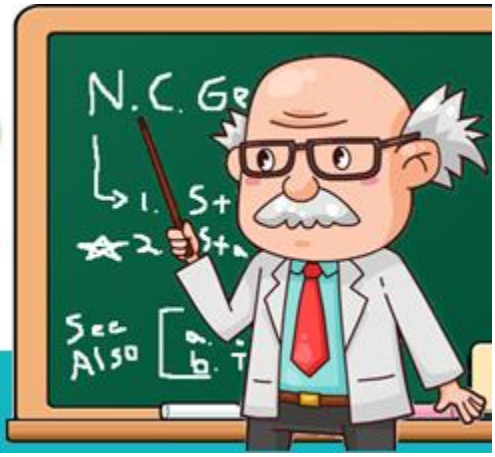
THINK YOU KNOW CRIMINAL LAW?

DISCOVERING NUGGETS—AND LANDMINES—IN THE RULES

VERSION 2.0



This paper* is an original, designed to stimulate your mind in an academic environment. As always, I will utilize many CLEs, observations of great lawyers, and, most importantly, trial experience in approximately 100 jury trials ranging from capital murder, personal injury, torts, to an array of civil trials. As a result, I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, drug trafficking, and a myriad of other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: *if it does not work, I am not interested*.

This paper is framed to test your *functional knowledge*, unearthing useful nuggets—and landmines—in the rules of law. My friend, John Rubin, calls it the pursuit of "practical scholarship." Resources include over 180 CLEs; N.C. Gen. Stat. §§ 15 (Criminal Procedure), 15A (Criminal Procedure Act), 8 (Evidence), 8C (Evidence Code), 7A (Judicial Department); JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (7th ed. Supp. 2012); ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 61 (5th ed. 2016); BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2018 COURTROOM MANUAL (Matthew Bender 2018); NORTH CAROLINA RULES OF COURT: VOLUME I – STATE 2018 (2017); SHEA DENNING, CHRISTOPHER TYNER & JEFFREY WELTY, PULLED OVER: THE LAW OF TRAFFIC TOPS AND OFFENSES IN NORTH CAROLINA (2017); and other UNC-School of Government Publications and blogs. Pronouns are in the masculine in accord with holdings of the cases referenced.

Please note the following: (1) all answers are anonymous; (2) all questions refer to North Carolina criminal law unless otherwise stated; (3) do not worry about answering all questions as the presentation is not designed for you to finish; and (4) the underlined language directs you to the subject matter of the question.

Let's get started.

TEXT YOUR ANSWERS!

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* I wish to acknowledge Timothy J. Readling, Esq., for his part in researching, designing, and creating this presentation.

1. True or False. An infraction is a criminal violation not punishable by imprisonment and, unless otherwise provided, having a maximum penalty of $100.00.

ANSWER: False.

EXPLANATION: An infraction is a noncriminal violation of the law. *See* N.C. Gen. Stat. § 14-3.1. Also, the right to appeal an infraction was eliminated when committed on or after December 1, 2013. *See* S.L. 2013-385 (S 182) (repealing N.C. Gen. Stat. § 15A-1115(a) in its entirety); *see also* N.C. Gen. Stat. § 15A-1441(b) (permitting the appeal of a defendant "convicted" in the district court; a finding of responsible for an infraction is not a conviction).

2. True or False. An officer may not arrest for an infraction.

ANSWER: True.

EXPLANATION: ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 61 (5th ed. 2016).

3. Officers must have the following jurisdiction to prosecute a crime:

(A) Personal and subject matter.

(B) Territorial, personal, and subject matter.

(C) Personal and territorial.

ANSWER: (B).

EXPLANATION: ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 14 (5th ed. 2016). Territorial jurisdiction requires the criminal offense to occur within sovereign boundaries of North Carolina (or a close enough nexus to justify same), personal jurisdiction generally requires a valid criminal process be properly served on the defendant granting the court power to act, and subject matter jurisdiction grants the court authority to hear the type of case before it. Additionally, officers retain their law enforcement authority 24 hours per day, on or off duty. *See State v. Gaines*, 332 N.C. 461 (1992).

4. True or False. The District Attorney represents law enforcement, including the State Highway Patrol.

ANSWER: False.

EXPLANATION: The Attorney General represents state agencies, including the State Highway Patrol. City and county attorneys represent their respective employees, including law enforcement. Therefore, District Attorneys do not have standing to object to subpoenas issued to law enforcement. *See Jarrell v. Charlotte-Mecklenburg Hospital Authority*, 206 N.C. App. 559 (2010) (holding parties to litigation lack standing to challenge a subpoena issued to a third party absent claim of privilege, proprietary right, or other interest in such production), *overruled on other grounds*, *Lassiter v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367 (2015).

5. True or False. For an officer to stop a vehicle for a traffic violation, probable cause is required.

ANSWER: False.

EXPLANATION: You are welcome, Part I. *State v. Styles*, 362 N.C. 412 (2008) (holding reasonable suspicion is the standard for all traffic stops).

6. Which agency has expanded authority generally unavailable to other law enforcement officers to stop citizens when investigating general criminal law violations?

(A) U.S. Marshals.

(B) SBI agents.

(C) State Highway Patrol.

(D) Wildlife and Marine Fisheries Officers.

ANSWER: (D).

EXPLANATION: Wildlife officers may stop anyone engaging in an activity regulated by their agency to see whether that person is complying with the law. In other words, no reasonable suspicion of criminal conduct is required in that circumstance. *See State v. Pike*, 139 N.C. App. 96 (2000) (holding Wildlife officers made a constitutional suspicionless stop of a motor vessel under N.C. Gen Stat. § 75-17(a) to conduct a safety inspection).

7. True or False. The prosecutor has an affirmative duty to ask for, seek, and investigate the existence of exculpatory or impeachment material favorable to the defense.

ANSWER: True.

EXPLANATION: *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police).

8. True or False. For discovery, the State serves a dual role as both a law enforcement agency and prosecutorial office.

ANSWER: True.

EXPLANATION: *See State v. Tuck*, 191 N.C. App. 768 (2008) (holding the above and that the State violates the discovery statute when (1) the law enforcement agency or prosecuting agency was aware of the statement required to be produced or, through due diligence, should have been aware of it; and (2) while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose it).

9. True or False. There are no rebuttable presumptions against a defendant.

ANSWER: False.

EXPLANATION: Three points: (1) there are rebuttable presumptions that no condition of release will reasonably assure the appearance of the person charged and the safety of the community if certain criteria are met for trafficking, gang, and firearm offenses. *See* N.C. Gen. Stat. §§ 15A-533(d), (e), and (f) (entitled "Right to Pre-Trial Release in Capital and Non-Capital Cases"); (2) the amended murder statute (N.C. Gen. Stat. § 14-17) in 2017, known as Britny's law, provides that certain domestic violence homicides have a rebuttable presumption that the killing is premediated and deliberate first degree murder; (3)(a) the doctrine of recent possession permits an "inference" of guilt based on a defendant's possession of stolen property recently after a larceny or breaking and entering. *See, e.g., State v. Etheridge*, 168 N.C. App. 359 (2005); and (3)(b) a chemical analysis of .08 does not create an evidentiary presumption, serving instead as "prima facie" evidence ("sufficient evidence to prove") the defendant's alcohol concentration. *State v. Narron*, 193 N.C. App. 76 (2008). No statutory presumptions have been challenged as of this date. In sum, "mandatory provisions"—unlike "permissive inferences"—violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense, even if rebuttable. *See Francis v. Franklin*, 471 U.S. 307 (1985).

10. True or False. State and local law enforcement officers may arrest individuals for violations of federal law.

ANSWER: True, absent specific authority to the contrary.

EXPLANATION: *See U.S. v. DiRe*, 322 U.S. 581 (1948).

11. True or False. Your client must be present for a felony first appearance.

ANSWER: False.

EXPLANATION: Defendant "need not appear personally if he is represented by counsel at the proceeding." N.C. Gen. Stat. § 15A-601(d).

12. True or False. A defendant must be allowed to communicate fully and confidentially with counsel during an initial appearance at the magistrate's office.

ANSWER: True.

EXPLANATION: ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 86 (5th ed. 2016). Remember, a defendant's Sixth Amendment right to counsel attaches at his initial appearance. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008).

13. For Structured Sentencing, jail credit applies to:

(A) Post-release supervision.

(B) Maximum sentence.

(C) Minimum and maximum sentence.

ANSWER: (C).

EXPLANATION: *See* N.C. Gen. Stat. § 15-196.3.

14. True or False. A party to a telephone conversation may record the conversation without notice to the other party.

ANSWER: True.

