DWI Motions

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Introduction

With regard to alcohol impaired driving charges, most of our clients are factually guilty of committing this crime. It is very rare to find an alcohol related DWI offense where the defendant has a blood or breath alcohol concentration of .07 or less. When we represent the factually guilty we put ourselves in a situation where an enormous valley separates the great DWI defense lawyer from the good DWI defense lawyer.

As a preliminary matter, be diligent when you investigate the facts of the case. Do not allow the charging officer to overgeneralize and simply tell you in the back room that it is an open-and-shut case; that your client was obviously impaired and did not perform field sobriety tests to his satisfaction; and that the client blew a .10 on the EC-IR II. When the client is factually guilty, it is incumbent upon counsel to diligently examine the officer's training, education, and experience regarding DWI investigative techniques, the officer's narrative related to observed driving and field test performance, and then to compare those factual allegations to the in-car or body camera videos. Sometimes the officer's memory – or report – will not match up with the best evidence of what happened which is generally located within the aforementioned videos.

Each section is intended for the true practitioner. I am attaching specific motions on issues that you can modify to fit your client's specific fact pattern. I also have applicable case law and statutory summaries that are beneficial for both the State and the defense. Know the cases on your particular issue inside and out so that you may champion the favorable case law and distinguish what at first glance appears to be prosecution friendly. With regard to DWI defense, the deck is stacked against you; you will have to convince the judge that the law very clearly supports your position in order to win on these motions. Become the authority in the courtroom on the issue at hand.

The following issues will specifically be addressed:

1. Reasonable suspicion to effectuate law enforcement's seizure of a citizen;

2. Probable cause to arrest for Driving While Impaired;

3. Excluding evidence of the client "refusing" a chemical analysis;

4. Excluding evidence of the portable breath test;

5. Excluding evidence of the chemical analysis based upon a warrantless blood draw;

6. Excluding evidence of the chemical analysis based upon a violation of right to witness viewing the blood or breath testing procedure;

7. Excluding evidence of unreliable "admissions" to the ingestion of impairing substances which are not confirmed in the chemical analysis;

8. Checkpoints;

9. In appropriate cases, allowing the provision of expert witness funds; and

10. New cases to know regarding Horizontal Gaze Nystagmus, statute of limitations, and an example Knoll motion.

Reasonable Suspicion

There is such an abundance of case law on whether reasonable suspicion of criminal activity existed to effectuate a motor vehicle stop that it could fill this entire seminar. Accordingly, I will only hit the highlights. When you are meeting with the client and mentally going through your rolodex of issues, ask yourself, "Why was my client pulled over?" If it is for a simple to spot and truly undisputed violation of the law like speeding or running a stop sign, move on. Alternatively, where your client was pulled over for some reason other than an obvious and undisputed violation of the law, it's time to carefully analyze whether the stop was legally justified.

Legal Standard

Reasonable suspicion that criminal activity is afoot, as opposed to probable cause that a crime has been committed, is the necessary standard for investigatory vehicle stops. State v. Styles, 362 N.C. 412 (2008).

While reasonable suspicion is a less demanding standard than probable cause, the requisite degree of suspicion must be high enough to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. State v. Fields, 195 N.C. App. 740 (2009).

The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Id. This "cautious officer" must have more than an unparticularized suspicion or hunch. Id.

Case law provides examples of the difference between **a true reasonable suspicion of criminal activity versus just a hunch that something seems weird, off, or unusual**.

When Reasonable Suspicion Must Exist

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

Common Issues

1. Weaving[1]

a. **Prosecution friendly cases**.

i. State v. Wainwright, 770 S.E.2d 99 (2015) (reasonable suspicion for impaired driving existed based upon the vehicle swerving right, crossing the white line marking the outside lane of travel, and almost hitting a curb; the late hour (2:37 a.m.); officer's concern vehicle might hit and strike a student given heavy pedestrian traffic; and the vehicle's proximity to numerous East Carolina University bars, nightclubs, and restaurants that serve alcohol).

ii. State v. Kochuk, 366 N.C. 549 (2013) (reasonable suspicion for vehicle stop existed where the vehicle completely – albeit momentarily – crossed the dotted line once while in the middle lane; then made a lane change to the right lane and drove on the fog line twice; and it was 1:10 a.m.).

iii. State v. Fields, 219 N.C. App. 385 (2012) (reasonable suspicion for vehicle stop existed where officer followed vehicle for three quarters of a mile and saw it weaving within its lane so frequently and erratically it prompted other drivers pulling over to the side of the road in reaction to Defendant's driving. Vehicle also drove on the center line at least once).

iv. State v. Otto, 366 N.C. 134 (2012) (reasonable suspicion for vehicle stop existed where the vehicle was constantly and continually weaving for three-quarters of a mile at 11:00 p.m. on a Friday night from an area in which alcohol was possibly being served).

b. **Defense friendly cases**.

i. State v. Derbyshire, 745 S.E.2d 886 (2013) (weaving alone did not provide reasonable suspicion for the vehicle stop; that driving at 10:05 p.m. on a Wednesday is "utterly ordinary" and insufficient to render weaving suspicious; and that having "very bright" headlights also was not suspicious).

ii. State v. Peele, 196 N.C. App. 668 (2009) (no reasonable suspicion to support vehicle stop where an officer received an anonymous tip that defendant was possibly driving while impaired; then the officer saw the defendant weave within his lane once).

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

iii. State v. Fields, 195 N.C. App. 740 (2009) (reasonable suspicion did not support a vehicle stop where the driver weaved within his lane three times over a mile and a half but was not driving at an inappropriate speed, at an unusually late hour, or within close proximity to bars).

2. Lack of turn signal.

a. **Prosecution friendly cases**.

i. State v. Styles, 362 N.C. 412 (2008) (the defendant violated G.S. 20-154(a) where he changed lanes immediately in front of an officer without using a turn signal; changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle thus violating the statute).

ii. State v. McRae, 203 N.C. App. 319 (2010) (reasonable suspicion existed where the defendant turned right into a gas station without using a turn signal in medium traffic and with the officer following a short distance behind the defendant's vehicle).

b. **Defense friendly cases**.

i. State v. Ivey, 360 N.C. 562 (2006) (a turn signal is not necessary when entering what amounts to a right-turn-only intersection; where a right turn was the only legal move the defendant could make; and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle).

ii. State v. Watkins, 220 N.C. App. 384 (2012) (vehicle stop inappropriate where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, but it was not clear that another vehicle was affected by the defendant's lane change).

3. Sitting at a stop light.

a. **Prosecution friendly cases**.

i. State v. Barnard, 362 N.C. 244 (2008) (reasonable suspicion supported a vehicle stop where the vehicle remained stopped at a green light for approximately thirty seconds).

b. **Defense friendly cases**.

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

4. Driving slower than the speed limit

   a. **Prosecution friendly cases**.

      i. State v. Bonds, 139 N.C. App. 627 (2000) (defendant's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion).

      ii. State v. Aubin, 100 N.C. App. 628 (1990) (reasonable suspicion existed where the defendant slowed to 45 m.p.h. on I-95 and weaved within his lane).

      iii. State v. Jones, 96 N.C. App. 389 (1989) (reasonable suspicion existed where the defendant drove 20 m.p.h. below the speed limit and weaved within his lane).

   b. **Defense friendly cases**.

      i. State v. Canty, 224 N.C. App. 514 (2012) (no reasonable suspicion where, upon seeing officers, vehicle slowed to 59 m.p.h. in a 65 m.p.h. zone).

      ii. State v. Brown, 207 N.C. App. 377 (2010) (unpublished) (traveling 10 m.p.h. below the speed limit is not alone enough to create reasonable suspicion for a traffic stop; reasonable suspicion found based upon slow speed, weaving, and the late hour).

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

5. Late hour or high-crime area

   a. **Prosecution friendly cases**.

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

   b. **Defense friendly cases**.

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

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

6. Tips

a. Anonymous tips[2]

i. **Prosecution friendly cases**.

1. Navarette v. California, 134 S. Ct. 1683 (2014) (although a "close case," anonymous tip was sufficiently reliable to justify an investigatory vehicle stop in that the 911 caller reported she had been run off the road by a specific vehicle – a silver F-150 pickup, license plate 8D94925. The 911 caller reported the incident contemporaneously as it occurred. The 911 caller reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result: running another car off the highway).

ii. **Defense friendly cases**.

1. State v. Coleman, 228 N.C. App. 76 (2013) (tipster treated as anonymous, even though the communications center obtained tipster's name and phone number, because tipster wished to remain anonymous; officer did not know tipster; and officer had not worked with tipster in the past. Tip did not provide reasonable suspicion, in part because it did not provide any way for the officer to assess the tipster's credibility, failed to explain her basis of knowledge, and did not include any information concerning the defendant's future actions).

