

# Criminal Law Update Winter Webinar 2016

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UNC School of Government

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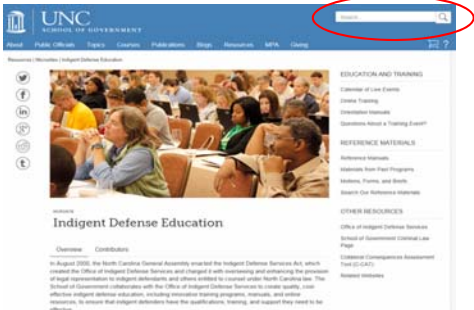
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<https://www.sog.unc.edu/resources/microsites/indigent-defense-education>

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### Roadmap

- Seizures, searches, and other investigation issues
- Criminal procedure
- Evidence
- Impaired driving
- Defenses
- Sentencing and probation
- Sex offenders

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### Seizures

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### Utah v. Strieff, p. 2



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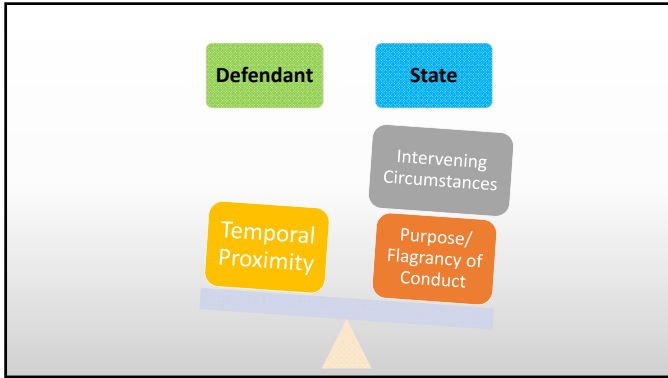
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How significant is *Strieff*?

- July 1, 2016
- +500,000 unserved warrants in NC

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Rodriguez v. U.S.  
135 S. Ct. 1609 (2015)

- Stop may not be extended beyond time necessary to complete mission of stop
- Authority for stop ends when tasks tied to traffic violation are or reasonably should be completed
- No exception for de minimus delays

A photograph showing a police officer in uniform standing next to a German Shepherd dog. The dog is on a leash and looking towards the camera. In the background, there is a white police car with 'CAUTION POLICE K-9' written on it. A digital clock overlay at the top of the image shows '4:59' in an orange box and '5:00' in a grey box.

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### Main Areas of Dispute

- Did the officer have reasonable suspicion to engage in additional investigation unrelated to mission of stop?
- Were actions unrelated to mission of stop?

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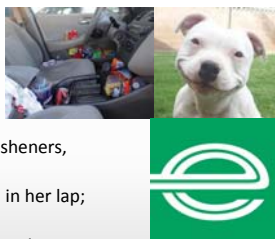
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### State v. Reed, p. 4

- Stop for 78 in a 65 on I-95
- Defendant pulled over right away
- Trooper saw energy drinks, air fresheners, and dog food around car
- Defendant's girlfriend had pit bull in her lap; dog was female
- Defendant provided license, registration, and rental car agreement




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### Actions in *Reed* after Stop

1. Directed defendant to get out of his car
2. Patted him down for weapons
3. Directed defendant to sit in patrol car with door closed and drug dog in back seat
4. Ran license check
5. Reviewed rental agreement
6. Asked about travel plans, criminal history, living arrangement with girlfriend, and owner of dog
7. Went back to car to talk with girlfriend about rental agreement and travel plans
8. Called rental car company to clarify terms
9. Questioned defendant further about purpose of trip
10. Said stop completed, asked if defendant would answer more questions about drugs and other matters, and asked for consent to search

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State v. Eldridge, p. 4



§ 20-126. Mirrors.  
(b) It shall be unlawful for any person to operate upon the highways of this State any vehicle manufactured, assembled or first sold on or after January 1, 1966 and registered in this State unless such vehicle is equipped with at least one outside mirror mounted on the driver's side of the vehicle. Mirrors herein required shall be of a type approved by the Commissioner.

