

Nontestimonial Identification Orders in Delinquency Matters

The law that governs the use of nontestimonial identification procedures in delinquency matters is markedly different than the law that governs use of these same procedures in criminal matters. The Juvenile Code requires a court order prior to the use of most nontestimonial identification procedures, a nontestimonial identification order (NTO) can only be issued in relation to felony charges, there are specific statutes that govern the destruction of resulting records, and the willful violation of the juvenile NTO statutes carries a criminal penalty. This post describes when NTOs are needed, and the procedure that must be followed to obtain them, in matters under juvenile jurisdiction.

When is a Nontestimonial Identification Order Required?

Nontestimonial identification “means *identification* by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar *identification procedures requiring the presence of a juvenile*.” [G.S. 7B-2103](#) (emphasis added). This is nearly identical to the definition provided in the Criminal Procedure Act. [G.S. 15A-271](#), except that the Criminal Procedure Act references a suspect instead of a juvenile. There is therefore no difference between juvenile and criminal procedure regarding what constitutes a nontestimonial identification procedure. These procedures are 1) for identification of the juvenile as the perpetrator and 2) require the presence of the juvenile to be performed.

The Procedure Must be for Identification

The North Carolina Court of Appeals described what it means for a procedure to be one that is for the purpose of identification in 1982. *State v. Whaley*, 58 N.C.App. 233. The court explained that “[m]anifestly, the focus of these statutes is identification of the suspect as the perpetrator, not a determination of whether the crime has been committed.” *Id.* at 235. So, in *Whaley*, a visual acuity test for a driver accused of involuntary manslaughter and death by vehicle was held not to be a nontestimonial identification procedure. The test was not administered to determine whether the driver was the person who committed the offense. Instead, the results of the test were sought in order to determine whether an element of the offense—gross negligence—existed.

This issue sometimes arises when juveniles are suspected of driving while impaired. A breath test administered to determine whether the juvenile is impaired is done to determine whether an element of the offense—impairment—is present. It is not done to identify the juvenile as the person who was driving the vehicle. Therefore, the breath test is not a nontestimonial identification procedure and an NTO is not required. Many procedures that involve the collection of evidence from a juvenile’s body to establish an element of a crime may still require a search warrant. Criminal law governing search and seizure should be consulted to determine if a search warrant is

required. You can find that body of law in [Arrest, Search, and Investigation in North Carolina](#).

The Procedure Must Require the Presence of the Juvenile

A nontestimonial identification order is needed only when the procedure requires the presence of a juvenile. Questions sometime arise when one of the items or procedures listed in G.S. 7B-2103 can be obtained or accomplished without the presence of the juvenile. For example, a photo lineup might be conducted using a publicly available photo, such as a yearbook photo. A fingerprint may have previously been legally obtained and could be used for comparison purposes for a new offense. These situations would not require an NTO because they do not require the presence of the juvenile.

Almost All Nontestimonial Identification Procedures in Juvenile Cases Require a Court Order

A major difference between the juvenile and criminal NTO statutes is the mandate for a court to issue an NTO in order to conduct almost all nontestimonial identification procedures in juvenile matters. While the criminal NTO statute begins with a permissive “may,” the juveniles statute provides a **mandatory prohibition on conducting nontestimonial identification procedures on a juvenile without a court order unless one of the exceptions applies**. G.S. 7B-2103. Unlike adult suspects, juveniles therefore cannot consent to participate in a nontestimonial identification proceeding.

Exception 1: Juveniles charged as an adult or transferred to superior court for trial as an adult

Juveniles who are charged with committing motor vehicle offenses under Chapter 20 of the General Statutes at ages 16 and 17 are under original criminal jurisdiction. [G.S. 7B-1501\(7\)b](#). In addition, any person who commits an offense under age 18 and who has previously been convicted in adult criminal court of an offense, other than a misdemeanor violation of Chapter 20 of the General Statutes that did not involve impaired driving, will be processed under the criminal law from the beginning of their case. [G.S. 7B-1604\(b\)](#). Any juvenile fitting one of these categories is “charged as an adult” and the juvenile NTO statute does not apply to them. G.S. 7B-2103. Criminal procedure applies in these cases. Additionally, criminal procedure applies following the transfer of any case that begins as a juvenile matter and is subsequently transferred to superior court for trial as an adult. G.S. 7B-2103.

Exception 2: Fingerprinting and Photographing Certain Juveniles When a Complaint is Prepared for Filing as a Petition

A juvenile must be fingerprinted and photographed if they are age 10 or older at the time of allegedly committing a nondivertible offense (see [G.S. 7B-1701\(a\)](#)), a complaint has been prepared

for filing as a petition, and the juvenile is in the custody of law enforcement or the Division of Juvenile Justice. [G.S. 7B-2102\(a\)](#).

Exception 3: Photographing Any Juvenile Committed to a County Juvenile Detention Facility

Every juvenile who is committed to a county juvenile detention facility must be photographed by that facility. [G.S. 7B-2102\(a1\)](#).

Exception 4: Fingerprinting and Photographing Any Juvenile Adjudicated Delinquent for Committing a Felony Offense at Age 10 or Older

If a juvenile 1) is adjudicated delinquent for committing an offense that would be a felony if committed by an adult, 2) was age 10 or older at the time of the offense, and 3) has either not been previously fingerprinted or photographed or previous fingerprints and photographs have been destroyed, then that juvenile must be fingerprinted and photographed. [G.S. 7B-2102\(b\)](#).

