

NORTH CAROLINA DWI LAW: *WHERE AM I AND HOW DID I GET HERE?*

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About

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Mr. Davis is a N.C. Board Certified Specialist in Federal Criminal Law, State Criminal Law, and Family Law with a trial practice in criminal, domestic, and general litigation. He is deeply committed to excellence and professionalism in the practice of law, having served on the N.C. State Bar Specialization Criminal Law Committee, the N.C. State Bar Board of Continuing Legal Education, the N.C. State Bar Disciplinary Hearing Commission, and was Issue Planning Editor of the Law Review at Regent University. James also lectures at criminal, family law, and trial practice CLE programs, and is regularly designated by the Capital Defender as lead counsel in capital murders.

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COVERING RECENT DEVELOPMENTS

This paper* is derived from my original paper entitled *Ubering Through North Carolina DWI Law: Outlining the Latest Defenses and Strategies*. I have utilized many CLEs, read many studies, consulted with and observed great lawyers, and, most importantly, gained trial experience in approximately 100 jury trials including capital murder, personal injury, torts, and an array of civil trials. I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, drug trafficking, and a myriad of other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault, and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: if it does not

work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.

A few preliminary comments. First, trial is a mosaic, a work of art. Second, I am an eclectic, taking the best I have ever seen or heard from others. Virtually nothing herein is original, and I claim no proprietary interest in the materials. Last, like the conductor of a symphony, be steadfast at the helm, remembering the basics: Preparation spawns the best examinations. Profile favorable jurors. File pre-trial motions that limit evidence, determine critical issues, and create a clean trial. Be vulnerable, smart, and courageous in jury selection. Cross with knowledge and common sense.

** I wish to acknowledge Timothy J. Readling, Esq., for his able assistance in researching, drafting, and editing this presentation.*

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I. Implied-Consent Offense Procedure: Statutes [\(TOC\)](#)

A person who drives on a highway or public vehicular area gives consent to a chemical analysis if charged with an implied consent offense. N.C. Gen. Stat. § 20-16.2(a).

An implied consent offense is an offense involving impaired driving, Misdemeanor Death by Motor Vehicle, or an alcohol-related offense subject to the procedure of N.C. Gen. Stat. § 20-16.2. N.C. Gen. Stat. § 20-16.2(a1).

The offense of impaired driving occurs when one drives any vehicle upon any highway, street, or public vehicular area within the State (1) while under the influence of an impairing substance, (2) after having consumed sufficient alcohol that one has, at any relevant time after driving, an alcohol concentration of 0.08 or more, or (3) with any amount of a Schedule I controlled substance or its metabolites in one's blood or urine. N.C. Gen. Stat. § 20-138.1(a).

One drives when in actual physical control of a vehicle which is in motion or which has the engine running. N.C. Gen. Stat. § 20-4.01(25) (noting “driver” and “operator” are synonymous terms).

- A. N.C. Gen. Stat. §§ 20-38.1 through 38.7:
 - 1. 20-38.1: Applicability
 - 2. 20-38.2: Investigation
 - 3. 20-38.3: Police processing duties
 - 4. 20-38.4: Initial appearance
 - 5. 20-38.5: Facilities
 - 6. 20-38.6: Motions and district court procedure
 - 7. 20-38.7: Appeal to superior court
- B. These procedures apply to any implied consent offense litigated in the District Court Division. N.C. Gen. Stat. § 20-38.1.
- C. What is an “implied-consent offense”? N.C. Gen. Stat. § 20-16.2(a1):
 - 1. Impaired driving (N.C. Gen. Stat. § 20-138.1);
 - 2. Impaired driving in a commercial vehicle (N.C. Gen. Stat. § 20-138.2);
 - 3. Habitual impaired driving (N.C. Gen. Stat. § 20-138.5);

4. Any death by vehicle or serious injury offense when based on impaired driving;
 5. First or second degree murder (N.C. Gen. Stat. § 14-17) or involuntary manslaughter (N.C. Gen. Stat. § 14-18) when based on impaired driving;
 6. Driving by a person less than twenty-one years old after consuming alcohol or drugs (N.C. Gen. Stat. § 20-138.3);
 7. Violating no-alcohol provision of a limited driving privilege (N.C. Gen. Stat. § 20-179.3);
 8. Impaired instruction (N.C. Gen. Stat. § 20-12.1);
 9. Operating commercial motor vehicle after consuming alcohol (N.C. Gen. Stat. § 138.2A);
 10. Operating school bus, school activity bus, or child care vehicle after consuming alcohol (N.C. Gen. Stat. § 20-138.2B);
 11. Transporting an open container of alcohol (N.C. Gen. Stat. § 20-138.7(a));
 12. Driving in violation of restriction requiring ignition interlock (N.C. Gen. Stat. § 20-17.8(f)).
- D. Generally, written motions in District Court are not required. N.C. Gen. Stat. § 15A-953:
1. The implied consent statutory procedures are silent on the form of the motion. N.C. Gen. Stat. § 20-38.6.
 2. Local practice utilizes a notice checklist. *See* attached [EXHIBIT A](#).
 3. Tip: One local district court judge prefers a written motion to suppress. *Query*: Do you hand up a full-bodied motion to suppress or try the issue without tipping off the ADA?
 4. Since N.C. Gen. Stat. § 20-38.6 does not specify, N.C. Gen. Stat. § 15A-951 governs motions practice and requires that motions:
 - a. Be in writing;
 - b. State the grounds;
 - c. Specify relief requested;

- d. Be served on the prosecution; and
 - i. As of July 1, 2021, service shall be made pursuant to Rule 5 of the N.C. Rules of Civil Procedure. *See* N.C. Gen. Stat. § 15A-951(b) (codifying Session Law 2021-47, s. 16(a)).
 - e. Be filed with the court.
5. The State has a “reasonable time” to procure witnesses and evidence and conduct research to defend against the motion. N.C. Gen. Stat. § 20-38.6.
6. *See* Shea Denning, *Motions Procedures in Implied Consent Cases After State v. Fowler and State v. Palmer*, UNC-SCHOOL OF GOVT. ADMIN. OF JUSTICE BULLETIN 3 (2009); *see also* *State v. Fowler*, 197 N.C. App. 1 (2009); *State v. Palmer*, 197 N.C. App. 201 (2009).
- E. Generally, all District Court DWI motions to suppress or dismiss are to be heard pretrial. N.C. Gen. Stat. § 20-38.6(a):
- 1. Includes stop, detention, SFST results, HGN and DRE evidence, lack of probable cause, statements of defendant, blood or breath test results, and *Knoll* or similar motions.
 - 2. Exceptions: N.C. Gen. Stat. §§ 20-38.6(a), 20-139.1(c1), and (e2):
 - a. Motions to dismiss for insufficiency of the evidence;
 - b. Motions based on surprise, unknown discovery, and facts not known to defendant before trial;
 - c. Foundational objections (since defendant cannot know pretrial whether State will satisfy foundational requirements); and
 - d. *Crawford* objections to lab analyst’s affidavit. N.C. Gen. Stat. §§ 20-139.1(c1) and (e2).
- F. N.C. Gen. Stat. § 20-38.4 (procedures a magistrate must follow):
- 1. Magistrate must:
 - a. Inform the person in writing of the procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis if the person is unable to make bond; and

- b. Require the person who is unable to make bond to list all persons he wishes to contact and telephone numbers. A copy of this form shall be filed with the case file.
- 2. Why is this procedure so important?:
 - a. Because in close cases, intoxication does not last long, and it is an essential element of the crime; and
 - b. Defendant's guilt or innocence depends upon whether he was intoxicated at the time of his arrest. Thus, a timely viewing of the defendant is crucial to his defense.
- G. N.C. Gen. Stat. § 20-38.5 (access to chemical testing rooms and jail for witnesses and attorneys):
- H. N.C. Gen. Stat. § 20-139.1 (requirements for breath tests):
- I. N.C. Gen. Stat. § 20-139.1(d) (mandatory "timely, reasonable efforts to provide defendant with telephone access and insure outside parties have physical access to defendant"):
- J. Other than the commandments in the plain language of the statute (*i.e.*, notification of rights), are there any other requirements of law enforcement?:
 - 1. Both state and federal constitutions declare that in all criminal prosecutions an accused has the right to obtain witnesses in his behalf. U.S. CONST. amend. VI; N.C. CONST. art. I § 23; *State v. Hill*, 277 N.C. 547 (1971);
 - 2. Upon arrest, detention, or deprivation of liberty of any person by an officer, it shall be the duty of the officer making the arrest to *permit the person so arrested to communicate with counsel and friends immediately*, and the right of such person to communicate with counsel and friends shall not be denied. N.C. Gen. Stat. § 15-47 (emphasis added); *State v. Hill*, 277 N.C. 547 (1971).
 - 3. Under the above provisions, an accused is entitled to consult with friends and relatives and have them make observations of his person. The right to communicate with family and friends necessarily includes the right of access to them. *State v. Hill*, 277 N.C. 547 (1971).
 - 4. This requires the jail to permit access to potential defense witnesses at a meaningful time. *Id.*

5. At a minimum, these rights permit potential defense witnesses the ability to see the defendant, observe and examine him, with reference to his alleged intoxication. *Id.*
 6. Tip: Great closing argument directly from the language of *Hill*. If witnesses are denied, “to say the denial was not prejudicial is to assume that which is incapable of proof.” *Id.*
- K. What’s the remedy for a violation?:
1. *Per se* offense (means (a) breath alcohol content of .08 or more grams of alcohol per 210 liters of breath or (b) blood alcohol content of .08 or more grams of alcohol per 100 milliliters of blood):
 - a. Suppression of the chemical analysis.
 - i. Exception: Flagrant violation of constitutional right to obtain evidence may require dismissal.
 2. Non *per se* offense (i.e., appreciable impairment prong):
 - a. Dismissal.
 3. For a detailed analysis, see Shea Denning, *What’s Knoll Got to Do with It? Procedures in Implied Consent Cases to Prevent Dismissals Under Knoll*, UNC SCHOOL OF GOVT. ADMIN. OF JUSTICE BULLETIN (2009).
 4. There is not a published case on magistrate violations in setting conditions of pre-trial release or jailor conduct prejudicing a DWI defendant to warrant dismissal. *See, e.g., State v. Cox*, 253 N.C. App. 306 (2017) (holding—because defendant was advised of his rights and neither requested the presence of a witness or attorney nor utilized his access to a telephone—a seven-hour delay between arrest and initial appearance in a Second Degree Murder based upon Driving While Impaired did not violate *Knoll*). *But see State v. Labinski*, 188 N.C. App. 120 (2008) (holding that although magistrate substantially violated defendant’s statutory right to pretrial release, she had the opportunity to gather evidence by having friends and family observe her and form opinions about her condition).
- L. Procedure: N.C. Gen. Stat. §§ 20-38.6 and 38.7:
1. If motion is not determined summarily, the judge must conduct a hearing, make findings of fact, and issue a written order called a “preliminary determination.” *See* EXHIBIT B.

2. If motion is granted, the judge may not enter a final judgment until the State has either appealed the ruling or indicated it does not intend to appeal. N.C. Gen. Stat. § 20-38.7(a).
3. The State has a “reasonable time” to appeal. *State v. Fowler*, 197 N.C. App. 1 (2009). The judge will usually set a new court date both for entry of the order and to allow the prosecution time to decide if it will appeal.
4. If motion is denied, the judge may enter a final judgment denying the motion. A denial of the pretrial motion to suppress may not be appealed, but the defendant may appeal a conviction as provided by law. N. C. Gen. Stat. § 20-38.7(b).
5. If the State’s appeal is not in conformity with N.C. Gen. Stat. § 15A-1432 or not “within a reasonable time,” the Superior Court can dismiss the appeal. The “preliminary indication” then becomes a final judgment. The State’s remedy is to petition the appellate court via a writ of certiorari.
6. If the State appeals and findings of fact are disputed, the superior court determines the matter *de novo*.
 - a. Tip: Ask the ADA to specify the specific findings which are disputed at the time of the entry of the “preliminary indication” judgment. This will prevent a new position by the prosecution in superior court and assist the judge.
7. If there is no dispute regarding the findings of fact, the district court’s findings are binding on the superior court and are presumed to be supported by competent evidence. *State v. Fowler*, 197 N.C. App. 1 (2009).
8. After considering the matter according to the appropriate standard of review, the superior court must enter an order remanding the matter to district court with instructions to enter a final judgment either granting or denying the motion. N.C. Gen. Stat. § 20-38.6(f).
9. Distinguish between Motions to Suppress and Motions to Exclude Evidence as the latter include matters of foundation (e.g., a proper foundation for admissibility of blood tests or to be an expert, etc.) which are not appealable.
10. Tip: Magic language includes: (a) a substantial violation of the statute, (b) substantive due process violations, (c) procedural due process violations, and (d) prejudice to the defendant.

II. Purpose of District Court Procedure: (TOC)

- A. Legislature intended pre-trial motions to address procedural matters such as (1) delays in processing, (2) limitations on defendant's access to witnesses, and (3) challenges to chemical analysis result. *State v. Fowler*, 197 N.C. App. 1 (2009); *see also State v. Palmer*, 197 N.C. App. 201 (2009).

III. Methods of Proving Impairment: (TOC)

- A. Two methods are authorized by statute and case law. N.C. Gen. Stat. § 20-139.1(a); *State v. Drdak*, 330 N.C. 587 (1992); and *State v. Cardwell*, 133 N.C. App. 496 (1999)
- B. The two ways to prove impairment are:
 - 1. A chemical analysis of blood, breath, or urine performed in accord with N.C. Gen. Stat. § 20-139.1(a); *see also* N.C. Gen. Stat. § 20-4.01(3a) (defining chemical analysis):
 - a. Blood or urine testing requires no foundation if (1) a law enforcement officer or chemical analyst requests a sample; (2) the analysis is performed by a person possessing a DHHS permit for the type of analysis requested; and (3) as of March 11, 2011, the test is performed by a laboratory accredited by a body that requires conformity to forensic specific requirements and is a signatory to the ILAC. N.C. Gen. Stat. §§ 20-139.1(c1) and (c2).
 - 2. Testing under the “other competent evidence” prong. N.C. Gen. Stat. § 20-139.1(a):
 - a. Requires a proper foundation (i.e., there is no presumption of admissibility) with court approval when the defendant is hospitalized and, using standard hospital lab procedures, blood or urine is tested for purposes of medical treatment.
 - b. Tip: *Drdak* case approved the Dupont Automatic Clinical Analyzer (which can test whole or serum blood); *Cardwell* court found the Dupont ACA Star Analyzer was reliable.

IV. Superior Court DWI Trials: (TOC)

- A. Procedures for a bifurcated trial and proof of previous convictions are addressed in N.C. Gen. Stat. § 15A-928.

- B. The State shall provide notice to the defendant of all grossly aggravating or aggravating factors at least ten days prior to trial. N.C. Gen. Stat. § 20-179(a)(1).
 - 1. Waiver of Statutory Right to Notice of Aggravating Factor at Sentencing:
 - i. *State v. McGaha*, 274 N.C. App. 232 (2020) (holding Defendant waived her statutory right to notice of the State’s intent to rely upon the aggravating factor of a prior DWI conviction at sentencing. *See contra State v. Hughes*, 265 N.C. App. 80 (2019) (holding where the State failed to give statutory notice of aggravating factors, Defendant’s sentencing at a Level One punishment was reversible error). Although N.C. Gen. Stat. § 20-179(a1)(1) requires the State to notice Defendant of its intent, the same is not a constitutional right and was waived when Defendant admitted to the prior conviction during cross-examination, counsel stipulated to a prior DWI conviction, and counsel failed to object to the lack of notice during sentencing). Counsel must object to the evidence at trial to preserve this issue at sentencing.
- C. [See infra Section XVII. Helpful Hints for strategies in a Superior Court jury trial.](#)

V. Evidence Gathering: (TOC)

- A. Review all documents in the court’s (CVR/CR) and officer’s files (DWI report form, sticky notes, etc.).
- B. Interview:
 - 1. Arresting officer;
 - 2. Defendant; and
 - 3. Witnesses.
- C. Subpoena:
 - 1. Body-worn cameras;
 - 2. In-car video/audio tapes;
 - 3. Belt tapes;
 - 4. Intoxilyzer room tapes;

5. Security cameras at the police department and detention center; and
6. 911 communications.
7. Note: Records of criminal investigations conducted by public law enforcement are not public records but may be released by court order. *See* N.C. Gen. Stat. § 132-1.4A. In short form, attorneys may obtain recordings of any video, audio, or visual and audio recording captured by a body-worn camera, dashboard camera, or any other video or audio recording device operated by law enforcement personnel when carrying out their responsibilities by filing a petition in the civil superior court division, serving designated agencies and persons, and obtaining an order for same.

VI. Issue Recognition: (TOC)

- A. See my form detailing a “Notice of Suppression or Dismissal Issues” checklist attached as EXHIBIT A.

VII. Best Issues to Litigate: (TOC)

- A. Reasonable and Articulate Suspicion: (TOC)
 1. Legal Standard: (TOC)
 - a. Reasonable and articulable suspicion (hereinafter “reasonable suspicion”) that criminal activity is afoot, as opposed to probable cause that a crime has been committed, is the necessary standard for investigatory vehicle stops. *State v. Styles*, 362 N.C. 412 (2008).
 - b. While reasonable suspicion is a less demanding standard than probable cause, the requisite degree of suspicion must be high enough to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. *State v. Fields*, 195 N.C. App. 740 (2009).
 - c. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. *Id.* This “cautious officer” must have more than an unparticularized suspicion or hunch. *Id.*

- d. Case law discriminates between a lawful reasonable suspicion of criminal activity versus only a hunch of criminal activity.
- 2. When Reasonable Suspicion Must Exist: [\(TOC\)](#)
 - a. Reasonable suspicion that criminal activity is afoot must exist at the time a seizure occurs. Instead, a seizure occurs at the moment there has been a show of authority (e.g., blue lights) coupled with compliance by the citizen to the officer's show of authority (e.g., the defendant actually pulling the vehicle over). *California v. Hodari D.*, 499 U.S. 621 (1991). A seizure does not necessarily occur once a law enforcement officer's blue lights are activated. For example, see the facts of *State v. Atwater*, 220 N.C. App. 159 (2012) (unpublished) (regardless of whether the officer had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions of erratic driving and running two stop signs gave the officer reasonable suspicion to stop defendant for traffic violations).
- 3. Common Issues: [\(TOC\)](#)
 - a. Weaving¹: [\(TOC\)](#)

Prosecution friendly cases: [\(TOC\)](#)

 - i. *State v. Orr*, 267 N.C. App. 377 (2019) (unpublished) (holding law enforcement had reasonable suspicion to stop Defendant when he weaved dramatically for approximately three-fourths of a mile within the lane, touching but not crossing the line, causing multiple approaching vehicles to believe a head-on crash would occur).
 - ii. *State v. Wainwright*, 240 N.C. App. 77 (2015) (holding reasonable suspicion for impaired driving existed based upon the vehicle swerving right, crossing the white line marking the outside lane of travel, and almost hitting a curb; the late hour (2:37 a.m.); officer's concern vehicle might hit and strike a student given heavy pedestrian traffic; and the

¹ Note – Shea Denning says that driving so one's tires touch, but do not cross, a lane line should be treated as weaving within a lane, not across lanes. Shea Denning, *Keeping It Between the Lines*, N.C. CRIM. L. BLOG (Mar. 11, 2015).

vehicle's proximity to numerous East Carolina University bars, nightclubs, and restaurants that serve alcohol).

- iii. *State v. Kochuk*, 366 N.C. 549 (2013) (holding reasonable suspicion for vehicle stop existed where the vehicle completely—albeit momentarily—crossed the dotted line once while in the middle lane; then made a lane change to the right lane and drove on the fog line twice; and it was 1:10 a.m.).
- iv. *State v. Fields*, 219 N.C. App. 385 (2012) (holding reasonable suspicion for vehicle stop existed where officer followed vehicle for three quarters of a mile and saw it weaving within its lane so frequently and erratically it prompted other drivers pulling over to the side of the road in reaction to Defendant's driving. Vehicle also drove on the center line at least once).
- v. *State v. Otto*, 366 N.C. 134 (2012) (holding reasonable suspicion for vehicle stop existed where the vehicle was constantly and continually weaving for three-quarters of a mile at 11:00 p.m. on a Friday night from an area in which alcohol was possibly being served).

Defense friendly cases: [\(TOC\)](#)

- i. *State v. Derbyshire*, 228 N.C. App. 670 (2013) (holding weaving alone did not provide reasonable suspicion for the vehicle stop; that driving at 10:05 p.m. on a Wednesday is “utterly ordinary” and insufficient to render weaving suspicious; and that having “very bright” headlights also was not suspicious).
- ii. *State v. Peele*, 196 N.C. App. 668 (2009) (holding no reasonable suspicion supported vehicle stop where an officer received an anonymous tip that defendant was possibly driving while impaired; then the officer saw the defendant weave within his lane once).
- iii. *State v. Fields*, 195 N.C. App. 740 (2009) (holding no reasonable suspicion supported vehicle stop where the driver weaved within his lane three times a mile and a half but was

not driving at an inappropriate speed, at an unusually late hour, or within close proximity to bars).

b. Lack of turn signal: [\(TOC\)](#)

Prosecution friendly cases: [\(TOC\)](#)

- i. *State v. Styles*, 362 N.C. 412 (2008) (holding the defendant violated N.C. Gen. Stat. § 20-154(a) where he changed lanes immediately in front of an officer without using a turn signal; changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle thus violating the statute).
- ii. *State v. McRae*, 203 N.C. App. 319 (2010) (holding reasonable suspicion existed where the defendant turned right into a gas station without using a turn signal in medium traffic and with the officer following a short distance behind the defendant's vehicle).

Defense friendly cases: [\(TOC\)](#)

- i. *State v. Ivey*, 360 N.C. 562 (2006) (holding a turn signal is not necessary when entering what amounts to a right-turn-only intersection; where a right turn was the only legal move the defendant could make; and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle).
- ii. *State v. Watkins*, 220 N.C. App. 384 (2012) (holding vehicle stop inappropriate where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, but it was not clear that another vehicle was affected by the defendant's lane change).

c. Sitting at a stop light: [\(TOC\)](#)

Prosecution friendly cases: [\(TOC\)](#)

- i. *State v. Barnard*, 362 N.C. 244 (2008) (holding reasonable suspicion supported a vehicle stop where the vehicle

remained stopped at a green light for approximately thirty seconds).

Defense friendly cases: [\(TOC\)](#)

- i. *State v. Roberson*, 163 N.C. App. 129 (2004) (holding no reasonable suspicion supported a vehicle stop where the vehicle sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds).

- d. Driving slower than the speed limit: [\(TOC\)](#)

Prosecution friendly cases: [\(TOC\)](#)

- i. *State v. Bonds*, 139 N.C. App. 627 (2000) (holding defendant's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion).
- ii. *State v. Aubin*, 100 N.C. App. 628 (1990) (holding reasonable suspicion existed where the defendant slowed to 45 mph on I-95 and weaved within his lane).
- iii. *State v. Jones*, 96 N.C. App. 389 (1989) (holding reasonable suspicion existed where the defendant drove 20 mph below the speed limit and weaved within his lane).

Defense friendly cases: [\(TOC\)](#)

- i. *State v. Canty*, 224 N.C. App. 514 (2012) (holding no reasonable suspicion where, upon seeing officers, vehicle slowed to 59 mph in a 65 mph zone).
- ii. *State v. Brown*, 207 N.C. App. 377 (2010) (unpublished) (holding traveling 10 mph below the speed limit is not alone enough to create reasonable suspicion for a traffic stop; reasonable suspicion found based upon slow speed, weaving, and the late hour).

iii. *State v. Bacher*, 867 N.E.2d 864 (Ohio Ct. App. 2007) (holding slow travel alone—in this case 23 mph below the speed limit—does not create a reasonable suspicion of criminal activity to permit a traffic stop).

e. Late hour or high-crime area: [\(TOC\)](#)

Prosecution friendly cases: [\(TOC\)](#)

i. *State v. Mello*, 200 N.C. App. 437 (2009) (holding reasonable suspicion existed for a stop where the defendant was present in a high-crime area and persons he interacted with took evasive action).

Defense friendly cases: [\(TOC\)](#)

i. *State v. Murray*, 192 N.C. App. 684 (2008) (holding no reasonable suspicion where officer stopped at vehicle who was driving out of a commercial area with a high incidence of break-ins at 3:41 a.m.; defendant was not violating any traffic laws, was not trespassing, speeding, or making any erratic movements, and was on a public street).

ii. *Brown v. Texas*, 443 U.S. 47 (1979) (holding presence in a high-crime area, standing alone, is not a basis for concluding a person is engaged in criminal conduct).

f. Anonymous tips: [\(TOC\)](#) Standing alone, anonymous tips are inherently unreliable and rarely provide reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266 (2000). Courts look for law enforcement corroboration of criminal conduct within the tip. *Id.* Categorize tipsters as anonymous or known (using 911 information, citizen informants, and collective knowledge of law enforcement).

Prosecution friendly cases: [\(TOC\)](#)

i. *Navarette v. California*, 572 U.S. 393 (2014) (although a “close case,” anonymous tip was sufficiently reliable to justify an investigatory vehicle stop in that the 911 caller reported she had been run off the road by a specific vehicle—a silver F-150 pickup, license plate 8D94925. The 911 caller reported the incident contemporaneously as it occurred. The

911 caller reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result: running another car off the highway).

Defense friendly cases: [\(TOC\)](#)

- i. *State v. Carver*, 265 N.C. App. 501 (2019), *aff'd*, 373 N.C. 453 (2020) (holding no reasonable suspicion based on an anonymous tip for a warrantless traffic stop when a deputy received a call, just before 11:00 p.m., from an anonymous tipster of a vehicle in a ditch, possibly with a “drunk driver,” with a truck attempting to pull the vehicle from same; that the tip provided no information about the vehicle, driver, call, or when the call was received; that the deputies’ stop of a truck [with Defendant as passenger] traveling away from said location at 15 to 20 mph below the 55 mph speed limit—the only vehicle big enough on the highway to pull the car out—was unlawful).
- ii. *State v. Coleman*, 228 N.C. App. 76 (2013) (tipster treated as anonymous—even though the communications center obtained tipster’s name and phone number—because tipster wished to remain anonymous; officer did not know tipster; and officer had not worked with tipster in the past. Tip did not provide reasonable suspicion, in part because it did not provide any way for the officer to assess the tipster’s credibility, failed to explain her basis of knowledge, and did not include any information concerning the defendant’s future actions).
- iii. *State v. Blankenship*, 230 N.C. App. 113 (2013) (taxicab driver anonymously contacted 911 via his personal cell phone; although 911 operator was later able to identify the taxicab driver, the caller was anonymous at the time of the tip. Tipster reported observing a specific red Ford Mustang, driving in a specific direction, driving erratically and running over traffic cones. Tip did not provide reasonable suspicion for the stop, as the officer did not personally observe any unlawful behavior or have an opportunity to meet the tipster prior to the stop).

- iv. *State v. Peele*, 196 N.C. App. 668 (2009) (anonymous tip that the defendant was driving recklessly, combined with the officer's observation of a single instance of weaving, did not give rise to a reasonable suspicion of criminal activity to effectuate this stop).
- v. [See Section VIII.B.5. for a more comprehensive summary.](#)
- g. Known tipsters: [\(TOC\)](#)

Prosecution friendly cases: [\(TOC\)](#)

- i. *State v. Maready*, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person and put her anonymity at risk, notwithstanding the fact that the officers did not make note of any identifying information about the tipster).
- ii. *State v. Hudgins*, 195 N.C. App. 430 (2009) (a driver called the police to report he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle. When the officer stopped the trailing vehicle, the caller also stopped briefly. Stop was proper, in part, because the tipster called on a cell phone and remained at the scene, thereby placing her anonymity at risk).

