

This paper* is the trilogy of a unique format designed to stimulate your legal brain. It is framed to test your functional knowledge, unearthing useful nuggets—and landmines—in the rules of law. Our friend, John Rubin, calls it the pursuit of “practical scholarship.”

The materials are designed for the practitioner. As always, I 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, negligence, 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.*

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 & WEISSENBARGER, 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); JAMES M. MARKHAM, PROBATION VIOLATIONS IN NORTH CAROLINA (2018); JAMES M. MARKHAM & SHEA RIGGSBEE DENNING, NORTH CAROLINA SENTENCING HANDBOOK (2018); 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; (4) the underlined language directs you to the subject matter of the question; and (5) the explanations contain rich practice pointers.

Let’s get started.

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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. A cell phone may be searched incident to arrest.

ANSWER: False.

EXPLANATION: *Riley v. California*, 573 U.S. 373 (2014) (holding law enforcement must get a warrant before searching a cell phone seized incident to arrest; that the nature of modern electronic devices implicates privacy concerns beyond searches of other items). Generally, cell phones are the functional equivalent of computers. Passwords matter, touching Fourth Amendment, wiretapping, and trespass issues. Remember, *a fortiori*, *State v. Carter*, 322 N.C. 709 (1988) (holding, under the state constitution, there is no good faith exception to the exclusionary rule).

2. What is the statute of limitations for a felony in North Carolina?

- (A) Two years.
- (B) Ten years.
- (C) There is none.

ANSWER: (C).

EXPLANATION: See N.C. Gen. Stat. § 15-1 (applying only to misdemeanors); *State v. Johnson*, 275 N.C. 264, 271 (1969) (holding no statute of limitations bars prosecution of felonies). Generally, the statute of limitations for a misdemeanor is two years from the date of commission. *Id.* For DWI, however, valid criminal pleadings listed in N.C. Gen. Stat. § 15A-921, including a citation, toll the two year statute of limitations. See *State v. Curtis*, 371 N.C. 355 (2018), which overruled *State v. Turner*, 250 N.C. App. 776 (2016), rev'd, 371 N.C. 427 (2018).

3. What is the statute of limitations for a felony in federal court?

- (A) Five years.
- (B) Ten years.
- (C) There is none.

ANSWER: (A).

EXPLANATION: 18 U.S.C. § 3282 (providing the limitation period bars prosecution more than five years after “after such offense shall have been committed”).

4. Which one of the following does not count towards sentencing points for felonies? Assume convictions are for countable offenses.
- (A) A PJC following a plea of guilty or conviction at trial.
 - (B) A conviction resulting in N.C. Gen. Stat. § 90-96 probation not yet dismissed.
 - (C) Prior to 2014, a PDP conviction without proof it involved marijuana.

ANSWER: (C).

EXPLANATION: *State v. McNeil*, ___ N.C. App. ___, 821 S.E.2d 862 (2018). However, defendant’s stipulation to his prior record level worksheet was sufficient to count a PDP conviction in sentencing points. *State v. Green*, ___ N.C. App. ___, 831 S.E.2d 611 (2019).

Regarding (A), see *State v. Canellas*, 164 N.C. App. 775 (2004).

Regarding (B), see *State v. Hasty*, 133 N.C. App. 563 (1999).

5. Which is false for probation violations?

- (A) There is no revocation for conviction of a Class 3 misdemeanor.
- (B) CRVs are not reduced by earned time/good time.
- (C) Contempt and termination are permissible in response to any violation.
- (D) Unsuccessful terminations are defined by statute.

ANSWER: (D).

EXPLANATION: Only “termination” is defined by statute. N.C. Gen. Stat. § 15A-1542(b).

6. True or False. An unsuccessful termination of a probation violation for a Chapter 20 driving offense—in which money remains owing—results in a driver’s license revocation until paid.

ANSWER: **True.**

EXPLANATION: Termination, successful or not, of probation does not, on its own, extinguish monetary obligations (i.e., costs, fines, and fees) defendant owes in relation to the case. N.C. Gen. Stat. § 20-24.1.

7. True or False. Counsel may inform a jury of sex registration consequences.

ANSWER: Per persuasive authority, true.

EXPLANATION: *State v. Prestwood*, 211 N.C. App. 198 (2011) (unpublished) (holding defendant has the right to inform the jury of sex registration consequences for an offense triggering same); *see also State v. McMorris*, 290 N.C. 286 (1976) (holding defendant has the right to inform the jury of the punishment for the crime tried, stating “[i]n a real sense the sanction prescribed for criminal behavior is part of the law of the case”); N.C. Gen. Stat. § 7A-97 (stating the whole case to include law and fact may be argued to the jury).

