MOTIONS TO SUPPRESS: STATEMENTS, PROPERTY, AND IDENTIFICATION

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I. Preface:

This paper is a practice guide for litigating **felony suppression motions in superior court**. Suppression guidelines for DWI, misdemeanors, motions to exclude evidence, and motions *in limine* are beyond the scope of this paper. The format is largely in outline form. Special practice tips are denoted as TIP.

II. Why Litigate a Motion to Suppress?

A. Strong suppression issue: Hot topic, good law, and/or good facts.

B. Arguable suppression issue: Unsettled law; decent, unusual, or inequitable facts.

C. Discovery of new material facts, legal issues, or evidence from law enforcement or witnesses resulting in motions *in limine*, etc.

D. Sworn testimony for impeachment.

E. Preservation of appellate issues.

F. No other defense.

G. A more realistic view of the case by the Defendant.

III. What Types of Evidence Can be Suppressed?

Generally, evidence may be suppressed if "its **exclusion is required by the U.S. Constitution or North Carolina Constitution**," **or** evidence "is obtained as a result of **a substantial violation of** the provisions of [the Criminal Procedure Act]" or **Chapter 15A** of the North Carolina General Statutes. N.C. Gen. Stat. §15A-974. Suppression motions are addressed to evidence "obtained" or "gathered" in violation of constitutional or statutory rights. *State v. Wilson*, 396 NC 47 (1997). They further concern the "application of the exclusionary rule of evidence" and matters of "police conduct not immediately relevant to the question of guilt." *U.S. v. Barletta*, 644 F.2d 50 (1st Cir. 1981) *Cf., generally Arizona v. Youngblood*, 488 U.S. 51 (1988). Simply put, look for a violation of a "state or federal constitutional right" or a "substantial violation" of Chapter 15A concerning:

A. Any kind of **identification**. (e.g., Eyewitness Identification Act, unduly suggestive identification procedures, Fifth Amendment, Sixth Amendment, confrontation, *Crawford*, due process, show-ups, reliability issues, etc.). State action may, or may not, apply.

B. Any **statement** of your client if:

1. "Interrogated" while in "custody" before advised of "*Miranda* rights" (includes statements "plainly likely to elicit an incriminating response.") *See Innis, infra at 11.* (Fifth Amendment);

2. "Interrogated" while in "custody" by law enforcement after "initial appearance" at magistrate's office. *See Rothgery, infra at 13.* (Sixth Amendment);

3. "Agent" of law enforcement (e.g., DSS, snitch, etc.) reports client's admissions after he was charged *and* had asked for an attorney, regardless of custodial status. (Sixth Amendment);

4. Defendant in "custody," has made an "unambiguous and unequivocal" request for a lawyer (e.g., at any previous time, first appearance, etc.), *and* has not requested to speak with law enforcement or waived his rights. (Sixth Amendment);

5. Law enforcement continues questioning client after he invokes his right to remain silent or right to counsel while in custody. (Fifth and/or Sixth Amendment);

6. Defendant has invoked his right to counsel while in custody *and* not more than fourteen days has passed. *Maryland v. Shatzer*, 559 U.S. _____ (2010), *infra at 12.* (Sixth Amendment);

7. "Unambiguous and unequivocal" assertion of the right to remain silent or right to counsel. *Davis v. United States*, 512 U.S. 452 (1994), *see also State v. Hyatt*, 355 N.C. 642, 656, 566 S.E.2d 61, 71 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823, 123 S. Ct. 916 (2003), (string cites deleted); *see also State v. Ash*, 169 N.C. App. 715 (2005). (Fifth and Sixth Amendment);

8. Violation of statute regarding recordation of homicide confessions. N.C. Gen. Stat. §15A-211, *et seq.* (effective March 1, 2008) ("Substantial violation" of Chapter 15A).

