

National Traffic Law Center

**HORIZONTAL GAZE NYSTAGMUS
STATE CASE LAW SUMMARY**

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INTRODUCTION

The following state case law summary contains the seminal cases for each state, the District of Columbia and the Federal courts on the admissibility of HGN. Three main issues regarding the admissibility of the HGN test are set out under each state: evidentiary admissibility, police officer testimony, and purpose and limits of the HGN test results. The case or cases that address each issue are then briefly summarized and cited.

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ALABAMA

I. Evidentiary Admissibility

- The HGN test is scientific in nature.
- Alabama recently changed its law and adopted the *Daubert* standard for scientific evidence. Ala. Code § 12-21-160 (2012).
- The Supreme Court of Alabama found that the State had not presented “sufficient evidence regarding the HGN test’s reliability or its acceptance by the scientific community to determine if the Court of Criminal Appeals correctly determined that the test meets the *Frye* standards.” *Ex parte Malone*, 575 So.2d 106 (Ala. 1990).
- However, the Court of Criminal Appeals distinguished *Malone*, indicating because the jury was instructed that they were to consider all of the evidence, treating the horizontal gaze nystagmus test the same as any other evidence, admission of HGN testimony was not in error. In this case, the officer testified as to how the test is performed, what he is looking for, what he observed, and gave his opinion as to the defendant’s impairment. No scientific expert was called. *Cumbie v. City of Montgomery*, 703 So.2d 423 (Ala.Crim.App. 1997)
- In *Blake v. State*, 581 So.2d 1282 (Ala. Crim. App. 1991), the Court referenced *Sides v. State*, 574 So.2d 856 (Ala. Crim. App. 1990) when the Court stated, “...our Supreme Court held, essentially, that the State’s failure to lay a proper predicate establishing either the HGN test’s reliability or the scientific principles upon which it is based, effectively precludes the admission of the test results into evidence, and that the admission of such results, *without first laying a proper predicate*, amounts to reversible error.”

- The most definitive statement came from the Court of Criminal Appeals in *Brunson v. State*, 580 So.2d 62 (Ala. Crim. App. 1991) when it stated, “that *once a proper foundation is laid* regarding the scientific reliability of the test *the HGN results are admissible.*”

II. Police Officer Testimony Needed to Admit HGN Test Result

- The Alabama Court of Criminal Appeals suggested that a proper foundation for the HGN test would include evidence of the officer’s training and experience in conducting the test. *Sides v. State*, 574 So. 2d 856 (Ala. Crim. App. 1990).

III. Purpose and Limits of HGN

- The result of a horizontal gaze nystagmus test is inadmissible in Alabama courts to prove intoxication. Alabama courts, however, do allow the results of an HGN test to support an officer's determination of probable cause. *Sides v. State*, 574 So. 2d 856 (Ala. Crim. App. 1990); *Strickland v. City of Dothan*, 399 F. Supp. 2d 1275, 1288 (D. Ala. 2005).

ALASKA

I. Evidentiary Admissibility

- The HGN test is scientific in nature.
- Alaska, at the time HGN was considered by the court, applied the *Frye* standard of admissibility (Note: Alaska today uses the *Daubert* Standard). *Ballard v. Alaska*, 955 P.2d 931 (Alaska Ct. App. 1998) (Overruled by *State v. Coon*, 974 P. 2d 386 (1999) only on the grounds that it adopted the *Daubert* standard).
- When a litigant wishes to offer data or results derived from a scientific test or a scientific analysis, "it is a prerequisite that the scientific test or analysis meet the test for admissibility under *Daubert* and *Coon*." *Guerre-Chaley v. State*, 88 P.3d 539, 544 (Alaska App. 2004). Moreover, when a party raises a *Daubert-Coon* objection to evidence that qualifies as "scientific", the burden of establishing the required foundation for that evidence falls on the proponent of the evidence. It is the proponent's task to establish the scientific validity of the analysis and/or the procedures that yielded this evidence. *Guerre-Chaley*, 88 P.3d at 544.

II. Police Officer Testimony Needed to Admit HGN Test Result

- A police officer may testify to the results of HGN testing as long as the government establishes a foundation that the officer has been adequately trained in the test. *Ballard*, 955 P.2d at 941. (Overruled by *State v. Coon*, 974 P. 2d 386 (1999) only on the grounds that it adopted the *Daubert* Standard).
- Police officers could testify about results of defendant's horizontal gaze nystagmus test for sobriety, in prosecution for driving while intoxicated (DWI), as one factor for the jury to consider. *Bertilson v. State*, 64 P.3d 180 (2003).

III. Purpose and Limits of HGN

- Test results may be admitted for the purpose of establishing that person has consumed alcohol and is therefore potentially impaired. HGN testing is “a reliable indicator of a person’s alcohol consumption and, to that extent, HGN results are relevant.” HGN is admissible to show the defendant had been consuming alcohol and is therefore circumstantial evidence of impairment. *Ballard*, 955 P.2d at 940 (overruled on other grounds).
- Horizontal gaze nystagmus testing may not, of itself, be sufficient to establish intoxication, in prosecution for driving while intoxicated; HGN test results are admissible as factor to be

considered by fact-finder when determining intoxication. *Ballard*, 955 P.2d at 940 (overruled on other grounds).

- The court cautioned that the HGN test could not be used to correlate the results with any particular blood-alcohol level, range of blood-alcohol levels, or level of impairment. *Ballard*, 955 P.2d at 940 (overruled on other grounds).

IV. Other

- It should be noted that Alaska now uses the *Daubert* standard for admissibility. No re-hearing on the admissibility of the HGN test has been ordered and *Ballard* has been relied upon for instruction on how HGN may be used in court at least twice since this time. (One of these was an unpublished decision.) *Bertilson v. State*, 64 P.3d 180 (Alaska Ct. App. 2003).
- *State v. Grier*, 791 P.2d 627 (1990) considered the question “[d]oes a police officer have probable cause to arrest a driver for driving while intoxicated where the driver is stopped for speeding; fails to pass a HGN test, but passes four other field sobriety tests; and exhibits several signs of intoxication such as the odor of alcohol, watery and bloodshot eyes, unsteady balance, “bouncy” gait, confusion, talkativeness, and difficulty in showing vehicle registration?” And held yes, that police officer's observations, combined with defendant's failing HGN test, established probable cause to arrest.

ARIZONA

I. Evidentiary Admissibility

- HGN is a scientific test.
- Arizona applies the *Daubert* standard of admissibility.
- A Frye hearing was conducted at the trial court level at which the State presented evidence, the court conducted some of its own research, but the defense did not call any witnesses. *State v. Superior Court (Blake)*, 718 P.2d 171 (Ariz. 1986). (Still good law despite Arizona changing from a *Frye* standard to a *Daubert* standard).
- The State has shown that HGN satisfies the *Frye* standard. *State v. Superior Court (Blake)*, 718 P.2d 171 (Ariz. 1986). (Still good law despite Arizona changing from a *Frye* standard to a *Daubert* standard).

II. Police Officer Testimony Needed to Admit HGN Test Result

- A proper foundation includes a description of the officer's training, education, and experience in administering the test and showing that proper procedures were followed.” *State ex. rel. Hamilton v. City Court of Mesa*, 799 P.2d 855 (Ariz. 1990). *See also Arizona ex. Rel. McDougall v. Ricke*, 778 P.2d 1358 (Ariz. Ct. App. 1989).

III. Purpose and Limits of HGN

- HGN test results are admissible to establish probable cause to arrest in a criminal hearing. *State v. Superior Court (Blake)*, 718 P.2d 171 (Ariz. 1986). (Still good law despite Arizona changing from a *Frye* standard to a *Daubert* standard).
- The parties may use HGN test results to "challenge or corroborate" a chemical analysis of a defendant's BAC. *Ricke*, 778 P.2d at 1361; *State v. Superior Court of County of Cochise*, 149 Ariz. 269 (Ariz. 1986); *State ex rel. Hamilton v. Mesa City Court*, 799 P.2d 855 (1990).

- When no chemical analysis is conducted, the use of HGN test results “is to be limited to showing a symptom or clue of impairment.” *Hamilton*, 799 P.2d at 858.
- *State v. Campoy*, 149 P.3d 756 (2006), stated HGN field sobriety test results, although satisfying the *Frye* standard of scientific reliability, cannot be used to quantify or estimate blood alcohol concentration (BAC) in a driving under the influence of intoxicant (DUI) prosecution in the absence of a chemical test.

ARKANSAS

I. Evidentiary Admissibility

- HGN is considered scientific in nature. *Whitson v. Arkansas*, 863 S.W.2d 794 (Ark. 1993).
- Arkansas follows the *Prater* standard of admissibility, which is a modified *Daubert* standard. *Whitson v. Arkansas*, 863 S.W.2d 794 (Ark. 1993).
- Because law enforcement has used HGN for over thirty-five years, a *Prater* inquiry is not necessary as the test is not “novel” scientific evidence. *Whitson v. Arkansas*, 863 S.W.2d 794 (Ark. 1993).

II. Police Officer Testimony Needed to Admit HGN Test Result

- *Brown v. State*, 827 S.W.2d 174 (1992), officer was qualified to testify regarding details and results of the HGN test. The trial court did not err in allowing testimony concerning the details and results of a field sobriety test known as the “horizontal gaze nystagmus” test. Appellant objected to this testimony on the basis that there was no foundation laid for the witness to testify as to how the biological effects of alcohol could be gauged by the HGN test. Following this objection, the officer testified as to the training he had received at the University of Arkansas's DWI school, including a course that dealt in depth with the HGN test.
- An officer's testimony regarding a HGN test is admissible to show that a driver has ingested substances that would make him an unsatisfactory driver, and is relevant as some indication of intoxication, but not to show the percentage of blood-alcohol content. *Hillery v. State*, 2003 Ark. App. LEXIS 875, 2003 WL 22853891 (Ark. Ct. App. Dec. 3, 2003)

III. Purpose and Limits of HGN

- HGN is relevant to show intoxication and indicating the presence of alcohol. *Whitson v. Arkansas*, 863 S.W.2d 794 (Ark. 1993).
- HGN may not be used to quantify BAC, although the court left the issue open as to whether a *Prater* hearing might be appropriate if such a correlation were to be made. *Whitson v. Arkansas*, 863 S.W.2d 794 (Ark. 1993). Also see, *Weisenfels v. State*, 283 S.W.3d 622 (2008), where mistrial was not warranted when police officer testifying for the State attempted to quantify defendant's blood-alcohol level based on defendant's performance of the horizontal gaze nystagmus (HGN) test; and officers' testimony was admissible as expert testimony, and thus, expert-witness instruction was warranted.