2. State v. Blankenship, 230 N.C. App. 113 (2013) (taxicab driver anonymously contacted 911 via his personal cell phone; although 911 operator was later able to identify the taxicab driver, the caller was anonymous at the time of the tip. Tipster reported observing a specific red Ford Mustang, driving in a specific direction, driving erratically and running over traffic cones. Tip did not provide reasonable suspicion for the stop, as the officer did not personally observe any unlawful behavior or have an opportunity to meet the tipster prior to the stop).

3. State v. Peele, 196 N.C. App. 668 (2009) (anonymous tip the defendant was driving recklessly, combined with the officer's observation of a single instance of weaving, did not give rise to a reasonable suspicion of criminal activity to effectuate this stop).

[2] Note – Standing alone, anonymous tips are inherently unreliable and rarely provide reasonable suspicion. Florida v. J.L., 529 U.S. 266 (2000).

b. Known tipsters

i. **Prosecution friendly cases**.

1. State v. Maready, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person and put her anonymity at risk, notwithstanding the fact that the officers did not make note of any identifying information about the tipster).

2. State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle. When the officer stopped the trailing vehicle, the caller also stopped briefly. Stop was proper, in part, because the tipster called on a cell phone and remained at the scene, thereby placing her anonymity at risk).

ii. **Defense friendly cases**.

1. State v. Hughes, 353 N.C. 200 (2000) (law enforcement officer who filed the affidavit had never spoken with the informant and knew nothing about the informant other than his captain's claim that he was a confidential and reliable informant. Although the captain received the tip from a phone call rather than a face-to-face meeting, the captain told the affiant the confidential source was reliable. Although the source of the information came from a known individual, Court concluded the source must be analyzed under the anonymous tip standard because the affiant had nothing more than the captain's conclusory statement that the informant was confidential and reliable. Anonymous tip and police corroboration did not approach the level of a close case. Upheld trial court's order allowing Defendant's motion to suppress); see also State v. Benters, 367 N.C. 660 (2014).

2. State v. Walker, 2017 N.C. App. LEXIS 814 (October 3, 2017) (Trooper, while on routine patrol, was notified by dispatch that a driver reported a vehicle for DWI. Specifically, the reporting driver observed Defendant driving at speeds of approximately 80 to 100 mph while drinking a beer; driver drove "very erratically"; and almost ran him off the road "a few times." While Trooper drove to the area in response, the informant flagged him down. Informant told Trooper the vehicle was no longer visible but had just passed through a specific intersection. At some point the vehicle in question was described as a gray Ford passenger vehicle but it is unclear whether the Trooper was aware of that description

before or after he stopped Defendant. Defendant stopped and arrested. Tip did not provide reasonable suspicion to make an investigatory stop. While informant was not anonymous, he was unable to specifically point out Defendant's vehicle as being the one driving unlawfully, as it was out of sight, and the Trooper did not observe Defendant's vehicle being driven in an unusual or erratic fashion. Moreover, it is unknown whether the Trooper had the license plate number before or after the stop and, further, we do not know whether he had any vehicle description besides a "gray Ford passenger vehicle" to specify the search.

7. Driving too fast for lane conditions

   a. State v. Johnson, 2017 N.C. Lexis 552 (August 18, 2017) (This reversed the Court of Appeals opinion which was favorable to the defense and held the officer had reasonable suspicion to initiate a traffic stop under N.C. Gen. Stat. 20-141(a) by driving too quickly for the road conditions where officer observed defendant abruptly accelerate his truck and turn left, causing the truck to fishtail in the snow before defendant gained control of the vehicle. This is true even though the defendant did not leave the lane that he was traveling in or hit the curb.

Probable Cause to Arrest

This is one of the most promising areas to attack when defending the close DWI arrest. My advice: Have courage; more often than not you will lose. Also, charge an appropriate fee because, if you do it right, you are going to spend a lot of time preparing and hearing the matter. Before we get into the law, here are a few quick-and-dirty practice pointers:

1. Do not fear HGN. Since Killian and Godwin, my experience is that it has been almost impossible for the State to introduce any meaningful evidence on HGN. In other words, don't use as an excuse for pleading the case out the fact that your client showed 6 out of 6 HGN clues. Even if that's true, it probably won't come into evidence. Object, object, object.

2. Know how to actually conduct the HGN test backwards and forwards. Even before Killian and Godwin, I had a fair amount of success getting HGN evidence excluded because the officer did not conduct the test in the prescribed, standardized manner. Exclusion requires you do a few things in examination:

    a. Have the officer admit he was trained with materials provided by the National Highway Traffic Safety Administration (NHTSA) on the proper administration of the HGN test.

    b. Have the officer admit he was trained to conduct the HGN test in a standardized and prescribed fashion (i.e., the same way every time).

    c. Have the officer admit he was trained scientific validation for the HGN test applies only when the tests are administered in the prescribed, standardized manner.

    d. Have the officer admit he was trained that if any of the standardized field sobriety elements is changed, the validity is compromised.

    e. With non-leading questions, have the officer explain how he conducted the test. Make sure to hit every point (How far did he hold the stimulus from the eyes? How did he conduct each check including how many seconds it took for him to move the stimulus from the midpoint to the end of the pass? Did he hold the stimulus in a specified location at the end of a pass? For how long? Etc.).

    f. Once you pin the officer down on how he administered the HGN test, now pinpoint the areas of improper administration. Assuming there is improper administration, if you have the manual or subpoena the officer to bring his own manual, my experience is he will have to agree that he did not perform one or many portions of the test properly.

g. Your argument: If the officer didn't conduct the test in the prescribed, standardized manner, his own training indicates the test's validity is compromised. HGN is expert evidence and thus admission must comport with N.C. R. Evid. 702. While HGN generally has been found to be scientifically reliable, that's only with proper foundation. Clearly if the officer did not, by his own admission, conduct the test properly then he has failed to apply the principles and methods of HGN reliably to the facts of the case. N.C. R. Evid. 702(a)(3).

3. In prescription medication and/or illegal drug cases, know what drug category the substances allegedly ingested fall under. I've seen many cases where the officer claims to have seen HGN clues based upon marijuana or hydrocodone consumption; this is not possible. Know if your officer has enough training to testify on this issue or whether you need to hire your own expert, such as Doug Scott. Horizontal Gaze Nystagmus <u>will be present</u> if the suspect is impaired by a Central Nervous System Depressant, Dissociative Anesthetic, or most Inhalants. Horizontal Gaze Nystagmus <u>will not be present</u>, even if the suspect is impaired, if the impairment comes from a Central Nervous System Stimulant, Hallucinogen, Narcotic Analgesic, or Cannabis. Obviously, if the officer claims to have viewed HGN but the substances ingested do not cause HGN, the testimony would not be the product of reliable principles and methods. N.C. R. Evid. 702(a)(2).

4. If your client's vehicle operation was not a scientifically validated indicator of impaired driving (i.e., client was pulled over for driving 12 m.p.h. over the speed limit), emphasize that point. If your client's driving was lawful in every way, but he was simply pulled over for some regulatory issue related to the vehicle (i.e., license plate frame was illegal), even better!

5. If it appears your client quickly noticed the officer's blue lights and pulled the vehicle over in a safe and appropriate fashion, emphasize that point.

6. If your client had no difficulty producing his license and registration, emphasize that point.

7. If your client had no difficulty exiting his vehicle, emphasize that point.

8. If your client had no difficulty walking to the patrol car, emphasize that point.

9. Let's face it: The officer is going to testify your client's speech was slurred. Use the in-car camera or body camera audio to rebut this testimony. If it's a close case worth trying, often judges will find your client's speech to have either not been slurred or that it was unremarkable.

10. Balance and coordination tests – Walk and Turn and One Leg Stand. A few points:

    a. These tests are so necessary, so important, to assist in evaluating psychomotor sobriety or impairment that they make up two-thirds of the standardized field sobriety testing battery. Far too often these tests aren't administered because of reliance on an alcosensor. It's the State's burden to prove probable cause existed for the arrest and failure to attempt to administer these tests without good reason should be frowned upon. Limited investigation and rushing to judgment creates a high risk the wrong decision is being made.

    b. Even if your client "fails" these tests by exhibiting two or more clues on each test, that does not necessarily mean your client's mental or physical faculties were appreciably impaired.

        i. For the Walk and Turn, if the suspect exhibits two or more clues, it is "likely" his or her BAC is above 0.10. CITE. According to the original research, "likely" is quantified as about 68% accurate. That means, according to the original research, about 32% of the time the test's dictated outcome will be wrong. Look for, and possibly put up evidence on, other factors (e.g., advanced age, overweight, surface or footwear issues, physical conditions not related to impairment that cause balance problems, etc.).

        ii. For the One Leg Stand, if the suspect exhibits two or more clues, it is "likely" his or her BAC is above 0.10. CITE. According to the original research, "likely is quantified as about 65% accurate. That means, according to the original research, about 35% of the time the test's dictated outcome will be wrong. Look for, and possibly put up evidence on, other factors (e.g., advanced age, overweight, surface or footwear issues, physical conditions not related to impairment that cause balance problems, etc.).

    c. Be flexible. Sometimes you can't stick to a script. Use a failure of proof to your advantage if your client did well but technically failed the tests. Sometimes the prosecutor remembers to ask "what happened" but fails to ask how your client scored or performed on the tests. Argue:

        i. "You never heard any testimony that the field sobriety tests were not performed to the officer's satisfaction."

        ii. "You never heard any testimony my client's performance on the tests indicate a probability of impairment."

