

Theory and Attack of the HGN

Joe Suhre

What is HGN

- Stands for Horizontal Gaze Nystagmus
- According to NHTSA:
 - Nystagmus is the involuntary jerking of the eyes. Alcohol and certain other drugs cause Horizontal Gaze Nystagmus

Administration of the HGN

- Three phases, six clues
 - LOSP: Lack of Smooth Pursuit
 - DSMD: Distinct and Sustained at Maximum Deviation
 - OP45: Onset Prior to 45 degrees

Administration of the HGN

- Pre-screen: equal pupil size, resting nystagmus, equal tracking
- Remove eye glasses
- Provide verbal instructions:
 - I am going to check your eyes
 - Keep your head still and follow the stimulus with your eyes
 - Keep following the stimulus with your eyes until I tell you to stop

Administration of the HGN

- Proper stimulus position
 - 12-15” from the face
 - Slightly above eye level
 - You will need a ‘contrasting stimulus’ The stimulus can be tip of index finger, penlight, or pen
- After checking for equal tracking, begin the test

Administration of the HGN

- Lack of Smooth Pursuit
 - Move stimulus at a rate that takes approximately two seconds to take the eye to the side as far as it can go. Move the stimulus back across the suspect's face and check the other eye
 - Rate should be two seconds out, two seconds back
 - Start with the suspects left eye, then the right eye, then repeat

Administration of the HGN

- Distinct and Sustained Nystagmus at Maximum Deviation
 - Move stimulus to take the eye to the side as far as it can go. Hold for at least 4 seconds, not more than 30. Move the stimulus back across the suspect's face and check the other eye.
 - There is no prescribed rate of movement, only 'holding time'
 - Start with the suspects left eye, then the right eye, then repeat

Administration of the HGN

- Onset Prior to 45 Degrees
 - Move stimulus to 45 degrees from the suspects nose - a line parallel to the shoulder. If nystagmus is observed prior to 45 degrees, stop and confirm that there is still white showing on the side closest to the ear.
 - Move the stimulus back across the suspect's face and check the other eye.
 - There is no prescribed rate of holding time, only 'moving time'.
 - Start with the suspects left eye, then the right eye, then repeat.

Administration of the HGN

- Vertical Gaze Nystagmus
 - Move stimulus vertically to elevate the suspects eyes as far as possible.
 - Hold for approximately 4 seconds
 - There is no prescribed rate of moving time, only 'holding time'
 - Repeat. Does not tell you to look at each eye separately.
 - Observed clue indicates 'high doses of alcohol' and 'certain other drugs'

Interpreting the HGN

- According to NHTSA
 - 4 or more clues = 77% likelihood BAC is above 0.10 (per 2006 manual) That then magically changed to 0.08.
 - A clue is the observation of either LOSP, nystagmus at maximum deviation, prior to 45 degrees.
 - There are two clues per phase - one for each eye

Theory of HGN

- NHTSA tells us that nystagmus occurs when there is an unequal concentration of a foreign fluid (such as alcohol) in the blood and vestibular system.
- What it isn't:
 - balance test
 - coordination test
 - mental process test

Theory of HGN

- Roots of the test are in Laboratory Science and Clinical Medicine
- Is it a scientific test?
 - If it is, then what? Rule 702 applies
 - If not, then can 701 be used to admit testimony?

701 & 702

- Rule 701 Opinion testimony by lay witnesses
- If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
 - (a) Rationally based on the perception of the witness;
 - (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
 - (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.



701 & 702

- Rule 702 Testimony by experts
- 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 or otherwise, if:
 - (1) The testimony is based upon sufficient facts or data;
 - (2) The testimony is the product of reliable principles and methods; and
 - (3) The witness has applied the principles and methods reliably to the facts of the case.



701 Challenge

- File a Motion in Limine
 - Hardin v. Comm says:
 - absent satisfying 702, officer can only testify as to lay opinion observations



701 Challenge

- Cannot say “pass” or “fail”
- Cannot say “clues” or “points”
- Why? Because it enhances the significance of the observations of a lay person to that of science
- Restricted to lay observations of impairment



701 Challenge

- If you can't call it a test
- You can't say it was passed or failed
- You can't correlate eye twitching to impairment or even alcohol consumption
- The results are irrelevant



701 Challenge

- If the prosecutor can't call it a test, can't have the officer testify as to the clues he observed, can't use it to correlate impairment, can't use it to establish a BA then what good is it?



702 Challenge

- Kentucky has adopted the Daubert Standard
 - Mitchell v. Comm.
 - Standard embodied in KRE 702



Rule 702 Testimony by experts

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 or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

702 Challenge

- Qualified Witness
 - knowledge
 - skill
 - experience
 - training
 - education



702 Challenge

- First challenge for prosecutor is to qualify their officer as 'an expert'
 - not easy to do if you challenge them
 - its not just that they know how to do it
 - a technician is not necessarily an expert



702 Challenge

- But that's a start:
 - challenge their training
 - request their training records



March 8, 2016

Brandi Robinson
Justice & Public Safety Cabinet
521 Lancaster Avenue
Richmond, KY 40475-3102

VIA EMAIL

Re: **Records Request**
Case Number: 16-T-02012 (Kenton)
My File No.: 7627

Dear Ms. Robinson,

Pursuant to the Kentucky Open Records Act, KRS 61.870 to KRS 61.884, I am requesting *certified* copies of the following items:

- 1) The Kentucky Justice Cabinet Department of Criminal Justice Training's record of training for the officer(s) identified below.
- 2) The training materials used to train the officer(s) – including, but not limited to, the DUI/Standard Field Sobriety Test Course – Reference Guide. I am requesting the specific materials that were used by the officer(s) identified in their training, not the current manual – unless of course, the two are the same.
- 3) Officer: D. Griswold, badge number 0240, of the Covington Police Department

Please mail the original "Certification of Copies of Official Governmental Records" to my office, as this certification will be used as evidence and I will need to admit the original certification as an exhibit. The records can be emailed to jsuhre@suhrelaw.com.

