PRACTICAL EVIDENCE AND TRIAL PRACTICE POINTERS
THIRD EDITION (2011)

James A. Davis
Davis and Davis, Attorneys at Law, PC
215 North Main Street
Salisbury, NC 28144
(704) 639-1900

I. Preface:

The evidence code is the courtroom Bible. Mastery of evidence, substantive law, and criminal/civil procedure puts you in control: evidence gets admitted or excluded, and cases hinge in the balance. Irving Younger calls it the "craft of the courtroom." You must win evidence arguments at the trial level. **Three percent of cases overturned on appeal are because of evidence errors at trial**. The point: one or two facts often win – or lose.

Public policy drives the law. **Argue the purpose of the rules**. The rules provide for a unitary system of evidence and generally apply to all court proceedings. Argue the evidence secures **fairness in administration, eliminates unjustified expense or delay, insures proceedings are justly determined, and promotes the ascertainment and establishment of truth**. N.C. R. EVID. 102; Martin v. Knight, 147 N.C. 564 (1908). Persuade the judge that your position promotes the interests of justice, reason the rules were not adopted in a vacuum, and argue the court has the inherent authority to do justice.

The vast majority of our case law is from criminal cases; therefore, much of this manuscript cites the same, concentrating primarily on North Carolina statutes, rules, procedures, and case law.

This paper is not an exhaustive treatise: it is a practice guide. The format is largely in outline form. **Special practice tips are denoted as TIP.**

II. When Rules of Evidence *Apply*:

a. Rules apply to *all civil and criminal court proceedings, whether* tried to the *court or* a *jury*. N.C. R. EVID. 101.

b. Some exceptions apply. N.C. R. EVID. 104(a) and 1101. See below.

III. When Rules of Evidence Do *Not Apply*:

a. The rules *do not apply to* probable cause hearings, sentencing, probation violations, bond hearings, extradition hearings, first appearances, summary contempt proceedings, juvenile nonsecure custody and review hearings, admissibility determinations of evidence, qualifications of a witness, existence of privilege, grand jury proceedings, issuance of search warrants, and issuance of

criminal processes. N.C. R. EVID. 1101(b); and 104(a); N.C. GEN. STAT. §7B-506(b); and 7B-906(c).

IV. Role of the Judge:

a. Is the "**governor** of the trial." Quercia v. U.S., 289 U.S. 466 (1933).

b. Has a "**gatekeeper** function." Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Howerton v. Arai Helmet, Ltd., 358 N.C. 440 (2004); State v. Pennington, 327 N.C. 89 (1990), N. C. Gen. Stat. Art. 30 Official Commentary to Probable-Cause Hearing; N.C. R. EVID. 104(a).

V. The Basics:

a. The **proponent** of the evidence **has the burden to prove admissibility**, if challenged. N.C. R. EVID. 104.

b. Know **rules of interpretation**, **cannons** and **rules of construction**, and their differences in a civil or criminal context.

i. Rules of Interpretation:

1. Words are presumed to bear their ordinary meanings;

2. Words or phrases are presumed to have the same meaning throughout a document absent contrary indication;

3. No interpretation should render any provision superfluous, unlawful, or invalid, if possible;

4. Every word should be given effect, if possible;

5. Legislative provisions should be interpreted in a constitutionally supportable manner;

6. A federal statute should not be interpreted to eliminate sovereign immunity or preempt state law unless clearly expressed;

ii. Canons of Construction:

1. *Inclusio unius est exclusio alterius*: "The inclusion of one implies the exclusion of others."

2. *Noscitur a sociis*: "A word is known by the words with which it is associated."

3. *Ejusdem generis*: "Of the same kind."

4. *Ut magis valeat quam pereat*: "So that it may survive rather than perish," meaning ambiguities should be interpreted in a way which makes the statement valid rather than invalid.

iii. Rules of Construction:

1. Words capable of more than one meaning will be given the meaning the parties appear to have intended. Goodyear v. Goodyear, 257 N.C. 374 (1962).

2. A contract (*e.g.*, a plea agreement) is to be considered as a whole, and the intention of the parties is gleaned from the entire instrument, not detached provisions thereof. Biggers v. Evangelist, 71 N.C. App. 35 (1984).

3. Where an ambiguity exists, it will be resolved against the party who prepared the document. Adder v. Holman & Moody, Inc., 288 N.C. 484 (1975).

4. Where general terms conflict with specific terms, specific terms govern. Wood-Hopkin Contracting v. N.C. State Port Authority, 284 N.C. 732 (1974).

c. **Statutes** are to be **construed "*in pari materia*,"** or as a whole and having a common purpose.

d. The **purposes of rules of procedure are** to provide (1) **notice** and (2) an **opportunity to be heard**. N.C. Gen. Stat. §8C-201(e); N.C. Civ. P. R. ___; U.S. Const. amend. XIV, §1; N.C. Const. Art. I, §19.

e. **Constitutional due process standards always apply**, even when the rules of evidence do not. Holmes v. South Carolina, 547 U.S. 319 (2006) (the defendant has a due process right to present a defense); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process requirements exist in parole revocation procedures).

f. **North Carolina constitutional protections are sometimes broader** than federal constitutional protections. Cite both federal and state counterparts. See: (1) Bob Farb, Arrest Search and Investigation in North Carolina, p. 4 (2003) (no good faith exception July 1, 2011, to the exclusion of evidence for a violation of the North Carolina constitution); (2) Jim Exum, The Law of the

Land: The North Carolina Constitution and State Constitutional Law: Rediscovering State Constitutions, N.C. Law Review (1992); (3) Corum v. UNC, 330 N.C. 761 (1992) (holding "the North Carolina Constitution is more detailed and specific than the federal constitution in the protection of the rights of its citizens").

g. While the **Sixth Amendment right to confront witnesses** applies to criminal and juvenile delinquency proceedings, but not non-criminal proceedings, the **Due Process Clause** still **provides certain confrontation rights in such proceedings**. In re: Pamela A.G., 134 P.3d 746 (N.M. 2006) (although the Confrontation Clause does not apply to abuse and neglect cases, the Due Process Clause requires that parents be given a reasonable opportunity to confront and cross examine a witness, including a child witness).

h. **Criminal charges must provide** enough information for the defendant to adequately prepare a defense, and include all necessary elements, the date of offense, the victim, and the nature of the offense. Lots of law of "fatal defects," and amendment.

i. **Criminal statutes are** punitive in nature and are **strictly construed**. State v. Reaves, 142 N.C. App. 629 (2001).

j. Know the **Rule of Lenity**: Ambiguities in statutes defining crimes and punishments shall be interpreted in favor of the accused. State v. Haddock, 191 N.C. App. 474 (2008).

k. **Burdens never shift in criminal cases**. *Presumptions are only in favor of a defendant, never against*. Do not let a prosecutor argue a "*prima facie* case" or "inference" rises to a "presumption." The defendant may, however, have to produce evidence to receive an affirmative defense or a lesser-included instruction.

l. The court shall provide a **limiting instruction** upon request. N.C. R. EVID. 105.

TIP: Crucial in **bench trials** (e.g., admitted solely for impeachment, etc.). Remind the judge in **closing argument**.

m. The **rules of evidence may be helpful**, even when they do not apply, **in determining reliability and relevance**. State v. Bonds, 345 N.C. 1 (1996).

n. Argue **reliability standards are interspersed throughout the criminal statutes** (e.g., N.C. Gen. Stat. **§** 15A-611(b)(2) ("reliable hearsay"); N.C. R. EVID. 104 ("questions of admissibility" and "laying a foundation"); N.C. Gen. Stat. **§** 15A-2000, *et seq.* (capital sentencing); Watson hearings (insufficient culpability to proceed capitally); State v. Hewett, 270 N.C. 348 (1967) (hearsay alone is sufficient for a probation violation).

o. Cite the **commentary** and **legislative history**. State v. Hosey, 315 N.C. 335 (1986) (while not binding authority, it is **given substantial weight**).

p. In admissibility determinations, the court is only bound by the rules of evidence in decisions on privilege. N.C. R. Evid. 104 (a).

VI. Burdens of Proof:

a. **Abuse/Neglect**: Clear and convincing evidence.

b. **Civil Standard**: Preponderance or greater weight of the evidence.

c. **Criminal Standard**: Beyond a reasonable doubt. Proof that "fully satisfies" or "entirely convinces" the trier-of-fact of guilt. Great language within the instruction itself. N.C. P.I. Crim. 101.10 ("a doubt based on reason and common sense").

d. **Motion to Dismiss**: Some substantial evidence that a reasonable person might find adequate to support a conclusion. State v. Matias, 354 N.C. 549 (2001); Shipman v. Shipman, 357 N.C. 471 (2003). It is **not a "scintilla**." **Also**, evidence which only raises "**suspicion**" **or** "**conjecture**" as to whether (1) an offense was committed or (2) the defendant was the perpetrator **is subject to dismissal**. State v. Grooms, 353 N.C. 50 (2000).

e. **Probable Cause**: Some substantial evidence that (1) a crime probably occurred and (2) the defendant probably committed it. Solely a review of the quality and quantity of the prosecution's evidence.

f. **Probation Violation**: To the satisfaction of the Judge. ("If the …court…is…reasonably satisfied...the defendant has violated a condition…it may within its sound discretion revoke the probation.") State v. Terry, 149 N.C. App. 434 (2002).

g. **Termination of Parental Rights**: Clear, cogent and convincing evidence. N.C. Gen. Stat. §7B-1109(f) (addressing the burden and all findings of fact required in an adjudicatory hearing on termination). *But see*, N.C. Gen. Stat. §7B-1111(b) (burden of proof is clear and convincing evidence to prove facts justifying grounds).

TIP: **Do not forget:** (1) the burden of production (a "prima facie" case) (**examine charging documents/pleadings, know elements, and consider evidence adduced**); (2) the tests for (a) a directed verdict ("no conflict of material evidence...viewed in the light most favorable…demands a verdict") and (b) summary judgment ("no genuine issue of material fact…and the party…is entitled to judgment as a matter of law"); (3) Rule 12(b)(6); (4) Rule 12(c) (judgment on the pleadings which can be treated as summary judgment); (5) loss of the "light most favorable" standard at the end of the evidence (**if "denied at this time," rest & renew**); (6) burden of persuasion (**if a weak case, argue the motion to dismiss**); (7) amendment of charging documents/pleadings to conform to the evidence (**if an element is missing and the process is not amended, move to dismiss**); (8) defensive force principles applicable to the prosecution's burden of persuasion **(prosecution must prove the defendant did not have the right to use defensive force beyond a reasonable doubt**); (9) presumptions of proper service in civil procedure (**serve via law enforcement or certified mail**); and more. Great resources are: (1) John Rubin, The Law of Self Defense in North Carolina (1996); and (2) G. Gray Wilson, North Carolina Civil Procedure (2d ed. 1995).

VII. Appeal: Perfection Requires:

a. **Small Claims:** appeal "within **10 days** after entry of judgment." N.C. Gen. Stat. §7A-228(a) & (b).

b. **Civil Cases**: appeal "within **30 days** after entry of judgment" (with considerations for service of the judgment and post trial motions). R. App. P. 3(c).

c. **Criminal Cases**:

1. **District Court**: appeal "within **10 days** of entry of judgment." N.C. Gen. Stat. §15A-1431.

2. **Superior Court**: appeal "within **14 days** after entry of the judgment" (with consideration for a motion for appropriate relief filed during said period). R. App. P. 4(a)(1) or (2).

TIP: (1) File a written appeal in District Court at the end of the tenth day. No statute, or even the prosecutor's manual, suggests there is jurisdiction to modify bond thereafter; (2) an **appeal** on **satellite based monitoring** is civil in nature and **requires** a **written appeal** comporting with the rules of appellate procedure.

d. **Content of Appeal**: When written, the notice must: (1) specify the party(ies) taking the appeal; (2) designate the judgment or order from which appeal is taken and the court to which appeal is taken; (3) be signed by counsel of record or the party(ies) taking the appeal. R. App. P. 3(d) and 4(b). **Query**: Is the routine "inmate request form" sent from jail after trial sufficient?

e. **Standard for Appellate Review of Evidence Errors**: "abuse of discretion."

TIP: Your **best shot** on appeal is "**insufficient findings**." State v. Wiggins, 334 N.C. 18 (1993) ("fact findings supported by competent evidence are conclusive on appeal").

TIP: **Know the rules** regarding: (1) withdrawal of an appeal (a matter of right within ten days). N.C. Gen. Stat. §15A-1431; (2) remand; (3) new DWI sentencing procedure; and (4) motion for bond in superior court (if granted, it stays execution of the sentence).

VIII. How to Admit Evidence:

a. **Understand** the rules and **the setting**. Relevance is broad (*e.g.*, "*any tendency* . . . to make . . . *any fact* . . . of consequence . . . *more or less* probable"). Generally, District Court judges like to admit and filter the evidence. Conversely, Superior Court judges are rule-oriented and are quick to limit evidence.

b. Understand **substantive** (proves a fact in issue), **testimonial** (a witness), **real** (the item itself), and **demonstrative** (illustrative) evidence.

c. Understand the **steps for admission** of real, demonstrative, substantive, illustrative, corroborative, lay opinion, and expert evidence.

d. Know **Chapter 8**: It addresses statutes, certified copies, public records, hospital medical records (8-44.1), mortality tables (8-46), competency of blood tests (8-50.1), results and admissibility of speed measuring instruments (8-50.2), privileges (8-53 through 57-1), admissibility of forensic evidence (8-58.20), attendance of witnesses (8-59 through 64), depositions (8-74 through 83), photographs (8-97), chain of custody (8-103), and more.

e. For **exhibits**, establish (1) a foundation and (2) cite the purpose(s) for which it is offered.

   1. Consider whether the exhibit should come in for **substantive** or **limited** (*i.e.*, **impeachment, illustrative, corroborative**, etc.) **purposes**, or any purpose that applies.

TIP: (1) While **opinion testimony** may embrace an ultimate issue, it **may not use a "legal term of art" when the legal meaning is not readily apparent to the witness**. State v. Rose, 327 N.C. 599 (1990) (such as "capable of premeditation"); N.C. R. EVID. 704; (2) **Do not allow a witness to read from** an **exhibit until** it has been **admitted** into evidence; and (3) **Photos** and **videos** have the same foundational rules and can be admitted for **substantive** or **illustrative** purposes. State v. Rogers, 323 N.C. 658 (1989).

IX. **Best Hearsay Exceptions**:

a. **Present Sense Impression**: "Statement describing…an event… while…perceiving the event…or immediately thereafter." N.C. R. EVID. 803(1). The theory for admissibility is **spontaneity without time for reflection**. State v. Markham, 80 N.C. App. 322 (1986). A "lapse of **several hours**" has been held **too long**. State v. Little, 664 S.E.2d 432 (2008).

b. **Excited Utterance**: "Statement relating to a startling event…while …under…stress of excitement caused by the event." N.C.R. EVID. 803(2). **Different** application **for children**. State v. Smith, 315 N.C. 76 (1985) (allows statements by children for up to two or three days). *See* Jessica Smith, Evidence Issues Involving Child Victims, Admin. of Justice Bull. (Apr. 2008). Cases are fact-driven and routinely allow up to **twenty minutes** for adults; **one hour** has been held too long. State v. Thomas, 119 N.C. App. 708 (1995) (good analysis of **factors** regarding admissibility).

c. **Then Existing Mental, Emotional, or Physical Condition**: "Statement of…then existing state of mind, emotion…or physical condition." N.C. R. EVID. 803(3).

1. Complicated rule: "**State of mind**" can have **three meanings**: (a) the effect on the person who heard it (not hearsay); (b) showing the state of mind of the declarant; and (c) proving state of mind and events that caused the same.

2. **Look for** statements about a persons (a) "**then existing** emotions, sensations, or physical condition" and (b) "intent or **plan to do some act in the future**," both of which are **admissible**. Statements may **not** refer to **the past**.

d. **Statements for Purposes of Medical Diagnosis or Treatment**: "Statements made for purposes of medical diagnosis or treatment…and describing medical…symptoms…pertinent to diagnosis or treatment." N.C. R. EVID. 803(4). Other **exceptions** exist for wills, etc.

1. Cite State v. Hinnant, 351 N.C. 277 (2000): **two part test**: statements made (a) for the purpose of medical diagnosis or treatment, and only if (b) pertinent to medical diagnosis or treatment, are admissible.

TIP: Look for: (1) Does the **declarant know and believe** his statement is **for treatment or diagnostic purposes**? He must; (2) Are the declarant's statements used as a **basis** for the **expert's opinion**? Then ask for a **limiting instruction**; (3) Know the case law for sex offenses and the **limits upon expert testimony** when there is, and is not, **physical injury**; and (4) Is the medical referral "**solely for trial preparation**"? If so, it is **not admissible.**

e. **Recorded Recollection**: "A record…which a witness once had knowledge but now has insufficient recollection…made…when fresh in his memory." N.C.R. EVID. 803(5). The foundation is as follows:

1. The witness once had personal knowledge;

2. The document was prepared when the matter was fresh in the memory of the witness; and

3. After reading the document, the witness is unable to testify fully and accurately about the document's contents.

4. The document itself may be entered into evidence.

TIP: (1) **If the witness denies** the prior inconsistent statement, the statement is **collateral** and **cannot be used** to discredit the witness. State v. Wilson, 676 S.E.2d 512 (2009) (holding a tape recording of a witness's prior inconsistent statement collateral and inadmissible). **But remember**: Any piece of evidence only requires one admissible purpose. Cite **impeachment**, and **ask to admit** for that purpose; (2) The rules have a **three-tiered preference** for witness testimony. **First**, unaided testimony of a witness is preferred. **Second**, the law then prefers "refreshed recollection" under Rule 612, wherein the writing revives the witness' memory. The writing itself is not offered into evidence. **Third**, if memory is not revived, the "past recollection recorded" exception to the hearsay rule allows admission of the document itself so long as the foundation is met under Rule 803(5).

f. **Records of Regularly Conducted Activity** (known as the "**Business Records** exception"): "A report…of…events…made at or near the time by…a person with knowledge…kept in the course of a regularly conducted business activity…unless the source of information… indicates lack of trustworthiness." N.C. R. EVID. 803(6).