EXPLANATION: North Carolina is a "one party" consent state. *State v. Thompson*, 332 N.C. 204 (1992); *State v. Branch*, 288 N.C. 514 (1975) (holding no violation of the Fourth Amendment or the federal wiretapping law occurred when only one party to a telephone conversation consented to its recording).

15. True or False. If an officer makes a valid stop, he has the right to frisk for officer safety.

ANSWER: False.

EXPLANATION: A frisk is a separate Fourth Amendment intrusion, justified only if the officer has reasonable grounds to believe the person to be frisked is presently armed and dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968). *But see U.S. v. Robinson*, 846 F.3d 694 (4th Cir. 2017) (en banc) (holding "an officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection . . . ."), *cert. denied*, ___ U.S. ___, 138 S. Ct. 379 (2017); *State v. Bullock*, ___ N.C. ___, 805 S.E.2d. 671 (2017) (holding, although in the context of a duration of the stop issue, a frisk was permissible in that case). In sum, *Robinson* addresses officer safety in the context of lawful gun possession, and, frankly, *Bullock* appears inconsistent with *Terry*. Please see the explanation for Question No. 45 for a summary of *Bullock*.

16. Rule 3.1 of the General Rules of Practice for Superior and District Courts provides guidelines for resolving scheduling conflicts. Which of the following is not true?

(A) Appellate courts prevail over trial courts, and, unless specifically excepted, priority shall be as follows: superior court, district court, and magistrate's court.

(B) There is no priority, regardless of trial division, among listed priority matters.

(C) An anticipated three day trial of an unconfined defendant charged with indecent liberties, a superior court Class F felony, has priority over an interim equitable distribution proceeding.

(D) A contested child custody hearing has the same priority as a capital murder trial.

ANSWER: (C).

EXPLANATION: *See* Rule 3.1 of the General Rules of Practice for Superior and District Courts. Attorneys should send advance written notice, seeking guidance from the courts. By rule, judges will confer, resolve the conflict, and notify counsel. *See* Rule 3.1(b).

17. Which of the following is not a proper character trait at trial?

(A) Truthful/untruthful (honest/dishonest) and peaceful/violent.

(B) General good character.

(C) Law-abiding/not law-abiding and temperance.

ANSWER: (B).

EXPLANATION: *State v. Squire*, 321 N.C. 541 (1988) (holding a defendant may not offer evidence of undifferentiated "good character"). Character evidence of a pertinent character trait is admissible in the form of opinion or reputation evidence. N.C. R. Evid. 405 and 608; KENNETH S. BROWN, BRANDIS & BROWN, N.C. EVIDENCE 257–91 (5th ed.). Also, case law permits the court to limit the number of character witnesses, taking judicial notice of remaining witnesses. *State v. Ramey*, 318 N.C. 457 (1986) (approving the court's limit to six character witnesses, thereafter allowing the remaining witnesses to identify themselves with the court instructing the jury said witnesses were present to testify to a pertinent character trait of defendant).

18. True or False. Consulate documents are acceptable for determining a person's actual identity or residency by law enforcement or a judicial official.

ANSWER: False.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-311 (entitled "Identification Documents"). However, passports are acceptable. Exceptions do apply. Refer to Question No. 82 for related subject matter.

19. Which of the following can be an effective disposition to avoid immigration consequences for a conviction?

(A) Expunction or Deferred Prosecution

(B) Prayer for Judgment Continued upon payment of costs

(C) Motion for Appropriate Relief

ANSWER: (C).

EXPLANATION: *See* George Miller, *Immigration Consequences of Criminal Convictions*, N.C. OFFICE OF INDIGENT DEFENSE SERVICES (undated), http://www.ncids.org/Defender%20Training/2004%20New%20Misd%20Defender%20Training/Immigration%20Consequences03.pdf. Also, to be effective, a MAR must vacate the conviction on the merits. *See* N.C. Gen. Stat. §§ 15A-1414 and 1415 (MAR statutes); *see also Santos Guzman Gonzalez v. Sessions*, 894 F.3d 131 (4th Cir. 2018) (holding a PJC upon payment of costs does not constitute a punishment within the Immigration and Naturalization Act's definition of "conviction" in 8 U.S.C. § 1101(a)(48)(A).)

20. True or False. An oral appeal of a SBM ruling is effective if notice is provided while term is in session.

ANSWER: False.

EXPLANATION: *See State v. Brooks*, 204 N.C. App. 193 (2010) (holding the appeal of an SBM ruling is civil in nature, requiring written notice). Additionally, trial courts have struggled with whether the State has made a sufficient showing to establish SBM is a reasonable search under *Grady v. North Carolina*, ___ N.C. App. ___, 817 S.E.2d 18 (2018), *et al*. In *State v. Griffin*, ___ N.C. App. ___, 818 S.E.2d 336 (2018), the State presented evidence on defendant's history in prison and on post-release supervision, the victim's youth, and the technical capabilities of the tracking device. The appellate court deemed the showing insufficient proof that SBM was effective in protecting the public from sex offenders, suggesting "empirical or statistical reports" on sex offender recidivism was preferred. *See also State v. Gordon*, ___ N.C. App. ___, 820 S.E.2d 339 (2018) (vacating the trial court order for lifetime SBM when the State made no attempt to report the level of intrusion as to the information revealed under the program, whether the monitoring device currently in use would be similar to that used in the future, the record did not indicate whether defendant would be on supervised or unsupervised release, and the State was unable to adequately establish the government's need to search). Current issues include: (1) if the defendant will be subject to SBM beyond his term of supervision, evidence of how SBM works for unsupervised offenders (monitored from Raleigh) must be presented and (2) evidence of SBM's efficacy must be presented through empirical or statistical reports, focusing on whether monitored sex offenders are less likely to offend than unmonitored sex offenders. *See, e.g.*, STEPHEN V. GIES, *ET AL.*, MONITORING HIGH-RISK SEX OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM FINAL REPORT) (2012).

21. What is the purpose of a Certificate of Relief?

(A) To permit possession of a firearm if otherwise prohibited by law.

(B) To grant eligibility for a motor vehicle license if otherwise limited, suspended, or revoked.

(C) To serve as a bar to an action alleging negligent hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the Certificate of Relief was issued.

ANSWER: (C).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-173.5 (entitled "Reliance on Order or Certificate of Relief as Evidence of Due Care").

22. Match the device with its use.

(A)	Pen Register	(___)	FBI's National DNA Identification Index System.
(B)	Trap and Trace	(___)	Cell site simulator that mimics cell phone towers to trick cell phones into transmitting their location and identifying information.
(C)	Sting Ray	(___)	Identifies the originating telephone number.
(D)	CODIS	(___)	Identifies telephone numbers dialed.

ANSWER: Answer choice (A) is the fourth entry, (B) is the third entry, (C) is the second entry, and (D) is the first entry.

23. True or False. The issuance of a magistrate's order charging a defendant with Driving While Impaired does not toll the two year statute of limitations applicable to misdemeanors.

ANSWER: False.

EXPLANATION: The demise of the *Turner* issue. Now, valid criminal pleadings listed in N.C. Gen. Stat. § 15A-921, including a citation, toll the two year statute of limitations in N.C. Gen. Stat. § 15-1. *See State v. Curtis*, 371 N.C. 355 (2018), which overruled *State v. Turner*, 793 ___ N.C. App. ___, 793 S.E.2d 287 (2016), *rev'd*, ___ N.C. ___, 817 S.E.2d 173 (2018).

24. True or False. A seizure occurs when a person submits to an officer's show of authority or the officer applies physical force resulting in the suspect's submission to authority.

ANSWER: True.

EXPLANATION: North Carolina appellate courts follow *California v. Hodari D.*, 499 U.S. 621 (1991) (holding same); *State v. Mewborn*, 200 N.C. App. 731 (2009) (holding defendant did not submit to officer's authority before fleeing and thus was not seized until officers took physical control of him). In contrast, an officer's mere tapping on the suspect's shoulder to get the suspect's attention is not a seizure. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4(a), at 585 (5th ed. 2012).

25. True or False. An officer's objectively reasonable mistake of fact or law in making a stop or arrest may be permissible under a Fourth Amendment analysis.

ANSWER: True.

EXPLANATION: You are welcome, Part II. *See State v. Lynch*, 94 N.C. App. 330 (1989) (holding an officer's objectively reasonable but mistaken belief of *factual* identity of a person to be arrested may be reasonable under the Fourth Amendment) (emphasis added); *see also Heien v. North Carolina*, 574 U.S. ___, 135 S.Ct. 530 (2014) (holding an officer's objectively reasonable but mistaken belief of *law* that a traffic violation had occurred can provide reasonable suspicion for a stop under the Fourth Amendment), *aff'g State v. Heien*, 366 N.C. 271 (2012) (emphasis added).

