DEFENSE OF DWI'S

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I. IS THE STOP VALID?

A. There must be reasonable suspicion based on objective facts that an individual is engaged in criminal activity, or violating a traffic law. If you are challenging reasonable suspicion for the stop, be aware that some motions are required to be made pre-trial since the Motor Vehicle Driver Protection Act. (MVDPA) There is no requirement in the statute that pre-trial motions be in writing. 20-38.6

1. Except in those situations in which there is at least articulable and reasonable suspicion that a driver is in violation of some law, stopping and detaining the driver is unreasonable under the Fourth Amendment.

   See: Delaware v. Prouse, 440 U.S. 648, 59 L.Ed. 2d 660, 99 S.Ct. 1391 (1979).

2. Erratic driving, speeding, justifies stop.

   See: Michigan v. Long, 463 U.S. 1032, 77 L.Ed. 2d 1201 (1983).

3. Weaving into the other lane justifies stop.

   See: State v. Green, 103 NC. App. 38 (1991)

   Weaving inside the lane is not enough.

   See: State v. Watkins, 111 NC App 766, rev 337 NC 437 (1994). See also: State v. Jacobs, 162 NC App 251 (2004). (weaving in the lane in an area near bars, coupled with the late hour of 1:43 am wan enough); **State v. Peele, 675 S.E.2d 682** anonymous tip plus one instance of weaving in lane is insufficient to provide reasonable suspicion.

   See also: State v. Fields, 676 S.E.2d 471 (NC 2009)

4. Faded tag justifies stop.

   See: State v. Hudson. 103 N.C. App. 708 (1991).

5. Driving excessively slowly and weaving in own lane justifies stop.

   See: State v. Jones. 386 S.E. 2d 217, 96 N.C. App. 389 (1989).
   State v. Aubin. 397 S.E. 2d 653. 100 N.C. App. 628 (1990).

6. Reliable admissible tips that car is carrying drugs justifies stop.

See: State v. Poczontek. 90 N.C. App. 455

7. N.C.G.S. 20-16.3a Properly executed impaired driving checks allows stop. N.C.G.S. 20-16. 3a governs impaired driving checks. The following is a copy of the roadblock statute as amended effective 12/01/06.

§ 20-16.3A. Checking stations and roadblocks.

(a) A law-enforcement agency may conduct checking stations to determine compliance with the provisions of this Chapter. If the agency is conducting a checking station for the purposes of determining compliance with this Chapter, it must:

(1) Repealed by Session Laws 2006-253, s. 4, effective December 1, 2006, and applicable to offenses committed on or after that date.

(2) Designate in advance the pattern both for stopping vehicles and for requesting drivers that are stopped to produce driver's license, registration, or insurance information.

(2a) Operate under a written policy that provides guidelines for the pattern, which need not be in writing. The policy may be either the agency's own policy, or if the agency does not have a written policy, it may be the policy of another law enforcement agency, and may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to produce drivers license, registration, or insurance information. If officers of a law enforcement agency are operating under another agency's policy, it must be stated in writing.

(3) Advise the public that an authorized checking station is being operated by having, at a minimum, one law enforcement vehicle with its blue light in operation during the conducting of the checking station.

(b) An officer who determines there is a reasonable suspicion that an occupant has violated a provision of this Chapter, or any other provision of law, may detain the driver to further investigate in accordance with law. The operator of any vehicle stopped at a checking station established under this subsection may be requested to submit to an alcohol screening test under G.S. 20-16.3 if during the course of the stop the officer determines the driver had previously consumed alcohol or has an open container of alcoholic beverage in the vehicle. The officer so requesting shall consider the results of any alcohol screening test or the driver's refusal in determining if there is reasonable suspicion to investigate further.

(c) Law enforcement agencies may conduct any type of checking station or roadblock as long as it is established and operated in accordance with the provisions of the United States Constitution and the Constitution of North Carolina.

(d) The placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity. This subsection shall not be grounds for a motion to suppress or a defense to any offense arising out of the operation of a checking station. (1983, c. 435, s. 22; 2006-253, s. 4.)

You must read and be familiar with Delaware v. Prouse 99 S. Ct. 1391, 440 US 648 (1979) whenever challenging any roadblock. Prouse made it clear that anytime a vehicle is stopped it is a seizure which must withstand Fourth Amendment scrutiny. However, Prouse did not address DWI checkpoints. Ten years later in Michigan Department of State Police v. Sitz 496 US 444, 110 S. Ct 2481, the Supreme Court in addressing DWI checkpoints held that "An impaired driving checkpoint conducted under guidelines that require officers to stop every vehicle and briefly examine the driver for signs of intoxication is constitutional." This was addressed and codified in NC's old version of 20-163.3A. The roadblock statute was amended on 12/01/06.

The legislature deleted the requirement that agencies "develop a systematic plan in advance, taking into account the likelihood of detecting impaired drivers, traffic conditions, number of vehicles to be stopped, and the convenience of the motoring public." The statute now gives officers discretion in requesting alco-sensors. The plan does not have to be in writing although it must "operate under a written policy that provides guidelines." The officers are no longer required to "mark the area" (ie post signs), but they must have one cop car with blue lights in operation.

Read State v. Rose 170 NC App 284 (2005), which states "We hold that the trial court, in considering the constitutionality of the checkpoint, failed to make findings of fact regarding the "primary programmatic purpose" of the checkpoint required by City of Indianapolis v. Edmond 531 US 32, 121 S. Ct. 447 (2000), and failed to conduct the separate analyses of the reasonableness of the checkpoint mandated by Illinois v. Lidster 540 US 419, 124 S. Ct. 885 (2004)." Rose created numerous requirements for a checkpoint to be lawful. The 2006 changes to the statute seem to be an attempt to legislatively over-rule Rose. I still believe that Rose, which grew from US Supreme Court cases, is good law and that the state must meet its two prong test.

Rose was followed by State v. Burroughs. 185 NC App 496, 648 S.E.2d 561, 565-66 (2007), which essentially held that the defendant has the burden of proof that the "stated purpose of the checkpoint (sobriety) was a mask for another unconstitutional purpose". Burroughs left the second prong requirement in place; holding that the state is still required "to prove that the checkpoint was conducted in a constitutional manner".

However State v. Veazey, 662 S.E.2d 683 (NC 2008), held that

> "Our Court has previously held that where there is no evidence in the record to contradict the State's proffered purpose for a checkpoint, a trial court may rely on the testifying police officer's

> assertion of a legitimate primary purpose". State v Burroughs, 185 N.C. App. 496, 648 S.E.2d 561, 565-66 (2007). However, where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose. *Id.* At ___, 648 S.E.2d at 565. In such cases, the trial court "may not 'simply accept the State's invocation' of a proper purpose, but instead must 'carry out a close review of the scheme at issue.'" Rose, N.C. App. At 289, 612 S.E.2d at 339.

See also State v. Gabriel, 665 S.E.2d 581 (NC 2008) where the Court of Appeals again required examination of "the primary programmatic purpose and the reasonableness of the driver's license checkpoint.

8. Lawful turn before routine police checkpoint does not constitute reasonable suspicion.

See: Murphy v. Commonwealth, 384 S.E. 2d 125 (Va. App. 1989).

In Murphy v. Commonwealth, the arresting officer observed defendant's vehicle make a lawful right turn onto a dead end street 350 feet from the checkpoint. The officer pursued and stopped the vehicle. The state argued that the stop was lawful based on the defendant's apparent attempt to avoid the roadblock. The Virginia Court of Appeals states:

> While Murphy's turn onto the dead end street may have justified a "hunch" that the driver might be in violation of the traffic law or might be involved in criminal activity, a legal turn into an existing road prior to reaching a checkpoint, standing alone, does not create reasonable suspicion that the operator is involved in criminal activity.

See also: State v. Foreman, 133 NC App 292 (1999) modified and affirmed 351 NC 627 (2000)

See also: Pooler v. Motor Vehicle Division, 88 Or App. 475, 746 P.2d 716 (1987) (a legal U-turn does not itself constitute reasonable suspicion.); Stroud v. Commonwealth, 6 Va. App. 633, 370 S.E.2d 721 (1988); Michigan Depart of State Police v. Sitz: 496 S.S. 44, 110 S.Ct. 2481 (1990).

9. Failure to wear seatbelt justifies stop.

10. Stopping a car based on a police broadcast.

State v. McArn, 159 N.C. App. 209, 582 S.E.2d 371 (2003)
HELD: Trial court should have suppressed evidence of cocaine seized in a stop when police officer received a police dispatch based on an anonymous tip. Even though the officer stopped a car that "exactly matched the description" of the car in an area where

there were prior complaints of drug activity "the tip on its own was not sufficiently reliable to create a reasonable suspicion of criminal activity." Affirming holding in Alabama v. White, 496 US 325 (1990) that a stop based on an anonymous tip is not sufficient to justify a seizure when the tip does not possess sufficient indicia of reliability. (such as information about the identity of the tipster, basis for the tipster's knowledge, accurate prediction of defendant's actions or independent observations by the officer.)
State v. Hughes, 353 N.C. 200, 539 S.E.2d 625 (2000)
Court of Appeals upheld the trial court's order suppressing drugs seized based on information from a confidential reliable informant. Even though the CRI correctly described the defendant as over 300 pounds, 6' feet or taller, between 20-30 years old and clean cut wearing baggy pants and predicted that he would be at the bus station carrying an overnight bag and leaving by taxi "the information provided did not contain the range of details required by Alabama v. White and Illinois v. Gates to sufficiently predict defendant's specific future actions but was instead peppered with uncertainties and generalities."
See also:

Alabama v. White, 496 US 325 (1990)
Florida v. J.L., 529 US 266 (2000)
State v. William Downing, NC Ct App 4/19/05
State v. Brown, 142 NC App 332, 542 S.E.2d 537 (2001)
U.S. v. Everett Brown, Fourth Circuit Court of Appeals, 3/25/05

11. Proximity to crime is not enough.

See: **State v. Cooper**, 2007 Court of Appeals; State v. Murray, 666 S.E.2d 205 (NC 2008) holding that an investigatory car stop in a problem area with reports of break ins of cars and businesses was based on an "unparticularized suspicion or hunch" and wan not sufficient justification for a stop.