11. The alcosensor, which used to be pretty much determinative in a probable cause analysis, has now by statute and case law been rendered basically worthless. I will address this issue in the case law section below. Obviously you want to chip away and exclude as much evidence against your client as possible, but know your judge and pick your battles. Your client probably told the officer he had two beers, the officer has observed an odor of alcohol about your client's breath, and your client registered a positive reading on the alcosensor for the presence of alcohol in his system. Assuming your client is at least 21 years of age, it's not criminal to drive with alcohol in your system, which is all the alcosensor indicates. It's a positive reading whether it's a .01 or a .20.

Argument regarding probable cause

There is no singular definition for what constitutes probable cause; it has been defined a few ways over the years. I always give the judge the legal standard which I address in the next section. Dumbed down, probable cause really just deals with probabilities. And remember – the evidence is viewed through the eyes of a cautious officer – not an overzealous officer. Argue: Is it probable Mr. Smith was impaired when he didn't exhibit a single impaired driving cue while operating the vehicle? Or is it more likely he had his normal mental and physical faculties. Is it probable Mr. Smith was impaired when he exited the vehicle just as a sober person would? Or is it more likely he had his normal mental and physical faculties? Etc. Your client isn't going to be perfect, but argue that on balance it's clearly more likely, i.e., probable, that to a cautious person your client would not have been deemed to have been appreciably impaired.

Legal standard

Whether probable cause existed is not subjective to the charging officer. Instead, the test is an objective one proper for court review. State v. Overocker, 236 N.C. App. 423 (2014). The question is whether the facts and circumstances, known at the time, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another. Id.

Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances strong in themselves, to warrant a cautious man in believing the accused to be guilty. State v. Teate, 180 N.C. App. 601 (2006) (quoting Illinois v. Gates, 462 U.S. 213 (1983)).

Probable cause deals with probabilities and depends on the totality of the circumstances and the substance of all the definitions of probable cause is a reasonable ground for belief of guilt. State v. Overocker, 236 N.C. App. 423 (2014) (quoting Maryland v. Pringle, 540 U.S. 366 (2003).

The State has the burden of proof and must persuade the trial judge by a preponderance of the evidence that the challenged evidence is admissible. State v. Williams, 225 N.C. App. 636 (2013). If a judge grants a motion to suppress for lack of probable cause to arrest, the remedy is suppression of any evidence acquired after the unconstitutional arrest; not dismissal (although in

practice, usually the case will be dismissed by the prosecutor because the admissible evidence will be too weak to proceed to trial).

Case Law

1. Probable Cause to Arrest for DWI – Note that a fair amount of these cases are unpublished opinions. Unpublished opinions do not constitute controlling legal authority. See N.C. R. App. P. 30(e)(3).

   a. **Prosecution friendly cases**.

      i. State v. Lindsey, 791 S.E.2d 496 (N.C. Ct. App. Sept. 20, 2016) Probable cause existed for Defendant's DWI arrest. Officer pulled behind a vehicle at a stoplight at 2:47 a.m. and noticed the vehicle registration was expired; officer activated his blue lights and Defendant turned into a nearby McDonald's parking lot where Defendant, who was apparently not handicapped, pulled into a handicapped parking space (**remember – you want to distinguish Lindsey and Sewell as much as possible so argue this is a clear indication of impairment**); Defendant tells officer his license is revoked for DWI (**no such evidence in Sewell**); officer smelled a "medium" odor of alcohol coming from Defendant's breath (**unlike Sewell Mr. Lindsey was the sole possible source of the alcohol odor**) and his eyes were red and glassy; regarding HGN, Defendant showed 5 of 6 clues of impairment; Defendant informs the officer he had three beers at 6:00 p.m. the previous evening; Defendant repeatedly failed to provide a sufficient sample to permit a positive or negative alcosensor reading (**a big difference from the Sewell case as well; Mr. Lindsey attempted to cheat the breath testing device**); **another huge difference between Lindsey and Sewell is that Ms. Sewell demonstrated her sobriety by passing the WAT and OLS tests; Mr. Lindsey was never offered those tests and, while we can't assume he would pass or fail, it is irrefutable Ms. Sewell passed further demonstrating her sobriety; there was also specific testimony Ms. Sewell's speech was not slurred; that topic doesn't appear to have been touched on in Mr. Lindsey's hearing**.

      ii. State v. Lilly, 792 S.E.2d 190 (N.C. Ct. App. Nov. 1, 2016) (unpublished) Probable cause existed for Defendant's DWI arrest. Defendant, at 2:30 a.m., entered a DWI checkpoint; was very agitated and high strung, even holding a holstered handgun around officers; officer had to repeat himself because Defendant was not comprehending what he was saying; two officers noticed an obvious odor of alcohol from Defendant's person; Defendant admitted had been drinking alcohol; and Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol. Note two officers opined Defendant was impaired.

iii. State v. Williams, 786 S.E.2d 419 (N.C. Ct. App. June 21, 2016) Probable cause existed for Defendant's DWI arrest. Defendant was operating a golf cart, wherein he at a high rate of speed made a hard U-turn, causing a passenger riding on the rear to fall off; Defendant had very red and glass eyes and a strong odor of alcohol coming from his breath; Defendant was very talkative, repeating himself several times; Defendant's mannerisms were fairly slow; Defendant placed his hand on the patrol vehicle to maintain his balance; Defendant stated he had 6 beers since noon; Defendant submitted to an alcosensor test which was positive for the presence of alcohol.

iv. State v. Mathes, 235 N.C. App. 425 (2014) (unpublished) Probable cause existed for Defendant's DWI arrest. Defendant involved in a single vehicle accident which included extensive damage to his truck; Defendant left the scene and witnesses reported he left walking up the road; 4 to 5 minutes later officer located Defendant walking down the road without shoes; Defendant looked intoxicated and appeared to have urinated on himself; and Defendant's eyes were bloodshot and glassy, there was a dark stain on his pants, he smelled of alcohol and urine, and he had slurred speech.

v. State v. Townsend, 236 N.C. App. 456 (2014) Probable cause existed for Defendant's DWI arrest. Defendant drove up to a checkpoint where he was stopped; officer noticed Defendant emitted an odor of alcohol and had red, bloodshot eyes; Defendant acknowledged he had consumed several beers earlier and that he stopped drinking about an hour before being stopped at the checkpoint; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; regarding HGN, officer observed "three signs of intoxication"; regarding WAT, officer observed "two signs of intoxication"; regarding OLS, officer observed "one sign of intoxication"; Defendant recited the alphabet from J to V without incident; trial court acknowledged and relied upon the officer's 22 years of experience as a police officer. ***Note – Townsend expressly cites Rogers (cited below) for the proposition that the odor of alcohol, couple with a positive alcosensor test, is sufficient for probable cause to arrest. Shepard's analysis indicates Rogers has been superseded by Overocker and Sewell. Townsend also expressly cites Fuller for the proposition that "the results of an alcohol screening test may be used by an officer to determine if there are reasonable grounds to believe that a driver has committed an implied-consent offense." This is absolutely an inaccurate statement of the current law and even inaccurate at the time Townsend was decided. The statutory language that allowed an officer (and the court) to consider the numerical reading of the alcosensor test in pretrial hearings was supplanted by the current version of N.C. Gen. Stat. § 20-***

16.3 in 2006. Now, at all stages – whether it be the officer out in the field or the judge in pretrial motions hearings or during trial – the only thing that can be considered is whether the driver showed a positive or negative result on the alcohol screening test. Under the current version of the statute, consideration of the actual alcosensor reading is always improper. N.C. Gen. Stat. § 20-16.3; State v. Overocker, 236 N.C. App. 423 (2014).