Defense friendly cases exist. *See State v. Eldridge*, ___ N.C. App. ___, 790 S.E.2d 740 (2016) (holding the officer's mistake of law was not objectively reasonable as the statutory requirement for an exterior driver's side mirror on vehicles "registered in this State" was susceptible to only one meaning); *State v. Coleman*, 228 N.C. App. 76 (2013) (holding the officer's mistake of law was not objectively reasonable as defendant's possession of an open container in his car in a parking lot was lawful since the statute only prohibited open containers on highways and highway right-of-ways, law well-settled for over a decade).

26. Defense counsel issues a subpoena duces tecum for law enforcement to produce all in-car cameras, belt tapes, and body cameras on the client's court date. Counsel for law enforcement files a motion to quash the subpoena. What is the remedy?

(A) Calendar the motion to quash, have a hearing, and move the Court to compel compliance with the subpoena by issuing a show cause order for law enforcement to appear and to show cause why they failed to comply.

(B) Arm wrestle the officer.

(C) File a Petition for Release of Custodial Law Enforcement Agency Recording pursuant to N.C. Gen. Stat. § 132-1.4A, *et seq.*, serve persons required by statute, and notice the petition for hearing in civil superior court.

ANSWER: (C).

EXPLANATION: *See* N.C. Gen. Stat. § 132-1.4A, *et seq.* I routinely use this petition for impaired driving, resisting or assaulting an officer, and other disputed fact patterns.

27. Which of the following doctrines is not an exception to the exclusionary rule (i.e., fruit of the poisonous tree doctrine)?

(A) Inevitable discovery and independent source.

(B) Public safety, attenuation, and derivative evidence.

(C) Good faith.

ANSWER: (C).

EXPLANATION: *State v. Carter*, 322 N.C. 709 (1988) (holding a good faith exception to the exclusionary rule does not apply to motions to suppress under the North Carolina Constitution).

28. What is the *Harbison* rule?

(A) It is *per se* reversible error for counsel to admit the defendant's guilt without the defendant's consent.

(B) Co-defendants tried jointly at trial lose the last argument if one co-defendant adduces evidence at trial.

(C) A defendant's confrontation clause rights are violated when a non-testifying co-defendant's confession naming the defendant as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant.

ANSWER: (A).

EXPLANATION: Answer choice (B) is true. *See* N.C. Gen. R. Prac. Super. & Dist. Ct. 10; N.C. Gen. Stat. § 7A-97.

Answer choice (C) is the *Bruton* rule. *Bruton v. United States*, 391 U.S. 123 (1968).

29. *Crawford* holds admission of testimonial statements by an out-of-court witness requires unavailability and a prior opportunity for cross-examination. Statements are testimonial for purposes of the Crawford constitutional analysis when:

(A) The primary purpose of police interrogation is to meet an ongoing emergency.

(B) The primary purpose of police interrogation is to establish or prove past facts potentially relevant to later criminal prosecution.

(C) Oral testimony is provided by a witness at trial.

ANSWER: (B).

EXPLANATION: Answer choice (A) is the definition of nontestimonial evidence in a *Crawford* analysis. *See Davis v. Washington*, 547 U.S. 813 (2006).

Answer choice (C) is a type of evidence like testimonial, documentary, real, etc.

30. The recent SCOTUS case, *Carpenter v. U.S.*, 585 U.S. ___, 138 S. Ct. 2206 (2018), holds:

(A) Automobile passengers, as well as the driver, are seized within the meaning of the Fourth Amendment when the vehicle is detained by law enforcement, and passengers have standing to contest the stop.

(B) The Sixth Amendment precludes law enforcement from interrogating a defendant in custody for 14 days after he invokes his Fifth Amendment right to counsel.

(C) When the government obtains long-term, historical cell site location information (CSLI) about a person, it conducts a Fourth Amendment search, and the government must generally obtain a warrant supported by probable cause before acquiring such records.

ANSWER: (C).

EXPLANATION: *Carpenter* holds accessing seven days of CSLI is a search under the Fourth Amendment, overruling prior precedent that the third party doctrine waives a person's privacy interest. The third party doctrine applies when one party shares information voluntarily with a third party (e.g., customer with a cell phone provider), waiving any reasonable expectation of privacy. In North Carolina, the third party doctrine still lives via pen register, bank record, and In re orders. The School of Government opines that *Carpenter* may be extended to real time CSLI collection, and the law is unclear about "tower dumps" which provide a snapshot of all cell phones connected to one tower within a specific window of time.

Answer choice (A) is the holding of *Brendlin v. California*, 551 U.S. 249 (2007).

Answer choice (B) is the holding of *Maryland v. Shatzer*, 559 U.S. 98 (2010).

31. True or False. *Knoll* violations deal with violations of pre-trial release statutes that prejudice a defendant's ability to present a defense.

ANSWER: True.

EXPLANATION: *See State v. Knoll*, 322 N.C. 535 (1988). Surprisingly, since *Knoll*, no published opinions find magistrates' violations in the setting of conditions of release—or a jailor's conduct—so prejudicial as to warrant dismissal of charges. *See* Shea Denning, *What's Hot in the Realm of DWI Litigation*, N.C. CRIM. L. BLOG (May 17, 2017, 8:45 PM), https://nccriminallaw.sog.unc.edu/whats-hot-realm-dwi-litigation/. Hot DWI topics today include admission of expert testimony (particularly HGN), admissibility of warrantless blood test results, probable cause arrests, and the appropriate remedy for statutory violations related to arrest and pre-trial detention. *See id.*

32. What is Marsy's law in North Carolina?

(A) A law requiring gun permit holders to be screened by the FBI before purchasing assault rifles.

(B) A proposed bill creating a new level DWI punishment for persons convicted of DWI when operation of the vehicle is the proximate cause of death of two or more persons and the operator has a BAC of .20 or more.

(C) A constitutional amendment strengthening victim's rights, expanding victim's rights in juvenile proceedings, and adding new enforcement proceedings.

ANSWER: (C).

EXPLANATION: *See* Shea Denning, *Marsy's Law Is on the Ballot; Voters Will Decide Whether it Goes on the Books*, N.C. CRIM. L. BLOG (July 25, 2018, 2:44 PM), https://nccriminallaw.sog.unc.edu/marsys-law-is-on-the-ballot-voters-will-decide-whether-it-goes-on-the-books/.

33. NCAWARE is:

(A) A statewide broadcasting service for missing children, particularly minors kidnapped under the PKPA.

(B) The North Carolina Warrant Repository, including all criminal processes other than a citation.

(C) A database utilized by law enforcement to research and investigate the backgrounds of suspects.

ANSWER: (B).

EXPLANATION: The title refers to the NC Automated Warrant Repository which allows a criminal process to be created electronically and printed as needed and—when originally created in paper form—to be entered into the electronic repository.

34. True or False. CJLEADS is a private database used nationwide by the Department of Homeland Security designed primarily to locate terrorist, national security, and related interstate criminal activity.

ANSWER: False.

EXPLANATION: CJLEADS, or "Criminal Justice Law Enforcement Automated Data Services," is a comprehensive integration of state databases with information about criminals that can be accessed immediately to include warrants; jail, court, and prison records; probation and parole status; sex offender registration; and DMV and Wildlife licensure as well as concealed handgun permits. This database is designed to provide law enforcement a positive identification and immediate status of an offender.

35. To request the identity of a confidential informant, defense counsel should file:

(A) A *Watson* motion.

(B) A *Roviaro* motion.

(C) A *Rothgery* motion.

(D) A *Shannon* motion.

ANSWER: (B).

EXPLANATION: *See Roviaro v. U.S.*, 353 U.S. 53 (1957) (holding prosecution must disclose informant's identity when relevant and helpful to the defense or essential to a fair determination); *State v. Cherry*, 55 N.C. App. 603 (1982) (holding disclosure is required when the informant's identity or contents of his communication is helpful and relevant to the defense or essential to a fair determination of a cause).

Regarding answer choice (A), a *Watson* hearing is a pre-trial hearing in a capital murder to determine whether there is sufficient evidence of an aggravating circumstance to try the case as first degree capital murder. *See State v. Watson*, 310 N.C. 384 (1984).

Regarding answer choice (C), *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008), held defendant's Sixth Amendment right to counsel attaches at the initial appearance before a judicial official.

Regarding answer choice (D), *State v. Shannon*, 182 N.C. App. 350 (2007), held a prosecutor must disclose a witness statement containing significantly new or different information from a prior statement made by such witness. *Shannon* is now codified in N.C. Gen. Stat. § 15A-903(a)(1)c.

