

**DWI Defense: Making Sense of the Maze
A Checklist**

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Disclaimer: This paper is largely what I have learned from others and through my own experience. My son, James A. Davis, II, deserves much credit for the content herein.

I. Implied-Consent Offense Procedure: Statutes

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 (G.S. 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 1.
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 wait and provide a memorandum or pocket brief when requested so as not to educate off the ADA?
4. Since N.C. Gen. Stat. §20-38.6 does not specify, N.C. Gen. Stat. §15A-951 governs written motions and requires that motions:
 - a. Be in writing;
 - b. State the grounds;
 - c. Specify relief requested;
 - d. Be served on the prosecution; and
 - 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*, p. 3, Administration of Justice Bulletin (December 2009). *See also, State v. Fowler*, 676 S.E.2d 523 (2009); *State v. Palmer*, 676 S.E.2d 559 (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) and 20-139.1(c1) & (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.
- 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; *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.*

a. **Tip:** This is a rich area for exploration.

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 (breath or blood alcohol content of .08 or more):
 - 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*, Administration of Justice Bulletin (December 2009).

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* attached Exhibit 2.
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. *Fowler, supra*. 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*, 676 S.E.2d 523 (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. **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:

- 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. *Fowler, supra* at 539; *See also, Palmer, supra*.

III. Methods of Proving Impairment:

A. Two methods are authorized by statute and case law. N.C. Gen Stat §§20-139.1 and 20-4.01(3a); *State v. Drdak*, 330 N.C. 587 (1992); and *State v. MacCardwell*, 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. 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); *MacCardell* court found the Dupont ACA Star Analyzer was reliable.

IV. **Superior Court DWI Trials:**

A. Procedures for a bifurcated trial and proof of previous convictions are addressed in N.C. Gen. Stat. §5A-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).

C. *See* Helpful Hints (section XVII. below) for strategies in a jury trial.

V. **Evidence gathering:**

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. In car video/audio tapes;
2. Belt tapes;
3. Intoxilyzer room tapes;
4. Security cameras at the police department and detention center; and
5. 911 communications.

VI. **Issue recognition:**

- A. See “Notice of Suppression or Dismissal Issues” checklist attached hereto as Exhibit 1.

VII. **Best Issues to Litigate:**

A. Checkpoints: General Overview.

1. Checkpoints are seizures implicating constitutional rights. To comply with constitutional mandates, the checkpoint must be reasonable within the meaning of the Fourth Amendment.
 - a. **Tip:** If challenged, the burden is on the State to prove by a preponderance of the evidence that the checkpoint was constitutionally sound. *City of Indianapolis v. Edmonds*, 531 U.S. 32 (2000). This burden cannot be met by having the arresting officer state, “It was a license and registration checkpoint,” and it was conducted “pursuant to our written guidelines.”
2. There is a two prong test the State must satisfy in order to prove the constitutionality of the checkpoint:
 - a. The primary programmatic purpose of the checkpoint must be proper.
 - i. Three proper purposes:
 - a) License and registration checkpoints;
 - b) Sobriety checkpoints;
 - c) Checkpoints designed to intercept illegal aliens.

- 1) Trial court cannot simply accept the State's invocation of a proper purpose, but must instead carry out a close review of the scheme at issue. *State v. Rose*, 170 N.C. App 284 (2005).
 - 2) Furthermore, this inquiry is not satisfied by testimony of field officers. **Tip:** The State must show a proper purpose at the supervisory level. *Id.*
- b. State must prove the checkpoint at issue was "reasonable" within the meaning of the Fourth Amendment.
- i. "Reasonableness" is a balancing test, weighing the public's interest in the checkpoint against the individual's Fourth Amendment privacy interests.
 - ii. Three factors are relevant:
 - a) Importance of the purpose of the checkpoint.
 - b) Whether the checkpoint is appropriately tailored to fit the primary purpose asserted. Tailoring is important because it ensures checkpoints are conducted in accordance with the asserted purpose. Without tailoring we run the risk of checkpoints being for an asserted proper purpose, but being conducted in a different manner.