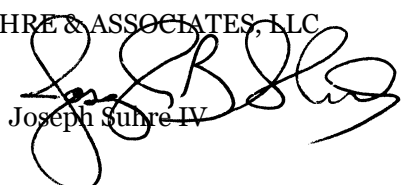
My office is located outside the county where these records are kept and accordingly, I am requesting that you mail or email copies to my office. If prepayment is required, please advise me of the amount and payment will be tendered. If pre-payment is not required, please include an invoice for all copying and postage charges, which we will gladly pay.

If you have any questions, please contact me at the numbers below.

Sincerely,

SUHRE & ASSOCIATES, LLC

By:


Joseph Suhre IV

cc: file

-
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 - 2) The training materials used to train the officer(s) – including, but not limited to, the DUI/Standard Field Sobriety Test Course – Reference Guide. I am requesting the specific materials that were used by the officer(s) identified in their training, not the current manual – unless of course, the two are the same.
 - 3) Officer: D. Griswold, badge number 0240, of the Covington Police Department
-

Department of Criminal Justice Training

Certification of Copies of Official Government Records Pursuant to KRE 902, KRE 1003 and CR 44.01

Joseph Suhre, Suhre & Associates

Address:

600 Vine Street, Suite 1004	Cincinnati	OH	45202
<small>Street/P. O. Box</small>	<small>City</small>	<small>State</small>	<small>Zip Code</small>

Official Document Description:

- 12 17 DUI Law (2014) 130912
- Detection of DWI Motorcyclist
- DID CSH N sheet
- DUI Investigation Field Notes updated January 2012
- DWI Motorists Brochure

The copies of the foregoing identified agency records for which this certification is made are true and complete reproductions of the original or microfilmed original records that are housed in the *Department of Criminal Justice Training*.

The original records were made or kept in the regular course of business or activity, of this agency, and it was the regular course of business of the *Department of Criminal Justice Training*, to keep, record, or cause to be recorded in a timely manner such records of the act, transaction, occurrence or event reflected therein. These records were made or otherwise created by a technician trained or employed by the *Department of Criminal Justice Training*. This certification is given pursuant to KRE 902, KRE 1003 and CR 44.01 by the custodian of the records for the above named government agency in lieu of my personal appearance.

Official Custodian of Records

State of Kentucky

County of Madison

Subscribed and sworn to and acknowledged before me this 20th day of January, 20 16.

Notary Public, State at Large

My commission expires: Aug. 29, 2016



DUI/STANDARDIZED FIELD SOBRIETY TESTING COURSE

Reference Guide Basic Training

**Contact Numbers
Switchboard 859-622-1328
DUI Enforcement 859-622-2309**

Revised 10/2006

Challenge the Officer's Administration

- Pre-screen - instructions, equal tracking, equal pupil size, resting nystagmus
- Stimulus distance
- Timing on LOSP
- Timing and placement on Maximum Deviation
- Angle Estimation and Timing on Onset Prior

Rule 702 Testimony by experts

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- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Where are we at?

- 701 says - lay opinion. If that's the case, then HGN is irrelevant because there's no correlation between jerking eyes and impairment.
- 702 says - expert opinion. Challenge the qualifications of the officer (not a mere technician) as well as the way the officer administered the HGN.

702 Challenge

- 702 Challenge based on:
 - sufficient facts and data
 - reliable principles and methods

702 Challenge

- Advantages of this type of challenge:
 - cost
- Disadvantage
 - no contrasting testimony

Case Study

- Cincinnati family
- Daughter getting married in Louisville
- Went to see the church, reception hall, and had dinner at Mitchell's Seafood to meet the grooms parents
- Headed back to Cincinnati on I-71

COMMONWEALTH OF KENTUCKY
UNIFORM CITATION

OFFENDER/VIOLATOR	AGENCY KY STATE POLICE, POST 05		ORI: KSP0500		
	NAME: LAST, FIRST, MI, FILIAL SELER, JAMES F.		ATTN <input type="checkbox"/>		
	ALIAS NAME: LAST, FIRST, MI, FILIAL		HOME PHONE UNKNOWN		
	ADDRESS (NUMBER, NAME, SUFFIX) 7470 STONEMERDOW LN		EMERGENCY PHONE UNKNOWN		
	CITY MONTGOMERY		STATE OH		
	ZIP CODE/EXTENSION 45242		KENTUCKY RESIDENT STATUS <input type="checkbox"/> F: FULL-TIME <input type="checkbox"/> P: PART-TIME <input checked="" type="checkbox"/> N: NON RESIDENT		
	ID TYPE OL		ID STATE OH		
	ID NUMBER RP236875		S. S. NUMBER [REDACTED]		
	<input type="checkbox"/> COMMERCIAL VEHICLE <input type="checkbox"/> PLACARDED HAZARDOUS VEHICLE		MARITAL STATUS MARRIED		
	DATE OF BIRTH [REDACTED]		SEX <input checked="" type="checkbox"/> MALE <input type="checkbox"/> FEMALE		
RACE <input checked="" type="checkbox"/> WHITE <input type="checkbox"/> BLACK <input type="checkbox"/> AM. INDIAN OR ALASKA <input type="checkbox"/> ASIAN		HEIGHT 5'11"			
PLACE OF EMPLOYMENT/OCCUPATION [REDACTED]		WEIGHT 190			
CITY [REDACTED]		HAIR COLOR BROWN			
STATE [REDACTED]		EYE COLOR BROWN			
VEHICLE MAKE LEXUS		VEHICLE MODEL SUV			
VEH. YEAR 2006		VEHICLE COLOR GRAY			
VEH. TYPE VN		REGISTRATION STATE, YEAR, NUMBER OH 2013 900XRH			
VEHICLE IDENTIFIERS [REDACTED]		MPH 87			
VIOLATION DATE 07 12 2013		VIOLATION TIME 9:10PM			
EXACT LOCATION OF VIOLATION I 0071		MILES DIRECTION 2 N			
ARREST DATE 07 12 2013		TIME OF ARREST 9:20PM			
EXACT LOCATION OF ARREST I 0071		MILES DIRECTION 2 N			
NUMBER 1 of 3		VIOLATION CODE 0017			
ASC# 0		STATUTE/ORD. 189.390			
CHARGE(S) 1		STARTING CASE			
ENDING CASE		DRUG TYPE			
NUMBER 2 of 3		VIOLATION CODE 02109			
ASC# 0		STATUTE/ORD. 189A.010(5A)			
CHARGE(S) 1		STARTING CASE			
ENDING CASE		DRUG TYPE			
NUMBER 3 of 3		VIOLATION CODE 00519			
ASC# 0		STATUTE/ORD. 304.39-117			
CHARGE(S) 1		STARTING CASE			
ENDING CASE		DRUG TYPE			
POST-ARREST COMPLAINT Charge 1: SPEEDING 17 MPH OVER LIMIT Charge 2: OPER MTR VEHICLE U/INFLU ALC/DRUGS/ETC. 09 (AGG CIRCUM) 1ST OFF Charge 3: FAILURE TO PRODUCE INSURANCE CARD SPEEDING FR, MR, OL, POV, NB, LL, CAL CHK OK TOOK A WHILE TO STOP HAD OPP TO DO SO BUT KEPT GOING THEN WENT BY GUARDRAIL AND WAITED TILL IT WAS PAST. AP. DS SMELLED ODOR OF AB, SAID HAD NOTHING TO DRINK ALL DAY. INC CARD WAS EXP. HGN 4 PTS PRIOR TO 45 MAX DEV. THEN SAID HE HAD BEEN TRYING WINE IN LOUISVILLE ONE LEG STAND NONE, WALK AND TURN MISSED HEAL TO TOE TWICE USED ARMS FOR BALANCE AFTER TURN STEPPED OFF LINE ONE TIME. REF PBT. TAKEN TO CCMH FOR BLOOD REF AFTER IC WAS READ. WIFE DROVE THE CAR HOME.					
COURT	COURT DATE	COURT TIME	<input type="checkbox"/> PAYABLE	COURT LOCATION	
	ARRESTED		<input checked="" type="checkbox"/> COURT	CARROLL	
CASE	COURT CASE NUMBER	TOTAL PREPAYABLE AMOUNT	NOT PREPAYABLE		
	WITNESS 1 NAME: LAST, FIRST, MI, FILIAL		STATE	ZIP CODE	
	WITNESS 1 ADDRESS (NUMBER, STREET, SUFFIX)		CITY		
	WITNESS 2 NAME: LAST, FIRST, MI, FILIAL		STATE	ZIP CODE	
	WITNESS 2 ADDRESS (NUMBER, STREET, SUFFIX)		CITY		
	<input type="checkbox"/> CARRIED FOR UCR BY OTHER AGENCY SPECIFY: _____		<input checked="" type="checkbox"/> IN-CAR VIDEO		<input checked="" type="checkbox"/> FINGERPRINTS
OFFICER SIGNATURE NOBLE, J.		BADGE/I.D. NUMBER 873	ASSIGNMENT 5		
		<input checked="" type="checkbox"/> PHOTOS		<input checked="" type="checkbox"/> EVIDENCE HELD	