36. Name this type of stop: One law enforcement agency (usually a federal agency) forwards information to local authorities to use in identifying a suspect traveling in a vehicle. Once identified, local authorities find an independent reason to stop the vehicle without relying on the tip to justify the traffic stop. After the stop, the officer tries to develop independent reasonable suspicion to conduct a drug investigation without relying on the tip.

(A) "Whisper," "walled-off," or "parallel construction" stops.

(B) *Whren* stop.

(C) *Terry* stop.

(D) A "teleport" stop.

ANSWER: (A).

EXPLANATION: These stops are suspect as (a) the tip does not rise to the level of justifying a stop or arrest, (b) the federal agency is unable or unwilling to disclose the details surrounding the tip, or (c) the stop is pretextual. Remember, the officer's subjective motivations in stopping a vehicle are irrelevant so long as there is an objectively reasonable justification for the stop. *Whren v. U.S.*, 517 U.S. 806 (1996); *State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren*).

37. True or False. N.C. Gen. Stat. § 14-51.2, the new statutory castle doctrine, deals with the use of defensive force in a home, workplace, or motor vehicle. The statute creates a rebuttable presumption in favor of the occupant, granting the right to use defensive force, including deadly force, if his castle is attacked or stormed, even if there was no evidence the assailant was trying to break in the home at the time he was killed.

ANSWER: True.

EXPLANATION: *See State v. Kuhns*, ___ N.C. App. ___, 817 S.E.2d 828 (2018) (holding the trial court erred in failing to give a defense of habitation instruction when there was no evidence the victim had tried to break into the physical structure of the home; that evidence demonstrated the victim (1) had returned repeatedly to the defendant's property and threatened him with bodily harm and (2) was in the yard, or within the curtilage of the property, and, therefore, within his home). It appears the statute no longer requires that the occupant act with the purpose of preventing or terminating the entry at the time the defendant uses defensive force. *See* John Rubin, *Defensive Force in the Home*, N.C. CRIM. L. BLOG (Aug. 7, 2018, 9:11 AM), https://nccriminallaw.sog.unc.edu/defensive-force-in-the-home/.

38. Which is not true of current forensic DNA analysis?

(A) The four steps are extraction, quantification, amplification, and capillary electrophoresis.

(B) Pull-ups, stutter, contamination, and mixtures are important concepts.

(C) Secondary transfer requires direct contact.

(D) The prosecutor's fallacy assumes the probability of a random match equals the probability the defendant is innocent.

ANSWER: (C).

EXPLANATION: Secondary transfer may occur from indirect contact, such as speaking or coughing. *See* Georgina Meakin & Allan Jamieson, *DNA Transfer: Review and Implications for Casework*, 7 FORENSIC SCI. INT. GENETICS 434 (2013).

39. The habitual felon phase of trial requires comparing information about the defendant and the person convicted of the predicate felonies. Which of the following is not information law enforcement is required to provide the magistrate when a person is charged with a crime?

(A) Name (first, middle, last, nickname, and alias), address, and driver's license number, including state of issuance.

(B) Date of birth, sex, and race.

(C) Height and weight.

(D) Social Security number, relationship to the alleged victim, and whether that relationship is a "personal relationship" as defined by statute.

ANSWER: (C).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-502(a3) (entitled "Photographs and Fingerprints"). Also, in *State v. Waycaster*, ___ N.C. App. ___, 818 S.E.2d 189 (2018), the court ruled the State could prove a prior conviction by offering a printout from ACIS (the Automated Criminal Infractions System) into evidence. *State v. Wall*, 141 N.C. App. 529 (2000), previously approved admission of a faxed, certified copy of a defendant's prior conviction. Usually, the State presents certified copies of judgments, cited by *Wall* as the "most appropriate means" to prove a conviction. *See also* N.C. Gen. Stat. § 14-7.4 (allowing proof by stipulation or certified copy of court records).

40. Which of the following is not true as published in recent SOG blogs?

(A) A defendant may be ordered to pay restitution only for offenses resulting in a conviction.

(B) Case law supports a justification defense for Possession of Firearm by Felon.

(C) A stipulation waives the defendant's confrontation rights, forfeiting his right to an individual colloquy that insures his knowing and voluntary waiver of constitutional rights—even if he does not speak English and requires an interpreter.

(D) A search warrant for a person does not allow the executing officer to conduct a strip search.

ANSWER: (D).

EXPLANATION: *See e.g., State v. Johnson*, 143 N.C. App. 207 (2001) (holding a search warrant for the defendant allowed law enforcement to ask the defendant to remove his clothing, bend over at the waist, and—after seeing a piece of plastic protruding from his anal area—instruct the defendant to remove the package from same). Also, (1) if the object of the search cannot reasonably be concealed under the person's undergarments, a strip search is not proper; (2) if the object of the search has already been found, further intrusive searching is not reasonable; (3) searches should be conducted by an officer of the same sex as the person searched and should not be conducted in public; and (4) physical intrusion into a body cavity likely requires separate and express authorization from the court. *See* Jeff Welty, *Does a Search Warrant for a Person Authorize a Strip Search?*, N.C. CRIM. L. BLOG (Aug. 7, 2018, 9:11 AM), https://nccriminallaw.sog.unc.edu/does-a-search-warrant-for-a-person-authorize-a-strip-search/.

Answer choice (A) is true. *See State v. Murphy*, ___ N.C. App. ___, 819 S.E.2d 604 (2018); N.C. Gen. Stat. § 15A-1340.34 (restitution may be ordered for a defendant "convicted" of a criminal offense).

Answer choice (B) is true. *See State v. Mercer*, ___ N.C. App. ___, 818 S.E.2d 375 (2018), *stay entered on September 28, 2018*, (holding, under its facts, defendant was entitled to a jury instruction on a justification defense for Possession of Firearm by Felon).

Answer choice (C) is true. *See State v. Perez*, ___ N.C. App. ___, 817 S.E.2d 612 (2018) (holding a stipulation waives all confrontation and other important trial rights without requiring a judicial inquiry). Counsel may stipulate to questions of fact but generally not to questions of law. *State v. Lee*, 193 N.C. App. 748 (2008). Be mindful of any stipulations. *See* Jamie Markham, *Stipulating to Prior Convictions for Second-Degree Murder*, N.C. CRIM. L. BLOG (Dec. 5, 2018, 5:46 PM), https://nccriminallaw.sog.unc.edu/stipulating-to-prior-convictions-for-second-degree-murder/.

Search Warrant Issues

41. Which is not a legal issue for analysis of search warrants? Assume the warrant is executed within the same county of the issuing official.

(A) Sufficiency of probable cause and whether a "substantial nexus" exists between the contraband and the person or place to be searched.

(B) The issuing judge.

(C) Staleness of the alleged criminal conduct and reliability of the informant (e.g., anonymous tip, citizen informant).

(D) A *Franks* issue.

ANSWER: (B).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-241, *et seq.*, and related case law. Regarding answer choice (D), *Franks, et al.*, are embodied in N.C. Gen. Stat. § 15A-978. *Franks v. Delaware*, 438 U.S. 154 (1978) (holding when defendant makes a preliminary showing that a false statement was made in a search warrant knowingly and intentionally, or with reckless disregard for the truth, a hearing must be held); *State v. Fernandez*, 346 N.C. 1 (1997) (the affiant "knowingly, or with reckless disregard for the truth, made a false statement in the affidavit"). A search warrant may not be issued for an infraction. N.C. Gen. Stat. § 15A-242 (allowing issuance of a search warrant to uncover property used in a "crime" or that is evidence of an "offense"). For consistency, an offense equates to a crime. *See* Jeff Welty, *Search Warrants for Very Minor Offenses*, N.C. CRIM. L. BLOG (Nov. 5, 2018, 3:52 PM), https://www.sog.unc.edu/blogs/nc-criminal-law/search-warrants-very-minor-offenes.

Beware: (1) search warrants authorizing destruction of dangerous items (e.g., methamphetamine, lab equipment, etc.) which raise the countervailing arguments of officer safety versus the right to test evidence. No North Carolina case resolves this issue; and (2) execution of a search warrant without proper adherence to the "knock-and-announce" rule required in N.C. Gen. Stat. § 15A-401(e)(1)(c) and the counterargument of inevitable discovery. *See* Jeff Welty, *Knock and Announce*, N.C. CRIM. L. BLOG (June 29, 2010, 8:26 AM), https://nccriminallaw.sog.unc.edu/knock-and-announce/.

42. Under N.C. Gen. Stat. § 15A-251, which factor listed below is not relevant in determining whether an officer may break and enter any premises or vehicle when necessary to execute a search warrant?

(A) The officer previously announced his identity and purpose.

(B) The officer has prior dealings with the property owner and knows he has a criminal history consistent with the warrant.

(C) The officer reasonably believes admittance is being denied or unreasonably delayed or the premises or vehicle is unoccupied.