C. **Physical evidence** seized.

1. "Stop" without "reasonable and articulable suspicion" or "probable cause," *or* which involves a "substantial violation" of statute *or* applicable case law. (e.g., checkpoint violations, etc.) (Fourth Amendment);

2. "Search" without "probable cause" or "consent." (e.g., exceeds scope of consent granted, are issues of limited or withdrawn consent, etc.) (Fourth Amendment);

3. "Search" pursuant to "search warrant" either invalid on its face or based on false information. *See Franks, infra at 14.* (Fourth Amendment);

4. "Search" pursuant to "search warrant" beyond scope of authority granted. (Fourth Amendment); and

5. Obtained through "outrageous police misconduct" that "shocks the conscience". (e.g., "strip searches" in public, etc.) *See Battle, infra at 13.* (Fourth Amendment).

TIP: "**Informational evidence" obtained illegally may be suppressed if** your client has "**standing**" **to object**. Consider the above scenarios and the exclusionary rule.

IV. Procedural Requirements:

A. Generally, a motion to suppress **must** (1) be **in writing** and (2) be **accompanied by** an **affidavit** containing facts supporting the motion. N.C. Gen. Stat. §15A-977(a). The statutory scheme is contained within N.C. Gen. Stat. §§15A-951 (motions in general) through 15A-977 (motion to suppress evidence in superior court: procedure). The specific statute addressing "suppression of unlawfully obtained evidence" in superior court is N.C. Gen. Stat. §15A-974. **Be sure to include specific allegations** of the violations in support of your motion to suppress. Reference discovery interviews, investigation reports, probable cause testimony, affidavits, and the like. The motion and affidavit together **must raise an issue and allege facts that, if found to be true, would support suppression**. Otherwise, the motion will be denied without hearing.

1. The time for filing is governed by N.C. Gen. Stat. **§**15A-976 (defendant must move to suppress evidence not later than **ten working days** following receipt of the state's notice of intent to use said evidence). Note: The **state must give notice** not later than **twenty**

working days before trial of its intention to use evidence of a type in N.C. Gen. Stat. §15A-975 (b). This is usually accomplished within standard language in the discovery response.

2. A motion to suppress may be made during trial under very limited conditions. N.C. Gen. Stat. §15A-975(b) and (c) (lack of notice and newly discovered evidence); 15A-977(e) (procedure for same).

3. A judge **may allow renewal of the motion before or during trial if** additional pertinent facts are discovered which could not have been discovered with reasonable diligence beforehand. N.C. Gen. Stat. §15A-975; *State v. Watkins*, 120 N.C. App. 804 (1995).

4. An **adverse ruling may be preserved** and reviewed **on appeal** after a conviction or guilty plea. N.C. Gen. Stat. §15A-979(b).

5. Other than search warrants, the **prosecution has** the **burden** of proving the legality of the challenged issue by the **preponderance of the evidence** and is usually required to proceed first. *Lego v. Twomey*, 404 U.S. 477 (1972).

6. The **defendant has** a **preponderance burden** to establish "**standing**" *unless* the evidence establishes it otherwise. *State v. Warren*, 309 N.C. 224 (1983). An "aggrieved party" may move to suppress evidence. N.C. Gen. Stat. §15A-972. An "aggrieved party" is one who has a "reasonable expectation of privacy" or "standing" with regard to seized evidence. *State v. Taylor*, 298 N.C. 405 (1979).

7. Heightened burdens and legal principles apply to (a) the **search of an automobile without a warrant** and (b) **consent** searches. *State v. Pearson*, 348 N.C. 272 (1998) (prosecution has a heavy burden to show the search falls within an exception to the Fourth Amendment's warrant requirement). Cognitive or language difficulty is relevant to knowing and voluntary consent, and expert evidence may be appropriate. *U.S. v. Mendenhall*, 446 U.S. 544 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (prosecution has the burden of proving consent was voluntary); *State v. Crenshaw*, 551 S.E. 2d 147 (2001) (consent must be clear and unequivocal before a

defendant can waive his constitutional rights); *State v. Aubin*, 100 N.C. App. 628 (1990) (prosecution must prove the search was limited to the scope of consent given); *see also* N.C. Gen. Stat. §§15A-221(b) and 15A-222.