COURT

YEAR
13

CONTROL NUMBER
BK79446

TYPE
1

DATE/TIME	VIOLATION DATE			VIOLATION TIME	EXACT LOCATION OF VIOLATION			MILES	DIRECTION	CITY	
	07	12	2013	9:10PM	I 0071			2	N	CARROLLTON	
ARREST DATE			TIME OF ARREST	EXACT LOCATION OF ARREST			MILES	DIRECTION	CITY		
07	12	2013	9:20PM	I 0071			2	N	CARROLLTON		
									COUNTY CARROLL		SECTOR
									COUNTY CARROLL		SECTOR
CHARGES AND POST-ARREST COMPLAINT	NUMBER	VIOLATION CODE		ASCF	STATUTE/ORD.	CHARGE(S)	STARTING CASE	ENDING CASE	DRUG TYPE		
	1	of	3	0017	0	189.390	1				
	2	of	3	02109	0	189A.010(5A)	1				
	3	of	3	00519	0	304.39-117	1				
		of									
POST-ARREST COMPLAINT											
Charge 1: SPEEDING 17 MPH OVER LIMIT											
Charge 2: OPER MTR VEHICLE U/INFLU ALC/DRUGS/ETC. .08 (AGG CIRCUM) 1ST OFF											
Charge 3: FAILURE TO PRODUCE INSURANCE CARD											
<p>SPEEDING FR, MR, OL, POV, NB, LL, CAL CHK OK TOOK A WHILE TO STOP HAD OPP TO DO SO BUT KEPT GOING THEN WENT BY GUARDRAIL AND WAITED TILL IT WAS PAST. AP. DSSMELLED ODOR OF AB, SAID HAD NOTHING TO DRINK ALL DAY. INC CARD WAS EXP. HGN 4 PTS PRIOR TO 45 MAX DEV. THEN SAID HE HAD BEEN TRYING WINE IN LOUISVILLE ONE LEG STAND NONE, WALK AND TURN MISSED HEAL TO TOE TWICE USED ARMS FOR BALANCE AFTER TURN STEPPED OFF LINE ONE TIME. REF PBT. TAKEN TO CCMH FOR BLOOD REF AFTER IC WAS READ. WIFE DROVE THE CAR HOME.</p>											

FR: Front Radar
MR: Moving Radar
OL: Opposite lane
POV: Passing Other Vehicle
NB: Northbound
LL: Left Lane
Took a while to stop: 1/2 mile

DATE/TIME	VIOLATION DATE			VIOLATION TIME		EXACT LOCATION OF VIOLATION			MILES	DIRECTION	CITY	
	07	12	2013	9:10PM		I 0071			2	N	CARROLLTON	
	ARREST DATE			TIME OF ARREST		EXACT LOCATION OF ARREST			MILES	DIRECTION	CITY	
	07	12	2013	9:20PM		I 0071			2	N	CARROLLTON	
CHARGES AND POST-ARREST COMPLAINT	NUMBER		VIOLATION CODE		ASCF	STATUTE/ORD.	CHARGE(S)	STARTING CASE	ENDING CASE	DRUG TYPE		
	1	of 3	00017		0	189.390	1					
	2	of 3	02109		0	189A.010(5A)	1					
	3	of 3	00519		0	304.39-117	1					
POST-ARREST COMPLAINT												
Charge 1: SPEEDING 17 MPH OVER LIMIT												
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HGN 4 PTS PRIOR TO 45 MAX DEV