8. Which is not a felony enhancement?

(A) Habitual felon, armed habitual felon, and violent habitual felon.

(B) Habitual misdemeanor assault, habitual misdemeanor larceny, and habitual breaking and entering.

(C) Hate crime/ethnic enhancement, gang activity enhancement, and gang leader or organizer enhancement.

ANSWER: (C).

EXPLANATION: Although enhanced penalties for misdemeanors are available, there are no enhanced penalties for felony offenses motivated by ethnic animosity. *See* N.C. Gen. Stat. § 14-401.14, *et seq.*; 15A-1340.16E(a) (one class enhancement, but no higher than Class C); and 15A-1340.16E(b) (two class enhancement, but no higher than Class C), respectively.

Regarding (A), *see* N.C. Gen. Stat. §§ 14-7.1 (four class enhancement, but no higher than Class C); 14-7.41 (Class C felony with a mandatory minimum sentence of 120 months); and 14-7.7 (life without parole), respectively.

Regarding (B), *see* N.C. Gen. Stat. §§ 14-33.2 (Class H felony); 14-72(b)(6) (Class H felony with four prior convictions whether misdemeanors, felonies, or substantially similar out of state convictions); and 14-7.25 (Class E felony if convicted of one or more breaking and entering offenses as defined therein), respectively.

9. True or False. The trial judge has inherent authority to authorize the jury to take evidence into the jury room.

ANSWER: **False.**

EXPLANATION: *State v. Mumma*, 372 N.C. 226 (2019). All parties must consent. Without consent, it is error under N.C. Gen. Stat. § 15A-1233(b), though not prejudicial.

10. True or False. Criminal forfeiture statutes apply to felonies and misdemeanors in North Carolina.

ANSWER: **False.**

EXPLANATION: Generally, one must be convicted of a felony to forfeit a conveyance, requiring proof of a causal connection by a preponderance. N.C. Gen. Stat. § 90-112, *et seq.* See *State v. Johnson*, 124 N.C. App. 462 (1996). Beware: Property seized is often transferred immediately (without conviction) to the federal government for “administrative forfeiture” within the Equitable Sharing program, generally allowing forfeiture of (1) cash, (2) vehicles, and (3) any other property (except for real estate) up to \$500,000.00 provided that probable cause exists. See 19 U.S.C. § 1607; 18 U.S.C. § 983; *USDOJ Asset Forfeiture Policy Manual*, Chap. 2, Sec. III, “Interplay of Administrative Forfeiture and Criminal Forfeiture” (2016).

11. Which one of the following is false?

- (A) A charged misdemeanor appealed from District Court does not permit a new felony charge.
- (B) A charged felony reduced to a misdemeanor in District Court and thereafter appealed permits reinstatement of the felony.
- (C) Aggravating factors used in DWI sentencing in District Court serve as sufficient notice on appeal for DWI sentencing in Superior Court.

ANSWER: **(C).**

EXPLANATION: When a DWI conviction in District Court is appealed to Superior Court for trial *de novo*, the State must notify the defendant no later than 10 days before trial of any aggravating factors it intends to prove. N.C. Gen. Stat. § 20-179(a1)(1).

12. True or False. The court may only assess one court cost for all charges tried at a single trial.

ANSWER: **True.**

EXPLANATION: *State v. Rieger*, ___ N.C. App. ___, 2019 N.C. App. LEXIS 793 (October 1, 2019) (holding only one court cost may be imposed when multiple charges, arising out of a single incident, are adjudicated together in the same proceeding).

13. True or False. The State may admit a defendant's affidavit of indigency into evidence to prove an element of the crime.

ANSWER: **False.**

EXPLANATION: *State v. Diaz*, ___ N.C. ___, 831 S.E.2d 532 (2019) (holding, despite the State's assertion it was a self-authenticating document, admission of defendant's affidavit of indigency to prove his age—an element of the charges—was a violation of his constitutional right against self-incrimination; that Defendant cannot be required to complete said affidavit to receive his right to counsel and then have the State use said affidavit against him, violating his constitutional right against self-incrimination; and he "cannot be required to surrender one constitutional right [Fifth Amendment right against self-incrimination] in order to assert another [Sixth Amendment right to counsel].") (internal citations omitted).