(D) The officer has probable cause to believe the giving of notice would endanger the life or safety of any person.

ANSWER: (B).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-251 (entitled "Entry by Force"); *State v. Mitchell*, 22 N.C. App. 663 (1974) (holding where the method of entry renders the search illegal, evidence obtained is not competent at defendant's trial).

43. Which of the following does not apply to an anticipatory search warrant?

(A) The warrant must set out, on its face, conditions for a triggering event that are explicit, clear, and narrowly drawn to avoid misunderstanding or manipulation by government agents.

(B) It is subject to the "sure course rule," meaning the contraband must be on a sure and irreversible course to the situs of the intended search, and any future search of the destination is expressly contingent upon the contraband's arrival there.

(C) The applicant must allege facts supporting probable cause that the triggering event will occur within 72 hours of issuance.

ANSWER: (C).

EXPLANATION: See the case notes under N.C. Gen. Stat. § 15A-244 (entitled "Contents of the Application for a Search Warrant").

For answer choices (A) and (B), see *State v. Smith*, 124 N.C. App. 565 (1996).

Dog Sniff Issues

44. True or False. A dog sniff is a permissible part of a traffic stop, regardless of reasonable suspicion or probable cause, because it is not a search under Fourth Amendment jurisprudence.

ANSWER: False.

EXPLANATION: Unless a dog sniff occurs when a defendant is properly detained (a) while the officer is diligently pursuing the original mission of the stop, (b) because of reasonable suspicion, or (c) as he is in custody due to probable cause to search or arrest, a dog sniff is *not* a permissible part of a traffic stop because it detects evidence of ordinary criminal wrongdoing which is not part of an officer's traffic mission (i.e., checking driver's license, vehicle registration and insurance, and determining if outstanding warrants). ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 48 (5th ed. 2016).

45. True or False. A dog sniff is not a task tied to a traffic infraction; rather it is essentially aimed at detecting ordinary criminal wrongdoing, and—if a sniff prolongs a stop at all—it violates the Fourth Amendment.

ANSWER: True.

EXPLANATION: The law no longer permits *de minimis* extensions absent lawful justification. *Rodriguez v. U.S.*, 575 U.S. ___, 135 S.Ct. 1609 (2015). However, some scholars may posit recent cases are an attempt to erode the bright line rule of *Rodriguez*. *See also State v. Reed*, ___ N.C. ___, 805 S.E.2d 670 (2017), *stay entered on June 7, 2018*, (holding the trial court erred in denying Defendant's motion to suppress in that he remained unlawfully seized in the patrol car after the trooper returned his paperwork, issued a warning ticket, and told him to "sit tight"; that the continued detention was neither consensual nor supported by reasonable suspicion in that Defendant's nervous appearance, a dog, dog food, and debris in the car were "legal activity consistent with lawful travel"). *But see State v. McNeil*, ___ N.C. App. ___, 2018 N.C. App. LEXIS 1147 (2018) (holding, after officers determined the registered owner of a passing car was a male with a suspended license, continued detention of the female driver was lawful when she did not initially roll down her window, fumbled with her wallet, opened her window about two inches after the officer asked her to roll it down, failed to produce a license upon request, the officer smelled an odor of alcohol emanating from the vehicle, and she was slurring her words slightly; that the appearance of a female did not rule out the possibility that the driver was a male, and every traffic stop may include certain routine inquiries such as checking a driver's license, determining whether there are outstanding warrants against the driver, and reviewing registration and insurance); *State v. Bullock*, ___ N.C. ___, 805 S.E.2d. 671 (2017) (holding, although the officer ordered the driver out of his vehicle and into the patrol car, frisked him, and then ran record checks, the officer developed reasonable suspicion via Defendant's nervous behavior, contradictory and illogical statements, possession of large amounts of cash and multiple cell phones, and his driving of a rental car registered to another person–all before the database checks were complete—to permit lawful detention for a dog sniff).

46. Which of the following is not true?

(A) Appellate cases have generally not required suppression for stops outside of an officer's territorial jurisdiction.

(B) The results of a speed measuring instrument may not be used as substantive evidence of speed but only to corroborate the opinion of the officer as to speed.

(C) N.C. officers conduct over a million stops a year, and approximately 68% of stops result in a citation.

(D) Running a tag randomly, without individualized suspicion, is an infringement of the driver's and registered owner's reasonable expectation of privacy.

ANSWER: (D).

EXPLANATION: *State v. Chambers*, 203 N.C. App. 373 (2010) (unpublished) (holding the defendant's license tag was displayed on the back of his vehicle for all society to view as required by state law. Therefore, defendant did not have a reasonable expectation of privacy in his license tag, and the officer's actions did not constitute a search under the Fourth Amendment).

For answer choice (A), appellate cases on point have generally not required suppression. *See, e.g.*, *State v. Scruggs*, 209 N.C. App. 725 (2011) (holding, even if a campus police officer made a stop and arrest outside his territorial jurisdiction, the violation was not so substantial as to require suppression). Additionally, to support a suppression motion, argue N.C. Gen. Stat. § 15A-402 (authorizing arrest only within jurisdictional boundaries) and N.C. Gen. Stat. § 15A-974(a)(2) (circumstances the court is to consider when determining whether a violation is substantial). *See generally* Shea Denning, *Seeking Suppression for Out-of-Jurisdiction Arrests*, N.C. CRIM. L. BLOG (Aug. 29 2018, 4:40 PM), https://nccriminallaw.sog.unc.edu/seeking-suppression-for-out-of-jurisdiction-arrests/.

For answer choice (B), see N.C. Gen. Stat. § 8-50.2(a) and *State v. Jenkins*, 80 N.C. App. 491 (1985) (holding by statute, evidence of radar speed measurement is admissible only to corroborate testimony based on visual observation).

For answer choice (C), see SHEA DENNING, CHRISTOPHER TYNER & JEFFREY WELTY, PULLED OVER: THE LAW OF TRAFFIC TOPS AND OFFENSES IN NORTH CAROLINA ix (2017).

47. True or False. Historically, anonymous tips are viewed with skepticism. Hence, an anonymous tip in the form of a 911 call reporting a specific vehicle had just run the caller off the road is insufficient to provide reasonable suspicion for a stop of a similar vehicle 15 minutes later.

ANSWER: False.

EXPLANATION: These are the key facts in *Navarette v. California*, 572 U.S. 393 (2014), wherein the court held, although a "close case," the tip was reliable as (1) the caller claimed first-hand knowledge, (2) the call was contemporaneous with the bad driving, (3) the call was made to 911 which has features for identifying and tracing callers, and (4) the bad driving suggested facts recognized as DWI cues, providing reasonable suspicion of impairment.

48. True or False. Assuming a checkpoint is lawful, even without reasonable suspicion, an officer may nonetheless order a driver out of his vehicle.

ANSWER: False.

EXPLANATION: Absent reasonable suspicion, it is improper for an officer to order a driver out of the vehicle, to undergo field sobriety testing, or to submit to an alcohol screening test. *See* 5 WAYNE LAFAVE, SEARCH AND SEIZURE § 10.8(d), at 437 (5th ed. 2012); *State v. Colbert*, 146 N.C. App. 506 (2001) (holding that requiring every driver to take an Alcosensor test "would violate the third prong of the balancing test" found in *Brown v. Texas* because it would be unduly intrusive); *see also Brown v. Texas*, 443 U.S. 47 (1979) (holding "a central concern in balancing the [three factors] . . . has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions at the unfettered discretion of officers in the field"). *But cf. Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (holding an officer may order the driver out of the vehicle during a lawful traffic stop).

49. True or False. Upon request of an officer, the operator of a vehicle in a routine traffic stop must identify himself and provide his license and registration. At all times subsequent, the operator has the right to remain silent. A passenger must also identify himself to law enforcement in this scenario.

ANSWER: False.

EXPLANATION: North Carolina has not enacted "stop and identify" laws which require persons stopped by police to identify themselves or to produce identification documents when a person is not operating a vehicle. *See In re D.B.*, 214 N.C. App. 489 (2011).

A word of caution: failure to identify oneself during a lawful stop can constitute a resist charge when it hinders the officer in issuing a citation or otherwise completing the stop. *State v. Friend*, 237 N.C. App. 490 (2014). However, if the officer's questions are unrelated to the purpose of the stop, prolong it, and are not supported by reasonable and articulable suspicion of a crime, they may violate the Fourth Amendment. *Rodriguez v. U.S.*, 575 U.S. ___, 135 S.Ct. 1609 (2015). An officer may order a passenger out of the vehicle. *Maryland v. Wilson*, 519 U.S. 408 (1997).

50. True or False. Waiting for a backup officer to arrive is not a *Rodriguez* issue; it is an officer safety issue.

ANSWER: False.