vi. State v. Pomposo, 237 N.C. App. 618 (2014) (unpublished) Probable cause existed for Defendant's DWI arrest. Defendant was operating a vehicle and speeding 52 mph in a 35 mph zone; after the officer activated his blue lights, Defendant made an abrupt left-hand turn and then turned again onto a side street; a very strong odor of alcohol was coming from the vehicle; Defendant's eyes were red and glassy and his speech was slurred; Defendant acknowledged he had consumed alcohol; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; regarding the Walk and Turn test, Defendant failed to walk heel-to-toe; regarding the One Leg Stand test, Defendant failed to count "one thousand one, one thousand two, one thousand three" as directed and failed to lift his leg at least six inches off the ground as instructed; regarding HGN, the officer did not fully administer the HGN test as required by NHTSA guidelines but claimed to have observed 6 out of 6 clues. Court stated that, even without admission of HGN evidence, it believed there was still sufficient evidence to establish probable cause. My two cents: I don't believe this case would turn out the same way today given the fact that HGN would not be admissible; and it appears this Defendant passed the WAT and OLS tests according to the test scoring. If no HGN comes into evidence, and a defendant passes the tests designed to determine impairment or sobriety, how can it be probable the person is appreciably impaired?

vii. State v. Williams, 225 N.C. App. 636 (2013) Probable cause existed for Defendant's DWI arrest. Police responded to a one-car accident around 4:00 a.m.; upon arrival, Defendant was lying on the ground behind the vehicle and appeared very intoxicated; Defendant's shirt was pulled over his head and his head was in the sleeve hole of the shirt; no other person was present or close to the vehicle when police arrived; Defendant exhibited a strong odor of alcohol, bloodshot eyes, slurred speech, and extreme unsteadiness on his feet; officers checked the area, including the woods, and saw no other signs of people and no tracks in the woods; police arrested Defendant for DWI.

viii. State v. Foreman, 227 N.C. App. 650 (2013) (unpublished) Probable cause existed for Defendant's DWI arrest. Officer observed Defendant in the driver's seat of a vehicle stopped at a roadway intersection without a stop sign at 9:30 p.m. and Defendant appeared to be leaning forward; while speaking with Defendant in his driveway minutes later, Defendant mumbled when he spoke; there was an odor of alcohol about Defendant's person; Defendant admitted to having been drinking; HGN test provided some indication Defendant was impaired.

ix. State v. Tabor, 2004 N.C. App. LEXIS 1640 (2004) (unpublished) Probable cause existed for Defendant's DWI arrest. Officer estimated Defendant's vehicle to be traveling 53 mph in a 35 mph zone and made a vehicle stop; upon request, Defendant had difficulty retrieving his license; a strong odor of alcohol emitted from the vehicle (two occupants); Defendant's eyes were glassy and his movements slow; in exiting the vehicle, Defendant was unsteady on his feet and used the vehicle for support; officer then noticed an odor of alcohol on Defendant's person; and Defendant stated he had been drinking beer at the Panther's game.

x. State v. Tappe, 139 N.C. App. 33 (2000) Probable cause existed for Defendant's DWI arrest. Defendant was pulled over because his vehicle crossed the center line (apparently just once); after the vehicle stop and upon approach, officer noticed a strong odor of alcohol about Defendant's breath and that he had glassy and watery eyes; Defendant admitted to consuming about one-half of the contents of an open beer container but denied drinking while driving; Defendant also remarked he was of German origin and that "in Germany they drank beer for water."

xi. State v. Crawford, 125 N.C. App. 279 (1997) Probable cause existed for Defendant's DWI arrest. Officer found Defendant alone in a car parked on the shoulder of a rural side road around 3:30 a.m.; the driver's door was open, Defendant was in the driver's seat with one leg hanging out of the car, his pants were undone, and he had been drooling to such an extent that Defendant's knee and shirt were wet; Defendant had a strong odor of alcohol about him, had difficulty speaking, and admitted he had been drinking; the hood of the car was warm although the outside temperature was 26 degrees; Defendant had possession of the ignition key; and Defendant attempted to put the key in the ignition in order to drive away from the scene. Unknown if officer would have provided field sobriety tests but he never really had the ability to offer them to Defendant due to Defendant's actions.

xii. State v. Thomas, 127 N.C. App. 431 (1997) Probable cause existed for Defendant's DWI arrest. Off-duty officer was told by a nurse that a patient under the influence of impairing medication was leaving the hospital and going to drive away; off-duty officer located the patient as she opened the driver's side door; when the patient sat in the driver's seat off-duty officer observed Defendant "slumbered down in the passenger seat" with his eyes closed. Off-duty officer detected a strong odor of alcohol coming from Defendant's breath, that his eyes were very red and bloodshot, and that his physical appearance was disorderly. Off-duty officer believed Defendant was impaired. Off-duty officer was assured the two would not drive away and that they would call for someone to pick them up. Defendant observed attempting to drive away and, over a very short distance, did not operate the vehicle in a straight line. Defendant arrested for DWI by a second officer who independently observed the same indicators of impairment that the off-duty officer observed.

xiii. State v. Rogers, 124 N.C. App. 364 (1996) Probable cause existed for Defendant's DWI arrest as originally laid out in the case. However, if you see this case being cited in court, note a *Shepard's* analysis indicates this case has been superseded by Overocker and Sewell.

b. **Defense friendly cases**.

i. State v. Sewell, 239 N.C. App. 132 (2015) (unpublished) Probable cause did not exist for Defendant's DWI arrest. Shortly after midnight, Defendant and her passenger arrived at DWI checkpoint; no moving violations or concerning driving was observed by officers; Defendant provided her license and registration upon request without difficulty; officer observed a strong odor of alcohol coming from the vehicle (as opposed to singularly from Defendant); Defendant's eyes were red and glassy, but her speech was not slurred; Defendant initially denied drinking alcohol, but later she changed her story, admitting she drank one glass of wine; Defendant demonstrated her sobriety as the officer observed no clues of impairment on the WAT or OLS tests; regarding HGN, officer observed 6 out of 6 indicators of impairment; and Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol. Defendant apparently had no difficulty exiting her vehicle, walking around, or talking with the officer. Throughout the entire encounter Defendant was polite, cooperative, and respectful.

ii. State v. Overocker, 236 N.C. App. 423 (2014) Probable cause did not exist for Defendant's DWI arrest. Around 4:00 p.m., Defendant parked his SUV directly in front of a local bar and met with friends inside; while inside, a group of motorcyclists arrived at the bar and one individual parked his or her motorcycle illegally and directly behind Defendant's

SUV; when Defendant left the bar it was dark outside; when Defendant attempted to back out of his parking spot, his SUV collided with the illegally parked motorcycle; over an approximate four hour period, Defendant had consumed four bourbon on the rocks drinks (although Defendant initially told the officer two drinks, then later admitted to three drinks); an off-duty officer present at the bar believed Defendant was impaired because he was "talking loudly"; however, there was nothing unusual about Defendant's behavior or conversation at the bar; Defendant's friend from the bar testified he observed Defendant performing field sobriety tests, that he did not see anything wrong with Defendant's performance, and that he did not believe Defendant was impaired or unfit to drive; regarding WAT, Defendant took nine heel-to-toe steps without a problem; Defendant then asked what he was supposed to do next; officer reminded Defendant to follow the instructions, and Defendant took nine heel-to-toe steps back without a problem; regarding OLS, Defendant raised his foot more than six inches off the ground, stopped after 15 seconds, and put his foot down; Defendant then asked what he was supposed to do next; officer reminded Defendant to complete the test, and Defendant picked his foot up and continued for at least 15 more seconds until he was stopped by the officer; Defendant submitted to two alcosensor tests, both of which were positive for the presence of alcohol; Defendant's speech was not slurred and he had no issues walking around. My two cents: Clearly an odor of alcohol and a positive PBT reading do not always equate to probable cause in a DWI investigation (Townsend above). The Court has to take into account the whole picture, which it did in this case.

iii. State v. Parisi, 2017 N.C. App. LEXIS 53 (February 7, 2017). This is a case on lack of jurisdiction to appeal the Court's order; however, it states the facts in which a court found no pc to arrest for DWI and could be argued as non-mandatory authority. Approximately 11:30 p.m. Defendant drove up to a DWI checkpoint. Nothing illegal observed about Defendant's driving. Upon approach, officer noticed an odor of alcohol coming from the vehicle, a box used to carry alcohol, but no opened alcohol containers. Defendant had red glassy eyes. Defendant admitted to consuming three beers that evening. Re WAT, Defendant had a gap greater than one half inch on two steps. This was the only clue of impairment. On the OLS, Defendant swayed and used his arms for balance – two possible clues of impairment. Re HGN, six clues of impairment. Defendant arrested for DWI. A motion to suppress for lack of probable cause to arrest was granted. State was not allowed to appeal this ruling on jurisdictional grounds.