1. Great utility. Applies to computer generated reports, repair estimates, incident reports, personality tests, telephone bills, lab reports, rental records, and lots more.

2. Seek to **exclude if** prepared in contemplation of litigation ("lack of trustworthiness").

TIP: Most judges will agree **computer reports** are **not hearsay** as they are not statements made by "a person." It is a "best evidence" issue and usually admitted.

g. **Public Records and Reports**: "Records…of public agencies, setting forth (a) activities of the…agency, or (b) matters observed pursuant to duty imposed by law…excluding…criminal cases…observed by police officers…or (c) in civil actions…and against the state in criminal cases, factual findings resulting from an investigation…unless…a lack of trustworthiness." N.C. R. EVID. 803(8).

1. Meet foundational requirements.

2. **Admissible evidence includes** government agency and court records; certificates of title, death and birth; deed records; and lots more.

h. **Learned Treatises**: "To the extent called to…attention of an *expert witness* upon cross-examination or relied upon by him in direct examination, statements contained in published treatises…on a subject of…medicine or…science…established as a reliable authority by…the witness or…other expert testimony or by judicial notice." N.C. R. EVID. 803(18).

1. May **only** be **read into evidence but is substantive** evidence.

TIP: Great trial technique. **Establish reliability** of treatises, periodicals, and more **through** the **prosecution's or opposing witness**, **or** ask the court to take **judicial notice**. Once the authority is established as reliable, statements in **treatises are substantive evidence**; books and articles are substantive evidence when endorsed by the expert. **Use the DSM-IV, PDR, and more.**

i. **Other Exceptions**: N.C. R. EVID. 803(24). State v. Smith, 315 N.C. 76 (1985). A **six-part inquiry**: (1) Has proper notice been given?; (2) Is the hearsay not specifically covered elsewhere?; (3) Is the statement trustworthy?; (4) Is the statement material?; (5) Is the statement more probative than other evidence the proponent can procure through reasonable efforts?; and (6) Will the interests of justice be best served by admission?

1. Appellate courts require extensive findings. Cases will be overturned for **lack of required findings**. State v. Benfield, 91 N.C. App. 228 (1998).

2. **One negative finding is enough to exclude** evidence. Phillips & Jordan Inv. Corp. v. Ashblue Co., 86 N.C. App. 186 (1987).

X. Common Objections/Errors:

a. **Hearsay**: The classic. Words or acts **intended as an assertion and** offered **solely for the truth**. **Ask**: Is it offered for another reason, and, if so, does a hearsay exception apply? N.C. R. EVID. 801.

b. **Irrelevant**: More common than we think. Does the evidence have **any tendency** to make a **fact of consequence more or less probable**? **Want in**? Argue goes to weight. **Want out**? Argue collateral. N.C. R. EVID. 401.

c. **Lack of foundation**: **No personal knowledge**. Reading from or offering an **unauthenticated document**. **Insufficient predicate** for character or expert evidence. N.C. R. EVID. 104(a), 601, 602, 701, 702, 901, and more.

TIP: Witness must demonstrate a basis of **personal knowledge before answering.** Object and move to strike. N.C. R. EVID. 602.

d. **Speculation**: Witnesses love to guess another's thoughts or motives. N.C. R. EVID. 602.

e. **Assuming facts not in or misstating the evidence**: Listen to opposing counsel's question. Is **counsel echoing or repeating a witness' testimony**? Does it **confuse** or **mislead** the trier of fact? N.C. R. EVID. 601, 602, and 403.

f. **Confusing/misleading**: Does the evidence require mental gymnastics to comprehend its import or evaluate its weight? Is the evidence partially admissible or only for a limited purpose?

TIP: Counsel cannot testify by repeating or paraphrasing a **witness' testimony**. Common mistake. N.C. R. EVID. 601 and 602.

g. **Improper character evidence**: **Look for** (1) the predicate **foundation** *or* (2) testimony about a **character trait before character** is **at issue**. Examples: "He's a liar," or "I am still afraid of him," or "He's telling the truth." *State v. Owen*, 130 N.C. App. 505 (1998). **Habit** is a close cousin of character evidence. N.C. R. EVID. 404, 405, 406, 607, and 608.

TIP: (1) **Approved character traits** are truthful/untruthful; honest/dishonest; peaceful/violent; law abiding/not law abiding; temperance; and conduct essential to a charge, claim, or defense. **No expert evidence on credibility of a witness,** although **there may be** expert evidence on characteristics consistent with certain profiles or groupings (e.g., children in general, sexually abused children, etc.); (2) **Distinguish** between "**admissions of a party opponent**" under Rule 801(d), which allows admission of the opposing party's "own statement," and a "**statement against interest**" under Rule

804(b)(3), which requires (a) unavailability *and* (b) a statement which is contrary to pecuniary or proprietary interest, subjects him to civil or criminal liability, or renders invalid a claim by him against another, among other elements; and (3) Think **character, impeachment**, and **crimes**. N.C. R. EVID. 404, 405, 406, 607, 608, 609, and 611. **The analysis**: relevance and Rule 403 balancing test.

h. **Unresponsive**: Great with the "wandering witness." N.C. R. EVID. 402 and 403.

i. **Beyond the scope of re-direct/re-cross**: We love to repair what we miss. State v. Barton, 335 N.C. 696 (1994). **Countermove**: recall the witness.

j. **Leading**: "Any question that suggests a response." State v. Britt, 291 N.C. 528 (1977). Skews truthful evidence and manufactures false evidence. See **limited exceptions** (i.e., undisputed facts, young children, transitioning topics, hostile witness, etc.) in N.C. R. EVID. 611(c).

k. **Asked and answered**: When we just can't get the answer we want. Or cumulative. N.C. R. EVID. 403.

l. **Unfairly prejudicial**: Does the evidence **arouse** the jury's **sympathies**, evoke a **sense of horror**, appeal to an **instinct to punish**, or appeal to the jury's **emotions rather than intellect**? Must "substantially outweigh" any probative value. Never argue it is a close call. **Want in**? Seek a limiting instruction. N.C. R. EVID. 403; Old Chief v. U.S., 519 U.S. 172 (1997).

TIP: Request (1) a *voir dire* on the Rule 403 topic *and* (2) ask the court to make analysis for the appellate record. This is a hot topic, and Superior Court judges generally permit the same. If denied, do an "offer of proof."

m. **Argumentative**: Simply "not evidentiary." Any question that is **rhetorical** or has **no real answer**. Example: "Were you lying then or now?" N.C. R. EVID. 403.

n. **Interrupting a witness:** Opposing counsel interrupting a witness's testimony without proper objection. Let the witness answer. Example: "Mr. Smith, who are you talking about?" There is a reason for cross-examination. **No colloquy**. **Keep addressing the judge**. N.C. R. EVID. 102 ("rules…secure fairness in administration"), 103 (rulings on evidence), Rule 12 of the General Rules of Practice for the Superior and District Courts (addressing fair treatment of witnesses, abusive language, propriety of conduct, and respect for the court).

TIP: (1) Object **timely** (or waiver/admonishment); (2) **constitutionalize** objections; (3) **guard "opening the door**"; and (4) always **cite basis** (or "plain error" review).

XI. **Character Evidence:**

a. Judges often discount character evidence in bench trials. Juries are often persuaded by character evidence.

b. There are **two competing policies** underlying character evidence: (1) The risk a finding will be based upon the fact-finder's attitude toward character rather than an objective determination of facts, and (2) the principle that credibility of a witness is always at issue.

c. The applicable rules are N.C. R. EVID. 404, 405, 607 and 608. *See also*, N.C. R. EVID. 609 below.

d. **Methods of proof**: Lay opinion, reputation, and specific instances. Remember: (1) **lay opinion** foundation requires witness #2 is "*personally acquainted*" with witness #1 "*well enough to have formed an opinion*" of a character trait; (2) **reputation** evidence requires witness #2 is *part of* "*an appreciable group of people who have an adequate basis to form an opinion*" of a character trait of witness #1. In other words, only reputation evidence requires the foundation predicate of knowledge within a "community." *See* Robert P. Mosteller, Donald H. Beskind, Thomas W. Ross, and Edward J. Imwinkelried, N.C. EVIDENTIARY FOUNDATIONS (1998) at 166 and 190; and (3) **specific instances** are generally limited to an essential element of a charge, claim, or defense. N.C.R. EVID. 405(b). One may also cross-examination a witness about **specific instances** of conduct concerning that or another witness's character for truthfulness/untruthfulness. N.C. R. EVID. 608(b). Usually bound by witness's answers.

e. **Approved "character traits"**: (1) truthful/untruthful (honest/dishonest); (2) peaceful/violent; and (3) law abiding/ not law abiding; (4) temperance; and (5) conduct essential to a charge, claim, or defense. State v. Moren, 98 N.C. App. 642 (1990)("reputation [the defendant was] not a drug user [is] relevant to trafficking"). **Exception:** When relevant, evidence of "general good character" may be adduced at capital sentencing. State v. Jennings, 333 N.C. 579 (1993).

f. **Standard of proof:** Preponderance of the evidence.

g. Character evidence **may be used to respond** to evidence presented by the other side.

h. **Expert opinion** as to a character trait or credibility is generally **inadmissible** . State v. Aguallo, 318 N.C. 590 (1986) (victim was "believable"). **Exceptions**: (1) credibility of children in general; and (2) characteristics consistent with certain profiles. State v. Kennedy, 320 N.C. 20 (1987); State v. O'Connor, 150 N.C. App. 710 (2002).

i. **Habit** is a close kin: involves "systematic conduct," "invariable regularity," or a "regular response to a repeated specific situation." State v. Hill, 331 N.C. 387 (1992). Habit is "doing" something, not "being" something (*e.g.*, "drunkenness"). *Id.*

j. **Understand N.C. R. Evid. 404(a)**: Covers the accused, victim, and witnesses. Do not let the prosecution admit evidence of the defendant's character in its case-in-chief.

k. Remember: (1) **do not "open the door"**; and (2) rebuttal/surebuttal. If this happens, limit the opponent's cross to relevant questions, or specific instances, about the precise character trait (*e.g.*, prosecution may question the witness broadly about the defendant's entire criminal record, and the character trait at issue is only truthfulness).

TIP: (1) Case law allows the court to **limit the number of character witnesses** and take judicial notice of the remaining witnesses. State v. Ramey, 318 N.C. 457 (1986) (after six character witnesses testified, the court had the remaining character witnesses identify themselves and instructed the jury said witnesses were present to testify to the defendant's pertinent character trait); (2) **Look for** comments like "**genuineness**," or "**reliability" of responses**, or that the **victim "did not seem to be coached**." State v. Wise, 326 N.C. 421 (1990); State v. Baymon, 336 N.C. 748 (1994); (3) character traits of honesty, peacefulness, and law-abiding are **substantive evidence**, and the defendant is entitled to an **instruction if he asks**. State v. Bogle, 324 N.C. 190 (1989); (4) once the defendant puts on evidence of good character, the state can cross with specific instances; and (5) **evidence of self-defense only does not allow** the state to proffer **specific instances of violent conduct**. State v. Ammons, 167 N.C. App. 721 (2005).

XII. The Law on "Possession":

a. A person is in possession of property when they "**have the power and intent to control it**; Possession need not be **actual** but may be **constructive**." State v. Rich, 87 N.C. App. 380 (1987); State v. McLaurin, 320 N.C. 143 (1987); State v. Boyd, 154 N.C. App. 302 (2002).

b. The State is neither required to prove a defendant owned property nor was the only person with access to it. State v. Rich, *supra* at 382.

c. To survive a **motion to dismiss**, the State must present substantial evidence (1) of each essential element of the offense *and* (2) of the defendant being the perpetrator. State v. Robinson, 355 N.C. 320 (2002).

1) At the close of the State's case, evidence is viewed "in the **light most favorable** to the State, giving the state the

benefit of every reasonable inference and resolving any contradictions in its favor." State v. Rose, 339 N.C. 172 (1995); State v. Turner, 168 N.C. App. 152 (2005).

2) At the close of all the evidence, the view of the evidence "in the light most favorable to the State" disappears.

d. A person has **actual possession** of property if it "[1] is on his person, he [2] is aware of its presence, and [3] either by himself or together with others he [4] has the power and [5] intent to control its disposition or use." State v. Reid, 151 N.C. App. 420 (2002). *See also*, the N.C. P.I. Crim. 104.41.

e. A person has **constructive possession** of property if "[1] he does not have it on his person but [2] is aware of its presence, and [3] has either by himself or together with others, both [4] the power and [5] intent to control its disposition or use. A persons awareness of the presence of the [substance or article] and his power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances." N.C.P.I. Crim. 104.41. **Case law** says constructive possession exists when the defendant "while not having actual possession,…has the intent and capability to maintain control and dominion over [the property]. State v. Matias, 354 N.C. 549 (2001); State v. Thorpe, 326 N.C. 451 (1990); State v. Davis, 325 N.C. 693 (1989); State v. Brown, 310 N.C. 563 (1984); State v. Harvey, 281 N.C. 1 (1972); State v. Hall, 692 S.E.2d 446 (2010) (the *State must prove* the *defendant knowingly had* a controlled substance and *permits a defense* for same); and State v. Mendez, 42 N.C. App. 141 (1979) (*except for trafficking offenses*, the *State must prove only* the *defendant knew* the *substance was a controlled substance* and *not the precise nature* of the controlled substance).

1) **Close proximity** permits an *inference* that the defendant was aware of its presence and had the power and intent to control its disposition and use. Turner, *supra* at 154.

2) If the defendant was the "**custodian of the vehicle**" where contraband was found, an *inference* of constructive possession arises. State v. Tisdale, 153 N.C. App. 294 (2002). Typically, a custodian **is both the driver and registered owner** of the vehicle. State v. Wiggins, 648 S.E.2d 865 (2007) (a vehicle both registered and driven by a defendant allows an inference of knowledge and possession).

3) If "a reasonable *inference* of the defendant's guilt may be drawn from the evidence," the court "must send the case to the jury." State v. Grisgby, 351 N.C. 454 (2000).

4) If possession is **non-exclusive**, the State must show "**other incriminating circumstances** before constructive possession may be inferred." State v. Davis, 325 N.C. 693 (1989); State v. Hedgecoe, 106 N.C. App. 157 (1992).

5) Intent is often proven by circumstantial evidence which may be inferred. State v. Jackson, 145 N.C. App. 86 (2001).

f. Beware of the "**doctrine of recent possession**": For this to apply, the State must prove: (1) the property was stolen; (2) the defendant has possession of the property; *and* (3) the defendant has possession "so soon after it was stolen *and* under such circumstances as to make it unlikely that the defendant obtained possession honestly." N.C. P.I. Crim. 104.40. State v. Wilson, 313 N.C. 516 (1985) and State v. Jackson, 274 N.C. 594 (1968). This doctrine **does not apply** to the crime of receiving stolen goods and **probably does not apply** to the crime of possession of stolen goods. **However**, the defendant's **purchase** of property **at a fraction of the cost permits an inference** the defendant either had knowledge or a reasonable belief the property was stolen. State v. Tanner, 666 S.E.2d 845 (2008).

g. The **amount** possessed **includes** "any mixture…which contains any controlled substance." N.C. Gen. Stat. §90-89(3)(a).

h. Possession is a **fact-intensive inquiry**.

TIP: Know the cases of (1) State v. Tuggle, 109 N.C. App. 235 (1993) (there is **insufficient evidence to support a conviction** of **unlawful possession of pills** where there is no evidence **(a)** the tablets were not issued pursuant to a prescription *or* **(b)** the quantity was larger than amounts normally prescribed); (2) **Arizona v. Gant**, 129 S. Ct. 1710 (2009) (**Police may search** the passenger compartment of a vehicle **incident to** a recent occupants **arrest only if** it is **reasonable to believe** (a) the arrestee might access the vehicle at the time of the search or (b) **the vehicle contains evidence of the offense of arrest**); (3) **State v. Davis**, 640 S.E.2d 446 (2007) (Dismissed defendant's conviction for drug offenses when he, pursuant to a search warrant of his girlfriend's residence, was located in the kitchen near money, marijuana, and crack cocaine, all found in numerous bags and locations underneath the refrigerator, in paper bags, a deep freezer, the kitchen cabinet, and a fryer on the kitchen floor. The court provides a **thorough analysis of** the facts in **a non-exclusive possession case**, **ultimately** holding the State's evidence merely created suspicion and conjecture and **dismissing** the case; and (4) **State v. Weems,** 31 N.C. App. 569 (1976) (non-exclusive, constructive possession case; without more, **mere presence of a passenger** in a vehicle, **even in close proximity**, **requires dismissal** as a matter of law).

XIII. Motions to Suppress:

a. **District Court**: **Generally**, motions to suppress evidence should ordinarily be made **during trial**, and may be made **orally**. N.C. Gen. Stat. §15A-973.

1. **Probable cause hearings**: A district court judge is not required to exclude evidence on the ground it was acquired by unlawful means. The decision is in the **discretion** of the district court judge. N.C. Gen. Stat. §15A-611(b) and commentary. State v. Hosey, 318 N.C. 330 (1986) ("commentary…not binding authority…but…given substantial weight"). The **commentary suggests** the judge serves as the gatekeeper, *is free to exclude evidence in a clear-cut or flagrant case*, and may choose or decline to hear close questions of law or fact.

TIP: (1) Find the legal issues, talk to prosecution witness(es) and officers (and use them to influence the A.D.A.), get videos and officer's notes, and show the ADA his problems. Wear them down *or* negotiate a smart plea; (2) **Ask** the judge **to toss a** really **bad case**. Tell the judge he is the "**gatekeeper**" who **can "exclude evidence in a clear-cut or flagrant case**." Superior court is backlogged. Empower the judge; (3) While the rules of evidence do not apply, **cite the statutory requirement of "reliable hearsay**" when making evidence objections; (4) Consider using PC hearings as a **discovery tool**; and (5) **Ask permission to record hearings** if you need **to preserve evidence**.