CALIFORNIA

I. Evidentiary Admissibility

- HGN is scientific in nature. *People v. Joehnk*, 35 Cal. App. 4th 1488; 42 Cal. Rptr. 2d 6; (Cal. Ct. App. 1995).
- California applies the *Kelly/Frye* standard of “general acceptance”. *California v. Leahy*, 8 Cal 4th 587 (Cal. 1994). *People v. Joehnk*, 35 Cal. App. 4th 1488, 1493, 42 Cal. Rptr. 2d 6, 8 (Cal. Ct. App.

1995).

- The HGN test satisfies the Kelly/Frye standard. A fully contested hearing was held at the trial court level. *People v. Joehnk*, 35 Cal. App. 4th 1488; 42 Cal. Rptr. 2d 6; (Cal. Ct. App. 1995).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Since there is an appellate decision indicating that HGN has reached the level of general acceptance, expert testimony is no longer needed. An officer's testimony is sufficient. *People v. Joehnk*, 35 Cal. App. 4th 1488; 42 Cal. Rptr. 2d 6; (Cal. Ct. App. 1995).
- Furthermore, police officer must testify as to the administration and result of the test. *Joehnk*, 35 Cal. App. 4th at 1508, 42 Cal. Rptr. 2d at 18.

III. Purpose and Limits of HGN

- HGN may be used, along with other scientific tests, as some evidence that defendant was impaired. *Joehnk*, 35 Cal. App. 4th at 1508, 42 Cal. Rptr. 2d at 17.

COLORADO

- We now hold that CRE 702 (Daubert), rather than Frye, governs a trial court's determination as to whether scientific or other expert testimony should be admitted. Such an inquiry should focus on the reliability and relevance of the proffered evidence and requires a determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury. We also hold that when a trial court applies CRE 702 to determine the reliability of scientific evidence, its inquiry should be broad in nature and consider the totality of the circumstances of each specific case. In doing so, a trial court may consider a wide range of factors pertinent to the case at bar. The factors mentioned in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and by other courts may or may not be pertinent, and thus are not necessary to every CRE 702 inquiry.
- *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001), as modified (May 14, 2001)
- There are no cases regarding HGN on 5/25/17

CONNECTICUT

I. Evidentiary Admissibility

- The HGN test is scientific in nature.
- Connecticut applies the *Daubert* standard of admissibility. *State v. Russo*, 773 A. 2d 965 (Conn. App. Ct. 2001).
- Proper foundation must be established in accordance with *Daubert* prior to the introduction of HGN test results. *State v. Russo*, 773 A. 2d 965 (Conn. App. Ct. 2001).
- HGN satisfies *Daubert* and is admissible. A hearing was held at the trial court level at which the State presented witnesses but the defense did not. *Connecticut v. Carlson*, 720 A.2d 886 (Conn. Super. Ct. 1998).
- Subsequently, the appellate court affirmed a trial court decision allowing the trial court to take

judicial notice of the decision in Carlson, and also of a decision rendered after another *Daubert* hearing in an earlier case by the same trial court. The appellate court held that it was unnecessary to conduct another *Daubert* hearing. *State v. Balbi*, 874 A.2d 288 (Conn. App. Ct. 2005)

- The Appellate Court has "consistently expressed [the] view that horizontal gaze nystagmus evidence is the type of scientific evidence that may mislead a jury in the absence of a proper foundation ... [and has] enunciated [a] three part test that must be satisfied before such evidence is admissible. That test requires that the state (1) satisfy the criteria for admission of scientific evidence, (2) lay a proper foundation with regard to the qualifications of the individual administering the test and (3) demonstrate that the test was conducted in accordance with relevant procedures." *State v. Balbi*, 89 Conn. App. 567, 573-74, 874 A.2d 288, cert. denied, 275 Conn. 919, 883 A.2d 1246 (2005).
- In addition, the Appellate Court has concluded that because the horizontal gaze nystagmus evidence satisfies the requirements of *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), the trial court is not required to hold a *Porter* hearing in every case in which horizontal gaze nystagmus evidence is proffered. *State v. Balbi*, supra, 576-77. "The state still must lay a proper foundation with regard to the qualifications of the individual administering the test and demonstrate that the test was conducted in accordance with generally accepted standards such as those specified in the relevant sections of the [traffic safety administration's] manual." *Id.*, 577.

II. Police Officer Testimony Needed to Admit HGN Test Result

- Officer administering the test must have the necessary qualifications and demonstrate that the test was conducted in accordance with generally accepted standards such as those specified in the relevant sections of the National Highway Traffic Safety Administration's manual. *State v. Merritt*, 647 A.2d 1021, 1028 (Conn. App. Ct. 1994); *State v. Commins*, 850 A.2d 1074 (Conn. App. 2004)

III. Purpose and Limits of HGN

- Recognizes that the SFSTs will not always be administered under ideal conditions in the field, because such conditions will not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, i.e., the inability to find a perfectly smooth surface at roadside, may have some effect on the evidentiary weight given to the test results. However, this does not necessarily make the SFSTs invalid. [Emphasis added]. *State v. Seige*, 2009 Conn. Super. LEXIS 472, 2009 WL 659198 (Conn. Super. Ct. Feb. 11, 2009)
- While these cases do not address any specific allowable correlations or arguments, it appears that HGN is admissible to show alcohol impairment.
- While nystagmus could be caused by factors other than alcohol impairment, that point could be argued on cross-examination or could be elicited through expert testimony. Also, such a challenge pertained to the weight of the HGN evidence, not its admissibility. *State v. Balbi*, 874 A.2d 288 (Conn. App. Ct. 2005).

DELAWARE

I. Evidentiary Admissibility

- HGN evidence is scientific in nature.
- Delaware adopted the *Daubert* standard for scientific evidence.
- The Delaware standard for the admissibility of scientific evidence is found in the Delaware Rules of Evidence. *Delaware v. Ruthardt*, 680 A.2d 349 (Del. Super. Ct. 1996).
- HGN evidence is acceptable scientific testimony under the Delaware Rules of Evidence. *Ruthardt*, 680 A.2d at 362.
- The hearing officer did not err in admitting the HGN test for the purpose of establishing probable cause or in admitting the police officer's testimony concerning the effect of false teeth on the results of the breath test. Lastly, the failure of the police officer to preserve certain notes written at the scene of the stop did not result in a reversal of the decision of the division of the motor vehicles. *Mooney v. Shahan*, 2001 WL 1079040 (Del. C.P. 2001)
- In *Zimmerman v. State*, this Court concluded that "the HGN test is scientific, [and] a proper foundation for testimony about it must be laid. Therefore, 'prior to the admission of HGN evidence the State must provide [a] proper foundation . . . by presenting testimony from an expert with specialized knowledge and training in HGN testing and its underlying principles. . . . [A] Delaware police officer with specialized training in HGN will suffice.'" *Guilfoil v. State*, 135 A.3d 78 *, 2016 Del. LEXIS 145 (Del. Mar. 11, 2016)

II. Police Officer Testimony Needed to Admit HGN Test Result

- Police officer may be qualified as an expert to testify about the underlying scientific principles that correlate HGN and alcohol. Delaware police receiving three-day (twenty-four hour) instruction on HGN test administration are not qualified to do this. *Ruthardt*, 680 A.2d at 361-62.
- The *Ruthardt* court held that arresting officers in DUI cases could not testify as experts about the results of the horizontal nystagmus test. The holding was based, however, on the court's conclusion that officers did not have sufficient training or experience to testify as experts regarding the test under the DUI training then provided by the state. The court specifically stated that an arresting officer might in the future be qualified to testify as an expert regarding the test if additional training and experience were provided and proven. *Ruthardt* fails to support Hardin's argument. *Hardin v. State*, 844 A.2d 982, 988 (Del. Super. Ct. 2004).
- Police officer testimony about training and experience alone, without expert testimony, is not enough foundation to admit HGN test results. *Zimmerman v. State*, 693 A.2d 311, 314 (Del. 1997) (But see above).
- *See also State v. Arnold*, 2003 Del. C.P. LEXIS 52 (Del. C.P. 2003), where the court granted defendant's motion to exclude horizontal gaze nystagmus test results on the basis that the officer was unable to meet the minimum requirements to qualify to administer the test.

III. Purpose and Limits of HGN

- HGN approved as a reliable indicator of impairment that may be used in assessing probable cause. However, due to the possibility of misdiagnosis or poor application, in order for a court to admit HGN evidence, a proper foundation must first be laid. To do so, the State must establish that the trooper was trained to administer the test and that he followed the standards as he was trained. *State v. Ministero*, 2006 WL 3844201 (Del. Sup. Ct. 2006).
- HGN test results admissible to show probable cause in a criminal hearing. *Ruthardt*, 680 A.2d at

355.

- HGN test results admissible to show probable cause in a civil hearing. *Cantrell v. DMV*, 1996 WL 453425 (Del. Super. Ct. 1996).
- HGN test results cannot be used to quantify the defendant's BAC. However, they can be used as substantive evidence that the defendant was "under the influence of intoxicating liquor." *Ruthardt*, 680 A.2d at 361-62.

DISTRICT OF COLUMBIA

I. Evidentiary Admissibility

- The Court does not address this issue.
- DC Federal - More likely to be open to *Daubert* standard.
- *Frye* - in State courts more likely to adhere to *Frye*.