Excluding Evidence Related to Client's "Refusal"

In the very rare case, you will have the following fact pattern (or something similar):

a. Client, while driving, does something not so great and is greeted by a patrol officer;

b. Patrol officer believes client is appreciably impaired and arrests client for DWI;

c. Patrol officer is not a chemical analyst;

d. Client refuses chemical analysis;

e. By the time the case gets to trial, the chemical analyst is no longer employed as a police officer and the State either does not or will not call the former chemical analyst as a witness.

Especially in front of a jury, you will want to exclude from the testimony the fact that your client refused a chemical analysis. Your case should get better where the jury doesn't hear that your client either attempted to or did hide his alcohol concentration from the officer, the judge, and the jury. File the following motion pretrial so that the jury never hears about your client's refusal.

Warrantless Breath and Blood Testing

At least to me, this has developed into a fairly complicated area of the law. There is a deeply entrenched relationship between the concept of implied consent and the Fourth Amendment as it relates to chemical testing. I have tried to accurately distill these lengthy opinions into a quick outline below.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) discussed some areas of the relationship between chemical testing for impairment and the Fourth Amendment. I am going to attempt to outline Birchfield's holding, along with other applicable case and statutory law, below:

1. Warrantless breath testing is permitted under the Fourth Amendment pursuant to the search incident to arrest exception.

2. Warrantless blood testing is not permitted under the Fourth Amendment pursuant to the search incident to arrest exception. Thus, one of the following is necessary for warrantless blood testing:

    a. **Search warrant** permitting a chemical analysis of person's blood.

        i. Look at the four corners of the search warrant permitting a chemical analysis of your client's blood. Did the applicant get lazy in stating facts that constitute probable cause to believe your client committed a DWI? "A valid search warrant application must contain allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause . . . affidavits containing only conclusory statements of the affiant's belief that probable cause exists are insufficient to establish probable cause for a search warrant. State v. McHone, 158 N.C. App. 117 (2003). For example, we currently have a case where the application for bodily fluids states that on April 24, 2015, at 4:10 a.m. on I 85 Northbound, I observed the Defendant operating a vehicle. On or about that date I detected a moderate odor of alcohol coming from the breath of Defendant at the scene. Nothing else is listed in the search warrant. Use McHone, along with the cases listed in the probable cause section, to show the judge why probable cause did not exist for the issuance of the search warrant for bodily fluids.

b. **Consent**.

i. ***Unconscious persons*** – N.C. Gen. Stat. § 20-16.2(b) expressly allows an unconscious person's blood to be taken at the direction of the officer. I'm assuming the theory was that implied consent steps in when the person does not have the ability to consent or refuse given their current state. That is no longer permissible; an officer must obtain a warrant before collecting a blood sample from an unconscious person. State v. Romano, 785 S.E.2d 168 (N.C. Ct. App. April 19, 2016) (warrantless blood draw from an unconscious person violates the Fourth Amendment, notwithstanding the provisions of N.C.'s implied consent law that authorizes such testing).

ii. ***Consent limited to rights for the particular test advised*** – Defendant was advised of his rights and refused a breath test. Afterwards, Defendant was asked to submit to a blood test but Defendant was not re-advised of his rights. If relying on consent for the blood draw, chemical analyst is required to re-advise a defendant of his rights before obtaining consent to the blood test. Failure to do so requires suppression of the blood test results. State v. Williams, 234 N.C. App. 445 (2014); beware, however, where the idea for a blood test in this factual scenario originates with your client. State v. Sisk, 238 N.C. App. 553 (2014) (because the prospect of submitting to a blood test originated with Defendant, as opposed to the Trooper, the statutory right to be re-advised was not triggered).

iii. ***Only notice of the rights is required; no issue with language barrier*** – State v. Martinez, 781 S.E.2d 346 (N.C. Ct. App. January 5, 2016) (even though the Spanish-speaking Defendant's rights were read to him in English, he signed a form with the rights printed in Spanish and there was no evidence Defendant was illiterate in Spanish. Case holds the notice requirement was met because the General Assembly simply requires notice and does not condition the admissibility of the results of the chemical analysis on the defendant's understanding of the information disclosed. My two cents: I'm not sure this opinion won't be overturned or at least questioned. In making its sweeping statement that the defendant doesn't have to understand the information disclosed, it appears the Court of Appeals

placed great weight on the fact that N.C. Gen. Stat. § 20-16.2(b) allows law enforcement to obtain a blood sample from an unconscious person; a motorist whose condition obviously creates an inability to understand the information disclosed. Martinez was decided before Romano, which held that portion of the statute to be unconstitutional and declared a warrantless blood draw of an unconscious person violative of the Fourth Amendment. Even if that portion of the statute being unconstitutional does not carry the day, factually speaking this officer did a lot to communicate with the Spanish speaking Defendant in Martinez: during SFSTs, the officer called his dispatcher, who spoke Spanish, to have him translate commands during the test; he read Defendant his implied consent rights in English but provided him with a Spanish language version of those same rights in written form; he then called the dispatcher once more and placed him on speaker phone to answer any questions Defendant might have; Defendant signed the Spanish language version of the implied consent form and there was no evidence he could not read Spanish.

State v. Mung, 2016 N.C. App. LEXIS 1324 (December 20, 2016) Defendant pulled up to a checkpoint. The officer asked Defendant, in English, for his license and registration. Defendant produced his license but was unable to produce registration. Officer asked Defendant if the address on his license was correct and Defendant responded "yes." Officer told Defendant to exit the vehicle and Defendant complied. Officer administered three SFSTs, explaining them in English, all of which Defendant indicated he understood how to perform the test but failed. After being placed under arrest for DWI, Defendant, in English, stated "he couldn't get in more trouble, that he had already been arrested once for DWI" and that "he was here on a work visa and he couldn't get in trouble again." After being placed in the patrol vehicle, Defendant repeatedly apologized in English. Regarding chemical analysis, Defendant was read and provided and tangible copy of his rights in English pursuant to N.C. Gen. Stat. § 20-16.2. Officer then instructed Defendant in English how to perform the test and Defendant complied (0.13). At no point did Defendant state he did not understand or request an interpreter. Defendant argued in his motion to suppress that he was originally from Burma and did not understand

his rights or what was occurring on the grounds that he did not speak English and that he needed a Burmese interpreter. Similar to Martinez, this court relies on the fact that the statute permits unconscious persons to be tested without consent, thus proving admissibility is not conditioned on understanding. Again, that rationale makes no sense in light of State v. Romano (above).

c. **Exigent circumstances.**

i. ***Natural dissipation of alcohol not always an exigency*** – Missouri v. McNeely, 133 S. Ct. 1552 (2013) (the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every impaired driving case that justifies a warrantless, nonconsensual blood draw).

ii. State v. Romano, 785 S.E.2d 168 (N.C. Ct. App. April 19, 2016) Defendant, a combative drunk, was hospitalized and sedated. Defendant appeared to be so impaired he could not be awakened to hear his implied consent rights. On her own initiative, a nurse took an extra vial of blood for law enforcement. Law enforcement relied on N.C. Gen. Stat. § 20-16.2(b) and did not make the short trip to the magistrate's office to fill out the fill-in-the-blank form for a blood-draw warrant. Law enforcement accepted the extra vial and sent it off for testing. Trial court granted Defendant's Motion to suppress the warrantless and non-consensual blood test; based upon Missouri v. McNeely, no exigency existed justifying the warrantless search.

Note – there is a new NC Supreme Court opinion. Same conclusion but different citation and thus different case that should be cited.

iii. State v. Granger, 235 N.C. App. 157 (2014) Exigent circumstances existed for warrantless, non-consensual blood draw. Officer had concerns regarding dissipation of alcohol as it had been more than one hour since the motor vehicle accident; Defendant needed immediate medical care and complained of pain in several parts of his body; Officer concerned, if he left Defendant unattended to get a search warrant or waited longer for blood draw, Defendant would have been administered pain medication which would have contaminated the blood sample; Officer was

the lone officer with Defendant and investigating the matter; it would have taken Officer approximately 40 minutes round-trip to secure warrant).

iv. State v. McCrary, 237 N.C. App. 48 (2014) Exigent circumstances existed for warrantless, non-consensual blood draw. Defendant feigned a need for medical care; Officer leaving to get a warrant was not a reasonable option because Defendant was combative with officers and medical personnel; several officers were needed to ensure safety.

Excluding Evidence Related to the PBT

Especially in front of a jury, the more evidence you can get excluded pretrial, the better. For evidence related to the portable breath test to be admissible, the officer must comply with both (a) the manner of use and (b) instrument calibration requirements set forth by the Department of Health and Human Services. N.C. Gen. Stat. § 20-16.3.