2. **DWI trials**: Defense **motions to suppress or dismiss** the charges are **required** to be made **before trial except** for (1) motions to dismiss at the close of the state's or defendant's case and (2) motions based on facts not known to the defendant before trial. N.C. Gen. Stat. §20-38.6.

a) The **statute does not require motions** to be **in writing**. However, our **local practice does**.

b) If not determined summarily, the judge must conduct a hearing, make findings of fact, and issue a written order called a "**preliminary determination**."

c) If granted, the judge may not enter a final judgment until the state has either appealed the ruling (per N.C. Gen. Stat. §20-38.7(a)) or indicated it does not intend to **appeal**.

d) If 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).

e) **If** the State appeals and **findings of fact** are **disputed**, the **superior court determines** the matter in ***de novo***.

f) 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).

g) 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).

h) The general assembly intended **pretrial motions** under N.C. Gen. Stat. §20-38.6(a) to address only **procedural matters** such as (1) **delays in processing** of a defendant, (2) limitations imposed on a defendant's **access to witnesses**, and (3) challenges to the **results of a chemical analysis**. Fowler, *supra* at 539.

i) As of this writing, there is no defined time limit (i.e., a "reasonable time") for the state's notice of appeal or for a hearing to occur in superior court.

j) For an attempted analysis of separation of powers, double jeopardy, due process, discovery rights, speedy trial, and equal protection issues, *see* Shea R. Denning, Motions Procedures in Implied Consent Cases Post State v. Fowler and State v. Palmer, Sch. of Gov't, (June 19, 2009).

k) Note trial procedure and evidence changes including new **remand** and **sentencing hearings**, **HGN** and **DRE** evidence, and **accident reconstruction experts**.

l) Consider: (1) **State v. Knoll**, 322 N.C. 535 (1988) (denial of access to observers and additional tests); (2) N.C. Gen. Stat. §534.2 (probable cause for **preventive detention**); (3) N.C. Gen. Stat. §20-38.4 (additional **procedures magistrate must follow**); (4) N.C. Gen. Stat. §20-38.5 (**access** to chemical testing rooms and jail **for witnesses and attorneys**); (5) N.C. Gen. Stat. §20-139.1(b) (requirements for breath test); and (6) N.C. Gen. Stat. §20-139.1(d) (mandatory "**timely, reasonable efforts to provide** defendant

with **telephone access and** ensure outside parties have **physical access to defendant**"), and much more.

m) In suppression hearings, **argue** (1) a **substantial violation** of the statute, (2) **substantive due process** violations, (3) **procedural due process** violations, and (4) **prejudice** to the defendant.

n) Remember: (1) N.C. Gen. Stat. §20-179 (**procedure** used **to determine aggravating factors** in **superior court**), (2) **Blakeley v. Washington**, 542 U.S. 296 (2004) (jury determines all aggravating factors other than prior convictions), and (3) **Melendez-Diaz** (use of lab reports or test results).

TIP: **Much remains unanswered**: (1) How long does the State have to give notice of appeal?; (2) How long may existing statutory requirements remain unfulfilled?; (3) When must there be "prejudice" to the defendant? State v. Labinski, 188 N.C. App. 120 (2008) (prejudice is required for *Knoll* motions); (4) Does the prosecutor have an ethical duty to dismiss after deciding not to appeal the "preliminary indication"? Rule 3.8 N.C. Rules of Professional Conduct (prosecutor must refrain from prosecuting a charge not supported by probable cause); (5) Does the case return to the judge who heard the suppression motion?; and (6) Regardless of the above, **isolate the issues and try them**.

TIP: **Extra credit**: (1) 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 check box number fourteen on the "willful refusal" affidavit); (2) Make sure your client has **paid** his **civil revocation fee** before you submit a post-trial limited driving privilege (LDP); (3) 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; (4) DMV **treats** a **LDP** just **like a driver's license** regarding consequences of a ticket; and (5) With a "**willful refusal**," be sure your client has completed (a) his substance abuse **assessment and treatment** and (b) his **trial** before you submit your LDP after six months. Otherwise, he is ineligible.

TIP: **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 difference between 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" and is neither a medical doctor nor has a doctorate in related fields; (8) He accepts and rejects various research and experts; (9) He was recently 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.

TIP: (1) As to the defendant's **notice of rights**, N.C. Gen. Stat. § 20-16.2 combined with State v. Thompson, 154 N.C. App. 194 (2002), require that (a) law enforcement orally read the notice, (b) the defendant receive a copy of the notice in writing, *and* (c) the defendant sign the rights form before the chemical analysis is performed (unless unconscious or unable to sign); (2) **District Attorneys do not represent law enforcement**. The Attorney General does. Remember this when the district attorney objects or serves you a motion to quash a subpoena; (3) State v. Bonds, 139 N.C. App. 627 (2000), allows the court to take **judicial notice of** the **NHTSA Manual**; (4) A **foundation for HGN** is still **required**. State v. Helms, 348 N.C. 578 (1998); N.C. R. Evid. 702; (5) File Brady motions in District Court which remind prosecutors of their duty to investigate; (6) Foreman and Bowden abolish the **myth** that **road-block avoidance grants** an **automatic right to stop**. It is a "totality of the circumstances" test; (7) Use the **Public Records Act** to get training certifications, manuals, and more (*e.g.*, N.C. Justice Academy materials, dog training materials, CI policies, etc.); (8) **Always get** the officer's notes, 911 tape, in-car video, intoxilyzer room video, and any security camera video (*e.g.*, magistrate's office, detention center, etc.); and (9) **Checkpoints** can be won and are still an issue. Know Rose, Veazey, and Veazey II.

b. **Superior Court**: Generally, a motion to suppress must (1) be **in writing** and (2) must be **accompanied by** an **affidavit** containing facts supporting the motion. N.C. Gen. Stat. §§15A-951 and 15A-977.

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

2. A motion to suppress may be made during trial under very limited conditions. N.C. Gen. Stat. §15A-975(b) and 15A-977(e).

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

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

5. The **prosecution has** the **burden** of proving the legality of the challenged issue by the **preponderance of the evidence** and is usually required to proceed first.

6. The **defendant has** a **preponderance burden** to establish **standing** unless the evidence establishes it otherwise. State v. Warren, 59 N.C. App. 264 (1983).

7. Heightened burdens and legal principles apply to (a) the search of an automobile without a warrant and (b) consent searches.

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

9. A defendant may contest validity of a search warrant by contesting the truthfulness of the testimony showing probable cause for its issuance. N.C. Gen. Stat. §15A-978. A defendant who requests the identity of a **confidential informant** must make a sufficient showing that the circumstances of his case mandate such disclosure. State v. Watson, 303 N.C. 533 (1981); Roviaro v. U.S., 353 U.S. 53 (1957).

10. For a comprehensive compendium for litigating felony suppression motions and issues in Superior Court, see J. **DAVIS, MOTIONS TO SUPPRESS: STATEMENTS, PROPERTY, AND IDENTIFICATION (2010).**

11. Remember **exceptions to the general exclusionary rules**: (1) "**Good faith**" doctrine. *See* N.C. Gen. Stat. §15A-974; (2) "**inevitable discovery**" doctrine. *See* State v. Garner, 331 N.C. 491 (1992); (3) "**independent source**" exception. *See* Murray v. U.S., 487 U.S. 533 (1988) (permits evidence initially discovered by an unlawful search but later obtained by untainted lawful conduct); (4) "**derivative evidence.**" *See* Wong Sun v. U.S., 371 U.S. 471 (1963) (where the connection between an illegal act and evidence later lawfully obtained becomes so attenuated the taint dissipates and allows admission); and (5) "**public safety**" exception. *See* State v. Henson, 182 N.C. App. 176 (2007) (officer responding to shooting asked husband where gun was located prior to Miranda warnings; no error); N.Y. v. Quarles, 467 U.S. 649 (1984).

TIP: Beginning July 1, 2011, a "**good-faith exception**" to the exclusionary rule **will apply to motions to suppress under N.C. Gen. Stat. §15A-971, *et seq.*** **However**, the statutory **exception** is limited and **does not apply to (1)** motions to suppress brought under the **state constitution**. See State v. Carter, 322 N.C. 709 (1988); **or (2)** any cases other than when law enforcement acted in good faith on a judicial ruling (e.g., a search warrant, a magistrate's finding of probable cause to issue a criminal process, etc.). In other words, **law enforcement** must be **relying in good faith** on a **document issued by** a **judicial official**.

12. Remember **case law** exists which generally **allows impeachment with unconstitutionally seized or suppressed evidence**.

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

XIV. Rule 404 (b):

a. The **rule itself restricts character and criminal propensity evidence** and is generally a **rule of exclusion**. ("Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes"). Evidence of character is not admissible to prove propensity with limited exceptions for the accused, victim, and witness. N.C. R. EVID. 404(a).

b. The **case law** states it is a "**rule of inclusion**" **subject to exclusion if** the **only probative value is** to show **propensity**. State v. Coffey, 326 N.C. 268 (1990).

c. There is a **three part test for admissibility**. State v. Bynum, 111 N.C. App. 845 (1993):

1. Is the evidence offered for a **proper purpose** under 404(b)?;

2. Is it **relevant**?; and

3. Is the **probative value substantially outweighed by** its **prejudicial effect** (a Rule 403 analysis)?

a) The cases emphasize "**similarity**" and "**temporal proximity**." State v. Artis, 325 N.C. 278 (1989).

b) For "*similarity*," appellate cases look for "unusual facts," "unique characteristics," and "factual similarity." State v. Al-Bayyinah, 356

N.C. 150 (2002) (two robberies were factually dissimilar); State v. Carpenter, 361 N.C. 382 (2007) (defendant's prior sale of cocaine lacked sufficient similarity);

1. **Similarity of** the **crime or sex** of the victim, without more, **are insufficient**. State v. McClain, 240 N.C. 171 (1954) ("[It] is…an established principle in North Carolina that 'the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime.'") This case was resurrected in Carpenter; State v. Ray, 678 S.E.2d 378, 2009 N.C. App. LEXIS 1069 (N.C. Ct. App. 2009).

c) For "*temporal proximity*," As **similarity increases**, concern over **remoteness decreases**. State v. Sneeden, 108 N.C. App. 506 (1993). However, the passage of time erodes commonality between offenses. State v. Jones, 322 N.C. 585, (1988).

    1. **Remoteness** in time is less important when to show intent, motive, *modus operandi*, knowledge, or lack of accident or mistake. Sneeden, *supra* at 510-11 (23 years between events).

    2. Remoteness in time is more problematic when used to show common plan or scheme. State v. Jones, 322 N.C. 585 (1988).

    3. Where acts and conduct are regular or continuous over a long period of time, length of time increases relevance. State v. Frasier, 121 N.C. App. 1 (1995).

    4. Where a defendant is incarcerated or removed from access to the victim for a period of time, remoteness is less significant. State v. Riddick, 316 N.C. 127 (1986).

5. **The common argument**: **remoteness** in time generally **affects weight** of the evidence, **not admissibility**. State v. Peterson, 361 N.C. 587 (2007).

d. A prior **acquittal generally precludes 404(b) evidence**. State v. Robinson, 115 N.C. App. 358 (1999) ("prior acquittal so divests the charge of its probative value that any 404(b) purpose is outweighed by prejudice"); State v. Bell, 164 N.C. App. 83 (2004) (cannot use prior charges if double-jeopardy applies because of the collateral estoppel doctrine). *But see* State v. Agee, 326 N.C. 542 (1990).

e. **Either the prior conviction or the underlying facts** and circumstances **are admitted, but not both**. State v. Badgett, 361 N.C. 234, (2007).

f. 404(b) evidence **may include** Class A through E juvenile adjudications. N.C. R. EVID. 404(b); Blakey, Loven, Weissenberger, North Carolina Evidence Courtroom Manual (2009); N.C. Gen. Stat. §7B-3000(f).

g. The court **must give a limiting instruction upon request**. State v. Everette, 111 N.C. App. 775 (1993).

h. Standard of proof: **preponderance of the evidence**. Most judges believe the burden is on the defendant to show that the evidence should not be admitted, although contrary to the rules of evidence ("proponent must establish admissibility, if challenged"). N.C. R. EVID. 104.

TIP: (1) **Always file a pretrial motion in limine** about Rule 404(b) evidence **if you suspect** the state may attempt to introduce the same into evidence; and (2) **File notice of your intent** to use 404(b) evidence **and serve** on the opposing party **pretrial.**

i. **Preferred procedure**: conduct a **voir dire hearing** outside the presence of the jury, make a full record, seek a ruling, and lodge all objections on the record.

TIP: (1) The **defendant has the right on voir dire** to ask questions on cross-examination **to "get the whole story on the record**." State v. Smith, 152 N.C. App. 514 (2002); and (2) ask for a **pre-trial ruling**. Otherwise, the delay has a "chilling effect" on the defendant's right to testify, and the defense is unable to address the issue in *voir dire* and overall trial strategy.

j. Criminal **discovery statutes provide** that **404(b) evidence must be turned over to the defendant**. N.C. Gen. Stat. §15A-903(a)(1) ("Upon motion by the defendant, the court must order the state to

make available to the defendant…complete files…in the investigation…**or of the prosecution of the defendant**.") However, the **State is not required to give notice of its intent to use 404(b) evidence** prior to the beginning of trial. State v. Walters, 357 N.C. 68 (2003).

TIP: (1) The **federal cognate requires** the government to give **notice of intent to use** 404(b) evidence. Neither the state legislature nor the appellate courts have said the rule is different in state court; (2) File your pretrial motion *in limine*; and (3) **Examine** the **state's witness list** for 404(b) evidence**.**

k. This rule is **fertile ground for reversal**. Judges will pay attention.

l. The **analysis**: proper purpose, relevance, temporal proximity, similarity, and 403 balancing test.

m. For a smart, defense-oriented 404(b) analysis, see Constance C. Widenhouse, **What's the Purpose? Making Sense of Rule 404(b) (2010).**

XV. Rule 609:

a. The rule allows **impeachment** by evidence of conviction of a crime and applies to class two misdemeanors and more serious crimes.

b. Listen to the **form** of the question. Must have a **good faith basis** to ask.

c. Can ask about **time**, **place of conviction**, and **sentence imposed**. State v. Lynch, 334 N.C. 402 (1993).

d**. Juvenile adjudications** are generally not admissible. However, the court **may** admit the same if (a) to attack credibility and (b) necessary for a fair determination of guilt or innocence.

e. The **rule limits admissibility to** the sole purpose of **attacking credibility** of a witness. ***See also***, the **N.C. P.I. Crim. 105.35** (May consider evidence of a criminal conviction "for one purpose only….if…you believe…this bears on truthfulness.") If a conviction appears to be for another purpose, file a motion *in limine*.

TIP: **Crimes** are generally of **three types**: (1) false statement (fictitious information, perjury, false report, etc.); (2) veracity (larceny, theft, burglary, embezzlement, etc.); and (3) others (driving charges, assaultive conduct, drug offenses, etc.). **Most crimes are the third type and are irrelevant**. File a pretrial motion *in limine*, object if elicited at trial, address the limited purpose in your motion to dismiss, and punctuate your point in closing argument. The **rule and pattern jury instruction** are **powerful tools** in your tool box.

f. **If more than ten years** from date of conviction or release, **requires** sufficient advance **written notice** to contest use of same. Generally excluded unless the proponent demonstrates, by specific facts, the probative value **substantially outweighs** the prejudicial effect.

g. A conviction on **appeal** may be admitted, but notice of the appeal is further allowed.

h. If the court or opposing counsel knows of client's criminal history, **draw the sting**.

TIP: **What is a "conviction**"? A "final judgment of a court that finds the defendant guilty of a criminal offense." **It is:** (1) a finding of guilt in district (without appeal) or superior court (with or without appeal); (2) a prayer for judgment continued (PJC) "with conditions amounting to punishment" (e.g., more than "payment of cost of court" and "not violate the laws") State v. Popp, 676 S.E.2d 613 (2009); and (3) certain juvenile adjudications (deemed proper by the court "to attack credibility" and "necessary for a fair determination of guilt or innocence"). **It is not:** (1) a finding of criminal (or civil) contempt; (2) a not guilty; (3) a dismissal; (4) a successful deferred prosecution; (5) a successful conditional discharge (90-96); or (6) a PJC "without conditions amounting to punishment."

TIP: **What is an "admission" for use in a civil case? It is:** (1) a guilty plea; and (2) a guilty plea that results in a PJC. **It is not:** (1) a no contest plea; and (2) a not guilty plea with a finding of guilt. **It is unclear whether:** (1) an Alford plea; or (2) an appeal of a guilty plea in district court are deemed admissions for use in a civil case. *See* Brandis and Broun on North Carolina Evidence, page 2:25, note in 246 (1993).

TIP: Beware of a PJC in many contexts: (1) The **public** has no idea what it means; (2) For Chapter 20 purposes, **other states** generally treat our PJC's as a conviction. Also, **DMV** allows two in five years, **insurance** one in three years; (3) a PJC may be a hammer ("from **day to day**"), for a **time certain** (until the "next term of court"), or **indefinite** (like a Chapter 20); (4) a PJC may, or may not, constitute a "**conviction.**" A PJC upon payment of cost *or* with the condition that the defendant obeys the law is **not a conviction**. Conversely, if it has "conditions amounting to punishment" or was granted after a "guilty" plea, it **is a conviction**. State v. Lynch, 337 N.C. 415 (1994), State v. Sidberry, 337 N.C. 779 (1994) (holding that, even where judgment was continued pending disposition of other charges, "*a plea of guilty . . . is equivalent to a conviction* of the offense charged"); (5) it may eliminate the possibility of an **expunction** (e.g., a misdemeanor conviction for a defendant under ages eighteen or twenty-one, etc.); (6) **Do not** plead guilty and ask for a PJC as this combination constitutes a conviction for Rule 609 purposes. State v. Sidberry, 337 N.C. 779 (1994)**.** Instead**,** plead "no contest" and Rule 609 does not apply.