12. Stopping someone because they're in a high drug area is not enough.

See: Brown v. Texas, 443U.S. 47, 61 L.Ed. 2d *357*, 99 S.Ct. 2637 (1979); State v. Fleming 106 N.C. App. 165 (1992). See also Indianapolis v. Edmund 531 US 32, 121 S Ct. (2000)

13. Is sitting too long at a red light Reasonable Suspicion?

See: State v. Roberson, 163 NC App

8 – 10 seconds is not enough

State v. Barnard, 645 S.E.2d 780 (N.C. App. 2007)

30 seconds is enough

14. Develop the facts.

a. Weaving within lane, absent any other moving violations, should not be sufficient. On voir-dire, establish that there were no moving violations; it is not unusual to move about within one's own lane; it is not against the law to do so; many people who are not impaired do so. Explore how long, for what distance the officer followed the defendant, etc. Were there mechanical problems with the car, which account for bad driving, unusual weather conditions, defendant's unfamiliarity with the area, etc.?

15. Pretext

Don't forget that even something that appears to be a valid stop may in fact be pretextual in nature. The standard is not what a reasonable officer could do (i.e. stop a vehicle for some violation) but what a reasonable officer would do.

See: State v. Ivey 360 NC 562 (2006); State v. Aubin 397 S.E. 2d 653 (1990); U.S. V. Guzman, 864 F. 2d 1512 (1988). See also Whren v. US, 517 US 806, 116 S. Ct. 1769 (1996)

Indianapolis v. Edmond, 531 U.S. 32 (2000) "In Whren, we held that an individual officer's subjective intentions are irrelevant to the Fourth Amendment validity of a traffic stop that is justified objectively by probable cause to believe that a traffic violation has occurred". "Whren therefore reinforces the principle that, while "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," 517 U.S., at 813, programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion. Accordingly, Whren does not preclude an inquiry into programmatic purpose in such contexts".

Explore the facts in your case and develop an argument that the officer was looking for something other than the reason he gave for initiating the stop (i.e., he's fishing).

16. State must prove officer had jurisdiction. However, see 20-38.2 of 2006 MVDPA

"A law enforcement officer who is investigating an implied consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out of state, and to make arrests an any place within the state.

17. The great unanswered question: Does failure to use a turn signal when no traffic is affected give rise to probable cause for a stop or not? State v. Ivey 26 NC 562 (2006) decided by the Court of Appeals on 8/18/06 revives the old fashioned rule that an

automobile stop requires that "police have probable cause to believe that a traffic violation has occurred." (citing Whren v. US) The officer's stop of a car for failing to use a turn signal when no other vehicle was affected violated the defendant's Fourth Amendment rights and the weapon seized was suppressed as poison fruit from an illegal stop.
Then in 2008, the NC Supreme Court in a case called State v. Styles attempted to "over-rule" State v. Ivey. I think Styles is distinguishable. You must read both cases carefully yourself however one of the distinctions that is clear is that the arresting officer in Ivey was not affected by the defendant's failure to signal. The Supreme Court in Ivey found that the officer in Styles was "immediately behind the defendant and was impacted by the driver's failure to signal.

II. CAN THE STATE PROVE THAT THE DEFENDANT WAS DRIVING?

A. Corpus Delicti

If there's no officer or witness who can put the defendant behind the wheel, did the defendant admit to driving? If he did, there's a corpus delicti issue. The state must prove that the defendant's "confession is supported by substantial independent evidence tending to establish its trustworthiness...." See State v. Trexler, 316 N.C. 528 (1986).

See also State v. Smith decided by the NC Supreme Court on 12/08/08, which is an excellent discussion on corpus delicti. "Under the corpus delicti rule, the State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that supports the facts underlying the confession". "Parker, requires that the corroborating evidence supporting defendant's extrajudicial confession be substantial and independent. 315 N.C. 236, 337 S.E.2d 495."

B. The engine must be running.

If the police arrive and the vehicle is not in motion, i.e., it is parked or pulled over; the state may not be able to prove operation. The definition of driving requires that the defendant is "in actual physical control of a vehicle which is in motion or which has the engine running." State v. Fields, 77 N.C. App. 404, 335 S.E. 2d 69 (1985). The definition of driver is found in G.S. 20.4.01(7) Of course, the state can prove this with circumstantial evidence.

C. The state must prove the defendant was operating on a public highway. street. or a public vehicular area.

These definitions are found in 20-138. 1 and 20-4.01 (13) (32) and (46). The definitions of public vehicular area are broader than that of streets and highways and include areas that would not support a conviction for DWLR (DWLR only applies to driving on highways). But still requires that the driving be on an area that is "generally open to and used by the public for vehicular area. "It excludes any private property not generally open to and used by the public."

State v. Snyder, 343 N.C. 61(1996). The 2006 changes in the MVDPA deleted the requirement that the area be generally open to the public.

D. The state must prove the defendant was operating a vehicle.

The new DWI statue at 20-138.1 (e) excludes only horses. (The old version of the statute said "vehicle does not include a horse, bicycle or lawnmower.") You can now be charged with DWI on a bicycle or lawnmower.

III. MOTION TO QUASH. DISMISS OR SUPPRESS

A. Unsigned Citations

N.C.G.S. 15A-302 requires that a copy of the citation be delivered to the defendant who may sign on the original. If the defendant refuses to sign, the officer must sign the original indicating that he delivered a copy to the defendant.

The remedy is a motion to quash. See: State v. Ferguson. 105 N.C. App. 692 (1992).

B. No finding of probable cause by magistrate as required by 15A -511.

N.C.G.S. 15A-511requires that a police officer who makes an arrest without a warrant must take the defendant before a magistrate. The magistrate must determine that there is probable cause to believe a crime has been committed by the defendant and that there is probable cause for his detention. The N.C. citation has a space in the top left hand corner where the magistrate signs, indicating that the defendant "has been arrested without a warrant and there is probable cause for his detention on the stated charges." Failure to comply with this requirement is arguably a constitutional as well as a statutory violation.

C. Knoll/Delay Violations

See: 15A 501, 511, and 534
State v. Knoll, 322 N.C. 535, (1988)

See: State v. Hill, 277 N.C. 547 (1971).
State v. Ham, 105 N.C. App. 658 (1992).
U.S. v. Canane, 622 F. Supp. 279 (D.C.N.C. 1985)

There are additional requirements related to Knoll that are required of the state in 20-38.4 in the 2006 MVDPA:

1. Notify defendants in writing of procedures to allow witnesses to chemical analyses and to have witnesses appear at the jail to observe the defendant's

condition; person unable to make bond to list all persons and phone numbers they wish to contact.

2. Judge and sheriff shall establish procedure for access to witnesses to intoxilyzer and set up procedure for detainees to get alternate blood or urine test.
3. Signs in jail telling witnesses how to get access to intoxilyzer room.

IV. THE STOP WAS VALID BUT THERE WAS INSUFFICIENT PROBABLE CAUSE TO ARREST.

Again, this requires exploring and developing the facts or the lack thereof. An officer may have had reasonable suspicion in his or her own mind to stop the defendant, but there is not probable cause to arrest. For example, there may have been weaving outside the lane and slow driving (enough to stop), and there may have the odor of alcohol about the person. If this is the only basis the officer gives for arrest (no sobriety tests), then that's probably not enough for an arrest.

This situation often occurs at Operation Eagle stops or license checks. The officer will have observed very little driving and in the absence of sobriety tests there may be no probable cause to arrest. This is also an issue when the only basis of the stop is speeding.

The field alcohol screening test devices (alco-sensor) may be admissible in court to show probable cause to arrest, but only if the State proves compliances with the DEHNR regulations (see 20-16.3 and the DHHS regulations). [The defendant removes all food, drink, tobacco; wait adds 5 minutes and do a second test; must use approved device, device must be calibrated once every 30 days] The results are no longer admissible under the new statute all the officer can testify to is whether the results were positive or negative. 20-16.3 (d)2 You need to understand the standardized field sobriety tests and the horizontal gaze nystagmus. Proper cross-examination on the results of these tests can be the difference in whether or not a Judge makes a finding that there was or was not probable cause to arrest.

§ 20-16.3. Alcohol screening tests required of certain drivers; approval of test devices and manner of use by Department of Health and Human Services; use of test results or refusal.

(a) When Alcohol Screening Test May Be Required; Not an Arrest. – A law-enforcement officer may require the driver of a vehicle to submit to an alcohol screening test within a relevant time after the driving if the officer has:

(1) Reasonable grounds to believe that the driver has consumed alcohol and has:
   a. Committed a moving traffic violation; or
   b. Been involved in an accident or collision; or

(2) An articulable and reasonable suspicion that the driver has committed an implied-consent offense under G.S. 20-16.2, and the driver has been

lawfully stopped for a driver's license check or otherwise lawfully stopped or lawfully encountered by the officer in the course of the performance of the officer's duties.

Requiring a driver to submit to an alcohol screening test in accordance with this section does not in itself constitute an arrest.