Defense friendly cases: [\(TOC\)](#)

- i. *State v. Hughes*, 353 N.C. 200 (2000) (law enforcement officer who filed the affidavit had never spoken with the informant and knew nothing about the informant other than his captain's claim that he was a confidential and reliable informant. Although the captain received the tip from a phone call rather than a face-to-face meeting, the captain told the affiant the confidential source was reliable. Although the source of the information came from a known individual, Court concluded the source must be analyzed under the anonymous tip standard because the affiant had nothing more than the captain's conclusory statement that the informant was confidential and reliable. Anonymous tip and police corroboration did not approach the level of a close

case. Upheld trial court's order allowing Defendant's motion to suppress); *see also State v. Benters*, 367 N.C. 660 (2014).

- ii. *State v. Walker*, 255 N.C. App. 828 (2017) (trooper, while on routine patrol, was notified by dispatch that a driver reported a vehicle for DWI. Specifically, the reporting driver observed Defendant driving at speeds of approximately 80 to 100 mph while drinking a beer; driver drove "very erratically"; and almost ran him off the road "a few times." While Trooper drove to the area in response, the informant flagged him down. Informant told Trooper the vehicle was no longer visible but had just passed through a specific intersection. At some point the vehicle in question was described as a gray Ford passenger vehicle but it is unclear whether the Trooper was aware of that description before or after he stopped Defendant. Defendant stopped and arrested. Tip did not provide reasonable suspicion to make an investigatory stop. While informant was not anonymous, he was unable to specifically point out Defendant's vehicle as being the one driving unlawfully, as it was out of sight, and the Trooper did not observe Defendant's vehicle being driven in an unusual or erratic fashion. Moreover, it is unknown whether the Trooper had the license plate number before or after the stop and, further, we do not know whether he had any vehicle description besides a "gray Ford passenger vehicle" to specify the search).

h. Driving too fast for lane conditions: [\(TOC\)](#)

- i. *State v. Johnson*, 370 N.C. 32 (2017) (this reversed the Court of Appeals opinion which was favorable to the defense and held the officer had reasonable suspicion to initiate a traffic stop under N.C. Gen. Stat. § 20-141(a) by driving too quickly for the road conditions where officer observed defendant abruptly accelerate his truck and turn left, causing the truck to fishtail in the snow before defendant gained control of the vehicle. This is true even though the defendant did not leave the lane that he was traveling in or hit the curb).

B. Probable Cause to Arrest: [\(TOC\)](#)

1. Legal Standard: [\(TOC\)](#)

- a. Whether probable cause existed is not subjective to the charging officer. Instead, the test is an objective one proper for court review. The question is whether the facts and circumstances, known at the time, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another. *Id.*
- b. Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances strong in themselves, to warrant a cautious man in believing the accused to be guilty. *State v. Teate*, 180 N.C. App. 601 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)).
- c. Probable cause deals with probabilities and depends on the totality of the circumstances and the substance of all the definitions of probable cause is a reasonable ground for belief of guilt. *State v. Overocker*, 236 N.C. App. 423 (2014) (quoting *Maryland v. Pringle*, 540 U.S. 366 (2003)).
- d. The State has the burden of proof and must persuade the trial judge by a preponderance of the evidence that the challenged evidence is admissible. *State v. Williams*, 225 N.C. App. 636 (2013). If a judge grants a motion to suppress for lack of probable cause to arrest, the remedy is suppression of any evidence acquired after the unconstitutional arrest rather than dismissal (although in practice, usually the case will be dismissed by the prosecutor because the admissible evidence will be too weak to proceed to trial).

2. Probable Cause to Arrest for DWI [\(TOC\)](#) – Some cases are unpublished opinions which do not constitute controlling legal authority but may be properly cited as persuasive authority. *See* N.C. R. App. P. 30(e)(3).

Prosecution friendly cases: [\(TOC\)](#)

- i. *State v. Finney*, ___ N.C. App. ___, 858 S.E.2d 145 (June 1, 2021) (unpublished). Probable cause existed for Defendant's

DWI arrest. The Court of Appeals affirmed when, the next morning, Defendant (1) was described as a disruptive patron, (2) ignored traffic patterns in a parking lot, (3) had a strong odor of alcohol on his breath, (4) was visibly impaired, (5) admitted to alcohol consumption the night before, (6) had difficulty with an alphabet test despite passing a finger-dexterity test, (7) had two positive alcosensor tests, and (8) was “unusually animated and carefree considering the circumstances” although one officer observed normal motor skills.

- ii. *State v. Parisi*, 372 N.C. 639 (2019). Probable cause existed for Defendant’s DWI arrest. Defendant entered a DWI checkpoint (1) with an odor of alcohol, (2) admitted to consuming three beers earlier in the evening, and (3) displayed six of six clues on HGN, among other indicators on field sobriety tests.
- iii. *State v. Higginbotham*, 271 N.C. App. 381 (2020) (unpublished). Probable cause existed for Defendant’s DWI arrest. The Court of Appeals affirmed the denial of Defendant’s motion to suppress as the trial court found he (1) admitted to consuming alcohol within the past hour, (2) had red eyes, (3) had an odor of alcohol, (4) tested positive for alcohol on two separate breath samples, (5) exhibited clues of intoxication on several field sobriety tests, including four of six clues on the HGN test, (6) had a 40-ounce open container of beer in his truck, and (7) was the driver of a truck matching the same description as a call received by law enforcement of a possible impaired driver.
- iv. *State v. Lindsey*, 249 N.C. App. 516 (2016). Probable cause existed for Defendant’s DWI arrest. Officer pulled behind a vehicle at a stoplight at 2:47 a.m. and noticed the vehicle registration was expired; officer activated his blue lights and Defendant turned into a nearby McDonald’s parking lot where Defendant, who was apparently not handicapped, pulled into a handicapped parking space (remember – you want to distinguish *Lindsey* and *Sewell* as much as possible so argue this is a clear indication of impairment); Defendant tells officer his license is revoked for DWI (no such evidence in *Sewell*); officer smelled a “medium” odor of alcohol

coming from Defendant's breath (unlike *Sewell*, Mr. Lindsey was the sole possible source of the alcohol odor) and his eyes were red and glassy; regarding HGN, Defendant showed five of six clues of impairment; Defendant informs the officer he had three beers at 6:00 p.m. the previous evening; Defendant repeatedly failed to provide a sufficient sample to permit a positive or negative alcosensor reading (a big difference from *Sewell* as well; Mr. Lindsey attempted to cheat the breath testing device); another huge difference between *Lindsey* and *Sewell* is that Ms. Sewell demonstrated her sobriety by passing the WAT and OLS tests; Mr. Lindsey was never offered those tests and, while we can't assume he would pass or fail, it is irrefutable Ms. Sewell passed further demonstrating her sobriety; there was also specific testimony Ms. Sewell's speech was not slurred; that topic doesn't appear to have been touched on in Mr. Lindsey's hearing.

- v. *State v. Lilly*, 250 N.C. App. 307 (2016) (unpublished). Probable cause existed for Defendant's DWI arrest. Defendant, at 2:30 a.m., entered a DWI checkpoint; was very agitated and high strung, even holding a holstered handgun around officers; officer had to repeat himself because Defendant was not comprehending what he was saying; two noticed an obvious odor of alcohol from Defendant's person; Defendant admitted had been drinking alcohol; and Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol. Note two officers opined Defendant was impaired.
- vi. *State v. Williams*, 248 N.C. App. 112 (2016). Probable cause existed for Defendant's DWI arrest. Defendant was operating a golf cart, wherein he at a high rate of speed made a hard U-turn, causing a passenger riding on the rear to fall off; Defendant had very red and glass eyes and a strong odor of alcohol coming from his breath; Defendant was very talkative, repeating himself several times; Defendant's mannerisms were fairly slow; Defendant placed his hand on the patrol vehicle to maintain his balance; Defendant stated he had six beers since noon; Defendant submitted to an alcosensor test which was positive for the presence of alcohol.

- vii. *State v. Mathes*, 235 N.C. App. 425 (2014) (unpublished). Probable cause existed for Defendant's DWI arrest. Defendant involved in a single vehicle accident which included extensive damage to his truck; Defendant left the scene and witnesses reported he left walking up the road; four to five minutes later officer located Defendant walking down the road without shoes; Defendant looked intoxicated and appeared to have urinated on himself; and Defendant's eyes were bloodshot and glassy, there was a dark stain on his pants, he smelled of alcohol and urine, and he had slurred speech.
- viii. *State v. Townsend*, 236 N.C. App. 456 (2014). Probable cause existed for Defendant's DWI arrest. Defendant drove up to a checkpoint where he was stopped; officer noticed Defendant emitted an odor of alcohol and had red, bloodshot eyes; Defendant acknowledged he had consumed several beers earlier and that he stopped drinking about an hour before being stopped at the checkpoint; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; regarding HGN, officer observed "three signs of intoxication"; regarding WAT, officer observed "two signs of intoxication"; regarding OLS, officer observed "one sign of intoxication"; Defendant recited the alphabet from J to V without incident; trial court acknowledged and relied upon the officer's 22 years of experience as a police officer. Note – *Townsend* expressly cites *Rogers* (cited *infra*) for the proposition that the odor of alcohol, couple with a positive alcosensor test, is sufficient for probable cause to arrest. Shepard's analysis indicates *Rogers* has been superseded by *Overocker* and *Sewell*. *Townsend* also expressly cites *Fuller* for the proposition that "the results of an alcohol screening test may be used by an officer to determine if there are reasonable grounds to believe that a driver has committed an implied-consent offense." This is absolutely an inaccurate statement of the current law and even inaccurate at the time *Townsend* was decided. The statutory language that allowed an officer (and the court) to consider the numerical reading of the alcosensor test in pretrial hearings was supplanted by the current version of N.C. Gen. Stat. § 20-16.3 in 2006. Now, at all stages—whether it be the officer out in the field or the judge in

pretrial motions hearings or during trial—the only thing that can be considered is whether the driver showed a positive or negative result on the alcohol screening test. Under the current version of the statute, consideration of the actual alcosensor reading is always improper. N.C. Gen. Stat. § 20-16.3; *State v. Overocker*, 236 N.C. App. 423 (2014).

- ix. *State v. Pomposo*, 237 N.C. App. 618 (2014) (unpublished). Probable cause existed for Defendant's DWI arrest. Defendant was operating a and speeding 52 mph in a 35 mph zone; after the officer activated his blue lights, Defendant made an abrupt left-hand turn and then turned again onto a side street; a very strong odor of alcohol was coming from the vehicle; Defendant's eyes were red and glassy and his speech was slurred; Defendant acknowledged he had consumed alcohol; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; regarding the Walk and Turn test, Defendant failed to walk heel-to-toe; regarding the One Leg Stand test, Defendant failed to count "one thousand one, one thousand two, one thousand three" as directed and failed to lift his leg at least six inches off the ground as instructed; regarding HGN, the officer did not fully administer the HGN test as required by NHTSA guidelines but claimed to have observed six out of six clues. Court stated that, even without admission of HGN evidence, it believed there was still sufficient evidence to establish probable cause.
- x. *State v. Williams*, 225 N.C. App. 636 (2013). Probable cause existed for Defendant's DWI arrest. Police responded to a one-car accident around 4:00 a.m.; upon arrival, Defendant was lying on the ground behind the vehicle and appeared very intoxicated; Defendant's shirt was pulled over his head and his head was in the sleeve hole of the shirt; no other person was present or close to the vehicle when police arrived; Defendant exhibited a strong odor of alcohol, bloodshot eyes, slurred speech, and extreme unsteadiness on his feet; officers checked the area, including the woods, and saw no other signs of people and no tracks in the woods; police arrested Defendant for DWI.

- xi. *State v. Foreman*, 227 N.C. App. 650 (2013) (unpublished). Probable cause existed for Defendant's DWI arrest. Officer observed Defendant in the driver's seat of a vehicle stopped at a roadway intersection without a stop sign at 9:30 p.m. and Defendant appeared to be leaning forward; while speaking with Defendant in his driveway minutes later, Defendant mumbled when he spoke; there was an odor of alcohol about Defendant's person; Defendant admitted to having been drinking; HGN test provided some indication Defendant was impaired.
- xii. *State v. Tabor*, 2004 N.C. App. LEXIS 1640 (2004) (unpublished). Probable cause existed for Defendant's DWI arrest. Officer estimated Defendant's vehicle to be traveling 53 mph in a 35 mph zone and made a vehicle stop; upon request, Defendant had difficulty retrieving his license; a strong odor of alcohol emitted from the vehicle (two occupants); Defendant's eyes were glassy and his movements slow; in exiting the vehicle, Defendant was unsteady on his feet and used the vehicle for support; officer then noticed an odor of alcohol on Defendant's person; and Defendant stated he had been drinking beer at the Panther's game.
- xiii. *State v. Tappe*, 139 N.C. App. 33 (2000). Probable cause existed for Defendant's DWI arrest. Defendant was pulled over because his vehicle crossed the center line (apparently just once); after the vehicle stop and upon approach, officer noticed a strong odor of alcohol about Defendant's breath and that he had glassy and watery eyes; Defendant admitted to consuming about one-half of the contents of an open beer container but denied drinking while driving; Defendant also remarked he was of German origin and that "in Germany they drank beer for water."
- xiv. *State v. Crawford*, 125 N.C. App. 279 (1997). Probable cause existed for Defendant's DWI arrest. Officer found Defendant alone in a car parked on the shoulder of a rural side road around 3:30 a.m.; the driver's door was open, Defendant was in the driver's seat with one leg hanging out of the car, his pants were undone, and he had been drooling to such an extent that Defendant's knee and shirt were wet;

Defendant had a strong odor of alcohol about him, had difficulty speaking, and admitted he had been drinking; the hood of the car was warm although the outside temperature was 26 degrees; Defendant had possession of the ignition key; and Defendant attempted to put the key in the ignition in order to drive away from the scene. Unknown if officer would have provided field sobriety tests but he never really had the ability to offer them to Defendant due to Defendant's actions.

- xv. *State v. Thomas*, 127 N.C. App. 431 (1997). Probable cause existed for Defendant's DWI arrest. Off-duty officer was told by a nurse that a patient under the influence of impairing medication was leaving the hospital and going to drive away; off-duty officer located the patient as she opened the driver's side door; when the patient sat in the driver's seat off-duty officer observed Defendant "slumbered down in the passenger seat" with his eyes closed. Off-duty officer detected a strong odor of alcohol coming from Defendant's breath, that his eyes were very red and bloodshot, and that his physical appearance was disorderly. Off-duty officer believed Defendant was impaired. Off-duty officer was assured the two would not drive away and that they would call for someone to pick them up. Defendant observed attempting to drive away and, over a very short distance, did not operate the vehicle in a straight line. Defendant arrested for DWI by a second officer who independently observed the same indicators of impairment that the off-duty officer observed.
- xvi. *State v. Rogers*, 124 N.C. App. 364 (1996). Probable cause existed for Defendant's DWI arrest as originally laid out in the case. However, if you see this case being cited in court, note a Shepard's analysis indicates this case has been superseded by *Overocker* and *Sewell*.

Defense friendly cases: [\(TOC\)](#)

- i. *State v. Sewell*, 239 N.C. App. 132 (2015) (unpublished). Probable cause did not exist for Defendant's DWI arrest. Shortly after midnight, Defendant and her passenger arrived at DWI checkpoint; no moving violations or concerning

driving was observed by officers; Defendant provided her license and registration upon request without difficulty; officer observed a strong odor of alcohol coming from the vehicle (as opposed to singularly from Defendant); Defendant's eyes were red and glassy, but her speech was not slurred; Defendant initially denied drinking alcohol, but later she changed her story, admitting she drank one glass of wine; Defendant demonstrated her sobriety as the officer observed no clues of impairment on the WAT or OLS tests; regarding HGN, officer observed six out of six indicators of impairment; and Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol. Defendant apparently had no difficulty exiting her vehicle, walking around, or talking with the officer. Throughout the entire encounter Defendant was polite, cooperative, and respectful.

- ii. *State v. Overocker*, 236 N.C. App. 423 (2014). Probable cause did not exist for Defendant's DWI arrest. Around 4:00 p.m., Defendant parked his SUV directly in front of a local bar and met with friends inside; while inside, a group of motorcyclists arrived at the bar and one individual parked his or her motorcycle illegally and directly behind Defendant's SUV; when Defendant left the bar it was dark outside; when Defendant attempted to back out of his parking spot, his SUV collided with the illegally parked motorcycle; over an approximate four hour period, Defendant had consumed four bourbon on the rocks drinks (although Defendant initially told the officer two drinks, then later admitted to three drinks); an off-duty officer present at the bar believed Defendant was impaired because he was "talking loudly"; however, there was nothing unusual about Defendant's behavior or conversation at the bar; Defendant's friend from the bar testified he observed Defendant performing field sobriety tests, that he did not see anything wrong with Defendant's performance, and that he did not believe Defendant was impaired or unfit to drive; regarding WAT, Defendant took nine heel-to-toe steps without a problem; Defendant then asked what he was supposed to do next; officer reminded Defendant to follow the instructions, and Defendant took nine heel-to-toe steps back without a problem; regarding OLS, Defendant raised

his foot more than six inches off the ground, stopped after 15 seconds, and put his foot down; Defendant then asked what he was supposed to do next; officer reminded Defendant to complete the test, and Defendant picked his foot up and continued for at least 15 more seconds until he was stopped by the officer; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; Defendant's speech was not slurred and he had no issues walking around.

My analysis: Clearly an odor of alcohol and a positive PBT reading do not always equate to probable cause in a DWI investigation (*Townsend*). The Court has to take into account the whole picture, which it did in this case.

C. Insufficiency of the Evidence: [\(TOC\)](#)

1. *State v. Nazzal*, 270 N.C. App. 345 (2020) (holding trial court erred by denying defendant's motion to dismiss DWI charge due to insufficient evidence of impairment at the time of a vehicle collision in that law enforcement: (1) formed an opinion on impairment based on passive observations of Defendant (occurring five hours after collision); (2) did not request performance of any field tests; and (3) did not ask him if or when he ingested any impairing substances), *disc. rev. denied*, 375 N.C. 491 (2020).
2. *State v. Carver*, 265 N.C. App. 501 (2019), *aff'd*, 373 N.C. 453 (2020) (holding no reasonable suspicion based on an anonymous tip for a warrantless traffic stop when a deputy received a call, just before 11:00 p.m., from an anonymous tipster of a vehicle in a ditch, possibly with a "drunk driver," with a truck attempting to pull the vehicle from same; that the tip provided no information about the vehicle, driver, call, or when the call was received; that the deputies' stop of a truck [with Defendant as passenger] traveling away from said location at 15 to 20 mph below the 55 mph speed limit—the only vehicle big enough on the highway to pull the car out—was unlawful).
3. *State v. Eldred*, 259 N.C. App. 345 (2018) (holding trial court erred by denying defendant's motion to dismiss DWI charge due to insufficient evidence at the time of a vehicle collision although Defendant was found walking on a highway two or three miles from

the scene, had a mark on his forehead, and admitted to consuming methamphetamine as well as being involved in an accident a couple of hours prior. The Court held the evidence was too remote and insufficient as (1) no testimony was presented about observation of Defendant driving at the time of the accident or immediately before, (2) law enforcement did not encounter Defendant until 90 minutes after the report of the accident, and (3) no evidence was presented regarding the amount of time between the report of the accident and the occurrence of the accident.

D. Checkpoints: General Overview: [\(TOC\)](#)

1. Checkpoint Basics: [\(TOC\)](#)

A. The Constitution generally requires reasonable and individualized suspicion of criminal activity to effectuate a seizure or stop. Searches and seizures are “ordinarily unreasonable” in the absence of individualized suspicion of wrongdoing. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

B. Checkpoints are suspicionless seizures which generally involve innocent citizens. As such, the trial court must conduct a close review of the checkpoint at issue and not merely accept the State’s invocation of a proper purpose for the checkpoint. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); *State v. Rose*, 170 N.C. App. 284, 289 (2005).

2 So Why are Checkpoint Challenges Difficult to Win?: [\(TOC\)](#)

A. The State has the burden of proof to demonstrate the constitutionality of the checkpoint. *State v. Rose*, 170 N.C. App. 284, 289-90 (2005). However, defense counsel ordinarily must prove the illegality of the checkpoint. Remind the Court that (1) the State has the burden of proof and (2) suspicionless seizures are ordinarily unreasonable. From the beginning, the analysis favors the defense.

B. The State should present evidence of (1) a department policy detailing how and why checkpoints are to be conducted and (2) specific written approval from a supervisor for the checkpoint at issue indicating when, where, and why the

checkpoint is to be conducted. The State will argue compliance with department policy. Defense counsel must analyze the evidence, explaining how the particular facts contravene the law.

3. Standing to Challenge the Checkpoint: [\(TOC\)](#)

- A. If your client is seized by the checkpoint, he has standing. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990).
- B. Checkpoint avoidance: Analyze whether the stop occurred (1) “under the totality of the circumstances” or as (2) “part of the checkpoint plan?”
 1. Under the totality of the circumstances, an officer may pursue and stop a vehicle which has turned away from a checkpoint for reasonable inquiry to determine why the vehicle turned away from the checkpoint. North Carolina’s interest in combating intoxicated drivers outweighs the minimal intrusion that an investigatory stop may impose upon a motorist under these circumstances. *State v. Foreman*, 351 N.C. 627 (2000). If, from the officer’s perspective, the seizure is based on the totality of the circumstances that criminal activity is afoot, the constitutionality of the checkpoint need not be examined. *Id.*
 2. However, counsel may still challenge the checkpoint’s constitutionality. If the law enforcement officer (1) testifies the stop is part of the “checkpoint plan” to stop persons avoiding the checkpoint and (2) “acted pursuant to the checkpoint plan” to stop the checkpoint avoider, your client has standing to challenge the constitutionality of the plan by which she was “snared.” *State v. Haislip*, 186 N.C. App. 275, 280 (2007), *vacated on other grounds*, 362 N.C. 499 (2008). Although not controlling law, argue the Court of Appeals rationale as our Supreme Court did not reject its reasoning on that issue.

4. Required Policy Evidence by the State: **(TOC)**
- A. The State must introduce into evidence the written checkpoint policy in effect at the time. N.C. Gen. Stat. § 20-16.3A.
 - B. The State must also introduce the checkpoint authorization.
 - C. Comparison:

Checkpoint Policy

CHINA GROVE POLICE DEPARTMENT
GENERAL ORDER: 800-08
SUBJECT: TRAFFIC CHECKPOINTS
DISTRIBUTION: All Personnel
EFFECTIVE DATE: 05-21-2016
LAST REVISION DATE: 05-21-2016
BY ORDER OF: W. M. Kruze, Chief of Police

PURPOSE
The purpose of this General Order is to establish departmental policy and procedure for conducting traffic checkpoints.

POLICY
Traffic checkpoints are a high profile enforcement activity designed to protect citizens awareness of and compliance with the motor vehicle laws, to identify and apprehend persons who are in violation of the law, to provide a safe environment for the public and to provide a safe environment for the police. Therefore, participating officers must display a high degree of professionalism and conduct must be consistent with the provisions of the General Order.

DEFINITIONS
The following definitions are for the purpose of this General Order and may not apply in all other cases.

1. **Road Stop Safety Check** - a temporary operation in which law enforcement personnel stop corner or all traffic on a public street or highway to inspect individual vehicles for their contents or to interview drivers.
2. **Impaired Driving Checkpoint** - a temporary operation intended to detect and apprehend impaired drivers when compared in accordance with N. C. General Statute 20-16.3A.
3. **Excise Checkpoint** - a temporary operation aimed at locating and apprehending a suspect involved in connection with a recently committed felony offense.

PROCEDURES

A. **AUTHORIZATION REQUIRED**

1. Traffic checkpoints must be authorized in advance by a supervisor and must be conducted in accordance with prevailing law and the provisions of this Order for any of the following purposes:

Checkpoint Authorization

GENERAL ORDER 800-08

China Grove Police Department
333 N. Main Street China Grove, NC 28023
Phone: 704-857-7755 Fax: 704-857-5419

Checkpoint

Start Date / Time: _____

End Date / Time: _____

Location: _____

Reason: _____

Authorizing Official: _____
(Traffic patrol, adjunct personnel, on-site supervisor, training)

Number of officers participating: _____

Agency of officers: _____

Number of charges: _____
(Check squares when indicating the offenses charged)

After Action Review: _____

Submitted By: _____
(On-site supervisor)

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- D. If a policy is not introduced into evidence, evidence acquired as a result of the seizure must be suppressed. *State v. White*, 232 N.C. App. 296 (2014); *State v. Frederick*, 238 N.C. App. 199 (2014) (unpublished).
- E. A written checkpoint policy is not authorization for the checkpoint at issue. Rather, it is a general framework of how and why checkpoints are to be conducted.

5. The Law for Evaluating Checkpoints: **(TOC)**

- A. The Court must determine the primary programmatic purpose of the checkpoint.
 - i. Reminder: The Court may not accept the State's invocation of a proper purpose and must closely review the scheme at issue. *State v. Rose*, 170 N.C. App. 284, 289 (2005).

- ii. The programmatic purpose inquiry requires testimony and a finding as to the programmatic purpose at the supervisory level. *State v. Rose*, 170 N.C. App. 284, 289 (2005). The inquiry is not an invitation to probe the minds of individual officers acting at the scene to determine such purpose. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000); *State v. Rose*, 170 N.C. App. 284, 288 (2005).
 - a. In practice, the State routinely elicits testimony from the officers who conducted the checkpoint about the programmatic purpose which is incompetent testimony.
- iii. A Court cannot presume that constitutional requirements have been satisfied from a silent record. *State v. Rose*, 170 N.C. App. 284, 292 (2005).
- iv. Four proper checkpoint purposes are outlined in case law:
 - a. License and registration;
 - 1. The State Highway Patrol often initiates checkpoints for the purpose of finding Chapter 20 violations. It is unclear whether discovering general motor vehicle violations is a lawful primary purpose. Rationale in support of such a checkpoint is that police cannot discover the foregoing violations by vehicle observation during normal road travel. *See, e.g.*, N.C. Gen. Stat. § 20-7(a) (driver must carry license while driving); N.C. Gen. Stat. § 20-313(a) (owner must maintain insurance policy). However, the U.S. Supreme Court has expressed concern over suspicionless stops to enforce readily observable motor vehicle violations. *See State v. Veazey*, 191 N.C. App.

181, 190 (2008). Many motor vehicle violations are readily observable and addressed by law enforcement developing individualized suspicion of a certain vehicle. *See, e.g.*, N.C. Gen. Stat. § 20-63(e) (license plate must be clean and unconcealed); N.C. Gen. Stat. § 20-126 (vehicle must have inside rearview mirror and driver's side outside mirror); N.C. Gen. Stat. § 20-129 (establishing requirements for headlights and rear lights).

- b. DWI;
 - c. Interception of illegal aliens; and
 - d. Attempts to uncover information about a recent and known crime (as opposed to unknown and general crimes).
- v. Practical Pointers Related to Primary Programmatic Purpose:
- a. What law enforcement officers are participating?
 - 1. If truly a “license and registration checkpoint,” why are narcotics officers present or conducting same? Why are drug dogs walked around vehicles? Is that not general crime control?
 - b. Is law enforcement prepared to properly investigate the checkpoint’s stated purpose?
 - 1. If truly a “DWI checkpoint,” why are a majority of the officers conducting the checkpoint not proficient in conducting DWI investigations?

Why are there no portable breath tests available on site?