8. A **defendant's testimony** at a suppression hearing cannot be used by the prosecution in its case-in-chief against the defendant. *State v. Bracey*, 303 N.C. 112 (1981). It **may**, however, **be used to impeach** the defendant **if he testifies at trial and be considered** by the court **at sentencing**.

9. A **search warrant is presumed valid if** the search is made within the parameters of the warrant *and* the warrant is not defective. A defendant may contest validity of a search warrant in various ways, most commonly by those outlined in **VII. Common Defects in Search Warrants**, *infra at 13*. A defendant who requests the **identity of a confidential informant must make a sufficient showing** that the circumstances of his case mandate such disclosure. *State v. Watson*, 303 N.C. 533 (1981); *Roviaro v. U.S.*, 353 U.S. 53 (1957).

10. Consider whether you should have a **memorandum of law** prepared for the court and opposing counsel.

TIP: (1) The defendant's **affidavit** is **not evidence**; it is the "**showing**" required to compel the hearing. *State v. Chance*, 130 N.C. App. 107 (1998) (defense counsel's affidavit was sufficient to meet the requirements of 15A-974); (2) The **better practice** is for the **attorney** to **sign** the affidavit, not the defendant; **otherwise**, the **judge may think** the defendant must testify; (3) It is the **defendant's right to put relevant facts before the jury**. Rule 104(e); (4) Nothing outside the scope of the issue presented during the suppression hearing should be adduced. Rule 104(d) ("**accused does not**, by testifying upon a preliminary matter, **subject himself** to cross-examination as **to other issues**"); (5) Consider, when appropriate, a *Roviaro* motion. *Roviaro v. U.S.*, 353 U.S. 53 (1957) (prosecution **must disclose informant's identity** when relevant and helpful to the defense or essential to a fair determination); (6) Use the pattern jury instruction allowing an "**interested witness**" **instruction** for an undercover officer or confidential informant attached as "Exhibit A"; (7) When I receive discovery, **I send a letter** immediately to the prosecutor **reserving the right to file motions** and **giving notice of objections** attached as "Exhibit B"; and (8) When in doubt, **consult with the Appellate Defender**.

V. Practical Advice:

1. Good sources of information are the client, other witnesses, officers or case agents, and the affidavit underlying the search warrant.

2. Sealed search warrant affidavits involve issues of public records, records of criminal investigations, inherent authority of the court, and strategic considerations. N.C. Gen. Stat. §§132-1 and 132-1.4;

3. Judges are reluctant to grant a suppression motion. Be prepared, make your point, and show why you are right.

4. Educate the judge on the law. Empower him or her as the gatekeeper who makes the system work. If you fail to inform the judge, you will lose.

5. The state always believes it will win. Therefore, prosecutors usually prepare minimally with the witnesses, on the facts, and on the law. Take advantage.

6. If the motion addresses suppression of **identification**, consider waiving your client's presence to avoid a "show-up" identification, thus bolstering the witness's identification of your client. If the issue is a **credibility** question, consider character witnesses for the defendant.

7. Subpoena all audio and video tapes, belt tapes, standard operating procedures, and any other physical, real, or illustrative evidence which may clarify facts.

8. Be mindful of scheduling orders. If something happens that limits your evidence, state for the record the facts or rulings that could result in the "ineffective assistance of counsel."

9. A "general notice" may not be sufficient notice of the prosecution's intent to introduce specific evidence and may not trigger timing requirements.

10. The judge **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-245(a).

11. **Have the "trial judge" hear and rule** on the suppression motion. This procedure will allow "reconsideration" of a denial at a later time. *State v. Woolridge*, 357 N.C. 544 (2003).

12. **Request** a **hearing and ruling pretrial** so you may consider evidence rulings during *voir dire*.

13. Certain privileges apply at trial, sentencing, and suppression hearings: Fifth Amendment; marital; attorney-client; physician-patient; clergymen-communicant; psychologist-client; school counselor; marital/family therapist-client; social worker; counselor; and optometrist-patient.