14. Law enforcement investigates a report of stolen construction equipment. Witnesses claim the suspect stays at the defendant's home. Law enforcement attempts a "knock and talk," no one answers, though a window curtain moves. Thereafter, law enforcement walks to the back of the home to conduct the same at the rear door, but no one answers. Law enforcement then walks towards the front of the home, smells marijuana, hears a fan in the crawl space, and sees marijuana.

True or False. On the above facts, law enforcement may obtain a search warrant.

ANSWER: **False.**

EXPLANATION: *State v. Ellis*, ___ N.C. App. ___, 829 S.E.2d 912 (2019) (holding law enforcement, in a "knock and talk" scenario, could only "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave" pursuant to *Jardines*); see also *Florida v. Jardines*, 569 U.S. 1 (2013).

15. True or False. The community caretaking exception permits a stop when an officer hears “MF’er” from a passing vehicle and thereafter conducts a stop for a domestic violence concern.

ANSWER: **False.**

EXPLANATION: *State v. Brown*, ___ N.C. App. ___, 827 S.E.2d 534 (2019) (unpublished) (holding the above facts invoke neither reasonable articulable suspicion nor the community caretaking exception). The “emergency” doctrine is a similar concept. *State v. Cline*, 205 N.C. 676 (2010) (holding—in allowing law enforcement to enter a home to find the missing parent of a found infant—that officers must have an “objectively reasonable basis” for believing (1) an individual is injured and may need assistance or (2) further violence is about to ensue).

16. What is required for *State v. Ali* to apply when difficulties arise between a defendant and counsel?

- (A) Conflicting strategies.
- (B) Irreconcilable tactics.
- (C) Absolute impasse.

ANSWER: **(C).**

EXPLANATION: “Absolute impasse” is required for *Ali* to apply. *State v. Dawkins*, ___ N.C. App. ___, 827 S.E.2d 551 (2019).

17. True or False. Counsel may disregard a defendant’s instruction to appeal after the signing of an appeal waiver.

ANSWER: **False.**

EXPLANATION: *Garza v. Idaho*, 586 U.S. ___, 139 S. Ct. 738 (2019); *see also Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (holding prejudice is presumed when counsel fails to file an appeal as directed by the defendant). The point: validity of an appeal waiver is always subject to scrutiny.

18. True or False. An arrested judgment vacates a conviction.

ANSWER: **False.**

EXPLANATION: An arrested judgment remains intact if the more serious conviction is overturned on appeal. *State v. Pakulski*, 326 N.C. 434 (1990) (holding, for an arrested judgment, “the underlying guilty verdict remains intact” so that it can be entered if the other conviction is overturned).

19. A trial is assembled quickly. After impaneling a jury, prosecutors learn a material witness is unavailable. Prosecutors move for a mistrial.

True or False. An unavailable material witness during trial constitutes a mistrial.

ANSWER: **False.**

EXPLANATION: *State v. Resendiz-Merlos*, ___ N.C. App. ___, 2019 N.C. App. LEXIS 837 (October 15, 2019) (holding—because the State took a chance empaneling the jury without first ascertaining that its witnesses were available to testify and there was no evidence defendant caused their absence—the proper inquiry examines the State’s knowledge when trial began, noting close cases should be resolved “in favor of the liberty of the citizen”) (internal citations omitted); *see also Arizona v. Washington*, 434 U.S. 497 (1978) (holding a mistrial requires “manifest necessity” such as a hung jury, death or disability of a judge or juror, or flawed pleading upon proper objection).

20. Match the case with its holding.

- (A). *Napue*. _____ (1). The prosecution must disclose evidence favorable to the defendant and material to guilt or sentencing under due process.
- (B). *Giglio*. _____ (2). The prosecution must not knowingly use false evidence under due process.
- (C). *Brady*. _____ (3). The prosecution must inform the jury that testimony was obtained from a witness in exchange for non-prosecution under due process.

ANSWER: (A). 2.
(B). 3.
(C). 1.

EXPLANATION: *Napue v. Illinois*, 360 U.S. 264 (1959) (holding that due process requires the prosecution to not knowingly use false testimony of a witness, even if the same affects only the credibility of that witness rather than the defendant’s guilt or innocence); *Giglio v. U.S.*, 405 U.S. 150 (1972) (holding that due process requires the prosecution to inform the jury that testimony was obtained from a witness in exchange for non-prosecution); *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process requires the prosecution to provide material evidence to the defendant that is favorable as to guilt or punishment).

21. What is the burden of proof for the doctrine of “forfeiture by wrongdoing”?

- (A) Beyond a reasonable doubt.
- (B) Clear and convincing evidence.
- (C) Preponderance of the evidence.

ANSWER: (C).