XVI. Third Party Guilt:

a. Holmes v. South Carolina, 547 U.S. 319 (2006) (South Carolina Supreme Court's evidence rule limiting evidence offered by the accused to (1) such facts as are inconsistent with his own guilt, (2) such facts as raise a reasonable inference to his own innocence, (3) facts which can have no other effect than to cast a bare suspicion upon another, or (4) facts which raise a conjectural inference as to the commission of a crime by another, are not admissible, and (5) before such evidence is received, there must be such proof which clearly points out another person as a guilty party, **is arbitrary and unconstitutional and violates a criminal defendant's right to have "a meaningful opportunity to present a complete defense**." *See also* Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

b. **North Carolina case law** states evidence of third party guilt must inculpate another and exculpate the defendant; do more than create a mere inference; point to the guilt of another; and be inconsistent with the defendant's guilt. State v. Deese, 33 N.C. App. 413 (2000); State v. May, 354 N.C. 172 (2001). These legal principles **are now of questionable authority and meaning in light of** the U.S. Supreme Court's ruling in **Holmes**.

c. "**Whether** rooted directly in the **Due Process** clause of the Fourteenth Amendment or in the **Compulsory Process or Confrontation clause** of the Sixth Amendment, **the Constitution guarantees criminal defendants 'a meaningful opportunity to present a compete defense**.'" California v. Trombetta, 467 U.S. 479 (1984); Holmes at 322.

d. "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Rock v. Arkansas, 483 U.S. 44 (1987); Holmes at 322.

e. Two North Carolina appellate cases have upheld the controlling case law since Holmes. State v. Loftis, 185 N.C. App. 190 (2007); State v. Wright, 2007 N.C. App. Lexis 774 (2007).

TIP: There is a "**due process" right to present a defense**, including third party guilt. Make a full record. This is fertile ground on appeal.

XVII. Habitual Felon:

a. Is a **status** and **not a crime**. The finding of habitual felon status serves to **enhance the underlying felony to a Class C felony unless** the underlying offense classification is higher. No sentence is imposed solely for the finding the defendant is a habitual felon.

State v. Wilson, 139 N.C. App. 544 (2000); N.C. Gen. Stat. § 14-7.1-7.6.

b. The State is collaterally estopped from using the same predicate felony convictions used in a prior habitual felon trial which resulted in an acquittal in a subsequent habitual felon trial. State v. Safrit, 145 N.C. App. 541 (2001).

c. The indictment must comport with N.C. Gen. Stat. §14-7.3.

d. If a defective indictment is dismissed, the State may seek a new indictment. State v. Cheek, 339 N.C. 725 (1995). **Query**: If the State fails to amend the indictment at the close of all the evidence, is this true? I do not believe so.

e. The defendant cannot be tried within ten days of indictment.

f. The judge may not accept a stipulation to habitual felon status. State v. Artis, 174 N.C. App. 668 (2005).

g. When adjudicating a plea, the judge must comply with N.C. Gen. Stat. § 15A-1022.

h. Prior record level points (1) do not include the predicate felonies and (2) are determined by the underlying substantive felony, not the elevated Class C habitual felon status. State v. Lee, 150 N.C. App. 701 (2002).

i. **Extraordinary mitigation** may apply to sentencing. Extraordinary mitigation is authorized for offenses that are Class B2, C, or D felonies; the offense is not a drug trafficking offense or drug trafficking conspiracy offense under N.C. Gen. Stat. § 90-95(h) or (i); *and* the defendant is a prior record level one or two. N.C. Gen. Stat. § 15A-1340.13(g), (h).

j. Predicate felonies may also constitute aggravating factors. State v. Roper, 328 N.C. 337 (1991).

k. Habitual felon sentences **must run consecutive** to any sentence being served. N.C. Gen. Stat. §14-7.6.

l. Because habitual felon is a status and not a separate offense, magistrates **should not impose additional release conditions** upon a defendant charges as a habitual felon. *See* Rowan County's Policies on Pretrial Release.

m. Any discrepancies in the predicate felony judgments are for the jury to consider.

XVIII. *Crawford* (*Davis* and *Melendez-Diaz*) Made Easy:

a. **Rule**: A testimonial, out of court witness statement is ***not admissible*** against a criminal defendant ***unless*** (1) the witness is **unavailable and** (2) there was a **prior opportunity for cross examination**.

1. "**Core class of testimonial statements**": Statements contained in formalized testimonial materials (including affidavits, depositions, confessions, and other statements under oath), custodial examinations, prior testimony, pretrial statements one would reasonably expect to be used by the prosecutor, and statements made under circumstances which would lead an objective person to reasonable believe the statement would be available for use at trial.

TIP: (1) Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) held that **forensic laboratory reports are testimonial** and subject to Crawford. The defendant was charged with distributing and trafficking cocaine. The prosecution offered into evidence "certificates of analysis," reporting both the weight of the bags seized and that they were cocaine. The court held, although the documents were called "certificates," they were clearly affidavits within the core class of testimonial statements covered by Crawford and subject to the holding therein; and (2) North Carolina jurisprudence has already incorporated Melendez-Diaz into its case law.

b. **Because of Melendez-Diaz** holding **and** the fact it deemed constitutional "**simple notice and demand statutes**" (laws that require the state to give notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period to time to object to admission of the evidence absent the analyst's live appearance at trial), **the law in North Carolina has been changed to address (1) chain of custody, (2) admissibility of lab reports containing the results of the chemical analysis of blood or urine, (3) how said reports may be transmitted, and (4) use of the chemical analyst's affidavit in the district and superior courts**.

1. **N.C. Gen. Stat. §8-58.20(d) requires** the **district attorney** to (1) **serve a copy of the lab report and affidavit and** (2) indicate whether it will be offered as evidence against the defendant no later than **five business days** after its receipt **or thirty business days** before any proceeding.

a) **N.C. Gen. Stat. §8-58.20(g)** governs "**chain of custody**" and **requires** the **district attorney** to (1) notify the defendant at least **fifteen business days** before any proceeding of its intent to introduce the statement **and** provides the defendant with a copy

and (2) **requires the defendant** to file written notification of his objection with the court and the state at least **five business days** before the proceeding. **If** a timely objection is filed and served, admissibility is governed by the rules of evidence.

2. **N.C. Gen. Stat. §20-139.1(c1)** states the "**results of a chemical analysis of blood or urine**" are **admissible** without authentication or testimony of the analyst **if** (1) the **state notifies** the defendant at least **fifteen business days** before the proceeding of its intent to introduce said report **and** (2) provides a copy of the report to the defendant **and** (3) the **defendant fails to file a written objection** with the court **and** with the state at least **five business days** before the proceeding. **If** a timely objection is filed and served, admissibility is governed by the rules of evidence.

   a) The report may be transmitted electronically or via facsimile.

   b) **Section (c3**) addresses "**chain of custody**" and **mirrors** the requirements set forth in **N.C. Gen. Stat. §8-58.20(g)** hereinabove.

3. **N.C. Gen. Stat. §20-139.1(e1)** addresses "**use of the chemical analyst's affidavit in district court**" and **allows admission** without further authentication and testimony **of** the alcohol concentration(s), time of collection, type of chemical analysis administered, procedures followed, type and status of any permit held by the analyst, and date the most preventive maintenance procedures performed, **subject to the following**: **if** (1) the **state notifies** the defendant at least **fifteen business days** before the proceeding of its intent to introduce affidavit **and** (2) provides a copy of the affidavit to the defendant **and** (3) the **defendant fails to file a written objection** with the court **and** with the state at least **five business days** before the proceeding. **If** a timely objection is filed and served, admissibility is governed by the rules of evidence.

   a) Following a timely objection, the case shall be continued until the analyst can be present, and the **case shall not be dismissed unless** the **analyst willfully fails to appear** after order of the court.

4. **N.C. Gen. Stat. §95-95(g)** governs **lab reports for chemical analysis of controlled substances** and **allows admissibility** without further authentication or testimony of the analyst **if** (1) the **state notifies** the defendant at least **fifteen business days** before the proceeding of its intent to

introduce report **and** (2) provides a copy of the report to the defendant **and** (3) the **defendant fails to file a written objection** with the court **and** with the state at least **five business days** before the proceeding. **If** a timely objection is filed and served, admissibility is governed by the rules of evidence.

TIP: (1) **Always file a notice of objection** in district and/or superior court **unless** you do not wish to contest the controlled substance for strategic reasons (e.g., concerns over effective cross-examination, appearance of professionalism by the state, desire to avoid a lab fee, etc.); (2) **Put** your **notice of objection in** your **motion for discovery**; (3) **Put** your **notice of objection in** a **letter to the State** preserving your right to file various motions, etc.; and (4) **Failure to object** constitutes **waiver**.

c. Melendez-Diaz has either **overruled** or called into question State v. Cao, 175 N.C. App. 434 (2006) (holding lab reports were mechanical and nontestimonial in a criminal prosecution); State v. Melton, 175 N.C. App. 733 (2006) (report finding defendant had genital herpes was mechanical); State v. Forte, 360 N.C. 427 (2006) (holding the SBI special agent's report identifying fluids from the victim was nontestimonial); State v. Heinricy, 183 N.C. App. 585 (2007) (chemical analyst's affidavit of defendant's blood alcohol level was nontestimonial); State v. Hinchman, 666 S.E.2d 199 (2008) (chemical analyst's affidavit was nontestimonial when limited to objective analysis of evidence and routine chain of custody information);

d. Cases subsequent to Melendez-Diaz have held: State v. Locklear, 681 S.E.2d 293 (2009) (holding an autopsy report including forensic pathology and dental analyses was testimonial); State v, Ward, 681 S.E. 2d 354 (2009) (court abused its discretion by permitting an expert chemist to identify pills as controlled substances based on a visual inspection and comparison with medical literature; methodology not sufficiently reliable under Rule 702); State v. Llamas-Hernandez, 673 S.E.2d 658 (2009) (lay opinion testimony by law enforcement that a substance was powder cocaine disallowed); State v. Brennan, 692 S.E.2d 427 (2010) (expert testimony merely reciting the report of another expert violates the Confrontation Clause); State v. Mobley, 200 N.C. App. 570 (2009) (no violation of Confrontation Clause when expert used another expert's report as the basis for his opinion after he independently reviewed and confirmed the results); State v. Brunson, 693 S.E.2d 390 (2010) (holds an expert may not identify pills only by visual inspection as this lacks sufficient indicia of reliability to determine the substance); State v. Brewington, 693 S.E.2d 182 (2010) (court committed reversible error by allowing a substitute analyst to opine a controlled substance was cocaine); State v. Woodard, 2011 N.C. App. LEXIS 645 (April 5, 2011) (allowed a pharmacist manager who had thirty-five years

experience to testify as to the identity of controlled substance pills which were stolen without a chemical analysis). **TIP**: The appellate **courts apply a different rule for marijuana** and **allow** the **visual identification** of same. State v. Garnett, 706 S.E.2d 280 (February 15, 2011).

e. **Outside of lab reports and affidavits, the analysis is as follows**:

1. Was the "**primary purpose**" of the interrogation to meet an "**ongoing emergency**"? If so, it's **nontestimonial**. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006).

2. If there is **no** "**ongoing emergency**," **and** the **primary purpose** is to **prove past events for a later criminal prosecution**, then its **testimonial**. Id.

TIP: (1) In district court, the state often **moves to join** companion or cross-warrant cases. Talk to law enforcement and, if appropriate, consider invocation of the **Fifth Amendment** by all parties. Remember Bruton precludes a non-testifying co-defendant's statement from implicating your defendant in a joint trial. **Caution**: Remember (a) "statements against interest" (N.C. R. EVID. 804(b)(3)) and (b) "statements of a party opponent" (N.C. R. EVID. 801(d)). Argue the **former requires additional "evidence of corroborating circumstances** showing trustworthiness of the statement."

f. **Remember**: The State may argue:

1. **Forfeiture by wrongdoing**. Did the defendant "cause" the absence of the declarant?

2. "**Present sense impression**" and "**dying declaration"** are hearsay **exceptions** to Crawford.

3. Crawford specifically says "**business records**" are **nontestimonial**.

g. Crawford is **not retroactive**.

h. Crawford **applies to capital sentencing** hearings but **not** to **non-capital** sentencing hearings.

i. **Consider** whether (1) statements were made with the **thought of a future trial in mind** or (2) if there is an indication reports were **prepared for use in later legal proceedings**. State v. Williams, 648 S.E.2d 896 (2007); State v. Raines, 362 N.C. 1 (2007).

j. For the latest application and compendium of cases, see (1) Jessica Smith, Crawford v. Washington: Confrontation One Year Later, UNC Sch. of Gov't, (Apr. 2005); and (2) Jessica Smith, Evidence

Issues in Criminal Cases Involving Child Victims and Child Witnesses, Admin. of Justice Bull., (Dec. 2008).

XIX. Forensic Evidence in North Carolina:

a. N.C. Gen. Stat. §**8-58.20** addresses "Admissibility of Forensic Evidence." Read it. **You must now object timely** in the recent legislation responding to Melendez-Diaz. The statute addresses time limitations for the use of S.B.I. lab reports and more.

b. In **alcohol and drug-related offenses**, know and understand the most recent changes in the law regarding admissibility and use of alcohol screening devices, suppression issues, ability to issue subpoenas, and much more. For a **good synopsis**, see the publication by James C. Drennan**,** DWI Legislative Changes Since 2006, Sch. of Gov't (Jan. 2008).

c. The general principle is that scientific, technical, or other specialized knowledge which assists the trier-of-fact's understanding by a qualified **expert** is admissible. N.C. R. EVID. 702. The rule is broad. A peanut farmer qualifies. Conversely, attack the field of expertise, qualifications, and the underlying principles. At least consider a **consulting expert**. Remember **discovery rules**.

d. **Expert opinion rules have changed**. **Accident reconstructionist** can testify to speed. **HGN** testing is admissible by a person who has successfully completed HGN training. N.C. R. Evid. 702(a)(1). The court may judicially notice reliability of HGN testing. State v. Smart, 674 S.E.2d 684 (2009); *cf.* State v. Helms, 348 N.C. 578 (1998) (a foundation for HGN is still required**).** **Drug recognition experts** (DRE's) who have received training and hold a current certification issued by DHHS are qualified to testify. N.C. R. EVID. 702(a1)(2) (allows both (a) an opinion of impairment and (b) the category of substance). The prosecution may use a DRE where no impairing substance is found in a chemical analysis *and* when the time of ingestion is inconclusive. However, **be careful of** expert opinions on the **state of mind of the deceased**. Do not allow an expert to testify to **sex abuse without physical injuries**. Experts cannot **bolster credibility of the witness**. Do the research.

TIP: (1) A witness may be accepted as an **expert by implication**. State v. Armstrong, 691 S.E.2d 433 (2010) (prosecution's expert, Paul Glover, was accepted as an expert by implication; ruling was harmless error); (2) **Do not let law enforcement explain terminology or symbols without** being tendered and **found** an **expert**. U.S. v. Johnson, 2010 WL 3307360 (Aug. 16, 2010); and (3) **metabolites** may, or may not, be psychogenic. Willey, *et al* v. Williamson Produce, 149 N.C. App. 74 (2002).

e. Case law exists **admitting opinions on** the following topics: general characteristics of abused children, accident reconstruction, ballistics, battered child, bloodstain pattern interpretation, causation, controlled substances, cause and time of death, diminished capacity, DNA, extrapolation, fingerprints, hair comparisons, origin of fire, handwriting, insanity, latent evidence, mental condition, mental defect or disease, non-accidental trauma, position of decedent's body, psychological and physiological effect of pain medications, serology, characteristics of sexually abused children, injuries caused were the result of sex abuse, toxicology, trace evidence, injuries inconsistent with a traffic accident, and much more.

f. Case law exists **excluding opinions on** the following topics: the victim of a homicidal assault, barefoot impressions, bite marks, cause of bloodstains (from a pathologist), trajectory of a fatal bullet, mitochondria DNA analysis, profiles of domestic violence victims, eyewitness identification evidence, defendant's reaction to an unreasonable fear he was about to be harmed, gunshot wounds being consistent with an intent to cause death, statements under hypnosis, effects of long-term imprisonment on the defendant's mental state, polygraph results, position of the victim's body when shot, "Phadebas methodology" for detecting saliva, and much more.

g. Study **State v. Goode**, 341 N.C. 513 (1995) (expert must be **qualified** in the field, subject matter must be **reliable**, and evidence must be **relevant**); Howerton v. Arai Helmet, Ltd., 358 N.C. 440 (2004); and State v. Pennington, 327 N.C. 89 (1990). These cases provide a good framework to argue expert evidence.

h. **Win at the trial court level**. Admissibility of expert evidence is "within the **wide discretion** of the court." State v. Washington, 141 N.C. App. 354 (2000). Appellate courts have even ruled the trial court made an "implicit finding" of expert status, although no tender was ever made. State v. Wyatt, 10 N.C. App. 538 (1971).

TIP: (1) Get the **North Carolina SBI Evidence Field Guide**. It identifies collection techniques, errors, and methods of attack and is a fund of information on (a) **Drugs and Toxicology** (controlled substances, blood alcohol samples); (b) **Latent Evidence** (latent prints, AFIS-IAFIS, footwear and tire tread impressions); (c) **Trace Evidence** (hair, fibers, arson, paint, gunshot residue, soil, physical matches, explosives, etc.); (d) **Documents and Digital Evidence** (handwriting and matters related to documents, digital evidence, graphics, and photography); (e) **Forensic Biology** (blood, semen, saliva, and DNA); (f) **Firearm and Toolmark Evidence** (firearms, toolmarks, IBIS); and more; (2) Read, and use, relevant professional **publications and treatises**; (3) Use **consulting experts**; (4) Remember the **boundaries of expert testimony**; (5) **Concede the obvious** and **make your point**; and (6) A lot of material is available. A national consortium of committees and councils within the **National Academy of Sciences** recently published a book entitled, "Strengthening Forensic Science in the United States: A Path Forward"

which found **no forensic method other than nuclear DNA** analysis has been rigorously shown to have the capacity to consistently and with a high degree of certainty match evidence to a specific known source. "Junk science" abounds.