II. Police Officer Testimony Needed to Admit HGN Test Result

- The Court used the case law of other jurisdictions to come to the conclusion that the Officer in the case could testify as an expert on the administration and the results of the HGN test. Therefore, in this case, the evidence was properly admitted using the Officer as the expert. *Karamychev v. District of Columbia*, 772 A. 2d 806 (D.C. App. 2001).
- Federal DC Case: The administration of the horizontal gaze nystagmus test and the interpretation of the test results are subjects beyond the ken of a lay juror, and thus, any challenge to the results of the test must be based on expert testimony. *Reiver v. District of Columbia*, 925 F.Supp.2d 1 (2013).

III. Purpose and Limits of HGN

- The Court has not yet addressed this issue.

FLORIDA

I. Evidentiary Admissibility

- HGN test evidence is "quasi-scientific" in nature. *Williams v. State*, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998). But see *State v. Meador*, 674 So.2d 826 (1996) finding that horizontal gaze nystagmus (HGN) test was scientific evidence for which there was danger of unfair prejudice if admitted as lay observations of intoxication.
- Florida follows the *Daubert* standard of admissibility. Fla. Stat. § 90.702 (2014).
- HGN test results should not be admitted as lay observations of intoxication because HGN testing constitutes scientific evidence. Thus, although the evidence may be relevant, the danger of unfair prejudice, confusion of issues, or misleading the jury requires the exclusion of the HGN test evidence unless the traditional predicates of scientific evidence are satisfied. *State v. Meador*, 674 So.2d 826, 836 (Fla. 4th DCA 1996).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Once a proper foundation is laid that the test was correctly administered by an officer properly trained and qualified to administer the test, the results are admissible. *Williams v. State*, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998); *Bowen v. State*, 745 So. 2d 1108 (1999).

- Although results on a Horizontal Gaze Nystagmus (HGN) test may be admissible at trial by a properly trained officer, such an officer may not testify as to what he or she believes a driver's actual or specific BAC level would be, based solely on the HGN test results. Such a use of HGN test results would raise a number of due process problems different from those associated with the chemical testing of bodily fluids. The arresting officer's reading of the HGN test cannot be verified or duplicated by an independent party. The test's recognized margin of error provides problems as to criminal convictions which require proof of guilt beyond a reasonable doubt. The circumstances under which the test is administered at roadside may affect the reliability of the test results. Nystagmus may be caused by conditions other than alcohol intoxication. And finally, the far more accurate chemical testing devices are readily available. *Williams v. State*, 710 So. 2d 24, 1998 Fla. App. LEXIS 2706, 23 Fla. L. Weekly 752 (Fla. Dist. Ct. App. 3d Dist. Mar. 18, 1998)
- HGN test results are admissible into evidence once a proper foundation has been laid that the test was correctly administered by an officer properly trained and qualified to administer an HGN test. The officer does not have to be certified as a Drug Recognition Evaluator. *Bowen*, 745 So.2d at 1109; *Cloyd v. State*, 943 So.2d 149, 165 -166 (Fla. 3rd DCA 2006).
- *Robinson v. State*, 982 So.2d 1260 (2008), held: (1) lay testimony regarding horizontal gaze nystagmus (HGN) test result are inadmissible, and (2) absent scientific evidence of defendant's blood alcohol level, improper admission of lay HGN testimony was prejudicial error.
- Results of horizontal gaze nystagmus (HGN) test performed upon defendant charged with operating an aircraft while intoxicated or in a careless or reckless manner were generally accepted as reliable in relevant scientific community, and were thus admissible upon showing that test was correctly administered by officer properly trained and qualified to administer it. *Cloyd v. State*, 943 So.2d 149 (Fla.App.3rd Dist., 2006)

III. Purpose and Limits of HGN

- HGN test results are admissible independently of other evidence as proof that a defendant was impaired. *Williams v. State*, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998).
- The HGN test results alone, in the absence of a chemical analysis of blood, breath, or urine, are inadmissible to trigger the presumption provided by Section 316.1934, and may not be used to establish a BAC of .08 percent or more. *Williams v. State*, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998).
- HGN test results were admissible to show a BAC level with corroborating evidence consisting of a breath test. *Cloyd v. State*, 943 So.2d 149 (Fla.App.3rd Dist., 2006)
- HGN is used as indicator of blood alcohol content and drug impairment. *Williams v. State*, 710 So. 2d 24 Court: 3rd District Court of Appeal Date: March 18, 1998

GEORGIA

I. Evidentiary Admissibility

- Note: Georgia uses *Frye* standard for criminal cases (*Daubert* for civil cases).
- The HGN test is scientific in nature. *Hawkins v. Georgia*, 476 S.E.2d 803 (Ga. Ct. App. 1996)
- *Hawkins v. Georgia*, 476 S.E.2d 803 (Ga. Ct. App. 1996)-The Court of Appeals held that, in Georgia, the HGN test is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can

determine that a driver was impaired by alcohol. The Court followed the standard set by the Georgia Supreme Court in *Harper v. State*, 249 Ga. 519 (1982) for determining whether a scientific procedure is admissible.

- The HGN test is subject to the *Harper* standard which states that “the determination of the admissibility of a new scientific process lies with the trial court which decides whether the procedure or technique in question has reached a stage of verifiable certainty or ‘rests upon the laws of nature.’ This determination may be based on an evaluation of expert testimony and/or an evaluation of exhibits, treatises, or opinion from other jurisdictions. The significant point is that a determination as to whether a new technology or procedure should be admissible is based on all of the evidence available to the trial court, of which only one factor is the procedure’s general acceptance in the scientific community.” *Hawkins v. Georgia*, 476 S.E.2d 803 (Ga. Ct. App. 1996)
- The HGN test is admissible as a “scientifically reliable field sobriety evaluation” under the *Harper* “verifiable certainty” standard. The court’s decision to allow the HGN evidence as a valid field sobriety test followed, inter alia, detailed expert testimony at the motion in limine hearing to the effect that the HGN test had reached a stage of verifiable certainty in the medical community. *Manley v. State*, 424 S.E.2d 818 (Ga. Ct. App. 1992).
- HGN testing now is judicially noticed as a scientifically reliable test and therefore expert testimony is no longer required before the test results can be admitted. *Mullady v. State*, 606 S.E.2d 645 (Ga. Ct. App. 2004); *State v. Tousley*, 611 S.E.2d 139 (Ga. Ct. App. 2005); *Polizzotto v. State*, 547 S.E.2d 390 (Ga. Ct. App. 2001).
- Court found HGN test was admissible to indicate (not determine) presence of alcohol and it had not been an error to admit the test’s numerical score (there was other evidence the driver crossed the center line). *Lorio v. State*, 216 Ga. App. 255 (1995).

II. Police Officer Testimony Needed to Admit HGN Test Result

- The State must establish that the officer received appropriate training in administering the test and that he substantially performed the test in an acceptable manner. *Stewart v. State*, 634 S.E.2d 141 (Ga. Ct. App. 2006); *Sieveking v. Georgia*, 469 S.E.2d 235 (Ga. Ct. App. 1996).
- Formal education is not required even for a witness to qualify as an expert in DUI detection. A combination of experience and study may suffice. *Tuttle v. State*, 502 S.E.2d 355 (Ga. Ct. App. 1998).
- Testimony of State’s expert witness that HGN test could detect nystagmus caused by alcohol and that arresting officer could have observed such nystagmus despite his improper administration of test was admissible as a corollary to the wide acceptance of HGN testing as a common procedure that has reached a state of verifiable certainty, in prosecution for driving under the influence (DUI). *Duncan v. State*, 699 S.E.2d 341 (2010).

III. Purpose and Limits of HGN

- HGN test can be admitted to show that the defendant “was under the influence of alcohol to the extent that it was less safe for him to drive.” *Sieveking v. Georgia*, 469 S.E.2d 235 (Ga. Ct. App. 1996); *Webb v. State*, 626 S.E.2d 545 (Ga. Ct. App. 2006)
- Numerical blood-alcohol level shown by results of HGN test was relevant in trial for driving under influence of alcohol to extent that it was less safe for her to drive; evidence directly addressed whether defendant was under influence of alcohol, which was element of offense, and shed light on whether she was less safe to drive, which was another element of offense. *Webb v.*

State, 626 S.E.2d 545 (Ga. Ct. App. 2006)

- "An accused may always introduce evidence of the possibility of error. . . . Such evidence would relate to the weight rather than the admissibility." *Hawkins v. State*, 476 S.E.2d 803 (Ga. Ct. App. 1996); *State v. Pierce*, 596 S.E.2d 725 (Ga. Ct. App. 2004).
- Concluded that although evidence of HGN tests may be admissible as evidence of alcohol consumption and impairment, it is not admissible to quantify a specific BAC. *Bravo v. State*, 696 S.E.2d 79 (2010).

HAWAII

I. Evidentiary Admissibility

- Hawaii accepted *Frye* test; however, will consider *Daubert* factors.
- HGN is a scientific test. *State v. Ito*, 978 P.2d 191 (Haw. Ct. App. 1999), as amended, (May 14, 1999).
- Hawaii follows a modified *Daubert* standard. The following factors should be considered in determining the admissibility of scientific evidence at trial: (1) the evidence will assist the trier of fact to understand the evidence or to determine a fact in issue; (2) the evidence will add to the common understanding of the jury; (3) the underlying theory is generally accepted as valid; (4) the procedures used are generally accepted as reliable if performed properly; (5) the procedures were applied and conducted properly in the present instance; and (6) whether admitting such evidence will be more probative than prejudicial. *State v. Montalbo*, 828 P.2d 1274 (1992).
- The HGN test is reliable under the Hawaii Rules of Evidence and admissible. The trial court took judicial notice of decisions in other states. This was deemed appropriate by the State Supreme Court. *State v. Ito*, 978 P.2d 191.