EXPLANATION: *See Rodriguez v. U.S.*, 575 U.S. ___, 135 S.Ct. 1609 (2015). Courts will likely consider factors such as the number of occupants in the vehicle, whether any occupants have criminal records, the time of day or night, and the location of the stop. SHEA DENNING, CHRISTOPHER TYNER & JEFFREY WELTY, PULLED OVER: THE LAW OF TRAFFIC TOPS AND OFFENSES IN NORTH CAROLINA 59 (2017).

51. True or False. Law enforcement may not fingerprint or photograph a defendant arrested for a Class 2 Chapter 20 violation.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-502(b) (entitled "Photographs and Fingerprints"). Exceptions apply.

52. True or False. A law enforcement officer who charges a student with a Chapter 20 felony shall notify the principal of the school that the person attends of the charge within five days.

ANSWER: False.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-505 (entitled "Notification of Parent and School") (creating an exception for Chapter 20 offenses to the general rule of notice to principals of felonies committed by students). Additionally, the notification requirement only applies to students 16 years of age or older because the law is subsumed within Chapter 15A and does not apply to juvenile proceedings.

Identification Issues

53. Which of the following is not true regarding a non-testimonial identification order?

(A) This order may be used in lieu of a search warrant for a person in custody.

(B) This order is requested by a prosecutor, may be issued by any judge, and may subject the person named to contempt.

(C) This order may require the person named to submit to fingerprints, blood specimens, saliva and hair samples, handwriting exemplars, voice samples, or other reasonable physical examinations or identification procedures.

ANSWER: (A).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-271 (entitled "Authority to Issue Order"). The statute does *not* apply to an accused in custody, rather only to (1) suspects, (2) accused persons before arrest, and (3) persons formally charged and arrested who have been released from custody pending trial. *See State v. Norris*, 77 N.C. App. 525 (1985).

54. Which of the following is not true for show-ups?

(A) A show-up is a procedure in which an eye witness is presented a single live suspect to determine the witness' ability to identify the perpetrator of a crime.

(B) The investigator may, at his discretion, photograph the suspect at a show-up to preserve a record of the appearance of the suspect.

(C) Show-ups are part of the Eyewitness Identification Reform Act, and non-compliance is admissible (1) in motions to suppress eyewitness identification and (2) as a jury instruction on reliability of eyewitness identification.

ANSWER: (B).

EXPLANATION: *See* N.C. Gen. Stat. §§ 15A 254.52 (a)(8), (c1), and (d). Investigators *shall* photograph a suspect at the time and place of the show-up to preserve a record of the appearance of the suspect at the time of the show-up procedure. *See* N.C. Gen. Stat. § 15A-284.52(c1)(3).

Miscellaneous Issues

55. What is the best way for the State to prove the defendant is the same individual in their records when defense counsel (a) raises a *Boykin* motion by collaterally attacking a prior conviction for denial of right to counsel rendering a plea involuntary, or (b) challenges a prior conviction by contesting identity?

(A) Name, address, race, and date of birth.

(B) FBI identification number.

(C) Social Security number.

ANSWER: (B).

EXPLANATION: Every defendant receives a unique FBI identification number based on his fingerprints. The Court will accept matching numbers. *See also Boykin v. Alabama*, 395 U.S. 238 (1969) (holding it was error for the trial judge to accept defendant's guilty plea without an affirmative showing that it was intelligent and voluntary).

56. True or False. An electronic recording is required of an entire custodial interrogation of any investigation conducted at any place of detention relating to any Class A, B1, B2, and any Class C or Class D felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury.

ANSWER: False.

EXPLANATION: N.C. Gen. Stat. §§ 15A-211(a) and (b) do not apply to Class D felonies.

57. True or False. A defendant can move the Court to order the State Crime Lab to perform DNA testing on any biological material collected in the case and to search CODIS for any profiles obtained.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-267(c) (entitled "Access to DNA Samples from Crime Scene").

58. True or False. One must rely on federal law as North Carolina state criminal law does not address the use of drones in regard to individual privacy.

ANSWER: False.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-300.1 (entitled "Use of Unmanned Aircraft Systems"). No person shall use an unmanned aircraft system to (1) conduct surveillance of (a) a person or a dwelling occupied by a person and that dwelling's curtilage without the person's consent and (b) private real property without the consent of the owner, easement holder, or lessee of the property, or (2) photograph an individual without the individual's consent for the purpose of publishing or otherwise publicly disseminating the photograph. Exceptions apply generally for law enforcement, emergency management, and, on a limited basis, news media.

59. True or False. A magistrate may not issue a criminal process against a school employee for an offense that occurs while discharging his duties of employment without prior written approval of the District Attorney's Office or delegated judicial review.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-301. Exceptions apply. While failure to comply does not affect validity of the criminal process, such failure bolsters meritorious defense arguments.

60. Which of the following is not true regarding statutory discovery in the Criminal Procedure Act (Chapter 15A)?

(A) A person seeking discovery must request, in writing, voluntary compliance with discovery before filing any motion before a judge.

(B) Upon the passing of 20 days following the written request for voluntary discovery, the accused may file a written motion for discovery.

(C) To the extent that discovery is voluntarily furnished upon request, discovery is deemed to have been made under a court order.

(D) If a defendant is indicted, he has ten days from service of the notice of indictment or appointment of counsel to file a motion for discovery.

ANSWER: (B).

EXPLANATION: Upon receiving a negative or an unsatisfactory response or upon the passage of *seven* days following receipt of the request for voluntary discovery, the party requesting discovery may file a motion for same with the court. *See* N.C. Gen. Stat. § 15A-902.

61. True or False. Motions to modify post-release supervision are directed properly to the sentencing court.

ANSWER: False.

EXPLANATION: The Post-Release Supervision and Parole Commission—not the court system—is responsible for administering post-release supervision. N.C. Gen. Stat § 15A-1368(b). Additionally, probation officers have different arrest powers from post-release supervision or parole officers. A probation officer may arrest *without a warrant* for probation violations upon written request. In contrast, post-release supervision or parole officers may only arrest supervisees or parolees upon issuance of a *temporary or conditional revocation order* from the Post-Release Supervision and Parole Commission. N.C. Gen. Stat. § 15A-1345(a) (addressing probation violations); § 15A-1368.6(a), § 15A-1376(a), and § 143B-721(d) (addressing the Commission's authority to issue warrants, including an order to arrest a parolee or post-release supervisee).

62. A defendant is required to complete 240 hours of community service for which of the following DWI dispositions?

(A) Aggravated Level 1

(B) Level 2 if a defendant has a DWI conviction within the last five years and the judge suspends any active sentence while imposing CAM.

(C) Level 1 if based on a child under age 18 in the vehicle.

ANSWER: (B).

EXPLANATION: N.C. Gen. Stat. § 20-179(h).

63. True or False. Any person who desires to testify before the grand jury must apply to the District Attorney or a superior court judge who may, in his discretion, call the witness to appear before the grand jury.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-626.

64. Which of the following is not true regarding a material witness order?

(A) A material witness order may be issued when reasonable grounds exist to believe a person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the proceeding and may not be responsive to a subpoena.

(B) A material witness order may be obtained upon motion supported by affidavit; the witness must be given reasonable notice, an opportunity to be heard, and to present evidence; the witness has a right of representation at the hearing; and the Court may direct detention or release of the witness.

(C) A material witness order may provide for incarceration of the material witness for up to 60 days.

ANSWER: (C).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-803 (entitled "Attendance of Witnesses"). A material witness order providing for incarceration may not be issued for a period longer than 20 days but may be renewed for periods not to exceed 5 days upon review by a superior court judge.

65. Any prisoner serving a sentence in the State prison system, who during his imprisonment, has a detainer lodged against him for a charge pending against him in any State court, shall be brought to trial within _____ after he has sent a request for a final disposition of the charge against him to the district attorney where the charge is pending, by registered mail and with written notice of his place of confinement.

(A) 8 months.

(B) 90 days.

(C) 1 year.

ANSWER: (A).

EXPLANATION: *See* N.C. Gen. Stat. § 15-10.2(a).

66. A defendant confined in a North Carolina penal or other state institution who has other criminal charges pending may, by filing a written request with the clerk of court where the charges are pending and serving the request upon the prosecutor, require the prosecutor to proceed. If the prosecutor does not proceed within _____ of the date the request is filed with the clerk, the charge(s) must be dismissed.

(A) 8 months.

(B) 90 days.

(C) 6 months.

(D) No particular time period is required as the test involves the length of the delay, reason for the delay, defendant's assertion of his right, and prejudice to defendant resulting from the delay.

ANSWER: (C).