- c. Why is the checkpoint being conducted at this time of day or night?
 - 1. If truly a “license and registration checkpoint,” most motorists drive during the day, right? Is it not more likely license and registration issues would be found during daytime hours? Why is a license and registration checkpoint being conducted at 1:00 a.m.?
- d. Does the operation of the checkpoint comply with its stated purpose?
 - 1. If truly a “license and registration checkpoint,” why is the officer walking around the vehicle shining his flashlight into the front and back passenger areas?
- vi. A legitimate primary programmatic purpose does not mean the stop is constitutional. *State v. Rose*, 170 N.C. App. 284, 293 (2005). The Court must analyze the checkpoint’s reasonableness based on the individual circumstances. *See U.S. v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (holding that a permissible DUI checkpoint was unreasonable in how it was conducted and thus unconstitutional). To determine the reasonableness of the checkpoint, the Court must conduct a three-part balancing test:
 - a. The gravity of the public concerns by the seizure (analyzing the importance of the checkpoint purpose);
 - 1. This factor is addressed by identifying the primary programmatic purpose and then assessing the

importance of the particular stop to the public. *State v. Rose*, 170 N.C. App. 284, 294 (2005).

2. If there is a proper programmatic purpose, this factor will weigh in favor of the checkpoint being reasonable.
- b. The degree to which the seizure advances the public interest (analyzing whether a checkpoint is appropriately tailored to meet the checkpoint purpose); and
1. This really means how effective is the checkpoint in meeting the State's goal?
 2. Four factors: (a) Whether the police spontaneously decided to set up the checkpoint on a whim; (b) Whether police offered any particular reason why a stretch of road was chosen for the checkpoint. *See State v. Rose*, 170 N.C. App. 284 (2005) (holding if there was no evidence to show why a particular road was picked, there are "serious questions as to whether the checkpoint was sufficiently tailored."); (c) Whether the checkpoint had a predetermined starting or ending time; and (d) Whether the police offered any reason why that particular time span was selected.
 3. This factor analyzes whether the checkpoint is tailored to the alleged public concern.
 4. "Without tailoring, it is possible a roadblock purportedly established to

check licenses would be located and conducted in a way as to facilitate the detection of crimes unrelated to licensing.” *State v. Rose*, 170 N.C. App. 284, 294-95 (2005).

5. General crime control concerns can be minimized by a requirement that the location of roadblocks be determined by a supervisory official, considering where license and registration checks would likely be effective. *Id.*
 6. Assume a “license and registration” checkpoint. Salient issues would include an analysis of the day, time, and location consistent with the purpose of finding those with license and registration issues (e.g., how is this purpose advanced with a checkpoint at 2:00 a.m. on a low-traffic country road?). Do not be afraid to ask how many vehicles were stopped at this checkpoint and how many citations were issued for license or registration issues.
- c. The severity of interference with individual liberty (analyzing officer discretion in conducting the checkpoint).
1. Eight factors: (1) The checkpoint’s potential interference with legitimate traffic; (2) Whether police took steps to put drivers on notice of an approaching checkpoint; (3) Whether the location of the checkpoint was selected by a supervising official, rather than officers in the field; (4) Whether police stopped every vehicle that passed through the checkpoint or

stopped vehicles pursuant to a set pattern; (5) Whether drivers could see visible signs of the officers' authority; (6) Whether police operated the checkpoint pursuant to any oral or written guidelines; (7) Whether the officers were subject to any form of supervision; and (8) Whether the officers received permission from their supervising officer to conduct the checkpoint.

E. Warrantless Breath and Blood Testing: [\(TOC\)](#)

The law contrasts the concept of implied consent with Fourth Amendment protections relating to chemical testing. An outline of the opinions follow:

Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (2016), discusses the relationship between chemical testing for impairment and the Fourth Amendment. *Birchfield* tells us:

1. Warrantless breath testing is permitted under the Fourth Amendment pursuant to the search incident to arrest exception. [\(TOC\)](#)
2. Warrantless blood testing is not permitted under the Fourth Amendment pursuant to the search incident to arrest exception. A blood draw requires (1) valid consent, (2) a proper search warrant, or (3) exigent circumstances with probable cause. *See State v. Romano*, 369 N.C. 678 (2017). [\(TOC\)](#)
 - a. Consent: [\(TOC\)](#)
 - i. *Consent limited to rights for the particular test advised* – Re-advisement of Defendant's implied consent rights before a blood draw is required. *See State v. Williams*, 234 N.C. App. 445 (2014). In *Williams*, Defendant was advised of his rights and refused a breath test. Afterwards, Defendant was asked to submit to a blood test but Defendant was not re-advised of his rights. If relying on consent for the blood draw, chemical analyst is required to re-advise a defendant of his rights before obtaining consent to

the blood test. Failure to do so requires suppression of the blood test results. *See id.* Be careful where the idea for a blood test originates with your client. *State v. Sisk*, 238 N.C. App. 553 (2014) (holding that, because the prospect of submitting to a blood test originated with Defendant—as opposed to the Trooper—the statutory right to be re-advised was not triggered). *See State v. Cole*, 262 N.C. App. 466 (2018).

- ii. *Unconscious persons* – A warrantless blood draw from an unconscious defendant violates the Fourth Amendment. *See State v. Romano*, 369 N.C. 678 (2017) (holding the implied consent statute did not apply to an unconscious defendant, and an unconscious defendant did not, *ipso facto*, create exigent circumstances).
- iii. *Only notice of the rights is required; no issue with language barrier* – *State v. Martinez*, 244 N.C. App. 739 (2016) (even though the Spanish-speaking Defendant’s rights were read to him in English, he signed a form with the rights printed in Spanish and there was no evidence Defendant was illiterate in Spanish. Case holds the notice requirement was met because the General Assembly simply requires notice and does not condition the admissibility of the results of the chemical analysis on the defendant’s understanding of the information disclosed. Factually speaking, the officer made considerable effort to speak with the Defendant in Spanish in *Martinez*: during SFSTs, the officer called his dispatcher, who spoke Spanish, to have him translate commands during the test; he read Defendant his implied consent rights in English but provided him with a Spanish language version of those same rights in written form; he then called the dispatcher once more and placed him on speaker phone to answer any questions Defendant might have; Defendant signed the Spanish language version of the implied consent form and there was no evidence he could not read Spanish).

State v. Mung, 251 N.C. App. 311 (2016). Defendant pulled up to a checkpoint. The officer asked Defendant, in English, for his license and registration. Defendant produced his license but was unable to produce registration. Officer asked Defendant if the address on his license was correct and Defendant responded “yes.” Officer told Defendant to exit the vehicle and Defendant complied. Officer administered three SFSTs, explaining them in English, all of which Defendant indicated he understood how to perform the test but failed. After being placed under arrest for DWI, Defendant, in English, stated “he couldn’t get in more trouble, that he had already been arrested once for DWI” and that “he was here on a work visa and he couldn’t get in trouble again.” After being placed in the patrol vehicle, Defendant repeatedly apologized in English. Regarding chemical analysis, Defendant was read and provided a tangible copy of his rights in English pursuant to N.C. Gen. Stat. § 20-16.2. Officer then instructed Defendant in English how to perform the test and Defendant complied (0.13). At no point did Defendant state he did not understand or request an interpreter. Defendant argued in his motion to suppress that he was originally from Burma and did not understand his rights or what was occurring on the grounds that he did not speak English and that he needed a Burmese interpreter. Similar to *Martinez*, this court relies on the fact that the statute permits unconscious persons to be tested without consent, thus proving admissibility is not conditioned on understanding. Again, that rationale makes no sense in light of *Romano*.

- b. Search warrant permitting a chemical analysis of person’s blood: [\(TOC\)](#)
 - i. Look at the four corners of the search warrant permitting a chemical analysis of your client’s blood. Did the applicant get lazy in stating facts that constitute probable cause to believe your client

committed a DWI? “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 . . . 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. McHone*, 158 N.C. App. 117 (2003). For example, we currently have a case where the application for bodily fluids states that “on April 24, 2015, at 4:10 a.m. on I-85 Northbound, I observed the Defendant operating a vehicle. On or about that date I detected a moderate odor of alcohol coming from the breath of Defendant at the scene.” Nothing else is listed in the search warrant. Use *McHone*, along with the cases listed in the probable cause section, to show the judge why probable cause did not exist for the issuance of the search warrant for bodily fluids.

c. Exigent circumstances: [\(TOC\)](#)

- i. Natural dissipation of alcohol is not an exigency in every case. *Missouri v. McNeely*, 569 U.S. 141 (2013) (holding that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every impaired driving case that justifies a warrantless, nonconsensual blood draw).
- ii. Sedation with impairment is not an exigency. *State v. Romano*, 369 N.C. 678 (2017). In *Romano*, Defendant, a combative drunk, was hospitalized and sedated. Defendant appeared to be so impaired he could not be awakened to hear his implied consent rights. On her own initiative, a nurse took an extra vial of blood for law enforcement. Law enforcement relied on N.C. Gen. Stat. § 20-16.2(b) and did not make the short trip to the magistrate’s office to fill out the fill-in-the-blank form for a blood-draw warrant. Law enforcement accepted the extra vial and sent it off for testing. Trial court granted

Defendant's Motion to suppress the warrantless and non-consensual blood test; based upon *Missouri v. McNeely*, no exigency existed justifying the warrantless search.

- iii. Exigent circumstances existed for a warrantless, non-consensual blood draw in *State v. Granger*, 235 N.C. App. 157 (2014). In *Granger*, law enforcement had concerns regarding dissipation of alcohol as it had been more than one hour since the motor accident. Defendant needed immediate medical care and complained of pain in several parts of his body. Law enforcement was concerned that by leaving Defendant unattended to get a search warrant or waiting longer for blood draw, Defendant would have been administered pain medication which would have contaminated the blood sample. Only one officer was with Defendant during the investigation, and it would have taken law enforcement approximately 40 minutes round-trip to secure a warrant.
 - iv. Exigent circumstances existed for a warrantless, non-consensual blood draw in *State v. McCrary*, 237 N.C. App. 48 (2014). In *McCrary*, Defendant feigned a need for medical care. Law enforcement leaving to get a warrant was not a reasonable option because Defendant was combative with officers and medical personnel, and several officers were needed to ensure safety.
3. Executing a warrant for blood testing must nonetheless be performed through reasonable force. See *State v. Hoque*, 269 N.C. App. 347 (2020) (holding performance of a blood draw by medical professionals at a hospital was reasonable in that any acts of force by law enforcement to obtain the sample were the result of Defendant's own resistance).

F. NHTSA DWI Detection and SFST Training: [\(TOC\)](#)

1. Generally: [\(TOC\)](#)

- a. The National Highway Traffic and Safety Administration (NHTSA) teaches DWI detection and standardized field sobriety testing (SFST) to law enforcement.
- b. The NHTSA manual is admissible and may be introduced into evidence. *State v. Bonds*, 139 N.C. App. 627 (2000).
- c. As taught by NHTSA, DWI detection is broken into three phases:
 - i. Phase one: Vehicle in motion;
 - ii. Phase two: Personal contact; and
 - iii. Phase three: Pre-arrest screening.
- d. There are 65 cues/clues per NHTSA.
- e. A “cue” is one of the NHTSA indicators of impairment relating to phase one (vehicle in motion) and phase two (personal contact). A “clue” relates to phase three (pre-arrest screening) and refers to indicators of impairment for the three Standard Field Sobriety Tests (HGN, OLS, and WAT).
- f. Emphasize the following NHTSA training principles when there is no bad driving (i.e., a checkpoint or seatbelt violation):
 - i. The effects of alcohol impairment are exhibited in driving;
 - ii. Driving is a complex task involving a number of subtasks, many of which occur simultaneously. These include:
 - a. Steering;

- b. Controlling the accelerator;
 - c. Signaling;
 - d. Controlling the brake pedal;
 - e. Operating the clutch;
 - f. Operating the gearshift;
 - g. Observing other traffic;
 - h. Observing signal lights, stop signs & other traffic control devices; and
 - i. Making decisions (whether to stop, turn, speed up, slow down).
 - iii. Safe driving demands the ability to divide attention among these various tasks.
- g. Tip: Cross-examine officers about their NHTSA Training:
 - i. Officers are taught to:
 - a. Describe DWI evidence “clearly and convincingly”;
 - b. “Preparation” is crucial to trial testimony;
 - c. Compile “complete and accurate” field notes and incident reports;
 - d. Review all of their reports and notes, refresh their memory, and talk to the prosecutor before trial;
 - e. Answer factually and not to guess in their answers. They are taught to say “I do not know” or “I do not remember” and not to volunteer information not asked; and

- f. Testify whether the person completed the SFST tests as instructed, not if a suspect “passed” or “failed” the test.
 - ii. When officers have few or no notes or failed to perform various tests, cross examine the officer about his training.
 - iii. Cues are described as “excellent” (meaning 50% or greater probability of legal impairment) and “good” (meaning 30% to 50% probability of legal impairment).
 - iv. Common signs of low blood alcohol concentration are “slowed reactions” (.03) and “increased risk taking” (.05).
- 2. Phase One: “Vehicle in Motion”: 24 Cues: [\(TOC\)](#)
 - a. NHTSA has identified 24 “visual cues” that are associated with impaired driving. Emphasize what the officer did not observe when your client was not pulled over for poor driving. The 24 cues are as follows (i. – xxiv.)
 - b. Problems maintaining proper lane position:
 - i. Weaving – Weaving occurs when the vehicle alternately moves toward one side of the roadway and then the other, creating a zig-zag course. The pattern of lateral movement is relatively regular as one steering correction closely followed by another.
 - a. Tip: Argue driving is, by definition, “controlled weaving.” *State v. Tarvin*, 972 S.W.2d 910 (Tex. App. Waco 1998) (recognizing that driving a car, by its very nature, is controlled weaving and such weaving onto the marking lines of a road only becomes illegal if a person poses a danger to traffic). Watch for conclusory “weaving” statements not supported by NHTSA’s definition.

- ii. Weaving Across Lane Lines – Extreme cases of weaving when the vehicle wheels cross the lane lines before correction is made.
 - iii. Straddling A Lane Line – The vehicle is moving straight ahead with the center or lane marker between the left-hand and right-hand wheels.
 - iv. Swerving – A swerve is an abrupt turn away from a generally straight course. Swerving might occur directly after a period of drifting when the driver discovers the approach of traffic in an oncoming lane or discovers that the vehicle is going off the road; swerving might also occur as an abrupt turn is executed to return the vehicle to the traffic lane.
 - v. Turning With Wide Radius – During a turn, the radius defined by the distance between the turning vehicle and the center of the turn is greater than normal. The vehicle may drive wide in a curve.
 - vi. Drifting – Drifting is a straight-line movement of the vehicle at a slight angle to the roadway. As the driver approaches a marker or boundary (lane marker, center line, or edge of the roadway), the direction of drift might change.
 - vii. Almost Striking Object or Vehicle – The observed vehicle almost strikes a stationary object or another moving vehicle.
- c. Speed and braking problems:
- viii. Stopping Problems – (i.e., too far, too short, too jerky, etc.). Stopping too far from a curb or at an inappropriate angle. Stopping too short or beyond limit line at an intersection. Stopping with a jerking motion or abruptly.
 - ix. Accelerating or Decelerating Rapidly – This cue encompasses any acceleration or deceleration that is significantly more rapid than that required by traffic

conditions. Rapid acceleration might be accompanied by breaking traction; rapid deceleration might be accompanied by an abrupt stop. Also, a vehicle might alternately accelerate and decelerate rapidly.

- x. Varying Speed – Alternating between speeding up and slowing down.
 - xi. Slow Speed – The observed vehicle is driving at a speed that is more than 10 mph below the speed limit.
- d. Vigilance problems:
- xii. Driving in Opposing Lanes or Wrong Way on One-Way Street – The vehicle is observed heading into opposing or crossing traffic under one or more of the following circumstances: driving in the opposing lane; backing into traffic; failing to yield the right-of-way; or driving the wrong way on a one-way street.
 - xiii. Slow Response to Traffic Signals – The observed vehicle exhibits a longer than normal response to a change in traffic signal. For example, the driver remains stopped at the intersection for an abnormally long period of time after the traffic signal has turned green.
 - a. Tip: Compare *State v. Barnard*, 362 N.C. 244 (2008) (reasonable suspicion supported an officer’s decision to stop the defendant where he remained stopped at a traffic light for approximately 30 seconds before proceeding), with *State v. Roberson*, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light for eight to ten seconds).
 - xiv. Slow or Failure to Respond to Officer’s Signals – Driver is unusually slow to respond to an officer’s lights, siren, or hand signals.

- xv. Stopping in Lane for No Apparent Reason – The critical element in this cue is that there is no observable justification for the vehicle to stop in the traffic lane; the stop is not caused by traffic conditions, traffic signals, an emergency situation, or related circumstances. Impaired drivers might stop in the lane when their capability to interpret information and make decisions becomes impaired. As a consequence, stopping in lane for no apparent reason is likely to occur at intersections or other decision points.
 - xvi. Driving without Headlights at Night – The observed vehicle is being driven with both headlights off during a period of the day when the use of headlights is required.
 - xvii. Failure to Signal or Signal Inconsistent with Action – A number of possibilities exist for the driver's signaling to be inconsistent with the associated driving actions. This cue occurs when inconsistencies such as the following are observed: failing to signal a turn or lane change; signaling opposite to the turn or lane change executed; signaling constantly with no accompanying driving action; and driving with four-way hazard flashers on.
- e. Judgment problems:
- xviii. Following Too Closely – The vehicle is observed following another vehicle while not maintaining the legal minimum separation.
 - xix. Improper or Unsafe Lane Change – Driver taking risks or endangering others. Driver is frequently or abruptly changing lanes without regard to other motorists.
 - xx. Illegal or Improper Turn (i.e., too fast, jerky, sharp, etc.) – The driver executes any turn that is abnormally abrupt or illegal. Specific examples include: turning with excessive speed; turning

sharply from the wrong lane; making a U-turn illegally; or turning from outside a designated turn lane.

- xxi. Driving on Other Than Designated Roadway – The vehicle is observed being driven on other than the roadway designated for traffic movement. Examples include driving at the edge of the roadway, on the shoulder, off the roadway entirely, and straight through turn-only lanes or areas.
- xxii. Stopping Inappropriately in Response to Officer – The observed vehicle stops at an inappropriate location or under inappropriate conditions, other than in the traffic lane. Examples include stopping: in a prohibited zone; at a crosswalk; far short of an intersection; on a walkway; across lanes; for a green traffic signal; for a flashing yellow traffic signal; abruptly as if startled; or in an illegal, dangerous manner.
- xxiii. Inappropriate or Unusual Behavior (i.e., throwing objects, arguing, etc.) – Throwing objects from the vehicle, drinking in the vehicle, urinating at roadside, arguing without cause, and other disorderly actions.
- xxiv. Appearing to be Impaired – This cue is actually one or more of a set of indicators related to the personal behavior or appearance of the driver. Examples might include:
 - a. Eye fixation;
 - b. Tightly gripping the steering wheel;
 - c. Slouching in the seat;
 - d. Gesturing erratically or obscenely;
 - e. Face close to the windshield; and
 - f. Driver's head protruding from vehicle.

3. Phase Two: Personal Contact: 23 Cues: [\(TOC\)](#)
 - a. Involves the senses of sight, hearing, and smell:
 - i. Sight:
 - a. Bloodshot eyes;
 - b. Soiled clothing;
 - c. Fumbling fingers;
 - d. Alcohol containers;
 - e. Drugs or drug paraphernalia;
 - f. Bruises, bumps, or scratches; and
 - g. Unusual actions.
 - ii. Hearing:
 - a. Slurred speech;
 - b. Admission of drinking;
 - c. Inconsistent responses;
 - d. Abusive language; and
 - e. Unusual statements.
 - iii. Smell:
 - a. Alcoholic beverages;
 - b. Marijuana;
 - c. Cover-up odors; and
 - d. Unusual odors.

- b. Exit sequence:
 - i. Shows angry or unusual reactions;
 - ii. Cannot follow instructions;
 - iii. Cannot open door;
 - iv. Leaves vehicle in gear;
 - v. Climbs out of vehicle;
 - vi. Leans against vehicle; and
 - vii. Keeps hands on vehicle for balance.
- 4. Phase Three: Pre-arrest Screening: 18 SFST Clues: [\(TOC\)](#)
 - a. First: Administer the three psychophysical, standard field sobriety tests (SFSTs); and
 - b. Second: Administer a preliminary breath test (PBT) to confirm the chemical basis of the driver's impairment.
- G. Standard Field Sobriety Tests (SFSTs): [\(TOC\)](#)
 - 1. Per NHTSA, the original purpose was to assist in "arrest" or "probable cause" determinations. [\(TOC\)](#)
 - 2. NHTSA recognizes three tests (HGN, OLS, and WAT). Two are balancing tests. [\(TOC\)](#)
 - 3. Important Considerations: [\(TOC\)](#)
 - a. Divided attention tests concentrate on physical and mental tasks simultaneously. At the same time, the person tested is subject to (1) information processing, short-term memory, and judgment assimilation and (2) balance, vision, and small muscle control;
 - b. Additionally, the tests have (1) an instruction phase and (2) a performance phase which bolster reliability;

- c. Officers demonstrate tests;
 - d. Each clue is counted only once;
 - e. Two tests are balancing tests (OLS and WAT). “Tests that are difficult for a sober subject to perform have little or no evidentiary value.” NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* § 7, p. 15 (2015).
 - f. Tests are to be completed on a hard, dry, level, and non-slippery surface (versus a sloped road or imaginary line);
 - g. Address back, leg, or middle ear problems (OLS and WAT);
 - h. Address whether more than 50 pounds overweight (OLS);
 - i. Address whether over age sixty-five (OLS and WAT);
 - j. Address whether heels are more than two inches high (OLS and WAT);
 - k. Other conditions that may interfere with testing include wind, weather conditions, footwear, etc.; and
 - l. Proper performance, insufficient clues, non-demonstration of the tests, etc., may support satisfactory performance.
4. Horizontal Gaze Nystagmus (HGN): [\(TOC\)](#)
- a. HGN is deemed a scientifically reliable test. *State v. Younts*, 254 N.C. App. 581 (2017) (holding HGN is a scientifically reliable test). Note: the original research found SFSTs were 77% accurate in detecting persons with at least a .10 BAC according to a San Diego SFST validation study.
 - b. A witness must qualify as an expert before testifying on HGN. *State v. Godwin*, 369 N.C. 605 (2017) (holding a witness must be qualified as an expert—although the court may do so implicitly—before testifying to HGN results at trial).

- c. A proper foundation is still required to admit the results of the HGN tests. *State v. Helms*, 348 N.C. 578, 581–82 (1998); N.C. R. Evid. 702:
 - i. Tips:
 - a. When the DA argues Rule 702 was amended in 2006 to allow admissibility of the test results when “administered by a person who has successfully completed training in HGN,” respond that Rule 702 still retains the language “and with proper foundation.” *Helms* remains good law. The rule itself retains the foundational requirement.
 - b. A foundation explains the relationship between the test results and intoxication (i.e., alcohol impairs muscle control, etc.).
 - c. When the ADA argues the Rules of Evidence do not apply to suppression hearings, argue the finding of expert status is a foundation issue, not a suppression issue.
 - d. Test Administration (six clues, four necessary):
 - i. Lack of smooth pursuit;
 - ii. Onset prior to 45 degrees; and
 - iii. Distinct and sustained nystagmus at maximum deviation.
 - iv. Fertile areas for examination include:
 - a. Defining nystagmus:
 - 1. An involuntary, saccadic, and rapid movement of the eyeball;
 - 2. Bouncing or jerking of the eyeball that occurs when there is a disturbance of the vestibular (inner ear) system or oculomotor control of

the eye due to alcohol consumption or other central nervous system depressants or intoxicants; and

3. Visually looks like marbles rolling on sandpaper.
- b. HGN is a normal, natural phenomenon (e.g., staring);
- c. Explaining the difference between a twitch, tremor, and nystagmus;
- d. Explaining the difference between slight, noticeable and distinct (and sustained) nystagmus;
- e. Checking for eyeglasses, obvious eye disorder(s), or an artificial eye;
- f. Estimations of degree (taught to look for some remaining white of the eye and to go to the end of shoulder; no measuring instrument);
- g. Administration of the test including:
 - i. Speed of the stimulus: (1) for lack of smooth pursuit, a proper pass is approximately two seconds from the center to the edge; (2) for onset prior to forty-five degrees, a proper pass is four seconds from the center to the edge. Passes are always done twice;
 - ii. Distance of stimulus from the subject's eyes (should be 12 to 15 inches and slightly above eye level);
 - iii. Holding the pen for more than four seconds at maximum deviation;

- iv. What constitutes 45 degrees (vs. 42 degrees, etc.; important for DRE);
- h. Tips:
 - i. There are over 40 different types of nystagmus, including pendular, jerk, gaze, vertical, optokinetic, epileptic, pathological, resting, natural, fatigue, physiological (exists naturally in every human eye to prevent tiring when fixated) and other forms;
 - ii. There are over 38 natural causes of nystagmus, including influenza, vertigo, hypertension, eye strain, eye muscle fatigue, eye muscle imbalance, excess caffeine, excess nicotine, aspirin, diet, chilling, and heredity; and
 - iii. Troopers typically test for vertical nystagmus (meaning there is an involuntary, distinct and sustained jerking of the eyes held at maximum deviation for at least four seconds). Common causes of vertical nystagmus are central nervous system disorders/diseases, metabolic disorders, alcohol and drug toxicity, and other unknown causes.
 - iv. See EXHIBIT C for Cross-Examination Techniques on HGN.
- 5. One Leg Stand (OLS) Requirements (four clues, two necessary):
 - (TOC)
 - a. Four clues:
 - i. Swaying (moving side to side an inch or more; not tremors);

- ii. Using arms to balance (must raise six inches);
 - iii. Hopping; and
 - iv. Putting foot down before 30 seconds.
 - b Generally:
 - i. One leg held out straight approximately six inches off ground for 30 seconds;
 - ii. Told to keep both legs straight;
 - iii. Told to count “one thousand and one, etc.” until told to stop; and
 - iv. Officer is to stop the test at 30 seconds.
 - c. Good examination issues:
 - i. Raising the arms six or more inches?;
 - ii. What constitutes “swaying?” Slight tremors of the body or foot should not be interpreted as swaying. *See generally* NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* (2015); and
 - iii. Officers are to tell suspects to “keep watching the raised foot,” causing the suspect to lean forward and lose his balance. Juries dislike deception.
- 6. Walk and Turn (WAT) Requirements (eight clues, two necessary):
(TOC)
 - a. Eight clues:
 - i. Instructional stage:
 - a. Inability to balance; and
 - b. Starts too soon.

- ii. Walking stage:
 - a. Stops while walking (not a clue if the individual is “merely walking slowly”; is hesitation a clue?);
 - b. Misses heel-to-toe (one-half inch or more);
 - c. Steps off line;
 - d. Uses arms to balance (must raise six inches);
 - e. Improper number of steps; and
 - f. Improper turn (the Defendant is told to “keep the front [lead] foot on the line and turn by taking a series of small steps with the other foot”; the manual describes an improper turn as being when the individual “spins or pivots around or loses balance while turning”).

- b. Good examination issues:
 - i. Cannot balance during instructions (does not include when suspect “raises arms or wobbles slightly”);
 - ii. Stops while walking (requires suspect to be told not to start walking until directed to do so; is it a pause?);
 - iii. Improper turn (spin, pivot, or loses balance);
 - iv. Steps off the line (imaginary line?);
 - v. One-half inch or more space between heel and toe; and
 - vi. Counting incorrectly is not a clue.

7. Tips:

- a. Officers may induce a clue by telling the defendant to look at the elevated foot on the OLS.

- b. Have the officer define terms, point out deficiencies in the officer's administration of the test(s), and then discredit his conclusions.
- c. Consider having the officer perform the tests. The manual instructs officers to "[b]e certain that you can do in court all the tests you ask the Defendant to perform at the time of the arrest. If you cannot do them, the jury will not expect that the Defendant could have done them properly." *See* NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* § 12, p. 39 (2015).