(b) Approval of Screening Devices and Manner of Use. – The Department of Health and Human Services is directed to examine and approve devices suitable for use by law-enforcement officers in making on-the-scene tests of drivers for alcohol concentration. For each alcohol screening device or class of devices approved, the Department must adopt regulations governing the manner of use of the device. For any alcohol screening device that tests the breath of a driver, the Department is directed to specify in its regulations the shortest feasible minimum waiting period that does not produce an unacceptably high number of false positive test results.

(c) Tests Must Be Made with Approved Devices and in Approved Manner. – No screening test for alcohol concentration is a valid one under this section unless the device used is one approved by the Department and the screening test is conducted in accordance with the applicable regulations of the Department as to the manner of its use.

(d) Use of Screening Test Results or Refusal by Officer. – The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result, or a driver's refusal to submit may be used by a law-enforcement officer, is admissible in a court, or may also be used by an administrative agency in determining if there are reasonable grounds for believing:

(1) That the driver has committed an implied-consent offense under G.S. 20-16.2; and

(2) That the driver had consumed alcohol and that the driver had in his or her body previously consumed alcohol, but not to prove a particular alcohol concentration. Negative results on the alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged impairment is caused by an impairing substance other than alcohol. (1973, c. 312, s. 1; c. 476, s. 128; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 435, s. 12; 2006-253, s. 7.)

Cross-Examining on the Horizontal Gaze Nystagmus Test (HGN)

The HGN test has rarely been admitted into evidence in the NC for the past 10 years based on State v. Helms 127NC App 375 (1997). Helms held that the HGN is a scientific test which is

only admissible following a proper foundation. Helms further held that the HGN test represents specialized scientific knowledge and principles that must be presented by a qualified expert.

In Mecklenburg County over the past 10 years, the DA's have made no effort to admit the HGN into evidence because they did not have or hire a scientific expert who was qualified to testify about the HGN.

The Motor Vehicle protection act of 2006 changed this and purports to make the HGN admissible by rewriting GS 8C1 Rule 702 as follows:

Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

Although the state will argue otherwise, I believe this new language simply allows an officer to testify about the results of the HGN if he/she is qualified as an expert and/or if he/she holds a current certification as a Drug Recognition Expert issued by the stat DHHS. In cross-examining an officer about the results of an HGN the first area to explore is whether or not they qualify as an expert. If they do not, their testimony is still inadmissible under Helms.

1. The underlying theory of the HGN is that alcohol affects the automatic tracking mechanism of the eye.
2. Nystagmus is the natural, involuntary jerking of the eyeballs which occurs when a person focuses on objects within their field of vision.
3. HGN attempts to measure the angle of onset of the involuntary pendular (back and forth) movement of the eyeball as it tracks a moving object.
4. A person moves his eye sideways from a straight ahead position to a 45 degree angle, and as they do so the officer estimates at what point the eye begins to jerk.
5. Alcohol is said to make the jerking more distinct and more noticeable.

6. Based on at what angle the eye begins to jerk, cop estimates, BAC.
7. Cops have been taught that if HGN is observed at a 45 degree angle, a person is probably .10 or more. Nystagmus at a 42 degree angle supposedly indicates an alcohol reading of approximately .08.
8. Before starting, the law enforcement officer should check for resting nystagmus, tracking ability and pupil size. Unequal pupil size and unequal tracking indicates medical rather than alcohol impairment.
9. Do not have an instrument which measures angle such as a protractor?
10. You have to estimate the angle at which HGN is observed?
11. Also, it's important you hold a pen or a flashlight at a certain distance in front of the person's eye?
12. Ruler to measure?
13. Cross-examination: There is a great amount of debate in scientific community about the correlation between the degree of onset of HGN and BAC.
14. Expert or training in opthamology?
    Neurology?
    Pharmacology?
15. Ask the officer: What training he/she has had about the neurological basis and the reliability of the relationship, if any, between alcohol consumption and Nystagmus.
16. Several physical conditions other than alcohol consumption can cause Nystagmus such as:
    lack of sleep
    Loss of blood
    Fever
    Water in the inner ear
    Hypertension
    Motion sickness
    Allergic reactions
    Eye muscle fatigue
    Glaucoma
    Inner ear problems
17. Did you ask defendant what medication he/she is taking? Isn't it true that several drugs that can cause Nystagmus such as:
    Anti-inflammatories like advil, aspirin
    Anti-histamines
    Antibiotics
    Muscle relaxers and sleep aids such as: Klonopin, Clonazeparm, Diazeparm can also affect the validity of the HGN.

The NHTSA requires that the officer administer the test properly. The requirements are:

- The officer stands directly in front of the defendant.
- The officer gives the test outside of the vehicle in a well lit area.
- The defendant stands with his feet together.
- The defendant removes glasses.
- The officer determines whether or not the defendant is wearing hard contact lenses.

- The officer positions the pen (or finger whatever is being used as the stimulus) 12-15 inches from the nose and slightly above eye level.
- The officer makes sure the suspect is not facing rotating lights, strobe lights, any moving lights.

There are six clues that are considered to be signs of impairment.

1. Onset of Nystagmus in the right eye before 45 degrees.
2. Onset of Nystagmus in the left eye before 45 degrees.
3. Moderate to distinct Nystagmus (jerking) in the right eye when moved as far as possible to the right.
4. Moderate to distinct Nystagmus (jerking) in the left eye when moved as far as possible to the left.
5. Lack of smooth pursuit in the right eye.
6. Lack of smooth pursuit in the left eye.

The NHTSA studies have determined that the HGN has an accuracy rate of 77%. This depends on the test being administered and interpreted correctly. Be sure to cross-examine on the officer's qualifications and training (or lack thereof); the officer's understanding of the physical conditions and diseases, medications, and exterior conditions that can cause a defendant to have Nystagmus or lack of smooth pursuit.

Consumption of caffeine, nicotine or aspirin can lead to Nystagmus.

Numerous diseases such as measles, syphilis, arteriosclerosis, muscular dystrophy, influenza, streptococcus infections, vertigo, Korsa Koffs Syndrome, brain damage, epilepsy, conjunctivitis have all been shown to cause Nystagmus.

Cross-Examining Officers on Field Sobriety Tests

A. "Standardized Field Sobriety Tests" are neither standard nor reliable. The National Highway Traffic Safety Administration (NHTSA) has developed several physical "tests" which are intended to determine whether or not a driver is impaired and to develop probable cause for arrest. Although they are referred to as 'Standardized Field Sobriety Tests", the manner in which they are administered in the field often falls far short of being "standard." Additionally, other than the horizontal gaze nystagmus which is not addressed here, of the four roadside tests routinely administered in NC: the walk and turn, the one leg stand, finger to nose, and the sway test; only two have been validated following research. Even those that have been validated have a very high error rate and are only valid if properly administered.

1. The only three physical tests which the NHTSA's research has determined to be accurate and reliable are:

    a. The walk and turn (68% accuracy rate)
    b. The one-leg stand (65% accuracy rate)
    c. The horizontal gaze nystagmus (77% accuracy rate)

The finger-to-nose and the "sway" test have not been scientifically validated. Studies that were sponsored by the NHTSA were conducted in California in 1977 and 1981 and later in Maryland, D.C., Virginia, and North Carolina in 1983. The research indicated that three tests: the one-leg stand, walk and turn, and horizontal gaze nystagmus, when properly administered; were reliable in estimating that a suspect's blood alcohol content exceeded .10. There has been very little research to validate these tests in determining if a defendant's blood alcohol content is .08, and there would arguably be an even higher error rate in determining a lower blood alcohol content.

When the walk and turn is properly administered and evaluated, the NHTSA's (20 year old) research has found it to be 68% accurate in distinguishing blood alcohol contents above .10. Hence, the existence of a 32% error rate. The NHTSA research regarding the one-leg stand indicates that it is 65% reliable in determining a blood alcohol content in excess of .10, indicating a 35% error rate. The same study found the horizontal gaze nystagmus to be 77% accurate.

2. A 1991 study found a much higher error rate.

A 1991 study designed by psychologist Spurgeon Cole and attorney Ronnie Cole, which was published in the Law and Science DWI Journal volume 6, number 2, found a 46% error rate. This Clemson University study involved experienced police officers administering field sobriety tests to 21 adults who were completely alcohol free. The officer administered the three NHTSA standard field sobriety tests: the horizontal gaze nystagmus, the one-leg stand, and the walk and turn. A remarkable 46% of the police officers' responses misdiagnosed intoxication, indicating that the completely sober

subjects were too intoxicated to drive.

The same study also asked experienced police officers to evaluate subject's ability to drive vs. impairment by watching the same 21 sober adults perform tests that are more indicative of normal physical and mental faculties. These normal physical and mental functions included counting from one to ten, reciting their social security number and driver's license number, walking in a normal manner, turning around and walking again. This study resulted in a much lower rate, only 14%.

3. <u>The finger-to-nose, "sway," and alphabet test have not been scientifically validated.</u>

The NHTSA Manual suggests some other tests that can be administered "while the suspect is still inside the vehicle" such as: reciting the alphabet, countdown tests, and finger count tests. However, the manual itself points out " that these kinds of tests have not been scientifically validated," NHTSA DWI Detection and Standardized Field Sobriety Testing, Instructor Manual Session VI.

Clues on Exiting the Car

The NHTSA teaches officers to look for clues when the defendant exits the car. Cross-examine the officer on each of these things the defendant did correctly.

How the driver steps and walks from the vehicle and actions or behavior during the exit sequence may provide important evidence of impairment. Be alert to the driver who:

- shows angry or unusual reactions;
- cannot follow instructions;
- cannot open the door;
- leaves the vehicle in gear;
- "climbs" out of the vehicle;
- leans against vehicle;
- keeps hands on vehicle for balance.