14. The judge **must rule** on your motion **during the session** the motion is heard *unless* he gets your permission to rule out-of-session. Otherwise, the ruling is invalid.

15. The judge **must make findings of fact** and **conclusions of law**. N.C. Gen. Stat. §15A-977(f). Request specific findings by the court favorable to your position, and object to unfavorable specific findings not supported by the evidence. Appellate courts are bound by said findings when there is no objection; with a specific objection, they are only bound by findings "adequately supported in the record." If the judge fails to make findings or conclusions and no party requests the same, the record is "presumed to support" the judge's ruling. *Estrada v. Burnham*, 316 NC 318 (1986).

16. Argue specific "prejudice" to the Defendant, and relate how fine citizens should not be subject to the same course of conduct.

17. Argue the **statute says evidence "must be suppressed if** obtained as a result of **a substantial violation** of Chapter 15A." N.C. Gen. Stat. §15A-974(2). A "conclusory affidavit constitutes a substantial violation" of Chapter 15A. *State v. Hunter*, 305 NC 106 (1982); *State v. Hyleman*, 324 N.C. 506 (1989). Remind the judge criminal statutes are punitive in nature and are strictly construed. *State v. Reaves*, 142 N.C. App. 629 (2001).

18. **Cite all possible grounds and sources**. Always raise comparable state and federal constitutional provisions (e.g. 4th, 5th, and 6th Amendments of the U.S. Constitution applicable to the states under the 14th Amendment and Article 1, sections 19, 20, and 23 of the North Carolina Constitution).

19. **Object** to the introduction of evidence **at trial**. Failure to do so may "waive" appellate review. *State v. Williams*, 355 NC 501 (2002).

20. **Renew** your objection(s) to the evidence **post trial**.

21. **State your intent to give notice of appeal** to the prosecution and the court **before plea negotiations are finalized**, and **make your appeal of the suppression issue part of the plea transcript**. Otherwise, the appeal is "waived." *State v. Tew*, 326 NC 732 (1990); *State v. McBride*, 120 NC App. 623 (1995).

22. State court rulings on suppression issues are not binding in federal court, and collateral estoppel does not apply. *State v. Brooks*, 337 N.C. 132 (1994).

VI. A Primer on Suppression Issues: Issue Spotting.

- The right to "detain"
- "Reasonable and articulable suspicion" (stop)
- "Anonymous tips" (vs. citizen informants/collective knowledge)
- "Frisk" of individual
- "Custody" (s*ee Buchanan, infra at 10*; an objective, reasonable person determination)
- "Plain feel" doctrine
- "Plain view" doctrine
- "Probable cause" (arrest or search)
- "Possession" (actual and constructive)
- "Privilege" issues
- "Exceptions to the warrant requirement" (consent, exigent circumstances, inevitable discovery, inventory searches)
- No "good faith" exception in North Carolina
- No "officer safety" exception in North Carolina (*see Burton, infra at 11*)
- Prior convictions at sentencing (*see Boykin, infra at 11*)
- Checkpoints (*see Rose, infra at 13*)
- Consent (scope; objective reasonableness standard; limited; voluntary; knowing; withdrawn; without coercion or trick) (*see Mendenhall, infra at 12*)
- Confessions (totality of the circumstances; voluntary custodial status; deception; *Miranda* rights honored; held incommunicado; length on interrogation; physical threats/shows of violence; promises; familiarity with criminal justice system; mental condition) (*see Jackson and Hyde, infra at 12)*
- Mistake of fact or law (*see McLamb, infra at 12)*
- Identification (hearsay; "in court" and "out of court"; unduly suggestive procedures; new statutory eyewitness identification act; line-up procedures; show-ups) (s*ee Lawson, infra at 12; see also* N.C. Gen. Stat. §284.51).
- Car "frisk"