H. Portable Breath Tests (PBTs): [\(TOC\)](#)

- 1. Administration of PBTs is to occur *at the end of all* SFSTs. NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* § 4, p. 3 (2015).
- 2. Grounds to administer PBTs are found in N.C. Gen. Stat § 20-16.3(a) (providing law enforcement may require a PBT with reasonable suspicion that Defendant (1) consumed alcohol and either committed a moving traffic violation or was involved in an accident; or (2) committed an implied-consent offense under N.C. Gen. Stat § 20-16.2 and was lawfully stopped or encountered).
- 3. Law enforcement may not use the actual alcohol concentration result of PBTs in an arrest decision, a probable cause hearing, or trial. *See State v. Overocker*, 236 N.C. App. 423 (2014); *see also* N.C. Gen. Stat. § 20-16.3(d). An officer may only testify whether the PBT yielded a positive or negative result. *See* N.C. Gen. Stat. § 20-16.3(d).
- 4. PBTs are regulated by the administrative code. N.C. Gen. Stat. § 20-16.3; 10A N.C.A.C. 41B § .0501, *et seq.*
 - a. Requirements:
 - i. Officer shall determine driver has removed all food, drink, tobacco products, chewing gum, and other substances and objects from his mouth;

- ii. If test result is .08 or more, officer shall wait five minutes and administer an additional test;
 - iii. If additional test result is more than .02 under first reading, officer shall disregard first reading and conduct a third test;
 - iv. Officer shall use an alcohol screening test device approved under administrative code in accord with the operational instructions for the device (except waiting periods within the code supersede manufacturer specifications);
 - v. Only certain breath alcohol screening test devices are approved [alcosensor, alcosensor III, alcosensor IV, and SD-2 (manufactured by CMI, Inc.)];
 - vi. Operator shall verify instrument calibration at least once during each 30-day period of use, using a simulator in accord with rules or an ethanol gas canister;
 - vii. Simulators shall have the solution changed every 30 days or after 25 calibration tests, whichever first occurs;
 - viii. Ethanol gas canisters used to calibrate shall not be utilized beyond expiration date on canister;
 - ix. Instrument calibration shall be recorded on a log maintained by the agency; and
 - x. Courts now take judicial notice of maintenance logs demonstrating compliance with statutory requirements.
- b. Cases:
- i. An odor of alcohol and a positive alcosensor result, without more, requires a dismissal. The test only bolsters the smell. *Atkins v. Moye*, 277 N.C. 179 (1970); N.C. Gen. Stat. § 20-16.3.
- c. Appreciate the difference between PBTs and intoxilyzers. See James A. Davis, *Do I have to blow?*, DAVIS & DAVIS,

I. Lab Reports: [\(TOC\)](#)

1. Timely file a Notice of Objection to the lab report pursuant to statute. *See* N.C. Gen. Stat. § 8-58.20(d) and (g); N.C. Gen. Stat. § 20-139.1(c1), (c3), and (e1); and N.C. Gen. Stat. § 90-95(g) and (g1).
2. Timely file a Notice of Objection to a request for remote testimony of the lab analyst. *See* N.C. Gen. Stat. § 20-139.1(c5).
3. The lab report will provide screening and confirmatory tests.
4. Lab analysts will cite the drug and drug category. Do not let them expound beyond the report provided to counsel, particularly the pharmacological effect.
5. Lab reports for controlled substances reference trace (or threshold) amounts, not impairing amounts. You must know the method of testing (e.g., immunoassay, GC-MS, or LC/MS-MS, etc.) to determine the limit of detection. Some standards reflect a trace amount at twenty nanograms per milliliter. Do not let the analyst opine that screening or confirmatory amounts are impairing. Refer to the State Crime Lab requirements. The State Crime Lab compiles a Toxicology Reporting Index, listing drugs capable of detection and corresponding detection limits for each test. *See* [EXHIBIT D](#).
6. They cannot tell you:
 - a. The quantity (e.g., the concentration amount) of the controlled substance;
 - b. The stage of the natural biochemical process of the degradation and elimination of the compounds (i.e., how long in the suspect's system);
 - c. Whether the controlled substance is psychoactive or not; or

- d. Whether metabolites (i.e., the intermediate or end products of cellular regulatory processes) are active or inert.
7. You must understand the pharmacology of controlled substances:
- a. Half-life: is a pharmacokinetic term meaning the length of time for half of the dose to be metabolized and eliminated from the bloodstream (e.g., after one-half life, the drug concentration in the body will be half of the starting dose). For alcohol, a single drink of an alcoholic beverage has a half-life of about half an hour for an adult. A half-life influences a person's craving for more;
 - b. Steady state: when the rate of drug input equals the rate of drug elimination. Steady state pharmacokinetics are important for chronically administered drugs. The factors that control steady state are the dose, dosing interval, and clearance. After one half-life, a person will have reached 50% of steady state. After two half-lives, a person will have reached 75% of steady state, and so forth. The rule of thumb is steady state will be achieved after five half-lives (97% of steady state achieved);
 - c. Layering effect: are drug responses individual, additive, or synergistic? Do your research. Appreciate a pharmacist will likely espouse multiple drugs have a layering or synergistic effect;
 - d. Mixing medications: Pharmacists use drug classifications (A through E) to address whether mixing medications is safe or unsafe;
 - e. Extended release: are medications slowly released into the body over a period of time, usually 12 to 24 hours;
 - f. Loading dose: is a higher dose initially given at the beginning of treatment before a lower maintenance dose. A loading dose is most useful for drugs eliminated slowly from the body (i.e., with a longer half-life);

- g. Effect of chronic drug use: most pharmacologists acknowledge chronic drug use leads to tolerance (a diminished response resulting from repeated use); and
- h. There is an interrelationship between the time of administration, dosage amount, method of introduction (e.g., oral versus intravenous introduction affecting bioavailability), length of usage, stage of the elimination process, and clearance (the absence of a drug).

VIII. Selected Issues and Cases: (TOC)

A. Checkpoints: see supra Section VII.D. (TOC)

1. *State v. Cobb*, 275 N.C. App. 740 (2020) (remanding for further findings as to whether checkpoint was unconstitutional as trial court failed to provide adequate findings as to reasonableness of the checkpoint under *Brown*'s three factors. Defendant did not preserve her argument regarding law enforcement's absence of a written policy).
2. *State v. Macke*, 276 N.C. App. 242 (2021) (holding the State Highway Patrol's changing of locations during the checkpoint time period was lawful as (1) it was in the plan and (2) the public may evade such checkpoints through smartphone apps).
3. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding checkpoints set up for "general crime control" purposes are unlawful and violate the Fourth Amendment).
4. *Brown v. Texas*, 443 U.S. 47 (1979) (listing balancing test factors). Great cross-examination checklist.
5. *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (approved sobriety or DWI checkpoints).
6. *Delaware v. Prouse*, 440 U.S. 648 (1979) (seminal case setting the legal standard of reasonable and articulable suspicion applied to motor vehicle stops; suggested license and registration checkpoints are allowed).
7. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976) (allowing suspicionless searches at border crossings to search for illegal aliens).

8. *State v. Rose*, 170 N.C. App. 284 (2005) (holding trial courts must make findings as to the checkpoint's programmatic purpose and the reasonableness of the checkpoint).
 9. *State v. Veazey*, 191 N.C. App. 181 (2008) (listing the relevant factors in determining lawfulness of a checkpoint); *see also State v. Veazey*, 201 N.C. App. 398 (2009) (*Veazey II*) (holding a checkpoint was constitutional as the primary purpose was a license checkpoint).
- B. Stops: [\(TOC\)](#)
1. The standard:
 - a. *State v. Styles*, 362 N.C. 412 (2008) (“reasonable and articulable suspicion” is the legal standard for all traffic stops).
 2. Weaving: [\(TOC\)](#)
 - a. *State v. Orr*, 267 N.C. App. 377 (2019) (unpublished) (holding law enforcement had reasonable suspicion to stop Defendant when he weaved dramatically for approximately three-fourths of a mile within the lane, touching but not crossing the line, causing multiple approaching vehicles to believe a head-on crash would occur).
 - b. *State v. Otto*, 366 N.C. 134 (2012) (holding weaving “constantly and continuously” over the course of three quarters of a mile at 11:00 p.m. on a Friday night was sufficient to create reasonable suspicion to stop).
 - c. *State v. Fields*, 195 N.C. App. 740 (2009) (holding no reasonable suspicion existed when the driver weaved three times within his own lane in a mile and a half at 4:00 p.m.).
 - d. Tip: It is still “weaving plus.” Argue the facts.
 3. Running the tag/Tag issues: [\(TOC\)](#)
 - a. *See infra* Section VIII.B.10. for Mistake of Law issues.
 - b. *State v. McNeil*, 262 N.C. App. 497 (2018) (holding, after officers determined the registered owner of a passing car was a male with a suspended license, continued detention of the female driver was

lawful when she did not initially roll down her window, fumbled with her wallet, opened her window about two inches after the officer asked her to roll it down, failed to produce a license upon request, the officer smelled an odor of alcohol emanating from the vehicle, and she was slurring her words slightly; that the appearance of a female did not rule out the possibility that the driver was a male, and every traffic stop may include certain routine inquiries such as checking a driver's license, determining whether there are outstanding warrants against the driver, and reviewing registration and insurance). *But see State v. Hess*, 185 N.C. App. 530 (2007) (holding officer may have reasonable suspicion to stop after running the tag and learning the owner's license is revoked if there is no evidence that someone other than the owner is driving the vehicle).

- c. *State v. Burke*, 212 N.C. App. 654 (2011) (holding officer's belief that temporary tag was likely fictitious because number was "much lower than what was given out at the time" does not create a reasonable suspicion to stop).
 - d. *U.S. v. Wilson*, 205 F.3d 720 (4th Cir. 2008) (holding officer's inability to see the date on temporary tag to determine if it is expired does not create a reasonable suspicion to stop).
 - e. *State v. Johnson*, 177 N.C. App. 122 (2006) (holding a partially obscured license tag was insufficient to warrant a stop).
4. Checkpoint avoidance: [*see supra* Section VII.D.](#): [\(TOC\)](#)
- a. *State v. Foreman*, 351 N.C. 627 (2000) (holding, under "totality of the circumstances" test, officers may consider a turn from a checkpoint; some language appears to support an automatic stop).
 - b. *State v. Bowden*, 177 N.C. App. 718 (2008) (post-*Foreman*, the court emphasized "the totality of the circumstances" in determining reasonable and articulable suspicion). Remembering that *Foreman* and *Bowden* have bad facts, this is a great case to argue when there is simply a lawful turn and subsequent stop.
 - c. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (court stressed the motorist should be allowed to make a u-turn to avoid the road block provided there is some reasonable justification).

- d. *State v. Griffin*, 366 N.C. 473 (2015) (holding because Defendant stopped in the middle of the road to do a three point turn and not at an intersection, reasonable suspicion existed for the stop and there was no need to examine the validity of the checkpoint).
 - e. Tip: do the facts demonstrate an effort to evade law enforcement or was it a lawful traffic maneuver? A legal turn, without more, does not create reasonable and articulable suspicion to stop.
5. Anonymous tips: [\(TOC\)](#)
- a. *State v. Carver*, 265 N.C. App. 501 (2019), *aff'd*, 373 N.C. 453 (2020) (holding no reasonable suspicion based on an anonymous tip for a warrantless traffic stop when a deputy received a call, just before 11:00 p.m., from an anonymous tipster of a vehicle in a ditch, possibly with a “drunk driver,” with a truck attempting to pull the vehicle from same; that the tip provided no information about the vehicle, driver, call, or when the call was received; that the deputies’ stop of a truck [with Defendant as passenger] traveling away from said location at 15 to 20 mph below the 55 mph speed limit—the only vehicle big enough on the highway to pull the car out—was unlawful).
 - b. *Navarette v. California*, 572 U.S. 393 (2014). [See supra Section VII.A.3.f.i.](#)
 - c. *State v. Harwood*, 221 N.C. App. 451 (2012) (holding officers failed to corroborate tipster’s allegations of criminal activity, thus invalidating the stop).
 - d. *State v. Johnson*, 204 N.C. App. 259 (2010) (courts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own unless such a tip itself possesses sufficient indicia of reliability or is corroborated by an officer’s investigation or observations).
 - e. *State v. Maready*, 188 N.C. App. 169 (2008) (addressing the factors that apply), *rev. on other grounds*, 362 N.C. 614 (2008).
 - f. *Florida v. J.L.*, 529 U.S. 266 (2000) (anonymous telephone call discloses black male at bus top, wearing plaid shirt and carrying gun;

officers see person matching description and frisk him; court rules insufficient information to support stop and frisk).

- g. *Alabama v. White*, 496 U.S. 325 (1990) (holding information gleaned from an anonymous tip can form the basis for probable cause to stop when the information is verified and criminal conduct is corroborated by independent investigation).
- h. Tip: A reliable informant, citizen informant, or “collective knowledge” of law enforcement will constitute a legitimate “source of information” to support the stop. An “anonymous tipster” will not. *Adams v. Williams*, 407 U.S. 143 (1972).
- i. Tip: Keys are sufficient detail, prediction of future events, and corroboration of the alleged criminal conduct.

6. Community Caretaking Doctrine: [\(TOC\)](#)

- a. *State v. Brown*, 265 N.C. App. 50 (2019) (holding that no objectively reasonable basis for a community caretaking function was present when a deputy, standing outside his patrol car in a parking lot of a closed gas station, “heard yelling from inside [a vehicle],” including the words “mother*****r” as he saw a vehicle coming down the road; that the deputy, concerned that the event might involve domestic violence, stopped the vehicle, leading to a DWI arrest).
- b. *State v. Smathers*, 232 N.C. App. 120 (2014) (holding, although nothing illegal or suspicious was observed regarding Defendant’s operation of the vehicle, the officer’s observation of the vehicle striking an animal, causing the vehicle to bounce and produce sparks as it scraped the road, including a decrease in speed from 45 mph to 35 mph was lawful under the community caretaking doctrine); see the case for an explanation of the doctrine.
- c. *State v. Sawyers*, 247 N.C. App. 852 (2016) (holding community caretaking doctrine applied to officer’s seizure of Defendant when he observed Defendant and another man dragging a woman into Defendant’s vehicle).

- d. *State v. Huddy*, 253 N.C. App. 148 (2017) (holding presence of a vehicle in one's driveway with its doors open was not an emergency justifying the community caretaking doctrine).
 - e. Tip: The State must satisfy a three-part test: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, an objectively reasonable basis for a community caretaking function is shown; and (3) if so, the public interest outweighs the intrusion upon the privacy of the individual. *State v. Smathers*, 232 N.C. App. 120 (2014).
7. Fail to signal: [\(TOC\)](#)
- a. *State v. Ivey*, 360 N.C. 562 (2006) (no other vehicle was affected by the defendant's turn without signaling as required by statute; thus the stop was not justified).
 - b. *State v. McRae*, 203 N.C. App. 319 (2010) (upheld holding in *Ivey* although allowed stop on alternate basis).
 - c. Tip: N.C. Gen. Stat. § 20-154(a) requires the turn without signaling "must affect traffic."
8. Brake lights: [\(TOC\)](#)
- a. *State v. Heien*, 214 N.C. App. 515 (2011) (malfunction of a single brake light did not violate the statute and was an insufficient basis for the stop), *rev. on other grounds*, 366 N.C. 271 (2012) (assuming without deciding that the Court of Appeals' interpretation of N.C. Gen. Stat. § 20-129 was correct, the court held, under the totality of the circumstances, the officer had a reasonable, articulable suspicion that N.C. Gen. Stat. § 20-129 was being violated, and the officer's mistake of law was objectively reasonable. Therefore, the traffic stop did not violate the Fourth Amendment).
 - b. Tip: See N.C. Gen. Stat. §§ 20-129(g) and (d); and 20-183.3.
9. Normal driving behavior: [\(TOC\)](#)
- a. *State v. Roberson*, 163 N.C. App. 129 (2004) (holding driver remaining at stop light after light turns green for eight to ten seconds

before proceeding is normal driving behavior and is insufficient to support a stop).

- b. *Compare State v. Barnard*, 362 N.C. 244 (2008) (holding reasonable suspicion supported an officer's decision to stop the defendant where he remained stopped at a traffic light for approximately 30 seconds before proceeding).

10. Mistake of fact vs. Mistake of law: [\(TOC\)](#)

- a. *See State v. Heien*, 214 N.C. App. 515 (2011), *rev. on other grounds*, 366 N.C. 271 (2012). [See supra Section VIII.B.8.a.](#)
- b. *State v. Jonas*, ___ N.C. App. ___, 2021-NCCOA-660 (Dec. 7, 2021) (holding that a transporter plate under a car—not on a truck—that was unassigned but not cancelled, suspended, or revoked, was an unreasonable mistake of law by law enforcement).
- c. *State v. Baskins*, 260 N.C. App. 589 (2018) (holding DMV information upon which the interdiction officer relied at the time of the stop explicitly provided the vehicle's registration was valid as the officer neglected to read the information correctly, and the trial court was reversed and remanded for entry of an order vacating Defendant's convictions), *writ of supersedeas denied*, 372 N.C. 102 (2019).
- d. *State v. Eldridge*, 249 N.C. App. 493 (2016) (holding officer's stop of vehicle registered in Tennessee driving without an exterior mirror on the driver's side of the vehicle was unlawful when the requirement applies to vehicles registered in North Carolina and the seizure was an unreasonable mistake of law).
- e. *State v. McLamb*, 186 N.C. App. 124 (2007) (holding officer's mistaken belief of law the speed limit was 20 mph when it was actually 55 mph was an objectively unreasonable basis for the stop).
- f. *Compare State v. Hopper*, 205 N.C. App. 175 (2010) (holding officer's mistaken belief of fact as to existence of a traffic offense does not render the stop illegal; rather, "the only question whether the officers mistake of fact was reasonable").

- g. *State v. Coleman*, 228 N.C. App. 76 (2013) (holding officer's arrest based on an open container in a parking lot was an unreasonable mistake of law as the law changed in 2000 to forbid same on a highway).
 - h. Tip: If possible, frame it as a mistake of law.
- C. Consent: [\(TOC\)](#)
 - 1. *State v. Johnson*, 177 N.C. App. 122 (2006) (removal of plastic wall panel exceeded scope of reasonableness and consent).
 - 2. Tip: Objective reasonableness is the issue.
- D. Containers within the vehicle: [\(TOC\)](#)
 - 1. *U.S. v. Ross*, 456 U.S. 798 (1982) (holding that if probable cause exists for a warrantless search of the vehicle, then there is probable cause to search any container that could hold the suspected contraband).
 - 2. *But see State v. Wise*, 117 N.C. App. 105 (1994) (holding probable cause is required to support a search of a separate sealed container within a vehicle; officer shook and opened a white aspirin bottle, and court held there was no probable cause to open the bottle).
 - 3. *State v. Simmons*, 201 N.C. App. 698 (2010) (officer saw white plastic bag in car door, and defendant told officer it had "cigar guts"; court held facts were insufficient to provide probable cause to search the bag).
- E. Frisk: [\(TOC\)](#)
 - 1. *Arizona v. Johnson*, 555 U.S. 323 (2009) (holding that before any frisk or pat down may occur, the officer must have reasonable suspicion the person is armed and dangerous).
- F. Exceeding scope of the stop: [\(TOC\)](#)
 - 1. *U.S. v. Rodriguez*, 575 U.S. 348 (2015) (holding a police stop exceeding the time necessary to handle its original purpose violates the Fourth Amendment; officers should pursue diligently the original purpose of the stop and, absent new facts creating reasonable suspicion, even a *de minimis* extension is impermissible).

2. *State v. Johnson*, 378 N.C. 236 (2021) (holding law enforcement did not unlawfully extend a stop for a Fictitious Tag when Defendant was pulled over in a high crime area late at night, displayed nervousness, bladed his body towards the center console when reaching for documents, and had a violent criminal history. Law enforcement had reasonable suspicion to believe Defendant was armed and dangerous to conduct a *Terry* frisk and limited search of the vehicle's passenger compartment, discovering cocaine).
3. *State v. Terrell*, 263 N.C. App. 595 (2019) (unpublished) (holding detention of Defendant for approximately one hour while law enforcement failed to actively pursue the investigation transformed the stop into a *de facto* arrest requiring probable cause. The officer stopped Defendant at 11:20 p.m. based upon reasonable suspicion of DWI but did not call for another officer until 12:15 a.m. who arrived at 12:21 a.m.).
4. *State v. Reed*, 373 N.C. 498 (2020) (holding the trial court erred in denying Defendant's motion to suppress in that he remained unlawfully seized in the patrol car after the trooper returned his paperwork, issued a warning ticket, and told him to "sit tight"; that the continued detention was neither consensual nor supported by reasonable suspicion. First, the payment of cash for a rental vehicle was too speculative to serve as a factor of reasonable suspicion of criminal activity. Second, the stories of Defendant and his passenger were not inconsistent with one another in that both mentioned going to Fayetteville. Third, law enforcement confirmed the vehicle was properly in the possession of Defendant's passenger after contacting the rental company. Fourth, the existence of a pit bill, dog food scattered across the floorboard, and debris in the vehicle was unremarkable and consistent with a road trip traversing hundreds of miles. Last, Defendant's nervous appearance was not "beyond the norm" of nervousness display by most people when interacting with law enforcement. Notably, three justices dissented, focusing on the majority's reasonable suspicion view and contending they analyzed by isolation rather than collectively.).
5. *State v. McNeil*, 262 N.C. App. 497 (2018) (holding, after officers determined the registered owner of a passing car was a male with a suspended license, continued detention of the female driver was lawful when she did not initially roll down her window, fumbled with her wallet, opened her window about two inches after the officer asked her to roll it down, failed to produce a license upon request, the officer smelled an odor of alcohol emanating from the vehicle, and she was slurring her words slightly; that the appearance of a female did not rule out the possibility that

the driver was a male, and every traffic stop may include certain routine inquiries such as checking a driver's license, determining whether there are outstanding warrants against the driver, and reviewing registration and insurance);

6. *State v. Bullock*, 370 N.C. 256 (2017) (holding, although the officer ordered the driver out of his vehicle and into the patrol car, frisked him, and then ran record checks, the officer developed reasonable suspicion via Defendant's nervous behavior, contradictory and illogical statements, possession of large amounts of cash and multiple cell phones, and his driving of a rental car registered to another person—all before the database checks were complete—to permit lawful detention for a dog sniff).
7. *State v. Jackson*, 199 N.C. App. 236 (2009) (holding officer unreasonably extended traffic stop when she asked just a few drug-related questions; provides a summary of the legal principles that apply to the scope of a stop).
8. *Florida v. Royer*, 460 U.S. 491 (1983) (holding an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop).
9. *State v. Falana*, 129 N.C. App. 813 (1998) (holding that weaving within lane, rapid breathing, slightly different version of events than passenger, and refusal to search were insufficient to support an articulable suspicion justifying detention for dog sniff).
10. *State v. Parker*, 183 N.C. App. 1 (2007) (holding an officer's request for consent to search which was unrelated to the initial purpose of the stop must be supported by reasonable articulable suspicion of additional criminal activity).
11. *State v. Branch*, 194 N.C. App. 173 (2008) (holding a ten-minute delay beyond the time it took to check driver's license and registration was unlawful).
12. *U.S. v. Place*, 462 U.S. 696 (1983) (holding that a canine sniff is not a search within the Fourth Amendment); *see also Illinois v. Caballes*, 543 U.S. 405 (2005) (holding the Fourth Amendment is not violated when the use of a drug-sniffing dog during a routine traffic stop does not unreasonably prolong the length of the stop). *But see U.S. v. Rodriguez*, 575 U.S. 348 (2015).

13. Key issues: Original purpose of the stop, specific additional facts justifying further detention, and defendant's actions prolonging the stop. While it appears recent N.C. appellate cases suggest an effort to carve out a meaningful rationale for a *de minimis* extension, no cogent reasoning can be applied to the current cases in support of same.
 14. Tip: Passengers may challenge the stop. *Brendlin v. California*, 551 U.S. 249 (2007).
- G. Arrest requires probable cause: [\(TOC\)](#)
1. *State v. Fisher*, 141 N.C. App. 448 (2000) (good factual analysis of what constitutes probable cause to arrest when an officer asserts the defendant is in custody but not under arrest).
 2. *State v. Carrouthers*, 200 N.C. App. 415 (2009) (holding if methods used by police exceed least intrusive means reasonably required to carry out the stop, the encounter evolves into a de facto arrest, creating the need for police to show probable cause to support detention).
- H. Search incident to arrest: [\(TOC\)](#)
1. *Arizona v. Gant*, 556 U.S. 332 (2009) (holding officers may search a vehicle if (1) defendant is unsecured and within reaching distance of the vehicle at the time of search and (2) there is a reasonable belief evidence relevant to the crime of arrest might be found in the vehicle).
 2. *State v. Smith*, 222 N.C. App. 253 (2012) (holding canine alert while walking around vehicle's exterior does not establish probable cause to search passengers outside of vehicle).
- I. Notice of rights must be given both orally and in writing: [\(TOC\)](#)
1. *State v. Thompson*, 154 N.C. App. 194 (2002).
 2. *See also* N.C. Gen. Stat. § 20-16.2.
- J. Injection of medications: [\(TOC\)](#)
1. *Robinson v. Life and Cas. Ins. Co. of Tenn.*, 255 N.C. 669 (1961) (holding that a blood test must occur before any other substances or medicines are injected). If the State argues *State v. McDonald*, 151 N.C. App. 236 (2002)

(citing *Robinson*), distinguish *McDonald* by noting *Robinson* is a Supreme Court decision that remains good law, directly addressing the introduction of extraneous matter injected into the body while *McDonald* does not. See also *State v. Granger*, 235 N.C. App. 157 (2014) (holding, *inter alia*, administration of pain medication to Defendant would have contaminated the blood sample).

K. Witnesses: [\(TOC\)](#)

1. *State v. Ferguson*, 90 N.C. App. 513 (1988) (holding that where a witness made timely and reasonable efforts to gain access to the defendant and was denied, defendant's constitutional right to obtain witnesses on his behalf is flagrantly violated and requires dismissal of the charges).
2. *State v. Hill*, 277 N.C. 547 (1971) (holding defendant's constitutional and statutory rights include advice from his attorney and consultation with friends and relatives to make observations of his person; that access must be within a relatively short time after arrest since intoxication does not last; that this implies, at the very least, the right to see, observe and examine him regarding intoxication; and to say denial was not prejudicial is to assume that which is incapable of proof).
3. *State v. Myers*, 118 N.C. App. 452 (1995) (holding that when defendant requested that his wife come into the breath-testing room, the officer's statement "that might not be a good idea" required suppression of the chemical analysis).
4. *State v. Hatley*, 190 N.C. App. 639 (2008) (holding that a witness who arrived on time and made reasonable efforts to view the testing procedures by stating she was there for the defendant at the testing facility and was not granted access required suppression of the intoxilyzer results).
5. Tip: It is the duty of the arresting officer to permit the arrestee to communicate immediately with counsel and friends. This right shall not be denied. N.C. Gen. Stat. § 15A-501(5).
6. Tip: Post-*Ferguson* cases hold there must be an outright denial of access to witnesses during the relevant time frame to warrant dismissal, as opposed to suppression of the chemical analysis. The analysis centers upon whether there is a flagrant violation of the defendant's constitutional rights.

L. Lab analyst: [\(TOC\)](#)

1. *Crawford v. Washington*, 541 U.S. 36 (2004) (holding a testimonial, out of court witness statement is not admissible against a criminal defendant unless the witness is unavailable and there was a prior opportunity for cross examination).
2. *State v. Ortiz-Zape*, 367 N.C. 1 (2013) (holding a substitute analyst could testify about her background, experience, education, and training; the practices and procedures of the testing crime lab; her review of the testing done; and based on the same, render her independent opinion regarding the test results. The State could not admit non-testifying analyst's report into evidence per Rule 403). *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (holding admission of lab report through the testimony of an analyst who did not perform or observe its testing violated the Confrontation Clause).
3. *See also Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (holding forensic laboratory reports are testimonial and subject to *Crawford*).
4. [See infra Section X.O.](#) for rich areas of cross-examination regarding blood tests.
5. Remote testimony: While notice of objection pursuant to notice and demand statute still apply, remote forensic analyst testimony in District Court is authorized by N.C. Gen. Stat. § 15A-1225.3(b).