The NHTSA's recommended standard field sobriety tests are only valid if properly administered.

1. The NHTSA advises officers that the field sobriety tests are only valid when:

    - "The tests are administered in the prescribed, standardized manner"
    - "The standardized clues are used to assess the suspect's performance"
    - "The standardized criteria are employed to interpret that performance"

"If any one of the standardized field sobriety test elements is changed, the validity is compromised." NHTSA DWI Detection Student Manual, Section VIII. "The standardized field sobriety tests are not at all flexible. They must be administered each time, exactly as outlined in this course." NHTSA Instructors Manual, preface page 10.

2. The NHTSA recommends that the tests be administered under ideal conditions that they are not flexible and must be administered as taught by the NHTSA and that police officers performance should be monitored and evaluated every six months.

    "The DWI Enforcement performance of officers completing this training should be monitored and evaluated on a regular basis (e.g. every six months). This assessment should examine such factors as:

    - The number of DWI arrests recorded by the graduate
    - Average BAC of those arrests
    - Percentage of arrests resulting in DWI conviction

    NHTSA Instructor's Manual, preface page 19.

3. Requirements for proper administration of the walk and turn and the one-leg stand.

Proper conditions for the walk and turn require that the "test be performed on a dry, hard, level, non-slippery surface and relatively safe conditions". If not, the research recommends: "1) Suspect be asked to perform the test elsewhere; or 2) Only horizontal gaze nystagmus be administered." NHTSA Instructor's Manual VIII page 41.

a. Walk and turn Instructional Phase: Instruct suspects to place right foot in front of left, feet on the line, in a heel to toe position, place arms down by sides. Instruct suspect to maintain position throughout instruction; do not begin walking until directly told to do so; Ask suspect: "do you understand?" The officer must receive affirmative response before proceeding to actual test.

b. Walk and turn walking phase: Take nine steps, along the line, heel-to-toe, place arms at sides, count out loud one through nine. When you get to nine, keep the front foot on the line and turn on the line by taking several small steps with the other foot. Come back taking nine steps, heel-to-toe on the line, arms by side, counting out loud. Suspect should be told to watch feet at all times. "Point out to students that it is actually easier to perform the test if the person watches the feet" NHTSA Instructor's Manual, Section VIII page 46. Tell the suspect once you start, do not stop until the test is complete. Officers should demonstrate the test.

c. Interpretation of the walk and turn.

There are eight clues the officer should observe.

1. Cannot balance while listening to instructions

"Emphasize that this clue is recorded only if the feet actually break

apart…Do not record the clue simply because suspect raises arms or wobbles slightly." NHTSA Instructor's Manual VIII page49

2. Starts before instructions are finished.
   "Emphasize that this clue cannot be recorded unless suspect was told not to start walking until directed to do so." NHTSA Instructor's Manual VIII page 49
3. Stops while walking.
4. Does not touch heel to toe. "A gap of at least ½ inch is necessary to record this clue." NHTSA Instructor's Manual page 49
5. Steps off the line.
6. Uses arms to balance. "A movement of the arms of six or more inches is required to record this clue" NHTSA Instructor's Manual page 49
7. Improper turn.
8. Incorrect number of steps. "Mistakes in the verbal count only do not justify recording this clue" NHTSA Instructor's Manual page 49

If the suspect exhibits two or more clues, the blood alcohol content is probably above .10. "Individuals over 65 years of age, with back, leg or middle ear problems had difficulty performing this test." Manual VIII page 11

4. Requirements for proper administration of the one leg stand.

1. One-leg stand instructional phase. The officer should tell the suspect to stand with feel together, arms by side, until told to begin.

2. One- leg stand balance and counting phase. The officer tells the suspect to raise one leg, either leg the suspect chooses, approximately six inches off the ground, foot pointed out, keep eyes on elevated foot, count out loud from 1001 to 1030, one thousand one, one thousand two to one thousand thirty. Ask the defendant if they understand before beginning test. The officer should demonstrate.

Interpretation of one-leg stand. There are four clues:

1. Swaying. "Swaying means a very distinct, very noticeable side-to-side or front-to-back movement…slight tremors of the foot or body should not be interpreted as swaying." NHTSA Instructor's Manual VIII page 59

2. Using the arms to balance. "a movement of the arms of six inches from the side is sufficient to record this clue" NHTSA Instructor's Manual VIII page 59
3. Hopping.
4. Putting the food down.- putting the foot down one or more times is only one clue. Manual at VIII-19

If the person exhibits at least two out of four possible clues, the suspect's blood alcohol content is probably above .10. This test is not recommended for individuals over 65 years of age or 50 pounds or more overweight. Individual with back, leg, or middle ear problems had difficulty performing this test. Individuals wearing heels of more than two inches should be allowed to remove their shoes.

C. Explanations for "failing" other than impairment

1. Conditions of scene.
    a. Road. Not flat, level, slope, no line, uneven pavement, passing traffic.
    b. Lighting. No lighting, "take down lights" in the defendant's eyes.

2. Nervousness.
3. Shoes. Heels, certain types of boots.
4. Defendant's physical condition.
    a. Leg injuries, ankles, knees, back or leg problems.

b. Over 65 years old.

c. Overweight.

d. Inner or middle ear problems.

e. Other causes of imbalance.

f. Fatigue.

g. Attention deficit disorder. (ADD) Tests are "divided attention" tasks. ADD is characterized by difficulty following directions.

5. Alphabet; counting.- lack of education, ADHD, see also Pennsylvania v. Muniz 110 S. Ct. 2636 (1990)

The NHTSA can be ordered by visiting www.ntis.gov and then clicking on Publications and Subscriptions.

V. MOTION TO SUPPRESS INTOXILYZER (INTOXIMETER) AFFIDAVIT AND/OR INTOXILYZER RESULTS.

A. The gift of Melendez-Diaz v. Massachusetts

1. What one hand giveth the other hand taketh away.

I'm sure you are all aware of the June 2009 US Supreme Court case of Menlendez-Diaz which held that the Sixth Amendment confrontation clause is still alive in the US. It held that lab reports are "testimonial" and therefore Crawford v. Washington, 541 U.S. 36 requires the analysts to testify in person and be subject to cross-examination.

We all enjoyed a brief moment of joy while we suppressed intoximeter results and blood test results when the chemical analyst was not present in Court to be cross-examined. This sometimes led to acquittals and sometimes led to convictions or guilty pleas through which we avoided the requirement that our clients install the ignition interlock when the results were .15 or higher. (This leads to another whole realm of problems and discussions regarding the exact procedure and language to be used so that DMV will honor non-ignition interlock privileges…this topic will not be covered by this paper.)

The General Assembly attempted to end this constitutional "loophole" by passing Senate Bill 252, which goes into effect October 1, 2009. The bill basically mirrors the Superior Court procedures for admissibility of lab reports. The new statute requires the state to notify the defendant at least 15 business days before the court date of its intention to introduce the report and provide a copy to the defendant. At

this point the burden shifts to the defendant and the chemical analyst or lab report is admissible unless the defendant files a written objection with the court with a copy to the state, at least 5 days before the proceeding.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009
SESSION LAW 2009-473
SENATE BILL 252

AN ACT TO AMEND STATE LAW REGARDING THE INTRODUCTION OF LAB REPORTS AND RELATED DOCUMENTS TO COMPLY WITH REQUIREMENTS OF THE UNITED STATES SUPREME COURT DECISION IN MELENDEZ-DIAZ V. MASSACHUSETTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 8-58.20(d) reads as rewritten:

"(d) The district attorney shall serve a copy of the laboratory report and affidavit and indicate whether the report and affidavit will be offered as evidence at any proceeding against the defendant on the attorney of record for the defendant, or on the defendant if that person has no attorney, no later than five business days after receiving the report and affidavit, or 30 business days before any proceeding in which the report may be used against the defendant, whichever occurs first."

SECTION 2. G.S. 8-58.20 is amending by adding a new subsection to read:

"(g) Procedure for Establishing Chain of Custody of Evidence Subject to Forensic Analysis Without Calling Unnecessary Witnesses. –

(1) For the purpose of establishing the chain of physical custody or control of evidence that has been subjected to forensic analysis performed as provided in subsection (b) of this section, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.

(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (a) of this section.

(3) The provisions of this subsection may be utilized by the State only if (i) the State notifies the defendant at least 15 business days before any proceeding at which the statement would be used of its intention to introduce the statement into evidence under this subsection and provides the defendant with a copy of the statement and (ii) the defendant fails to file a written notification with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the statement into evidence.