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Presence in Area of Unlawful Activity

**Factors**

1. Relationship between crimes in area and suspected offense
  2. Geographic boundaries of area
  3. Frequency of crimes
  4. Temporal proximity between crimes and suspected offense
- U.S. v. Wright, 485 F.3d 45 (1st Cir. 2007)*

**S v. Goins, p. 5**

- Manager said that apt. complex getting bad again and some had residents complained about illegal drugs
- Officers testified that complex was in high crime area and was basically open-air drug market

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Presence in Area of Unlawful Activity

**Factors**

1. Relationship between crimes in area and suspected offense
2. Geographic boundaries of area
3. Frequency of crimes
4. Temporal proximity between crimes and suspected offense

**S v. Crandell, p. 6**

- "Blazing Saddles" was partially burned, abandoned building
- Metal cable was down, which in officer's experience meant place was open for business
- Officer had made 23 stops there leading to drug charges; other SAFE team officers had done same
- Location known for one thing only: selling drugs and stolen property

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Searches

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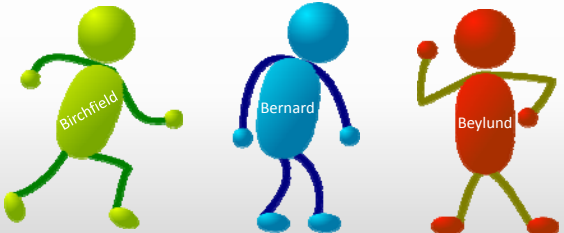
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Birchfield v. North Dakota, p. 9



Refused blood draw.      Refused breath test.      Submitted to blood test.

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North Dakota, p. 9



Refused breath test.

- Warrantless breath testing permissible as a search incident to arrest
- Person who refuses may be sanctioned in ways ranging from license revocation to criminal prosecution

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North Dakota, p. 9



Refused blood draw.

- Warrantless blood testing of impaired driving suspects is **not** permissible under the Fourth Amendment as a search incident to arrest.
- A suspect's consent is required to conduct such testing.
- A person who refuses to submit to such testing may **not** be criminally prosecuted for that refusal.

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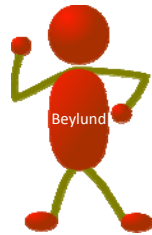
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North Dakota, p. 9

- Voluntariness depends on the totality of the circumstances
- State court must reevaluate consent given the partial inaccuracy of the officer's advisory



Submitted to blood test.

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Impact in NC?

- *State v. Romano*, \_\_ N.C. App. \_\_ (2016): warrantless withdrawal of blood from an unconscious suspect pursuant to G.S. 20-16.2 violates the Fourth Amendment
- Is acquiescence following warnings always voluntary consent?

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State v. Pigford, p. 8

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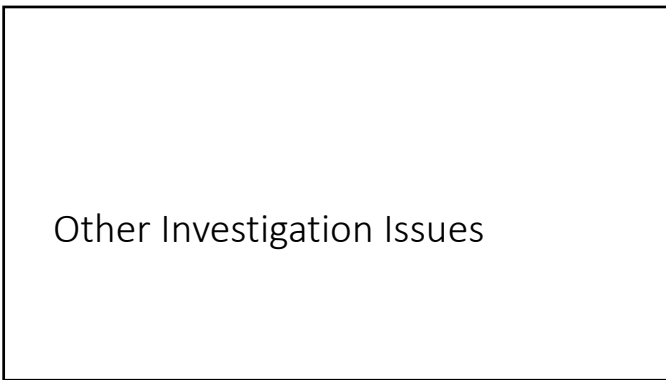
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Other Investigation Issues

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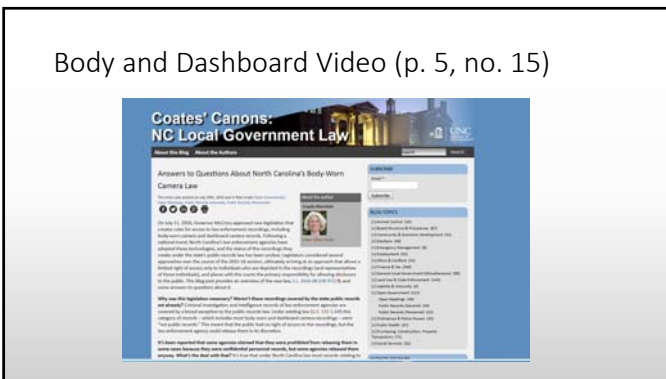
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Body and Dashboard Video (p. 5, no. 15)