XX. The Land of Thorns and Thistles:

a. **What is the best approach when the State will not calendar your case?** Best options: (1) a letter; (2) a motion for a "scheduling order" pursuant to N.C. Gen. Stat. §7A-49.4 (each district must have a criminal case docketing plan "after opportunity for comment by members of the local bar"; "upon motion by the defendant…a judge…may hold a hearing for the purpose of establishing a trial date"); (3) a motion for a "speedy trial" (or denial of the same) pursuant to N.C. Gen. Stat. §15A-954(a)(3); Barker v. Wingo, 407 U.S. 514 (1972); State v. Flowers, 347 N.C. 1 (1997); N.C. Const. Art. I, §18; and (4) Simeon v. Hardin, 339 N.C. 358 (1994) (due process violation for the State to use its calendaring authority for tactical advantage).

b. **The standard practice of filing the motion and order for examination on capacity to proceed**: Are we disclosing confidential information to the prosecution to the detriment of the client? Should we give notice of ex parte contact with the judge, seek a forensic evaluation under seal, limit the scope of the evaluation, and only reveal the results in accord with the statute if the defendant lacks capacity to proceed?

c. **Federal/State criminal law nexus**: General advice: (1) *Do not proceed* with state criminal charges *until* a determination is made about federal prosecution; (2) Be aware of *guns (including ammunition), drugs, and immigration status*. These are hot issues federally; and (3) Beware of the concept of "relevant conduct," client interviews with federal pretrial/probation officers, detention hearings (and presumptions that apply), grand jury indictment dates, substantial assistance (and related terms like "5k"), and more.

d. **Immigration issues**: What is a lawful permanent resident, nonimmigrant visa status, temporary protected status, entry without inspection (first time or multiple), entry after removal, fugitive, and aggravated felon status? What are grounds for deportation and inadmissibility as well as ineligibility for US citizenship, removal, or asylum? What do we do about "ICE," drug offenses, domestic violence, crimes involving moral turpitude, traffic offenses, bond hearings, and more? **Helpful hints**: (1) The individual is referenced as an "undocumented person," not an "illegal alien"; (2) The client is more likely to be picked-up by ICE the longer he is held in detention; (3) DWI charges are more likely to trigger notification to ICE; (4) Law enforcement focuses on the status of the defendant's license. If the client does not have a valid

driver's license, suspicion is aroused and ICE may be notified; (5) A bond agreement may sometimes be arranged in advance with ICE. Once ICE takes the client, little can be done; and (6) Consult with an immigration law specialist.

TIP: Know the case of Padilla v. Kentucky, 130 S.Ct. 1473 (2010) (lawyers **must advise** non-citizens about the risk of deportation prior to the acceptance of a guilty plea, and the failure to do so constitutes the ineffective assistance of counsel).

e. **New MAR statute**: More strict requirements statutorily and by case law, particularly post-conviction proceedings in Superior Court. N.C. Gen. Stat. § 15A-1415; State v. Potter, 680 S.E.2d 262 (2009) (second petition untimely as it is included in one year calculation).

f. Ph**one searches**: Law enforcement scrolling of cell phones appears legal. How about searching smartphones which may require a password? Probably not legal.

g. **The police may lie or deceive defendants to obtain a confession**. State v. Hyde, 352 N.C. 37 (2000) (lists the **factors** within the "totality of the circumstances"); State v. Jackson, 308 N.C. 549 (1983) (addressing officer's deception and tactics). The Fourth Circuit recently stated "the use of trickery is a widely-accepted tool in law enforcement."

h. **Satellite-based monitoring**: Bring-back hearings, Static 99's, aggravated offenses, civil appeal procedure, etc. The SORNA compliance deadline is July 27, 2011. For a primer, *see* John Rubin, Determining the Defendant's Registration, Satellite Monitoring, and Other Obligations Under the Sex Offender Laws, November 2008. **TIP**: Cases now hold the **court must use the crime** for which the defendant was **convicted** and **not** the **underlying facts** in making an SBM determination. State v. Davison, 689 S.E. 2d 510 (2009).

i. **Sex offenses, sex registration, and federal legislation to come**. Are you familiar with the Adam Walsh Act? Are you familiar with the new statutes which forbid "social networking" sites, etc.? What is the residence of a "drifter"? State v. Abshire, 363 N.C. 322 (2009) (residence is the actual place of abode where the defendant lives, whether temporary or permanent, where "certain life activities" occur); *See also* State v. Worley, 198 N.C. App. 329 (2009).

j. **Substantial Assistance:** Lots to consider including dangerousness, discretionary assistance, publicity, ability to assist (*e.g.*, defendant cannot possess drugs while on probation, etc.), and more.

k. **Tactical decisions are the province of the attorney, right?** In a criminal case, the client decides whether to (1) enter a plea or go to trial, (2) testify or not, and (3) appeal. N.C. Rules of Professional Conduct 1.2. Tactical decisions at trial are generally determined by counsel. **However, if** the client and attorney reach an "**impasse**" over jury selection or other trial issues, **the client's position controls**. State v. Ali, 329 N.C. 394 (1991); State v. Freeman, __ N.C. ___ (2011). Absurd.

l. **More to come**: Gun purchase and concealed carry permits (and disqualifying prohibitors); canine alerts; strict liability crimes; scope of self-representation; etc.

XXI. The Land of Milk and Honey: These are topics that are either complicated or have favorable case law or legal principles for the defense. Explore them thoroughly.

a. **Contempt**: Examine willfulness, compliance before hearing, procedural issues, and more.

b. **"Continuous transaction" doctrine**: Applies where acts are "part of the same series of events, forming one continuous transaction." State v. Wooten, 295 N.C. 378 (1978). This doctrine commonly applies to kidnapping, sex offenses, arson, and murder and may apply to multiple assaultive acts (*e.g.*, gun shots, dog bites, etc.) which occur close in time, are difficult to separate, and may be part of one continuous transaction. *See also* State v. Campbell, 332 N.C. 116 (1992) (doctrine applies to murder and arson cases); State v. Thomas, 329 N.C. 423 (1991) (doctrine applies to murder and sex offense).

c. **Criminal process for larceny**: Fatal defect for incorrect name of victim. State v. Patterson, 671 S.E.2d 357 (2009) (fatal defect if the victim is a corporate business entity which is not capable of owning property), *et al*.

d. **Closing argument**: Many great techniques and arguments exist. More to come.

e. **Consent**: The last refuge for law enforcement. Great law for the defense.

1. Consent must be "**freely** and **intelligently given**, **without coercion, duress**, or **fraud**." State v. Paschal, 35 N.C. App. 239 (1978); State v. Vestel, 278 N.C. 561 (1971).

2. "There must be a **clear and unequivocal consent** before a defendant can waive his constitutional rights." State v. Pearson, 348 N.C. 272 (1998).

3. A valid consent to search requires: (1) Consent be **voluntary**; (2) Consent be granted **by a party having real or apparent authority** to consent; and (3) The search must be **limited to the scope of** the **consent granted**. State v. Pearson, 348 N.C. 272 (1998).

4. Consent is defined by statute as "a statement to the officer, made **voluntarily** and **in accordance with the** requirements [of the **statute**], **giving** the officer **permission** to make a search." N.C. Gen. Stat. §15A-221(b).

5. "**Standing**" has been **broadened** to include passengers in a vehicle. Brendlin v. California, 127 S. Ct. 2400 (2007);

6. The **State has** the **burden of proving consent** to search was voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The burden of proof is by **clear and convincing evidence**. State v. Vestal, 278 N.C. 561 (1971). The State's burden of proof is **higher** for "**implied consent**." CITE. When a defendant is in **custody**, the State has a **greater burden** to show that consent was voluntary. State v. Cobb, 295 N.C. 1 (1978); *See also* State v. Crenshaw, 551 S.E.2d 147 (2001) (consent must be **clear and unequivocal** before a defendant can waive his constitutional rights).

7. **Consent** is a **question of fact** determined from the "**totality of all the circumstances**." State v. Steen, 352 N.C. 227 (2000); State v. Brown, 306 N.C. 151 (1982).

8. Consent is an issue of fact and not a question of law. State v. Fincher, 309 N.C. 1 (1983).

9. **When** consent is **challenged**, the court **must conduct a *voir dire* hearing** to determine if consent was voluntary. State v. McDowell, 329 N.C. 363 (1991). The court must make findings of fact when there is conflicting evidence. State v. Smith, 135 N.C. App. 377 (1999).

10. **Factors** considered in the voluntariness of a consent search include custodial status, degree of cooperation, presence of coercive police conduct, defendant's awareness of his rights, failure of officers to return documents before requesting consent, and mental condition of the defendant.

11. Court's recognize the concept of "**implied consent**," including (a) an affirmative action in response to a question by police, (b) an affirmative act that directly exposes property to inspection, or (c) silence. State v. Weavil, 59 N.C. App. 708 (1982) (defendant opened the trunk of his car after a request to search); *U.S. v. Cephas*, 254 F. 3d 488 (4th Cir. 2001) (when defendant opens door when answering a knock he voluntarily exposes any odors to the public); State v. McDaniels, 103 N.C. App. 175 (1991) (consent inferred from silence). Argue **ambiguity hurts the State**.

12. The doctrine of "**consent once removed**" is sometimes argued in undercover officer or informant cases. The proposition is the informant enters a place with consent of one with authority, thereafter obtains probable cause to arrest or search, and then request help from other officers. No North Carolina authority exists on this point.

13. A threat to obtain a search warrant if consent is not granted does not render consent invalid. State v. Colson, 274 N.C. 295 (1968). However, an officer must have the legal ability to follow through on a threat. It is not duress to threaten to do what one has a legal right to do.

14. **If the officer does not have the legal ability to follow through on a threat or misrepresents the existence of a search warrant**, **consent is invalid**. State v. Paschal, 35 N.C. App. 239 (1978); Bumper v. North Carolina, 391 U.S. 543 (1968);

15. A **request for consent**, **if it detains** a person **longer than necessary to effectuate the purpose of the stop**, **may** exceed the lawful scope of the stop and **violate** the **Fourth Amendment**. State v. Jackson, 681 S.E.2d 492 (2009); Ohio v. Robinette, 519 U.S. 33 (1996). See related section on "scope of the stop" for more favorable law.

16. **If** the "**request for consent** to search **is unrelated to** the **initial purpose of the stop**, then **the request must be supported by reasonable articulable suspicion of additional criminal activity**." State v. Parker, 183 N.C. App. 1 (2007) (emphasis added); *But cf.* State v. Jacobs, 162 N.C. App. 251, (2004).

17. The defendant's **subjective state-of-mind applies**. State v. Jackson, 681 S.E. 2d 492 (2009). Query: Did the defendant

feel "*free to leave*" under the circumstances? **Contrast** the importance of (a) the defendant's *subjective* state of mind for consent with (b) the *objective* analysis that applies *to "custody" or "seizure" determinations*.

18. The sophistication, emotional state, subnormal intelligence, age, and cognitive and language difficulty of the defendant are considerations in assessing voluntariness of consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); In Re: JDB, 674 S.E.2d 795 (2009). *Expert evidence* may be appropriate.

19. Police deception, intimidating circumstances, show of force, and other coercive facts may render consent involuntary. State v. Jackson, 308 N.C. 549 (1983) (addressing officer's deception and tactics);

20. **Other issues** include (a) delay in the search after consent, (b) special relationships (*e.g.*, homeowner, family member, caretaker, etc.), (c) if the search is inevitable, and (d) consent obtained post-violation.

21. Consent may be **limited in scope** or **withdrawn**. *State v. Aubin*, 100 N.C. App. 628 (1990) (prosecution must prove the search was limited to the scope of consent given); Florida v. Jimeno, 111 S.Ct. 1801(1991) (officer's belief regarding scope of search must be "*objectively reasonable*" for purposes of the Fourth Amendment; "*what a typical, reasonable person would have understood by the exchange*").

22. Evidence of the defendant's **refusal to give consent is not admissible** at trial. State v. Jennings, 333 N.C. 579 (1993).

f. **Fifth Amendment Right to Counsel**: Attaches at the moment of a "**custodial interrogation**." State v. Buchanan, 353 N.C. 264 (2002) ("custody" is "a restraint of movement commensurate with that of formal arrest"); Rhode Island v. Innis, 46 U.S. 291 (1980) ("interrogation" means express questioning or words or actions by police that are "reasonably likely to elicit an incriminating response"). Also know Maryland v. Shatzer, 130 S.Ct.1213, (2010) (after a suspect *in custody invokes* his *Fifth Amendment right to counsel*, police must cease questioning but may try again after **fourteen days**); *See also* Berghius v. Thompkins, 560 U.S. ____ (2010).

TIP: Invocation of the Fifth Amendment during a **civil trial** yields a **presumption** the **answer would be adverse to the witness**. Sports Quest, Inc. v. Dale Earnhardt, Inc., 2004 NCBC 3.

g. **Sixth Amendment Right to Counsel**: Attaches at all "**critical stages**" of a prosecution after formal proceedings have begun (*e.g.*, preliminary hearings, post indictment questioning and line-ups, etc.). Rothgery v. Gillespie County Texas, 128 S. Ct. 2578, (2008) (**Sixth Amendment right to counsel attaches at the "initial appearance before a judicial official,"** presumably including the defendant's appearance at the **magistrate's office**); Messiah v. U.S., 377 U.S. 201 (1964) (rights associated with the **assertion of counsel** under the **Sixth Amendment** only attach after (1) formal charges have been taken out *and* (2) they are "**offense specific**").

h. **Self-serving statements**: Are they part of the *res gestae* ("telling the whole story")? Does the rule of completeness apply? Course of conduct?

i. **Defenses**: Affirmative and otherwise. The law is **favorable** on **defensive force, defense of habitation, presumptions** that apply, and much more.

j. ***Corpus delecti***: "Whether there is substantial, independent evidence to support a defendant's confession." State v. Ash, 668 S.E.2d 65 (2008). Is there enough independent corroborative evidence to prove the trustworthiness of the defendant's confession? Rarely argued, but useful.

k. **Brady violations warranting a dismissal**. State v. Williams, 362 N.C. 628 (2008) (spoliation of evidence).

l. The law limits admissibility of "**gang membership**" and "**illegal alien"** status. Dawson v. Delaware, 503 U.S. 159 (1992). *See also* State v. Gayton, 648 S.E.2d 275 (2007).

m. **Discovery: Great law and techniques.**

1. **Statutory discovery applies** to "cases within the original jurisdiction of the Superior Court." N.C. Gen. Stat. § 15A-901 *et seq.*; *See also,* N.C. Gen. Stat. § 7A-271(a)(1) (**includes** jurisdiction over a **misdemeanor** that has been **indicted**).

2. **Statutory deadlines for filing a request/motion for discovery apply** as follows: (1) If a defendant is *represented by counsel*, a request for discovery must be made not later than the *tenth working day* after either the probable cause hearing or the date defendant waives the hearing *or* (2) if *unrepresented*, *or* indicted, *or* there is consent to the filing of a Bill of

Information, a request for discovery may not be made later than the *tenth working day* after (a) defendant's consent for trial upon a Bill of Information *or* service of a true bill of indictment upon the defendant, *or* (b) appointment of counsel. N.C. Gen. Stat. § 15A-902.

3. **Statutory evidence required to be disclosed by the State includes**: (1) the "complete files of all law enforcement and prosecutorial agencies involved in the investigation," (2) notice of expert witnesses (with reports and *curriculum vitae* provided a reasonable time prior to trial or as set by court), and (3) a written list of all witnesses the State "reasonably expects to call during the trial" (at the beginning of jury selection).

4. **Statutory evidence required to be disclosed by the defendant includes**: (1) documents and tangible objects (which the defendant intends to introduce into evidence); (2) reports of examinations and tests (which the defendant intends to introduce into evidence); (3) notice of defenses (within twenty days after date set for trial or as set by court; duress, entrapment, insanity, automatism, and involuntary intoxication require specific information about nature and extent of defense); (4) notice of expert witnesses (with reports and *curriculum vitae* provided a reasonable time prior to trial or as set by court); and (5) a written list of all witnesses the defense "reasonably expects to call during the trial" (at the beginning of jury selection).

5. **Defendant's motion for discovery should request the following**: (1) all search and arrest warrants and non-testimonial identification orders with supporting affidavits; (2) all pretrial identification procedures conducted; (3) an inventory of all property seized; (4) all written reports made by law enforcement, including handwritten notes, tapes, and other recorded communications; (5) all physical evidence; (6) all information which would tend to exculpate the defendant, mitigate the offense or punishment, weaken testimony, impeach the credibility of a witness, or otherwise be favorable to the defense; (7) all 404(b) evidence; and (8) objections to prior convictions more than ten years old, introduction of lab reports without authentication, any redaction of discovery, *ex parte* applications for records, and failure to provide a complete criminal history of the defendant.

6. **Misdemeanor discovery is generally non-statutory but is still available** via a motion for Brady, Agurs, Kyles, Whitley, and related material. File this motion, stake the prosecution out before the judge pretrial, and notify the court when violations occur. Argue for a *dismissal with prejudice* (*e.g.*, spoliation of evidence, etc.) or, if you desire, a *mistrial*. State v. Cornett

simply means there is no statutory discovery for misdemeanors.

7. The **State has an affirmative duty** to ask for, seek, and investigate the existence of exculpatory or impeachment material favorable to the defense. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

8. A "**prosecutorial agency" includes** "any private or public entity that obtains information on behalf of a law enforcement agency," and includes the Department of Social Services, fire marshal, the SBI Crime Laboratory, pathologist, and more. N.C. Gen. Stat. § 15A-903(a)(1).

9. **Oral statements made by a witness to a prosecuting attorney are discoverable** and shall be in written or recorded form **if** there is "significantly new or different information" than a prior statement made by the witness. N.C. Gen. Stat. § 15A-903(a)(1); State v. Shannon, 182 N.C. App. 250 (2007).

10. 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. The **State has a duty to provide** *said material in a* **timely manner**. N.C. Gen. Stat. 15A-501(6) and 903(c).

12. The criminal records of jurors are discoverable. State v. Smith, 352 N.C. 531 (2000).

13. The State's **notice of an expert** the **Friday before trial** is a **discovery violation barring** the expert's **testimony**. State v. Cook, 362 N.C. 285 (2008).