- Statements (capacity, Fifth and Sixth Amendments, juvenile rights, voluntariness, knowing, threats, promises, impairment, lying) *(see Miranda, Innis*, and *Crawford, infra at 11*)
- Searches (cell phones vs. iphones, pocketbooks, watching tapes, etc.)
- Search warrants (48 hours, probable cause, reliability, confidential informant, staleness, held to affidavit, mere conclusions are insufficient, *Roviero* motion, etc.) (*see* **VII. Common Defects in Search Warrants,** *infra at 13*)
- Nontestimonial identification orders
- Scope of detention or stop
- "Standing" to object
- Statutory violations ("substantial")
- Territorial jurisdiction
- Test results/chemical analysis (*see Melendez-Diaz* and progeny, *infra at 10*)
- Expert evidence (e.g., defendant's statements)
- Drug dogs (well-trained; dog alerts/*Frank's* hearing; masking; casting; cuing; false positives; cross-contamination; reliability)
- Discovery violations (constitutional vs. *Cornett, infra at 12*)
- Electronic recording of custodial interrogations in homicides (*see* N.C. Gen. Stat. §15A-211, *et seq*., *supra at 3*)
- Eyewitness identification and line-up procedures (show-ups) (see N.C. Gen. Stat. §15A-284.51, *et seq., infra at 15)*
- Constitutional arguments (due process; confrontation; statements; right to counsel; right to remain silent; legitimate expectation of privacy, etc.)
- First Amendment (delegating police powers to religious institutions); *State v. Pendleton*, 339 NC 379 (1994) (Campbell University police force unconstitutional); *State v. Jordan*, 155 NC App. 146 (2002) (Pfeiffer University police force unconstitutional)
- Fourth Amendment (stop; detention; reasonable suspicion; frisk; custody)
- Fifth Amendment (custodial interrogation; statements; "custody" plus "interrogation" equals *Miranda*)
- Sixth Amendment ("unequivocal" assertion of right to counsel; are "offense specific"; *see Messiah, infra at 12*)

- **Cases of note**:

* *Arizona v. Gant*, 129 S. Ct. 1710 (2009) [**police may search** the passenger compartment of a vehicle **incident to** a recent occupants **arrest only if** it is **reasonable to believe** (a) the arrestee **might access the vehicle** at the time of the search **or** (b) the **vehicle contains evidence of the offense of arrest]**

* *Arizona v. Johnson,* 129 S. Ct. 781 (2009) ("**frisk**" standard applies to **passengers**)

* *State v. Buchanan,* 353 N.C. 264 (2002) (**custody** is a restraint of movement commensurate with that of formal arrest or its functional equivalent)

* *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009) (**forensic laboratory reports are testimonial** and subject to *Crawford*); *see also State v. Locklear,* 363 N.C. 438 (2009) (autopsy prepared by non-testifying pathologist is testimonial and inadmissible); *State v. Brewington,* 693 S.E. 2d 182 (2010) (SBI agent rendering an opinion a substance was cocaine when using another agent's test results is testimonial and inadmissible); *see also State v. Brennan,* 692 S.E. 2d 427 (2010); *State v. Galindo,* 683 S.E. 2d 785 (2009) (expert rendering opinion as to weight of cocaine based solely on lab report prepared by non-testifying analyst is testimonial and inadmissible); *State v. Ward,* 681 S.E. 2d. 354 (2009) (expert testimony identifying a controlled substance based on visual inspection of tablets violates *Melendez)*; *Cf., State v. Mobley,* 684 S.E. 2d 508 (2010) (law allows one expert to testify to own conclusions based on testing of another expert in the field; Rule 703); *State v. Hough,* 690 S.E. 2d 285 (2010) ("peer review" by experts in same field is admissible); *State v. Steele,* 689 S.E. 2d 155 (2010) ("notice-and-demand" statute is constitutional)

* *Bruton v. United States,* 391 U.S. 123 (1968); *See also,* N.C. Gen. Stat. §15A-927. (purpose of *Bruton* and its codification is to sanitize references so that co-defendants are guaranteed a fair and impartial trial. **References to another person may not suggest or infer guilt**)

* *State v. Davis,* 640 S.E.2d 446 (2007) (dismissed defendant's conviction for drug offenses when he, pursuant to a **search warrant** of his girlfriend's residence, was located in the kitchen near money, marijuana, and crack cocaine, all found in numerous bags and locations underneath the refrigerator, in paper bags, a deep freezer, the kitchen cabinet, and a fryer on the kitchen floor. The court provides a **thorough analysis of** the facts in **a non-exclusive possession case**, **ultimately** holding the State's evidence merely created suspicion and conjecture and **dismissing** the case.)