1. Manner of Use – 10A NCAC 41b .0502 lists the requirements related to the officer's manner of use of screening test devices:

    a. The officer shall determine the driver has removed all food, drink, tobacco products, chewing gum, and other substances and objects from his mouth. Dental devices or oral jewelry need not be removed.

    b. Unless the driver volunteers the information that he has consumed an alcoholic beverage within the previous 15 minutes, the officer shall administer a screening test as soon as feasible. If a test made without observing a waiting period results in an alcohol concentration reading of 0.08 or more, the officer shall wait five minutes and administer an additional test. If the results of the additional test show an alcohol concentration reading more than 0.02 under the first reading, the officer shall disregard the first reading.

2. Instrument Calibration – 10A NCAC 41B .0503 dictates the requirements related to instrument calibration:

    a. The agency or operator shall verify instrument calibration of each alcohol screening test device at least once during each 30 day period of use. Verification shall be performed through an alcoholic breath simulator using simulator solution or an ethanol gas canister.

    b. Alcoholic breath simulators used exclusively to verify instrument calibration of alcohol screening test devices shall have the solution changed every 30 days or after 25 calibration tests, whichever occurs first.

    c. Ethanol gas canisters used exclusively to verify instrument calibration of alcohol screening test devices shall not be utilized beyond the expiration date on the canister.

    d. These requirements related to instrument calibration shall be recorded on an alcoholic breath simulator log or an ethanol gas canister log.

As a reminder, older case law and the former version of N.C. Gen. Stat. § 20-16.3 permitted the Court to consider the results of the alcosensor test in determining whether an officer had reasonable grounds to believe the defendant committed an implied consent offense. Moore v. Hodges, 116 N.C. App. 727 (1994).

The statutory language that allowed an officer (and the court) to consider the numerical reading of the alcosensor test in pretrial hearings was supplanted by the current version of N.C. Gen. Stat. § 20-16.3 in 2006. Now, at all stages – whether it be the officer out in the field or the judge in pretrial motions hearings or during trial – the only thing that can be considered is whether the driver showed a positive or negative result on the alcohol screening test. Under the current version of the statute, consideration of the actual alcosensor reading is always improper. N.C. Gen. Stat. § 20-16.3; State v. Overocker, 236 N.C. App. 423 (2014); State v. Townsend, 236 N.C. App. 456 (2014).

A sample Motion to exclude evidence related to the portable breath test is attached.

Right to Have Witness View Chemical Analysis

When interviewing the client and reviewing the court filings, try not to focus on the fact that your client blew a .10 on the EC IR-II. Instead, search for ways to exclude the chemical analysis. It's not always there; however, sometimes after your client is notified of his rights pursuant to N.C. Gen. Stat. § 16.2, he is intelligent enough to call a witness to appear and view the breath testing or blood extraction. A few times a year I run across cases where I believe the client's right to have a witness view the respective procedure has been violated. Make sure and ask your client and the witness the important questions:

1. When the client was notified of his right to a witness to view the procedure, did he actually call and reach a witness to come?
    a. If the client did not attempt to contact a witness, was he discouraged in any way by the officer?
    b. If the client did attempt and in fact contacted a witness, did the witness arrive in the room within a timely fashion to view the procedure? If yes, that ends the analysis. If not, keep going.
        i. Why was the witness not in the room at the time of the procedure?
        ii. Did the witness live too far away? Impossible to arrive within 30 minutes?
        iii. Did the witness arrive in a timely fashion but was told by the front desk or some other State agent to wait in the front area until your client is finished?
        iv. Was the witness told by a State agent to go to the Magistrate's Office where hopefully the client would be released into the witness' custody?
        v. Did the witness tell the State agent he or she was there to view the breath testing or blood extraction procedure?
        vi. Was the specific witness who arrived the same person Defendant contacted to view the testing procedure?

All of these questions are important to determine if your client's right to have a witness view the breath or blood testing procedure was violated or not. Ask them. I have attached a Motion and Order suppressing the EC/IR-II breath test results for a violation of the right to have a witness view the procedure. Below is the applicable case law; each decision is a highly fact intensive inquiry. Know the facts of each case. One final note – this is a completely separate issue from Knoll. Sometimes I see these issues being merged or confused as being the same issue. It's not.

Case law

1. Right to Witness to View Blood or Breath Testing Procedure

   a. **Prosecution friendly cases**

      i. State v. Munjal, 791 S.E.2d 459 (N.C. Ct. App. August 16, 2016) (unpublished) Defendant's motion to suppress for denial of the opportunity to have a witness observe his breath test was denied. This case places a burden on witness(es) to make reasonable efforts to gain access to Defendant. Facts: 20 minutes after being notified of his right to have a witness present for the breath test Defendant reached a witness by phone; Defendant did not, however, explain the details of needing a witness for the procedure just that he needed someone there. Trooper did not recall Defendant informing him he had someone on the way to witness the test. Before conducting the breath test Trooper asked the jail staff if there was a witness outside for Defendant. Trooper was not informed a witness was present. There were two passengers from the vehicle at the Magistrate's Office but they did not make any effort to attempt to observe the breath test despite visible signs hanging on the walls that provided instructions for witnesses needing access to the DWI breath testing room; instead, they were just concerned about what was necessary to get Defendant released on bond. Defendant submitted to two breath tests 42 and 45 minutes after being notified of his rights.

      ii. State v. Brown, 763 S.E.2d 338 (N.C. Ct. App. July 15, 2014) (unpublished) Defendant's motion to suppress for denial of the opportunity to have a witness observe his breath test was denied. This case (a) places burden on Defendant to notify officer a witness is on the way to view the procedure and (b) notes Defendant, who never told law enforcement his wife was on the way to view the procedure, signed a form indicating he waived his right to a breath test witness. Facts: At 4:30 a.m., before beginning the breath testing procedure, Defendant called his wife and left a voicemail indicating she needed to come to the jail to observe the test. Wife heard the voicemail at 4:40 a.m. and arrived at the police station approximately 10 minutes later. When wife arrived, she attempted to see her husband but was denied access by the magistrate. Defendant never told the charging officer nor the chemical analyst he wanted his wife present for the procedure and the officers did not know wife was present at the police station. After being notified of his rights, but before the breath test was performed, Defendant then signed a form waiving his right to a witness for purposes of viewing the breath test. Defendant submitted to two breath tests at 5:07 a.m. and 5:09 a.m.; his wife was not present in the breath testing room.

iii. State v. Hall, 230 N.C. App. 411 (2013) (unpublished) Defendant's motion to suppress for denial of the opportunity to have a witness observe his breath test was denied. Facts: Defendant, who was operating a vehicle with a passenger, was arrested for DWI and taken to the Detention Center's intoxilyzer room to conduct a breath test. Defendant requested a witness be present to view his procedure and, according to Defendant, at 11:50 p.m. solely called and spoke with his mother for that purpose. Trooper Speas testified the phone call to Defendant's mother occurred at 12:17 a.m. as Defendant was notified of his right to have a witness view the procedure at 12:16 a.m. Trooper Speas testified he waited until 12:46 a.m. to administer the breath test and that he checked the lobby to see if anyone was waiting for Defendant at approximately 12:50 a.m. After the breath test, when Trooper Speas transported Defendant to the Magistrate, he observed Defendant's passenger in the waiting area. Trooper Speas further testified there is a sign in the waiting area directing breath test witnesses to push a button to notify officers of their arrival. Trooper Speas stated no person pushed the button during this waiting period. In contradiction to Trooper Speas' testimony, Defendant's passenger (not mother) testified she arrived at the Detention Center somewhere between midnight and 12:10 a.m. and spoke to a magistrate at the front desk who stated Defendant was "not in the log." Defendant's passenger stated she approached the front desk on three separate occasions and was not able to reach Defendant. Defendant's passenger testified Defendant's mother arrived at the Detention Center somewhere between 12:15 a.m. and 12:20 a.m. In making its decision to deny Defendant's motion to suppress, the Court found Defendant's mother to not be credible in that she gave conflicting statements on her time of arrival at the Detention Center during examination. Next, the Court found "there was no evidence the witnesses identified they were there to witness the breath tests or that the witnesses pressed the button to alert Trooper Speas that they were present for the test" and thus there was no violation of Defendant's breath test rights pursuant to N.C. Gen. Stat. § 20-16.2. Finally, even if Defendant's passenger was present, the Court seemed to limit the right of a witness for the breath test specifically to the individual Defendant contacts to arrive and appear to view the procedure ("while there was a call to [Defendant's mother] in this case, there was not a call by Defendant to [Defendant's passenger] to observe his breathalyzer test"). The person Defendant did call, his mother, did not announce her presence to anyone nor requested to see Defendant while at the Sheriff's office. Finally, "presence in a law enforcement facility to observe a breathalyzer test is not enough; a witness must make 'reasonable efforts to gain access to a defendant.'" Apparently "reasonable efforts" means the specified witness must specifically tell law enforcement they are there to observe the breath test.