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### Body and Dashboard Video (p. 5, no. 15)

- Not public records
- Disclosure
  - law enforcement agency may disclose to people depicted and their representatives, based on factors in statute
- Release
  - only by court order, based on same factors
- Required release to DA for certain purposes
  - compliance with discovery requirements
  - "use in criminal proceedings in district court"
- No statutory requirement to use body and dashboard cameras

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### Criminal Procedure

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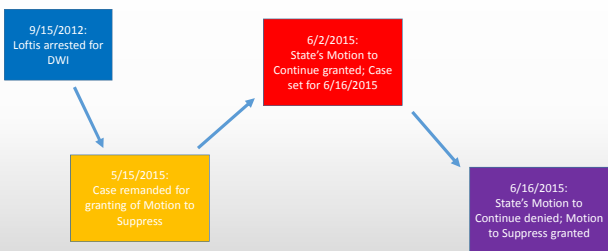
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### State v. Loftis, p. 15



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State v. Loftis, p. 15

Madam Prosecutor, call your case or dismiss the charges

The charges are dismissed for failure to prosecute

[SILENCE]

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DISMISSAL OF DWI CHARGE BY PROSECUTOR WHEN INSUFFICIENT EVIDENCE DUE TO SUPPRESSION ORDER

Adopted January 25, 2010

Opinion rules that a prosecutor must dismiss a DWI charge if the suppression of the evidence renders the evidence insufficient to support the charge.

Inquiry:

In a Driving While Impaired (DWI) case in which evidence obtained from the stop of the vehicle is suppressed, the evidence offered at the pretrial hearing, the fact that APD-18 A&D indicating law enforcement officers the stop was unconstitutional in violation of the preliminary ruling to suppress evidence and the date presented to the state. The district court judge ruled in favor of the state.

May the prosecutor call the case for trial, arrange otherwise offer evidence, and rest the case, thus imposing the burden of proof on the defendant? The prosecutor has an ethical duty to dismiss the case after all evidence is suppressed pursuant to the pretrial hearing?

Opinion:

A lawyer has an ethical duty, under Rule 3.1, not to bring a proceeding unless there is a basis in law and in fact for doing so that is not frivolous. In light of this duty, a prosecutor who knows that she has no admissible evidence supporting a DWI charge to present at trial must dismiss the charge prior to calling the case for trial.

A lawyer has an ethical duty, under Rule 3.1, not to bring a proceeding unless there is a basis in law and in fact for doing so that is not frivolous. In light of this duty, a prosecutor who knows that she has no admissible evidence supporting a DWI charge to present at trial must dismiss the charge prior to calling the case for trial.

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State v. Ward, p. 14

- Client makes final decision on ALL matters if absolute impasse
- Except if
  - unlawful or
  - unsupported or frivolous



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Pretrial Issues (p. 9, no. 21)

- Termination of bond obligation if probation under deferred prosecution or conditional discharge
  - Does it terminate requirement of posting bond?
  - Or, does it merely terminate obligation of obligor?

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State v. Brice, p. 12




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offense	date or range (OR OR ABOUT)	G.S. No.
I. HABITUAL MISDEMEANOR LARCENY <u>2399</u>	4/21/2013	14-72(b)(6)

I. HABITUAL MISDEMEANOR LARCENY

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named unlawfully, willfully, and feloniously did steal, take, and carry away FIVE PACKS OF STEAKS, the personal property of FOOD LION, LLC, such property having a value of SEVENTY DOLLARS (\$70.00), and the defendant has had the following four prior larceny convictions in which he was represented by counsel or waived counsel:

On or about MAY 8, 1996 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 10, 1996 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Lincoln County, North Carolina, and that

On or about FEBRUARY 10, 1997 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about JULY 20, 1997 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina, and that

On or about JUNE 13, 2003 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about OCTOBER 17, 2003 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina, and that

On or about JULY 7, 2007 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 24, 2007 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina.