II. Police Officer Testimony Needed to Admit HGN Test Result

- Before HGN test results can be admitted into evidence in a particular case it must be shown that (1) the officer administering the test was duly qualified to conduct and grade the test; and (2) the test was performed properly in the instant case. *Ito*, 978 P.2d 191; *see also State v. Toyomura*, 904 P.2d 893 (Haw. 1992) and *State v. Montalbo*, 828 P.2d. 1274, 1281 (Haw. 1992), and *State v. Bebb*, 53 P.3d 1198 (Haw. Ct. App. 2001).

III. Purpose and Limits of HGN

- HGN test can be admitted as "evidence that police had probable cause to believe that a defendant was DUI." *Ito*, 90 Haw. 225 (Haw. Ct. App. 1999).

IDAHO

I. Evidentiary Admissibility

- HGN is scientific in nature.
- Idaho follows Idaho Rule of Evidence 702, which is the *Daubert* standard. *State v. Gleason*, 844 P.2d 691, 694 (Idaho 1992).
- HGN was first found admissible under the *Frye* standard in a plurality decision. *State v. Garrett*, 811 P.2d 488, 493 (Idaho 1991).

- HGN test results admitted under the Idaho Rules of Evidence. *State v. Gleason*, 844 P.2d 691 (Idaho 1992).
- The courts have made their determination essentially by means of taking judicial notice of other state's decisions. *State v. Garrett*, 811 P.2d 488, 493 (Idaho 1991).
- In *State v. Besaw*, 155 Idaho 134, 138, 306 P.3d 219, 223 (Ct. App. 2013), the court held an officer may testify that "nystagmus, in conjunction with evidence from other field sobriety tests, may be an indicator of intoxication" after "establishing the qualifications of the person who administered the test." *Id.* at 139, 306 P.3d at 224.

II. Police Officer Testimony Needed to Admit HGN Test Result

- The officer may testify regarding HGN if the foundation shows he or she is competent and can testify reliably on HGN evidence. This can be shown through training and experience. *State v. Garrett*, 811 P.2d 488, 493 (Idaho 1991); *State v. Anderson*, 947 P.2d 1013 (Ct.App.1997)
- State was not required to independently lay foundation for arresting officer's testimony, in prosecution for misdemeanor driving under the influence (DUI) with an excessive alcohol concentration of .20 or above, establishing reliability of horizontal gaze nystagmus evidence, although it was required to present foundation establishing officer's qualifications to administer test; admissibility of HGN evidence was to be determined pursuant to state rules of evidence, which contained no requirement that state establish general acceptance in scientific community. Rules of Evid., Rule 702. *State v. Besaw*, 306 P.3d 219 (2013).

III. Purpose and Limits of HGN

- HGN test results may not be used at trial to establish the defendant's blood alcohol level in the absence of the chemical analysis of the defendant's blood, breath, or urine. *State v. Garrett*, 811 P.2d 488, 493 (Idaho 1991).
- HGN may be admitted as evidence of intoxication, in conjunction with other evidence. *State v. Garrett*, 811 P.2d 488, 493 (Idaho 1991).
- Officer may base an opinion of intoxication based upon HGN and other evidence. *State v. Gleason*, 844 P.2d 691 (Idaho 1992).
- While the theory underlying the horizontal gaze nystagmus (HGN) test is sound, the test results may only be used to draw certain inferences, and as circumstantial evidence of intoxication, a positive HGN test result alone is not evidence of a certain level of blood alcohol content in a driving under the influence (DUI) case. *State v. Hunter*, 328 P.3d 548 (Idaho Ct. App. 2014), review denied, (July 12, 2014).

ILLINOIS

I. Evidentiary Admissibility

- "Because the results of an HGN test require expert interpretation" by a trained police officer, "the results of HGN testing are scientific evidence." *People v. McKown*, 924 N.E.2d 941 (2010), Citing *McKown I*, 875 N.E.2d 1029, at 257.
- The relevant scientific fields that embrace the testing for and observation of HGN include medicine, ophthalmology, and optometry. Research and expert opinion in other scientific or

medical fields, such as neurophysiology, might also be relevant. *People v. McKown*, Docket No. 102372, Decided Feb. 19, 2001.

- HGN testing is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired. *People v. McKown*, 924 N.E.2d 941 (2010).
- Police officer's testimony, that defendant turned his head despite officer's instruction to keep his head still while officer was attempting to administer a horizontal gaze nystagmus test, was not scientific evidence, and thus state was not required to establish as foundation for testimony that test had been generally accepted as a reliable indicator of alcohol impairment; officer never testified that he formed any opinions based the movement of defendant's eyes during test, but instead he merely related his observation that defendant moved his head despite being instructed to keep it still. *People v. King*, 23 N.E.3d 365 (Ill. App. Ct. 2014).
- While HGN testing is an indicator of alcohol consumption, it is not necessarily a sign of impairment. *People v. Motzko*, 2017 IL App (3d) 160154 Court: 3rd District Court of Appeals Date: April 19, 2017

II. Police Officer Testimony Needed to Admit HGN Test Result

- [E]vidence of HGN field-sobriety testing, when performed according to the NHTSA protocol by a properly trained officer, is admissible under the *Frye* test for the purpose of showing whether the subject has likely consumed alcohol and may be impaired. *People v. McKown*, 924 N.E.2d 941 (2010).
- A properly trained police officer who performed the HGN field test in accordance with proper procedures may give expert testimony regarding the results of the test. *People v. McKown*, 924 N.E.2d 941 (2010).
- “A proper foundation should consist of describing the officer's education and experience in administering the test and showing that the procedure was properly administered.” *People v. Buening*, 592 N.E.2d at 1222 (Ill.App. 5th Dist. 1992); *People v. Robinson*, 812 N.E.2d 448 (Ill. App. 1st Dist. 2004)

III. Purpose and Limits of HGN

- [A] testifying officer may use the HGN test results as a part of the basis for his opinion that the defendant was under the influence and impaired. *People v. McKown*, 924 N.E.2d 941 (2010).
- HGN test results may be used to establish probable cause in a criminal hearing. *People v. Furness*, 526 N.E.2d 947, 949 (Ill. App. Ct. 1988).
- HGN test results admissible to show probable cause in a civil hearing. *People v. Hood*, 638 N.E.2d 264, 274 (Ill. App. Ct. 1994).
- HGN evidence is evidence of impairment, that one factor, along with other evidence of defendant's behavior, may be used in the determination of whether defendant was under the influence of alcohol. *People v. Wiebler*, 640 N.E.2d 25 (Ill. App. 3rd Dist. 1994); *Robinson*, 349 Ill. App. 3d 622.

INDIANA

I. Evidentiary Admissibility

- There is no indication in the case law that HGN is considered to be scientific in nature. *Cooper v. State*, 761 N.E.2d 900 (Ind. Ct. App. 2002).
- Results of properly administered HGN test are admissible to show impairment which may be caused by alcohol. *Cooper v. State*, 761 N.E.2d 900 (Ind. Ct. App. 2002).
- *Daubert* is consistent with Indiana's R. Evid 702(b); however *Daubert* is not controlling. *Malinski v. State*, 794 N.E.2d 1071, 1084 (Ind. 2003).

II. Police Officer Testimony Needed to Admit HGN Test Result

- The proper foundation for admitting HGN evidence should consist of describing the officer's education and experience in administering the test and showing that the procedure was properly administered. *Cooper*, 761 N.E.2d at 903; *O'Banion v. State*, 789 N.E.2d 516, 518 (Ind. Ct. App. 2003); *Brown v. State*, 915 N.E.2d 996 (2009).

III. Purpose and Limits of HGN

- Results of properly administered HGN test are admissible to show impairment which may be caused by alcohol and, when accompanied by other evidence, will be sufficient to establish probable cause to believe someone may be intoxicated. *Cooper v. State*, 761 N.E.2d 900 (Ind. Ct. App. 2002).

IOWA

I. Evidentiary Admissibility

- *Daubert* considered but not controlling.
- HGN admissible as any other field test under the Iowa Rules of Evidence. *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990).
- The results of the HGN test are admissible without need for further scientific evidence. *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990); *State v. Edman*, 452 N.W.2d 169 (Iowa 1990); *State v. Hicks*, 791 N.W.2d 89 *, 2010 Iowa Sup. LEXIS 120 (Iowa Nov. 24, 2010)
- *State v. Murphy*, 451 N.W.2d 154, 158 (Iowa 1990) ("ease with which the test may be administered and evaluated obviates the need for a more scientific interpretation").

II. Police Officer Testimony Needed to Admit HGN Test Result

- Police officer may testify about HGN test results under Rule 702 if the officer is properly trained to administer the test and objectively records the results. *Murphy*, 451 N.W.2d at 158; *State v. Edman*, 452 N.W.2d 169 (Iowa 1990)

III. Purpose and Limits of HGN

- HGN test results may be used as an indicator of intoxication. *Murphy*, 451 N.W.2d at 158
- Any inconsistencies in administering the field sobriety tests affect the weight to be accorded to the results, rather than their admissibility. *Murphy*, 451 N.W.2d at 158.

KANSAS

I. Evidentiary Admissibility

- The HGN test is scientific in nature, and before the results from an HGN test may be considered by court for any purpose, the State must establish the reliability of such a test. *City of Wichita v. Molitor*, 341 P.3d 1275 (Kan. 2015).
- Kansas follows the *Frye* standard of admissibility.
- A *Frye* hearing is required at the trial level. There was no *Frye* hearing conducted and the appellate court refused to make a determination based on the record it had. *State v. Witte*, 836 P.2d 1110, 1121 (Kan. 1992).
- In 1998 the State presented evidence at the trial level regarding the scientific admissibility of the HGN test. The Supreme Court held that the evidence presented was not sufficient to meet the *Frye* standard. *State v. Chastain*, 960 P.2d 756 (Kan. 1998).
- “Notwithstanding the passage of more than two decades since *Witte's* direction, the State has yet to follow the procedure outlined in *Witte* as being necessary to establish the reliability of the HGN test. Indeed, we are unaware of any proceeding in which the reliability of the HGN has been established under any standard.” *Molitor*, 341 P.3d at 1282.