(4) In lieu of the notice required in subdivision (3) of this subsection, the State may include the statement with the laboratory report and affidavit, as

provided in subsection (d) of this section.
(5) If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file the written objection as provided in this subsection, then the statement may be admitted into evidence without the necessity of a personal appearance by the person signing the statement.
(6) Upon filing a timely objection, the admissibility of the statement shall be determined and governed by the appropriate rules of evidence.
Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement."
SECTION 3. G.S. 20-139.1(c1) reads as rewritten:
Page 2 Session Law 2009-473 SL2009-0473
"(c1) Admissibility. – The results of a chemical analysis of blood or urine reported by the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory, or any other laboratory approved for chemical analysis by the Department of Health and Human Services, are admissible as evidence in all administrative hearings, and in any court, without further authentication. authentication and without the testimony of the analyst. The results shall be certified by the person who performed the analysis. However, The provisions of this subsection may be utilized in any administrative hearing, but can only be utilized in cases tried in the district and superior court divisions, or in an adjudicatory hearing in juvenile court, if:if the defendant notifies the State, at least five days before trial in the superior court division or an adjudicatory hearing in juvenile court that the defendant objects to the introduction of the report into evidence,
(1) The State notifies the defendant at least 15 business days before the proceeding at which the evidence would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
(2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding at which the report would be used that the defendant objects to the introduction of the report into evidence.
If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection as provided in this subsection, then the report may be admitted into evidence without the testimony of the analyst. Upon filing a timely objection, the admissibility of the report shall be determined and governed by the appropriate rules of evidence.
The report containing the results of any blood or urine test may be transmitted electronically or via facsimile. A copy of the affidavit sent electronically or via facsimile shall be admissible in any court or administrative hearing without further authentication. A copy of the report shall be sent to the charging officer, the clerk of superior court in the county in which the criminal charges are pending, the Division of Motor Vehicles, and the Department of Health and Human Services.
Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report."
SECTION 4. G.S. 20-139.1(c3) reads as rewritten:
"(c3) Procedure for Establishing Chain of Custody Without Calling Unnecessary Witnesses. –
(1) For the purpose of establishing the chain of physical custody or control of

blood or urine tested or analyzed to determine whether it contains alcohol, a controlled substance or its metabolite, or any impairing substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.
(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (c1) of this section.
(3) The provisions of this subsection may be utilized in any administrative hearing and by the State in district court, hearing, but can only be utilized in cases tried in the district and superior court divisions, or in an adjudicatory hearing in juvenile court, if:a case originally tried in superior court or an adjudicatory hearing in juvenile court if the defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.
a. The State notifies the defendant at least 15 business days before the proceeding at which the statement would be used of its intention to introduce the statement into evidence under this subsection and provides a copy of the statement to the defendant, and
SL2009-0473 Session Law 2009-473 Page 3
b. The defendant fails to file a written notification with the court, with a copy to the State, at least five business days before the proceeding at which the statement would be used that the defendant objects to the introduction of the statement into evidence.
If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection as provided in this subsection, then the statement may be admitted into evidence without the necessity of a personal appearance by the person signing the statement. Upon filing a timely objection, the admissibility of the report shall be determined and governed by the appropriate rules of evidence.
(4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement."
SECTION 5. G.S. 20-139.1(e1) reads as rewritten:
"(e1) Use of Chemical Analyst's Affidavit in District Court. – An affidavit by a chemical analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication and without the testimony of the analyst in any hearing or trial in the District Court Division of the General Court of Justice with respect to the following matters:
(1) The alcohol concentration or concentrations or the presence or absence of an impairing substance of a person given a chemical analysis and who is involved in the hearing or trial.

(2) The time of the collection of the blood, breath, or other bodily fluid or substance sample or samples for the chemical analysis.
(3) The type of chemical analysis administered and the procedures followed.
(4) The type and status of any permit issued by the Department of Health and Human Services that the analyst held on the date the analyst performed the chemical analysis in question.
(5) If the chemical analysis is performed on a breath-testing instrument for which regulations adopted pursuant to subsection (b) require preventive maintenance, the date the most recent preventive maintenance procedures were performed on the breath-testing instrument used, as shown on the maintenance records for that instrument.
The Department of Health and Human Services shall develop a form for use by chemical analysts in making this affidavit. If any person who submitted to a chemical desires that a chemical analyst personally testify in the hearing or trial in the District Court Division, the person may subpoena the chemical analyst and examine him as if he were an adverse witness. A subpoena for a chemical analyst shall not be issued unless the person files in writing with the court and serves a copy on the district attorney at least five days prior to trial an affidavit specifying the factual grounds on which the person believes the chemical analysis was not properly administered and the facts that the chemical analyst will testify about and stating that the presence of the analyst is necessary for the proper defense of the case. The district court shall determine if there are grounds to believe that the presence of the analyst requested is necessary for the proper defense. If so, the case shall be continued until the analyst can be present. The criminal case shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court."
SECTION 6. G.S. 20-139.1 is amended by adding a new subsection to read:
"(e2) Except as governed by subsection (c1), (c2), or (c3) of this section, the State can only use the provisions of subsection (e1) of this section if:
(1) The State notifies the defendant at least 15 business days before the proceeding at which the affidavit would be used of its intention to introduce the affidavit into evidence under this subsection and provides a copy of the affidavit to the defendant, and
(2) The defendant fails to file a written notification with the court, with a copy to the State, at least five business days before the proceeding at which the affidavit would be used that the defendant objects to the introduction of the affidavit into evidence.
The failure to file a timely objection as provided in this subsection shall be deemed a waiver of the right to object to the admissibility of the affidavit. Upon filing a timely objection,

the admissibility of the report shall be determined and governed by the appropriate rules of evidence. The case shall be continued until the analyst can be present. The criminal case shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court. Nothing in subsection (e1) or subsection (e2) of this section precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the affidavit."
SECTION 7. G.S. 90-95(g) reads as rewritten:
"(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation

Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication and without the testimony of the analyst in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, the provisions of this subsection may be utilized by the State only if: that a report is admissible in a criminal proceeding in the superior court division or in an adjudicatory hearing in juvenile court in the district court division only if:

(1) The State notifies the defendant at least 15 business days before trial the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and

(2) The defendant fails to file a written objection with the court, with a copy to the State, notify the State at least five business days before trial the proceeding that the defendant objects to the introduction of the report into evidence.

If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection as provided in this subsection, then the report may be admitted into evidence without the testimony of the analyst. Upon filing a timely objection, the admissibility of the report shall be determined and governed by the appropriate rules of evidence. Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report."

SECTION 8. This act becomes effective October 1, 2009, and applies to offenses committed on or after that date. Nothing in this act shall be construed to abrogate any judicial or administrative rulings or decisions prior to the effective date of this act that (i) allowed or disallowed the introduction of evidence or (ii) validated or invalidated procedures used for the introduction of evidence.

In the General Assembly read three times and ratified this the 6th day of August, 2009.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 1:11 p.m. this 26th day of August, 2009

Other ways to suppress Intoxilyzer/Intoximeter

2. Problem with the notary signature /seal.

The affidavit must be sworn to and properly executed. If the notary signature/seal/stamp is defective argue that it is not properly executed and therefore the affidavit is not admissible. N.C.G.S. Sec. 10A-9 sets out requirements for a "notarial act". It states that a notarial act shall be attested by all of the following (emphasis added):

a. The signature of the notary, exactly as shown on the notary's commission.

b. The readable appearance of the notary's name, either from the notary's signature or otherwise.

c. The clear and legible appearance of the notary's stamp or seal.

d. A statement of the date the notary's commission expires.

B. Defendant not advised of intoxilyzer rights 20-16.2.

20-16.2(a) requires that before any type of chemical analysis is administered, the defendant must be informed orally of his right to refuse, the consequences of refusal, the admissibility of the test results, the right to have another chemical test administered by the person of his choosing, and the right to an attorney or witness if that person can be present within thirty (30) minutes.

Failure to inform defendant of these rights makes the chemical test inadmissible in evidence. State v. Gilbert. 85 N.C. App. 594, 355 S.E. 2d 261 (1987).

C. Defendant not observed for fifteen (15) minutes as required by the intoxilyzer/intoximeter regulations.

If you don't have a copy of the regulations in the Administrative Code, call the DHHS. The regulations require an observation period of fifteen minutes, during which a chemical analyst observes the person to be tested. If the box on the affidavit is not checked, or if it shows less than fifteen minutes of observation, the intoxilyzer results are inadmissible. The jail videotapes are sometimes very helpful in this issue.

D. State can't prove proper preventive maintenance.

The unfortunate truth is that the defendant has the burden of proof that preventive maintenance was not done. See 20-139.1 (b2)

The regulations differ according to which machine is used. Breathalyzers 900, 900A, 2000, and 3000 must have preventive maintenance at least once every thirty (30) days. The Intoximeter 3000 also requires maintenance at least once every thirty days. The Intoxilyzer 5000 requires maintenance at least once every four months; however, the breath simulator solution must be changed every four months or after 125 tests, whichever occurs first. The affidavit does not provide this information.

Websites for maintenance records:
http://www.communityhealth.dhhs.state.nc.us/fta/IntoxECIR2.htm

E. Intoxilyzer readings not within .02.

N.C.G.S. 20-139.1 (b3) and the intoxilyzer regulations at Sect 0313 "Breath-Testing Instruments: Reporting of Sequential Test require a pair of consecutively administer tests (that) do not differ from each other by an alcohol concentration of greater than 0.02."

F. Defendant denied access to witness to breathalyzer.

If the defendant requests a witness, and the witness arrives within thirty (30) minutes, makes reasonable efforts to gain access to defendant and is denied access, then the test is inadmissible. See 20-16.2 and State v. Ferguson, 90 N.C. App. 513 (1988). Ferguson also states that in a refusal case this type of violation may require a dismissal. "The denial of access to a witness in this case - when the State's sole evidence of the offense is the personal observations of the authorities - would constitute a flagrant violation of defendant's constitutional right to witnesses... and would require that the charges be dismissed." Ferguson at 519.

> See also: State v. Myers 445 SE 2d 492 (N.C. App. 1995) where defendant asked that his wife be allowed to observe the breath test; but the officer suggested "that might not be a good idea". The Court found the officer's statement to be "tantamount to the refusal of the request" (for a witness) and ruled the breathalyzer results inadmissible.

G. Defendant denied right to take alternative test.

N.C.G.S. 20-139.1 (d) states that a person who submits to a chemical analysis may have a qualified person of his own choosing administer an additional chemical test or of this right. Violation of these rights requires suppression of the chemical analysis results. See: State v. Bumgarner. 97 N.C. App. 567, 398 S.E. 2d 425 (1990). However, the new language from 2006 adds:

The failure or inability of the person who submitted to a chemical analysis to obtain any additional test or to withdraw blood does not preclude the admission of evidence related to the chemical analysis. 20-38.4

H. Chemical Analyst had current permit at time of the test.

The state fails to prove chemical analyst had a certificate which was current on the test date.