1) Four factors:

- a. Whether police decided to spontaneously set up the checkpoint on a whim;
- b. Whether police offered any particular reason why a stretch of road was chosen for the checkpoint;

- c. Whether the checkpoint had a predetermined starting or ending time; and
- d. Whether police offered any reason why that particular time span was selected.

2) If there is no evidence to show why that road was picked, there are “serious questions as to whether the checkpoint was sufficiently tailored.” *Rose, supra*.

c) Severity of interference with individual liberty:

1) Factors include:

- a. Checkpoint’s potential interference with legitimate traffic;
- b. Whether police took steps to put drivers on notice of an approaching checkpoint;
- c. Whether drivers could see visible signs of the officers’ authority; and
- d. Whether officers conducting the checkpoint were subject to any supervision.

3. Relevant cases:

- a. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *State v. Veazey*, 191 N.C. App. 181 (2008) (Veazey I); *State v. Veazey*, 201 N.C. App. 398 (2009) (Veazey II); *State v. Gabriel*, 192 N.C. App. 517 (2008); *State v. Rose*, 170 N.C. App. 284 (2005).

B. NHTSA Driving Cues (*State v. Bonds*, 139 N.C. App 627 (2000)):

1. Generally:

- a. The National Highway Traffic and Safety Administration (NHTSA) teaches DWI detection and standardized field sobriety testing (SFST) to law enforcement.

- b. 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.

- c. Where a DWI defendant was not pulled over for poor driving (such as a checkpoint or not wearing a seatbelt), it is important to emphasize the following, all of which is taught to law enforcement:
 - 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;
 - iv. As a result, 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.

2. Phase One: “Vehicle in Motion”: 24 Cues:

- a. 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, 911 (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.

- iii. 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.

b. Speed and braking problems.

- i. 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.
- ii. 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.
- iii. Varying Speed – Alternating between speeding up and slowing down.
- iv. Slow Speed – The observed vehicle is driving at a speed that is more than 10 MPH below the speed limit.

c. Vigilance problems.

- i. 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.
- ii. 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 8 to 10 seconds).

- iii. Slow or Failure to Respond to Officer's Signals – Driver is unusually slow to respond to an officer's lights, siren or hand signals.
- iv. 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.
- v. 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.
- vi. 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.

d. Judgment problems.

- i. Following Too Closely – The vehicle is observed following another vehicle while

- not maintaining the legal minimum separation.
- ii. Improper or Unsafe Lane Change – Driver taking risks or endangering others. Driver is frequently or abruptly changing lanes without regard to other motorists.
 - iii. 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.
 - iv. 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.
 - v. 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.
 - vi. 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.
 - vii. 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:

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;
- iii. Leaves vehicle in gear;
- iv. Climbs out of vehicle;
- v. Leans against vehicle; and
- vii. Keeps hands on vehicle for balance.

4. Phase Three: Pre arrest Screening:

- a. First: Administer the three psychophysical, standard field sobriety tests (SFST's).

- b. Second: Administer a preliminary breath test (PBT) to confirm the chemical basis of the driver's impairment.

5. **Tip:** Cross-examine Officers about their NHTSA Training:

- a. Officers are taught to:
 - i. Describe DWI evidence "clearly and convincingly";
 - ii. Preparation" is crucial to trial testimony;
 - iii. Compile "complete and accurate" field notes and incident reports; and
 - iv. Review all notes and talk to the prosecutor before trial.
- b. When officers have few or no notes or failed to perform various tests, cross examine the officer about his training.
- c. Cues are described as "excellent" (meaning 50% or greater probability of legal impairment) and "good" (meaning 30% to 50% probability of legal impairment).
- d. Common signs of low blood alcohol concentration are "slowed reactions" (.03) and "increased risk taking" (.05).

C. Portable Breath Tests (PBT's):

- 1. Regulated by the administrative code. N.C. Gen. Stat. §20-16.3; 10A NCAC 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 [alco-sensor, alco-sensor III, alco-sensor IV, and SD-2 (manufactured by CMI, Inc.)].
- vi. Operator shall verify instrument calibration at least once during each thirty day period of use, using a simulator in accord with rules or an ethanol gas canister.
- vii. Simulators shall have the solution changed every thirty days or after twenty five 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.
- x. **Tip:** Officers can rarely testify in accord with the above requirements.

b. Cases:

- i. *Moore v. Hodges*, 116 N.C. App. 727 (1994) (the alcosensor result is admissible to establish probable cause but not as substantive evidence of guilt). *See also*, *State v. Rogers*, 124 N.C. App. 364 (1996); *State v. Bartlett*, 130 N.C. App. 79 (1998).
- ii. **Tip:** Odor of alcohol combined with a positive reading on the alcosensor, without more, requires a dismissal. The test only bolsters the smell. *Atkins v. Moyer*, 277 N.C. 179 (1970); N.C. Gen. Stat. §20-16.3.