EXPLANATION: See N.C. Gen. Stat. §§ 15A-711(a) and (c) (entitled "Securing Attendance of Criminal Defendants Confined in Institutions within the State; Requiring Prosecutor to Proceed).

Answer choice (D) cites the elements of a speedy trial analysis. *See Barker v. Wingo*, 407 U.S. 514 (1972).

Expungement Issues

67. True or False. A defendant has no legal obligation to recite or acknowledge a prior expungement.

ANSWER: False.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-145 (the general rule does not apply at "a sentencing hearing when convicted of a subsequent criminal offense").

68. True or False. An expungement is mandatory if the applicant meets the criteria for expungement for a non-violent felony under N.C. Gen. Stat. § 15A-145.5.

ANSWER: False.

EXPLANATION: The Court *may* order an entry of expungement. If denied, the order shall include a finding as to the reason for the denial. Further, prosecutors have access to expunged files per N.C. Gen. Stat. § 15A-151.5.

69. True or False. Notification of expungement is provided by the clerk of court to AOC, the arresting agency, DMV (if applicable), any State or local agency bearing record of same, Combined Records of DPS, SBI, FBI, and any private entity having a licensing agreement with a State agency for bulk extracts of data from the agency criminal record database.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. §§ 15A-150(b), (c), and (d).

70. Which of the following is not true? A citizen's arrest or detention of a suspect is proper if there is probable cause to believe a crime occurred and that:

(A) The crime was committed in the citizen's presence.

(B) The crime is a felony, regardless of whether committed in the citizen's presence.

(C) The crime is a breach of the peace.

(D) The crime involves physical injury to another, theft, or destruction of property.

ANSWER: (B).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-404. All of the above must be committed "in the presence" of a private person for a citizen's arrest or detention to occur.

71. Which of the following is not true regarding an arrest?

(A) An arrest is complete when the person submits to the control of the arresting officer who has indicated his intention to arrest.

(B) An arrest is complete when the arresting officer takes a person into custody by the use of physical force with intent to make an arrest.

(C) Upon making an arrest, an officer must inform the person arrested, upon that person's request, of the probable cause existing for the arrest.

(D) Upon making an arrest, an officer must identify himself as an officer unless otherwise apparent, inform the arrestee he is under arrest, and inform the arrestee of the charge of the arrest unless evident.

ANSWER: (C).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-401(c) (entitled "Arrest by Law-Enforcement Officer").

72. True or False. An officer generally has discretion whether to make an arrest or charge an offense even if probable cause exists, including violation of a DVPO.

ANSWER: False.

EXPLANATION: N.C. Gen. Stat. § 50B-4.1(b) provides an officer *shall* make an arrest if the officer has probable cause to believe a person knowingly violated a valid DVPO.

73. True or False. An officer who knows an arrest warrant has been issued—but does not have the warrant in his possession—may enter a home to make the arrest with knowledge of the arrestee's presence in the home.

ANSWER: False.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-401(a)(2). Officers generally may not enter a home or place of residence without a warrant to make a routine arrest. Two exceptions apply: (1) consent or (2) exigent (emergency) circumstances (e.g., to assist someone seriously injured, to prevent infliction serious injury, etc.) that justify entry. ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 71 (5th ed. 2016).

74. True or False. When a DWI arrest occurs in an adjoining state to North Carolina pursuant to the continuous flight (hot pursuit) doctrine, the officer may not return the arrestee to North Carolina for processing.

ANSWER: True.

EXPLANATION: Instead, the officer must take the person arrested to a judicial official where the arrest was made to determine if the arrest was lawful, set conditions of release, and await extradition proceedings. ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 88 (5th ed. 2016).

75. True or False. An officer—without a warrant—may arrest a person whom the officer has probable cause to believe has violated a pre-trial release order, regardless of whether the violation occurred in the officer's presence.

ANSWER: False.

EXPLANATION: *See* N.C. Gen. Stat. §§ 15A-401(b)(1) and (b)(2)f.

76. True or False. An officer who arrests a deaf person must secure a qualified interpreter before the arrestee is notified of his rights or interrogated.

ANSWER: True.

EXPLANATION: N.C. Gen. Stat. § 8B-2(d). Otherwise, any answer, statement, or admission is inadmissible in court for any purpose. ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 80 (5th ed. 2016).

77. True or False. A foreign national is a person who is not a U.S. citizen or national and not lawfully admitted for permanent residence. Law enforcement officers who arrest a foreign national are required to inform him of his right to have authorities notify consular officials of the arrest.

ANSWER: True.

EXPLANATION: *See* Article 36, Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. N0.6820. For some countries, notification is mandatory without a request, but a violation does not result in suppression of a confession. *State v. Herrera*, 195 N.C. App. 181 (2009). It is unclear whether a foreign national may sue civilly law enforcement officers and agencies when the national was not notified of consular notification, although persuasive authority suggests not. Foreign nationals are defined in 8 U.S.C. § 1101(a)(3).

78. True or False. An arrestee required to provide a DNA sample by statute, who refuses to provide a DNA sample, shall be compellable to provide same by the use of reasonable force prior to release on bond.

ANSWER: False.

EXPLANATION: An arrestee who refuses to provide a DNA sample shall be required to provide same prior to his release on bond. *See* N.C. Gen. Stat. § 15A-534(a).

Bond Issues

79. True or False. A magistrate must set pre-trial release conditions for all arrested persons, with or without a warrant.

ANSWER: False.

EXPLANATION: For the charge of first degree murder, only a judge may set pre-trial release conditions. For a domestic violence charge, only a judge may set conditions for release for the first 48 hours; a magistrate must immediately set conditions for release thereafter. *See State v. Thompson*, 349 N.C. 483 (1998); N.C. Gen. Stat. §§ 15A-533(b) and (c).

80. True or False. A person charged with any crime alleged to have been committed on escape or during an unauthorized absence from involuntary commitment has no right to pre-trial release.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-533(a) (entitled "Right to Pre-Trial Release in Capital and Non-Capital Cases").

81. In domestic violence crimes, which of the following is not true regarding bail?

(A) Crimes of domestic violence are defined as assault, stalking, communicating a threat, domestic criminal trespass, violation of a Chapter 50B order, or committing a felony provided in Articles 7B, 8, 10, or 15 of Chapter 14 upon a person with whom he has had a personal relationship as defined in N.C. Gen. Stat. § 50B-1(b)(6).

(B) For the first 48 hours of confinement, only a judge can set conditions of pre-trial release, and he must be provided and consider the accused's criminal history in setting bail.

(C) Conditions of release may include visitation with the accused's child for an existing order, abstinence from alcohol via CAM, and a secured bond not less than $500.00.

ANSWER: (C).

EXPLANATION: No secured bond is required for bail in crimes of domestic violence under N.C. Gen. Stat. § 15A-534.1. However, read your local rules. The Rowan County local rules—without addressing the type of bond—suggest bonds in the amount of $500.00 to $3,500.00 for Class 1 and A1 misdemeanors.

82. True or False. A person accused of DWI may be denied pre-trial release for a period no longer than 24 hours before his conditions of release must be determined by a judicial official.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-534.2(c)(2) (entitled "Detention of Impaired Drivers"). Also, a defendant's refusal to comply with a judicial official's request for periodic PBT testing—when addressing release from detention—is not admissible in evidence. *See* N.C. Gen. Stat. § 15A-534.2(d).

Beware: State law imposes a mandatory obligation to investigate immigration or residency status of persons arrested for DWI or felony offenses. N.C. Gen. Stat. § 162-62 (Administrator shall attempt to determine if that prisoner is a legal resident of the United States by inquiry of the prisoner or examination of any relevant documents or both. If unable to determine status, inquiry shall be made to the U.S. Department of Homeland Security through ICE). State *habeas corpus* relief is not available to challenge immigration detainers. *Chavez v. Carmichael*, ___ N.C. App. ___, 2018 N.C. App. LEXIS 1095 (November 6, 2018).

83. True or False. A district or superior court judge may, for good cause, conduct a hearing on the source of money or property to be posted for bond for any defendant, and the court may refuse to accept the security proferred.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. § 15A-539 (entitled "Modification [of Order of Release] Upon Motion of Prosecutor") (brackets not in original; used for clarity).

84. True or False. In addition to forfeiture, a person who fails to appear is subject to prosecution for a Class I felony if he was on release (a) for a pending felony charge, (b) after a conviction in superior court, or (c) for a firearm offense involving domestic violence. Otherwise, the person who fails to appear is subject to a Class 2 misdemeanor.

ANSWER: False.

EXPLANATION: The "firearm offense involving domestic violence" does not apply. *See* N.C. Gen. Stat. § 15A-543 (entitled "Penalties for Failure to Appear").

85. True or False. A no contact order in the conditions of release for a criminal charge takes effect once the defendant is released from jail.

