

Suppression Motions **Bases and Procedures**

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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, 501U. 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.