likelihood of irreparable misidentification”. The affidavit of counsel in support of this motion is attached hereto and incorporated by reference.

If for any reason the Court determines that suppression is not an appropriate remedy in this case then the defendant pursuant to N.C.G.S. §15A-284.52(d)(2) & (3), requests permission of the Court to elicit from law enforcement testimony that the requirements of the Eyewitness Identification Reform Act were not complied with in this case and the defendant further requests the Court to instruct the jury in the jury charge that the jury may consider credible evidence of non compliance with the Act in evaluating the reliability of eyewitness identification. The defendant will tender in writing an appropriate jury instruction regarding this request.

Respectfully submitted, this the ____ day of October 09.

Paul M. James, III
Assistant Public Defender
Forsyth County
Suite 400, 8 West Third Street
Winston-Salem, NC 27101
(336) 761-2510
N.C. Bar #13212

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion to Suppress) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Seventh Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the _____ day of February 10.

Paul James

NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
) SUPERIOR COURT DIVISION
FORSYTH COUNTY)

STATE OF NORTH CAROLINA)
 vs.) REQUEST FOR JURY INSTRUCTION
)
)
)
DEFENDANT NAME,)
 Defendant.

Now comes the defendant, by and through counsel, and requests the Court tender the following instruction to the jury with regard to the failure to follow the procedures of the Eyewitness Identification Reform Act as per N.C.G.S. §15A-284.52(d)(3).

Members of the jury, on March 1, 2008 a law enacted by the General Assembly and entitled the Eyewitness Identification Reform Act became the law in North Carolina. This law was in effect at the time of the allegations in this case and remains in effect today. The purpose of this law as stated by our Legislature is "to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects"(N.C.G.S. §15A-284.51). A portion of this law (N.C.G.S. §15A-284.52(b)) requires all line up procedures conducted by law enforcement personnel to follow the requirements of the Act. The substance of those procedures require that any live line up or photo line up contain no less than 6 persons, including the suspect, that those 6 persons reasonably resemble any prior description of the suspect by the witness, and that the suspect not unduly stand out from the others, and that any such procedure be administered by someone without knowledge as to who the suspect may be.

In this case you have received evidence regarding a line up procedure or procedures conducted by law enforcement and consisting of the display of a single individual by the investigating officers to one or more witnesses who were asked to identify the displayed person as being the suspect or not. This procedure does not comply with the requirements of the Eyewitness Identification Reform Act.

In determining whether or not any such eyewitness identification obtained through the use of a procedure not in compliance with the Eyewitness Identification Reform Act should be considered reliable, you may take the failure by law enforcement to follow the Act's requirements into consideration in determining the reliability of any such identification.

Authority: N.C.G.S. §15A-284(d)(3)

WHEREFORE, the defendant respectfully requests this Court tender the foregoing instruction to the jury.

Respectfully submitted, this ____ day of February 10.

Paul M. James, III
Assistant Public Defender
Forsyth County
Suite 400,8 West Fifth Street
Winston-Salem, NC 27101
(336) 761-2510

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Request for Jury Instruction) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Jane Smith
Assistant District Attorney
Seventh Floor
Forsyth County Hall of Justice
Winston-Salem, NC 27101

This, the ____ day of February 10.

Paul James, APD