This act was in violation of the law referenced above.

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G.S. 15A-928

- When a previous conviction raises an offense to a higher grade, the previous conviction(s) must be alleged in a special indictment or information filed with the principal pleading, or special indictment or information may be incorporated in principal document as a separate count

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State v. Williams, p. 29

- Defendant indicted for misdemeanor DWI and prosecuted in superior court not entitled to formal notice of prior convictions
  - G.S. 20-179(a1)(1) requires formal notice of aggravating factors for DWI cases appealed from district court
  - Does not apply to these facts
- No Sixth Amendment violation even though prior conviction increases maximum punishment
  - Sentence enhanced solely for prior record
  - Defendant was provided notice 7 days before trial

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Evidence Issues

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### Expert Testimony

**Rule 702 and Daubert**

- Scientific, technical, or specialized knowledge that will assist trier of fact
- Qualified witness
- Based on sufficient facts or data and product of reliable principles and methods

**S v. McGrady, p. 19**

- Pre-attack cues made it reasonable for D to use defensive force
- D was suffering from nervous system's fight or flight response
- Reaction time from threat to response could explain shots in back

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### Rape Shield, Evidence Rule 412

- “[T]he sexual behavior of the complainant is irrelevant . . . unless:”
  - 1) Was between complainant and defendant
  - 2) Is evidence of specific instances of sexual behavior offered to show charged acts not committed by defendant
  - 3) Is evidence of distinctive pattern of sexual behavior to show consent
  - 4) Is evidence of sexual behavior offered as basis of expert opinion that complainant fantasized or invented charged acts

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### State v. Mbaya, p. 19

Publications | Bulletin

**Administration of Justice Bulletin**

Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant

Jeffrey B. Welty  
Saturday, August 1, 2009

This bulletin addresses two of the most common special evidentiary issues in sexual assault cases: the admissibility of evidence about the complainant's sexual history and the admissibility of evidence of prior sexual misconduct by the defendant.



**Jeffrey B. Welty**  
Associate Professor of Public Law and Government and Director, North Carolina Judicial College  
welty@ing.unc.edu

**Bulletin file:**

 Download Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant, 472.26 KB

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### State v. Fleming, p. 13

- Admission of video recording for illustrative purposes
  - Does the video recording fairly and accurately illustrate the events filmed?
- Authentication of video recording introduced as substantive evidence
  - Is recording process reliable?
  - Is this the video that was produced by the recording process?




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## Impaired Driving

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### Chemical Analysis (p. 1, no. 1)

STATE OF NORTH CAROLINA		In The General Court Of Justice County <input type="checkbox"/> District <input type="checkbox"/> Superior Court Division	
STATE VERSUS		NOTICE OF INTENT TO USE CHEMICAL ANALYST'S AFFIDAVIT AND CHAIN OF CUSTODY STATEMENT - BLOOD OR URINE	
<p>1. The defendant is hereby notified that unless one <input type="checkbox"/> is used in Superior Court pursuant to G.S. 20-139.1(a) and (a2), the State of North Carolina intends to introduce into evidence in this matter, without further authentication and without the testimony of the chemical analyst, the person or that order: <input type="checkbox"/> Affidavit and Retention Report (AOC-CR-606-AD-Ready 3007) <input type="checkbox"/> North Carolina State Crime Laboratory report (SCL-1976) <input type="checkbox"/> local law enforcement laboratory report <input type="checkbox"/> hospital laboratory report. The State intends to introduce this document(s) at a proceeding scheduled on (date) _____ and at any subsequent proceedings in this matter in District Court Pursuant to G.S. 20-139.1(a) and (a2), the defendant's failure to file a timely written objection with the court, with a copy to the State, shall be deemed a waiver of the defendant's right to object to the admissibility of the document(s). A copy of the above referenced document(s) is attached to this notice.</p> <p>2. In case of Superior Court pursuant to G.S. 20-139.1(a), the State of North Carolina intends to introduce into evidence in this matter, without further authentication and without the testimony of the chemical analyst, the <input type="checkbox"/> North Carolina State Crime Laboratory report (SCL-1976) <input type="checkbox"/> local law enforcement laboratory report <input type="checkbox"/> hospital laboratory report. The State intends to introduce this document at a proceeding scheduled on (date) _____ and at any subsequent proceedings in this matter in Superior Court. Pursuant to G.S. 20-139.1(a), the defendant's failure to file a timely written objection with the court, with a copy to the State, shall be deemed a waiver of the defendant's right to object to the admissibility of the document. A copy of the above referenced document is attached to this notice.</p> <p>3. The defendant is also hereby notified that, pursuant to G.S. 20-139.1(a2), the State of North Carolina intends to introduce into evidence in this matter a statement signed by each business person in the chain of custody that the person delivered the defendant's blood or urine sample in this matter to the other person indicated on the statement on or about the date stated, without the personal appearance in court of the person signing the statement. The State intends to introduce the statement at a proceeding scheduled on (date) _____ and at any subsequent proceedings in this matter in <input type="checkbox"/> District Court <input type="checkbox"/> Superior Court Pursuant to G.S. 20-139.1(a2), the defendant's failure to file a timely written objection with the court, with a copy to the State, shall be deemed a waiver of the defendant's right to object to the admissibility of the statement. A copy of the statement is attached.</p>			