II. Police Officer Testimony Needed to Admit HGN Test Result

- The Court did not address this issue.

III. Purpose and Limits of HGN

- The Kansas Supreme Court held in *Molitor* that unless the HGN test is proven to be scientifically reliable, the results of the test are inadmissible for any reason—including to establish reasonable suspicion to request a PBT. *City of Liberal v. Fitz*, 2016 Kan. App. Unpub. LEXIS 71 *, 364 P.3d 1221, 2016 WL 368231 (Kan. Ct. App. Jan. 29, 2016)

KENTUCKY

I. Evidentiary Admissibility

- Issue of whether HGN is scientific in nature has not been addressed.
- Kentucky follows the *Daubert* standard of admissibility.
- There are no reported cases of a *Daubert* hearing having been conducted to determine the admissibility of the HGN test.
- Admission of HGN test evidence held not to be in error where defendant failed to object. *Commonwealth v. Rhodes*, 949 S.W.2d 621, 623 (Ky. Ct. App. 1996).

II. Police Officer Testimony Needed to Admit HGN Test Result

- The Court did not address this issue.

III. Purpose and Limits of HGN

- Defendant failed the HGN test, which reveals intoxication by alcohol or some other drug, although she later passed the breathalyzer test. *Leatherman v. Commonwealth*, 357 S.W.3d 518 *, 2011 Ky. App. LEXIS 11 (Ky. Ct. App. Jan. 21, 2011).

- As a result, along with other signs of impairment, the officer had probable cause to arrest the defendant. *Leatherman v. Commonwealth*, 357 S.W.3d 518 *, 2011 Ky. App. LEXIS 11 (Ky. Ct. App. Jan. 21, 2011).
- Defendant failed the standardized Horizontal Gaze Nystagmus test, or "HGN" test, twice and the non-standardized finger-count test twice. Along with other factors, circumstances were such that an officer had reasonable grounds to believe that a felony, at least an assault if not a homicide, had been committed, and as such there was probable cause to arrest the defendant. *Sluss v. Commonwealth*, 450 S.W.3d 279 *, 2014 Ky. LEXIS 621 (Ky. Dec. 18, 2014)

LOUISIANA

I. Evidentiary Admissibility

- HGN is scientific in nature.
- HGN meets *Frye* standard of admissibility and with proper foundation may be admitted as evidence of intoxication. *State v. Breitung*, 623 So. 2d 23, 25-6 (La. Ct. App. 1993), and *State v. Regan*, 601 So. 2d 5, 8 (La. Ct. App. 1992), and *State v. Armstrong*, 561 So. 2d 883, 887 (La. Ct. App. 1990).
- The standard of admissibility for scientific evidence is currently the Louisiana Rules of Evidence. *State v. Foret*, 628 So. 2d 1116 (La. 1993).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Police officer may testify as to training in HGN procedure, certification in the administration of HGN test and that the HGN test was properly administered. *Armstrong*, 561 So. 2d at 887; *also see State v. Taylor*, 880 So. 2d 197 (La. Ct. App. 2004)
- Witness was qualified to testify regarding HGN based on his training and experience, regardless of certification. *State v. Garris*, 603 So. 2d 277, 281 (La. Ct. App. 1992).
- Results of HGN test were admissible in driving while intoxicated (DWI) prosecution, where police officer who administered test testified regarding his training, certification, and manner of conducting test. *State v. Finch*, 733 So.2d 716 (1999).

III. Purpose and Limits of HGN

- The HGN test may be used by the officer “to determine whether or not he [needs] to ‘go any further’ and proceed with other field tests.” *Breitung*, 623 So. 2d at 25.
- HGN test results may be admitted as evidence of intoxication when the proper foundation has been laid. *State v. Garris*, 603 So.2d 277 (1992); *Armstrong*, 561 So. 2d at 887.
- HGN may be admitted as proof of probable cause to arrest. *Armstrong*, 561 So. 2d at 887.

MAINE

I. Evidentiary Admissibility

- Evidence of the HGN test is scientific in nature. *State v. Taylor*, 694 A.2d 907 (Me. 1997).
- In Maine, either the *Daubert* or *Frye* standard must be met. *State v. Taylor*, 694 A.2d 907 (Me. 1997).
- The Maine Supreme Court took judicial notice of the reliability of the HGN test to detect impaired drivers. *Taylor*, 694 A.2d at 910.

II. Police Officer Testimony Needed to Admit HGN Test Result

- A proper foundation to admit HGN testimony is met by showing administrator of the HGN test is trained in the procedure and that the test was properly administered. *Taylor*, 694 A.2d at 912; *State v. Moulton*, 704 A.2d 361 (Me. 1997)
- The State lays a proper foundation pursuant to *Taylor* when the officers who administered the HGN test "testified that they graduated from the Maine Criminal Justice Academy, where they received training on the administration of field sobriety tests, including the HGN test." *State v. Hinkel*, 2017 ME 76, 159 A.3d 854, 2017 Me. LEXIS 79, 2017 WL 1649911 (Me. May 2, 2017).

III. Purpose and Limits of HGN

- Police officer's testimony that defendant's performance on horizontal gaze nystagmus (HGN) test indicated impairment was admissible as circumstantial evidence of intoxication. *State v. Just*, 926 A.2d 1173 (2007).
- HGN test results may only be used as evidence of probable cause or and for purposes of establishing criminal guilt in cases involving operating under the influence. *Taylor*, 694 A.2d at 912.
- The HGN test may not be used by an officer to quantify a particular blood alcohol level in an individual case. *Taylor*, 694 A.2d at 912.
- An officer's testimony regarding "impairment" was within this permissible scope of evidence relating to the HGN test. *State v. Just*, 926 A.2d 1173 (2007)
- "A police officer's failure to strictly adhere to the specific procedures promulgated by NHTSA does not render evidence regarding those field sobriety tests inadmissible or without value in determining whether a suspect is under the influence of intoxicants." *State v. Fay*, 2015 ME 160, ¶ 7, 130 A.3d 364.

MARYLAND

I. Evidentiary Admissibility

- The horizontal gaze nystagmus (HGN) test is a scientific test, and testimony recounting a defendant's performance on the test is admissible in evidence pursuant to Md. Rule 5-702. *Maryland v. Blackwell*, 971 A.2d 296 (2009).
- HGN is scientific in nature. *Schultz v. State*, 664 A.2d 60 (Md. Ct.App. 1995).
- HGN must satisfy the *Frye/Reed* standard of admissibility. *Schultz v. State*, 664 A.2d 60 (Md.Ct.App. 1995). (Note: Maryland uses the *Frye* standard; however, it has not completely rejected *Daubert* – Leaving it to a case by case analysis).
- The Court of Appeals took judicial notice of HGN's reliability and its acceptance in the relevant scientific communities. *Schultz v. State*, 664 A.2d 60 (Md.Ct.App. 1995).

II. Police Officer Testimony Needed to Admit HGN Test Result

- [Officer's] testimony...about performance on the HGN test constituted expert testimony subject to the strictures of Md. Rule 5-702. *Maryland v. Blackwell*, 971 A.2d 296 (2009).
- Before HGN testimony can be admitted into evidence the witness must be offered to the court, and accepted by it, as an expert in the field of administering the HGN test. *Maryland v. Blackwell*, 971 A.2d 296 (2009).
- A proper foundation should consist of describing the officer's education and experience in administering the test and showing that the procedure was properly administered. *Schultz*, 664 A.2d at 77.

III. Purpose and Limits of HGN

- HGN test results may be admitted as evidence of intoxication. *Schultz v. State*, 664 A.2d 60 (Md. Ct.App. 1995).
- HGN testing may not be used to establish a specific blood alcohol level. *Wilson v. State*, 723 A.2d 494 (Md.Ct.App. 1999).

MASSACHUSETTS

I. Evidentiary Admissibility

- The HGN test is scientific in nature.
- In Massachusetts, either the *Daubert* or *Frye* standard must be met. “Party seeking to introduce scientific evidence may lay foundation either by showing that underlying scientific theory is generally accepted within the relevant scientific community, or by showing that the theory is reliable or valid through other means; if proponent fails to show its “general acceptance” in the relevant scientific community, evidence of general acceptance remains a factor for the court to consider in its determination of the reliability of the scientific evidence.” See *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994).
- No *Frye* or *Daubert* hearing has been held at the trial court level. It was error for the court to admit this evidence without the proper foundational hearing. *Commonwealth v. Sands*, 675 N.E.2d 370 (Mass. 1997).

II. Police Officer Testimony Needed to Admit HGN Test Result

- The individual administering the HGN test must be properly qualified and the appropriate procedure in administering the test followed. *Sands*, 675 N.E.2d at 373.
- This testimony was improper, in the absence of an expert to explain the test properly. See *Commonwealth v. Sands*, 424 Mass. 184, 187-189, 675 N.E.2d 370 (1997).

III. Purpose and Limits of HGN

- The Court did not address this issue.

MICHIGAN

I. Evidentiary Admissibility

- HGN evidence is scientific in nature.
- At the time of the relevant case law, Michigan followed the *Frye* standard of admissibility. *People v. Berger*, 551 N.W.2d 421 (Mich. Ct. App. 1996). (Note: *Berger* is still good law despite Michigan adopting the *Daubert* standard).
- The HGN test satisfies the *Frye* standard of admissibility. *People v. Berger*, 551 N.W.2d 421 (Mich. Ct. App. 1996). (Note: *Berger* is still good law despite Michigan adopting the *Daubert* standard).
- The court took judicial notice of the general acceptance within the scientific community. *People v. Berger*, 551 N.W.2d 421 (Mich. Ct. App. 1996). (Note: *Berger* is still good law despite Michigan adopting the *Daubert* standard).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Only foundation necessary for the introduction of HGN test results is evidence that the police officer properly performed the test and that the officer administering the test was qualified to perform it. *Berger*, 551 N.W.2d at 424. (Note: *Berger* is still good law despite Michigan adopting the *Daubert* standard).