D. Horizontal Gaze Nystagmus (HGN):

1. A proper foundation is still required to admit the results of the HGN tests. *State v. Helms* 348 N.C. 578, 581-2 (1998); N.C Rule Evid. 702.

a. **Tips :**

- i. 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* is still good law. The rule itself retains the foundational requirement.

- ii. A foundation explains the relationship between the test results and intoxication (i.e., alcohol impairs muscle control, etc.).
2. Six clues: Three for each eye.
 - a. Lack of smooth pursuit;
 - b. Distinct and sustained nystagmus at maximum deviation; and
 - c. Onset prior to 45 degrees.
 3. Fertile areas for examination include:
 - a. Defining nystagmus:
 - i. An involuntary, saccadic, and rapid movement of the eyeball;
 - ii. 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
 - iii. Visually looks like marbles rolling on sandpaper.
 - b. Explaining the difference between a twitch, tremor, and nystagmus;
 - c. Explaining the difference between slight, noticeable, distinct and sustained nystagmus;
 - d. Checking for eyeglasses, obvious eye disorder(s), or an artificial eye;
 - e. Estimations of degree (taught to go to end of shoulder; no measuring instrument);
 - f. Administration of the test including:
 - i. Speed of the stimulus (proper pass is approximately two seconds; always done twice);
 - ii. Distance of stimulus from the subjects eyes (should be twelve to fifteen inches and slightly above eye level);

- iii. Holding the pen for more than four seconds at maximum deviation;
- iv. What constitutes forty-five degrees (vs. forty two degrees, etc.; important for DRE);

g. Tips:

- i. There are over forty 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 thirty-eight 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 suspect told to elevate eyes as far as possible and hold for four seconds to look for same).

E. Standard Field Sobriety Tests (SFST's):

- 1. Per NHTSA, the original purpose was to assist in arrest or probable cause determinations.
- 2. NHTSA recognizes three tests (HGN, OLS, and WAT).
- 3. Generally: Important considerations.
 - a. Divided attention tests;
 - b. Two stages: instructions and performance;
 - c. Officer demonstrates test;
 - d. Each clue is counted only once;
 - e. Done on a hard, dry, level, and nonslippery surface (or on a sloped fog line?);
 - f. Back, leg, or middle ear problems (OLS and WAT);
 - g. More than fifty pounds overweight (OLS);
 - h. Over age sixty-five (OLS and WAT). Initial research was age sixty;
 - i. Heels more than two inches high (OLS and WAT);
 - j. Conditions that may interfere with testing include wind/weather conditions, age and weight, and footwear;

- k. Insufficient number of clues can be used to argue the defendant passed the test.
4. One leg stand (OLS) requirements (four clues, two necessary):
- a. Four clues:
 - i. Swaying;
 - ii. Using arms to balance;
 - iii. Hopping; and
 - iv. Putting foot down before 30 seconds.
 - b. Generally:
 - i. One leg held out straight approximately six inches off ground for thirty 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 thirty seconds.
 - c. Good examination issues:
 - i. Raising the arms six or more inches; and
 - ii. What constitutes “swaying” (vs. slight tremors).
5. Walk and turn (WAT) requirements (eight clues, two necessary):
- a. Eight clues:
 - i. Instructional stage:
 - a) Inability to balance;
 - b) Starts too soon;
 - ii. Walking stage:
 - a) Stops while walking (pauses to regain balance);
 - b) Misses heel-to-toe;
 - c) Steps off line;
 - d) Uses arms to balance;
 - e) Improper number of steps; and
 - f) Improper turn.
 - 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 (pivot?);
- iv. Steps off the line (imaginary line?);
- v. ½ inch or more space between heel and toe; and
- vi. Counting incorrectly is not a clue.