State v. Franks 87 NC App 265 (1987), State v. Roach 145 NC App 159 (2001)

I. Does the new language in 20-139.1 (b) create a presumption that the defendant is guilty or not?

"The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration." This is new language that went into effect 12/01/06. There has been a great deal of discussion about whether or not this created an irrebuttable presumption. The NC Court of Appeals answered this in the negative on October 7, 2008 in the case of State v. Narron NC Ct App 08-129. Narron at page 4: "In addition to technical challenges set out in the statutes, a defendant presumably could impeach the admissibility, credibility, or weight of the results of a chemical analysis in traditional ways. The Court continues: "We conclude that the challenged provision does not create an evidentiary or factual presumption, but simply states the standard for prima facie evidence of a defendant's alcohol concentration" Narron at page 6

NO. COA08-129

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v . Pitt County
No. 07 CRS 50348

JOHN ARTER NARRON, III

Appeal by Defendant from judgment entered 16 October 2007 by Judge Kenneth F. Crow in Pitt County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, and Assistant Attorney Generals Kathryne E. Hathcock and Christopher W. Brooks, for the State.

The Law Office of Matthew J. Davenport, P.A., by Matthew J. Davenport, for Defendant.

ARROWOOD, Judge.

John Narron, III (Defendant) appeals from judgment entered upon his conviction of impaired driving, in violation of N.C. Gen. Stat. § 20-138.1. We affirm.

Defendant was arrested on 13 January 2007 in Greenville, North Carolina, and charged with impaired driving. He was convicted in Pitt County District Court and appealed to Superior Court for trial *de novo*. On 5 February 2007 Defendant filed a motion to dismiss the charge of impaired driving, on the grounds that N.C. Gen. Stat. § 20-138.1 violated the North Carolina and U.S. Constitutions. He specifically challenged the statute's provision addressing chemical analysis as evidence of a defendant's blood alcohol concentration. On 10 August 2007 Judge Clifton W. Everett, Jr., entered an order denying Defendant's dismissal motion.

Defendant was tried before a Pitt County jury on 15 October 2007. The State's evidence tended to show in pertinent part, the following: Officer W.O. Terry of the Greenville, North Carolina, Police Department testified that, while on patrol in the early morning hours of 13 January 2007, he saw Defendant in the driver's seat of a motor vehicle that was stopped "in the middle of the travel lane" on the left side of a downtown street. Terry approached Defendant and noticed that Defendant's eyes were red and glassy and that he had an odor of alcohol. Terry summoned a traffic safety officer and about five minutes later Greenville Police Department Corporal Michael Montanye arrived at the scene.

Officer Montanye testified that at 1:30 a.m. on 13 January 2007 he was on duty as a traffic safety officer in Greenville. In response to Terry's call, Montanye drove to Cotanche Street, where he saw the Defendant in a vehicle "stopped in the left travel lane." Defendant told Montanye he had been at a party where he drank three beers. The officer observed that Defendant's eyes were glassy, that he was talkative, and that he smelled of alcohol. Officer Montanye performed two tests on an alcosensor, a portable machine that measures alcohol in a person's breath. When both tests showed a positive result for the presence of alcohol, Montanye placed defendant under arrest and took him to the Pitt County Detention center. There he administered an Intoxylizer test which showed an alcohol concentration of 0.08. Defendant did not present evidence at trial. After the presentation of evidence, the trial court submitted the case to the jury. Defendant moved for a special jury instruction regarding proof of the Defendant's blood alcohol concentration; his motion was denied. The jury found Defendant guilty of impaired driving, and the court entered judgment accordingly. From this judgment and conviction, Defendant appeals.

Standard of Review

Defendant argues that the statute under which he was convicted is unconstitutional. "[T]he judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *Guilford Co. Bd. of Education v. Guilford Co. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993) (citing *Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958)) (other citations omitted). "In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Guilford Cty. Bd. of Educ.*, 110 N.C. App. at 511, 430 S.E.2d at 684-85 (citing *Baker v. Martin*, 330 N.C. 331, 411 S.E.2d 143 (1991)) (other citation omitted). Moreover:

> A well recognized rule in this State is that, where a statute is susceptible to two interpretations _ one constitutional and one unconstitutional _ the Court should adopt theinterpretation resulting in a finding of constitutionality.

In re Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978) (citations omitted).

_____

Defendant argues that certain language in N.C. Gen. Stat. § 20-138.1(a)(2) (2007) renders the statute unconstitutional. N.C. Gen. Stat. § 20-138.1 provides in pertinent part that:

(a) A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]

Defendant contends that the provision that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" in N.C. Gen. Stat. § 20-138.1(a)(2) "constitutes a mandatory presumption violative of his right to due process secured by the Fifth and Fourteenth Amendments to the U.S. Constitution." We disagree.

Defendant asserts a violation of the "principles of due process of law which require the State to prove beyond a reasonable doubt every essential element of the crime charged and which preclude placing upon a defendant any burden to prove the nonexistence of any such element." *State v. White*, 300 N.C. 494, 499, 268 S.E.2d 481, 485 (1980) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975)). "The three essential elements of the offense of impaired driving are (1) driving a vehicle (2) upon any public vehicular area (3) while under the influence of an impairing substance or '[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of [0.08] or more.' N.C.G.S. § 20-138.1 [(2007)]". *State v. Denning*, 316 N.C. 523, 524, 342 S.E.2d 855, 856-57 (1986). Thus, "there are two ways to prove the single offense of impaired driving: (1) showing appreciable impairment; or (2) showing an alcohol concentration of 0.08 or more." *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277 (2002) (citing *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984)). The present appeal concerns proof of impairment by showing an alcohol concentration of .08 or more. N.C. Gen. Stat. § 20-4.01(1b) (2007), defines "alcohol concentration" as "[t]he concentration of alcohol in a person, expressed either as: a. Grams of alcohol per 100 milliliters of blood; or b. Grams of alcohol per 210 liters of breath." N.C. Gen. Stat. § 20-4.01(3a) (2007) defines "chemical analysis" in relevant part as "[a] test or tests of the breath [or] blood . . . of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses." In the instant case, the chemical analysis was performed on an Intoxilyzer 5000 machine, which showed Defendant's blood alcohol concentration to be eight one-hundredths grams of alcohol per 210 liters of breath (.08). "The Intoxilyzer is a breath-testing instrument approved for use by the North Carolina [Department of Health and Human Services (DHHS).] Pursuant to

N.C. Gen. Stat. § 20-139.1 [(2007)], [DHHS] has adopted procedures for the use of this instrument which are codified at [10A N.C.A.C. 41B.0320 and 41B.0321 (December 2007)]." Machines such as the Intoxilyzer 5000 have been used for decades to measure blood alcohol concentration by chemical analysis of an individual's breath. *See, e.g., State v. Powell*, 264 N.C. 73, 140 S.E.2d 705, (1965) (upholding admission of Breathalyzer results). Appellate cases have noted the general reliability of this chemical analysis, observing as early as 1984 that "the science of breath analysis for alcohol concentration has become increasingly reliable . . . and increasingly accepted as a means for measuring blood alcohol concentration." *State v. Smith*, 312 N.C. 361, 372, 323 S.E.2d 316, 322 (1984). *Smith* expressly associated the reliability of chemical analysis with the provisions of N.C. Gen. Stat. § 20-138.1:

[S]cientific and technological advancements which have made possible this type of analysis have removed the necessity for a subjective determination of impairment[.] . . . Indeed, our legislature's recognition of this reliable and accurate innovation of blood alcohol concentration testing is manifested in N.C.G.S. § 20-138.1(a)(2) which now provides that a person who "after having consumed sufficient alcohol that he has, at any relevant time after driving, an alcoholconcentration of [0.08] or more", commits the offense of impaired driving.

Id. at 373, 323 S.E.2d at 323.

However, under N.C. Gen. Stat. §§ 20-138.1 and 139.1, statutory criteria must be met before results of a chemical analysis are admissible in court. The defendant may challenge the admissibility of a chemical analysis of his blood alcohol level. N.C. Gen. Stat. § 139.1 (2007) provides in relevant part that:

(a) In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration . . . as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.

(b) The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration. A chemical analysis of the breath administered pursuant to the implied-consent law is admissible in any . . . proceeding if . . .

(1) It is performed in accordance with the rules of the Department of Health and Human Services.

(2) The person performing the analysis had . . . a current permit . . .

N.C. Gen. Stat. § 20-138.1 states:

(a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not

have, at a relevant time after driving, an alcohol concentration of 0.08 or more.

. . . .

(b1) Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2).

In addition to technical challenges set out in the statutes, a defendant presumably could impeach the admissibility, credibility, or weight of the results of chemical analysis in traditional ways.

As a corollary of the accepted reliability of chemical analysis, and of and the presence of statutory standards for their admissibility, the longstanding common law rule is that results of a chemical analysis are sufficient evidence to submit the issue of a defendant's alcohol concentration to the fact finder:

Once the trial court determined that the chemical analysis of defendant's breath was valid, then the reading constituted reliable evidence and was sufficient to satisfy the State's burden of proof under N.C. Gen. Stat. § 20-138.1(a)(2).