* *State v. Tuggle,* 109 N.C. App. 235 (1993) (**insufficient evidence** for conviction of unlawful **possession** of diazepam where there was no evidence that the tablets were not issued pursuant to a prescription or that the quantity was larger than the amounts normally prescribed even though officers found seventy-eight tablets of diazepam in a bottle in the defendant's residence)

* *Miranda v. Arizona,* 384 U.S. 436 (1966) (state cannot use statements from custodial interrogation of a defendant unless the state shows the use of **procedural safeguards** "effective to secure the privilege against self-incrimination" such as a **warning** to the defendant of his right to remain silent or to counsel)

* *Rhode Island v. Innis*, 446 U.S. 291 (1980) ["term '**interrogation**' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"]

* *Crawford v. Washington*, 541 U.S. 36 (2004) [a **testimonial, out of court witness statement is not admissible** against a criminal defendant ***unless*** (1) the witness is **unavailable and** (2) there was a **prior opportunity for cross examination**]

* *Roviaro v. U.S.*, 353 U.S. 53 (1957) (prosecution **must disclose informant's identity** when relevant and helpful to the defense or essential to a fair determination)

* *State v. Spencer*, 664 S.E.2d 601 (2008) (**defendant must review and confirm officer's notes or** they **must be verbatim**)

* *Illinois v. Caballes*, 543 U.S. 405 (2005) (a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment*); State v. Branch*, 177 N.C. App. 104 (2006) (a dog sniff during a lawful detention is reasonable under the Fourth Amendment*); State v. Brimmer*, 653 S.E.2d 196 (2007) (defendant's actions prolonged the stop; a dog sniff adding one and one half minutes is a *de minimis* intrusion); *State v. Jackson*, 681 S.E.2d 492 (2009) (precise **summary** of the **legal principles that apply** to the **scope of stop**)

* *Boykin v. Alabama*, 395 U.S. 238 (1969) (court held it was "error, plain on the face of the record, for the trial judge to accept [the **defendant's] guilty plea** without an affirmative showing that it was **intelligent** and **voluntary**")

* *State v. Carter*, 322 N.C. 709 (1988) (**no "good faith" exception** in NC); *State v. Hyleman*, 324 N.C. 506 (1989) (**no "good faith" exception** to violations of Chapter 15A)

* *Terry v. Ohio*, 392 U.S. 1 (1968) (detention requires **reasonable suspicion of particularized criminal activity**)

* *U.S. v. Burton*, 228 F.3d 524 (4th Cir. 2000) (**no "officer safety" exception** to law on "**frisk**")

* *U.S. v. Mendenhall*, 446 U.S. 544 (1980) (law on "**consent**")

* *State v. Jackson*, 308 N.C. 549 (1983) (**use of trickery** by police is not illegal as a matter of law; while deceptive methods or false statements by police are not commendable practices, standing alone they do not render a **confession** inadmissible; admissibility is a totality of the circumstances test, considering whether the means employed was calculated to gain an untrue confession); *see also State v. Hyde*, 352 NC 37 (2000) (same test for confession; consider whether in custody, deceived, *Miranda* rights honored, held incommunicado, physical threats or shows of violence, and promises made as well as the length of interrogation, familiarity with criminal justice system, and mental condition)

* *Nix v. Williams*, 467 U.S. 431 (1984) (law on "**inevitable discovery**"; must be "virtually certain to be discovered in the ordinary course of the investigation")

* *Florida v. Wells*, 495 U.S. 1 (1990) (law on "**inventory search**"; search must be conducted "pursuant to a set of policies or procedures previously approved by seizing agency, an inventory of contents regularly made, and vehicle stored")