6. **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.

F. Lab reports:

- 1. Lab analysts will generally provide a summary of the drug(s) found and the pharmacological effect of same.
- 2. They cannot tell you:
 - a. The concentration;
 - b. How long the drug(s) have been in the suspect’s system (*i.e.*, whether psychoactive or not); or
 - c. The stage of the natural biochemical process of degrading and eliminating the compounds.
- 3. **Tip:** Metabolites are generally remnants of drugs at the end of the elimination process, and they may, or may not, have any impairing effect.

VIII. **Selected Issues and Cases:**

A. Checkpoints:

- 1. *City of Indianapolis v. Edmonds*, 531 U.S. 32 (2000) (checkpoints set up for “general crime control” purposes are unlawful and violate the fourth amendment).
- 2. *Brown v. Texas*, 443 U. S. 47 (1979) (lists balancing test factors). Great cross-examination checklist.
- 3. *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (approved sobriety or DWI checkpoints).

4. *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).
5. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976) (allows suspicionless searches at border crossings to search for illegal aliens).
6. *State v. Rose*, 170 N.C. App 284 (2005) (trial courts must make findings as to the checkpoint's programmatic purpose and the reasonableness of the checkpoint).
7. *State v. Veazey*, 191 N.C. App 181 (2008) (listed the relevant factors in determining lawfulness of a checkpoint). *See also, Veazey II*.

B. Stops:

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:
 - a. *State v. Otto*, 726 S.E 2d 824 (2012) (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).
 - b. *State v. Fields*, 195 N.C. App 740 (2009) (no reasonable suspicion when the driver weaved three times within his own lane in a mile and a half at 4:00 p.m.).
 - c. **Tip:** It is still “weaving plus.” Argue the facts.
3. Running the tag/Tag issues:
 - a. *U.S. v. Wilson*, 205 F. 3d 720 (4th Cir. 2008) (officer's inability to see the date on temporary tag to determine if it is expired does not create a reasonable suspicion to stop).
 - b. *State v. Johnson*, 627 S.E 2d 488 (2006) (a partially obscured license tag was insufficient to warrant a stop).
 - c. *State v. Hess*, 185 N. C. App 530 (2007) (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).

- d. *State v. Burke*, 712 S.E. 2d 704 (2011) (officer believed temporary tag was likely fictitious because number was “much lower than what was given out at the time”; court held an insufficient basis for the stop).

4. Turnaways:

- a. *State v. Foreman*, 351 N.C. 627(2000) (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*, 630 S.E. 2d (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 Department 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).

5. Anonymous tips:

- a. *State v. Johnson*, 693 S.E.2d 711 (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).
- b. *State v. Maready*, 654 S.E 2d 764 (2008) (addresses the factors that apply).
- c. *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).
- d. *Alabama v. White*, 496 U.S. 325 (1990) (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).
- e. **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).

- f. **Tip:** Keys are sufficient detail, prediction of future events, and corroboration of the alleged criminal conduct.

6. Fail to signal:

- 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*, 691 S.E. 2d 56 (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."

7. Brake lights:

- a. *State v. Heien*, 714 S.E. 2d 827 (2011) (malfunction of a single brake light did not violate the statute and was an insufficient basis for the stop).
- b. **Tip:** See N.C. Gen Stat. §§20-129(g) and (d), and 20-183.3.

8. Normal driving behavior:

- a. *State v. Roberson*, 163 N.C. App 129 (2004) (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) (reasonable suspicion supported an officer's decision to stop the defendant where he remained stopped at a traffic light for approximately thirty seconds before proceeding).

9. Mistake of fact v. Mistake of law:

- a. *State v. McLamb*, 186 N.C. App 124 (2007) (officer's mistaken belief of law the speed limit was 20 miles per hour when it was actually 55 miles per hour was an objectively unreasonable basis for the stop).
- b. *Compare State v. Hopper*, 695 S.E. 2d 801 (2010) (officer's mistaken belief of fact as to the existence of a traffic offense does not render the stop illegal; rather, "the only question whether the officers mistake of fact was reasonable").
- c. **Tip:** It is all how you frame it. It is always a mistake of law.