Exception 5: Show-ups

While the show-up is a procedure that requires the presence of the juvenile for the purpose of identifying them as the perpetrator of an offense, the Supreme Court of North Carolina established an exception to the juvenile NTO requirement for show-ups. [In re Stallings, 318 N.C. 565 \(1986\)](#). The court held that as long as the show-up is not conducted in a manner that is so suggestive as to deem it unreliable, the important law enforcement objective of efficiency and protection of the juvenile from more intrusive identification procedures render this use of nontestimonial identification of a juvenile permissible without a court order. [Session Law 2019-47](#) created a new requirement to photograph juveniles at the time and place of a show-up when the juvenile is age 10 or older and is reported to have committed a nondivertible offense or common law robbery. Photographing a juvenile at the time and place of any show-up outside of this limited circumstance is not allowed without an NTO.

No Exception for Juveniles in Custody

The criminal NTO process “applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused.” [State v. Irick, 291 N.C. 480, 490 \(1977\)](#). Some nontestimonial identification procedures such as fingerprinting, photographing, and lineups are allowed in criminal matters following an arrest. A search warrant is generally required to compel an adult who is in custody to participate in more intrusive nontestimonial identification procedures, such as taking a blood sample. A thorough explanation of this criminal law can be found in Chapter 4 of [Arrest, Search, and Investigation in North Carolina](#). There are no analogous in-custody exceptions to the requirement for a nontestimonial identification order in juvenile matters. Instead,

G.S. 7B-2103 strictly prohibits the use of nontestimonial identification procedures without an NTO in juvenile matters unless one of the above-referenced exceptions applies. This includes nontestimonial identification procedures conducted when the juvenile is in custody.

Procedure to Obtain a Nontestimonial Identification Order

By whom and when: A district or superior court judge may issue a juvenile NTO on the prosecutor's request. [G.S. 7B-2103](#). A request for an NTO can be made before a juvenile is taken into custody or after a juvenile has been taken into custody and before the adjudicatory hearing. [G.S. 7B-2104](#).

On what basis: A juvenile nontestimonial identification order can only be issued on a sworn affidavit or affidavits that establish all of the statutorily listed grounds. [G.S. 7B-2105](#). For everything other than an order to obtain a blood specimen, these grounds include (1) probable cause to believe that an offense that would have been a felony if committed by an adult was committed, (2) reasonable grounds to suspect that the named juvenile committed the offense, and (3) that the results of the ordered procedure will be of material aid in determining whether the named juvenile committed the offense.

Grounds for a nontestimonial identification order to obtain a blood specimen from a juvenile are enhanced, requiring (1) probable cause to believe that an offense that would have been a felony if committed by an adult was committed, (2) probable cause to suspect that the named juvenile committed the offense, and (3) probable cause to believe that obtaining the blood specimen will be of material aid in determining whether the named juvenile committed the offense.

The types of offenses for which a juvenile NTO can be issued are more limited than the types of offenses for which a criminal NTO can be issued. The grounds for a juvenile NTO requires probable cause to believe a felony offense has been committed. Criminal NTOs can be issued if there is probable cause to believe a felony offense or a Class A1 or Class 1 misdemeanor offense has been committed. [G.S. 15A-273](#).

Procedure on issuance: If the court finds that the statutory grounds have been shown, the judge may issue an NTO following the procedure for issuing NTOs contained in G.S. 15A-274 – 280 and G.S. 15A-282—the criminal procedures for the NTO process. [G.S. 7B-2106](#). This includes the right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel for that purpose. [G.S. 15A-279\(d\)](#).

Issuance on request of the juvenile: Juveniles also have a statutory right to request an NTO if they are in custody for an offense that would be a felony if committed by an adult. [G.S. 7B-2107](#). Courts are required to issue an order at the juvenile's request if it appears that the results of the procedure will be of material aid in the juvenile's defense.

Mandatory destruction of records: The Juvenile Code includes specific requirements regarding the destruction of records resulting from nontestimonial identification procedures in juvenile cases. [G.S. 7B-2108](#). These records must be destroyed by the law enforcement agency having possession of the records if (1) a petition is not filed, (2) the juvenile is not adjudicated delinquent or convicted following transfer to superior court, or (3) the juvenile was adjudicated for an offense that would be less than a felony if committed by an adult and the juvenile is under the age of 13. Records can be retained in the court file when a juvenile over the age of 13 is adjudicated delinquent for an act that would be a felony if committed by an adult. These retained records have limited use. They can only be inspected by law enforcement officers for comparison purposes in the investigation of a crime. Any records related to a nontestimonial identification order in a case that results in conviction following transfer to superior court are to be processed the same way as records in other criminal cases.

Willful Violation is a Crime

One final difference between the criminal law that governs nontestimonial identification procedures and the law that governs those same procedures in delinquency matters is the criminalization of the willful violation of the juvenile requirements. [G.S. 7B-2109](#) makes the willful violation of the Juvenile Code provisions prohibiting use of nontestimonial identification procedures without an NTO a Class 1 misdemeanor.