* *State v. Worsley*, 336 NC 268 (1994) (law on "**exigent circumstances**"; must be "a true emergency and probable cause for the search")

* *State v. Cornett*, 177 N.C. App. 452, 629 S.E.2d 857 (2006) (while there is no statutory discovery for misdemeanors, ***Brady, Kyles, Whitley, Agurs, et al,* always apply to criminal cases**)

* *Brendlin v. California*, 551 U.S. 249 (2007) (**passenger** in vehicle has **standing** to contest the stop)

* *Messiah v. U.S.*, 377 U.S. 201 (1964) (rights associated with the **assertion of counsel** under the **Sixth Amendment** only attach after formal charges have been taken out and they are "offense specific")

* *State v. Lawson*, 159 NC App. 534 (2003) (if **pretrial identification procedures** are so suggestive to create a substantial likelihood of irreparable misidentification, the evidence must be suppressed)

* *Dunaway v. New York*, 442 U.S. 200 (1979) (taking a suspect to the police station for questioning is the **equivalent of formal arrest** requiring probable cause)

* *Maryland v. Shatzer*, 559 U.S. _____ (2010) (Sixth Amendment precludes law enforcement from interrogating a defendant in custody for **fourteen days** after he invokes his Fifth Amendment right to counsel)

* *Doyle v. Ohio*, 426 U.S. 610 (1976) (**prosecution may not use** a **defendant's post-arrest silence** to impeach his later testimony; due process requires the defendant will not be penalized for asserting a constitutional right)

* *Rothgery v. Gillespie County, Texas*, 1285 S. Ct. 2578 (2008) (**Sixth Amendment right to counsel attaches at** the **initial appearance** before a judicial official)

* *City of Indianapolis v. Edmonds*, 531 U.S. 32 (2000) (a **checkpoint** with a limited programmatic purpose narrowly tailored to fit that purpose will likely be upheld; border searches and license, registration, and sobriety checkpoints may be allowed; searching for general evidence of crimes, general crime control, and drug interdiction checkpoints are unlawful)

* *State v. Rose*, 170 N.C. App. 284 (2005) (court must determine the **checkpoint**'s programmatic purpose and make findings as to the reasonableness of the checkpoint)

* *State v. Jackson*, 681 S.E. 2d 492 (2009) (a precise summary of the legal principles that apply to the **scope of** a **stop** issue; considers original purpose of the stop, additional facts which may justify further detention, defendant's actions prolonging the stop, length of the stop, and more)

* *State v. Battle*, (2010) (**roadside strip searches** require probable cause and exigent circumstances to be permissible)

* *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (the "**plain feel" doctrine** requires the incriminating character of the object must be immediately apparent to the officer who is conducting a lawful search)

VII. Common Defects in Search Warrants:

A. "**Execution**" within forty-eight hours. N.C. Gen. Stat. §15A-248. Query: Was the warrant returned "without unreasonable delay"?

B. Do the facts constitute "**probable cause**"? Consider:

1. Is there an "adequate factual basis"? (i.e., are there affidavits "particularly setting forth the facts and circumstances establishing probable cause to believe the items are in the places or possession of the individuals to be searched"?) N.C. Gen. Stat. §15A-244(3); *State v. Flowers*, 12 N.C. App. 487 (1971) ("should contain facts material and essential to support finding of probable cause");
2. Mere conclusions of probable cause are insufficient;

3. Scope of probable cause. Do the facts within the affidavit create a basis to seize the property requested?;
4. Who issued the warrant? (e.g., magistrate vs. superior court judge, etc.); and
5. Location of the alleged criminal activity. (i.e., home vs. car, etc.).

C. "**Reliability**" of the information? Consider:

1. Anonymous tips vs. citizen informants;
2. Frequency of alleged criminal activity; and
3. Are there "confidential informants"? If so, look for:

    a. conclusory statements;
    b. prior arrests, convictions, etc.;
    c. propriety of a *Roviero* motion; and
    d. remember they are rarely good witnesses.