C. Consent:

1. *State v. Johnson*, 627 S.E. 2d 688 (2006) (removal of plastic wall panel exceeded scope of reasonableness and consent).
2. **Tip:** Objective reasonableness is the issue.

D. Containers within the vehicle:

1. *U.S. v. Ross*, 456 U.S. 798 (1982) (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) (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*, 688 S.E. 2d 28 (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:

1. *Arizona v. Johnson*, 555 U.S. 323 (2009) (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:

1. *State v. Jackson*, 199 N.C. App 236 (2009) (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).
2. *Florida v. Royer*, 460 U.S. 491 (1983) (an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop).
3. *State v. Falana*, 129 N.C. App 813 (1998) (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).
4. *State v. Parker*, 183 N.C. App. 1 (2007) (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).
5. *State v. Branch*, 194 N.C. App. 173 (2008) (ten minute delay beyond the time it took to check driver’s license and registration was unlawful).
6. *U.S. v. Place*, 462 U.S. 696 (1983) (a canine sniff is not a search within the fourth amendment).

7. Key issues: *De minimis* intrusion, original purpose of the stop, specific additional facts justifying further detention, defendant's actions prolonging the stop, waiting in excess of ten to fifteen minutes, and more.
8. Summary of the law: A brief delay to conduct a dog sniff appears lawful. *De minimis*. A brief delay with a request for consent to search appears unlawful. *Parker, supra*. A brief delay with questions unrelated to the stop appears unlawful. *Jackson, supra*.
9. **Tip:** Passengers may challenge the stop. *Brendlin v. California*, 551 U.S. 249 (2007).

G. Arrest requires probable cause:

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).

H. Search incident to arrest:

1. *Arizona v. Gant*, 556 U.S. 332 (2009) (law enforcement 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).

I. Notice of rights must be given both orally and in writing:

1. *State v. Thompson*, 151 N.C. App. 194 (2002).
2. *See also*, N.C. Gen. Stat. §20-16.2.

J. Injection of medications:

1. *Robinson v. Life and Casualty Insurance Company of Tennessee*, 255 N.C. 669 (1961) (blood test must occur before any other substances or medicines are injected).

K. Witnesses:

1. *State v. Ferguson*, 90 N.C. App 513 (1988) (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) (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) (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*, 661 S.E. 2d 43 (2008) (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:

1. *Crawford v. Washington*, 541 U.S. 36 (2004) (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. *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (an analyst who did not perform or observe the test cannot testify as to the results of same).
3. *See also, Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (forensic laboratory reports are testimonial and subject to *Crawford*).

M. *Corpus delicti*:

1. *State v. Trexler*, 316 N.C. 528 (1986) (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).
2. *State v. Ash*, 668 S.E.2d 65 (2008) (there must be substantial, independent evidence to support a defendant's confession).

N. *Knoll* issues:

1. *State v. Knoll*, 322 N.C. 535 (1988) (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 *Ferguson* and *Hill*, *supra*.

IX. **Beware:**

A. Three forms of license suspensions:

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

B. Retrograde extrapolation:

1. A mathematical process wherein an expert (Paul Glover) 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. Mr. Glover is quick to respond there is no evidence of the 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*, 702 S.E. 2d 507 (2010).
6. Mr. Glover accepts certain treatises and rejects others.
7. Use a defense expert (Andrew Mason, Fred Whitehurst, etc.).
8. **Tip:** Remember, every reading occurs twice, once during the absorption phase and again during elimination.

C. Synergistic drug/alcohol combinations.

1. The lab analyst routinely testifies impairment is increased by mixing medications or medications and alcohol.

D. DRE (Drug Recognition Expert):

1. Recognized under Rule 702(a1)(2) if officer has received training and has a current certification issued by DHHS.
2. Allows testimony that person was under the influence of one or more impairing substances and the category of same.
3. 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.
4. 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).

5. **Tip:** Use the chart against the DRE expert. See attached Exhibit 3.

E. Motions to Suppress vs. Motions *in Limine*:

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.