EXPLANATION: Forfeiture by wrongdoing is invoked when a defendant causes the absence of a witness by wrongdoing, thereby forfeiting his constitutional right to confrontation. *State v. Allen*, ___ N.C. App. ___, 828 S.E.2d 562 (2019) (holding the net effect of defendant’s conduct to pressure and intimidate his girlfriend into not testifying at trial was proved by a preponderance of the evidence, properly resulting in defendant’s forfeiture of his confrontation rights by wrongdoing).

22. True or False. Using the term “Victim #1” creates a facially defective indictment.

ANSWER: **True.**

EXPLANATION: The statute requires the child be named in the indictment, that is, to identify a person in a way unique to that individual and to distinguish said person from all others. N.C. Gen. Stat. § 15-144.2(b). Unique identification is allowed; however, “Victim #1” does not differentiate this victim from other children. *State v. White*, 372 N.C. 248 (2019) (noting the purpose of the naming requirement is to provide notice of the victim’s identity to the defendant).

23. True or False. On appeal, the State cannot correct the name of the victim once defendant is arraigned in District Court on a warrant for Misdemeanor Larceny and Injury to Personal Property.

ANSWER: **Per the North Carolina Court of Appeals, true.**

EXPLANATION: *State v. Capps*, ___ N.C. App. ___, 828 S.E.2d 733 (2019) (holding, after arraignment in District Court, the Superior Court lacked subject matter jurisdiction to try a defendant after the State filed a misdemeanor statement of charges to amend an arrest warrant naming an incorrect victim), *stay granted*, 372 N.C. 358 (2019); *State v. Wall*, 235 N.C. App. 196 (2014).

24. True or False. Jeopardy attaches in District Court when the first witness is sworn.

ANSWER: **True.**

EXPLANATION: *State v. Brunson*, 327 N.C. 244 (1990). In Superior Court, jeopardy attaches when the jury is sworn and impaneled. *Id.* A fatally defective process neither confers jurisdiction nor allows jeopardy to attach. *See, e.g., State v. Blakeney*, 156 N.C. App. 671 (2003) (holding a fatal defect in a drug offense indictment does not prevent the State from re-indicting defendant).

25. While executing a search warrant of a suspect's home, law enforcement detains her boyfriend who does not live there but is washing a car across the street.

True or False. Law enforcement may not detain the boyfriend to conduct its search.

ANSWER: True.

EXPLANATION: *State v. Thompson*, ___ N.C. App. ___, 2019 N.C. App. LEXIS 703 (August 20, 2019) (holding the boyfriend did not qualify as an "occupant" under *Wilson*'s three-part test requiring seized persons be (1) occupants, (2) within the immediate vicinity of the premises to be searched, and (3) who are present during execution of a search warrant to comply with the Fourth Amendment when detained during a search warrant); *see also State v. Wilson*, 371 N.C. 920, (2018).

26. Which one of the following is the State Crime Lab's detection threshold to determine the presence of a controlled substance?

- (A) 25 nanograms per milliliter.
- (B) 50 nanograms per milliliter.
- (C) 75 nanograms per milliliter.

ANSWER: (A).

EXPLANATION: An expert may testify he would not expect to see impairment from a person who had 25 nanograms per milliliter of a controlled substance in one's bloodstream. *State v. Shelton*, ___ N.C. App. ___, 824 S.E.2d 136 (2019) (holding evidence of defendant's impairment was sufficient when he took impairing drugs hours before crashing a vehicle into a pedestrian after his brakes failed despite a pharmacologist opining he would not expect to see impairment from one having 25 nanograms per milliliter of oxycodone and tramadol in his bloodstream). Chemical analysts will address the impairing effect of substances and their half-lives; however, they will concede testing does not measure the precise amount of substances in the blood stream and impairment depends on time administered, amount of dosage, tolerance, and other factors.

27. True or False. Visual identification of marijuana by an officer with training and experience is sufficient to convict.

ANSWER: True.

EXPLANATION: *State v. Fletcher*, 92 N.C. App. 50 (1988). *But see* N.C. State Bureau of Investigation, Memorandum on Industrial Hemp and CBD Issues (May 2019) (noting hemp looks and smells—burned and unburned—like marijuana, police canines cannot tell the difference, and no field or lab test can currently distinguish; the memo acknowledges that law enforcement no longer has probable cause to seize an item because it could be legal hemp). Drug possession requires the defendant knowingly possessed drugs. *State v. Perez*, 55 N.C. App. 92 (1981) (holding if the defendant testifies she did not know she had an illegal drug, the State must produce some evidence of her knowledge). However, probable cause may be developed when combined with signs of impairment or a suspect’s admission the substance is marijuana. *State v. Bridges*, ___ N.C. App. ___ 810 S.E.2d 365 (2018).