III. Purpose and Limits of HGN

- HGN test results are admissible to indicate the presence of alcohol. *Berger*, 551 N.W.2d at 424.
- If an officer demonstrated the test was properly administered, then scientific evidence was permitted to be presented to the jury to show the presence of alcohol and/or prove intoxication. *People v. Malik*, 2010 WL 3155181 (Mich. App., 2010)(unpublished opinion)

IV. Other

- Michigan now applies the *Daubert* standard per M.R.E. 702. There have been no reported cases regarding the admissibility of the HGN test under this standard.

MINNESOTA

I. Evidentiary Admissibility

- HGN is scientific in nature. *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994).
- Minnesota follows the *Frye* standard of admissibility. *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994).
- A fully contested *Frye* hearing was held at the trial court level. *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994).
- Court found that HGN meets the *Frye* standard of admissibility. *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Police officers must testify about their training in and experience with the HGN test. *Klawitter*, 518 N.W.2d at 585-86.

III. Purpose and Limits of HGN

- HGN admissible as evidence of impairment as part of a Drug Evaluation Examination in the

prosecution of a person charged with driving while under the influence of drugs. *Klawitter*, 518 N.W.2d at 585.

- “We refer counsel and courts to *State v. Superior Court ex rel. Cochise County*, 718 P.2d 171 (1986) and *State ex rel. Hamilton v. City Court*, 799 P.2d 855 (Ariz. 1990), cases which generally support admission of opinion testimony based on nystagmus testing but which caution counsel and courts about letting a witness go farther in expressing an opinion on the ultimate issue of intoxication or drug impairment than is justified.” *Klawitter*, 518 N.W.2d at 585, n.4.

MISSISSIPPI

I. Evidentiary Admissibility

- HGN is a scientific test. *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997).
- Mississippi follows the Frye standard of admissibility. *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997); however, the Mississippi Court of Appeals recently applied the *Daubert* analysis in *Mooneyham v. State*, 915 So.2d 1102 (Miss.App., 2005). The Court stated (915 So.2d at 1105) that “In every case, “whether testimony is based on professional studies or personal experience, the 'gatekeeper' must be certain that the expert exercises the same level of ‘intellectual rigor that characterizes the practice of an expert in the relevant field.’” *Id.* at 37-38 (¶ 15).”
- It does not appear that any *Frye* or *Daubert* hearing has been conducted in regard to the HGN test in the state of Mississippi. *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997).
- The Supreme Court found that HGN is not generally accepted within the relevant scientific community and is inadmissible at trial in the State of Mississippi. *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997).

II. Police Officer Testimony Needed to Admit HGN Test Result

- This issue about police officer testimony to admit HGN test results has not been addressed.
- Police officer who administered field sobriety tests and HGN test did not have to be rendered expert to give opinion testimony regarding administration of tests, since tests relied upon common experiences to develop opinion whether person was intoxicated or not, and were based upon coordination and ability to concentrate, with simple exercises such as reciting alphabet, walking, or standing on one leg, and only required officer to observe actions of person or whether he was slurring, stumbling or staggering, and to testify to them in court. Rules of Evid., Rules 701, 702. *Graves v. State*, 761 So. 2d 950 (Miss. Ct. App. 2000).

III. Purpose and Limits of HGN

- HGN test results are admissible only to prove probable cause to arrest. *Young*, 693 So.2d at 1361; *Deloach v. City of Starkville*, 911 So. 2d 1014 (Miss. Ct. App. 2005)
- HGN test results cannot be used as scientific evidence to prove intoxication or as a showing of impairment. *Young*, 693 So.2d at 1361.
- Evidence was sufficient to find that police officer's testimony about administering HGN test was to show probable cause to arrest defendant rather than to indicate that test was scientific evidence or to show defendant's impairment. *Graves v. State*, 761 So. 2d 950 (Miss. Ct. App. 2000).

MISSOURI

I. Evidentiary Admissibility

- The HGN test was first adopted as an accepted test and described in detail by this court in *State v. Hill*, 865 S.W.2d 702, 704 (Mo.App.1993), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997).
- HGN evidence is scientific in nature. *State v. Hill*, 865 S.W.2d 702 (Mo.Ct.App. 1993), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997).
- Missouri follows the *Frye* standard of admissibility. *State v. Hill*, 865 S.W.2d 702 (Mo.Ct.App. 1993), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997).
- A Frye hearing was held at the trial court level with witnesses called by the state. *State v. Hill*, 865 S.W.2d 702 (Mo.Ct.App. 1993).
- Court found that HGN test meets the *Frye* standard of admissibility. *State v. Hill*, 865 S.W.2d 702 (Mo.Ct.App. 1993).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Police officer must be adequately trained and able to properly administer the test and that the test was in fact properly administered. Adequate training consists of eight hours of training on how to conduct and interpret the test. *State v. Rose*, 86 S.W.3d 90 (Mo. Ct. App. 2002).
- Police officer must be adequately trained and able to properly administer test. In this case Court of Appeals held that the trial court did not abuse its discretion in finding a foundation had been laid for deputy's testimony regarding the results of defendant's HGN test; deputy testified at length regarding her qualifications to administer the HGN test, when asked how many hours of training she had regarding the HGN test, deputy stated, "[t]oo many to recall. I've had two or three classes in the past year or two," and she also testified that she performed defendant's HGN test in accordance with the training she had received and that defendant exhibited all three clues of nystagmus, indicating that he was intoxicated. *State v. Ostdiek*, 351 S.W.3d 758 (2011).
- Police officer's testimony that he had received the requisite eight hours of instruction on how to administer and interpret the horizontal gaze nystagmus (HGN) test, and his explanation of instructions he gave defendant and observations that were made during each phase of the HGN test before arresting defendant for driving while intoxicated (DWI), was sufficient to show that officer properly administered the test, as required for admission of test results, even if he did not follow all guidelines of National Highway Traffic Safety Administration (NHTSA); any challenges raised by defendant to the procedures followed by officer during administration of test went to its weight, rather than to admissibility of the test results. *State v. Burks*, 373 S.W.3d 1 (2012).

III. Purpose and Limits of HGN

- Proper administration of the HGN test means that the results are admissible as evidence of driver's intoxication in prosecution for driving while intoxicated (DWI). *State v. Ostdiek*, 351 S.W.3d 758 (2011); *State v. Myers*, 940 S.W.2d 64 (Mo. Ct. App. 1997).
- HGN evidence is not properly admissible to correlate a defendant's performance to a precise BAC level. *State v. Rose*, 86 S.W.3d 90 (Mo. Ct. App. 2002)

- HGN test evidence is admissible as a reliable measure of an illegal level of intoxication (test score of six points is clearly indicative of intoxication); however, results are not admissible to estimate that a driver's blood alcohol content was at or exceeded a specific level. *State v. Stone*, 280 S.W.3d 111 (2009).

MONTANA

I. Evidentiary Admissibility

- HGN evidence is scientific in nature. *Hulse v. DOJ, Motor Vehicle Div.*, 961 P.2d 75 (Mont. 1998).
- Montana follows the Daubert standard of admissibility. *Hulse v. DOJ, Motor Vehicle Div.*, 961 P.2d 75 (Mont. 1998)
- HGN is neither new nor novel; thus, *Daubert* does not apply. *Hulse v. DOJ, Motor Vehicle Div.*, 961 P.2d 75 (Mont. 1998).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Evidence of a proper foundation showing that the officer was properly trained to administer the HGN test and that he administered the test in accordance with this training will allow testimony of the administration and observations related to the test. *Hulse v. DOJ, Motor Vehicle Div.*, 961 P.2d 75 (Mont. 1998).
- Before the officer can testify as to the correlation between alcohol consumption and nystagmus, a foundation must be established that the officer has special training in the underlying scientific basis of the HGN test. *Hulse*, 961 P.2d 75 (Mont. 1998); *Bramble v. State*, 982 P.2d 464 (1999).
- In addition, a witness so qualified to testify about the scientific underpinnings of the HGN test may testify as to the correlation between alcohol consumption and nystagmus. *State v. Clark*, 762 P.2d 853 (Mont. 1988).
- Officer was properly allowed to testify as an expert where he held a bachelor of science degree in criminal justice administration, officer had taken numerous courses in biology, anatomy, physiology, and forensic science, and officer had developed a specialty in DUI and impaired driving enforcement. *State v. Crawford*, 68 P.3d 848 (Mont. 2003).
- The proper evidentiary foundation for admission of the results of a horizontal gaze nystagmus (HGN) test in a prosecution of a defendant for driving under the influence (DUI) is a showing that the test was properly administered by a police officer, along with expert testimony demonstrating a scientific basis for the reliability of the test results. *State v. Gieser*, 248 P.3d 300 (2011).
- State trooper was qualified to testify as expert about correlation between alcohol consumption and horizontal gaze nystagmus test, in trial for driving under influence (DUI), fifth offense; he had associate degree in criminal justice with courses in anatomy and biology, he had received basis training on standard field sobriety testing and was recertified on same every year, he had completed advanced roadside impaired driving enforcement course, he had completed eight classroom hours dedicated specifically to horizontal gaze nystagmus testing, he had 3.5 years' experience as state trooper with over 100 DUI arrests, and he had been previously qualified as expert. Rules of Evid., Rule 702. *State v. Bollman*, 272 P.3d 650 (2012).
- An officer may be qualified to testify as to the HGN test administration and results, but may not be qualified to testify as to the scientific basis of the HGN test results without additional

foundation laid. *State v. Rodriguez*, 248 P.3d 850 (2011).