DATE/TIME	VIOLATION DATE			VIOLATION TIME	EXACT LOCATION OF VIOLATION			MILES	DIRECTION	CITY	
	07	12	2013	9:10PM	1 0071			2	N	CARROLLTON	
ARREST DATE			TIME OF ARREST	EXACT LOCATION OF ARREST			MILES	DIRECTION	CITY		
07	12	2013	9:20PM	1 0071			2	N	CARROLLTON		
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Charge 1: SPEEDING 17 MPH OVER LIMIT											
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ONE LEG STAND NONE, WALK AND TURN MISSED HEAL (sic) TOE TWICE USED ARMS FOR BALANCE AFTER TURN STEPPED OFF LINE ONE TIME

Interview with Officer

- Confirmed what I was seeing in the report:
 - Speeding was PC for stop (87/70)
 - No fumbling/not confused
 - No slurred speech
 - Odor was strong

Interview with Officer

- There are no other field notes/reports besides the Uniform Citation
 - No video
- SFSTs
 - No clues on the One Leg Stand

Interview with Officer

- SFSTs
 - Walk and Turn
 - Used Arms for Balance
 - Missed Heel to Toe
 - Stepped off the line

Interview with Officer

- SFSTs
 - HGN
 - No clue observed for Lack of Smooth Pursuit
 - Observed Distinct and Sustained Nystagmus at Maximum Deviation
 - Observed Onset Prior to 45 degrees

Motions Were Filed and Hearings Were Held

- Filed a Motion in Limine to exclude the HGN
 - hearing was set for 2/13/14
 - prior to the hearing, I was not provided with the experts reports and or articles he intended to rely on in giving his opinion

Rule 701 Opinion testimony by lay witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness;
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

- The HGN is a scientific test
- The opinion of intoxication is not rationally based on perceiving a 'bouncing eye'

Motions Were Filed and Hearings Were Held

- Day of Hearing the prosecutor provides a stack of articles.
- Never provided a summary of his expected testimony
- 7.24(1)(c) upon written request by the defense, the attorney for the Commonwealth shall furnish to the defendant a written summary of any expert testimony that the Commonwealth intends to introduce at **trial**. This summary must identify the witness and describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Their Expert Dr. Karl Citek

KARL CITEK, O.D., Ph.D., FAAO

P.O. Box 432
Forest Grove, Oregon 97116
Office: vox (503) 352-2126
fax (503) 352-2929
citekk1@pacificu.edu

CURRICULUM VITAE

EDUCATION

SUNY College of Optometry
Ph.D. in Vision Science, May 1995.
SUNY College of Optometry
O.D., December 1993.
SUNY College of Optometry
M.S. in Vision Science, June 1990.
Columbia University
B.A. in Physics, May 1984.

PROFESSIONAL AND WORK EXPERIENCE

Institute of Police Technology and Management, University of North Florida
Adjunct Faculty, 2003-present.
Instructor, Medical Foundations of Visual System Testing.
Pacific University College of Optometry
Professor, 2006-present;
Associate Professor, 2000-2006;
Assistant Professor, 1994-2000.
Instructor, Physiological Optics; Ophthalmic Optics; Visual Perception;
Environmental Vision.
Attending Doctor, Primary Care and Low Vision Clinics.
Research Coordinator, Pacific/Nike Research Program.
SUNY College of Optometry
Research Assistant, 1987-1994, for Dr. Sheldon M. Ebenholtz.
Teaching Assistant, 1987-1991, 1994, Geometrical Optics.
Laboratory Assistant, 1988-1989, Ocular Anatomy and Physiology.
Research Assistant, 1984-1987, for Dr. Milton Katz.

PROFESSIONAL LICENSES (OPTOMETRY)

Oregon (AT), New York (DPA).

Their Expert Dr. Karl Citek

- Optometrist
- Has taught/lectured at many DUI/DRE seminars almost all of which are police/prosecution centric
- Testified “well over two hundred times” for the prosecution and 3 times for the defense - those three times were on improper administration and/or medical disqualification.

Their Expert Dr. Karl Citek

Keep in mind that the HGN test is a screening test, it is not going to be proof -- proof positive of intoxication or sobriety.

If someone has gaze nystagmus, that onset prior to 45, without the earlier clues being present, then I would attribute that as a medical or neurological condition.

Their Expert Dr. Karl Citek

20 So someone could have lack of smooth
21 pursuit naturally when sober. Someone could have
22 gaze nystagmus naturally, someone could have
23 vertical gaze nystagmus naturally, but if they have
24 it in isolation without any of the other clues, and
25 certainly without any other indicators that would be

1 consistent with intoxication, then the officer will
2 rightfully not conclude that the suspect is impaired
3 because of intoxication. There could be something
4 else causing the impairment but not intoxication.

Their Expert Dr. Karl Citek

15 THE COURT: Meniere's disease?

16 A. Any problem with the vestibular system
17 could certainly cause nystagmus.

18 THE COURT: But I have that.

Their Expert Dr. Karl Citek

2 the presence of at least four clues is consistent
3 with a blood alcohol concentration of .08 or higher.
4 It does not prove .08 or higher, it absolutely does
5 not prove that, certainly not beyond reasonable
6 doubt or anything, but it is consistent with it.
7 Most -- the majority of individuals who demonstrated
8 at least four clues will have a .08. I have

Their Expert Dr. Karl Citek

11 Q. In your opinion is the presence of
12 nystagmus a reliable and valid indicator of the use
13 of a central nervous system depressant such as
14 alcohol?

15 A. If the nystagmus or the lack of smooth
16 pursuit is consistent with what an officer would
17 expect to observe when conducting the test, then
18 yes, it is.

Their Expert Dr. Karl Citek

12 Q. Are you aware of any scientific peer
13 reviewed publications that state that there is a --
14 there is no correlation between depressant drug use
15 or alcohol consumption in the presence of
16 nystagmus?

17 A. No, but even the critics of the HGN test
18 who might not believe that officers should be
19 allowed to conduct this test, or that they cannot
20 form the proper opinion because they don't have the
21 educational background or whatever, even the critics
22 will concede that alcohol and other depressant drugs
23 and other similar drugs will cause nystagmus at high
24 enough levels of intoxication.

Their Expert Dr. Karl Citek

7 Q. And as that goes, have you ever opined
8 that the HGN test standing alone by itself when
9 properly administered is not reliable?