28. True or False. A defendant’s admission he “used heroin” is enough to identify the controlled substance.

ANSWER: False.

EXPLANATION: Generally, the State must present a chemical analysis to show a substance is a controlled substance. *State v. Ward*, 364 N.C. 133 (2010). A defendant’s admission to use of a substance is different than admitting its identity. *See generally State v. Osborne*, ___ N.C. ___, 831 S.E.2d 328 (2019) (reversing the Court of Appeals and finding, after counsel allowed lay opinion testimony and field test evidence that the substance was heroin, the evidence was sufficient for the jury; the Court of Appeals had found defendant’s admission she used heroin was different than admitting its identity and vacated the conviction); *see also State v. Bridges*, ___ N.C. App. ___, 810 S.E.2d 365 (2018) (holding defendant’s out-of-court admission that she had methamphetamine in her bra was sufficient to survive a motion to dismiss); *State v. Nabors*, 365 N.C. 306 (2011) (holding defendant’s identification of the substance as cocaine at trial was sufficient). The lesson from Osborne? Counsel must object to inadmissible evidence to preclude a sufficiency of the evidence argument by the State.

29. True or False. In North Carolina, 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). Beware: if the recording (i.e., the contemporaneous interception of oral, wire, or electronic communication) involves an individual in a “two party” consent state, the recording is illegal. 18 U.S.C. § 2511.

30. James gives his friend, Alex, money to buy drugs. Alex neither gets the drugs nor returns the money. James goes to Alex’s home to retrieve his money, barging inside and threatening Alex with a gun. James leaves without any money, but is charged with Attempted Armed Robbery. At trial, James testifies he had no intent to commit robbery but was simply trying to get his money back. Alex admits on the stand he had the money and never bought the drugs. James moves to dismiss, arguing insufficiency of the State’s evidence to establish felonious intent because he had a legitimate claim to the property. Who wins?

- (A) James.
(B) The State.

ANSWER: **Per the North Carolina Court of Appeals, (A).**

EXPLANATION: Where the uncontroverted evidence shows defendant had no intent to steal anything other than his property, a bona fide claim of right to the property defeats the intent element of Attempted Armed Robbery. *See State v. Cox*, ___ N.C. App. ___, 825 S.E.2d 266 (2019), *stay granted*, 372 N.C. 99 (2019).

31. Before a murder trial, a witness met with prosecutors to review her statement and prepare trial testimony, essentially stating she did not see the shooting but saw the defendant holding a gun and running towards the victim. The State provided notes of that interview to the defense. At trial, the witness testified differently, stating she saw the defendant stand over the victim and shoot him. The defense requested the Court instruct the State to enter into a stipulation or make a statement to the jury that the witness had not previously claimed she saw the shooting. The Court declined, instead offering the defense the opportunity to conduct additional cross-examination. The defense declined.

True or False. The above constitutes the intentional use of false testimony to convict the defendant.

ANSWER: **False.**

EXPLANATION: *State v. Kimble*, ___ N.C. App. ___, 2019 N.C. App. LEXIS 792 (October 1, 2019) (holding, even if the witness' trial testimony was false, defendant failed to show the testimony was material or that the State knowingly and intentionally used that false testimony to convict defendant). This is a two-prong test. *Id.* On the material prong, other witness testimony and circumstantial evidence established defendant shot the victim. On the knowing and intentional use of false testimony prong, the State was not aware the witness would testify inconsistently with her prior statement and pre-trial interview. Query: How is this different from counsel's duty not to perpetrate a fraud upon the Court? The Court, nonetheless, found any discrepancies between her prior statements and trial testimony were matters of credibility properly addressed via impeachment on cross-examination.

32. Which one of the following is false regarding standby counsel?
- (A) He has a duty to assist the defendant when called upon.
 - (B) He has a duty to bring to the Court's attention matters favorable to the defendant.
 - (C) He is subject to IAC claims beyond statutory duties.

ANSWER: (C).

EXPLANATION: Duties of standby counsel are to (1) assist the defendant when called upon and (2) bring "to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion." N.C. Gen. Stat. § 15A-1243. Standby counsel should assess capacity issues (to stand trial or self-representation) and must be ready and prepared to take over trial at any time, including preparing mitigation. *See Porter v. McCollum*, 558 U.S. 30 (2009). Defendant may not make an IAC claim beyond limited scope of the duties assigned to counsel by statute or voluntarily assumed by counsel. *State v. Thomas*, 331 N.C. 671 (1992).