TIP: **To succeed on a *Roviero* motion, the defendant must show:** (1) disclosure is fundamentally fair; (2) the informant's identity is relevant and helpful to the defense *or* essential to a fair determination of the matter; (3) the disclosure is material to a particular defense; and (4) circumstances mandate such disclosure. *See Roviero, supra page 11*; *U.S. v. Mabry*, 953 F. 2d 127 (4th Cir. 1991); *State v. Watson*, 303 N.C. 533 (1981).

D. "**Staleness**" of the information? Consider:

1. Timeliness. Are dates provided?;
2. Less important for drugs; and
3. More important for isolated crimes.

E. Did law enforcement **seize property or persons beyond the scope of the authority granted**? Or did law enforcement open items, watch videos, search third parties, or look at materials beyond the authority of the warrant?

F. Did the applicant make material **statements which were false, misleading, or with a reckless disregard for the truth of falsity of the declaration**? *Franks v. Delaware*, 438 U.S. 154 (1978). A *Franks* violation may exist where the applicant omitted material facts with the intent to make, or in reckless disregard which made, the affidavit misleading.

G. Does the warrant include **information not known at the time of issuance**?

1. Example: Ballistics report received days later, etc.

H. Is there a "**substantial violation**" of Chapter 15A?

I. **Anticipatory search warrants**. *See State v. Smith*, 124 N.C. App. 565 (1996) [sets out state constitutional requirements for the issuance of an anticipatory search warrant including (1) clear and narrowly drawn triggering events; (2) requires events which are ascertainable, preordained, and which establish probable cause; and (3) requires the property to arrive at the destination, all of which must occur before execution of the warrant]

J. **Practice pointers**:

1. The state is held strictly to the contents of the affidavit;
2. Mere conclusions are insufficient. Common with informants; and
3. Remind the judge of the "interested witness" instruction for confidential informants and undercover officers.

VIII. Suppression of In-Court and Prior Out-of-Court Identifications:

A. If the defendant can show pretrial identification procedures were **so suggestive as to create a substantial likelihood of irreparable misidentification**, the identification evidence **must be suppressed**. *State v. Lawson*, 159 N.C. App. 534 (2003).

B. "**Show-up**" identifications are disfavored, but they are not *per se* violative of a defendant's due process rights. *State v. Turner*, 305 N.C. 356 (1982); *State v. Washington*, 665 S.E. 2d 799 (2008) (court stressed concern over "show-ups" and referenced the Eyewitness Identification Act as a remedy).

C. **Factors** are outlined in *State v. Powell*, 321 N.C. 364 (1988) (i.e., opportunity to view, degree of attention, accuracy of description, level of certainty, and time between crime and confrontation).

D. The **Eyewitness Identification Act** applies to all line-up procedures since March 1, 2008. N.C. Gen. Stat. §15A-284.51. It addresses procedure, recordation, and remedies.

E. Request a ***voir dire*** before trial for in-court identification testimony. Relevant cases include *State v. Covington*, 290 N.C. 313 (1976); *State v. Flowers*, 318 N.C. 208 (1986).

TIP: (1) **File a motion for a Nontestimonial Identification Order requiring** the state to conduct a **neutral line-up identification procedure** when the state intends to seek an in-court identification of the defendant. If the witness is unable to identify your client in the neutral setting, follow-up with your motion to suppress; and (2) **Challenge a "show-up" as an improperly done "line-up" of one, triggering statutory rights** under the Eyewitness Identification Act. You may then receive a **jury instruction** for same.

IX. Sample Motions, Affidavits, and Brief:

A. See attached.

X. Small Group Sample Problems:

A. See attached.

XI. Conclusion:

Knowledge is power. Think through the evidence, read the cases applying the law, and, if you believe you are right, try the case. Knowledge, combined with experience, will make you a master of our craft.

Epilogue: "The day may come when we are unable to muster the courage to keep fighting . . . but it is not this day." *

* Attributed to: The Lord of the Rings: Return of the King (2003).