10 A. Well --

11 Q. Without regard to the facts?

12 A. Without regard to the -- no, I've never
13 been asked to do that.

14 Q. Okay. Would you ever do that?

Their Expert Dr. Karl Citek

15 A. Would I ever do — would I ever say that
16 by itself it is not reliable for determining
17 intoxication? That actually would be my conclusion.

Reminder

Rule 702 Testimony by experts

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 or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Direct Exam Summary

- It's a screening test, but not proof positive of intoxication
- There are three clues, which are expected to be seen in order: Lack of Smooth Pursuit, Distinct and Sustained Nystagmus at Maximum Deviation, and Onset prior to 45 degrees. If the later clues are seen but the earlier ones are not - then there is a medical or other cause, but not intoxication
 - Significant in my case because the officer reported seeing DSNMD and OSP but no LOSP

Direct Exam Summary

- HGN can occur in sober individuals
- If they show HGN in isolation, the officer will conclude that the suspect is not intoxicated
- If they show HGN in isolation, the officer will conclude that the suspect is not intoxicated

Direct Exam Summary

- Meniere's Disease, along with other medical conditions, can cause nystagmus.
- Judge pointed out he has Meniere's Disease

Direct Exam Summary

- 4 clues is consistent with, but does not prove alcohol intoxication
 - Odor is consistent
 - Bloodshot/glassy eyes is consistent
- Not looking for 'consistent' looking for a SCIENTIFIC TEST.

Direct Exam Summary

- No Peer Reviewed Studies
- By itself, the HGN is not a reliable test for determining intoxication

PAPER

GENERAL; PSYCHIATRY AND TOXICOLOGY

*Steven J. Rubenzer,¹ Ph.D. and Scott B. Stevenson,² Ph.D.***Horizontal Gaze Nystagmus: A Review of
Vision Science and Application Issues**

ABSTRACT: The Horizontal Gaze Nystagmus (HGN) test is one component of the Standardized Field Sobriety Test battery. This article reviews the literature on smooth pursuit eye movement and gaze nystagmus with a focus on normative responses, the influence of alcohol on these behaviors, and stimulus conditions similar to those used in the HGN sobriety test. Factors such as age, stimulus and background conditions, medical conditions, prescription medications, and psychiatric disorder were found to affect the smooth pursuit phase of HGN. Much less literature is available for gaze nystagmus, but onset of nystagmus may occur in some sober subjects at 45° or less. We conclude that HGN is limited by large variability in the underlying normative behavior, from methods and testing environments that are often poorly controlled, and from a lack of rigorous validation in laboratory settings.

KEYWORDS: forensic science, driving while intoxicated, DUI, sobriety testing, horizontal gaze nystagmus, DWI, HGN, driving under the influence, operating while intoxicated, OWI

The *Standardized Field Sobriety Tests* (SFSTs) have become an important part of driving while intoxicated (DWI) enforcement since they were introduced in the 1980s. Consisting of three standardized psychophysical tests, failure on the SFSTs is used to establish probable cause to arrest and demand a breath test. The defendant's performance on the SFSTs may also be introduced in most states as circumstantial evidence that the defendant is impaired by alcohol (1,2).

Of the three tests, *Horizontal Gaze Nystagmus* (HGN) has generated the most interest, both from scientific and legal perspectives. The other tests, Walk and Turn and One Leg Stand, arguably do not require any specialized knowledge to interpret, as many courts have held (1–4). Primarily, defendants are scored on behaviors that reflect lack of balance and coordination, symptoms of intoxication that have long been recognized. Legal tradition holds that any lay person can testify as to whether another person appeared intoxicated or not and that such judgments require no special expertise. In contrast, HGN's indications of intoxication are more subtle and not common knowledge. Further, HGN has roots in laboratory science and clinical medicine. For these reasons and others, HGN has often been regarded as a scientific test requiring expert testimony before admitting it as evidence. Although this might seem to require testimony from a behavioral or medical scientist, some courts have taken judicial notice of the test or permitted police officers to qualify as experts based on specialized training. Other courts do not deem HGN to be a scientific test (1–4).

HGN is controversial (5–8) and has been the subject of considerable advocacy by prosecutors and their experts and criticism by defense lawyers and their experts. Not surprisingly, there has been

a polarization of opinion. At the time of this article, there have been no comprehensive scientific reviews of HGN from the perspective of eye movement science. This article will attempt to fill this void, focusing on laboratory studies of functional eye movement and gaze, including those that employed alcohol. It will not attempt to address physiology or diseases of the eye or nervous system in depth. We will begin with a brief description of the visual system and HGN. We will then address the empirical studies of HGN as a sobriety test, partisan arguments that support or criticize its use, and in the main part of the article, discuss empirical findings in the visual science literature that bear on its reliability and validity. Finally, we summarize our analysis and discuss the limitations of National Highway Traffic Safety Administration's (NHTSA) (1,2) training program for police officers and the implications for use of HGN in a law-enforcement environment.

Overview of the Visual System

The retina is the tissue at the back of the eye on which light is focused and detected. The most sensitive portion of the retina is the fovea, a specialized area that is densely packed with receptors and allows maximum resolution and clarity of images. Animals with a fovea must be able to move the eye to a target of interest, then maintain the gaze to keep the image on the fovea. People are able to change the direction of their gaze in several ways, some of which are reflexive and others which are mostly voluntary. The *smooth pursuit (SP) system* allows the viewer to smoothly track a steadily moving object, as long as it does not go too fast, thus keeping the image on the fovea. In this way, a motorist can read a road sign, even as it moves relative to the body and the rest of the visual field. Generally, the smooth pursuit system is reported to be able to track smoothly moving objects up to a rate of 30°/sec (9–11), although texts (12,13), a review (14), and authors of individual studies (15–19) report that wide individual differences exist.