33. What is the only field of forensic science deemed reliable by both the National Academy of Sciences and President's Council of Advisors on Science and Technology?
- (A) Hair fiber analysis.
 - (B) Nuclear DNA.
 - (C) Firearm ballistics.

ANSWER: (B).

EXPLANATION: See NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 7-8 (2009); PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016).

The latest in DNA: labs now (1) examine one ten-millionth of a genome (equivalent to only one inch of 300 tennis courts), (2) are bypassing serology for sperm; (3) focus on DNA mixture interpretation; (4) use Y-STR for retesting of male perpetrators; (5) can test with one chromosome; and (6) have increased reliance on computer-based interpretation (i.e., probabilistic models).

Proven science matters. See THE INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states>. Latest statistics: 367 post-conviction exonerations from DNA testing with an average sentence served of 14 years, 44% involved misapplication of forensic science, 69% involved eyewitness misidentification, and 28% involved false confessions.

34. True or False. *Harbison* is violated when counsel admits to the element of a crime.

ANSWER: False.

EXPLANATION: *State v. Harbison*, 315 N.C. 175 (1985) (defendant must knowingly and voluntarily consent to concessions of guilt made by trial counsel after a full appraisal of the consequences and before any admission); *State v. Berry*, 356 N.C. 490 (2002) (holding the defendant receives *per se* ineffective assistance of counsel when counsel concedes the defendant's guilt to the offense or a lesser-included offense without consent); *State v. McAlister*, ___ N.C. App. ___, 827 S.E.2d 538 (2019) (holding defense counsel's statement, during closing argument, that "things got physical . . . he did wrong . . . God knows he did" was not an admission of a specific act or element as alleged by the State, thus not violating *Harbison*); *State v. Wilson*, 236 N.C. App. 472 (2014) (holding defense counsel's admission of an element of a crime charged—while still maintaining the defendant's innocence—does not necessarily amount to ineffective assistance of counsel).

35. Which one of the following is false for felony CRVs?

- (A) CRVs may be reduced by good time/earned time.
- (B) CRVs start on the date ordered, not arrival date.
- (C) CRVs apply to Post-Release Supervision.

ANSWER: (A).

EXPLANATION: For probation violations committed on or about October 1, 2014, the Court may not reduce the 90 day term by any jail credit; however, a defendant will be discharged upon sentence completion. Credit will be applied to the suspended sentence in event of revocation. N.C. Gen. Stat. § 15A-1344(d2).

Regarding (B), see Jamie Markham, *A Visit to the Burke CRV Center*, N.C. CRIM. L. BLOG (May 23, 2019, 4:07 p.m.), <https://nccriminallaw.sog.unc.edu/a-visit-to-the-burke-crv-center/>.

Regarding (C), see *id.* It is called a PR3. *Id.*

36. Which one of the following permits an intermediate probationary sentence if the defendant has four or less record level points; is convicted of a Class B2, C, or D felony; and the Court makes certain findings?
- (A) Extraordinary mitigation.
 - (B) Advanced supervised release.
 - (C) Substantial assistance.

ANSWER: (A).

EXPLANATION: Extraordinary mitigation, however, does not apply to drug trafficking cases, including conspiracy. N.C. Gen. Stat. § 15A-1340.13(g)-(h).

Regarding (B), upon prosecutor consent and defendant's completion of "risk reduction incentives" in prison, a defendant who receives an active sentence in certain Class D through H (record level appropriate) cells may be released when he completes 80% of the imposed minimum sentence. N.C. Gen. Stat. § 15A-1340.18. Various statutory provisions apply. *Id.*

Regarding (C), upon a finding and entry in the record of substantial assistance, the Court may reduce the fine, impose a prison term less than the applicable minimum, or suspend said term and place the defendant on probation. N.C. Gen. Stat. § 90-95(h)(5). Essentially, sentencing is in discretion of the Court.

37. Which one of the following does not count as jail credit?
- (A) Hospitalization to determine competency to stand trial.
 - (B) Time imprisoned as a "quick dip."
 - (C) For DWI, the first 24 hours in jail pending trial.

ANSWER: (C).

EXPLANATION: N.C. Gen. Stat. § 20-179(p)(1).

Regarding (A), see *State v. Lewis*, 18 N.C. App. 681 (1973).

Regarding (B), see N.C. Gen. Stat. §§ 15A-1343(a1)(3) and 1343.2.