iv. State v. Hargis, 718 S.E.2d 737 (N.C. Ct. App. June 21, 2011) (unpublished) Defendant's motion to suppress for denial of the opportunity to have a witness observe his breath test was denied. Really, there was no beneficial evidence for Defendant other than the fact that he made a phone call; nothing else. Facts: Defendant was arrested for DWI and transported to the jail to administer a breath test. Defendant was notified of his breath test rights at 10:53 p.m. Defendant made a telephone call at 10:55 p.m. No evidence was presented that Defendant actually reached anyone via the telephone call, nor did Defendant inform the officers that he had reached anyone or that someone was coming to witness the test. Testimony was received that a law enforcement officer is routinely posted at the public entrance such that if a witness arrived the chemical analyst would have been notified. Further testimony was received that there is a sign in the lobby directing breath test witnesses to take the elevator to the jail where the breath tests are performed. No evidence was received that anyone actually arrived within 30 minutes. Officers waited 30 minutes from the time in which Defendant was notified of his breath test rights, but no witness arrived to observe the test. 40 minutes after being noticed of his breath test rights, Defendant blew a 0.12.

v. State v. Lyle, 2003 N.C. App. LEXIS 987 (May 20, 2003) (unpublished) Defendant's motion to suppress for denial of the opportunity to have a witness observe his breath test was denied. Facts: Defendant was arrested for DWI and taken to the breath testing facility. At 6:58 p.m., Defendant was advised of his rights pertaining to the breath test. Defendant attempted to telephone an attorney who was out of town. Defendant then attempted to telephone his wife, telling the officer he wanted her to be a witness. Defendant was unable to speak to his wife, did speak with an employee of his business, but did not request that employee come serve as a witness. At some point prior to administering the breath test, the officer spoke by telephone with "someone," and after the conversation told Defendant his wife was not present. Defendant's wife was in fact present in a timely fashion at the facility and, at one point, was told by the dispatcher that the "processing" was nearly complete. Defendant's wife did not inform any State agent she was there to be a witness to the breath test because she did not know at that time Defendant wanted her to be a witness. Defendant submitted to the breath test upon request at 7:37 p.m. Because neither the arresting officer nor Defendant knew his wife was present; because wife did not know or indicate she was there to be a witness for the breath test; and because a dispatcher knew wife was present but did not know Defendant had requested her to be a witness, Defendant was not entitled to suppression of his breath test results.

b. **Defense friendly cases**

i. State v. Hatley, 190 N.C. App. 639 (2008) Defendant was entitled to suppression of the breath test results. Facts: Defendant was arrested for DWI and taken to the breath testing facility. At 3:01 a.m., Defendant was advised of her rights pertaining to the breath test. At 3:04 a.m., Defendant indicated she wanted to call a witness, was successful in reaching her daughter, and advised her daughter was on the way. Officer could not specifically recall if he notified the front desk officer a witness was coming to view the test; however, it was his habit and practice to do so. At 3:35 a.m., upon request, Defendant submitted to the breath test as there was no indication her daughter had arrived. Defendant's daughter testified she received a phone call from her mother to witness the breath test at approximately 3:05 a.m. and that she arrived at the facility 15 minutes later. Upon arrival, daughter notified the front desk officer she was there for Defendant. Daughter then waited until she saw Defendant and the officer and was directed to the Magistrate's Office. Trial court incorrectly denied the motion to suppress because daughter "did not tell the officer she was there to be a witness." Both Trooper and Defendant knew Defendant reached a witness who was on the way. Daughter informed from desk she was there for Defendant and for a "DUI." A potential witness to a breath test need not state unequivocally and specifically he or she has been called to witness a breath test. Under these facts, particularly because the charging officer knew a witness had been contacted and was en route to observe the test, the trial court erred in denying Defendant's motion to suppress.

ii. State v. Buckheit, 223 N.C. App. 269 (2012) Defendant was entitled to suppression of the breath test results. Facts: Defendant was arrested for DWI and taken to the breath testing facility. At 10:33 p.m., Defendant was advised of his rights pertaining to the breath test. At 10:39 p.m., in the presence of the chemical analyst, Defendant made contact with a witness and asked her to come view the testing procedures. At 10:52 p.m. the witness arrived in the lobby and told the officer at the front desk she was there to be a witness for Defendant who had been arrested for DWI. The front desk officer told the witness to wait in the lobby; that Defendant was being processed. At 10:58 p.m. the witness sent a text message to Defendant attempting to notify him she was in the lobby. At 11:03 p.m., Defendant told the officer he did not want to take the test without his witness being present. At 11:09 p.m., Defendant was asked to submit to the test, all the while his witness was in the lobby. At no point did the officer ask the front desk if a witness was present and at no point did front desk personnel notify the officer a witness was present. Court held that

the witness, after her timely arrival, made reasonable efforts to gain access to Defendant but was prevented from doing so.

iii. State v. Myers, 118 N.C. App. 452 (1995) Defendant was entitled to suppression of the breath test results. Facts: Defendant was arrested for DWI. At the police station, Defendant told the officer he wanted his wife to come into the breathalyzer room with him; the officer said that might not be a good idea because she had been drinking also. Wife was there and available. However, when the officer discouraged her from being present she left to check on her children. 22 minutes after notification of his breath test rights the officer attempted to have Defendant submit to testing. Defendant responded, "Don't you have to wait 30 minutes?" The officer informed Defendant "Only for a witness. Do you want to contact a witness?" Defendant replied, "no," and submitted to the breath testing. Court found Defendant unequivocally asked his wife be permitted to observe the breath testing and that the officer's statement "that might not be a good idea" was tantamount to a refusal when the officer had no right to refuse the request. Fact that Defendant later took the breath test, after he was first refused permission to have his wife witness the test, could not be construed as a waiver of his right to have a witness.

Excluding Evidence of Unreliable Admissions

There are times when your client either (a) is in possession of lawfully prescribed medications that could be impairing which were specifically tested for but not present in the chemical analysis of her blood; or (b) "admits" she ingested a potentially impairing substance which was specifically tested for but not present in the chemical analysis of her blood.

In either event, consider filing a Motion *in limine* to exclude any and all reference to that particular medication or substance. Obviously, any statement or reference to your client possessing her lawfully prescribed medication which was not present in her system would be irrelevant, confuse the issues, have a tendency to mislead the jury, and force your client to defend against law abiding behavior.

A sample Motion and Order to exclude are attached.

Checkpoints

The burden is on the State to prove the constitutionality of the checkpoint. There is a two prong test the State must meet to satisfy this burden.

1. **Primary programmatic purpose of the checkpoint must be proper.**

    a. Proper purposes include license and registration checkpoints, impaired driving checkpoints, and checkpoints designed to intercept illegal aliens.

    b. Trial court may not simply accept the State's invocation of a proper purpose, but must carry out a close review of the scheme at issue.

    c. To meet this element, the State must present some admissible evidence of the purpose at the supervisory or programmatic level – it is not an invitation to probe the minds of the individual officers acting at the scene.

2. **The checkpoint, on balance, must be reasonable within the meaning of the Fourth Amendment.** This balancing test includes the following three factors (which have sub-factors):

    a. The importance of the purpose of the checkpoint.

    b. Whether the checkpoint is appropriately tailored to fit the primary purpose asserted.

        i. Did police spontaneously decide to set up the checkpoint on a whim?

        ii. Did police offer any particular reason why a stretch of road was chosen for the checkpoint?

        iii. Did the checkpoint have a predetermined starting or ending time?

        iv. Did police offer any reason why that particular time span was selected?

    c. Severity of interference with individual liberty.

        i. Checkpoint's potential interference with legitimate traffic?

        ii. Did police take steps to put drivers on notice of an approaching check point?

        iii. Was the checkpoint location selected by a supervising official, rather than by officers in the field?

        iv. Did police stop every vehicle that passed through the checkpoint or stop vehicles pursuant to a set pattern?

        v. Could drivers see visible signs of the officers' authority?

        vi. Were the officers conducting the checkpoint subject to any supervision?

vii. Did officers receive permission from their supervising officer to conduct the checkpoint?

3. **An additional requirement per case law and statute**. **State must introduce a written checkpoint policy in full force and effect at time of checkpoint.**

   a. State v. White, 753 S.E.2d 698 (N.C. Ct. App. February 4, 2014). Trial court did not err by granting Defendant's motion to suppress evidence obtained as a result of a checkpoint. Court concluded a lack of a written policy in full force and effect at the time of Defendant's stop at the checkpoint constituted a substantial violation of N.C. Gen. Stat. § 20-16.3A (requiring a written policy providing guidelines for checkpoints).