14. **Smart techniques**: (1) Look at the *original files*. You will see sticky notes, prosecutor notes, and the thought processes of the investigator and prosecutor; (2) *Talk to the officer* alone and in person. You may be surprised how much you learn; (3) Ask about *emails*. A great source of information; (4) Take *pictures* of the evidence and discovery; (5) *Copy all discovery* furnished and make it an exhibit *for the record on appeal*; (6) Ask a *District Court judge* to *sign discovery or other orders*. *See* State v. Jones, 151 N.C. App. 317 (2002); (7) Ask for *all training records for drug dogs*; and (8) *Ask the prosecutor* during the trial *if he has interviewed any other witnesses*.

n. **Anonymous tips**: What is the "source" of the information? Is it the "collective knowledge" of law enforcement, a "citizen informant," or an "anonymous tipster"? Corroboration must be of the criminal conduct. *See* State v. Johnson, L. Weekly (10-07-0511) (tip

included many details about the person and vehicle but little detail about the alleged crime, basis of knowledge, and future behavior; court ruled there was *insufficient corroboration* and the *stop was suppressed*). *See* State v. Maready, 654 S.E.2d 764 (2008) (addressing the **factors** that apply); *See also*, Florida v. J.L., 529 U.S. 266 (2000); Alabama v. White, 496 U.S. 325 (1990); State v. Hughes, 353 N.C. 200 (2000); State v. Brown, 142 N.C. App. 332 (2001).

TIP: (1) The prosecution cannot adduce evidence in an area known as a "high drug location" or "open air market for drugs" *unless* the stop is challenged. State v. Ross, 700 S.E.2d 412 (2010); and (2) **Remember**: (a) presence in a high crime area *and* (b) at an unusually late hour is *insufficient to provide reasonable suspicion*. State v. Murray, 192 N.C. App. 684 (2008); Brown v. Texas, 443 U.S. 47 (1979) (presence in a high crime area alone is not a basis for a stop).

o. **Punitive damages**: The cap does not apply to alcohol related offenses. They are also non-dischargeable in bankruptcy.

p. **No "good faith" exception to the exclusionary rule in North Carolina** as of this printing. How does this comport with an officer's "mistake of fact" and "inevitable discovery"? State v. Styles, 362 N.C. 412 (2008) (officer's misunderstanding of the law applicable to turn signals).

q. **Opening statement is not evidence (at least for purposes of N.C.R. Evid. 404(a)(2))**. State v. Buie, 671 S.E.2d 351 (2009); State v. Faison, 330 N.C. 347 (1991). **Caution**: What is an "admission"? Will the State argue it is an "adopted admission"?

r. What is "**in custody**"? State v. Buchanan, 353 N.C. 264 (2002) (custody is a restraint of movement commensurate with that of formal arrest or its functional equivalent). May apply to many fact patterns. Examples of persons "in custody" include those handcuffed, in a locked area (*e.g.*, the back of a patrol car, etc.), or told "not to move" from a location.

s. **Law enforcement must use the Miranda rights waiver for juveniles until a minor is eighteen years of age**. N.C. Gen. Stat. §7B-2101; State v. Brantley, 129 N.C. App. 725 (1998) (juvenile rights waiver applies to a person under age eighteen who is neither married, emancipated, nor in the military). If the juvenile is **less than fourteen years of age**, he has the right to (1) have a parent of guardian present *and* (2) Miranda warnings.

t. The **constitution** is your friend. Massage the concepts into your position. Know and understand due process, confrontation, double jeopardy, right to material witnesses, right against self-incrimination, right to counsel, unreasonable searches and seizures,

and much more. **Remember** the North Carolina Constitution is more specific and expansive.

u. **Batson** is a weapon, applying to race, sex, and other protected groups. Prosecutors wince and are on their heels. Argue the "*prima facie"* case, prepare for "race neutral" reasons, and counter they are "pretextual." Cite federal and state constitutional clauses on equal protection.

v. **Lesser-included instructions**: Is the "evidence in conflict"? Does all the evidence support only one charge? Was an element "in doubt"? State v. Gwynn, 661 S.E.2d 706 (2008). The **court must give a lesser-included instruction unless it finds as a matter of law no other charge applies**. State v. Millsaps, 336 N.C. 556 (2002). Hence, lesser-included charges must be submitted to the jury unless the court finds the weapon used is a "deadly weapon" as a matter of law. State v. Smith, 650 S.E.2d 29 (2007). False imprisonment can be a lesser-included crime of first or second degree kidnapping. State. Ryder, 674 S.E.2d 805 (2009).

w. **Pay attention to the judge**: (1) A judge's denial of the jury's request to read the transcript is reversible error. State v. Long, 674 S.E.2d 696 (2009); (2) A judge's comments may infringe on the defendant's right to a jury trial. State v. Springs, 2009 N.C. App. LEXIS 1615 (N.C. Ct. App. 2009); and (3) It is constitutional **error to admit into evidence** (a) the **defendant's pre-arrest silence if the defendant does not testify**, *and* (b) **if** the **defendant does testify, to ask him, "Why [has he] not told this story before now**?" State v. Bostian, 663 S.E.2d 886 (2008).

x. Remember the "**merger doctrine**," especially in kidnapping, armed robbery, and murder cases. **Key issues**: (1) Is the "removal and restraint separate and apart from the other crime"?; and (2) Is it a "technical asportation"? State v. Payton, 679 S.E.2d 502 (2009). If the movement is inherent in another offense, appellate courts will consider this issue.

y. Has the officer made a "**mistake of fact**" or "**mistake of law**"? A "reasonable mistake of fact" can provide reasonable suspicion, but a **"mistake of law" cannot provide a lawful basis for a stop**. State v. McLamb, 186 N.C. App. 124 (2007) (officer's mistake of law regarding a speed limit did not provide a lawful basis for the stop). *Be ready to distinguish between the two.*

z. Are you aware the purchase of a **drug "tax stamp"** from the NC Department of Revenue can eliminate the controlled substance tax which accompanies drug charges? Ask Heather Coffey. The purchase of a "tax stamp" is confidential tax information and can never be divulged.

aa. **Confessions**: **Look for** impairment, coercion, location, waiver of rights, intelligence/capacity issues, presence of law enforcement, restraint, and more. **Great suppression issue**: Officers must (a) have a defendant review and confirm their notes *or* (b) the statement must be a verbatim account for a confession to be admissible. State v. Spencer, 664 S.E.2d 601 (2008). **Research reveals** why sixty-six percent of death row inmates who were exonerated by DNA evidence **falsely confessed** to a murder. Officers systematically isolate, build a rapport, confront, and then persuade the suspect to confess. **TIP**: An "**involuntary" confession cannot be used against a defendant** at trial, **not even to impeach** him if he testifies. Mincey v. Arizona, 437 U.S. 385 (1978).

bb. **Stipulations**: If you stipulate to a prior felony, then the nature of the conviction is irrelevant. State v. Tice, 664 S.E.2d 368 (2008).

cc. **Public disturbance:** Lots of great law.

dd. **Resisting an officer**: If the initial encounter was "consensual," the defendant's subsequent flight vitiates this charge. State v. Sinclair, 663 S.E.2d 866 (2008). Is the defendant simply questioning or criticizing the officer? If so, the law is favorable.

ee. **Exigent circumstances**: Law enforcement's entry into a hotel room without exigent circumstances or consent was deemed unlawful under the Fourth Amendment. State v. McBennett, 664 S.E.2d 51 (2008). Lots of law.

ff. Officers routinely misapprehend or disregard the law on "**frisk**." The common justification is "officer safety." **The law**: Are there reasonable grounds to believe (1) criminal activity is afoot; and (2) the person is armed and dangerous? State v. Smith, 150 N.C. App. 317 (2002). Also **remember**: the "plain feel" doctrine. Minnesota v. Dickerson, 508 U.S. 366 (1993).

gg. "**Scope of the stop**" issues are hot. Know the cases. Correlatively, appreciate stop, seizure, detention, reasonable suspicion, and probable cause issues. Characteristics of the investigatory **stop**, including length, method(s) used, and any search performed, **should be the** "**least intrusive means reasonably available to effectuate the purpose of the stop**." State v. Carrouthers, 2009 N.C. App. LEXIS 1642 (N.C. Ct. App. 2009); *See also*, 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**). Know U.S. v. Sharpe, 470 U.S. 675 (1985) (twenty minute detention was reasonable because officers were diligent); State v. McClendon, 350 N.C. 630 (1999) [fifteen minute delay waiting for canine ("K9") unit was reasonable under the circumstances]; *but see*, State v. Falana, 129 N.C. App. 813 (1988)

(despite weaving, a South Carolina license, tiredness, rapid breathing, pauses in swallowing, a different version of events by a passenger, and the defendant's refusal to grant consent to search, said facts were **insufficient to support an "articulable suspicion" of criminal activity**); Illinois v. Caballes, 543 U.S. 405 (2005) (a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment); State v. Branch, 177 N.C. App. 104 (2006) (a dog sniff during a lawful detention is reasonable under the Fourth Amendment); State v. Brimmer, 653 S.E.2d 196 (2007) (defendant's actions prolonged the stop; a dog sniff adding one and one half minutes is a *de minimis* intrusion); State v. 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**); State v. Branch, 194 N.C. App. 173 (2008) (**ten minute delay** "beyond the time it took to check [the driver's] license and registration **was unlawful**); State v. Jackson, 681 S.E.2d 492 (2009) (**officer unreasonably extended** a traffic **stop when** she **asked** just a **handful of drug-related questions**; precise summary of the legal principles that apply to the scope of stop). **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. A brief delay with questions unrelated to the stop appears unlawful. Jackson. **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.

TIP: Understand (1) reasonable suspicion, (2) probable cause, and (3) consensual encounters. **If a consensual encounter, a defendant may walk away, decline to listen to any questions, refuse to answer any questions, and the above actions do not furnish reasonable suspicion**. Florida v. Royer, 460 U.S. 491 (1983); In Re: J.L.B.M., 176 N.C. App. 613 (2006) (defendant's decision to walk away from approaching patrol car insufficient for reasonable suspicion); State v. Fleming, 106 N.C. App. 165 (1992) (**presence in high drug area** *plus* **decision to walk away from police did not give rise to reasonable suspicion**).

hh. **Defective pleadings**: A motion to dismiss for failing to charge an offense may be made at any time. N.C. Gen. Stat. §15A-952(d). Jurisdictional motions may be made at any time. Very common is district court. Suprisingly common in superior court.

ii. Remember **new statutory requirements** apply to law enforcement for (1) electronic recording of custodial interrogations in homicide investigations and (2) eyewitness identification and interrogation procedures ("line-ups"). N.C. Gen. Stat. §15A-211; N.C. Gen. Stat. §15A-284.50 – 284.53. **A "show-up"** identification procedure **is not regulated by the Eyewitness Identification Act.** State v. Rawls, 700 S.E. 2d 112 (2010) (a show-up moments after a break-

in does not create a substantial likelihood of irreparable misidentification).

jj. **Disclosure of the confidential informant**: Is *required when* disclosure (1) would be helpful and relevant to the defense or (2) essential to a fair determination of the cause. The burden is on the defendant. *Factors supporting disclosure* include the informant was a participant, a conflict exists in the State's and the defendant's evidence that the informant could clarify, and the informant is likely to be a witness at trial. *Factors against disclosure* include the informant is a mere tipster, the defendant admits culpability and presents no evidence, there is substantial independent evidence of defendant's guilt, and disclosure would endanger the informant. N.C. Gen. Stat. § 15A-904(a1); Roviaro v. U.S., 353 N.C. 53 (1957); State v. Dark, 694 S.E. 2d 502 (2010).

kk. **Possession of Firearm by Felon**: State law now comports with federal law. Look for antiques, muzzle loaders, and a fact pattern similar to State v. Britt, 185 N.C. App. 610 (2007) (defendant convicted of a felony in 1979, received a civil restoration of his citizenship rights which allowed possession of a firearm, had remained a good citizen since his conviction, and the court found the statute, *as applied to this individual*, was unconstitutional); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (the Federal Second Amendment right to bear arms applies to the states).

XXII. General Practice Pointers:

a. **Who argues last?** The party with the burden of proof, or the party who does not offer evidence? *See* N.C. Gen. Stat. §7A-34 (Rule 10 of the General Rules of Practice) and N.C. Gen. Stat. §7A-97. **Answer**: It is the judge's call. N.C. Gen. Stat. §7A-34 (Rule 10 of the General Rules of Practice). **Different rules** apply with **multiple parties**.

b. Understand **authentication**. N.C. R. EVID. 900, *et seq*. Proper authentication simply **means** there is sufficient evidence to support a finding the matter is what the proponent claims it to be. **Methods include** certified public records, voice identification, reply letter doctrine, lay or judicial opinion on handwriting, real evidence, and more. Motor vehicle collision reports (*i.e.*, **accident reports**) **are not self-authenticating**. N.C. Gen. Stat. §20-166.1.

c. **Use the local bond guidelines**. Judges like and generally apply them. In the exceptional case, argue they are only "guidelines." Be mindful of trafficking charges and high bonds. Consider waiving probable cause in exchange for a bond reduction. Know the judge.

d. **Be ready for a bond increase in district court following an appeal if** conditions of release are minimal, your client received an active sentence, problems have occurred on pretrial release, or the judge is known for same.

e. Always **attend** or have a representative at the **calendar call**. **Tell the judge your forecast**. Continue the case, advise the court you need to speak to the officer or see the lab report, or state it is for trial. Judges love to plan, and the public sees you are prepared.

f. Address **capacity issues** when necessary. N.C. Gen. Stat. §15A-1001, *et seq*. The **test for capacity** to stand trial is whether a defendant (1) has capacity to comprehend his position; (2) understands the nature of the proceedings against him; and (3) can conduct his defense in a rational manner and cooperate with counsel so that any available defense may be interposed. State v. Jackson, 302 N.C. 101 (1981). Remember "**capacity at the time of the offense**" as well as "**incapacity to proceed**." **Caveat**: The former usually requires inquiry into the defendant's memory of the crime itself. Specifically request that the evaluator not ask about the crime. **Remember**: (1) different rules apply for evaluations for misdemeanor and felonies; (2) defenses exist for "diminished capacity" (for "specific intent" crimes) and "insanity"; (3) not guilty by reason of insanity may result in an extended civil commitment; and (4) a finding of incapacity may result in involuntary commitment proceedings, or the prosecution may elect to dismiss the charge(s), with or without leave.

g. In the end, **the client wants three things from you**: (1) to care; (2) to give good advice; and (3) a truthful assessment of the result.

h. Argue the "**rule of completeness**": Do not let your opponent put in a portion of a tape or letter. You are entitled to have the trier-of-fact see or hear it all in context. N.C. R. Evid. 105, 106 and 612; State v. Lloyd, 354 N.C. 76 (2001) (the rule of completeness requires that evidence must be "explanatory and relevant" for admission).

i. Argue "**conditional relevance**." N.C. R. Evid. 104(b). The rule states the court **shall admit** evidence subject to later introduction of evidence sufficient to support a finding of the fulfilled condition. If you are going to prove a fact later in your evidence, say so.

j. **Contempt motions require either** (1) verification or (2) show cause orders. *See* N.C. Gen. Stat. §5A-23; N.C. R. Civ. P. 11. The better practice is to have both. A **show cause order changes** the **burden of proof** and requires the contemnor to

prove he is not in contempt, thus changing the order of evidence. If you represent the opposing, **do not call** the **contemnor** as a witness **or** you **lose** the option of **criminal contempt**. Know the difference between criminal and civil, direct and indirect, summary and plenary. N.C. Gen. Stat. §5A-1 through 34. Advise your client in advance of the applicable punishments. The judge will. Also, good news if your cell phone rings in trial. It's not criminal contempt. State v. Phair, 668 S.E.2d 110 (2009).

k. **When contesting a prior conviction, look for a FBI identification number**. Every individual receives one. Look for a prior FBI number assigned to the defendant. It is great evidence for the prosecution.

l. **Continuances** are a **hot appellate topic**. Do not put the judge in a box. Articulate a reasoned position. Consider the history of the case, the right to or need for a continuance, actions of counsel, the timing of motions, and other relevant facts. *See* State v. Cook, 362 N.C. 285 (2008). (Error to deny defendant a continuance for discovery violation amounting to violation of a constitutional right).

m. Put "**legal mail**" on all correspondence with incarcerated clients, including envelopes and letters. **Do not** have any binders, staples, paperclips, or any other object attached to discovery or inside the envelope which could be converted to contraband. **Also**: Be aware of "implied consent" to record outgoing calls from the detention center if the defendant knows of the practice. State v. Troy, 679 S.E.2d 498 (2009).

n. For powers of attorney, wills, and other legal documents due to incarceration, advise the client to contact **N.C. Prisoner Legal Services, Inc.**, P.O. Box 25397, Raleigh, N.C. 27611; 919-856-2200.

o. Tell the client about **court costs and fees**. Examples: Failure to appears, labs, community service, jail, subpoenas, and more.

p. **Craft your questions during trial to make your closing argument**. Consider "evidence blocking," a technique espoused by John Rubin, Professor of Public Law and Government at the Institute of Government.

q. **Credibility** of the witness **is always at issue**. *See* N.C. R. EVID. 602, 607, 611(c), and 806.

TIP: I **recite** routinely **phrases** from N.C. P.I. Crim. 101.15 on Credibility of the Witness **in closing argument**. We "**apply the same test of truthfulness**" we use in our "**everyday affairs**." These tests include the "**opportunity** of the witness **to see, hear,**

know, or remember" the evidence; the "**manner and appearance**" of the witness; "**any interest, bias, or prejudice**" the witness may have; the "**apparent understanding and fairness**" of the witness; **whether** his **testimony "is reasonable**"; **and** whether his testimony "is **consistent with the other believable evidence**" in the case. Great language. Use it.

r. Resist the urge to pounce at the start of **cross-examination**. **Elicit favorable material first**. Use your judgment. If the witness does not hurt you, ask no questions. Be gentle with the young, meek, and old. Hurl a thunderbolt at the liar. Cross examination is "the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149 (1970).

s. **Electronic data/information is admissible if** it meets the evidentiary requirements of **authenticity, relevance, and hearsay**. N.C. R. EVID. 901 governs authentication. N.C. R. EVID. 401, 402, and 403 address relevance. **Hearsay exceptions** that may apply include: (1) the business records exception; and (2) admissions by a party opponent. N.C.R. EVID. 803(6) and 801(d). Federal and state wiretapping and invasion of privacy arguments are often made against admissibility. **Ascertain if** the user saves to a PFC via AOL, the password was unprotected or permissively used, or the data/information was in post transmission storage. If true, there is no violation. *See* Evans v. Evans, 169 N.C. App. 358 (2005) ("Interception must occur at the time of transmission to be a violation."); *See* Stephanie T. Jenkins, E-Discovery, Spoliation, and Electronic Bear Traps (Oct. 2008).