III. Purpose and Limits of HGN

- With proper foundation, HGN test results admissible to correlate alcohol consumption to nystagmus. *Hulse*, 961 P.2d 75 (Mont. 1998).
- Without the proper foundation, HGN testimony is limited to the administration of the test and observations made. *Bramble v. State*, 982 P.2d 464 (1999).
- Office's failure to comply with standard four-second interval requirements of applicable manual didn't preclude admission of results of HGN test in prosecution for driving under the influence of alcohol; valid HGN results were obtainable despite deviation from four-second interval requirements, particularly because nystagmus was more apparent in the more inebriated suspect. *State v. Zakovi*, 110 P.3d 469 (2005).

NEBRASKA

I. Evidentiary Admissibility

- HGN evidence is scientific in nature. *State v. Baue*, 607 N.W.2d 191 (Neb. 2000); (Note, *Baue* is still good law but Nebraska had not adopted the *Daubert* standard yet).
- A Frye hearing was held at the trial court level over defense objection after they withdrew a motion in limine to prohibit HGN evidence. The defense called no witnesses. *State v. Baue*, 607 N.W.2d 191 (Neb. 2000).
- HGN is generally accepted in the relevant scientific communities and meets the *Frye* standard. *State v. Baue*, 607 N.W.2d 191 (Neb. 2000).
- *State v. Casillas*, 782 N.W.2d 882 (2010) – Prior to admitting the evidence at trial, results of defendant's horizontal gaze nystagmus (HGN) test, as provided in arresting officer's testimony, was scientific evidence of the sort requiring State to establish its reliability in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Schafersman v. Agland Coop.*, in prosecution for driving under the influence (DUI)... The State points out that HGN testing is not novel to this or any other court and that it is generally found to be admissible. HGN testing has not been affirmed in Nebraska since we adopted the *Daubert* test. So the trial court could not have taken judicial notice of precedent to satisfy its gatekeeping findings.

II. Police Officer Testimony Needed to Admit HGN Test Result

- A police officer may testify to the results of HGN testing if it is shown that the officer has been adequately trained in the administration and assessment of the HGN test and has conducted the testing and assessment in accordance with that training. *State v. Baue*, 607 N.W.2d 191 (Neb. 2000) (overturned on other grounds); *State v. Prescott*, 784 N.W.2d 873 (2010).

III. Purpose and Limits of HGN

- When the test is given in conjunction with other field sobriety tests, the results are admissible for the purpose of establishing that a person has an impairment which may be caused by alcohol. *State v. Baue*, 607 N.W.2d 191 (Neb. 2000)
- *Daubert* hearings are required in any district where HGN is to be used, because there is no precedent for HGN on appeal since the state adopted the *Daubert* standard. “Instead, once a Nebraska trial court has actually examined and assessed the reliability of a particular scientific wheel under *Daubert*, and its determination has been affirmed on appeal, then other courts may simply take judicial notice and ride behind. . . HGN testing is not novel to this or any other court

and that it is generally found to be admissible. HGN testing has not been affirmed in Nebraska since we adopted the *Daubert* test.” *State v. Casillas*, 279 Neb. 820, 838-39, 782 N.W.2d 882, 898-99 (2010)

NEVADA

I. Evidentiary Admissibility

- Not addressed by the court.

II. Police Officer Testimony Needed to Admit HGN Test Result

- Not addressed by the court.

III. Purpose and Limits of HGN

- Not addressed by the court.

IV. Other

- There are no published cases directly discussing the admissibility of HGN. In the following cases the test was considered as the sum of the evidence supporting the conviction or probable cause.
- Evidence was sufficient to support conviction for driving under the influence of alcohol causing substantial bodily harm on theory that defendant was under influence of intoxicating liquor when he hit motorcyclist; defendant testified that, prior to the accident, he had six and a half beers, investigating deputies testified that defendant exhibited signs of intoxication, defendant failed the HGN field test, and a blood test yielded a blood alcohol result of 0.10. *Gordon v. State*, 117 P.3d 214 (Nev. 2005).
- Officer who administered horizontal gaze nystagmus test to motorist and noticed that motorist had an odor of alcohol on her breath and that her eyes were bloodshot had reasonable grounds to believe that motorist had been driving under the influence and adequate grounds for requiring her to submit to evidentiary test with respect to blood alcohol content, even though motorist was suffering from a head injury and officer knew that head injury could affect the results of the horizontal gaze nystagmus test. *Department of Motor Vehicles & Pub. Safety v. McLeod*, 801 P.2d 1390 (Nev. 1990).

NEW HAMPSHIRE

I. Evidentiary Admissibility

- HGN test evidence is scientific in nature. *State v. Dahood*, 814 A.2d 159 (N.H.2002)
- New Hampshire follows the *Daubert* standard of admissibility. *State v. Dahood*, 814 A.2d 159 (N.H.2002)
- The NH Supreme Court remanded a case to the trial court for a *Daubert* hearing to determine the admissibility of the HGN test. A fully contested hearing was held. The trial court found that HGN test as administered in New Hampshire was not reliable and therefore not admissible as evidence of intoxication. *State v. Dahood*, 814 A.2d 159 (N.H.2002)
- The NH Supreme Court disagreed and ruled the HGN test is admissible under N.H. Rule of

Evidence 702 and *Daubert*. The HGN test is a scientifically reliable and valid test. *State v. Dahood*, 814 A.2d 159 (N.H.2002).

- N.H. Supreme Court ruled their findings binding in *Dahood* and that courts “will not be required to establish the scientific reliability of the HGN.” Also see *State v. Cochrane*, 897 A.2d 952 (N.H. 2006).

II. Police Officer Testimony Needed to Admit HGN Test Result

- The proponent of the evidence must present a qualified witness who can testify about the subject. *State v. Dahood*, 814 A.2d 159 (N.H.2002).
- The State must put forth evidence that the police officer who administered the HGN test is trained in the procedure and that the test was properly administered at that time. *State v. Dahood*, 814 A.2d 159 (N.H.2002).
- A police officer's testimony regarding his training, his administration and scoring of the HGN test, and the HGN test results as established by the National Highway Traffic Safety Administration (NHTSA) standards and guidelines does not require an understanding of the underlying scientific mechanisms explaining the phenomenon of nystagmus itself. All that is required is an understanding that alcohol consumption can cause nystagmus, which can be detected by a trained police officer through observing the defendant during the administration of an HGN test. *State v. Cochrane*, 897 A.2d 952.

III. Purpose and Limits of HGN

- HGN results are admissible as circumstantial evidence of intoxication. *State v. Dahood*, 814 A.2d 159 (N.H.2002).
- HGN results cannot be introduced at trial for the purpose of establishing a defendant's BAC. *State v. Dahood*, 814 A.2d 159 (N.H.2002).
- HGN results alone are not sufficient to establish intoxication. *State v. Dahood*, 814 A.2d 159 (N.H.2002).
- So long as a trained police officer's testimony is limited to: (1) his or her training and experience in administering and scoring the HGN test based upon the NHTSA standards and guidelines; (2) the administration of the HGN test in a particular case; and (3) the results of the HGN test as established by the NHTSA standards and guidelines, we hold that it constitutes lay testimony not subject to pretrial disclosure requirements applicable to expert testimony. *State v. Cochrane*, 897 A.2d 952.

NEW JERSEY

I. Evidentiary Admissibility

- HGN evidence is scientific in nature. *State v. Doriguzzi*, 760 A.2d 336 (N.J. Super. 2000).
- Follows the Frye standard for criminal cases; Frye/Daubert in civil cases
 - *State v. Doriguzzi*, 760 A.2d 336 (N.J. Super. 2000).
 - “[P]laintiffs in toxic-tort litigation, despite strong and indeed compelling indicators that they have been tortiously harmed by toxic exposure, may never recover if required to await general acceptance by the scientific community of a reasonable, but as yet not certain, theory of causation.” *Kemp ex rel. Wright v. State*, 174 N.J. 412, 425, 809 A.2d 77, 84 (2002).
 - *State v. Harvey*, 699 A.2d 596, 605, 151 N.J. 117, 137, 1997 N.J. LEXIS 261, *1 (N.J. July 30, 1997): In criminal cases the appeals court continues to apply the general

acceptance or Frye test for determining the scientific reliability of expert testimony. While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

- No Frye hearing was held at the trial court level which was later reviewed by an appellate or the Supreme Court. The appellate court declined to take judicial notice of general acceptance of the test within the community. *State v. Doriguzzi*, 760 A.2d 336 (N.J. Super. 2000).

II. Police Officer Testimony Needed to Admit HGN Test Result

- The Court did not address this issue.

III. Purpose and Limits of HGN

- *State v. Logan*, 2008 WL 731934 (N.J. Ct. App. Mar. 20, 2008)—Defendant argued that the Law Division's decision should be reversed because it was improper for the court to use the HGN test as a basis for finding defendant guilty of driving while intoxicated. Court disagreed. Defendant relied on *State v. Doriguzzi*, 334 N.J. Super. 530, 539 (App.Div.2000). *Doriguzzi* provides that where there was no breathalyzer test in evidence, where the hgn test results were an integral part of the decision finding defendant guilty, and absent a hearing and determination that the hgn test was reliable as a scientific test, a conviction should be reversed and the matter remanded for trial de novo without consideration of the test. This case, however, we do not find that the test results were an integral part of the decision finding defendant guilty. Rather, after reviewing the entire record and the comments of the Law Division, we note that the court relied upon the following facts taken as a whole: defendant was speeding; he admitted he had a number of beers; his hands were fumbling and slow as he tried to produce his motor vehicle documents; he smelled of alcohol; when he exited the vehicle, he had to hold the vehicle for stability; he was swaying; his knees were sagging; and he had his feet wide apart for balance. His speech was slurred, hoarse, and slow. Furthermore, defendant refused the one-leg stand, saying that he could not do it even if he was "stone sober." The arresting officer had extensive experience, with over 200 driving-while-under-the-influence arrests, and was of the opinion that defendant was intoxicated. On the way to the station, defendant asked for the officer to take him home, and he refused the breathalyzer test. The Law Division clearly found defendant's explanation to be incredible. Based on this overwhelming record supporting the Law Division's findings, we cannot find the horizontal gaze nystagmus test to have been an integral part of the Law Division's decision.
- *State v. Paltridge*, 2017 N.J. Super. Unpub. LEXIS 35 (App.Div. Jan. 6, 2017)— HGN tests are not admissible at trial as "neither this court nor our Supreme Court has yet endorsed HGN testing." *State v. Doriguzzi*, 334 N.J. Super. 530, 533, 760 A.2d 336 (App. Div. 2000). However, police can use them to ascertain probable cause.
- *State v. Slater*, 2016 N.J. Super. Unpub. LEXIS 450 (App.Div. Mar. 2, 2016)— The Law Division judge did not consider defendant's performance on the HGN test in his determination of defendant's guilt on any of the charges.
- *State v. Ferrucci*, 2010 N.J. Super. Unpub. LEXIS 427 (App.Div. Mar. 3, 2010)— In *State v. Doriguzzi*, 334 N.J. Super. 530, 538-39, 760 A.2d 336 (App. Div. 2000), we held that the HGN test is a scientific test that must satisfy the standard for admissibility set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), before the results of the test can be introduced in evidence. Had Ferrucci "failed" the HGN, the result would have been inadmissible for that reason. [*4] However, Abrusci's observations about "swaying" were related to Ferrucci's general demeanor and not the "scientific" aspect of the test.