ANSWER: False.

EXPLANATION: *See State v. Mitchell*, ___ N.C. App. ___, 817 S.E.2d 455 (2018) (holding the no contact provision in Defendant's release order applies to the accused while in jail as the order serves many purposes, including, *inter alia*, committing the defendant to a detention facility, subjecting him to a domestic violence hold, and requiring fingerprints).

86. Contempt may arise in a criminal context. Which of the following is not true?

(A) The process for indirect criminal contempt is usually initiated by the issuance of a show cause order for the suspect to appear in court to show why he should not be held in contempt.

(B) The purpose of civil contempt is to compel compliance with a court order, and the purpose of criminal contempt is to punish said conduct.

(C) Criminal contempt is a crime noted on a person's criminal record.

(D) Generally, direct criminal contempt must occur in the presence or hearing of the court, and the maximum punishment is 30 days in jail and a $500.00 fine.

ANSWER: (D).

EXPLANATION: While normally punishable by, *inter alia*, up to 30 days in jail, criminal contempt for a failure to comply with a non-testimonial identification order is punishable by up to 90 days. *See* N.C. Gen. Stat. § 5A-12(a)(2) (criminal contempt provision for same); N.C. Gen. Stat. § 5A-21(b1) (civil contempt provision for same).

87. True or False. All of the following are covered in N.C. Gen. Stat. Chapter 8?

(A) Competency of blood tests and admissibility of speed measuring instrument results.

(B) Privileges and immunity.

(C) Admissibility of forensic evidence (notice and demand statutes).

(D) Hospital medical records and statements obtained from persons in shock or under the influence of drugs.

ANSWER: True.

EXPLANATION: Answer choice (A) is addressed in 8-50.1 and 50.2.

Answer choice (B) is addressed in 8-53 through 8-57.1.

Answer choice (C) is addressed in 8-58.20.

Answer choice (D) is addressed in 8-54.1 and 8-45.5.

88. True or False. Neither an indictment nor a bill of information may be amended without consent of the defendant.

ANSWER: True.

EXPLANATION: *See* N.C. Gen. Stat. §§ 15A-923(d) and (e).

89. In superior court, N.C. Gen. Stat. § 15A-952 requires certain motions to be filed by 5:00 p.m. the Wednesday prior to the session when trial of the case begins. Failure to do so constitutes waiver of the motions. The court may grant counsel relief from any waiver except for which motion?

(A) Improper venue.

(B) Severance or joinder of an offense.

(C) A special venire.

(D) Change of venue.

ANSWER: (A).

EXPLANATION: *See* N.C. Gen. Stat. § 15A-952(e).

90. True or False. Rules of Evidence do not apply in motions to suppress.

ANSWER: It is up to the judge. This author believes they apply.

EXPLANATION: One school of thought is the rules of evidence do not apply to suppression hearings, asserting N.C. R. Evid. 104(a) states that in determining preliminary questions of admissibility—a central issue in suppression hearings—the court is not bound by the rules of evidence except as to privilege. Thus, an officer does not have to be formally tendered as an expert under Rule 702 before testifying about HGN. This result should give us pause. Why would we allow a process which delays application of the rules to a proffered expert until a trial because of a failure to enforce foundational rules at a suppression hearing?

Case law does not address the issue specifically, but, on balance, bolsters the position that the rules apply. Expert evidence is common in suppression hearings, particularly DWI and high level felony cases. Reliability is the touchstone of expert evidence. Therefore, while HGN is deemed a scientifically reliable test, the law on expert evidence *requires* the witness qualify as an expert before testifying. *State v. Godwin*, 369 N.C. 605 (2017) (holding a witness must be qualified as an expert—although the court may do so implicitly—before testifying to HGN results at trial); *see also State v. Younts*, ___ N.C. App. ___, 803 S.E.2d. 641 (2017) (holding HGN is a scientifically reliable test). For probable cause to arrest, the law *requires*—as a balancing test—an officer to rely upon "reasonably trustworthy information" supporting a reasonable belief the suspect committed an offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Cases are replete recognizing the disparate experience and training of officers. Thus, as a whole, it appears a judge may find the officer has sufficient experience and training in HGN to testify, or the judge may require the State to offer additional evidence of the officer's command of the facts, understanding of reliable principles and methods, and application of the principles and methods in a reliable manner to the facts of the case. N.C. R. Evid. 702.

The rules of evidence are silent on their application to motions to suppress, but together support the position they apply. First, as a threshold, Rule 101 states the rules *apply* in court proceedings unless excepted in Rule 1101. Rule 1101(b)(1) creates a *limited exception* for "the determination of questions of *fact* preliminary to admissibility of evidence" under Rule 104(a). Rule 104(a) primarily focuses upon situations where evidence requires a prerequisite showing for admission, known as "laying a foundation." BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2018 COURTROOM MANUAL 40 (Matthew Bender 2018). The troubling—and impractical—aspect of Rule 104(a) is the broad, sweeping language stating the court is authorized to determine "preliminary questions concerning . . . admissibility of evidence" and "is not bound by the rules of evidence" except as to privileges. However, the scope of Rule 104(a) cannot be greater than its incorporating rule. Hence, asserting Rule 104(a) grants unlimited authority to admit evidence fails to consider *the very rule has self-limiting language to "questions of fact"* under Rule 1101(b)(1). Second, to assert the rules do not apply to preliminary questions on admissibility of evidence fails to recognize the *distinct nature and purpose of suppression hearings* as opposed to other evidentiary

hearings. In other threshold determinations, such as motions *in limine* and to *voir dire*, the court applies the evidence code to the issues raised (e.g., personal knowledge, competency, foundation, qualification, privilege, unavailability, hearsay, authentication, etc.). Third, suppression hearings decide questions of *law* applied to facts found by the court. *See, e.g.,* N.C. Gen Stat. § 15A-971, *et seq*. In sum, although the rules are silent as to their applicability in suppression hearings, statutory construction—and common sense—suggest the limited exception does not apply and the rules therefore govern.

Analytically, while a judge may consider extrinsic evidence when determining preliminary questions of fact to provide context, suppression hearings are about specific issues of *law*. N.C. Gen. Stat. § 20-38.6 addresses motions to suppress for, *inter alia*, delays in processing, limitations on the defendant's access to witnesses, and challenges to chemical analysis results. In essence, these motions test procedural due process issues. In N.C. Gen. Stat. § 15A, motions to suppress address constitutional violations and substantial violations of the Criminal Procedure Act. As an example, motions to suppress consider the importance of the particular interest violated, the extent of deviation from lawful conduct, the extent the violation was willful, the extent to which privacy was invaded, the extent to which exclusion will tend to prevent subsequent violations, whether the thing seized would have inevitably be discovered, and the extent to which the violation prejudiced the defendant's ability to defend himself, and legal considerations overlaying the facts. *See* Official Commentary to N.C. Gen. § 15A-974. Overarchingly, suppression hearings address constitutional and statutory concepts rather than evidence code issues.

Sound public policy drives sounds principles of law. The policy framing the rules of evidence is to "secure fairness in administration" so that "the truth may be ascertained and proceedings justly determined." N.C. R. Evid. 102(a). A jurist may elect to hear factual evidence otherwise inadmissible to provide context; however, the same jurist would likely apply the template of the rules to insure reliability when determining complex legal issues involving a defendant's liberty interest. *A fortiori*, judicial economy is promoted by early application of the rules rather than later application at trial. N.C. R. Evid. 102(a) (stating the rules shall be construed to eliminate unjustifiable delay). The foregoing case law focuses on reliability of evidence at various stages of judicial hearings. The very nature of a motion to suppress *requires* the court to find the *reliable* evidence and determine questions of *law*.

Construing the rules, no express exception to their application exists for motions to suppress. As a unitary concept, *expressio unius est exclusio alterius*: the express mention of one thing excludes all others. Moreover, the rule of lenity and case law support strict construction of the law in a criminal context. *See, e.g., State v. Reaves*, 142 N.C. App. 629 (2001) (holding criminal statutes are strictly construed). The better interpretation of the rules suggests they should apply. The rules of evidence are designed to address relevance, reliability, and the right result, the very essence of a suppression hearing and criminal proceedings.

Thus, why wouldn't the rules apply to—and guide—a suppression hearing to find *reliable* evidence and determine questions of *law*? I posit sound public policy, judicial economy, reliability considerations, a superior interpretation of the rules, and the recognition that suppression hearings ultimately address issues of constitutional and statutory law compel the conclusion that the rules of evidence should apply. One author appears to agree with me. *See* BLAKEY, LOVEN & WEISSENBERGER, NORTH CAROLINA EVIDENCE 2018 COURTROOM MANUAL 40 (Matthew Bender 2018).