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Horizontal Gaze Nystagmus: A Review of Vision Science and Application Issues

ABSTRACT: The Horizontal Gaze Nystagmus (HGN) test is one component of the Standardized Field Sobriety Test battery. This article reviews the literature on smooth pursuit eye movement and gaze nystagmus with a focus on normative responses, the influence of alcohol on these behaviors, and stimulus conditions similar to those used in the HGN sobriety test. Factors such as age, stimulus and background conditions, medical conditions, prescription medications, and psychiatric disorder were found to affect the smooth pursuit phase of HGN. Much less literature is available for gaze nystagmus, but onset of nystagmus may occur in some sober subjects at 45° or less. We conclude that HGN is limited by large variability in the underlying normative behavior, from methods and testing environments that are often poorly controlled, and from a lack of rigorous validation in laboratory settings.

Getting Ready for the Cross

- Try not to screw it up
- Emphasize the good points he made for us
- Focus on the reliability/predictability of the test using the Robustness Study

The HGN Robustness Study

The National Highway Traffic Safety Administration

The Robustness^{of the} Horizontal Gaze Nystagmus Test

The HGN Robustness Study

Table 5.

Study Variables – HGN Procedural Variations Examined in This Study

Experiment	Variable	Definition
I	Stimulus speed	Rate of speed at which the stimulus moves as it passes in front of a participant's eyes
	Stimulus elevation	Vertical position of the stimulus relative to the participant's eye-level gaze
	Stimulus distance	Distance of the stimulus from the participant's face
II	Participant's posture	Participant standing, sitting, or lying down during examination
III	Participant's vision	Participant having monocular versus binocular vision

The HGN Robustness Study

- Put an ad out - I'm not kidding - on Craigslist asking for participants who would be paid \$75 to drink
 - Had to be:
 - 21
 - a licensed driver
 - drink alcohol
 - and live in Santa Monica or Culver City area

The HGN Robustness Study

- There were 7 police officers who participated
 - There were 7 sessions
 - Each session, with the exception of 1, only had 3 officers present

The HGN Robustness Study

- The study basically concludes that variations in stimulus speed, height, and/or distance from the suspect do not effect the validity of the HGN.
- Nor does positioning: standing, sitting, supine
- Moving the stimulus too fast actually helps the suspect because the officers reported an increased amount of false negatives

What's Significant About a BAC of .05 or Less

- KY law give a person with a BAC of under .05 the right to a jury instruction that states the individual is presumed to not be under the influence.
- 189A.010 (3) In any prosecution for a violation of subsection (1)(b) or (e) of this section in which the defendant is charged with having operated or been in physical control of a motor vehicle while under the influence of alcohol, the alcohol concentration in the defendant's blood as determined at the time of making analysis of his blood or breath shall give rise to the following presumptions: (a) If there was an alcohol concentration of less than 0.05 based upon the definition of alcohol concentration in KRS 189A.005, it shall be presumed that the defendant was not under the influence of alcohol; and

Table 10.

HGN Signs (Total Number) by Variations of Stimulus Speed, BACs, and Examination Period

BACs (g/dL)	Exam	Participant's BAC (g/dL)	Stimulus Speed		
			2 sec (Standard)	1 sec	
≥ .100	1	.102	4	6	
		.143	6	4	
.05-.099	2	.127	6	4	
	1	.097	4	0*	
		.093	4	4	
		.087	6	4	
		.084	6	4	
		.075	2*	3*	
		.064	4	4	
		.063	6	0*	
		2	.088	4	2*
			.084	6	4
		.077	4	2*	
		.073	6	4	
		.069	6	4	
		.063	4	4	
.055	2	2			
.054	4	4			
3	.095	6	4		
	.073	4	4		
	.069	4	4		
	.063	4	0*		
	.063	2*	0*		
	.059	2	0*		
4	.076	4	0*		
	.058	4	4		
	.057	4	4		
<.05	3	.049	4	4	
		.044	4	4	
4	.039	4	0		
	.048	4	0		
	.044	2	2		
	.042	4	0		
	.030	4	2		
	.019	2	4**		
	.016	4**	4**		

*False Negative (FN) and **False Positive (FP) relative to the ranges specified above for the various BACs

signs. A "Hit" occurred when the number of reported signs for a given BAC fell within the range reported below.

<u>BAC</u>	<u>Number of Signs</u>
$\geq .06$	4 - 6
.05 - .059	2 - 4
.03 - .049	0 - 4
$\leq .03$	0 - 2

They changed the stimulus speed on the LOS, but performed the full test.

BACs (g/dL)	Exam	Participant's BAC (g/dL)	Stimulus Speed	
			2 sec (Standard)	1 sec
<.05	3	.049	4	4
		.044	4	4
		.039	4	0
	4	.048	4	0
		.044	2	2
		.042	4	0
		.030	4	2
		.019	2	4**
		.016	4**	4**

*False Negative (FN) and **False Positive (FP) relative to the ranges specified above for the various BACs

They changed the stimulus speed on the LOS, but performed the full test.

- There were 18 administrations of the test to subjects with a BAC less than .05
- Of those 18, 11 showed 4 clues - 61%

They changed the stimulus elevation and performed the full test.

BACs (g/dL)	Exam	Participant's BAC (g/dL)	Stimulus Elevation (relative to eye level)		
			2 nd (standard)	0 th	4 th
		.032	0	2	1
<.05	2	.047	6**	6**	6**
	3	.047	0*	4	0*
		.031	4	4	4
	4	.019	4**	4**	6**
		.033	0	4	4
		.034	0	0	4
		.038	0	4	4
		.038	0	4	4
		.047	0	4	4
		.049	4	4	4

- 30 administrations of the test
- 22 showed 4 or more clues
73%

Table 15

HGN Signs (Total Number) by Stimulus Distance from Face, BAC, and Examination

BACs (g/dL)	Exam	Participant's BAC (g/dL)	Stimulus Distance (in front of face)		
			12-15" (standard)	20"	10"
≥ .100	1	.129	6	6	6
		.112	4	4	4
		.106	4	6	4
		.104	4	6	6
		.102	6	6	6
.05-.099	1	.091	6	6	6
		.087	4	4	4
		.079	6	6	6
		.070	6	4	6
		.066	2*	4	4
	2	.085	4	6	4
		.079	2*	2*	6
		.076	6	6	6
		.075	2*	4	6
		.064	6	4	6
	3	.059	4	2	4
		.052	4	4	4
		.070	4	4	6
		.063	2	4	4
		.057	2	4	4
<.05	1	.051	4	4	6**
		.044	4	4	4
	2	.045	6**	6**	6**
		.036	4	4	4
	3	.049	4	4	4
		.035	2	4	4
	4	.029	6**	4**	6**
		.025	4**	4**	2
		.046	2	2	4
		.046	4	4	6**
.037		0	2	0	
.036		6**	4	4	
.027	4**	4**	4**		
.022	4**	4**	4**		
.120	4**	4**	6**		