M. *Corpus delecti*: [\(TOC\)](#)

1. *State v. Sweat*, 366 N.C. 79 (2012) (holding two burdens of proof apply upon the State regarding *corpus delecti* rule: (1) the State can rely solely on the defendant's confession to obtain a conviction in noncapital cases if the confession “is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime”; and (2) however, if “independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession.”) (emphasis in original).
2. *State v. Ash*, 193 N.C. App. 569 (2008) (holding there must be substantial, independent evidence to support a defendant's confession).

3. *State v. Trexler*, 316 N.C. 528 (1986) (holding there must be corroborative evidence sufficient to establish the trustworthiness of a confession to fulfill the *corpus delicti* rule; defendant's admission of driving was sufficiently corroborated when he later returned to the scene impaired, blew a .14, a single person was seen leaving the wreck, and the wreck was otherwise unexplained).

N. *Knoll* issues: [\(TOC\)](#)

1. *State v. Knoll*, 322 N.C. 535 (1988) (holding that because of a lack of information during processing and commitment to jail, the defendant lost an opportunity to gather evidence, thus violating his constitutional rights).
2. Tip: The *Knoll* line of cases addresses where the magistrate commits substantial statutory violations related to setting conditions of pre-trial release that prejudice the defendant's ability to have access to witnesses. The cases discriminate between *per se* and non *per se* offenses. *Per se* offenses (.08 or more) require proof of prejudice for a dismissal of charges pursuant to N.C. Gen. Stat. § 20-138.1(a)(2). Non *per se* offenses (proof of impairment prong) presume prejudice when the defendant is denied access to witnesses. However, dismissal is the proper remedy in a non *per se* offense only when denied his constitutional right to obtain evidence for his defense; less serious statutory violations warrant suppression of evidence rather than dismissal. See *State v. Ferguson*, 90 N.C. App. 513 (1988); *State v. Hill*, 277 N.C. 547 (1971).

O. Jury unanimity: [\(TOC\)](#)

1. There are three ways to prove impairment by statute, and the State is not required to elect a theory at trial. See N.C. Gen. Stat. § 20-138.1(a).
2. Case law creates a basis for appeal on the issue of jury unanimity. See *State v. Malachi*, 371 N.C. 719 (2018); *State v. Fowler*, 263 N.C. App. 710 (2019) (unpublished) (holding, although disjunctive jury instructions are generally permissible for impaired driving, the State presented no evidence supporting the N.C. Gen. Stat. § 20-138.1(a)(2) instruction relating to consuming sufficient alcohol that one has an alcohol concentration of .08 or more at any time relevant after driving).

IX. Caveat Lector (Let the *Reader* Beware): (TOC)

A. Three forms of license suspensions: (TOC)

1. 30-day civil revocation;
2. Willful refusal (one year); and
3. DWI conviction (one year to a permanent revocation).

B. DMV traps: (TOC)

1. Defendant's use of the wrong LDP form. For example, Defendant's failure to use the ignition interlock form bars any credit for same.
2. The ignition interlock must be installed in every vehicle registered in Defendant's name. As of November 18, 2021, it is no longer true that all vehicles registered in Defendant's name must have an ignition interlock installed when DMV restores a license when he: (1) was convicted of impaired driving under N.C. Gen. Stat. § 20-138.1; and (2) had an alcohol concentration of .15, was convicted of another impaired driving offense which occurred within the last seven years before the offense date for which the license was revoked, *or* was sentenced to Aggravated Level One Punishment. *See* 2021 N.C. Sess. Laws 182; N.C. Gen. Stat. §§ 20-17.8(a) and (c1). Instead, Defendant must now designate any registered vehicle which he owns and intends to operate. *Id.*
3. Defendant cannot receive a LDP with a CDL.
4. Defendant cannot receive a PJC with a CDL.
5. Defendant cannot receive a LDP if he fails to pay the civil revocation fee. Cite. The status of said fee is reflected with the clerk.
6. Defendant must physically surrender the license for DMV to start the suspension period and receive credit. The form acknowledging surrender of the license is critical to DMV.
7. Defendant should insure DMV received his notice of appeal to prevent further suspension(s) or arrest(s).

8. When resolving several cases on one date, insure the clerk sends notices of all suspensions to DMV at the same time to prevent later notices and suspensions.
9. Habitual DWI results in a permanent revocation. However, DMV may conditionally restore a license after 10 years following Defendant's completion of any court sentence if: (1) in the 10 years immediately prior to his application for a restored license, he was not convicted of a motor vehicle offense, an alcohol beverage control law offense, a drug offense, or other criminal offense; and (2) he is not currently a user of alcohol, unlawful controlled substance, or an excessive user of prescription drugs). *See* N.C. Gen. Stat. § 20-19(e4).
10. Any mistake that suspends a LDP also suspends the revocation period (e.g., notice from DMV of an invalid ignition interlock privilege requires Defendant to restart the process from the beginning [i.e., pay the \$100.00 restoration fee, resubmit the privilege, etc.]).
11. To receive a LDP, Defendant must have had a valid driver's license at the time of the offense or a license expired for less than one year. *See* N.C. Gen. Stat. § 20-179.3(b)(1)a.
12. Defendant cannot receive a LDP when under the age of 21 at the time of an impaired driving offense. *See* N.C. Gen. Stat. § 20-179.3(e) (authorizing a LDP when a license is revoked solely for impaired driving under N.C. Gen. Stat. § 20-138.1 or 20-138.2); N.C. Gen. Stat. § 20-17(a)(2) (revoking a license for an impaired driving offense under N.C. Gen. Stat. § 20-138.1 or 20-138.2); N.C. Gen. Stat. § 20-13.2(b) (in addition to any other revocation authorized by law, revoking a license for an impaired driving offense and the offense occurs when under the age of 21).
13. An out-of-state Defendant should list the out-of-state driver's license number on the LDP as DMV will not have this information.
14. Defendant cannot receive a LDP for Misdemeanor Speeding to Elude Arrest (although Defendant may be eligible to receive a LDP for Felony Speeding to Elude Arrest under certain circumstances).
15. A LDP for a speeding violation has (1) a 12-month look-back period (different from other DMV look-back periods) and (2) less restrictions than other privileges (i.e., only hour restrictions).

16. LDPs are available for Failures to Appear and Failures to Pay Costs.
17. When a blood test is cancelled, counsel should follow-up with the District Attorney's Office to insure the request is cancelled (to prevent receipt of a subsequent .15 blood test result).
18. DMV will do a "contaminant" review for low alcohol-reading violations of a LDP.
19. The 45-day wait period for ignition interlock privileges was removed by the General Assembly on November 18, 2021. *See* 2021 N.C. Sess. Laws 182.
20. A significant number of these traps are discussed by Jake Minick on The NC DWI Guy Podcast. This podcast is a valuable resource to the practitioner. *See* NC DWI Guy Podcast, <https://www.minicklaw.com/category/nc-dwi-guy-podcast>.

C. Retrograde extrapolation: [\(TOC\)](#)

1. A mathematical process wherein an expert will first use a specific chemical analysis reading obtained at a certain time and then, using a formula (.0165), extrapolates back to a specific time when defendant was operating a vehicle.
2. The process of alcohol ingestion and elimination from the body includes an absorption phase, peak alcohol concentration, and an elimination rate.
3. Retrograde extrapolation typically does not address the absorption phase. The expert may respond there is no evidence as to time of consumption; therefore, he assumes, at all relevant times, the defendant is in the process of elimination.
4. There are many variables including sex; weight; metabolism; food intake; concentration, amount, and speed of the alcohol ingested; etc.
5. Odor of alcohol alone is insufficient to allow extrapolation. *State v. Davis*, 208 N.C. App. 26 (2010).
6. Experts may accept certain treatises and reject others.
7. Use a defense expert.

8. Tip: Remember, every reading occurs twice, once during the absorption phase and again during elimination.
 9. For a sample examination, see [EXHIBIT E](#).
- D. Synergistic drug/alcohol combinations: [\(TOC\)](#)
1. The lab analyst routinely testifies impairment is increased by mixing medications or medications and alcohol.
- E. DRE (Drug Recognition Expert): [\(TOC\)](#)
1. Recognized under N.C. R. Evid. 702(a1)(2) if officer has received training and has a current certification issued by DHHS.
 2. DRE case law is a tangled web. First, DRE evidence is deemed reliable. *See State v. Fincher*, 259 N.C. App. 159 (2018). Second, a certified DRE may properly testify regarding the level and cause of Defendant's impairment. *See State v. Wright*, 2010 N.C. App. LEXIS 845 (2010) (unpublished). Finally, a witness need not be a certified DRE to qualify as a Rule 702 expert regarding non-alcohol impairment. *See State v. Istvan*, 240 N.C. App. 295 (2015) (unpublished) (holding officers—believing Defendant was not impaired by alcohol—properly rendered expert opinions that she “appeared to be impaired by some substance” after observing Defendant for approximately two hours).
 3. Allows testimony that person was under the influence of one or more impairing substances and the category of same.
 4. Twelve step evaluation process including:
 - a. Breath alcohol tests;
 - b. Interview of arresting officer;
 - c. Pulse exams;
 - d. Eye exam;
 - e. Divided attention tests (Romberg balance, WAT, OLS, and finger to nose);

- f. Vital signs;
 - g. Dark room (pupil) and ingestion exams;
 - h. Muscle tone exam;
 - i. Injection site check;
 - j. Interrogation;
 - k. Observations; and
 - l. Toxicological exam.
- 5. Focuses on major signs and symptoms of impairment for seven drug categories:
 - a. Central nervous system depressants (alcohol, valium, barbiturates, etc.);
 - b. Central nervous system stimulants (cocaine, amphetamines, methamphetamines, etc.);
 - c. Hallucinogens (LSD, ecstasy, peyote, etc.);
 - d. Dissociative anesthetics (PCP, ketamine, etc.);
 - e. Narcotic analgesics (heroin, codeine, morphine, etc.);
 - f. Inhalants (glue, paint, nitrous oxide, etc.); and
 - g. Cannabis (marijuana, hashish).
- 6. Tip:
 - a. Use the chart against the DRE expert. See attached **EXHIBIT F**.
 - b. Do not let the State use a DRE expert for any other purpose.

F. Motions to Suppress vs. Motions *in Limine*: [\(TOC\)](#)

1. Prosecutors often attempt to characterize defense motions as a motion to suppress rather than a motion regarding evidence, thus invoking sharp procedural rules.
2. Motions to suppress, as a term of art, address unlawfully obtained evidence that require exclusion by the U.S. or N.C. Constitutions or due to a substantial violation of Chapter 15A (the Criminal Procedure Act). N.C. Gen. Stat. §§ 15A-971 through 980. This evidence includes a “statement” made by defendant or evidence obtained via a “search.” N.C. Gen. Stat. § 15A-975(b). There are timing requirements and limits on the type of evidence which can be suppressed.
3. Motions *in limine* are simply “threshold” motions made at the start of a trial, typically seeking rulings on evidence.
4. This distinction matters. See attached [EXHIBIT G](#).

G. *State vs. Drdak*, 330 N.C. 587 (1992): [\(TOC\)](#)

1. Allows the state to introduce defendant’s blood test results when drawn while rendering medical assistance under the “other competent evidence” prong of statute, routinely arising in wreck cases. N.C. Gen. Stat. § 20-139.1(a).
2. Key facts: Blood test was less than one hour after crash; experienced phlebotomist; trained lab technician; per doctor’s orders; a routine procedure; used Dupont Automatic Clinical Analyzer (which can test whole or serum blood).
3. Also cites the conversion ratio of plasma or serum alcohol to whole blood alcohol (when hospital results are reported as milligrams):
 - a. Average conversion factor is 1.18;
 - b. Formula is plasma divided by 1.18 equals whole blood value; and
 - c. Example: 213 (mg of plasma/serum alcohol) ÷ 1.18 (conversion factor) 180 mg of whole blood alcohol (or .18 blood alcohol).

H. Nontraditional tests: [\(TOC\)](#)

1. The prosecution may attempt to bolster its case by using unreliable, non-standardized tests.
2. In Wildlife cases, impaired driving or boating often involves these types of tests. Wildlife officers are trained by NASBLA (National Association of State Boating Law Administrators, a 501(c)3 organization designed for recreational boating safety). They are trained in a 24-hour Boating Under the Influence Detection and Enforcement Course, using afloat (seated) and ashore (standing) standardized field sobriety test batteries.
3. Nontraditional tests include finger dexterity test, hand (palm) pat test, hand coordination test (movement of fists in a step-like fashion, counting, and clapping hands), reciting numbers test, finger to nose test, finger count test, Romberg balance test, partial alphabet test (cannot sing), backwards count test, etc.
4. Allows lay opinion testimony regarding intoxication. N.C. R. Evid. 701.

I. Evidence of a willful refusal to submit to a chemical analysis or perform field sobriety tests is admissible against the defendant: [\(TOC\)](#)

1. N.C. Gen. Stat. §§ 20-16.2(a) and 20-139.1(f).
2. *State v. Hernandez*, 277 N.C. App. 219 (2021) (unpublished) (holding that evidence of a willful refusal to a DRE evaluation and blood draw was admissible despite Defendant's later consent to a blood test after a warrant issued).

J. Can lab analysts testify outside their area of expertise?: [\(TOC\)](#)

1. Expert testimony should be limited to his or her area of expertise.
2. Prosecutors often try to solicit an opinion about matters outside of the lab report (e.g., dosage amounts of non-prescribed controlled substances, etc.).
3. Tip: A blood test, without more, indicating a positive result for a controlled or impairing substance (other than Schedule 1) is insufficient to establish impairment. *Moore v. Sullbark Builders, Inc.*, 198 N.C. App. 621 (2009).

- K. *Per se* offenses require proof of prejudice: [\(TOC\)](#)
1. *State vs. Labinski*, 188 N.C. App. 120 (2008) (prejudice is required for *per se* offenses or *Knoll* motions).
 2. *Per se* means a blood or breath alcohol content (BAC) of .08 or more.
- L. Substitution of a DRE as expert for a chemical analyst: [\(TOC\)](#)
1. Object. You are entitled to timely notice of the expert and the results of the lab report. N.C. Gen. Stat. §§ 20-139.1(c1) and (e2); *Crawford*, et al., *supra*.
 2. Always serve a timely, written notice of objection per *Crawford* and progeny. You can always withdraw your objection.
 3. In Superior Court, you are entitled to expert information (name, CV, basis of opinion) as outlined in the discovery statutes based on fundamental fairness; effective assistance of counsel; case law interpreting expert reports requiring disclosure of testing procedures, underlying data and bench notes; and potential *Brady* material. N.C. Gen. Stat. § 15A-903.
- M. Officers directing the defendant to face the patrol car and perform tests: [\(TOC\)](#)
1. Purpose is to videotape the suspect.
 2. Client is facing flashing blue lights which induce optokinetic nystagmus.
 3. The most recent technique by law enforcement is to perform testing off camera, limiting impeachment of the officer's observations.
- N. What qualifies as an "inpatient treatment facility" for purpose of jail credit?: [\(TOC\)](#)
1. The statute allows credit when the defendant has been in an "inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse." N.C. Gen. Stat. § 20-179(k1).
 2. Be careful with Christian or faith-based treatment facilities that do not qualify. Some judges will not grant credit.

- O. Tricks of the trade: [\(TOC\)](#)
1. Officers ask the suspect to do two things simultaneously (divided attention test). I have seen law enforcement add additional tasks to a particular SFST test, claiming it comported with the purposes of divided attention. Any such practice undermines the historical testing, administration, and reasoning of HGN reliability.
 2. Officers purposefully interrupt the suspect and redirect.
 3. Cover-up odors (i.e., air fresheners, breath sprays, etc.) are a cue.
- P. Disaster: One test result followed by a willful refusal: [\(TOC\)](#)
1. The only time one test result is admissible. N.C. Gen. Stat. § 20-139.1(b3).
 2. Allows for a conviction and an additional, one year suspension based on the refusal.

X. Smart Techniques: [\(TOC\)](#)

- A. Ask the officer if he reviewed his notes in preparation for his testimony, and then ask the court for permission to review the officer's notes. N.C. R. Evid. 612. A treasure trove.
- B. Litigate a "willful refusal" finding (in exchange for a DWI plea?). N.C. Gen. Stat. § 20-16.5(b)(4):
1. District Court (or magistrate) hearing. N.C. Gen. Stat. § 20-16.5(g):
 - a. Request must be made within ten days of date of revocation;
 - b. Hearing must be held within five working days before a district court judge (three working days before a magistrate).
 - c. ADA's involvement in the hearing permits collateral estoppel argument. *Brower v. Killens*, 122 N.C. App. 658 (1996) (collateral estoppel applies if the issue has been previously determined and there are identical parties).

2. DMV hearing. N.C. Gen. Stat. § 20-16.2(d):
 - a. Request must be made in writing to DMV before the effective date of the order of suspension.
 - b. Statute addresses the use of a subpoena for witnesses, including the charging officer and chemical analyst.
 - c. Tip: DMV now charges significant fees and requires completion of a request form to obtain driver license hearings. Use the DMV form revised in September 2018 attached as EXHIBIT H.
3. What is a “refusal”? *Rock v. Hiatt*, 103 N.C. App. 578 (1991). It occurs when the motorist:
 - a. Is aware he has a choice;
 - b. Is aware of the time limit;
 - c. Voluntarily elects not to take the test; and
 - d. Knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test.
 - e. Tip: You must refute at least one prong to win.
- C. Tip: Refuse all DWI Motorboat tests. There is no driver license revocation or other consequences as the charge is not a Chapter 20 violation.
- D. Speeding is not a cue of impairment. Slow driving is (i.e., ten miles or more under the speed limit).
- E. Speech patterns are individual. Officers are rarely familiar with a defendant’s manner of speaking prior to arrest. Caution: If a defendant testifies, the State may offer rebuttal evidence.
- F. Alcohol has no odor. The odor emanates from the flavorings. Ask about non-alcoholic beverages.

- G. Strength of odor indicates mere presence of alcohol, not potency or amount consumed:
1. Tip: Odor of alcohol, without more, requires a dismissal as a matter of law. *Atkins v. Moye*, 277 N.C. 179 (1970).
- H. Red eyes occur for many reasons. Lack of sleep, allergies, dry eyes, sun exposure, contacts, foreign particles, chemicals, and many other natural and/or environmental causes.
- I. A request to repeat instructions may be because the defendant either does not understand or simply wants to perform the test(s) correctly.
- J. Intoxilyzer requirements: Pay attention to:
1. The time the “notice of implied consent rights” form was administered;
 2. Whether a witness or lawyer was requested;
 3. How long the testing procedure was delayed (15 minute observation period is the minimum requirement, and 30 minutes is the maximum time for a witnesses to appear);
 4. Whether the defendant has “ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked” during the observation period (i.e., the 15 minutes immediately preceding collection of the breath specimen). 10A N.C.A.C. 41B §§ .0101(6) and .0322;
 5. Whether all objects (chewing gum, tobacco, dentures, etc.) were removed from suspect’s mouth prior to testing; and
 6. Whether the results showed “test time out” (vs. “test refused”).
 7. Tips:
 - a. Law enforcement is required to provide both oral and written notice of rights and obtain the defendant’s signature. N.C. Gen. Stat. § 20-16.2; *State v. Thompson*, 151 N.C. App. 194 (2002);
 - b. Lip balm often has alcohol as an ingredient;
 - c. Inhalers may have an alcohol compound;

- d. Tears have alcohol which may enter the oral cavity; and
 - e. If the test results show an increasing BAC result, you may be able to argue non-impairment while driving (vs. “at any relevant time after driving”).
- K. The prosecution may no longer enter a specific numerical result on the alcosensor, even when the defendant is contesting probable cause:
 - 1. Testimony may only indicate a positive or negative reading. N.C. Gen. Stat. § 20-16.3.
- L. Take judicial notice of the NHTSA manual. *State v. Bonds*, 139 N.C. App. 627 (2000) (appellate court took judicial notice of the NHTSA manual for clues of impaired driving):
 - 1. Tip: Buy the NHTSA student manual and look at the current BLET manual (section on “Techniques of Traffic Law Enforcement”).
- M. Consider having a new, timid or less than athletic officer perform the WAT/OLS tests before the judge or jury:
 - 1. The ADA will object and state, “The officer is not on trial.” Of course he is. Witness credibility is always an issue.
 - 2. At a minimum, argue the judge or jury should at least see the instructional phase and how the test is to be properly performed.
- N. Tip: The Attorney General represents state agencies, including the State Highway Patrol. City and county attorneys represent their respective employees, including law enforcement. Therefore, District Attorneys do not have standing to object to subpoenas issued to law enforcement. *See Jarrell v. Charlotte-Mecklenburg Hospital Authority*, 206 N.C. App. 559 (2010) (holding parties to litigation lack standing to challenge a subpoena issued to a third party absent claim of privilege, proprietary right, or other interest in such production), *overruled on other grounds*, *Lassiter v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367 (2015).
- O. Blood tests present rich cross-examination issues for lab analysts:
 - 1. Blood draws are typically held by law enforcement for 30 to 90 days in an unrefrigerated state before transfer to the State Crime Lab. Once received, Defendant’s name is removed from the tube, the tube is relabeled with an

assigned number, and the tube is refrigerated. Approximately four individuals are involved in the transfer process, beginning with the person qualified to take the blood draw.

2. The lab analyst will acknowledge (1) multiple individuals possessed the tube, (2) the relabeling process, and (3) refrigeration of the tube to prevent fermentation.
3. Common issues include:
 - a. Chemicals in sealed vials may vary;
 - b. Samples are easily tainted during extraction;
 - c. Samples are improperly stored;
 - d. Expiration dates may elapse;
 - e. Improper collection procedures;
 - f. Vacuum seal issues;
 - g. *Candida albicans* (diploid fungus that grows as yeast based on human infection) can cause alcohol to ferment in the tube; and
 - h. Tip: Look for blood left or stored in a warm environment for days. *State v. McDonald*, 151 N.C. App. 236 (2002) (blood left in patrol car for three days before analysis).
4. These facts present important “admissibility” issues. Once Defendant objects to chain of custody, the statute requires all individuals who have handled the blood tests to be present in court to testify. *See* N.C. Gen. Stat. §§ 8-58.20(d) and (g); 20-139.1(c1), (c3), and (e1); and 90-95(g) and (g1),
 - a. The State will argue *State v. Grier*, 307 N.C. 628 (1983) (holding an insufficiency of a blood sample’s chain of custody went to weight of the evidence rather than admissibility when the testifying doctor did not witness the extraction but was in the same room during the extraction and was immediately presented the sample). Argue *Grier* addressed the absence of a witness when a doctor was in the same room as a technician rather than multiple transfers and relabeling by

unknown persons over an extended period of time with variance of refrigeration and non-refrigeration. *See* N.C. R. Evid. 901.

5. Generally speaking, blood tests create more issues for the jury.

P. *Brady* material applies in District Court:

1. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires the prosecutor to produce at trial, even without a request from the defendant, material evidence favorable to the defendant on issues of guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963).
2. This includes both impeachment evidence and exculpatory evidence. *U.S. v. Bagley*, 473 U.S. 667 (1985).
3. The State must produce “apparently or obviously” exculpatory evidence. *Kyles v. Whitley*, 514 U.S. 419 (1995). Caution: This only applies to evidence not available to the defense either directly or through diligent investigation. *State v. Scanlon*, 176 N.C. App. 410 (2006).
4. To establish a *Brady* violation, defendant must show the value of the evidence was apparent, favorable, material, and would have affected the outcome of the trial. *State v. Alston*, 307 N.C. 321 (1983).
5. If the evidence was “potentially helpful,” bad faith must be shown. *Arizona v. Youngblood*, 488 U.S. 51 (1988).
6. Tip: File your *Brady* motion. It puts the ADA on notice and alerts him of his duty to “affirmatively act” and inquire about exculpatory material. *See* [EXHIBIT I](#) for a sample *Brady* motion.

Q. Use the Public Records Act to see if law enforcement is following standard operating procedures (SOP’s), training and policy. N.C. Gen. Stat. § 132-1, *et seq.*

1. Internal policies are great impeachment tools.

R. Drug dog certifications:

1. As a primer, review *Florida v. Harris*, 568 U.S. 237 (2013) (holding if a bona fide organization has certified a dog after testing his reliability in a controlled setting, or if dog has recently and successfully completed a training program that evaluated his proficiency, a court can presume,

subject to conflicting evidence offered, that the dog's alert provides probable cause to search, using a totality of the circumstances approach), and *Florida v. Jardines*, 569 U.S. 1 (2013) (holding the government's use of trained police dogs to investigate home and its immediate surroundings is a "search" within the meaning of Fourth Amendment).

2. Most certifications are usually valid for one year. Check with the individual certifying agency.
 3. The gold standard is U.S. Police Canine Association certification.
- S. Consider a motion to suppress in district court with the prospect for appeal as opposed to a trial on the merits with *res judicata* effect.
1. Query: Do you seek discovery to litigate issues and limit evidence; or try it, use the trial as a discovery tool, and possibly bar an appeal?
- T. Always file a notice of objection to the lab report:
1. You can always withdraw the objection.
- U. Make a motion to dismiss at the end of the State's evidence in a close case:
1. Remind the judge both how weak the evidence is and of the burden of proof.
- V. Was there a search warrant issued and a blood test result?:
1. The fact finder always questions why the officer did not get the easy and ultimate answer: a blood test result.
 2. Tip: Case law authorizes a warrantless blood draw if probable cause and exigent circumstances are present. *State v. Welch*, 316 N.C. 578 (1986). Dissipation of alcohol from blood is seen as an exigent circumstance. *Schmerber v. California*, 384 U.S. 757 (1956) (risk of dissipation justified drawing blood from suspect without a warrant).
- W. The last argument is of first importance:
1. Motions *in limine* and evidence blocking may lead to a weak case against your client. Final argument often wins.

X. Out-of-State defendants:

1. May be sentenced in absentia.
 - a. Tip: Use a long form waiver.
2. Do not have to surrender license.
3. Typically pay court costs and allowed to do community service in their state of residence.
4. Must deal with DMV consequences in their home state.

Y. Out-of-State probation:

1. Done through Interstate Compact.
2. Defendant must have a minimum sentence of six months.
3. Contact probation in advance.
4. Requires \$250.00 application fee.
5. Client must bring proof of residency.
6. Client should arrive a day or two in advance and be prepared to remain several days until approved.

XI. Who is an Expert?: (TOC)

- A. New N.C. R. Evid. 702(a) and (a1).
 1. Includes HGN and DRE training.
- B. There is a higher threshold for expert status with the focus on fringe fields of science.
- C. The rule is amplified by *State v. McGrady*, 368 N.C. 880 (2016), and its progeny.
- D. Remember the (1) 2011 National Academy of Sciences (NAS) report found every forensic science but nuclear DNA is junk science, and (2) the 2016 President's

Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods readdressed current issues with forensic science.

E. Tip: How to cross-examine experts: use the Scientific Method:

1. Get the expert to admit he is a scientist.
2. Get the expert to admit he is using the Scientific Method.
3. Cover the Scientific Method:
 - a. Establish objective;
 - b. Gather information;
 - c. Form a hypothesis;
 - d. Design the experiment;
 - e. Perform the experiment;
 - f. Verify the data;
 - g. Interpret the data;
 - h. Publish the results; and
 - i. Repeat the process.
4. Then ask these questions:
 - a. Do you admit there are variables that can change the result?
 - b. What are they?
 - c. Please provide documents that prove verification of your result.
5. Concluding question:
 - a. Without making a single assumption, can you tell us what the defendant's true BAC was at the time of driving?