38. True or False. The State has a right to appeal an expunction order.

ANSWER: **False.**

EXPLANATION: *State v. J.C.*, 372 N.C. 203 (2019).

39. The “private-search” doctrine is:

- (A) A lawful search into a suspect’s private areas.
- (B) A privacy interest invaded by a private actor who reveals that information to law enforcement.
- (C) An ancillary reference to a non-testimonial identification order.

ANSWER: **(B).**

EXPLANATION: The “private-search” doctrine holds the Fourth Amendment is not implicated by the State’s inspection of private property when it follows a private party’s search and does not exceed its scope. *U.S. v. Jacobson*, 466 U.S. 109 (1984) (holding that a federal agent’s warrantless examination of a package of cocaine discovered by FedEx employees and field testing of its contents was not a Fourth Amendment search; that the testing did not abridge any legitimate privacy interest); *see also State v. Terrell*, ___ N.C. ___, 2019 N.C. LEXIS 784 (August 16, 2019) (holding in a case of first impression that, after defendant’s girlfriend discovered an image of her granddaughter on his USB flash drive, law enforcement violated his Fourth Amendment rights by, in the absence of a warrant, searching through folders the girlfriend had not and finding incriminating images previously unseen).

40. True or False. A federal court may award state jail credit towards a mandatory federal sentence when the state conviction is part of the required behavior for the federal crime.

ANSWER: **False.**

EXPLANATION: *U.S. v. Moore*, 918 F.3d 368 (4th Cir. 2019) (holding U.S. Sentencing Guidelines do not authorize a downward departure from a statutorily imposed mandatory-minimum sentence). Additionally, federal sentences must run consecutively if sentenced at different times. 18 U.S.C. § 3584(a).

41. Since 2012, second degree murder can be a Class B1 or B2 offense.

True or False. Counsel may stipulate to the class of offense.

ANSWER: **Generally, false.**

EXPLANATION: Counsel may stipulate to questions of fact, not legal conclusions. Judges determine conclusions of law. *But see State v. Arrington*, 371 N.C. 518 (2018) (holding stipulation to a B1 offense was proper because it was “fact driven”). The legislature distinguishes between second-degree murders that (1) involve an intent to harm (actual malice or the intent to take a life without justification), a B1 offense resulting in nine sentencing points; and (2) less culpable ones that involve recklessness (an inherently dangerous act or omission) or drug overdose, a B2 offense resulting in six sentencing points. *See* N.C. Gen. Stat. §§ 14-17(b); 15A-1340.14(b)(1a) and (2). In sum, counsel may stipulate to facts which include: (1) whether an out-of-state conviction is a felony or a misdemeanor; (2) application of a prior record bonus point under N.C. Gen. Stat. §15A-1340.14(b)(7) for committing the present offense while under supervision, incarcerated, or on escape; and (3) the version of a “split offense” he committed. *See State v. Edgar*, 242 N.C. App. 624 (2015); *State v. Miles*, 221 N.C. App. 211 (2012); *State v. Arrington*, 371 N.C. 518 (2018), respectively. However, counsel may not stipulate to conclusions of law which include (1) whether an out-of-state conviction is substantially similar to a North Carolina offense; and (2) application of prior record bonus point under N.C. Gen. Stat. § 15A-1340.14(b)(6) for all the elements of the present offense being included in a prior offense. *See State v. Palmateer*, 179 N.C. App. 579 (2005); *State v. Eury*, 245 N.C. App. 328 (2016), respectively.

42. True or False. To convict a defendant of Maintaining a Vehicle for the Purpose of Keeping a Controlled Substance, the State must prove defendant possessed or transported drugs inside a vehicle on at least two occasions.

ANSWER: **False.**

EXPLANATION: “Keeping or maintaining” a vehicle refers to possessing for at least a short period of time or intending to retain possession for a certain use. “Keeping” of drugs means the “storing” of drugs. The issue is storage: whether a vehicle is used to store drugs does not require its use on multiple occasions. *A fortiori*, merely possessing or transporting drugs inside a vehicle—whether in an occupant’s pocket or being taken from one place to another—does not justify a conviction. *State v. Rogers*, 371 N.C. 397 (2018) (holding sufficient evidence existed to convict when a defendant was selling drugs, possessed a vehicle at least two and one-half months, and drugs were found in a hidden compartment).

43. 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-offenses>.

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/>.

44. 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).

45. Which one 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).

46. 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).