*False Negative (FN) and **False Positive (FP) relative to the ranges specified above for the various BACs

Table 15: Stimulus distance

BACs (g/dL)	Exam	Participant's BAC (g/dL)	Stimulus Distance (in front of face)		
			12-15" (standard)	20"	10"
<.05	1	.044	4	4	4
	2	.045	6**	6**	6**
		.036	4	4	4
	3	.049	4	4	4
		.035	2	4	4
		.029	6**	4**	6**
		.025	4**	4**	2
	4	.046	2	2	4
		.046	4	4	6**
		.037	0	2	0
		.036	6**	4	4
		.027	4**	4**	4**
		.022	4**	4**	4**
		.120	4**	4**	6**

- 42 administrations of the test
- 35 showed 4 or more clues
83%

Using it to Cross Examine

- Talked about NHTSA
- Married him to the study
 - he was familiar with it
 - he's read it
 - in fact, he taught on it

Using it to Cross Examine

- Then went right to the tables
- I basically read them and he said, “yes”
- Yes
- Yes

Using it to Cross Examine

2 Q. The onset of prior you're supposed to move
3 at a particular rate. But for our purposes, or for
4 NHTSA's purposes in this test, they checked the
5 variable of the lack of smooth pursuit stimulus
6 speed?

7 A. Yes.

8 Q. Okay. And in the first column, the two
9 second standard one, there were nine
10 administrations -- nine individuals to whom the test
11 was administered that had a BAC of under .05?

12 A. Correct.

13 Q. And of those nine individuals, 100 percent
14 showed at least two clues?

15 A. That was the standard two second
16 administration, yes.

<.05	3	.049	4	4
		.044	4	4
		.039	4	0
	4	.048	4	0
		.044	2	2
		.042	4	0
		.030	4	2
		.019	2	4**
		.016	4**	4**

*False Negative (FN) and **False Positive (FP) relative to the ranges specified above for the various BACs

17 Q. Yes. Correct. The standard two second.
18 And then seven out of nine, or 77 percent of
19 individuals showed four or more clues -- four clues
20 at the standard speed?
21 A. Correct.

At the standard speed: 100% showed 2 clues and 77% showed 4 clues - and they were UNDER .05

Cross Exam Summary

- Emphasize the opinion that the HGN, standing alone, is not a valid predictor of whether or not someone is under the influence
- Illustrate through the use of the Robustness Study that the HGN shows false positives at an extremely high rate
- Lay a little bit of ground work for our expert on other causes of nystagmus and the environmental/field variables and training deficiencies of the officers

Dr. Adams

- Dr. Neal Adams
 - Undergrad at Yale - BS Chemistry
 - Medical School at Johns Hopkins Univ.
 - Residency in Ophthalmology at the Wilmer Eye Institute at Johns Hopkins

Dr. Adams

- Retina Fellowship at Johns Hopkins
- Board Certified
- Licensed in 4 states and DC
- Professor at Johns Hopkins
- Currently in private practice

Neal Adams, MD

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Academic Appointments and Clinical Positions

2011 – present

Editor-in-Chief

Eye Reports – www.eyereports.org – ISSN 2039-4756
Peer-Reviewed Ophthalmic Medical Journal

2010 – present

*Clinical Consultant – Diseases and Surgery of the Vitreous and Retina
and Visual Electrophysiology*
Private Sector

2008 – 2010

Chair of Department of Ophthalmology
Associate Professor of Ophthalmology
Department of Ophthalmology
The Paul L. Foster School of Medicine
The Texas Tech University Health Sciences Center

2005 – 2008

Chief of Division of Visual Physiology
Director of Retinal Dystrophy Center
Assistant Professor of Ophthalmology
Department of Ophthalmology
The Johns Hopkins University School of Medicine
The Wilmer Eye Institute of The Johns Hopkins Hospital

2003 – 2004

Assistant Professor of Ophthalmology
Department of Ophthalmology
The Johns Hopkins University School of Medicine
The Wilmer Eye Institute of The Johns Hopkins Hospital

2003 – 2004

*A. Edward Maumenee Scholar**
Department of Ophthalmology
The Johns Hopkins University School of Medicine
The Wilmer Eye Institute of The Johns Hopkins Hospital
**Wilmer's Highest Honor Bestowed on a Junior Faculty Member*

Dr. Adams

- His testimony really focused on the lack of scientific validity
- Multiple causes of HGN

JAVS

Camera Lock 2

2
1:53:05 PM

11/05/14

Dr. Adams

- His testimony really focused on the lack of scientific validity
 - things that look like nystagmus...but really aren't

JAVS

Camera Lock 2

4

1:54:16 PM

11/05/14

Dr. Adams

- His testimony really focused on the lack of scientific validity
- gives an opinion but also adds useful information about the timing on LOSP



4

2:15:14 PM

11705714

Dr. Adams

- The HGN is not sound science
 - the officers aren't capable of determining if nystagmus is present
 - the officers can't distinguish between alcohol induced and non-alcohol induced
 - we have to look at external factors to validate the results of the HGN (agreed to by their expert as well)

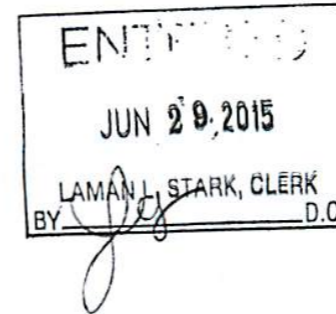
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11/05/14

COMMONWEALTH OF KENTUCKY
CARROLL DISTRICT COURT

CASE NUMBER 13-T-01250
COMMONWEALTH OF KENTUCKY
VS.
JAMES SEILER



AND

CASE NUMBER 13-M-00494
COMMONWEALTH OF KENTUCKY
VS.
COURTNEY HEARN

The Defendants in the above styled cases have filed Motions in Limine requesting the HGN and "lack of convergence" tests not be allowed into evidence without the prosecution laying a proper foundation for the introduction of the test results. Conversely the Commonwealth believes that the HGN test is so scientifically reliable that it should be accepted into evidence without a preliminary foundation being provided.