State v. Phillips, 127 N.C. App. 391, 394, 489 S.E.2d 890, 892 (1997) (citing *State v. Shuping*, 312 N.C. 421, 323 S.E.2d 350 (1984)). In 2006 the North Carolina General Assembly formally codified this rule by amending N.C. Gen. Stat. § 20-138.1 to state that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]" Defendant asserts that this amendment creates an impermissible presumption. We do not agree.

"A presumption of fact is defined as an inference of the existence of one fact from the existence of some other fact, or an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known." *Bryant v.Burns-Hammond Const. Co*., 197 N.C. 639, 643, 150 S.E. 122, 124 (1929). "Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime _ that is, an 'ultimate' or 'elemental' fact _ from the existence of one or more 'evidentiary' or 'basic' facts." *State v. White*, 300 N.C. 494, 499-500, 268 S.E.2d 481, 485 (1980). The North Carolina Supreme Court has explained further that:

The word presumption, as lucidly pointed out by Stansbury, N. C. Evidence § 215 (2d Ed., 1963), has been used in different senses, but always upon the premise that when a certain basic fact is established another (presumed) fact is assumed or inferred. The following situations illustrate the varying uses of the word presumption: (1) If evidence to disprove the presumed fact will not be heard, we have a rule of substantive law, sometimes loosely called "a conclusive presumption"; (2) If the basic fact authorizes, but does not compel, the jury to find the assumed facts, we have a permissible inference or *prima facie* evidence; (3) If the basic fact compels the jury to find the assumed fact unless and until sufficient evidence of its nonexistence has been introduced, we have a true presumption, and, in the absence of sufficient proof to overcome it, the jury must find

according to the presumption.

State v. Cooke, 270 N.C. 644, 649, 155 S.E.2d 165, 168 (1967).

In the instant case, we are called upon to decide whether the provision that "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" creates an unconstitutional presumption. We are concerned with the interpretation of "shall be deemed sufficient evidence to prove," as there is no dispute about the phrases "results of a chemical analysis" or "a person's alcohol concentration." We conclude that the challenged provision does not create an evidentiary or factual presumption, but simply states the standard for *prima facie* evidence of a defendant's alcohol concentration.

"'Statutory interpretation properly begins with an examination of the plain words of the statute.' If the language of a statute is clear, then the Court must implement the statute according to the plain meaning of its terms." *State v. Crow*, 175 N.C. App. 119, 123, 623 S.E.2d 68, 71 (2005) (quoting *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "Nontechnical statutory words are to be construed in accordance with their common and ordinary meaning." *Comr. of Insurance v. North Carolina Rate Bureau*, 54 N.C. App. 601, 605, 284 S.E.2d 339, 342 (1981) (citations omitted)).

As noted by Defendant, the word "shall" connotes that the action referred to is mandatory. "It is well established that 'the word 'shall' is generally imperative or mandatory." *Multiple Claimants v. N.C. Dep't of Health & Human Servs*., 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). "The definition of the word 'deemed' in the legal context is 'considered' or 'treated as if.' black's law dictionary 415 (6th ed. 1990); Bryan A. Garner, A dictionary of modern legal usage 254 (2d ed. 1995)." *Ward v. Wake Cty. Bd. of Educ*., 166 N.C. App. 726, 731, 603 S.E.2d 896, 900 (2004) Black's Law Dictionary treats "sufficient evidence" as synonymous with "satisfactory evidence" which it defines as "evidence that is sufficient to satisfy an unprejudiced mind seeking the truth[;] Also termed sufficient evidence." Black's Law Dictionary 599 (8th ed. 2004). Finally, the word "prove" means "to establish the truth of a fact or hypothesis by satisfactory evidence." Black's Law Dictionary 1261 (8th ed. 2004).

The phrase at issue contains no obscure or technical terms. We conclude that in the context of "results of chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" the meaning of the phrase "shall be deemed sufficient evidence to prove" is that properly admitted results of a chemical analysis "must be treated as *prima facie* evidence of" a defendant's alcohol concentration.

"In interpreting statutes, . . . it is always presumed that the Legislature acted with full knowledge of prior and existing law." *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Accordingly, our conclusion is further supported by the fact that the language of the amendment is essentially the same as the established common law rule that "[o]nce it is determined that the chemical analysis of the defendant's breath was valid, then a reading of [0.08] constitutes reliable evidence and is sufficient to satisfy the

State's burden of proof as to this element of the offense of DWI." *Shuping*, 312 N.C. at 431, 323 S.E.2d at 356.

We also conclude that the provision that "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration," which we construe as a statement of the standard for *prima facie* evidence of a person's alcohol concentration, does not create a legal presumption.

As discussed above, the essential feature of a true presumption is that proof of a basic fact permits or requires the fact finder to find a different, elemental, fact. For example, "[m]alice may be presumed upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon, nothing else appearing." *State v. Weeks*, 322 N.C. 152, 172, 367 S.E.2d 895, 907 (1988) (citation omitted). Thus, proof beyond a reasonable doubt of the basic fact - a defendant's use of a deadly weapon to commit a killing _ allows the jury to find the elemental fact _ that the defendant acted with malice.

The Defendant does not articulate what he contends is the elemental fact to be "presumed" upon proof of the basic fact of the existence of a properly admitted chemical analysis of his alcohol concentration, and we conclude there is none. For example, the statute does not state that "results of a chemical analysis shall be deemed sufficient evidence to prove" e.g., a person's degree of intoxication, or his operation of a vehicle on a state highway.

The "result of a chemical analysis" is a report of a person's alcohol concentration, and the statute provides that the result of such a test constitutes *prima facie* evidence of the defendant's alcohol concentration as reported in the results. In other words, the statute simply authorizes the jury to find that the report is what it purports to be _ the results of a chemical analysis showing the defendant's alcohol concentration. This is the definition of *prima facie* evidence of an element of any criminal offense or civil cause of action - that the jury may find it adequate proof of a fact at issue. However, there is no "presumption" created with regards to some other element or factual issue. "Appellee contends that the instruction at issue here did not create a presumption, mandatory or otherwise. . . . We agree that no such presumption was established here. . . . The instruction did not state that upon finding certain predicate facts, the jury could infer that a necessary element of the [State's] case had been met." *Koonce v. Pepe*, 99 F.3d 469, 473 (1st Cir. 1996).

We conclude that the statutory amendment simply codifies the common law threshold for *prima facie* evidence of a defendant's alcohol concentration. Therefore, there was no need for the trial court to call to the jury's attention that the chemical analysis was the basis of the trial court's determination that the State had presented *prima facie* proof of the element. If a case is submitted to the jury, then by definition, the court has determined that the State presented "sufficient evidence to prove" each of the elements of the offense. However, we perceive no prejudice to the Defendant in the court's statement to the jury that "results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration."

This assignment of error is overruled.

Defendant also argues that the trial court erred by denying his motion for a special jury instruction. We disagree. "A trial court's jury instruction 'is for the guidance of the jury.' Furthermore, the purpose 'is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.' 'In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented.' A judge has the obligation 'to instruct the jury on every substantive feature of the case.'"

State v. Smith, 360 N.C. 341, 346-47, 626 S.E.2d 258, 261 (2006) (quoting *Sugg v. Baker*, 258 N.C. 333, 335, 128 S.E.2d 595, 597 (1962); *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971); *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253 (1985); and *State v. Mitchell*, 48 N.C. App. 680, 682, 270 S.E.2d 117, 118 (1980)).

"However, '[t]he burden upon the defendant is to show more than a possibility that the jury applied the instruction in an unconstitutional manner.' Further, '[w]here the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous.'"

State v. Freeman, 185 N.C. App. 408, 419, 648 S.E.2d 876, 884 (2007) (quoting *State v. Smith*, 360 N.C. 341, 347, 626 S.E.2d 258, 261-62 (2006); and *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004)).

Defendant's argument, that the trial court erred by denying his motion for a special instruction, is premised on his contention that the instruction given by the court created an impermissible presumption. As discussed above, we have rejected this argument. We conclude that the court's instructions adequately informed thejury of the law as applied to the evidence presented at trial. This assignment of error is overruled.

For the reasons discussed above, we conclude the Defendant had a fair trial, free of reversible error.

No error.

Judges BRYANT and JACKSON concur.

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J. Admissibility of Blood tests:

(c1) Admissibility. – The results of a chemical analysis of blood or urine by the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory, or any other laboratory approved for chemical analysis by the Department of Health and Human Services, are admissible as evidence in all administrative hearings, and in any court, without further authentication. The results shall be certified by the person who performed the analysis. However, if the defendant notifies the State, at least five days before trial in the superior court division or an adjudicatory hearing in juvenile court that the defendant objects to the introduction of the report into evidence, the admissibility of the report shall be determined and governed by the appropriate rules of evidence. **(emphasis added)**

The report containing the results of any blood or urine test may be transmitted electronically or via facsimile. A copy of the affidavit sent electronically or via facsimile shall be admissible in any court or administrative hearing without further authentication. A copy of the report shall be sent to the charging officer, the clerk of superior court in the county in which the criminal charges are pending, the Division of Motor Vehicles, and the Department of Health and Human Services.

Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

(c2) A chemical analysis of blood or urine, to be admissible under this section, shall be performed in accordance with rules or procedures adopted by the State Bureau of Investigation, or by another laboratory accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) for the submission, identification, analysis, and storage of forensic analyses.

(c3) Procedure for Establishing Chain of Custody Without Calling Unnecessary Witnesses. –

(1) For the purpose of establishing the chain of physical custody or control of blood or urine tested or analyzed to determine whether it contains alcohol, a controlled substance or its metabolite, or any impairing substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement. **(emphasis added)**

(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and

shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (c1) of this section. **(emphasis added)**

(3) The provisions of this subsection may be utilized in any administrative hearing and by the State in district court, but can only be utilized in a case originally tried in superior court or an adjudicatory hearing in juvenile court if the defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.