6. We are looking for a unique and specific measurement which the expert cannot provide.
7. For a sample examination, see [EXHIBIT E](#).
8. See James A. Davis, *Your Expert Tender is Denied: Now What?*, DAVIS & DAVIS, ATTORNEYS AT LAW, P.C. (Apr. 27, 2018), <https://www.davislawfirmnc.com/wp-content/uploads/sites/231/2018/04/Your-Expert-Tender-is-Denied-Now-What.pdf>

XII. *Appendi and Blakeley: Procedure and Burdens of Proof:* [\(TOC\)](#)

- A. There is a presumption all DWI's are a level 4.
- B. The State must prove any grossly aggravating or aggravating factors beyond a reasonable doubt. N.C. Gen. Stat. §§ 20-179(a)(1) and (o):
 1. Exception: Prior DWI convictions.
- C. In Superior Court, the State shall provide notice to the defendant of all aggravating or aggravating factors at least 10 days prior to trial. N.C. Gen. Stat. § 20-179(a)(1).
- D. Defendant must prove any mitigating factors by a preponderance of the evidence. N.C. Gen. Stat. §§ 20-179(a)(1) and (o).
- E. There are procedures for a bifurcated trial and proof of previous convictions in Superior Court. N.C. Gen. Stat. § 15A-928.
- F. Tips:
 1. Contest prior conviction(s) if defendant was indigent, had no counsel, and had not waived counsel. *Boykin v. Alabama*, 395 U.S. 238 (1969).
 2. Remind jurists of the different burdens of proof in a close case.

XIII. Current Sentencing Scheme (after December 1, 2011): (TOC)

- A. Super aggravator: N.C. Gen. Stat. § 20-179(c)(4) (driving by the defendant while (i) a child under the age of 18 years, (ii) a person with the mental development of a child under the age of 18 years, or (iii) a person with a physical disability preventing unaided exist from the vehicle was in the vehicle):
 - 1. Automatic Level One punishment.
 - 2. Argue “void for vagueness” in that an ordinary person is not able to discern when passenger meets that definition. *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926).
- B. Aggravated Level One: Requires:
 - 1. Three or more grossly aggravating factors (GAF).
 - 2. Minimum of 120 days with probation up to a maximum of 12 to 36 months. If probation, must do 120 days of continuous alcohol monitoring (CAM), *inter alia*. Any special probation or prison term is served day-for-day.
 - 3. Shall be released four months prior to maximum term imposed with CAM during said period.
 - 4. May be fined up to \$10,000.00.
 - 5. Any other lawful condition.
- C. Continuous Alcohol Monitoring (CAM):
 - 1. SCRAM was the precursor.
 - 2. CAM can now be a condition of pretrial release if the defendant has a DWI conviction within seven years of the current date of offense. N.C. Gen. Stat. § 15A-534.
 - 3. Aggravated Level One offender: a mandatory minimum of 120 days of CAM:
 - a. Active sentence – Even if the offender receives an active sentence, he shall be released on the date equivalent to his maximum imposed

term of imprisonment less four months; the offender shall be supervised; and the offender shall abstain from alcohol consumption for the four-month period of supervision as verified by CAM. N.C. Gen. Stat. § 20-179(f3).

- b. Probationary sentence – Judge shall require the offender to abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by CAM. N.C. Gen. Stat. § 20-179(f3).

4. Level One and Level Two offender:

- a. Judge may require, as a condition of probation, that the offender abstain from alcohol consumption for a minimum of 30 days, to a maximum of the term of probation, as verified by CAM. N.C. Gen. Stat. § 20-179(h1).
- b. For Level One, 120 days of CAM may reduce the minimum term of imprisonment required from 30 days to 10 days. N.C. Gen. Stat. § 20-179(g).
- c. For Level Two, the statute only permits the court to allow 60 days of CAM pre-trial. With 90 days of CAM, the court may reduce the minimum term of imprisonment required from seven days to zero days.

5. Level Three, Four, and Five offender: Not addressed under the statute.

- 6. Beware: A defendant is required to complete 240 hours of community service for a Level 2 disposition if he has a DWI conviction within the last five years and the judge suspends any active sentence while imposing CAM. See N.C. Gen. Stat. § 20-179(h).

- 7. To test your knowledge of North Carolina DWI law and other criminal law issues, take the exam. See James A. Davis, *Think You Know Criminal Law? Version 3.0*, DAVIS & DAVIS, ATTORNEYS AT LAW, P.C. (Mar. 3, 2020), <https://www.davislawfirmnc.com/wp-content/uploads/sites/231/2020/03/Think-You-Know-Criminal-Law-Version-3.0.pdf>.



XIV. Habitual DWI: (TOC)

- A. Mandatory active sentence of at least 12 months. N.C. Gen. Stat. § 20-138.5(b).
- B. The sentence must commence at the expiration of any sentence being served.
- C. Substantive (not status) offense.
- D. 10-year look-back period.
- E. Lifetime suspension:
 - 1. The current law allows a hearing 10 years after completion of sentence. N.C. Gen. Stat. § 20-19(e4).

XV. License Suspensions/DMV Hearings: (TOC)

- A. First offense (no priors within seven years):
 - 1. DWI – one year revocation; and
 - 2. Commercial DWI – one year revocation.
- B. If second DWI within three years:
 - 1. DWI – four year revocation (hearing after two years); and
 - 2. Commercial DWI – four year revocation (hearing after two years).
- C. If third overall DWI and second within five years:
 - 1. DWI – permanent revocation (hearing after three years); and
 - 2. Commercial DWI – permanent revocation (hearing after three years).
- D. New fee schedules increasing costs for applicants have been issued for DMV hearings. See DMV Form HF-001 attached as EXHIBIT H.

XVI. Limited Driving Privileges: (TOC)

- A. Governing authority: N.C. Gen. Stat. §§ 20-179.3; 20-16.2; and local rules.
- B. Defendants must sign the form in advance of submission.
- C. Pre-trial LDP requires:
 - 1. Coversheet;
 - 2. \$100.00 fee;
 - 3. Substance abuse assessment;
 - 4. DL-123 (proof of liability insurance; only valid 30 days);
 - 5. Petition (signed by ADA). *See* AOC CVR-9 form;
 - 6. Copy of charge;
 - 7. Copy of driving record;
 - 8. Work letter (if outside standard hours); and
 - 9. Privilege itself (three copies).
- D. Post-trial LDP requires (on day of conviction):
 - 1. \$100.00 fee;
 - 2. Substance abuse assessment;
 - 3. DL-123 (proof of liability insurance; only valid 30 days);
 - 4. Work letter (if outside standard hours); and
 - 5. Privilege itself (three copies).

E. Willful refusal LDP requires:

1. A valid driver's license at the time of the refusal, or a license expired for less than one year;
2. No DWI or willful refusal within seven years;
3. No death or critical injury to another person;
4. A six-month waiting period before submission (even if defendant is convicted, found not guilty, or the case is dismissed prior to the end of the six-month waiting period);
5. If defendant is found not guilty or the case is dismissed after the six month waiting period, you must submit a Willful refusal LDP until the one year willful refusal suspension ends;
6. If defendant is convicted after the six month waiting period, you may submit the applicable LDP form (meaning the willful refusal suspension will run concurrent and expire before any other applicable suspension);
7. Successful completion of a substance abuse assessment and any recommended treatment prior to entry of the Willful refusal LDP;
8. No unresolved pending DWIs;
9. Revocation of the license for at least six months;
10. Coversheet;
11. Copy of judgment;
12. \$100.00 fee;
13. DL-123 (proof of liability insurance; only valid 30 days);
14. Waiver of Notice to be Heard (signed by ADA);
15. Work letter (if outside standard hours); and
16. Privilege itself (three copies).

- F. Ignition Interlock (when BAC is .15 or more or defendant convicted of DWI within seven years) requires:

Tip: An Ignition Interlock device is required on every vehicle registered to defendant.

1. Coversheet;
2. 45-day delay. Tip: Schedule installation a day or two before the 45 day period ends;
3. Proof of interlock installation;
4. Copy of judgment;
5. \$100.00 fee;
6. Substance abuse assessment;
7. DL-123 (proof of liability insurance; only valid 30 days);
8. Waiver of Notice to be Heard (signed by ADA);
9. Work letter (if outside standard hours); and
10. Privilege itself (three copies).

XVII. Helpful Hints: (TOC)

- A. A “cue” is one of the NHTSA indicators of impairment relating to phase one (vehicle in motion) and phase two (personal contact). A “clue” relates to phase three (pre-arrest screening) and refers to indicators of impairment for the three Standard Field Sobriety Tests (HGN, OLS, and WAT).
- B. Officers do not always send in the willful refusal affidavit. Delayed submissions can increase the revocation period and be problematic for the client:
1. Tip: DMV has a Customer Contact Center (919-715-7000) which has been helpful on occasion in the past.

- C. DMV cannot suspend driving privileges based upon an improperly completed “willful refusal affidavit.” *Lee v. Gore*, 206 N.C. App. 374 (2010) (officer failed to properly check box on affidavit).
- D. Make sure your client has paid his civil revocation fee before you submit a post-trial limited driving privilege (LDP).
- E. Be sure your client has only a driver’s license or identification card, but not both. DMV only recognizes one at a time. Otherwise, your client may not have a valid driver’s license.
- F. DMV treats a LDP just like a driver’s license regarding consequences of a ticket (i.e., points, suspensions, etc.).
- G. Argue “serious injury” and “reportable accident” as aggravating factors:
 - 1. Tip: Reportable accident is probably defined as a “reportable crash” which requires, among other things, total property damage of \$1,000.00 or more. N.C. Gen. Stat. § 20-4.01(33b)b.
 - 2. Case law on “serious injury” is a question of fact, inclusive of physical and mental injury. *State v. Everhardt*, 326 N.C. 777 (1990). Relevant factors include pain and suffering, loss of blood, hospitalization, and time lost from work. *State v. Tice*, 191 N.C. App. 506 (2008).
- H. Convictions for Felony DWI and DWI merge at sentencing.
- I. ECIR machines truncate numbers from the fourth digit causing a variation of .029, meaning you can argue a .10 could be a .07 (using in combination with a *Narron/Simmons* instruction).
- J. In suppression hearings, cite the issue, quote the law, and make your point. Jurists often equate brevity with genius.
- K. Videos are often the best evidence of innocence.
- L. A .08 is only a *prima facie* showing of a defendant’s alcohol concentration. *State v. Narron*, 193 N.C. App. 76 (2008) (holding a chemical analysis of .08 or more does not create an evidentiary or factual presumption, but simply states the standard for prima facie evidence of a defendant's alcohol concentration); *see also State v. Simmons* (holding prosecutor gave improper closing argument by injecting personal experiences of the *Narron* trial, creating a substantial likelihood that the

jury believed it was compelled to return a guilty verdict based on the chemical analysis. The analysis was “prima facie evidence” of an alcohol concentration of .11 rather than a presumption of same). Before the jury, argue the language of *Simmons*. It is neither creates a presumption nor mandates a finding of guilt. *But see State v. Fulton*, 222 N.C. App. 635 (2012) (unpublished) (holding trial court did not err in denying defendant’s request for a special jury instruction that the results of a chemical analysis exceeding a .08 did not create a “legal presumption” and the jury was not compelled to return a guilty verdict).

M. Additionally, ask the Court to take judicial notice of the SFST Manual. *See State v. Bonds*, 139 N.C. App. 627 (2000) (appellate court took judicial notice of the NHTSA manual for clues of impaired driving).

1. “The fact finder (court or jury) may accept the legal presumption and conclude that the driver was or was not impaired on the basis of the chemical test alone. However, *other evidence such as testimony about the defendant’s driving, odor of alcohol, appearance, behavior, movements, speech, etc. may be sufficient to overcome the presumptive weight of the chemical test.*” NAT. HIGHWAY TRAFFIC SAFETY ADMIN., *DWI Detection and Standardized Field Sobriety Tests* § 3, p. 9 (2015) (emphasis added).

N. Advice for cross-examination of the State’s retrograde extrapolation expert:

1. Understand the difference between the terms “social drinker” and “bolus experiment”;
2. The expert may claim food consumption is irrelevant except for a reading of .02 or less;
3. Recognize the blood alcohol difference between a serum and whole blood analysis (approximately 15%). *See* the conversion ratio on page 79;
4. The expert may claim calculations used (e.g., .0165 elimination rate, etc.) are lower than the norm;
5. Rates are different for men and women;
6. The expert may acknowledge the existence of an “absorption phase” but evade timing issues. *See State v. Babich*, 252 N.C. App. 165 (2017) (holding expert testimony failed the “fit” test because the analysis was not properly tied to the facts of the case since there was no evidence Defendant

was not in a post-absorption or post-peak state); *see also State v. Hayes*, 256 N.C. App. 559 (2017);

7. The expert may claim to be a “research scientist” but may be neither a medical doctor nor have a doctorate in related fields;
8. The expert may accept and reject various research and experts;
9. Consider whether the expert has been granted or denied expert status at trial; and
10. Get your own expert, consult with lawyers who concentrate on DWI defense, and utilize the latest expert examination techniques.

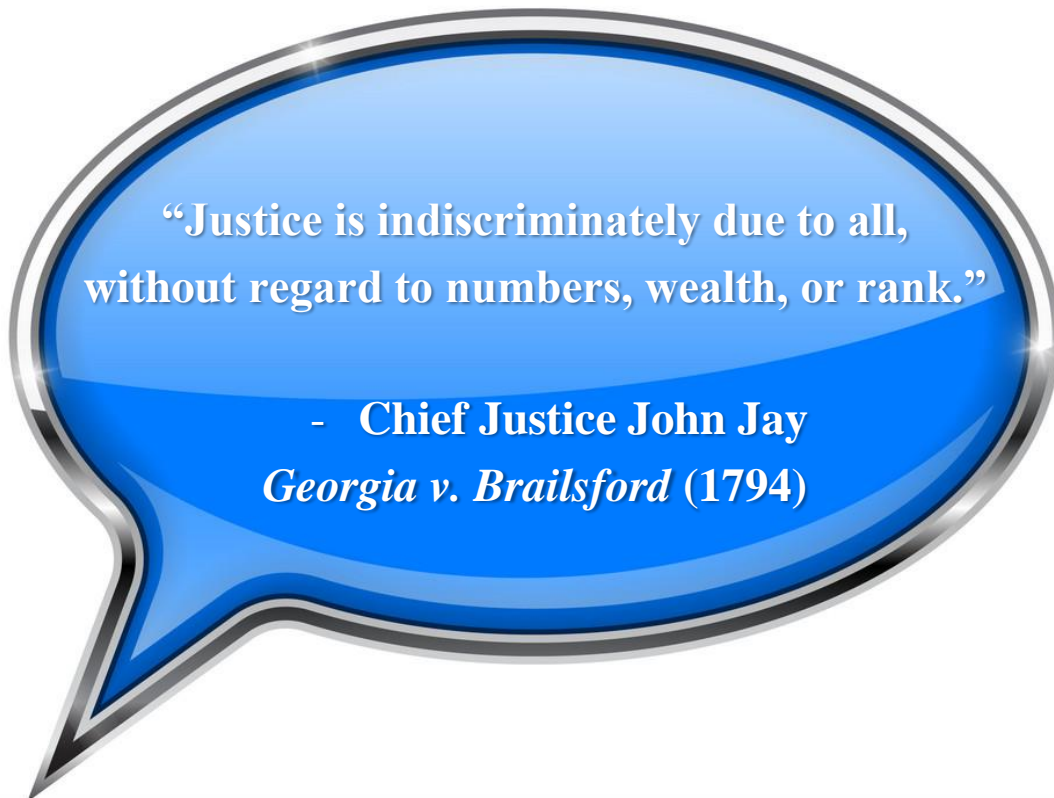
O. Strategies for a Superior Court jury trial:

1. Be the most reasonable person in the courtroom.
2. Appeal to both emotional and rational jurors.
3. Address bad facts in jury selection.
4. Win the jury with humility and vulnerability in voir dire.
5. Cross-examine with common sense (i.e., lack of evidence, knowledge, etc.).
6. Use evidence blocking.
7. Do not open the door.
8. Consider carefully whether the defendant should testify.
9. Last argument wins.
10. For a comprehensive understanding of behavioral science and legal principles related to jury selection, *see* James A. Davis, *2021 Update to Jury Selection: The Art of Peremptories and Trial Advocacy*, DAVIS & DAVIS, ATTORNEYS AT LAW, P.C. (Sept. 16, 2021), <https://www.davislawfirmnc.com/wpcontent/uploads/sites/231/2021/09/2021-Update-to-Jury-Selection-with-Exhibits.pdf>.

XVIII. Current Trends: (TOC)

- A. Active sentences for level threes;
- B. Superior Court jury trials are difficult but may yield better results; and
- C. Judicial, law enforcement, and public perception: one hot topic.

Epilogue: (TOC)



NORTH CAROLINA DWI LAW: WHERE AM I AND HOW DID I GET HERE?

JAMES A. DAVIS

EXHIBIT A

STATE OF NORTH CAROLINA

COUNTY OF ROWAN

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

FILE NO.: 21 CR _____

STATE OF NORTH CAROLINA

v.

Defendant.

NOTICE OF SUPPRESSION
OR DISMISSAL ISSUE(S)

Defendant, by and through counsel, hereby gives notice in advance of hearing of the following suppression or dismissal issue(s):

1. Admissibility of chemical analysis ☐
2. Admissibility of expert evidence ☐
3. Admissibility of FST's ☐
4. Aggravating factor(s) ☐
5. Boykin ☐
6. Bumgarner issue ☐
(right to witness at jail or additional chemical analysis if unable to make bond issue)
7. Checking station/Checkpoints ☐
8. Collateral estoppel issue ☐
9. Consent to search ☐
10. Consent to testing ☐
11. Double jeopardy issue ☐
12. Ferguson/Hill/Myers/Gilbert issue ☐
(Right to witness issue)
13. HIPPA violation ☐
14. Identification procedures ☐
15. Individual frisk ☐
16. Inventory search ☐
17. Knoll/Conditions of pretrial release issue ☐
18. Miranda/Custody/Interrogation issues ☐
19. Pretextual stop ☐
20. Privilege violation ☐
21. Probable cause to arrest ☐
22. Probable cause to search ☐
23. Public vehicular area Issue ☐
24. Reasonable and articulable suspicion/stop ☐
25. Right to an independent test ☐
26. Right to continue with trial ☐
27. Right to recalendar ☐
28. Right to search ☐

Notice of Suppression or Dismissal Issue(s)

- 29. Statements by Defendant ☐
- 30. Scope of consent ☐
- 31. Scope of detention/stop ☐
- 32. Scope of search/frisk ☐
- 33. Search warrant ☐
- 34. Statutory violation (N.C.G.S. 20-38.4; 20-38.5;
15A-534.2) ☐
- 35. Territorial jurisdiction ☐
- 36. Test results ☐
- 37. Valid waiver of rights ☐
- 38. Vehicle frisk/search ☐
- 39. Other _____ ☐

This the _____ day of _____, 2021.

JAMES A. DAVIS
ATTORNEY FOR DEFENDANT
DAVIS & DAVIS, ATTORNEYS AT LAW, P.C.
215 NORTH MAIN STREET
SALISBURY, N.C. 28144
TELEPHONE: (704) 633-1900

**NORTH CAROLINA DWI LAW:
WHERE AM I AND HOW DID I GET HERE?**

JAMES A. DAVIS

EXHIBIT B

STATE OF NORTH CAROLINA

COUNTY OF ROWAN

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

FILE NO.: 21 CR _____

STATE OF NORTH CAROLINA

v.

Defendant.

)
)
)
)
)
)

PRELIMINARY INDICATION ON
DEFENDANT'S MOTION TO SUPPRESS

This matter coming on to be heard before the undersigned District Court Judge presiding at the January 2, 2020, and January 5, 2020, Criminal District Court terms. Defendant was present and represented by James A. Davis, and the State was represented by Assistant District Attorney _____. The Court having heard Defendant's Motion, evidence presented, and arguments from the State and Defendant, makes the following:

FINDINGS OF FACT

1. On March 18, 2017, at 4:25 p.m., Officer _____ of the East Spencer Police Department received a dispatch of a possible intoxicated driver near the Weant Street Apartments in East Spencer, N.C.

2. The caller described the vehicle as a white Ford Mustang occupied by two black males.

3. Officer _____ first saw a white Ford Mustang near Bringle Ferry Road on Long Street within the city limits of Salisbury, N.C.

4. There was a "fair amount" of traffic, and several cars separated Officer Bard from the white Ford Mustang.

5. Officer _____ followed the white Ford Mustang another 1.3 miles into Salisbury, N.C., stopping the vehicle on East Horah Street in Salisbury, N.C.

6. Officer _____ did not observe any violations of the law while following said vehicle until a couple city blocks of the stop.

7. The stop occurred two miles outside of the East Spencer, N.C., city limits.

8. Officer _____ requested dispatch to notify the Salisbury Police Department of the stop.

9. Officer _____ of the Salisbury Police Department was dispatched to the scene.

10. Officer _____ observed that Defendant's eyes were glassy, his speech was slurred, and noticed an odor of alcohol.

11. Defendant declined to perform standard field sobriety testing.

12. No portable breath test result was obtained.

13. Defendant was arrested for Driving While Impaired.

14. Officer _____ was not familiar with Defendant's pattern of speech.

15. No competent evidence was introduced of compliance with the mutual aid policy between the East Spencer and Salisbury Police Departments.

16. The Court's preliminary indication is that dismissal is proper.

CONCLUSIONS OF LAW

1. The stop was beyond the territorial jurisdiction of N.C. Gen. Stat. 15A-402, *et. seq.*

2. There were insufficient facts supporting probable cause to arrest for Driving While Impaired relying on the analysis of *State v. Sewell*, 239 N.C. App 132 (2015); *State v. Overocker*, 236 N.C. App. 423 (2014); and *State v. Parisi*, 796 S.E.2d 524 (2017).

ORDER

1. The Court preliminarily indicates dismissal is proper.

This the ____ day of _____, 2021.

HONORABLE DISTRICT COURT JUDGE

NORTH CAROLINA DWI LAW: WHERE AM I AND HOW DID I GET HERE?

JAMES A. DAVIS

EXHIBIT C

Cross Examination Techniques on HGN

I. General:

- A. Address officer training. Some officers have only been trained in BLET. Most have completed the initial training taught by NHTSA on SFST's known as NHTSA DWI Detection and SFST Testing. There are seven different NHTSA training courses and manuals. The first course almost exclusively deals with alcohol impairment. Most officers have no academic training in ophthalmology or neurology.
- B. Officers are trained to describe DWI evidence clearly and convincingly, compile complete and accurate field notes and incident reports, review all notes, and talk to the prosecutor before trial.
- C. Officer's observations may not be consistent with the type of intoxication alleged by the State. If impairment involves controlled substances, ask about the involvement or availability of a DRE. A DRE evaluation is far more comprehensive and may be very helpful when drugs are a contributing or sole cause of impairment. For example, officers may claim observation of all six HGN clues and impairment from cannabis. A person under the influence of cannabis will not show any HGN.
- D. Medical conditions may mimic impairment by alcohol or drugs. A good primer is the Advanced Roadside Impaired Driving Enforcement (A.R.I.D.E.) training program.
- E. Do not let an officer testify about NHTSA research, including percentages of accuracy or likely BAC's. Rule 702 (a1) addresses HGN and DRE testimony and specifically precludes evidence on a specific alcohol concentration.
- F. Subpoena any video of the actual test. Compare the officer's administration to testing requirements. HGN is a standardized test and must be administered as prescribed; otherwise, it is not a valid test. Stake the officer out, use the video, and point out inconsistencies from the officer.

II. Specific:

- A. HGN is one of three NHTSA approved SFST tests which are "psychophysical divided attention tests," or tests assessing mental and physical impairment via information processing, short term memory,

balance, small muscle control, and limb coordination. SFST Student Manual Page VII-4.

- B. Fertile areas of examination include the science of HGN, proper administration of the test, test interpretation, and limitations on officer training.
- C. Have the officer define nystagmus. Nystagmus means an involuntary jerking of the eyes. SFST Student Manual Page VII-2. Jerk nystagmus means the eye rapidly corrects itself via a saccadic or fast movement. HGN is a lateral jerking when the eye gazes to the side, and VGN is a vertical jerking as the eye gazes upwards. Nystagmus is a natural condition which becomes more pronounced with certain types of impairment. Google nystagmus at Wikipedia for a visual illustration. Officers are asked to check the suspect's eyes prior to administration of the HGN test for resting nystagmus. SFST Student Manual Page VIII-6. The science: Nystagmus occurs when there is a disturbance of the vestibular inner ear system or oculomotor control of the eye due to alcohol, CNS depressants, dissociative anesthetics, and most inhalants. It is an involuntary and rapid movement of the eyeball which visually looks like a marble bouncing or rolling on sandpaper. Nystagmus neither affects vision nor is the subject aware of its occurrence. Nystagmus is defined in various manuals as clear, distinct, pulsating, unmistakable, and very pronounced.
- D. Insure the officer properly performed the instructional phase.
- E. Proper administration of the test includes, sufficient light to insure the subject's eyes can be seen clearly; avoiding flashing lights of the police cruiser or passing cars; inquiry about contact lenses and eye glasses, removal of eye glasses, recognition that hard contact lenses may come out at maximum deviation, and asking about any medical condition that would prohibit or affect the test; and strict adherence to the test protocol.
- F. There are three possible clues for each eye, totaling six clues. They are lack of smooth pursuit (i.e., does the eye move smoothly or jerk noticeably?), onset of nystagmus prior to forty-five degrees, and distinct and sustained nystagmus at maximum deviation (i.e., when the eye moves as far as it can to the side and is kept at that position a minimum of four seconds, does the eye continue to distinctly jerk?).
- G. Test administration for lack of smooth pursuit: Each pass should take approximately two seconds from the middle to the edge, each eye has two passes, and the test is repeated. The test should take about sixteen seconds.
- H. Test administration for onset of nystagmus prior to forty-five degrees: The speed of the stimulus should take approximately four seconds to reach the

edge of the suspect's shoulder, the stimulus should be returned at a speed which takes approximately four seconds to reach the edge of the other shoulder, and the procedure should be repeated. The edge of the shoulder serves as the forty-five degree marker. Law enforcement does not use a measuring device (e.g., a protractor).

- I. Test administration for distinct and sustained nystagmus at maximum deviation: Move the stimulus to the right until the suspect's eye has gone as far as possible. Usually, no white will be showing in the corner of the eye. Hold for a minimum of four seconds and observe for distinct and sustained nystagmus. Move the stimulus to the other side in the same manner. Repeat the procedure. Each pass should last at least eight seconds as maximum deviation should be held at least four seconds, meaning this test should take a minimum of sixteen seconds. People exhibit slight jerking of the eye at maximum deviation when unimpaired. SFST Student Manual Page VIII – 5.
- J. If the HGN test is conducted properly, there should be six total passes and the test should take at least fifty-two seconds.
- K. Ask the officer to define the difference between a twitch, tremor, and nystagmus. A slight, barely visible tremor does not constitute distinct jerking. Drug Recognition Expert School Session IV Page 13.
- L. Ask the officer to explain the difference between slight, noticeable and distinct (and sustained) nystagmus.
- M. Ask the officer to explain the use of estimates in lieu of measuring instruments. He will state he was trained to perform the test in that manner. Inquire about the following: (1) Humans are physically different, and one person may have narrow shoulders while another has wide shoulders. The estimate of forty-five degrees from nose to shoulder is likely to be inaccurate; (2) The stimulus is to be held twelve to fifteen inches from the suspect's face. Law enforcement does not use a ruler or measuring device to determine the distance. Ask the officer the specific distance. Make him admit it could be the difference of several inches (i.e., 12, 13, 14, or 15 inches). Then have him concede how far the stimulus is positioned from the suspect's nose is critical factor in estimating the forty-five degree angle. SFST Student Manual Page VIII – 6; (3) If the officer is a DRE, he will testify there is an approximate statistical relationship between BAC and the angle of onset. The formula is $BAC = 50 - \text{angle of onset}$. Drug Recognition Expert School Session IV Page 13. For example, if the angle of onset is forty-two degrees, the BAC is a .08. (e.g., $50 - 42 = .08$); and (4) Make the officer admit one degree is the difference in two of six clues (e.g., onset at 44 degrees is not a clue as opposed to 45 degrees).