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### Chemical Analysis (p. 1, no. 1)

- State must provide laboratory analysis of blood or urine to defendant within **15 business days** of receiving report to use notice and demand
  - Same is required for chain of custody and chemical analyst's affidavit
- Written objection filed by defendant at least five business days before proceeding (or not filed) **remains effective at any subsequent calendaring**

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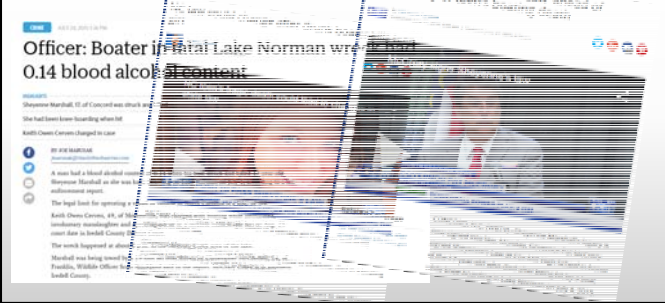
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### Impaired Boating (p. 3, no. 7)




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### State v. Lindsey, p. 25

- Stop for expired registration
- "My license is revoked for DWI."
- Medium odor of alcohol coming from defendant's breath
- Red, glassy eyes
- 5 of 6 clues on HGN test
- **Probable cause for DWI?**

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### What is different?

UNPUBLISHED

#### State v. Lindsey

- Stop for expired registration
- "My license is revoked for DWI."
- Medium odor of alcohol coming from defendant's breath
- Red, glassy eyes
- 5 of 6 clues on HGN test
- **Probable cause for DWI**

#### State v. Sewell

- Checkpoint stop
- **Odor of alcohol coming from car (2 people in car)**
- Red, glassy eyes
- Positive result on portable breath test
- 6 of 6 clues on HGN test
- **No PC for DWI**

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### State v. Lindsey, p. 22

- Who gets the last word?
- Rule 10 of the General Rules of practice
  - If D does not introduce evidence, he has the right to open and close the arguments to the jury
- D did not call witnesses
- D played video of traffic stop on cross
- Was the admission of video on cross the introduction of evidence?

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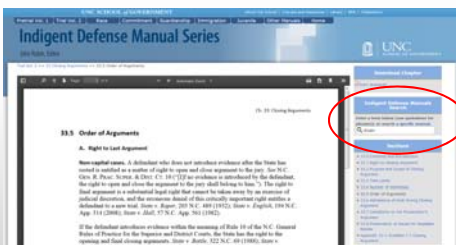
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defendermanuals.sog.unc.edu




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Defenses

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Duty to Retreat and State v. Lee, p. 27

- G.S. 14-51.3 applies to “defense of person”
- A person may use deadly force without retreating “in any place he or she has the lawful right to be” as long as
  - the defendant reasonably believes such force is necessary to prevent imminent death or great bodily injury, or
  - the circumstances in G.S. 14-51.2 apply

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Sentencing and Probation

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### Probation Changes (p. 3, no. 11)

- New credit rule for multiple CRVs
- Effective for offenses committed on or after 12/1/2016

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### CRV Credit

*Person on probation in three felony cases  
Sentences set to run consecutively if revoked  
Technical violation in all three cases*

- 90 days total CRV confinement



CRVs "shall run **concurrently** on all cases related to the violation"

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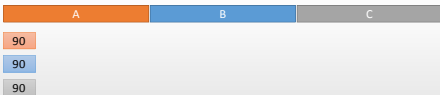
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### CRV Credit

*Same person later gets revoked  
Activated sentences are run consecutively*

- 270 total days of CRV credit?