TIP: A **federal decision** provides **guidance** for authentication and **admissibility** of "**electronically stored information**." Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D. Md. 2007). **Five part test**: (1) Is the material **relevant**?; (2) Is the material **authenticated** under Rule 901?; (3) Is the material **hearsay**? If so, is there an **exception** under 801, 803, or 804?; (4) Is it the **best evidence**?; and (5) Should it be admitted under a **Rule 403 analysis?**

t. **Electronic data/information is discoverable**. File a motion to preserve evidence or for a TRO to avoid spoliation. Subpoena the computer, phone, or other transmittal device. Hire a computer expert. If the other side files a written objection or motion to quash, file a motion to compel. Argue the data is "reasonably likely to lead to admissible evidence," and, if purged, it relates to credibility. If necessary, move for sanctions.

TIP: A treasure trove of electronic evidence can be found in **twitter, facebook, my space, linked-in**, and other **social networking sites**, especially when investigating a person's location, friends, and employment status.

u. **Emails** are common evidence today. **Admissibility factors include**: (1) the address of the email message; (2) the designee of the email or to whom it is addressed; (3) the content of the message referring to circumstances unique to the party; and (4) any confirmation of its content. Stephanie T. Jenkins, E-Discovery, Spoliation and Electronic Bear Traps, p. 36 (2008); *See* also United States v. Siddiqui, 235 F.3d 1318, 1322-23 (11th Cir. 2000).

v. **Text messages** have become an important evidence tool. N.C. R. EVID. 901(b)(1) governs authentication "by a witness with knowledge that a matter is what it is claimed to be." **Admissibility requirements are**: (1) a record of all incoming and outgoing text messages to and from a business or other proper source; (2) the ability to access a record of text messages via the internet by visiting a website and inserting the access code; (3) authorization to access the website from a particular source; (4) knowledge of how text messages are sent and received from a source; and (5) knowledge of how text messages are restored and retrieved. State v. Taylor, 178 N.C. App. 395 (2006). **Also consider** what showing is made of who actually typed and sent the messages, the information within the messages, and whether there is sufficient circumstantial evidence tending to show who sent and received them. N.C. R. EVID. 904(b)(4).

Tip: Consider: (1) Did someone type another person's email address or text number as the sending source and then send a fake message? All that is required is a "reply email address," a "display name," and a "spoof IP address"; (2) A highlighted, unnamed message may mean it came from a computer; (3) Check with the "email provider" (*i.e.*, Google, Yahoo, etc.) for the source of the email; (4) Does the recipient have the ability to "block" a sending source? This may be important for a consensual exchange between the parties. (5) Did the party send the email to himself? All that is required is knowledge of the other person's "password" and "email address"; and (6) Consult with a computer wiz.

w. **Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation**. Therefore, a conviction for DWLR cannot be used as a grossly aggravating factor for a DWI in the same case, and five children under age sixteen would only establish one grossly aggravating factor. N.C. Gen. Stat. §15A-1340.16(d).

x. **Consider carefully whether you need to** (1) cross-examine a witness or (2) **introduce evidence**. Often, less is more. The last argument is powerful.

TIP: **When has a party** "**introduced" evidence**? "When a new matter is adduced during cross-examination which is not relevant to any issue." State v. English, 669 S.E.2d 869 (2008). Important for the last argument.

y. Remember: **One reason to admit is enough**. Argue corroboration, impeachment, state of mind, illustrative, course of conduct, motive, context, etc. State v. Sexton, 153 N.C. App. 641 (2002) ("*chain of circumstances" evidence* is *admissible if* it forms a part of the history of an event *or* serves to enhance the natural development of the facts).

z. Argue the evidence "**goes to weight** and **not admissibility**." Examples: Chain of custody, close questions of relevance, etc.

aa. **Preserve evidence**: **Object timely** and **state your basis**. Failure to do so is a waiver. A general objection is insufficient unless plain error. **Constitutionalize** your objection: relevance is due process, and hearsay is confrontation. By doing so, you change the standard of review from an abuse of discretion standard to the presumption of prejudicial error unless the state shows it to be harmless beyond a reasonable doubt. You also preserve certain federal appeal rights.

bb. Have **copies of exhibits** for (1) opposing counsel, (2) the court, and, if applicable, (3) the individual jury members. It's courteous and expedites the trial.

cc. The **controlling case in North Carolina on expert testimony is State v. Goode,** 341 N.C. 513 (1995). The expert must be **qualified** in the field of expertise, the subject matter must be **reliable**, and the evidence must be **relevant**. Pennington and Howerton provide further guidance.

dd. Know and appreciate N.C. Gen. Stat. §8-44.1 regarding **hospital medical records**. Case law broadens this area. State v. Drdak, 330 N.C. 587 (1992). Copies of records are **admissible if** (1) tendered with an affidavit **or** (2) if authenticated by the custodian of the records. N.C. R. Civ. P. 45(c).

ee. **Anything can be used to impeach** provided there is a good faith basis. Moreover, you can admit for impeachment purposes.

ff. Appreciate the value of N.C. R. Evid. 607, 611 and State v. Williams, 330 N.C. 711 (1992). Impeach, impeach, and impeach. Here are the **methods of impeachment**: (1) Prior inconsistent statement; (2) impeachment (self-contradiction); (3) contradiction; (4) prior bad acts; (5) convictions; (6) character impeachment (lack of truthfulness); (7) mental incapacity; (8) perceptual incapacity; and (9) bias, interest, motive or prejudice.

Attack a witness's character for untruthfulness. State v. Hernandez, 646 S.E.2d 579, (2007). Use a witness's writings against him. State v. Whaley, 362 N.C. 156 (28 January 2008). Think creatively: Consider loan and job applications, applications for criminal process, etc. State v. Hunt, 324 N.C. 343 (1989) (If witness either denies or testifies differently from a prior inconsistent statement, you may impeach the witness with the substance of the prior inconsistent statement).

gg. If you cannot think of the legal authority, argue the "**inherent authority**" of the court. State v. Brewington, 170 N.C. App. 264 (2005) (addresses in detail the purpose of the rules of evidence and the court's inherent authority).

hh. **Know the rules on Interstate Compact**, including length of sentence, residency, and other requirements. Contact the probation department in advance. Advise your client of the cost to petition, the need to produce documents proving residency, and the time he may have to remain here awaiting a decision.

ii. You **must ask the trial court for jail credit** to get a review by the appellate courts. State v. Cloer, 678 S.E.2d 399 (2009) (requirements for alleged errors in the trial court's determination of credit).

jj. You **must ask the judge to arrest judgment** at the trial court level or you lose this right. State v. Davis, 302 N.C. 370 (1981).

kk. If you have a prior verified pleading and order in effect (e.g., 50B, 50C, etc.), move for a **judgment on the pleadings**. Judicial economy.

ll. Use **judicial notice**: Believe it or not, judicial notice is **mandatory if** (1) requested by a party and (2) supplied with the necessary information. N.C. R. EVID. 201(d). **Admit** statutes, maps, dictionaries, and prior court proceedings. **Exclude** the internet, newspaper articles, etc.

mm. **Approved lay opinion testimony** includes age, appearance, color, demeanor, distance, emotions, facial expression, first aggressor, health, identification of a person, intoxication, mannerisms, mental competence, sanity, speed, time, and whether alive or dead. Remember "shorthand statements of fact" (an instantaneous conclusion derived from various facts observed at the same time). N.C. R. EVID. 701. But cannot "vouch" for a witness. State v. Gobal, 651 S.E.2d 279 (2008).

nn. **Know the local rules**. They are instructive regarding calendaring, required affidavits, bankruptcy notices, peremptory settings, priority of courts, and many other procedural rules.

oo. Use "**magic words**." Judges look for a lynchpin on which to hang their hat. Remember the old law school axiom you can pass by knowing certain legal words or phrases.

pp. Argue "**opened the door**" or "**waiver**." Caution: **Analyze your evidence in advance** to foresee topics which may be dangerous to your client. Conversely, explore "waived" subjects vigorously.

qq. The **only order for arrest issued for a violation of unsupervised probation is failure to comply with a delayed payment order**. All other violations result in a "notice of violation of unsupervised probation."

rr. **Plea agreements are contracts**. Use contract principles. If there is a disagreement or **mutual mistake** over the terms of the plea (i.e., the "intent of the parties") and you do not either like the terms or want to proceed, **withdraw** the plea. State v. Handy, 326 N.C. 532 (1990) (lists **factors** to consider for withdrawal of a guilty plea; "granted with liberality"; "allowed for any fair and just reason"). **If** a plea is **rejected**, you are **entitled to a continuance**. **New law**: beginning December 1, 2009, judges must be advised of a previously rejected plea offer.

ss. **A "guilty" (in fact) plea eliminates the possibility of a Motion for Appropriate Relief (MAR)**. Unless you need this fact for a mitigating factor, is it not in the client's best interest to use another type of plea?

tt. **Know and understand plea and sentencing options**. Consider: deferred prosecution; conditional discharge and expunction of records for first offense (90-96); diversion programs for (1) possession of alcohol underage and (2) the sell of alcohol to underage persons; lesser-included offenses; PJC; expunction; pleading to other hybrid charges (e.g., speeding in lieu of stop light violation, etc.); sentence bargaining; and more.

uu. If necessary, **ask the court to accept the plea and "continue judgment**" to allow your client to complete tasks or conditions which may improve his sentence.

vv. **Preparation wins**. You almost always see flaws you missed the first time or later learn new facts that may carry the day. **Frame your evidence**, and **know the rules that apply**.

ww. **Presumptions against the defendant in a criminal context are unconstitutional**. Rose v. Clark, 478 U.S. 570 (1986); Sandstrom v. Montana, 442 U.S. 510 (1979). In criminal actions,

due process prevents presumptions from operating to obviate the state's burden of proving each element of an offense beyond a reasonable doubt. Id. Correlatively, in criminal cases the court may not direct the jury to make certain findings even where facts are conclusively established, because the court cannot direct a verdict against the accused. United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947). **Presumptions** operate to **shift burdens of proof**. **Inferences apply**. **Pay attention to** armed robbery, child abuse, larceny, possession of stolen goods, and driving while license revoked charges as well as certain doctrines and cases cited in Robert L. Farb, North Carolina Crimes: A Guidebook on the Elements of Crime (5th ed.).

TIP: "**Prima facie" means**: (1) "Evidence sufficient to permit the trier-of-fact to draw an **inference** that [the fact] has occurred." Johnson v. California, 125 S. Ct. 2410 (2005); (2) "Results of a **chemical analysis**…**establish a prima facie case** of the defendant's alcohol concentration…but do **not** operate as **a presumption**." State v. Narron, 666 S.E.2d 860 (2008); (3) If an **inference** is drawn, the court **must send the case to the jury**. State v. Grigsby, 351 N.C. 454 (2000); (4) ***But see***, Black's Law Dictionary (prima facie can mean: (a) evidence sufficient "to go to the jury" or (b) evidence which "compels…a conclusion if…no evidence to rebut it."); and (5) *See* Rule 301 for Presumptions in Civil Proceedings.

xx. Especially in a civil context, if a trial is only about a few issues and the judge's inclinations, ask for a **pretrial conference**. Caution: once you do so, precedent is set.

yy. **Probation violations can not occur for**: (1) convictions of class three misdemeanors; (2) pending charges; or (3) hearsay alone. N.C. Gen. Stat. §15A-1344(d); State v. Hewitt, 270 N.C. 348 (1967). For current and comprehensive summaries of the law, see (1) Jamie Markham, Probation Violations: Jurisdiction and Related Issues (27 October 2007); and (2) Paul James, Probation Violation Points to Check (5 March 2007). **Recent changes**: (1) There is no longer a requirement of "reasonable efforts" to serve the defendant (only need "good cause"); and (2) Expiration of probation is irrelevant. Tolling applies. **Helpful hint**: (1) **Opus numbers** reflect all active and tolled probation violation files; *and* (2) **Be careful of "unsuccessful terminations" in a Chapter 20 case if money is owed**. The defendant cannot get his license until all money is paid. Try to get the court to either "remit" the money owed *or* find the violation is "not willful."

zz. **Read indictments**. Study the **pattern jury instructions**, the relevant **case law**, the **crimes book(s)**, and consult with an **experienced attorney**. Be familiar with Jessica Smith, The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment (8 July 2008). Stay abreast of various Institute of Government publications on many important topics.

aaa. When you are surprised by the evidence, unsure what to do, need to talk to your client, or need another opinion, ask for a **recess**. A call to the Appellate Defender during a recess in a murder trial once saved me – or at least my client.

bbb. **Audio and video tape recordings** are routine evidence. **Proper authentication includes**: (1) the recording apparatus was operating properly; (2) the tape fairly and accurately illustrates events described; (3) chain of custody was maintained; and (4) the recorded information is the same as that observed by the witness (meaning not altered). State v. Ayscue, 169 N.C. App. 548 (2005). The above foundation permits admissibility for **both illustrative and substantive** purposes.

ccc. Read **Rule 12 of the General Rules of Practice**. N.C. Gen. Stat. §7A-34. No colloquies between counsel. Yield gracefully to the court's rulings; a gracious loss today may reap a close win tomorrow. Do not make suggestions for the comfort or convenience of jurors in front of the jury. And lots more.

ddd. Remember the value of a motion to **sequester witnesses**. N.C. R. EVID. 615. This rule has great value when **memory** is **at issue**, there is a **mob of witnesses**, or you suspect **witnesses** were **not present or** are **untruthful**. The **commentary favors granting the motion** "unless some reason exists not to." State v. Anthony, 354 N.C. 372 (2001) (no error unless a specific reason is proffered for belief the potential witness will tailor his testimony to that of another). There are minimal **exceptions** for parties and persons whose presence is deemed proper by the court in the interest of justice (e.g., law enforcement, a child's parent, etc.). Failure to **cite specific reasons** on the record why witnesses would tailor their testimony if not sequestered will thwart an appeal. State v. Patino, 699 S.E. 2d 678 (2010).

eee. **A lawfully issued subpoena is a court order**, regardless of who signs the subpoena. **Remedies** include contempt. If you object, file a written notice of objection or motion to quash within ten days or, if less, before the time specified for compliance. Failure to object is a waiver. **If** there is **noncompliance, file** a motion to compel and/or motion for contempt. **Consider** privilege (chapter eight); HIPPA (only applies to healthcare organizations, not individuals); whether there is "possession, custody, or control" ("right to control *means* the right to obtain the records upon request"); and relevance ("reasonableness," etc.). **Remember**: (1) Issue a subpoena for an expert witness when seeking reimbursement for an expert witness fee (e.g., personal injury cases); and (2) you may be required to pay the costs of any subpoenaed expert (e.g., your client's psychologist, the opposing party's doctor, the business valuation expert, etc.). Jarrell v.

Charlotte Mecklenburg Hospital Authority, L. Weekly (10-07-0797) (**expert witness fees are included in court costs** even for an invalid out-of-state subpoena). See (1) the subpoena form itself, AOC-G-100 (Rev. 10/2003); and (2) North Carolina Rules of Court, MEDICO-LEGAL GUIDELINES OF NORTH CAROLINA (2008). Generally, an **expert witness fee** will be set by the judge. **TIP:** (1) **Do not issue an out-of-state subpoena.** New ethics opinion; and (2) **Do not issue a subpoena** in a **criminal case** unless you must as **Rule 45 requires notice to prosecutors** of all **information received** by subpoena.

TIP: (1) **You may subpoena documents directly to your office, without the need to schedule a hearing, deposition, or trial**." Rule 45(a)(2) ("…or any subpoena may be issued separately"). Pamela Best, Associate Counsel for the Administrative Office of the Courts, said the same in an AOC memo. *See also* 2008 Formal Ethics Opinion 4, Use of Subpoena Power to Obtain Records (2008); and (2) Do not forget to **serve opposing counsel or an unrepresented opposing party with** a copy of all **civil subpoenas**. Otherwise, expect to make due process arguments, experience a delay in the proceedings, or get your evidence excluded.

fff. Consider the viability of N.C. R. EVID. **803(24)** and **804(b)(5)**. Know State v. Smith and State v. Triplett and their **six part inquiries**. The **real value appears to be** statements of a deceased, child, or other unavailable witness. Also, appreciate the real risk court decisions will be overturned for the lack of required findings. *See* State v. Benfield, 91 N.C. App. 228 (1988).

ggg. Know **witness competency rules**. N.C. R. EVID. 601 and 602 (oath, perception, memory, competent). Parties cannot stipulate to competency of a child witness. State v. Fearing, 315 N.C. 167 (1985) (requires *voir dire* and ruling). A number of cases have held a four-year old to be a competent witness. Ask to examine young children *in camera*. Consent from all parties is required. However, judges generally dislike parties who require public examinations of children.

hhh. **When examining a witness, do not address the witness by his first name**. U.S. v. Gonzalez, 1977 U.S. App. LEXIS 14665 (U.S. Ct. App. 1977).

iii. **Caution**: Always consider whether **you may be a witness** at trial. Be mindful of your presence at interviews with law enforcement, DSS, and other investigating agencies. Consider the use of a private investigator, an affidavit, or other means of memorializing evidence.