- N. For DRE testimony, HGN will be present if the suspect is impaired by CNS depressants, dissociative anesthetics, and most inhalants. A.R.I.D.E. Session V – Page 10; Drug Recognition Expert School Session IV Page 12. HGN will not be present, regardless of impairment, if the impairing substance is a CNS stimulant, hallucinogen, narcotic analgesic, or cannabis. A.R.I.D.E. Session V – Page 10; Drug Recognition Expert School Session IV Page 14.
 - O. A rich topic for cross examination is whether the officer conducted the test in a non-standardized fashion.
 - P. There are more than forty different types of nystagmus, including optokinetic, pathological, resting, natural, fatigue, physiological (i.e., nystagmus occurs naturally when the eye is fixated), among others. SFST 4 Hour Refresher Page III – 5. Causes include congenital disorders; acquired or CNS disorders; toxicity or metabolic reasons; rotational movement; certain drugs or alcohol; and an array of other causes. At most, officers may be trained on two types, HGN and VGN.
 - Q. There are over thirty-eight natural causes of nystagmus, including influenza, vertigo, hypertension, eye strain, eye muscle fatigue, eye muscle imbalance, caffeine, nicotine, aspirin, diet, chilling, heredity, and others. Case law and medical literature is replete with this information.
- III. Conclusion:
- A. In sum, while hailed as the most accurate of the SFST's, HGN has been highly criticized and major deficiencies exist in the testing methodology and analysis therefrom.

NORTH CAROLINA DWI LAW: WHERE AM I AND HOW DID I GET HERE?

JAMES A. DAVIS

EXHIBIT D

Issued by the Toxicology Technical Leader

NC State Crime Lab
Toxicology Reporting Index

Version 15
Effective Date: 2/24/2020

The LOD (limit of detection) is the lowest concentration of the drug in whole blood that can be reproducibly detected.

The LLOQ (lower limit of quantitation) is the lowest concentration that will be reported for a process.

All concentrations shown are in ng/ml unless otherwise indicated.

The following notations indicate that a derivative of the drug is referenced: * = TMS derivative, ** = dTMS derivative, and *** = acetyl derivative.

The following notation indicate that the chirality of a drug is referenced: ^ = d-isomer

The following notation indicates that the compound is not part of the QSCREEN method: Ø

Immunoassay Screened Categories / Substances	Process						UoM	therapeutic range (ng/ml)	reference
	EIA cut-off concentration	QSCREEN	BSPE	ANSPE	PHEALLE	BCLE			
The drugs listed in the table below can be detected. If an LOD has been established it is reported below.									
Amphetamine/MDA									
Amphetamine	20 [^]				12.5***			20-100	(1)
MDA					12.5***			<400	(1)
Phentermine								30-100	(1)
Barbiturates									
Amobarbital		Ø						1000-5000	(1)
Butabarbital		Ø						5000-15000	(1)
Butalbital		Ø		250				1000-5000	(1)
Phenobarbital	300	Ø		250				10000-40000	(1)
Secobarbital		Ø						1500-5000	(1)
Benzodiazepines									
7-Aminoclonazepam		5	>300					n/a	
7-Aminoflunitrazepam		20							
Alpha-hydroxyalprazolam									
Alprazolam		20	50					5-80	(1)
Bromazepam								50-200	(1)
Chlordiazepoxide		5							
Clonazepam		5						4-80	(1)
Delorazepam									
Desalkylflurazepam		30						n/a	
Diazepam		20	25					100-2500	(1)
Diclozepam		5						n/a	
Estazolam		5						55-200	(1)
Etizolam		10						8-20	(1)
Flualprazolam									
Flubromazepam								n/a	
Flubromazolam		20						n/a	
Flunitrazepam		5							
Flurazepam		10							
Lorazepam									
Lorazepam Glucuronide									
Midazolam		100	25					40-250	(1)
Nitrazepam								30-100	(1)
Nordiazepam		25	25					20-800	(1)
Oxazepam	50	40	>1500					200-1500	(1)
Phenazepam		200						20-40	(1)
Temazepam		20						20-900	(1)
Triazolam		10						2-20	(1)

NC State Crime Lab
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Immunoassay Screened Categories / Substances	Process						UoM	therapeutic range (ng/ml)	reference
	EIA cut-off concentration	QSCREEN	BSPE	ANSPE	PHEALLE	BCLE			
Cannabinoids									
Cannabidiol									
Cannabinol		100							
Tetrahydrocannabinol (THC)						1	+/- 20%	5-50	(1)
11-hydroxy-Δ-9-tetrahydrocannabinol (11-OH-THC)		Ø				1	+/- 19%	n/a	
11-nor-Δ-9-tetrahydrocannabinol-9-carboxylic acid (THCA)	25					5	+/- 28%	n/a	
Methamphetamine									
MDMA					12.5***			100-350	(1)
Methamphetamine	20*				12.5***			-100	(1)
Cocaine Metabolite									
Benzoylcegonine	50	2.5	750/100*					100	(1)
Cocacethylene		2.5	10					n/a	
Cocaine		1	25					50-300	(1)
Ecgonine Methyl Ester									
Opiates/Opioids									
Codeine		20	25					30-250	(1)
Codeine-6β-D-Glucuronide		50							
Dihydrocodeine		10						30-250	(1)
Heroin		30							
Hydrocodone		10	25					10-50	(1)
Hydromorphone		20	50*					5-15	(1)
6-Monoacetylmorphine (6MAM)		25	150/25*					n/a	
Morphine	50	10	50**					10-100	(1)
Morphine-3-β-D-Glucuronide									
Norhydrocodone		5							
Noroxycodone		50						n/a	
Oxycodone	25	5	50					5-100	(1)
Oxymorphone -3-β-D-Glucuronide									
Oxymorphone		40	150					1-7	(2)
Methadone									
EDDP		25							
Methadone	25	10	25					50-750	(1)
Carisoprodol/Meprobamate									
Carisoprodol	500	25		125				10000-30000	(1)
Meprobamate		175		250				5000-10000	(1)
Tramadol									
Tramadol	50	10	25					100-300	(1)
O-Desmethyltramadol		5	50					30-40	(1)
Zolpidem									
Zolpidem (Ambien)	20	2.5	12.5					80-150	(1)
Non Immunoassay Screened Drugs									
2,5-DMA		150							
25B-NBOME		20							
25C-NBOME		25							
25E-NBOME		20							
25H-NBOME		5							
25I-NBOME		10							

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Immunoassay Screened Categories / Substances	Process						UoM	therapeutic range (ng/ml)	reference
	EIA cut-off concentration	QSCREEN	BSPE	ANSPE	PHEALLE	BCLE			
25T4-NBOMe		10							
25T7-NBOMe		20							
2C-B		50							
2C-E		40							
2C-I		20							
2C-T-2		40							
3,4-DMA									
3,4-DMMC		50							
4-ANPP		5							
4-FMA									
4-hydroxy DMT									
4-MEC									
5-APB									
5-IAI		25							
5-MEO-DALT									
5-MEO-DIPT		20							
5-MEO-DMT		20							
6-APB									
Acetaminophen		25							
Acetyl Fentanyl		2.5							
Acyl Fentanyl		5							
Alpha - PPP		50							
Alpha - PVP		40							
Amitriptyline		50	10					50-300	(1)
Amoxapine		10							
Aripiprazole		10							
Atomoxetine									
Benzocaine									
Benzphetamine		100						10-180	(1)
Benzylpiperazine									
Brompheniramine		10							
Buprenorphine		20							
Buprenorphine Glucuronide									
Bupropion								10-20	(1)
Buspirone		10							
Butylone								n/a	
Butyryl Fentanyl		5							
Carbamazepine		2.5		250				2000-12000	(1)
Carbinoxamine		5						~ 20-40	(1)
Carfentanil		2.5							
Cathinone									
Chlorpheniramine		20	10					3-17	(1)
Chlorpromazine		20						30-500	(1)
Chlorzoxazone		0							
Citalopram		20	25					50-110	(1)
Clozapine		10						20-400	(1)

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Immunoassay Screened Categories / Substances	Process						UoM	therapeutic range (ng/ml)	reference
	EIA out-off concentration	QSCREEN	BSPE	ANSPE	PHEALLE	BCLLE			
Clonidine		10						1-4	(1)
Clozapine		50						100-600	(1)
Cotinine									
Crotonyl Fentanyl		5							
Cyclobenzaprine		25	25					3-40	(1)
Cyclobutyl Fentanyl									
Cyclohexyl Fentanyl		25							
Cyclopropyl Fentanyl		5							
DBZP		20							
Desipramine		100						10-500	(1)
(Dextro)Methorphan		10	50					10-40	(1)
Dibutylone		20							
Diltiazem		5						30-250	(1)
Diphenhydramine		50	12.5					50-100	(1)
DMT		100							
DOB		20							
Doxepin		20	25					10-200	(1)
Doxylamine		10	50					50-200	(1)
Duloxetine		100							
Ephedrine (Pseudo)		300						50-800	(1)
Ethylamphetamine									
Ethylone								n/a	
N-Ethylpentylone		100							
Fenfluramine		50							
Fentanyl		2.5	50					3-300	(1)
Flephedrone									
Fluoxetine		40	100					120-500	(1)
Furanylfentanyl		2.5							
Gabapentin		25							
Guafenesin		150							
Haloperidol		2.5						1-20	(1)
Hydroxy Bupropion		40							
Hydroxyzine		2.5						50-100	(1)
Imipramine		200						50-350	(1)
Isobutryl Fentanyl		2.5							
Isopropyl U-47700		0							
JWH-015		20							
JWH-122 (4-Hydroxypentyl Metabolite)		10							
JWH-250 (4-Hydroxypentyl Metabolite)		5							
Ketamine		10						1000-6000	(1)
Lamotrigine		500	300					1000-14000	(1)
Levamisole									
Levetiracetam									
Lidocaine		40	25					1000-5000	(1)
Lisdexamfetamine		20							
Loratadine		10							
LSD		10							

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Immunoassay Screened Categories / Substances	Process						UoM	therapeutic range (ng/ml)	reference
	EIA cut-off concentration	QSCREEN	BSPE	ANSPE	PHEALLE	BCLE			
Maprotiline		10							
MDOB									
MDEA									
3,4-methylenedioxypyrovalerone (MDPV)		20	25					n/a	
Meclizine		20							
Meperidine		25						100-800	(1)
Mephedrone								n/a	
Mescaline		50							
Metaxalone		500		250				<2000-8600	(2)
Methaqualone		20						1000-3000	(1)
Methcathinone									
Methedrone									
Methocarbamol		20							
Methoxetamine		5							
Methoxyacetyl Fentanyl		1							
Methylone		40						n/a	
Methylphenidate			25					10-60	(1)
Metoclopramide		10							
Mirtazapine		20	25					30-300	(1)
Mitragynine		20						n/a	
Naloxone		20							
Naproxen									
Norbuprenorphine		20							
Norfentanyl		40	150					n/a	
Norketamine									
Normeperidine		20						n/a	
Norquetiapine		0						n/a	
Nortriptyline			200					20-150	(1)
Noscapine		2.5							
Ocfentanil		5							
O-Desmethylenlafaxine		2.5	100					100-400	(1)
Olanzapine		40							
Orphenadrine		50						100-600	(1)
Oxcarbazepine		20		1000				10000-35000	(1)
Papaverine		2.5							
para-fluoro Tetrahydrofuran Fentanyl		10							
Paroxetine		150	>250					10-120	(1)
PCP (phencyclidine)		100	10					10-200	(1)
Pentazocine		10						10-200	(1)
Pentadrone									
Pentyone		40							
Para-Fluorobutyl Fentanyl		2.5							
Para-Fluoroisobutyl Fentanyl		25							
Para-MethoxyButyl Fentanyl		50							
Phenmetrazine									
Phenyl Fentanyl		5							
Phenylpropanolamine									

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Immunoassay Screened Categories / Substances	Process						UoM	therapeutic range (ng/ml)	reference
	EIA out-off concentration	QSCREEN	BSPE	ANSPE	PHEALLE	BCLLE			
Phenytoin				200				5000-20000	(1)
Pregabalin									
Primidone				125				4000-15000	(1)
Procalinamide		25							
Procaine		50							
Promethazine		25						50-400	(1)
Propoxyphene		20						50-500	(1)
Psilocin									
Psilocybin									
Pyrovalerone		40							
Quetiapine		2.5	2000					100-500	(1)
Risperidone		5							
Sertraline		10	25					10-250	(1)
Sildenafil		50							
Stanozolol		40							
Tapentadol		20						50-130	(1)
Tetrahydrofuran Fentanyl									
TFMPP		50							
Thioniazine		25						100-2000	(1)
Topiramate									
Trazodone		25	100					700-1000	(1)
U-47700		40						n/a	
U-49900									
Valeryl fentanyl		5							
Venlafaxine		20	50					100-400	(1)
Verapamil		10						10-400	(1)
W-18		10							
Zaleplon		5							
Ziprasidone		50							

The drugs listed in the table below cannot be detected in blood, by current state crime laboratory procedures.

Non-screened Drugs
Butanediol
GHB (gamma-hydroxybutyric acid)
GBL (gamma-butyrolactone)
Lithium
Naloxone
"Synthetic Cannabinoids"
Topiramate
Valproic acid
Zopiclone

References:

- ① - Schulz, Iwerzen-Bergmann, Andresen, Schmoldt, "Therapeutic and toxic blood concentrations of nearly 1,000 drugs and other xenobiotics", Crit Care, 2012, pages 1-146.
 ② - North Carolina Office of the Chief Medical Examiner Toxicology Drug Chart, Last Modified August 18, 2015 <https://www.ocme.dhhs.nc.gov/toxicology/index.html>

Volatile Analysis (a.k.a. - Blood Alcohol Concentration (BAC) analysis)			
	Lower Limit		Quantitative
Blood Alcohols			
Ethanol	0.01		4%
Isopropanol (2-propanol)	0.01		7%
Methanol	0.01		11%
Acetone	0.01		14%
Non-Alcohol Volatiles			
Chloroethane			
1,1-Difluoroethane			
Toluene			
Ether (diethyl ether)			

Signature of Approver:

Wayne
Lewallen

Digitally signed by
Wayne Lewallen
Date: 2020.02.24
10:39:25 -05'00'

NORTH CAROLINA DWI LAW: WHERE AM I AND HOW DID I GET HERE?

JAMES A. DAVIS

EXHIBIT E

INTRODUCTION

In a Superior Court DWI prosecution, Paul Glover, the leading DWI expert for the State of North Carolina, was excluded as an expert witness. My preparation included reviewing my prior examination(s) of Mr. Glover, reading transcripts of his testimony, distilling strategies gleaned from various CLEs, preparing a notebook of reliable authorities and articles on retrograde extrapolation, and crafting my cross examination.

CASE FACTS

Defendant hit several mailboxes driving his truck in the late afternoon on a country road. Neighbors observed the event and called law enforcement. A trooper went to defendant's home about an hour later, found him highly intoxicated in bed, and arrested him for DWI. Defendant asserted he got excited, drank most of a pint of liquor, and blew a .30. I filed a motion for a Rule 702(a) hearing. Post-hearing, Mr. Glover was excluded as an expert witness.

The strategy and method I used to examine Mr. Glover is in outline form. His general responses are contained within the parenthetical following each entry:

PRELIMINARY COMMENTS TO COURT

Alerted the judge prehearing Mr. Glover was the State's flagship DWI expert, the case was an absorption phase and not a retrograde extrapolation case, and I was puzzled about the theory Mr. Glover would espouse.

Asked the court to release the defendant before *voir dire* to eliminate observations of defendant.

EXAMINATION

Covered academic background (BS and Master's Degrees in biology from FSU).

Covered work history (generally in lab research, a police officer, and 17th year with state of N.C.; emphasized he is currently a police officer).

Covered prior acceptance by state and federal courts as an expert (310 to 320 times; tendered as expert in various fields of expertise; testified nine times for the defense).

Covered current occupation (head of Forensic Tests for Alcohol Branch within DHHS; trains officers on breath tests using instruments; conducts training on SFST's and DRE's; oversees permit issuance of chemical analysts who draw blood for alcohol and drug tests; and trains

judges, prosecutors, and law enforcement officers in the testing and effects of alcohol and drugs).

Asked if he was a research scientist (yes).

Asked if he did any studies of alcohol in three previous jobs (no).

Asked if he had heard any testimony in the instant case (no).

Requested the factual basis he was relying on to provide an opinion (rough knowledge based on conversations with the prosecutor and review of charging documents).

Requested factual basis for time of alcohol consumption either before, during, or after driving (said he would start at end point of .30 breath test at 9:19 p.m. and work backwards).

Requested again the factual basis to render an opinion (male, 130 lbs., review of officer's DWIR form, history of alcohol use, preventive maintenance was current, no statements by defendant).

Asked if he spoke with the officer (no).

Asked again if there were other facts which helped him render an opinion (he began to discuss rate of elimination, etc.; I redirected).

Asked if he knew the type of alcohol consumed (no).

Asked if he was testifying regarding a particular theory, retrograde extrapolation or another (he did not know).

Asked why he was here (because he was faxed information and subpoenaed to come, and he may be used on direct or rebuttal).

Asked if prepared a report (no).

Asked if he had ever been denied expert status (yes; one time in Brunswick County).

Asked if he was a medical doctor (no).

Asked if he had a degree in a related discipline like physiology or pharmacology (no).

Asked if he had a doctorate in those fields (no; he says he is certified by the Forensic Toxicology Certification Board as a diplomate in alcohol toxicology).

Asked which fields of expertise he expected to apply in the instant case (breath alcohol testing, Intoxilyzer 5000, blood alcohol physiology, pharmacology, and related research).

Asked about process of alcohol consumption, absorption, and elimination.

Asked if he agreed there is an absorption phase (yes).

Covered factors that affect absorption (food, gender, alcohol concentration, etc.).

Asked if there is a peak alcohol concentration (yes; between 15 and 90 minutes; normally expect about 45 minutes).

Asked if he agreed there is a large degree of variability in absorption (it is very difficult to measure; there is some variability).

Asked about articles and research in medical journals on ethanol metabolism (he gets his information from reading journals).

Quoted hypotheses, findings, and statements from reliable authorities and journals on rates of absorption (e.g., factors include concentration of alcohol, speed of consumption, rate of gastric emptying, etc.).

Asked about elimination rates (accepts .012 to .054 as the credible range for rates of elimination; uses the rate of .0165 because of *State v. Cato*).

Asked about NHTSA training standards (he does not personally do NHTSA training).

Asked about NHTSA comparisons of beer, wine, and liquor consumption with similarly-sized, same gender individuals and resulting alcohol concentrations (he was unaware of same).

Questioned him about a number of published studies, medical journal articles, and expert opinions; asked him who were reliable authorities in the field; and asked what articles he found reliable, and why. Used quotes from persons he deemed reliable authorities to show disagreement within the field, even on retrograde extrapolation.

Asked if blood, breath, or urine testing was more reliable (stated he did not know what I meant by reliable).

Asked him to show the court any authority supporting his position (none).

Asked if he used the scientific method (yes).

Walked through the scientific method (i.e., establish an objective, gather information, form a hypothesis, design the experiment, perform the experiment, verify the data, interpret the data, repeat) (he agreed).

Asked to admit there are variables that would change his opinion (yes).

Identified variables (food, gender, etc.).

Asked to admit that, without making a single assumption, he could not tell the defendant's BAC at the time of driving (agreed he could not).

Asked to admit he recently testified on a theory of odor analysis (yes).

Asked about his hypothesis on odor analysis and opinion of a specific alcohol concentration (.16 to .18).

Asked if the appellate court said it was a novel scientific theory (yes).

Asked if the appellate court said it was unreliable (he did not believe so).

Refreshed his recollection of the court's holding and findings.

Asked if he had received peer review (he asked what I meant; stated there is no peer review unless you publish).

Asked if he had published (published in a newsletter, etc.).

Asked to name any reputable authorities in the field who had done a peer review on him (none).

My argument: Mr. Glover had insufficient, and incorrect, facts; did not articulate application of any field(s) of expertise (or their principles/methods) to the facts; *a fortiori*, did not reliably apply any field of expertise (or principles/methods) to facts; Rule 702(a), as amended, specifically required the same; the proffered expert recently espoused, as described by our appellate court, a "novel theory" on odor analysis (ethanol has no odor); the purpose of *voir dire*; the instant case was an absorption case, and the proffered expert could not assist the trier of fact; covered "indices of reliability," citing the absence of established techniques, visual aids, independent research, or peer review, thus leading the jury to sacrifice its independence and accept scientific hypothesis on faith; noted a prior example of expert exclusion when a witness had merely read published articles and research; referenced infringement of Rule 609 (limiting impeachment of crimes to cross-examination) and Rule 405(a) (barring expert evidence on credibility of a witness; *see also State v. Hammett*, 361 N.C. 92 (2006)) in light of his expected testimony about "experienced drinkers" and apparent intent to reference defendant's prior DWI's in the State's case-in-chief; and a final concern about appellate review, highlighting again Mr. Glover's lack of familiarity with the evidence, failure to apply the principles/methods of any field of expertise, and the requirement he do so reliably.

NORTH CAROLINA DWI LAW: WHERE AM I AND HOW DID I GET HERE?

JAMES A. DAVIS

EXHIBIT F

INDICATORS CONSISTENT WITH DRUG CATEGORIES

	CNS DEPRESSANTS	CNS STIMULANTS	HALLUCINOGENS	DISSOCIATIVE ANESTHETICS	NARCOTIC ANALGESICS	INHALANTS	CANNABIS
HGN	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	NONE
VGN	PRESENT (HIGH DOSE)	NONE	NONE	PRESENT	NONE	PRESENT (HIGH DOSE)	NONE
LACK OF CONVERGENCE	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	PRESENT
PUPIL SIZE	NORMAL (1)	DILATED	DILATED	NORMAL	CONSTRICTED	NORMAL (4)	DILATED (6)
REACTION TO LIGHT	SLOW	SLOW	NORMAL (3)	NORMAL	LITTLE TO NONE VISIBLE	SLOW	NORMAL
PULSE RATE	DOWN (2)	UP	UP	UP	DOWN	UP	UP
BLOOD PRESSURE	DOWN	UP	UP	UP	DOWN	UP/DOWN (5)	UP
BODY TEMPERATURE	NORMAL	UP	UP	UP	DOWN	UP/DOWN/NORMAL	NORMAL
MUSCLE TONE	FLACCID	RIGID	RIGID	RIGID	FLACCID	NORMAL OR FLACCID	NORMAL

FOOTNOTE: These indicators are those most consistent with the category, keep in mind that there may be variations due to individual reaction, dose taken and drug interactions.

- (1) Soins, Quaaludes and some anti-depressants usually dilate pupils.
- (2) Quaaludes, ETOH and some anti-depressants may elevate.
- (3) Certain psychedelic amphetamines may cause slowing.
- (4) Normal, but may be dilated.
- (5) Down with anesthetic gases, up with volatile solvents and aerosols.
- (6) Pupil size possibly normal.

HS172A R01/10

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MAJOR INDICATORS	CNS DEPRESSANTS	CNS STIMULANTS	HALLUCINOGENS	DISSOCIATIVE ANESTHETICS	NARCOTIC ANALGESICS	INHALANTS	CANNABIS
GENERAL INDICATORS	Disoriented Droopy eyes (Ptosis) Drowsiness Drunk-like behavior Gait ataxia Slow, sluggish reactions Thick, slurred speech Uncoordinated *NOTE: With Methaqualone, pulse will be elevated and body tremors will be evident. Alcohol and Quaaludes elevate pulse. Soma and Quaaludes dilate pupils.	Anxiety Body tremors Dry mouth Euphoria Exaggerated reflexes Excited Eyelid tremors Grinding teeth (Bruxism) Increased alertness Insomnia Irritability Redness to nasal area Restlessness Runny nose Talkative	Body tremors Dazed appearance Difficulty w/speech Disoriented Flashbacks Hallucinations Memory loss Nausea Paranoia Perspiring Poor perception of time and distance Synesthesia Uncoordinated NOTE: With LSD, piloerection may be observed (goose bumps, hair standing on end).	Blank stare Confused Chemical odor (PCP) Cyclic behavior (PCP) Difficulty w/speech Disoriented Early HGN Onset Hallucinations Incomplete verbal responses Increased pain threshold "Moon Walking" (PCP) Non-communicative Perspiring (PCP) Possibly violent (PCP) Sensory distortions Slow, slurred speech	Constricted pupils Depressed reflexes Drowsiness Droopy eyelids (Ptosis) Dry mouth Euphoria Facial itching Nausea "On the Nod" Puncture marks Slow, low, raspy speech Slowed breathing NOTE: Tolerant users exhibit relatively little psychomotor impairment.	Bloodshot, watery eyes Confusion Disoriented Flushed face Intense headaches Lack of muscle control Non-communicative Odor of substance Possible nausea Residue of substance Slow, thick, slurred speech **NOTE: Anesthetic gases cause below normal blood pressure; volatile solvents and aerosols cause above normal blood pressure.	Body tremors Disoriented Debris in mouth Eyelid tremors Impaired perception of time & distance Increased appetite Marked reddening of conjunctiva Odor of Marijuana Possible paranoia Relaxed inhibitions
DURATION OF EFFECTS	Barbiturates: 1-16 hours Tranquilizers: 4-8 hours Methaqualone: 4-8 hours	Cocaine: 5-90 minutes Amphetamines: 4-8 hours Meth: 12 hours	Duration varies widely from one hallucinogen to another. LSD: 4-6 hours Psilocybin: 2-3 hours	PCP Onset: 1-6 minutes Peak Effects: 15-30 minutes Exhibits effects up to 4-6 hours DXM: Onset 15-30 min. Effects 3-6 hours	Heroin: 4-6 hours Methadone: Up to 24 hours Others: Vary	4-8 hours for most volatile solvents Anesthetic gases and aerosols - very short duration	2-3 hours - exhibits effects (Impairment may last up to 24 hours, without awareness effects.)
USUAL METHODS OF ADMINISTRATION	Oral Injected (occasionally)	Insufflation (snorting) Smoked Injected Oral	Oral Insufflation Smoked Injected Transdermal	Smoked (PCP) Oral Insufflation (PCP) Injected (PCP) Eye drops	Injected Oral Smoked Insufflation	Insufflation (Historically, have been taken orally.)	Smoked Oral
OVERDOSE SIGNS	Shallow breathing Cold, clammy skin Pupil dilated Rapid, weak pulse Coma Shallow breathing	Agitation Increased body temperature Hallucinations Convulsions	Long intense "trip"	Long intense "trip"	Slow, shallow breathing Clammy skin Coma Convulsions	Coma	Fatigue Paranoia

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NORTH CAROLINA DWI LAW: WHERE AM I AND HOW DID I GET HERE?

JAMES A. DAVIS

EXHIBIT G

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF ROWAN

FILED

FILE NO.:

STATE OF NORTH CAROLINA

2021 SEP 20 A 9:12

v.

ORDER

(Dismissing the State's Appeal)

Defendant.

THIS CAUSE coming on to be heard and being heard before the Honorable Alyson A. Grine, presiding at the 14 September 2021 criminal session of the Superior Court for Rowan County, North Carolina, upon Defendant's Motion to Dismiss the State's Appeal. The State of North Carolina was represented by Assistant District Attorney Andrew W. Deschler. The Defendant was present and represented by Attorney James A. Davis. After reviewing the court file and relevant authority and hearing arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. Defendant is charged with, *inter alia*, Driving While Impaired with an alleged date of offense of 19 October 2018.