F. *State vs. Drdak*, 330 N.C. 587 (1992).

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 points: 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;
 - c. Example: 213 (mg of plasma/serum alcohol)
 $\div 1.18$ (conversion factor)
180 mg of whole blood alcohol
(or .18 blood alcohol)

G. Nontraditional tests:

1. The prosecution may attempt to bolster its case by using unreliable, nonstandardized tests.
2. Examples include finger to nose, finger count, palm pat, Romberg balance, alphabet test (cannot sing), backwards count, etc.

3. Allows lay opinion testimony regarding intoxication. N.C. Rule Evid. 701.
- H. Evidence of a willful refusal to submit to a chemical analysis or perform field sobriety tests is admissible against the defendant.
1. N.C. Gen Stat. 20-16.2(a) and 20-139.1(f).
- I. Can lab analysts testify outside their area of expertise?
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., et al*, 680 S.E.2d 732 (2009).
- J. *Per se* offenses require proof of prejudice:
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.
- K. Substitution of a DRE as expert for a chemical analyst:
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. Remember: always serve a timely, written notice of objection per *Crawford* and progeny.
 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.
- L. Officers directing the defendant to face the patrol car and perform tests:
1. Purpose is to videotape the suspect.
 2. Client is facing flashing blue lights which induce optokinetic nystagmus.

M. What qualifies as an “inpatient treatment facility” for purpose of jail credit?

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.

N. Tricks of the trade:

1. Officers ask the suspect to do two things simultaneously (divided attention test).
2. Officers purposefully interrupt the suspect and redirect.
3. Cover-up odors (i.e., air fresheners, breath sprays, etc.) are a cue.

O. Disaster: One test result followed by a willful refusal:

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:**

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. Rule 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

3. What is a “refusal”? *Rock v. Hiatt*, 406 S.E 2d 638 (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.

4. The new DMV hearing officer is Rosalee Hart-Morrison.

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 only indicated the 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 (fifteen minute observation period is the minimum requirement, and thirty 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 fifteen minutes immediately preceding collection of the breath specimen). 10A N.C.A.C. 41B.0101(6);
5. Whether all objects (chewing gum, tobacco, dentures, etc.) were removed from suspect’s mouth prior to testing;
6. Whether the results showed “test time out” (vs. “test refused”); and
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 alcSENSOR, 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 BLEET 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. Credibility is at issue for any witness.
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, not District Attorneys, represents law enforcement officers. The ADA has no “standing” to either object or move to quash when you subpoena materials from the officer.

O. Blood tests are not perfect.

1. Things that can go wrong include:
 - a. Chemicals in sealed vials may vary;
 - b. Samples are easily tainted during extraction;
 - c. Samples are improperly stored;
 - d. Check the expiration date (may lead to contrary readings);
 - 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 vial; 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).

P. *Brady* material applies in district court.

1. The due process clause of the Fourteenth Amendment to the US 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 US 667 (1985).
3. The state must produce “apparently or obviously” exculpatory evidence. *Kyles v. Whitley*, 514 US 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 NC 321 (1983).
5. If the evidence was “potentially helpful,” bad faith must be shown. *Arizona v. Youngblood*, 488 US 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.
- 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 for most certifying agencies are usually valid for one year.
1. Check with the individual certifying agency.
- S. If discovery is not provided in district court, the trial is *res judicata*.
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 a real option.
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 (primary contact is Crystal Houston).
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?**

A. New Rule 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 *Howerton*, *Pennington*, and related cases.

D. Remember the 2011 National Academy of Sciences (NAS) report found every forensic science but nuclear DNA is junk science.

E. **Tip:** How to cross-examine experts:

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.

XII. *Apprendi/Blakeley*: Procedure and burdens of proof.

- 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 grossly 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. New sentencing scheme (after December 1, 2011):

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 1 punishment.
2. Argue “void for vagueness” in that an ordinary person is not able to discern when passenger meets that definition. *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

B. Aggravated level 1: Requires:

1. Three or more grossly aggravating factors (GAF).
2. Minimum of twelve months and maximum of thirty-six months.
3. Shall be released four months prior to maximum term imposed with continuous alcohol monitoring (CAM) during said period.
4. May suspend term of imprisonment if serves special probation of at least 120 days.
5. May be fined up to \$10,000.00.
6. 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 7 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).
5. Level Three, Four, and Five offender: Not addressed under the statute.
6. **Tips:**
 - a. David Collins of TARHEEL MONITORING, LLC., is the regional representative providing CAM services. Telephone No. (704) 253-1054; Fax (704) 872-1750.
 - b. Cost is a \$75.00 installation fee and a daily monitoring fee of \$10.00 (with home phone) or \$12.00 a day otherwise.
 - c. There is no longer a requirement to pay CAM through the clerk's office or a fee limit of \$1,000.00.
 - d. Your client may receive credit for using CAM pretrial.