47. 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 more recent cases are an attempt to erode the bright line rule of *Rodriguez*. See also *State v. Reed*, ___ N.C. App. ___, 810 S.E.2d 245 (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”), *stay granted*, 371 N.C. 344 (2018). But see *State v. McNeil*, ___ N.C. App. ___, 822 S.E.2d 317 (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).

48. 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).

However, persuasive authority erodes the strength of *Rodriguez*. See allowing extension of a traffic stop for officer safety, DRE/SFST proficient officers, and language barriers. See Jeff Welty, *Extending Traffic Stops to Wait for Other Officers*, N.C. CRIM. L. BLOG (April 15, 2019, 5:00 AM), <https://nccriminallaw.sog.unc.edu/extending-traffic-stops-to-wait-for-other-officers>. Further, 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. See SHEA DENNING, CHRISTOPHER TYNER & JEFFREY WELTY, *PULLED OVER: THE LAW OF TRAFFIC TOPS AND OFFENSES IN NORTH CAROLINA* 59 (2017).

49. Which one 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).

50. 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. For a recent analogous North Carolina case, see *State v. Neal*, ___ N.C. App. ___, 2019 N.C. App. LEXIS 766 (September 17, 2019) (holding an anonymous tip contained sufficient indicia of reliability when the (1) tipster alleged defendant drove a small green vehicle erratically on several instances, hit another vehicle in a different location, and attempted to flee the scene and (2) law enforcement quickly located a matching vehicle attempting to leave the scene).

51. 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 LAFAYE, 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).

52. 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).

53. 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.

54. 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.

55. Which one 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).

56. Which one 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). A suggestive identification (ID) procedure is analyzed under a two-prong test. The first prong is whether the ID procedure was unnecessarily suggestive. If so, the second prong analyzes accuracy, considering five factors: (1) the eyewitness's opportunity to view; (2) degree of attention; (3) description of the suspect; (4) degree of certainty at the time of ID; and (5) length of time between crime and ID. *Neil v. Biggers*, 409 U.S. 188 (1972).

The perils of eyewitness identification: 69% of post-conviction DNA exonerations involve mistaken identification.

Factors affecting memory: passage of time, level of stress, sleep deprivation, exposure duration, cross-race circumstances, rehearsing details, police procedures (including confirming feedback, suggested recall, line-up construction, and inherent suggestiveness of a show-up procedure), environmental conditions during an event, limited attention and storage capacity, and gap-filling misinformation.

57. 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).

58. 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.

59. 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”).

60. 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.

61. 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.

62. Which one 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.

63. 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).

64. A defendant is required to complete 240 hours of community service for which one 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).

65. 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.

66. Which one 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 five days upon review by a superior court judge.

67. 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).

68. 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).

69. 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”).

70. 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.

71. 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).

72. Which one 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.

73. Which one 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").

74. 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.

75. 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 of serious injury, etc.) that justify entry. ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 71 (5th ed. 2016).

76. 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).

77. 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.

78. 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).

79. 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).

80. 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).

81. 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).

82. 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”).

83. In domestic violence crimes, which one 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.

84. 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).

Locally, jail personnel ask for a driver’s license, Social Security number, or other document of legal status. Information is forwarded to ICE who arranges a phone interview within 24 to 48 hours. If notice of bond arises, jail personnel notify ICE who expedites the process, generally issuing a computer-generated detainer. The best practice is to address conditions of release prior to jail admission or soon thereafter.

State *habeas corpus* relief is not available to challenge immigration detainers. *Chavez v. Carmichael*, ___ N.C. App. ___, 822 S.E.2d 131 (2018).

85. 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 proffered.

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).

86. 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”).

87. 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).

88. Contempt may arise in a criminal context. Which one 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).

89. 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.

90. 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).

91. 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.

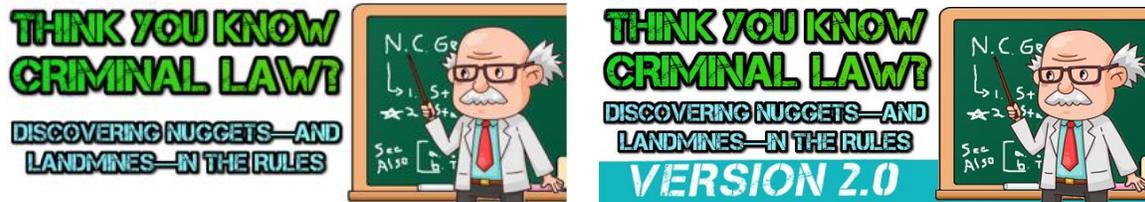
ANSWER: **(A).**

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

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