2. On 5 September 2019, Defendant filed a Motion *in Limine* in District Court to exclude the results of the chemical analysis of the Defendant's blood on the basis that a proper foundation could not be established for the evidence to be admissible. Specifically, Defendant argued that medical treatment providers had administered numerous medications to Defendant prior to the blood draw which tainted the evidence, citing *Robinson v. Casualty Ins. Co.*, 255 N.C. 669 (1961).

3. In her Motion, Defendant distinguished between a motion *in limine* and a motion to suppress. Defendant clarified that she was making a motion *in limine* seeking exclusion of evidence based on foundation requirements of evidence law. Defendant did not make a motion to suppress based on law enforcement conduct that violated her constitutional rights or based on a substantial statutory violation under Section 15A-974 of the North Carolina General Statutes.

3. On 20 November 2019, District Court Judge Kevin Eddinger entered an order in response to Defendant's Motion *in Limine*, captioned as a Preliminary Indication. The Preliminary Indication addressed the issue of whether a proper foundation for the admissibility of the blood test had been established, citing the same case law referenced in Defendant's Motion *in Limine* to include *Robinson v. Casualty Ins. Co.*, 255 N.C. 669 (1961). Judge Eddinger found that:

[A] proper foundation for blood test evidence in this case has not been met. Specifically, the Court finds the State has not met its burden of proof on the third *Robinson* factor, the accuracy of the analysis.

4. The District Court used the term “suppress” within the caption of the Preliminary Indication and Decretal No. 1, but the issue addressed therein is the evidentiary, foundation issue raised in Defendant’s Motion *in Limine*.

5. On 13 December 2019, the State filed a Notice of Appeal from the Preliminary Indication pursuant to Section 20-38.7 of the North Carolina General Statutes.

6. North Carolina General Statutes Section 38.7 allows the State to appeal to superior court a preliminary determination of the district court granting a motion to suppress or dismiss.

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The legal grounds of a motion and order have been considered by our courts to be persuasive in determining their nature. *See, e.g., State v. Reavis*, 207 N.C. App. 218, 222 (2010); *State v. Van Peay*, 231 N.C. App. 715, 2014 N.C. App. LEXIS 28 (2014) (unpublished).

2. In enacting N.C. Gen. Stat. § 20-38.7(a), the General Assembly did not create a route of appeal for a district court judge’s ruling on evidentiary issues such as whether a foundation for admissibility has been met.

8. This Court is without subject matter jurisdiction to hear the State’s appeal.

2. Any Finding of Fact more properly denominated as a Conclusion of Law is incorporated herein by reference as if fully set forth.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The State’s appeal is dismissed.

2. The instant action is remanded to District Court.

3. This Order may be signed out-of-term and session by consent of the parties.

This the 20th day of September, 2021.



HONORABLE ALYSON A. GRINE
SUPERIOR COURT JUDGE

NORTH CAROLINA DWI LAW: WHERE AM I AND HOW DID I GET HERE?

JAMES A. DAVIS

EXHIBIT H



NORTH CAROLINA DIVISION OF MOTOR VEHICLES

3118 MAIL SERVICE CNTR RALEIGH, N.C. 27697-3118

(919) 715-7000

DRIVER LICENSE HEARING REQUEST

I, _____, whose driving privilege is, or will be suspended effective, _____ request a hearing to contest the action or to be considered for possible reinstatement. My **driver license/customer number** is _____. If driver license/customer number unknown, provide date of birth ____/____/_____.

<input type="checkbox"/>	Preliminary Hearing—(ex. Speeding, Points, 1 st Off. Out of State DWI), G.S. 20-16 & G.S. 20-13 Hearing Fee \$100.00
<input type="checkbox"/>	Preliminary Hearing—Alcohol Concentration Restriction Violation—(Received by Law Enforcement or Report from II provider) G.S. 20-17.8, <i>If you have multiple violations you must send in a separate Hearing Request and Hearing Fee per violation</i> , Hearing Fee \$450.00.
<input type="checkbox"/>	Preliminary Hearing—Refused Chemical Test—G. S. 20-16.2, Hearing Fee \$450.00
<input type="checkbox"/>	Preliminary Hearing—Ignition Interlock Device Restriction Violation (Received ticket for not have the ignition interlock device) G.S. 20-17.8, Hearing Fee \$450.00
<input type="checkbox"/>	Hearing—(ex. Speeding, Points, 1 st Off. Out of State DWI, currently suspended) G.S. 20-16 & 20-13 Hearing Fee \$100.00
<input type="checkbox"/>	DWLR/MV—(Driving while license revoked or Moving violations). <i>If you are currently suspended for both DWLR & MV, you must submit two requests and two fees.</i> Hearing Fee \$200.00
<input type="checkbox"/>	Motor Vehicle Safety & Financial Responsibility—(Accident, No Insurance), Hearing Fee \$200.00
<input type="checkbox"/>	CDL Disqualification—(Failed Drug Test, CDL Disq.), G.S. 20-17.4, Hearing Fee \$200.00
<input type="checkbox"/>	Conference for Evaluation to Attend a Driver Improvement Clinic—(For Driver License Point Reduction Only), <i>If you need to take a driver improvement clinic for any other reason, send written request for a NON-Hearing Clinic by fax to 919-715-1947. Or you may call 919-715-7000.</i> Hearing Fee \$40.00.
Driving While Impaired Hearings have TWO parts, Initial Hearing Fee of \$225.00 for an Interview, if approved the second Hearing Fee of \$425.00 is due. If you are suspended for a DWI along with other suspensions, you are required to have a DWI Interview first, and will be notified of other Hearing Fees.	
<input type="checkbox"/>	Driving While Impaired Interview—(1 st Part of a DWI hearing) G.S. 20-19, Hearing Fee \$225.00
<input type="checkbox"/>	Driving While Impaired Restoration—(2 nd Part of a DWI hearing) G.S. 20-19, Hearing Fee \$425.00
<input type="checkbox"/>	Ignition Interlock Medical Accommodation Program Review—(Medically cannot blow into the Ignition Interlock Device), Hearing Fee \$70.00

I have enclosed the required fee in the amount of \$ _____.00.

Send your request by mail to: Division of Motor Vehicles, Attn: Administrative Support Unit, 3118 Mail Service Center, Raleigh, North Carolina 27697-3118.

Customer Name: _____ Customer Phone Number: _____
(PRINT FULL NAME)

Mailing address: _____

Customer Signature: _____ Date Requested: _____

Name, Address and Phone Number of Attorney (if applicable)

Bar Number: _____

Date: _____

*Note: Hearing Requests are not valid unless accompanied by payment in full or completed Affidavit of Indigence and a hearing will not be scheduled.

*You may cancel your hearing at any time. Please review the Cancellation Form for terms and conditions of partial refunds.

Please see Admin Code 19 A NCAC 03K .0101 for further information.

NORTH CAROLINA DWI LAW: WHERE AM I AND HOW DID I GET HERE?

JAMES A. DAVIS

EXHIBIT I

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

COUNTY OF ROWAN

FILE NO.: 21 CR _____

STATE OF NORTH CAROLINA

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v.

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MOTIONS REGARDING CONSTITUTIONAL

RIGHT TO EXCULPATORY EVIDENCE and

PRESERVATION OF EVIDENCE

_____,

Defendant.

NOW COMES Defendant, by and through the undersigned attorney, who moves for *Brady*, *Agurs*, *Kyles*, *et al.*, and other favorable and impeachment material, based upon the incorporated Memorandum of Law, and shows as follows:

INTRODUCTION

1. There is no general constitutional or common law right to discovery in criminal cases. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *State v. Alston*, 307 N.C. 321, 335 (1983).

2. There is no statutory right to discovery for criminal cases pending in district court and misdemeanors pending in superior court. N.C. Gen. Stat. § 15A-901; *State v. Cornett*, 177 N.C. App. 452 (2006). The only statutory right to discovery applies to felonies pending in superior court. N.C. Gen. Stat. § 15A-901.

3. North Carolina's statutory discovery does not address a defendant's right to discovery per case law. The touchstone of discovery in criminal cases is governed by the due process clause of the fourteenth amendment, as outlined by *Brady* and its progeny. *Brady v. Maryland*, 373 U.S. 83, 83 (1963).

CONSTITUTIONAL RIGHT TO EXCULPATORY EVIDENCE

4. Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. U.S.*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *U.S. v. Agurs*, 427 U.S. 97 (1976), *Napue v. Illinois*, 360 U.S. 264 (1959), *Giles v. Maryland*, 386 U.S. 66 (1967), *Ashley v. Texas*, 375 U.S. 931 (1963), *State v. Howard*, 334 N.C. 602 (1993), *State v. Potts*, 334 N.C. 575 (1993), and their progeny, any and all documents, reports, facts or other information in whatever form which would tend to exculpate the defendant, mitigate the degree of the offense or the appropriate punishment, weaken or overcome testimony adverse to the defendant given by a State's witness, impeach the credibility of a State's witness, or would otherwise tend to be favorable to the defendant in any way.

5. *A fortiori*, in *United States v. Agurs*, 427 U.S. 97 (1976), the U.S. Supreme Court held a prosecutor has a duty to disclose exculpatory evidence, even in the absence of a Defendant's request. To the extent that specificity is required to demonstrate materiality of the requested information, (*see United States v. Agurs*, 427 U.S. 97 (1976)), Defendant submits that this requirement is satisfied in this Motion.

6. Defendant has a constitutional right to due process, fundamental fairness, adequately prepare for trial, and the effective assistance of counsel. U.S. Const. amends. V, VI, & XIV; N.C. Const. art. I §§ 19 & 23.

DUTIES OF THE PROSECUTION PURSUANT TO *BRADY, ET AL.*

7. *Brady* applies to criminal cases in both district and superior criminal courts. *Brady* requires the prosecutor to produce and disclose evidence not available to the defense either directly or through diligent investigation, *State v. Scanlon*, 176 N.C. App. 410, 436 (2006), and consists of material evidence favorable to the defendant on issues of guilt (including impeachment evidence) or punishment.¹ *Brady*, 373 U.S. 83 (1963); *see also* Avery, *Brady Material in District Ct., CONF. OF DISTRICT ATT'YS FOR THE REC.*, V. 9, Issue 2 (May 2012).

8. The prosecutor's duties under *Brady, et al.*, are governed by constitutional duties, ethical rules, and case law: (1) The prosecutor has a constitutional duty under the Due Process Clause to disclose evidence favorable to the defense and material to the outcome of either the guilt-innocence of sentencing phase of a trial. U.S. Const., amend. V & VI; N.C. Const. art. 1 § 19 & 23; (2) The prosecutor is imputed with knowledge of law enforcement investigative files under *Brady, et al.*, for the purpose of statutory discovery. *See State v. Tuck*, 191 N.C. App. 768 (2008) (holding, *inter alia*, for purposes of statutory discovery, the State (i) is both the law enforcement agency and prosecuting agency, and (ii) violates the discovery statute if either agency was aware of and should have reasonably known of a statement related to the charges—or through due diligence should have been aware of it—but failed to disclose the same); (3) The prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (holding the same, considering the cumulative effect of undisclosed evidence, required a new trial); (4) North Carolina cases illustrate a panoply of *Brady, et al.*, violations. *See, e.g., State v. Barber*, 147 N.C. App. 69 (2001) (State's failure to disclose cell phone records which would have bolstered the defense theory of the case constituted a *Brady* violation); *State v. Absher*, 207 N.C. App. 377 (2010) (unpublished) (dismissing case for destruction of video evidence, although modified and partially preserved); and (5) Prosecutors have an ethical obligation to disclose exculpatory evidence to the defense. *See* N.C. State. Bar. Rev. R. Prof'l. Conduct R. 3.8(d) (prosecutor has a duty to make timely disclosure to defense of all evidence that tends to negate guilt or mitigate offense or sentence).

¹ Evidence is "material" if there is a "reasonable probability" of a different result had the evidence been disclosed. *State v. Berry*, 356 N.C. 490, 517 (2002). As it relates to the "reasonable probability" standard, it has been noted that the court cannot simply find the failure to disclose harmless, since the reasonable probability test "necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abramson*, 507 U.S. 619 (1993).

9. The prosecutor has an *affirmative duty* to ask for, seek, and investigate the existence of exculpatory and/or impeachment material favorable to the defense. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police).

10. As referenced, the State serves a dual role as both a law enforcement agency and prosecutorial office. *State v. Tuck*, 191 N.C. App. 768 (2008).

11. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. N.C. Rules of Professional Conduct, Rule 3.8, Comment 1.

12. Prosecutors sometimes argue the duty to provide *Brady* material occurs only at trial. *State v. Hunt*, 339 N.C. 622, 657 (1994); *State v. Shedd*, 117 N.C. App. 122, 124 (1994). This contention is incorrect. In *Brady*, 373 U.S. 83 (1963), the Supreme Court held the District Attorney has an obligation to produce all *Brady* material for the Defendant well in advance of the scheduled trial date in order to prepare an adequate defense and to make meaningful and effective use of the evidence at trial. The analysis is retrospective in nature and requires the defense to receive *Brady* material in time for effective use at trial. *State v. Taylor*, 344 N.C. 31 (1996); *State v. Spivey*, 102 N.C. App. 640 (1991).

13. *Brady* obligations may pierce a prosecutor's work product. Work product is not an absolute privilege. There are two types of work product. First, mental impressions, strategy, etc., are privileged. Second, fact work product may not be privileged. *State v. Shannon*, 182 N.C. App. 250 (2007) (statements made by witness to the prosecution with significantly new or different information from a prior statement shall be disclosed to the defense); *see also* N.C. Gen. Stat. § 15A-903 (a)(1)c. If the prosecutor learns of a significantly different witness statement or hears such testimony at trial (e.g., a witness significantly alters her testimony in superior court from district court, etc.), disclosure of exculpatory material (e.g., prosecutor notes, etc.) is required. The basis is found in the prosecutor's ethical duties to seek justice, not merely convict.

14. Because *Brady* material is defensive in nature, the prosecutor does not know Defendant's theory of defense, or what it may be at trial. The District Attorney prosecuting the case may have a substantially different view of *Brady* and Defendant's theory of defense than the criminal defense trial lawyer. The U.S. Supreme Court emphasized that prosecutors should err on the side of disclosure "as it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 115 S.Ct. at 1668.

15. In fairness and equity, Defendant respectfully requests the prosecution to seek and produce for Defendant the exculpatory material sought herein, regardless of the District Attorney's determination of whether a witness's statement or a particular letter or exhibit can help Defendant. Defendant and counsel, not the District Attorney, ought to be the judge of any defense, relevant material, and information subject to the foregoing.

BRADY MATERIAL EXAMPLES

16. Examples of Brady material include, but are not limited to, the following:
- A. False statements of a witness. See *U.S. v. Minsky*, 963 F.2d 870, 875 (6th Cir. 1992); *Alcorta v. Texas*, 355 U.S. 28 (1957) (prosecutor knowingly allowed false testimony to go uncorrected on a material fact); see also *U.S. v. Agurs*, 427 U.S. 97 (1976) (prosecutor “should have known” of duty to correct false testimony);
 - B. Prior inconsistent statements. See *Smith v. Cain*, 565 U.S. 319 (2012) (eyewitness’s undisclosed statement that he could not identify Defendant contradicted his trial testimony identifying Defendant); see also *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980).
 - C. Bias of a witness. See *U.S. v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (threat of prosecution if witness did not testify); see also *State v. Prevatte*, 346 N.C. 162 (1997) (precluding Defendant from cross-examining witness about pending criminal charges, giving the State leverage over the witness, reversible error); *Banks v. Dretke*, 540 U.S. 668 (2004) (failure to disclose witnesses were paid police informants, *inter alia*, established materiality and sufficient prejudice to overcome procedural default in state prosecution proceeding);
 - D. Witness’ capacity to observe, perceive, or recollect. See *State v. Williams*, 330 N.C. 711 (1992) (Defendant had the right to cross examine witness about drug habits and mental problems to cast doubt on witness’s capacity to observe and recollect).
 - E. Psychiatric evaluations of a witness. See *State v. Thompson*, 187 N.C. App. 341 (2007) (impeachment information may include prior psychiatric treatment of witness); see *Chavis, supra* (evaluation of witness).
 - F. Significant criminal history of untruthful conduct of a witness. See, e.g., *State v. Kilpatrick*, 343 N.C. 466, 471-72 (1996) (non-disclosure of witnesses’ criminal record upheld in that the same was insignificant and thus not material).
 - G. Information discrediting police investigation and credibility, including prior misconduct by officers. See *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (information discrediting “the thoroughness and good faith,” caliber of, and methods employed assembling the case in a police investigation are appropriate subjects of inquiry for the defense); *Banks v. Dretke*, 540 U.S. 668 (2004) (failure to disclose witnesses had been intensively coached by prosecutors and

law enforcement, *inter alia*, established materiality and sufficient prejudice to overcome procedural default in state prosecution proceeding);

- H. Information discrediting the prosecution. *See State v. Williams*, 362 N.C. 628 (2008) (dismissal of Defendant's assault upon an officer charge upheld when State created and destroyed a poster favorable to the defense—a poster depicting Defendant before and after injuries captioned “Before he sued the D.A.’s office” and “After he sued the D.A.’s office”—which was material and could have been used to impeach State’s witness);
- I. Evidence undermining identification of Defendant. *See Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (evolution over time of the eyewitness’s description); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) (witness’ testimony differed from previous accounts).
- J. Evidence tending to show guilt of another. *See Barbee v. Warden*, 351 F.2d 842 (4th Cir. 1964) (forensic reports indicated Defendant was not the assailant); *see also Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding evidence rule barring evidence of third party guilt violated Defendant’s constitutional right to a meaningful opportunity to present a complete defense, vacating Defendant’s conviction). *But see State v. Wright*, 2007 N.C. App. LEXIS 774, at *10 (2007) (unpublished) (North Carolina’s rule that evidence of the guilt of another “must tend both to implicate another and be inconsistent with the guilt of the defendant.”).
- K. Characteristics of physical evidence. *See U.S. ex rel. Smith v. Fairman*, 769 F.2d 386 (7th Cir. 1985) (evidence that gun used in the shooting was inoperable).
- L. Negative exculpatory evidence. *See Jones v. Jago*, 575 F.2d 1164 (6th Cir. 1978) (co-Defendant’s statement did not mention Defendant was either present or participated).
- M. Identity of favorable witnesses. *See, e.g., U.S. v. Cadet*, 727 F.2d 1453 (9th Cir. 1984) (non-disclosure of witnesses to a crime that prosecution did not intend to call).

REMEDIES

17. Withholding of material evidence favorable to the defense has been divided by the U.S. Supreme Court into three categories, which are (1) the knowing use of perjured testimony or the failure to correct what the State knows is perjured testimony, (2) the withholding of evidence which is specifically requested by the defendant during discovery, and (3) exculpatory evidence in the possession of the State for which no request has been made by the defendant. *United States*

v. Bagley, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Potts*, 334 N.C. 575 (1993); *State v. Craven*, 312 N.C. 580 (1985).

18. The test for determining whether the withheld evidence is material and thus requires a new trial is different for each category. *State v. McDowell*, 310 N.C. 61 (1984).

19. The duties outlined above have been recognized in an extensive line of cases in North Carolina including *State v. Howard*, 334 N.C. 602 (1993) and *State v. Potts*, 334 N.C. 575 (1993).

20. In *Maynard v. Dixon*, 943 F.2d 407, 418 (4th Cir. 1991), the U.S. Court of Appeals held that the exculpatory matter withheld by the State does not have to be admissible in evidence as long as it would lead to admissible exculpatory evidence. *Id.* at 418.

21. Remedies are abundant for *Brady* violations. The State's knowing use of false testimony may vacate a conviction. *See, e.g., State v. Morgan*, 60 N.C. App. 614 (1983) (conviction vacated for failure of prosecutor to correct witness' denial of immunity). If evidence is lost or destroyed in violation of Defendant's constitutional rights, the Court may dismiss the case or suppress all evidence related to lost or destroyed evidence. *See California v. Trombetta*, 467 U.S. 479, 487 (1984). A due process violation occurs if evidence is lost or destroyed due to a bad faith failure to preserve material evidence. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). The State's destruction of evidence, whether or not in bad faith, may violate statutory requirements and warrant sanctions to include prohibiting the calling of witnesses, stripping peremptory challenges, and allowing Defendant the final argument. *See State v. Banks*, 347 N.C. App. 390 (1997).

REQUESTS

22. Defendant claims under *Brady* and its progeny, as well as the language and spirit of *Giglio v. U.S.*, 405 U.S. 150 (1972); *U.S. v. Tashman*, 478 F.2d 129 (5th Cir. 1973); and *Napue v. Illinois*, 360 U.S. 264 (1959), that court precedent elevates the notion of justice over the prosecution's pursuit of a criminal conviction.

23. Based on the foregoing, Defendant is entitled to following:

- A. Any oral, written, or recorded statements made by any person to the police, District Attorney or grand jury which tend to negate guilt, establish Defendant's innocence, mitigate punishment, or impeach, or which could impeach, the credibility of or to contradict the testimony of any witness whom the State will call at the trial of the cause. *Brady v. Maryland*, 373 U.S. 83 (1963);
- B. Any police investigation report made to the police which tends to establish Defendant's innocence, mitigate punishment, or impeach, or which could impeach, the credibility of or to contradict the testimony of any witness whom the State will call at the trial of this case. *Giles v. Maryland*, 386 U.S. 66 (1967);

- C. The names and addresses of witnesses who might establish Defendant's innocence, mitigate punishment or impeach, or which could impeach, the credibility of or to contradict the testimony of any witness whom the State will call at the trial of this cause;
- D. Any information or material which tends to establish Defendant's innocence, mitigate punishment or impeach, or which could impeach, the credibility of or to contradict the testimony of any witness whom the State will call at the trial of the cause. *Napue v. Illinois, supra; Giglio v. U.S., supra*;
- E. Any report, regardless of source, which tends to establish Defendant's innocence, mitigate punishment, or impeach, or which could impeach, or discredit or contradict the testimony of any witness whom the State will call at the trial of the cause;
- F. Any inconsistent statements made or suggestions of loss of memory by the witnesses for the State about the alleged crime;
- G. Any evidence which would tend to show that any search, surveillance, arrest, or other police procedure utilized in the case was illegal or improper;
- H. Any notes or reports, regardless of form, prepared by any law enforcement officer, official, or agent which tend to refute, impeach, or contradict any of the evidence the State intends to introduce at trial or which tend to show or indicate in any way that Defendant did not commit the crime(s) charged or may have a legal defense thereto;
- I. Any evidence or information which would tend to indicate in any way that someone other than Defendant committed the crime(s) charged, including, but not limited to, any reports concerning any investigation of suspects other than Defendant in connection with this case or containing a description of the alleged perpetrator which is inconsistent with the physical characteristics of Defendant;
- J. The facts and circumstances surrounding any pretrial identification procedure conducted by any law enforcement officer, official, or agent in connection with this case in which any alleged or prospective witness failed to identify Defendant or identified someone other than Defendant;
- K. Any written, recorded, or oral statements made by any person which would tend to exculpate Defendant, indicate in any way that Defendant may not have committed the alleged crime(s), or show that Defendant may have a legal defense thereto;

- L. The names and addresses of any alleged or prospective witness who may have knowledge of facts which may be favorable to Defendant, or who was interviewed by any law enforcement officer, official, or agent and failed to provide inculpatory information concerning Defendant;
- M. Any statements made previously by any alleged or prospective witness for the State—whether written or oral, or made under oath or not—which are inconsistent or at variance in a material way with what the witness is anticipated to testify at the trial, including, but not limited to, victim impact statements. *See Smith v. Cain*, 565 U.S. 73 (2012) (reversing a conviction of first degree murder because prosecutors did not turn over exculpatory evidence that might be used to impeach a prosecution witness);
- N. The complete prior criminal and juvenile records of all witnesses who may testify for the State, information concerning any criminal charges under investigation or pending against such witnesses in any jurisdiction, and information concerning any bad acts engaged in by such witnesses;
- O. The details of (1) any promises or indications of actual or possible immunity, leniency, favorable treatment, or any other consideration whatsoever, or (2) any inducements or threats—made or suggested by any State or federal employee or agent—to any person who has provided information to or will testify for the State in this case, or to anyone representing such a person;
- P. Any information suggesting (1) any bias or hostility by any alleged or prospective witness for the State toward Defendant, or (2) any other factor bearing on the credibility of any alleged or prospective witness for the State, including, but not limited to, (a) any mental illness or condition, or (b) dependence on or use of alcohol or drugs of any kind, legal or illegal;
- Q. Any and all District Attorney, Attorney General, and other prosecutorial (1) “watch lists” (i.e., a “*Brady* List,” “*Giglio* List,” or any combination thereof) or other lists containing the names and details of law enforcement officers who have had incidents of untruthfulness, bias, criminal convictions, or other issues placing credibility or candor into question, including within internal affairs’ investigations, and (2) “death letters” to officers which indicate an officer’s testimony will be limited or not utilized;
- R. Any and all promises, rewards, or inducements (including, but not limited to, non-prosecution, agreement to a lesser charge or sentence, etc.) made to any witness herein, whether (1) written or oral, (2) they have testified before any State or federal grand jury,

District Attorney, or other investigative agency, or (3) they will testify at the trial herein;

- S. Any offer or grant of immunity to any witness from loss of property, fine, forfeiture, prosecution, or punishment in this or any other case, related or otherwise;
- T. A list of names and addresses of the treatment providers, hospitals, and relevant records of any alleged or prospective witness—whether called before the grand jury or who may be called at trial—who has ever (1) undergone psychiatric examination, hospitalization, or treatment; (2) received a mental health diagnosis; or (3) been subject to mental health treatment, including medication for same; and
- U. Any and all criminal histories of arrests or convictions of any unindicted co-conspirator, co-Defendant (if joined for trial), or State's witness.

24. Defendant contends he is entitled any and all memoranda, reports, and correspondence to and from any law enforcement agencies of the United States and all state, county, municipal, and local law enforcement agencies regarding the investigation herein and, more particularly, documenting any conflict and antagonism between the various state and federal agencies.

25. Defendant contends he is entitled to statements by and from all witnesses who admitted to engaging in the same conduct as Defendant, but who (1) denied knowledge that their conduct violated the law, (2) claimed no intention to violate the law, or (3) was “forgiven” by federal or state authorities.

26. Defendant contends he is entitled to:

- A. Any information, based on the above cases and principles, regarding compliance, or noncompliance, with traffic stops in accord with N.C. Gen. Stat. § 20-16.3; N.C. Gen. Stat. § 20-16.3A; *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *State v. Sanders*, 112 N.C. App. 477 (1993);
- B. Any information, based on the above cases and principles, regarding compliance, or noncompliance, with witness availability in accord with *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Ferguson*, 90 N.C. App. 513 (1988); and N.C. Const., art. 1 § 23; and
- C. Any information or material which tends to negate guilt, establish Defendant's innocence, mitigate punishment, or impeach, or which could impeach, the credibility of or contradict the testimony of any witness whom the State will call at the trial of this case.

MOTION FOR PRESERVATION OF EVIDENCE

27. Preservation of all evidence to include advance written notice from law enforcement, or others acting on their behalf, before seeking an order for destruction of evidence or otherwise destroying evidence, thereby depriving the defense of the opportunity to examine or test evidence for exculpatory material. N.C. Gen. Stat. § 15A-901, *et seq.*; *see also* U.S. Const. amends. V & XIV; *State v. Johnson*, 60 N.C. App. 369 (1983) (holding “the better practice” is to notify Defendant of the State’s desire to destroy evidence so that he may object); *State v. Anderson*, 57 N.C. App. 602 (1982) (holding “[w]hether the destruction infringes upon the rights of an accused depends on the circumstances in each case,” focusing on factors of good faith, practical reason, preservation of random samples, and photographs of physical evidence as well as the failure of Defendants to show the weight of the marijuana was a critical issue).

WHEREFORE, the undersigned prays for such Order as is just and proper.

This the ____ day of _____, 2021.

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