XIV. **Habitual DWI**

- A. Mandatory active sentence of at least twelve 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. *Exception:* current sunset statute expires December 1, 2014, which allows a hearing ten years after completion of sentence.

XV. **License Suspensions/DMV Hearings**

- 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. Refer to the “Revocations, Restorations, and LDP’s” chart by Cecil Whitley of Whitley and Jordan, P.A., for a comprehensive compilation of selected offenses.

XVI. Limited Driving Privileges

- A. Governing authority: N.C. Gen. Stat. §§20-179.3; 20-16.2; and local rules.
- B. Pretrial 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).
 6. Copy of charge.
 7. Copy of driving record.
 8. Work letter (if outside standard hours).
 9. Privilege itself (3 copies).
- C. Post trial requires:
1. \$100 fee.
 2. Substance abuse assessment.
 3. DL-123 (proof of liability insurance; only valid 30 days).
 4. Work letter (if outside standard hours).
 5. Privilege itself (3 copies).
- D. Willful refusal 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. Disposition of the underlying DWI charge other than by conviction or a conviction allowing a privilege;
5. No unresolved pending DWIs;
6. Revocation of the license for at least six months;
7. Successful completion of a substance abuse assessment and any recommended treatment.
8. Coversheet.
9. Copy of judgment.
10. \$100 fee.
11. Substance abuse assessment.
12. DL-123 (proof of liability insurance; only valid 30 days).
13. Petition (signed by ADA).
14. Work letter (if outside standard hours).
15. Privilege itself (3 copies).
16. **Tip:** No limited driving privilege may be issued in a willful refusal case involving death or critical injury to another person. N.C. Gen Stat §20-16.2(d1).

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

1. Coversheet.
2. 45 day delay.
 - a. **Tip:** Schedule installation a day or two before the 45 day period ends.
3. Proof of interlock installation.
4. Copy of judgment.
5. \$100 fee.
6. Substance abuse assessment.
7. DL-123 (proof of liability insurance; only valid 30 days).
8. Petition (signed by ADA).
9. Work letter (if outside standard hours).
10. Privilege itself (3 copies).

XVII. **Helpful hints:**

- A. A “cue” is one of the NHTSA indicators of impairment relating to phase one (vehicle in motion), phase two (personal contact), and phase three (pre arrest screening). A “clue” is one of the indicators of impairment relating to 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 Problem Resolution Department 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*, 698 S.E.2d 179 (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.
- H. I believe jurists want suppression hearings to be brief. Isolate the issue(s) and make your point.
- I. Videos are often the best evidence of innocence.
- J. A .08 is only a *prima facie* showing of guilt. *State v. Narron*, 193 N.C. App. 76 (2008). It is neither a presumption nor a mandatory finding of guilt. Look for the right case.
- K. Advice for cross-examination of the State’s expert, Paul Glover:
 - 1. Understand the difference between the terms “social drinker” and “bolus experiment”;
 - 2. He claims 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%);
 - 4. He claims the calculations he uses (e.g., .0165 elimination rate, etc.) are lower than the norm;
 - 5. Rates are different for men and women;
 - 6. He acknowledges the existence of an “absorption phase” but evades timing issues;
 - 7. He claims to be a “research scientist” but is neither a medical doctor nor has a doctorate in related fields;
 - 8. He accepts and rejects various research and experts;
 - 9. He has been 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.

L. Strategies for a 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.

XVIII. Current trends:

- A. Active sentence for level threes;
- B. Jury trials may yield better results; and
- C. Judicial, law enforcement, and public perception – one hot topic.

Epilogue:

“When the people fear their government, there is tyranny; when the government fears the people, there is liberty.” Thomas Jefferson