4. **Cases to know.**

   a. City of Indianapolis v. Edmund, 531 U.S. 32 (2000).

   b. State v. Rose, 170 N.C. App. 284 (2005).

   c. State v. Gabriel, 192 N.C. App. 517 (2008).

   d. State v. Veazey, 191 N.C. App. 181 (2008) (also referred to as Veazey I).

   e. State v. Veazey, 201 N.C. App. 398 (2009) (also referred to as Veazey II).

   f. State v. White, 753 S.E.2d 698 (N.C. Ct. App. February 4, 2014).

   g. State v. McDonald, 768 S.E.2d 913 (N.C. Ct. App. March 3, 2015).

   h. State v. Ashworth, 790 S.E.2d 173 (N.C. Ct. App. August 2, 2016).

Receiving Funds for Experts

In appropriate cases, I have had the court appoint and provide necessary funding for defense experts including a neurologist and, on multiple occasions, for a drug recognition expert. See two motions I have used as examples which are attached to this section.

N.C. Gen. Stat. § 7A-450(b) provides an indigent defendant with counsel "and other necessary expenses of representation." The North Carolina Supreme Court has ruled that assistance under this statute will be provided if there is a "reasonable likelihood that it will materially assist the defendant in the preparation of [his] defense or that without such help it is probable that the defendant will not receive a fair trial." State v. Robinson, 327 N.C. 346 (1990); State v. Gray, 292 N.C. 270 (1977).

Show the court in your motion why the expert testimony you seek is necessary, material, otherwise unavailable from other witnesses, and how a trial without this expert testimony would prevent your client from receiving a fair trial.

New Cases Regarding HGN, Statute of Limitations, and Example Knoll Motion

1. Statute of Limitations

   a. State v. Turner, 2016 N.C. App. LEXIS 1248 (N.C. Ct. App. Dec. 6, 2016) and State v. Curtis, 2016 N.C. App. LEXIS 1209 (N.C. Ct. App. Dec. 6, 2016). These cases, construing N.C. Gen. Stat. § 15-1, hold citations and magistrate's orders are not adequate to toll the statute of limitations and, because the State did not bring the case to trial or issue a pleading adequate to toll the statute of limitations within two years of the offense date, the State was barred from pursuing the action further.

   b. File the attached motion to dismiss. It is slightly modified from a version of the motion I received from an appellate attorney and I believe the model originated at the New Hanover Public Defender's Office.

2. HGN

   a. State v. Godwin, 786 S.E.2d 34 (N.C. Ct. App. April 19, 2016). Officer testified, without being qualified and accepted as an expert witness in HGN, that he administered HGN and observed 4 out of 6 possible indicators of impairment. Although officer completed a training course in DWI detection and SFSTs, there was never a formal offer by the State to tender the officer as an expert witness regarding HGN. Trial court erred in allowing a witness who had not been qualified as an expert under Rule 702(a) to testify as to the issue of impairment based on the HGN test results.

   Note – there is a new NC Supreme Court opinion – State v. Godwin, 2017 N.C. Lexis 393 (June 9, 2017) Officer still must be deemed an expert to testify in HGN. NC Supreme Court found there was sufficient evidence that the judge implicitly found officer to be an expert in HGN despite the fact that there was no formal tender and acceptance based upon foundational evidence regarding officer's training and experience and in overruling the defense objection to the testimony. Important point is that an officer still has to be an expert to testify regarding HGN results. Court ruled the trial court found this officer to implicitly be an expert although there was never any formal tender.

   b. State v. Killian, 792 S.E.2d 883 (N.C. Ct. App. November 15, 2016). Officer was not tendered nor accepted as an expert witness in HGN. Allowing him to testify regarding his interpretation of impairment based upon HGN results was plain error.

   c. State v. Torrence, 786 S.E.2d 40 (N.C. Ct. App. April 19, 2016). Trial court erred by admitting a deputy's testimony on the issue of impairment relating to the

results of the HGN test without first determining if he was qualified to give expert testimony under N.C. R. Evid. 702(a). Deputy was further allowed to testify, over objection, "if four or more clues exist that it's a 77 percent chance that they are a .10 or higher blood alcohol level." Trial court further erred by allowing the deputy to testify on the issue of specific alcohol concentration level relating to the results of the HGN test under N.C. R. Evid. 702(a1).

d. State v. Younts, 2017 N.C. App. LEXIS 563 (July 18, 2017). The State does not need to prove reliability of the HGN test when laying its foundation for admissibility. State v. Smart, 195 N.C. App. 752 (2009) obviated the need for the State to prove the HGN test is sufficiently reliable. The question presented is whether Smart's conclusion is still good law following North Carolina's adoption of the Daubert expert standard. The 2011 amendment to N.C. R. Evid. 702(a) does not require the State to lay a foundation regarding the reliability of the HGN test before an officer or other qualified expert is allowed to testify about the results of the HGN test. Rationale: The N.C. Supreme Court in Godwin concluded with the 2006 amendment to Rule 702 that the General Assembly clearly signaled HGN results are sufficiently reliable to be admitted. The Godwin holding is similar to the Smart holding that the State need not prove HGN's reliability. Accordingly, it appears Smart survived the General Assembly's 2011 amendment designating N.C. a Daubert state.

   i. My note – Smart and Godwin only deal with HGN's reliability with investigating alcohol impairment. It should be limited accordingly.

e. State v. Sauls, 2017 N.C. App. LEXIS 758 (September 19, 2017). Issue: Whether N.C. R. Evid. 702(a1) requires a law enforcement officer to be recognized ***explicitly*** as an expert witness before he may testify to the results of a HGN test. In this case the trooper had been with highway patrol since 2004, had training in SFST including HGN, completed refresher courses every year, and had participated in hundreds of DWI investigations. No formal tender was ever made. Defense counsel did not argue the trooper was not properly trained and qualified to testify, just that he had to be formally tendered as such. Under Godwin the **Court can implicitly find the law enforcement officer to be an expert in HGN assuming proper foundation**. This case, although a new case, adds nothing to Godwin.

f. State v. Barker, 2017 N.C. App. LEXIS 1082 (December 19, 2017). At trial, trooper was tendered and admitted as an expert in HGN. Defendant objected to that qualification which trial court overruled. On appeal, Defendant argued the trooper failed to provide necessary foundation to establish the reliability of HGN. Citing Godwin and Younts (holding Evidence Rule 702(a1) obviates the State's need to prove HGN is reliable), the court determined such a finding is "simply unnecessary."

3. Knoll

   a. See attached example motion.

4. Brady Motion

   a. See attached example motion.

5. Retrograde Extrapolation

   a. State v. Babich, 2017 N.C. App. LEXIS 133 (March 7, 2017). Retrograde extrapolation results depended on an assumption – that defendant was in a "post-absorptive state" – but where the expert had no evidence that defendant was in such a state, the expert's opinion was inadmissible because it was not properly tied to the facts of the case. Mathematical model used by state's expert is applicable only if the subject is in a "post-absorptive" or "post-peak" state – meaning alcohol is no longer entering the subject's bloodstream and thus her blood alcohol level is declining. Expert conceded she had no factual information from which she could assume that defendant was in a post-absorptive state. When expert offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive state, that assumption must be based on at least some underlying facts to support the assumption.

   b. State v. McPhaul, 2017 N.C. App. LEXIS 924 (November 7, 2017). Prosecution fingerprint expert's testimony should have been excluded because, while the expert explained the methodology used in analyzing the fingerprints, expert failed to tell the jury how she reliably applied that procedure to the facts of the case. Without further explanation for the expert's conclusions, the expert implicitly asked the jury to accept her expert opinion that the fingerprints found matched the defendant's. While typically the focus of an expert's testimony is the reliability of their methods used, rather than the application of that method to the case at hand, proffering party must develop the testimony in all respects. Unanimous opinion. Use this case to argue lack of proof as it relates to the Daubert prongs to have experts excluded.

   c. State v. Hayes, 2017 N.C. App. LEXIS 987 (November 21, 2017). Where the State's expert had no basis for assuming that alcohol was being eliminated from defendant's bloodstream at the time of the traffic stop, the State concedes that the expert's retrograde extrapolation testimony should not have been admitted. Given the lack of evidence of appreciable physical or mental impairment, the court concludes that the erroneously admitted retrograde extrapolation testimony prejudiced defendant by playing a pivotal role in determining the outcome of the trial. Conviction reversed.

6. Traffic Stop Turning Into Custodial Interrogation

a. State v. Burris – 2017 N.C. App. Lexis 175 (March 21, 2017). Where a police detective took Defendant's and his companion's driver's licenses, smelled alcohol on Defendant's person, told Defendant and his companion to "hang tight" in the hotel parking lot while he investigated the "suspicious person" call that had brought him to the hotel, and came back and questioned Defendant without returning his license or giving him Miranda warnings, Defendant's admission that he had been driving was inadmissible. Trial court's denial of Defendant's Motion to Suppress is reversed and case is remanded for a new trial.