TIP: **Is the prosecutor a material witness** when he interviews a witness and provides notes to you in writing of any material changes? N.C. Gen. Stat. §15A-903(f); State v. Shannon, 182 N.C. App. 350 (2007). The rules apply to everyone.

jjj. If you can, **meet with witnesses** pretrial for a few minutes. Address the key facts, their roles, and the mechanics of trial.

kkk. **When does a defendant forfeit his right to counsel?** When there is "serious misbehavior" (and no evidence of lack of capacity or competency), including abusive conduct towards counsel or egregious behavior in the court room. State v. Wray, 698 S.E. 2d 137 (2010).

lll. Consider a "**pretrial conference**" with the judge. Defendants deserve to know what sentence they will receive. Open pleas are landmines. Address "double-dipping"; the judge's view on a "no contest," Alford plea, or 90-96 disposition; or whether the judge will allow you to continue the case for another judge's consideration. Also, **make the terms of the plea agreement clear**. Query: Does a term that the "defendant will receive probation" mean he can receive "special probation"?

mmm. **Fees**: (1) Client's equate the quality of the representation with the fee charged; (2) If client's are difficult or need lots of time, they get a higher fee; and (3) Thank goodness not everyone hires you.

nnn. **In Re: Superior Court Orders**: District Attorneys may seek a Superior Court order compelling a custodian to provide certain records prior to the filing of charges. **Three issues**: (1) Is there a "sufficient showing" of (a) reasonable grounds to suspect a crime has been committed *and* (b) the records sought are likely to bear upon the investigation?; (2) Is the order sought by a prosecutor? If not, it may be the unauthorized practice of law; and (3) Is the Defendant represented by counsel? If so, the prosecutor cannot go *ex parte* to the judge. Notice, due process, and any confidentiality interest of the defendant are important. In re: Superior Court Order, 315 N.C. 378 (1986) (prosecution must establish factual basis of need for customer's bank records; bare allegations of need are insufficient).

ooo. **Miranda**: "Custody" plus "interrogation" requires Miranda warnings. The only relevant inquiry is how "a reasonable man in the suspect's position would have understood his situation." An objective analysis. State v. Little, 692 S.E. 2d 451(2010).

ppp. **Conflicts of Interest**: If you have ever represented a witness, notify the court and let the judge address any potential conflict. State v. Choudhry, 702 S.E. 2d 495 (2010). **Great tip**: **If the**

court addresses and **enters an order on** a potential **conflict of interest**, the NC **State Bar will not consider a complaint against you**.

qqq. **N.C. Aware**: New statewide online program serving as a repository for all outstanding orders for arrest. Your clients will be arrested on their court date if they have such or a similar hold on them. Advise your clients.

rrr. **Lab Fees** are discretionary, and the court may **waive or reduce** the amount **for "just cause**." N.C. Gen. Stat. §7A-304(a)(7) and (8). *Argue* the offense was committed before September 1, 2009; lab was not introduced at trial; no lab analyst testimony; and "dry labbing" or "random sampling" techniques were used.

sss. Understand **good time, gain time**, and **emergency time credits**. The *North Carolina Department of Correction* has gain time one, two and three for work and educational assignments, allowing a reduction of up to seventy-two days a year (roughly a 19.7% reduction). Emergency time may be awarded for special assignments. In the *federal system*, the *Bureau of Prisons* will award up to fifty-four days of credit a year for inmates serving sentences in excess of twelve months, plus pro-rated credit for the last year (approximately a 12.9% reduction). You can determine the minimum sentence an inmate will serve by dividing the total number of days by 1.148.

ttt. For any **motion to return guns**, there is a **ten day waiting period** *after* the order is entered.

uuu. **Call the DA in advance** if you (a) need extra time to consider a plea offer, (b) to continue an old or peremptorily set trial, (c) permission for your defendant to be absent, or (d) have other unusual matters. **Prosecutors appreciate advance notice so they can call off their witness(es).**

uuu. **Manage client expectations early**. At the outset, tell them if prison is likely, about the true costs (*e.g.*, money, time, preparation, loss of liberty, etc.) of a case, and warn of the slowness of the system. Meet with clients for a few minutes after trial. Debrief. End well.

vvv. **Work zones** are tough to prove. They require a designation approved by the Secretary of DOT, a recorded plat, and a certified copy for trial.

www. If the **judge awards** a **particular fee**, **no affidavit** is **required** reflecting your hours.

xxx. **Judges** generally (1) do not like to spend much time deciding what to decide; (2) often associate the brevity of the argument with the quality of the lawyer; (3) value clarity of writing above style; and (4) value reason above emotion. **A. SCALIA & B. GARNER, MAKING YOUR CASE (2008).**

yyy. Where the only evidence in support of a **restitution** award are (1) unsworn statements by the prosecutor *and* (2) a restitution worksheet, the restitution order will be vacated. State v. Smith, 707 S.E. 2d 779 (2011).

TIP: **Nuggets**: (1) Know offenses for which a court appearance may be waived or is mandatory. Often the prosecution does not; (2) Understand the District Attorney's **policy** on (a) **when** the **defendant must be present** and (b) ***in absentia* guilty pleas**. (3) Know when the **court cannot give an active sentence** (*e.g.*, misdemeanor class 1, record level 1; felony class I, record level 1) and when the court **must give an active sentence** (e.g., felony class E, record level 3; and above); (4) **Jail credit** applies to both the minimum and maximum terms for felonies; (5) A **split sentence** can be up to one-fourth of the maximum sentence; (6) A defendant convicted of a **Class A-E felony must serve** the **mandatory minimum active term, minus jail credit**. The *nine month re-entry parole* can only reduce an active sentence down to the minimum active term, less jail credit; (7) **Do not plead** a defendant to a state charge **if** there is "**federal interest**" until the same is determined; (8) The state needs **money**. Be creative at sentencing; and (9) Be **civil, courteous, and professional**. You will need help tomorrow.

XXII. **Jury Trial Toolbox**:

a. **Know the case**. Everything spins off this truth.

b. **Do not make an admission without the client's informed and written consent**. Admissions by counsel may be attributable to the client. Address any admission, including to a lesser offense, in front of the judge before the same is done in court.

c. **Bruton is more powerful than you think**. A non-testifying co-defendant's confession cannot implicate your defendant in a joint trial. Bruton v. United States, 391 U.S. 123 (1968); *See also*, N.C. Gen. Stat. §15A-927. "An ineffective redaction . . . violates the principles of Bruton." Gray v. Maryland, 523 U.S. 118 (1998). The purpose of Bruton and its codification is to sanitize references so that co-defendants are guaranteed a fair and impartial trial. **References to another person may not suggest or infer guilt**. One can utilize a **redacted** statement **only when** it does not point suspicion and allow jurors to conclude the defendant was involved in the crime. In a joint trial, extrajudicial confessions must be excluded unless all portions of the statement that implicate a defendant can be deleted without prejudice. State v. Barnett, 307 NC 608 (1983). The confrontation clause requires **not only elimination of defendant's name but any reference to his existence** along with proper limiting instructions. Richardson v.

Marsh, 481 U.S. 200 (1987). Also, Bruton is rich with great quotes.

d. Read, know, and understand **peremptory challenges** and **challenges for cause**. N.C. Gen. Stat. **§**15A-1212, *et seq*.

e. Keep an "**appeal issues" checklist** during trial. Otherwise, you will forget important rulings during the hectic nature of trial.

f. Make an "**evidence checklist**" of the key points you need to frame your closing argument.

g. In **civil cases**, make sure the **pretrial order** is **correct and complete**. Avoid the nightmare of changes and opposing counsel's objections.

h. In **closing argument**, the first thirty seconds is your window of opportunity. Stop, look jurors in their eyes (no more than three to five seconds), pause, and state your theme. Seize the moment, and make it count. At a minimum, **cover** the key elements, reference relevant pattern jury instructions, and cite key facts. Address, and undress, your opponent's arguments. Cite burdens of proof. Tell the jury they are at the pinnacle of the American experience, why their service counts, and remind them of promises made in *voir dire*. Last, tell them what you want, and why it's the right choice.

i. **Know the boundaries of closing argument**. Common objections: Personal opinion, societal demands of a conviction because of a generalized problem, putting the jurors in place of the victim, evidence argued for purposes outside the basis for admission, arguments based on group classification, and inflammatory argument. *See* the publication by Staples Hughes, Appellate Defender, "You Are Sorry and No Count if You Don't Protect the Record for your Client's Appeal" (Nov. 14, 2008).

j. In criminal jury trials, **do not accept late or last minute discovery** which impairs your ability to prepare and adequately defend. U.S. Const. amend. V and VI; N.C. Const. Art. I, §19 and 23. The constitution is your friend, appellate case law is favorable, and judges want to be fair. File a **motion to continue**.

k. Judges want evidence that is **right, relevant, and reliable**. Credit Thomas A. Mauet, Trial Evidence, (3rd ed.).

l. **When in doubt**, **consult an expert**. Many times I have consulted with local counsel, board certified specialists, the Capital Defender, the Appellate Defender, the Center for Death Penalty Litigation, the Institute of Government, and other entities and experienced colleagues, almost always with enormous benefits.

m. **Fine art techniques**: (1) Look at the court reporter. Are you, or the client, talking too fast or soft?; (2) Spell the witnesses' last name for the court reporter; (3) Show exhibits to the judge first before presenting them to the witness; (4) Have copies of exhibits you intend to introduce for the witness, jurors, and alternate jurors; (5) Always acknowledge opposing counsel, the judge, and the jury before you begin opening statement or closing argument; (6) Never fudge on the facts or the law; (7) Be early and prepared; and (8) Never let them see you sweat.

Tip: Important reminders: (1) Always move to dismiss at the close of the State's case-in-chief *and* after all the evidence; (2) Listen to the judge's charge. Sometimes we all misspeak; (3) Listen to the judge's comments to the jury. Comments on the evidence occur; (4) Put the amount of time the jury has been deliberating in the record; (5) Renew objections at trial to adverse motion *in limine* rulings, and renew motions to admit evidence; (6) Record opening statements and closing arguments, or re-state objectionable comments for the record; (7) Move to strike inadmissible evidence; and (8) Read Staples Hughes' materials for preserving the record before every trial.

n. **Object** at trial to an "**in court identification**" *and* **move to strike**. State v. McCray, 342 N.C. 123 (1995) (both are required to preserve a challenge to in court identification). Remember to make a pretrial motion regarding same.

o. **Inform the court of your intention to address the sentence the defendant could receive if convicted**. The defendant has a statutory right to inform the jury of the potential maximum sentence he could receive. N.C. Gen. Stat. § 7A-97. The judge will appreciate the notice and instruct you on what you can say.

p. **Judges are sensitive to juror perception** of fairness and efficiency. Let the judge, and opposing counsel, know of any pretrial issues, personal commitments, witness problems, or other issues before the jury is impaneled or otherwise waiting. Also, **do not ask to approach the bench during trial** unless absolutely necessary. Jurors do not like it; neither does the judge. Ask for a recess or to be heard out of the presence of the jury.

q. Call colleagues in the district where your judge resides. Or just watch. **Know the judge's tendencies**.

r. Consider consulting with **David Ball** on favorable juror profiles or damages for your case. Also, consider a **focus group**. We have. It helped.

s. If the jury convicts your client and the case will carry over to the next day, be ready for the prosecutor to request that the judge **revoke your client's bond**.

t. **Poll the jury**. Especially when the case appears close or the jury had lengthy deliberations.

u. Remember to **ask for a limiting or curative instruction**. Seek a **motion to strike** (one of my favorites; it suggests something really bad to the jury), **or** move for a **mistrial** (requires "substantial and irreparable prejudice"). **Caution:** (1) Be careful what you ask for – you may get it; and (2) **If you do not desire a mistrial, object** or double jeopardy does not apply at the later trial. State v. Hargrove, 697 S.E. 2d 479 (2010).

v. File "**motions *in limine***" to exclude bad evidence or provide pretrial rulings critical to your case. These are great trial tools. You need to know in advance what evidence will, or will not, come in. Often these rulings lead to a smart plea or a favorable trial. *See* State v. Hightower, 340 N.C. 735 (1995), for great language. **Renew objections to adverse rulings at trial**. State v. Thibodeaux, 352 N.C. 570 (2000) (motion *in limine* alone is insufficient to preserve appellate review without objection at trial); *see also* State v. Oglesby, 361 N.C. 550 (2007). A practice trap.

w. Remember "**motions to sever" require:** (1) a pretrial hearing and (2) the renewal of the motion at the end of all the evidence.

x. If you file a **motion to change venue**, you **must (1)** exhaust all peremptory challenges **and** (2) be denied a challenge for cause to preserve the venue issue. **Consider** alternatives like a special venire, individual *voir dire*, admonitions to the jury regarding media exposure, jury sequestration, and a motion to continue.

y. **Object timely and state your basis**. Failure to do so is a waiver. A general objection is insufficient unless plain error. **Constitutionalize** your objection: relevance is due process, and hearsay is confrontation. By doing so, you change the standard of review from an abuse of discretion standard to the presumption of prejudicial error unless the state shows it to be harmless beyond a reasonable doubt. You also preserve certain federal appeal rights.

z. Do not forget to **make "offers of proof."** N.C.R. EVID. 103(a)(2). Judges want to keep trials moving efficiently. Make a big reminder note on your table. Put everything in your offer. Reversals happen.

aa. As defense counsel, consider whether you want to give your **opening statement** in a criminal trial before the state begins presenting evidence. The principle of primacy is important. However, *voir dire* is a wonderful opportunity to explain the order of trial and the principles that apply. Why tell your case until you see theirs? You can always say, "And now for the rest of the story."

bb. **Do not let opposing counsel argue facts outside the evidence or vouch for witnesses**. It happens unexpectedly. Object on the spot. Counsel can argue "reasonable inferences" from the evidence.

cc. Review the **pattern jury instructions**. Memorize them. Think about them. Incorporate the instructions into the evidence. It's persuasive.

dd. **Renew pretrial motions and/or objections at trial**. They are **not preserved** by pretrial rulings. N.C. R. EVID. 103 and State v. Oglesby, 361 N.C. 550 (2007).

ee. **Seek wise counsel in the courtroom**. Ask the clerks, baliffs, and court reporter their opinions. They are experienced – and usually right.

ff. Provide **timely notice of defenses**, some of which must be specific, and **reciprocal discovery**.

gg. Make a list of every key point you learn in trials over the years. I have a "**trial tips" master list** which I supplement after and review before each jury trial. I do the same for ***voir dire***. You will be amazed how much it helps.

hh. Understand **trilogies**. Jurors generally do not remember more than three points.

ii. Do not let the prosecution use the **term** "**victim**." It (1) implies guilt; (2) expresses a personal opinion; and (3) assumes the state has proven its case. State v. Riddle, 311 N.C. 734 (1984); State v. Belk, 268 N.C. 320 (1966); *contra* State v. Jackson, 688 S.E.2d 766 (2010).

jj. **Emphasize *voir dire***. Know your **desired juror profile**. Massage important principles of law into the jury's consciousness. Be personal, humble, and vulnerable. Integrate the bad in the beginning. **People like and vote for people like themselves**. They "**save themselves**." They use "**intuitive justice,**" or **the desire to compensate or punish**. **They decide what they "feel" is right and justify their decision within the confines of the instructions**. First impression matters. Win the beginning. Presentation is critical (i.e., eye contact, open posture, and appropriate dress). **They believe in propensity**. **If a witness contradicts** an earlier statement, most jurors believe **the witness is lying**. Humanize the client. Never exaggerate. **Jurors want to know their jobs, rely on common sense, see the case through their life experience, selectively remember, love motive, like visual evidence, favor experts, and need a story**. Most jurors

choose sides early, and a few wait until the end. **Limiting instructions** can **backfire. A judge's nonverbal behavior matters greatly**. **Ask** the jury if they need to hear from the defendant to find him innocent. Jurors want the defendant to prove his innocence. **Ask** how they understand key concepts. Do group questions and instructions, have individual dialogue, and secure promises to follow the law. **Find the leaders**. Give them facts and motive to persuade. **Followers are inconsequential** and reduce the size of the jury. In the end, address the worth of each juror. **TIP**: Figure out what the jury is interested in; find a compelling detail or insight and make it a centerpiece of trial; and connect with the jury by demonstrating respect, fairness, calmness, and a command of the law.

kk. Type out your **witness list**. Have **copies** for (1) opposing counsel *and* (2) the judge. List *all* possible witnesses.

ll. When a witness takes notes to the stand and uses them to refresh his memory while giving testimony, **move to examine the notes prior to beginning cross-examination**. A great technique which often yields gold nuggets.

mm**. You, and your client, are always on display**. Humanize your client. Touch him. Dress properly. React appropriately. Jurors make quick judgments about whom they like and trust and then find facts to support their view.

nn. **Pattern Jury Instructions**: Helpful rules: (1) Evidence is construed in the "light most favorable" to the defendant (the reverse of a motion to dismiss); (2) An instruction is required if there is "any" evidence of self-defense; (3) You have the right to the "substance" of the requested instruction if it is supported by the evidence *and* it is a correct statement of the law; (4) You have the right to have portions of the instructions omitted if not at issue in the case; (5) Put all proposed instructions in writing; (6) Make the proposed instruction a part of the record; and (7) The state's evidence alone may be sufficient for an instruction, even for self-defense.

oo. At the verdict, make sure your client has already completed an "**indigent form**" so the **Appellate Defender** may be **appointed** for the appeal.

pp. When you **remand** a case from superior court, be sure to (1) tell the judge the type of disposition rendered in district court, *and* (2) for DWI cases, get a new sentencing date from the clerk.

qq. Ask permission to **speak to the jury post-trial**. Be brief. Thank them for their patience, honest assessment of the evidence, and their jury service. Tell them you are sensitive to their time, and

invite them to call you if anyone would like to share their thoughts on the trial. Be short, humble and full of grace.

Tip: (1) **Be the most reasonable person in the courtroom**; (2) There is one bully in every conversation. No one likes a bully. Let the expert be the bully; (3) Most people are emotional thinkers. Some are rational thinkers. The most effective lawyer appeals to emotion and yet provides a frame for reason; and (4) Never let them see you sweat.

XXIV. Conclusion:

TIP: Aim high. Work hard. Manage relationships well. Proceed as if every moment matters. Help without expectation. Develop a reputation for excellence. End well.

Knowledge is power. A Superior Court Judge once suggested that I **read the rules of evidence** several times a year. I took that advice to heart, and I commend the same to you. Moreover, I suggest you **try cases**, think through the evidence, and read the cases applying and explaining the rules. Knowledge, combined with experience, will make you a master of our craft.

"**The wise store up knowledge** . . . ." Proverbs 11:17

Epilogue: "The day may come when we are unable to muster the courage to keep fighting . . . but it is not this day." *
* Attributed to: The Lord of the Rings: Return of the King (2003).

" **The constitution is what separates us from tyranny**."
Willis Whichard, former North Carolina Supreme Court Justice

" **Epiphany's occur in the middle of the night – or at least after hours of repeated reflection**."
The true trial lawyer.