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### New Credit Rule

- “Upon revocation of two or more consecutive sentences as a result of a probation violation, credit for time served on concurrent [CRVs] shall be **credited to only one sentence.**”

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### CRV Credit

*Same person later gets revoked  
Activated sentences are run consecutively*



- 90 total days of jail credit for CRV

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### Restitution to Insurance (p. 4, no. 12)

- ~~15A-1340.37(d) stated that~~
  - “[n]o third party shall benefit by way of restitution as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant . . . .”
- Restitution allowed if
  - insurance company provided assistance to victim and is subrogated to rights of victim (15A-1340.37(b)),
  - court in discretion orders it (*id.*), and
  - after restitution to victim and others (7A-304(d)(1), 15A-1340.37(d))

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### Sentencing Decisions

- Consecutive sentences for direct contempt
  - State v Burrow, p. 29
- Sentence in excess of maximum for drug trafficking
  - State v. Pless, p. 30

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### Sex Offenders

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### Premises Restrictions for Sex Offenders

1. On the premises of any place intended primarily for the use, care, or supervision of minors
2. Within ~~300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located~~ on premises that are not intended primarily for the use, care, or supervision of minors
3. At any place where ~~minors gather for regularly scheduled educational, recreational, or social programs~~

G.S. 14-208.18

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### New Premises Restrictions (p. 8, no. 20)

1. On the premises of any place intended primarily for the use, care, or supervision of minors
  - Same as before
2. Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors
  - Applicable only to offenses against minors or offenses presenting danger to minors
3. At any place where minors frequently congregate, with examples
  - Language revised and examples added, such as libraries and amusement parks
4. State Fair and Mountain State Fair
  - New

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### Questions about Premises Restrictions?



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### Bonus Material

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### Was the Defendant in Custody?



Crook, p. 10: Yes  
Barnes, p. 9: No

Hammonds, p. 10: Maybe  
Portillo, p. 10: No



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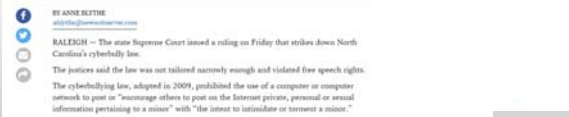
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### State v. Bishop, p. 24

Unlawful to use a computer or computer network, with the intent to intimidate or torment a minor, to post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor



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### Herndon v. Herndon, p. 20

- Civil DVPO proceeding
- Defendant voluntarily takes stand
- Judge admonishes defendant not to assert Fifth
- After direct testimony, judge questions defendant
- Neither defendant's counsel nor defendant assert Fifth at any time

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### New Trespass Offense (p. 2, no. 4)

- Elements are
  - first-degree trespass
    - therefore, trespass must be on enclosed/secured premises or building
  - if first-degree trespass occurs,
    - after previous removal pursuant to order or writ of possession, or
    - where person has knowingly provided false evidence of ownership or possessory interest
- Punished as
  - class I felony
  - minimum \$1,000 fine

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### Motor Vehicle Law Changes (p. 7, no. 16; p. 14, no.7)

- New equipment requirements for bicycles operated at night
- Exceptions to no passing rules to allow passing of bicycles and mopeds
- New penalties for unsafe movement that affects bicyclists




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### Uniform Fee Schedule Pilot (p. 9, no. 18)

- Fee schedule = flat fees
  - Already exists in Rowan and Cabarrus counties
- AOC responsible for implementing after consulting with IDS and, in districts selected, chief district court judges and district bar
- At least six judicial districts, with range of small, medium, and large caseloads
- STAY TUNED

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