(4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement.

(c4) The results of a blood or urine test are admissible to prove a person's alcohol concentration or the presence of controlled substances or metabolites or any other impairing substance if:

(1) A law enforcement officer or chemical analyst requested a blood and/or urine sample from the person charged; and

(2) A chemical analysis of the person's blood was performed by a chemical analyst possessing a permit issued by the Department of Health and Human Services authorizing the chemical analyst to analyze blood or urine for alcohol or controlled substances, metabolites of a controlled substance, or any other impairing substance.

For purposes of establishing compliance with subdivision (2) of this subsection, the court or administrative agency shall take judicial notice of the list of persons possessing permits, the type of instrument on which each person is authorized to perform tests of the blood and/or urine, and the date the permit was issued and the date it expires.

(d) Right to Additional Test. – Nothing in this section shall be construed to prohibit a person from obtaining or attempting to obtain an additional chemical analysis. If the person is not released from custody after the initial appearance, the agency having custody of the person shall make reasonable efforts in a timely manner to assist the person in obtaining access to a telephone to arrange for any additional test and allow access to the person in accordance with the agreed procedure in G.S. 20-38.5. The failure or inability of the person who submitted to a chemical analysis to obtain any additional test or to withdraw blood does not preclude the admission of evidence relating to the chemical analysis.

(d1) Right to Require Additional Tests. – If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would

result in the dissipation of the percentage of alcohol in the person's blood or urine.

(d2) Notwithstanding any other provision of law, when a blood or urine sample is requested under subsection (d1) of this section by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood and obtain the urine sample, and no further authorization or approval is required. If the person withdrawing the blood or collecting the urine requests written confirmation of the charging officer's request for the withdrawal of blood or obtaining urine, the officer shall furnish it before blood is withdrawn or urine obtained. A person requested to withdraw blood or collect urine pursuant to this subsection may refuse to do so only if it reasonably appears that the procedure cannot be performed without endangering the safety of the person collecting the sample or the safety of the person from whom the sample is being collected. If the officer requesting the blood or urine requests a written justification for the refusal, the medical provider who determined the sample could not be collected safely shall provide written justification at the time of the refusal.

(d3) When blood is withdrawn or urine collected pursuant to a law enforcement officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions. The results of the analysis of blood or urine under this subsection shall be admissible if performed by the State Bureau of Investigation Laboratory or any other hospital or qualified laboratory.

(e) Recording Results of Chemical Analysis of Breath. – A person charged with an implied-consent offense who has not received, prior to a trial, a copy of the chemical analysis results the State intends to offer into evidence may request in writing a copy of the results. The failure to provide a copy prior to any trial shall be grounds for a continuance of the case but shall not be grounds to suppress the results of the chemical analysis or to dismiss the criminal charges.

(e1) Use of Chemical Analyst's Affidavit in District Court. – An affidavit by a chemical analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in any hearing or trial in the District Court Division of the General Court of Justice with respect to the following matters:

(1) The alcohol concentration or concentrations or the presence or absence of an impairing substance of a person given a chemical analysis and who is involved in the hearing or trial.

(2) The time of the collection of the blood, breath, or other bodily fluid or substance sample or samples for the chemical analysis.
(3) The type of chemical analysis administered and the procedures followed.
(4) The type and status of any permit issued by the Department of Health and Human Services that the analyst held on the date the analyst performed the chemical analysis in question.
(5) If the chemical analysis is performed on a breath-testing instrument for which regulations adopted pursuant to subsection (b) require preventive maintenance, the date the most recent preventive maintenance procedures were performed on the breath-testing instrument used, as shown on the maintenance records for that instrument.
The Department of Health and Human Services shall develop a form for use by chemical analysts in making this affidavit. If any person who submitted to a chemical analysis desires that a chemical analyst personally testify in the hearing or trial in the District Court Division, the person may subpoena the chemical analyst and examine him as if he were an adverse witness. A subpoena for a chemical analyst shall not be issued unless the person files in writing with the court and serves a copy on the district attorney at least five days prior to trial an affidavit specifying the factual grounds on which the person believes the chemical analysis was not properly administered and the facts that the chemical analyst will testify about and stating that the presence of the analyst is necessary for the proper defense of the case. The district court shall determine if there are grounds to believe that the presence of the analyst requested is necessary for the proper defense. If so, the case shall be continued until the analyst can be present. The criminal case shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court.
(f) Evidence of Refusal Admissible. – If any person charged with an implied-consent offense refuses to submit to a chemical analysis or to perform field sobriety tests at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action against the person.
(g) Controlled-Drinking Programs. – The Department of Health and Human Services may adopt rules concerning the ingestion of controlled amounts of alcohol by individuals submitting to chemical testing as a part of scientific, experimental, educational, or demonstration programs. These regulations shall prescribe procedures consistent with controlling federal law governing the acquisition, transportation, possession, storage, administration, and disposition of alcohol intended for use in the programs. Any person in charge of a controlled-drinking program who acquires alcohol under these regulations must keep records accounting for the

disposition of all alcohol acquired, and the records must at all reasonable times be available for inspection upon the request of any federal, State, or local law-enforcement officer with jurisdiction over the laws relating to control of alcohol. A controlled-drinking program exclusively using lawfully purchased alcoholic beverages in places in which they may be lawfully possessed, however, need not comply with the record-keeping requirements of the regulations authorized by this subsection. All acts pursuant to the regulations reasonably done in furtherance of bona fide objectives of a controlled-drinking program authorized by the regulations are lawful notwithstanding the provisions of any other general or local statute, regulation, or ordinance controlling alcohol. (1963, c. 966, s. 2; 1967, c. 123; 1969, c. 1074, s. 2; 1971, c. 619, ss. 12, 13; 1973, c. 476, s. 128; c. 1081, s. 2; c. 1331, s. 3; 1975, c. 405; 1979, 2nd Sess., c. 1089; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 435, s. 26; 1983 (Reg. Sess., 1984), c. 1101, s. 20; 1989, c. 727, s. 219(2); 1991, c. 689, s. 233.1(b); 1993, c. 285, s. 7; 1997-379, ss. 5.3-5.5; 1997-443, s. 11A.10; 1997-443, s. 11A.123; 1997-456, s. 34(b); 2000-155, s. 8; 2003-95, s. 1; 2003-104, s. 2; 2006-253, s. 16; 2007-115, ss. 5, 6; 2007-493, ss. 3, 18, 22, 23.)

VI. PRIVILEGES

A. Under 21 -- State v. Boyles, NCCT App 7/03

When a District Court Judge signed a limited driving privilege for a 19 year old defendant charged with DWI, the DMV sent a notice to the defendant that the privilege was "void." The Court of Appeals held that DMV cannot unilaterally invalidate a privilege: to do so violates the defendant's rights to due process and the separation of powers clause of our Constitution. However, DMV continues to refuse to honor privileges for people less than 21 years old who are charged with DWI.

The Supreme Court should rule on this issue. Be careful how you advise clients under 21 about privileges in DWI's.

VII. INTERLOCK

20-17.8 (a) & (b) requires ignition interlock if a defendant blows 0.15 or higher and he/she requests a limited driving privilege. Interlock is also required when the defendant seeks to restore his/her privilege on a second DWI offense within seven (7) years. The changes that went into effect for offenses on or after December 1, 2007 now require that the defendant wait for 45 days after final conviction before he/she is eligible for a limited driving privilege. Household maintenance driving is no longer authorized. See 20-179.3 (c1) All the more reason to be zealous in looking for ways to suppress the chemical analysis.

Query: if you can suppress the intoxilyzer results, can you avoid the statutory requirement for interlock? If you do suppress the results, have the Judge instruct the Clerk to note "chemical analysis suppressed" on the docket and the Judgment. Our experience has been that DMV will accept this and honor a non-interlock privilege; however any other wording will cause DMV to reject a privilege and notify the defendant of the interlock requirement.

Interlock- New 20.16.2 (c)(1) now requires that alcohol concentration of .15 or more be reported to DMV by the charging officer and the analyst (in certain cases). There is now a medical exception in 20-17.8 (b) when the defendant proves by 2 or more doctors that he is "incapable of personally activating" the interlock.

Instructions for client who are required to install Interlock are available at www.Monitechnc.com

VIII. DWI APPEALS

§ 20-38.7. Appeal to superior court.

(a) The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. If there is a dispute about the findings of fact, the superior court shall not be bound by the findings of the district court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.

(b) The defendant may not appeal a denial of a pretrial motion to suppress or to dismiss but may appeal upon conviction as provided by law.

(c) Notwithstanding the provisions of G.S. 15A-1431, for any implied-consent offense that is first tried in district court and that is appealed to superior court by the defendant for a trial de novo as a result of a conviction, the sentence imposed by the district court is vacated upon giving notice of appeal. The case shall only be remanded back to district court with the consent of the prosecutor and the superior court. When an appeal is withdrawn or a case is remanded back to district court, the district court shall hold a new sentencing hearing and shall consider any new convictions.

(d) Following a new sentencing hearing in district court pursuant to subsection (c) of this section, a defendant has a right of appeal to the superior court only if:

(1) The sentence is based upon additional facts considered by the district court that were not considered in the previously vacated sentence, and

(2) The defendant would be entitled to a jury determination of those facts pursuant to G.S. 20-179.

A defendant who has a right of appeal under this subsection, gives notice of appeal, and subsequently withdraws the appeal shall have the sentence imposed by the district court reinstated by the district court as a final judgment that is not subject to further appeal. (2006-253, s. 5; 2007-493, s. 9; 2008-187, s. 10.)