In this case, the respective Defendants were stopped by the police for driving under the influence. At the stop of Defendant Seiler, the police administered a horizontal gaze nystagmus (hereinafter referred to as "the HGN") test. At the stop of Defendant Hearn, the police administered a "lack of convergence" test.

by all measures, it would be fundamentally unfair to the defense to allow admission without a proper foundation.

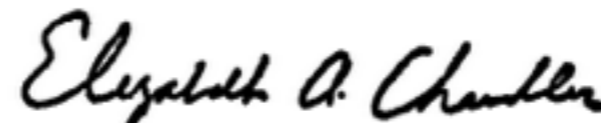
Although there is ample testimony of its use in the field, the testing is not reliable enough for this Court. The error rates, even by the State's standards, eliminate one quarter of the tests. If you take into account all of the physical, behavioral and medical attributes that may cause nystagmus as testified by the defense, one quarter of tests eliminated may be low.

HGN and "lack of convergence" testing is scientific by nature. Unlike other types of evidence, like finger printing, it does not meet the requirements of the Daubert, supra for admission into evidence.

THEREFORE IT IS ORDERED that the Defendant's Motion in Limine to prevent the introduction into evidence with an expert foundation being put forth is SUSTAINED.



THOMAS M. FUNK, JUDGE, Division II



ELIZABETH A. CHANDLER, JUDGE, Division I

COMMONWEALTH OF KENTUCKY
CARROLL DISTRICT COURT

COMMONWEALTH OF KENTUCKY)
)
) PLAINTIFF)
)
 VS) FILE NO. 13-T-01250
)
)
) JAMES SEILER)
)
) DEFENDANT)

AND ORDER

COMMONWEALTH OF KENTUCKY)
)
) PLAINTIFF)
 VS) FILE NO. 13-M-00494
)
) COURTNEY HEARN)
)
) DEFENDANT)


This matter came before the Court on the Commonwealth's Motion to Clarify its ruling in the above case. The Order was entered June 29, 2015 and dealt with the horizontal gaze nystagmus (HGN) used at trial.


IT IS ORDERED and ADJUDGED as follows:

1. The Court rules that the HGN test does not have an indicia of reliability. The use of HGN test results are inadmissible unless an evidentiary foundation is laid by a qualified expert.

2. The Court rules that the HGN test is a scientific test and the qualified expert necessary to lay a proper foundation must be someone qualified to the particular science of this type of test.

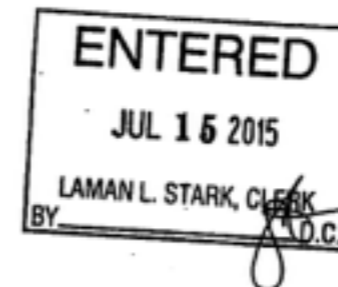
A police officer, alone and without the proper scientific training, would not qualify as the appropriate expert for the introduction of this test into evidence.


THOMAS M. FUNK, JUDGE
CARROLL DISTRICT COURT


ELIZABETH A. CHANDLER, JUDGE
CARROLL DISTRICT COURT

Copies to:

All Attorneys of Record



COMMONWEALTH OF KENTUCKY
UNIFIED COURT OF JUSTICE
CARROLL DISTRICT COURT
CASE NO. 13-T-001250

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

NOTICE OF APPEAL

JAMES F. SEILER

DEFENDANT

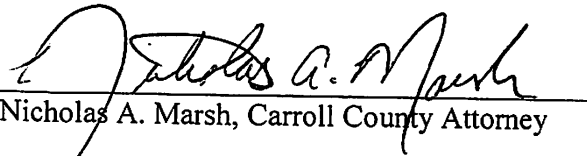
*** **

Notice is given that the Commonwealth of Kentucky, hereby appeals for a certification of law from a judgment by the Carroll District Court dated March 17, 2016, dismissing the charge of Operating a Motor Vehicle While Under the Influence of Alcohol which upheld its order suppressing the HGN evidence. The Commonwealth of Kentucky is the Appellant and James F. Seiler is the Appellee.

Respectfully submitted,

CARROLL COUNTY ATTORNEY
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(502) 732-7009

Attorneys for Commonwealth of Kentucky

By: 
Nicholas A. Marsh, Carroll County Attorney

Challenges

- 701 - the HGN needs science to make sense. The police officer is not an expert, therefore its inadmissible as irrelevant
- 702 - challenge the officer on her qualifications
 - use their training record and material

Challenges

- Use the NHTSA manual
- Use the Robustness Study
- Use the lack of peer reviewed studies validating the test
- Use the Journal of Forensic Science article

Additional Resources

NHTSA Training Manuals

DWI Detection & Standardized Field Sobriety Testing:

- [Instructor Manual \(DWI Detection\) – February 2006.pdf](#)
- [Instructor Manual \(DWI Detection\) – May 2013.pdf](#)
- [Instructor Manual \(DWI Detection\) – September 2004.pdf](#)
- [Student Manual \(DWI Detection\) – February 2006.pdf](#)
- [Student Manual \(DWI Detection\) – May 2013.pdf](#)
- [Student Manual \(DWI Detection\) – September 2004.pdf](#)

SFST Refresher Training Course:

- [Instructor Manual \(4-hr Refresher\) – August 2008.pdf](#)
- [Instructor Manual \(8-hr Refresher\) – August 2008.pdf](#)
- [Student Manual \(4-hr Refresher\) – August 2008.pdf](#)
- [Student Manual \(8-hr Refresher\) – August 2008.pdf](#)

SFST Teacher-Trainer:

- [Student-Instructor Manual \(SFST\) – February 2006.pdf](#)
- [Teacher-Trainer Manual \(SFST\) – February 2006.pdf](#)

Introduction to Drugged Driving:

- [Instructor's Manual \(Intro to DD\) – February 2006.pdf](#)
- [Participant Manual \(Intro to DD\) – February 2006.pdf](#)

[www.suhrelaw.com/
NHTSA](http://www.suhrelaw.com/NHTSA)

[www.suhrelaw.com/
seminars](http://www.suhrelaw.com/seminars)