NEW MEXICO

I. Evidentiary Admissibility

- HGN is a scientific test. *State v. Torres*, 976 P.2d 20 (N.M. 1999).
- New Mexico follows the *Daubert* standard. *State v. Torres*, 976 P.2d 20 (N.M. 1999).
 - *State v. Alberico*, 116 N.M. 156, 158, 1993-NMSC-047, 2, 861 P.2d 192, 194, 1993 N.M. LEXIS 291, *2, 32 N.M. St. B. Bull. 861 (N.M. Aug. 30, 1993): Today we abandon the Frye test as a predicate for the admissibility of scientific evidence by way of expert opinion testimony, relying instead on our Rules of Evidence.
- A *Daubert* hearing is necessary at the trial court level before HGN test evidence may be admitted. *State v. Torres*, 976 P.2d 20 (N.M. 1999); *State v. Aleman*, 194 P.3d 110 (2008).
- The *Daubert* standard was not met where the state presented only evidence of Dr. Marceline Burns, a behavior psychologist responsible for much of the published data on the test. The trial court found and the appellate court affirmed that the a proper *Daubert* foundation would include some sort of medical expert. Dr. Burns could satisfy the reliability questions, but not the validity questions. *State v. Lasworth*, 42 P.3d 844 (Ct. App. N.M. 2001).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Should the foundational requirement be met, police officers can qualify as non-scientific experts based on their training and experience. In order to establish the “technical or specialized knowledge” required to qualify as an expert in the administration of the HGN test, “there must be a showing: (1) that the expert has the ability and training to administer the HGN test properly, and (2) that the expert did, in fact, administer the HGN test properly at the time and upon the person in question.” *State v. Torres*, 976 P.2d 20 (N.M. 1999).
- Horizontal Gaze Nystagmus (HGN) testing during stop for suspected driving while intoxicated (DWI) involves scientific knowledge and, therefore, only a scientific expert may testify as to HGN results. *State v. Marquez*, 223 P.3d 931 (2009).

III. Purpose and Limits of HGN

- Horizontal gaze nystagmus test administered in course of 12-step protocol to determine whether defendants were impaired and what chemical substance was involved was scientific process which was subject to *Daubert* analysis, in trials for driving under influence (DUI) of drugs. NMRA, Rule 11–702. *State v. Aleman*, 194 P.3d 110 (2008).

NEW YORK

I. Evidentiary Admissibility

- HGN evidence is scientific in nature.
- New York follows the *Frye* standard of admissibility
- [HGN] tests had been found to be accepted within the scientific community as a reliable indicator of intoxication and, thus, a court was permitted to take judicial notice of the HGN test's acceptability. *People v. Tetrault*, 2008 NY Slip Op 6219; 53 A.D.3d 558; 861 N.Y.S.2d 408; 2008 N.Y. App. Div. LEXIS 6087
- Multiple courts in New York have held fully contested *Frye* hearings. *People v. Vanderlofske*, 186 Misc.2d 182, 717 N.Y.S.2d 450; *People v. Prue*, 2001 N.Y. Slip Op. 40594[U], 2001 WL

1729710.

- *Prue* found that HGN test results are admissible under *Frye* standard of “general acceptance. *People v. Prue*, 2001 N.Y. Slip Op. 40594[U], 2001 WL 1729710.
- Based on the above cases, it is not error for a court in New York to now take judicial notice of the reliability of the HGN test. *People v. Gallup*, 302 A.D.2d 681 (3rd Dept) (2003); *People v. Julius*, 93 A.D.3d 1296 (2012).
- See 2012 case: Trial court was not required to conduct *Frye* hearing prior to permitting arresting officer to testify regarding horizontal gaze nystagmus (HGN) field sobriety test in prosecution for driving while intoxicated. People laid proper foundation for admission of HGN test. *People v. Julius*, 93 A.D.3d 1296 (2012).

II. Police Officer Testimony Needed to Admit HGN Test Result

- People must lay a proper evidentiary foundation in order for HGN results to be admissible at trial. HGN evidence to be admitted by showing that the officer had been successfully trained in the administration of the test and had administered and scored the test in accordance with accepted techniques and procedures. *People v. Hammond*, 35 A.D.3d 905, 827 N.Y.S.2d 298 (3rd Dept. 2006); *People v. Vanderlofske*, 186 Misc. 2d 182 (N.Y. Misc. 2000); *People v. Heidelberg*, 214 A.D.2d 767 (1995).

III. Purpose and Limits of HGN

- The Court held that HGN is generally accepted in the relevant scientific community as a reliable indicator of intoxication. *Vanderlofske*, 186 Misc. 2d 182.

NORTH CAROLINA

I. Evidentiary Admissibility

- HGN is scientific in nature.
- **Follows the Daubert standard of admissibility**
 - *State v. McGrady*, 232 N.C. App. 95, 753 S.E.2d 361, 2014 N.C. App. LEXIS 55, 2014 WL 211962 (N.C. Ct. App. Jan. 21, 2014): We hold that the 2011 amendment adopts the federal standard for the admission of expert witness testimony articulated in the Daubert line of cases. The General Assembly amended North Carolina’s rule in 2011 in virtually the same way that the corresponding federal rule was amended in 2000. It follows that the meaning of North Carolina’s Rule 702(a) now mirrors that of the amended federal rule.
- North Carolina follows North Carolina Rules of evidence which talks about a ‘reliability standard’ and ‘scientific acceptance.’ *State v. Helms*, 504 S.E.2d 293 (N.C. 1998).
- No such hearing has been held to determine the admissibility of HGN. Until there is, HGN evidence is inadmissible. *State v. Helms*, 504 S.E.2d 293 (N.C. 1998).
- State was not required to prove that horizontal gaze nystagmus (HGN) testing method is sufficiently reliable. *State v. Smart*, 674 S.E.2d 684 (2009).

II. Police Officer Testimony Needed to Admit HGN Test Result

- N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 702(a1) (2015), does not require a law enforcement officer to be recognized explicitly as an expert witness pursuant to Rule 702(a) before he or she may testify to the results of a Horizontal Gaze Nystagmus (HGN) test. The Supreme Court of North

Carolina found that the court of appeals erred in holding that the officer's expert testimony was erroneously admitted because the officer qualified as an expert under Rule 702(a) since he had completed training on how to administer the HGN test he administered to defendant; In overruling defendant's objection, the trial court implicitly found that the officer was qualified to testify as an expert, and as such, in accordance with the guidance in Rule 702(a1), the officer could give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level. *State v. Godwin*, 800 S.E.2d 47 *, 2017 N.C. LEXIS 393 (N.C. June 9, 2017)

- The trial court did not err by admitting an officer's testimony about the horizontal gaze nystagmus (HGN) test in a prosecution for impaired driving. An amendment to N.C.G.S. § 8C-1, Rule 702(a1) obviates the need for the State to prove that HGN testing is sufficiently reliable. Given that this officer was questioned at length about her skill, experience and training in administering the test, and that defendant's argument on appeal concentrated on the method of proof rather than the officer's qualifications, the court did not err in admitting the testimony. *State v. Smart*, 674 S.E.2d 684 (2009).
- Officer Noble was tendered as an expert in the HGN test, defendant objected, and a voir dire was conducted. During voir dire, Officer Noble testified that he completed a total of eight (8) hours of training, "a full day of lecture," on the HGN test. Officer Noble also took an eight (8) hour HGN test refresher class, amounting to a total of sixteen (16) hours of training on the HGN test. Officer Noble was also given materials and "studies that they have conducted on events such as alcohol impairment on the effect on the eyes as well as brain injuries and other forms of medical problems that would affect the eyes and the nystagmus of the eyes." He had administered the HGN test "well over a hundred" times and seen a correlation between the eye's involuntary movements with recorded breath alcohol concentrations. *State v. Jackson*, 2014 N.C. App. LEXIS 1123, *6-7, 237 N.C. App. 183, 767 S.E.2d 149, 2014 WL 5587011 (N.C. Ct. App. Nov. 4, 2014)

III. Purpose and Limits of HGN

- HGN test which gave some indication that Defendant was impaired by an intoxicating substance. *State v. Foreman*, 745 S.E.2d 375 (2013).
- **N.C. R. Evid. 702 (2013). 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, or otherwise, if all of the following apply:
 - (1) The testimony is based upon sufficient facts or data.
 - (2) The testimony is the product of reliable principles and methods.
 - (3) The witness has applied the principles and methods reliably to the facts of the case.
 - (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.

IV. Other

- In 2006 the N.C. legislature enacted a statute that provided for the admissibility of the HGN test.

NORTH DAKOTA

I. Evidentiary Admissibility

- **Follows N.D. Rule 702**
 - *Howe v. Microsoft Corp.*, 2003 ND 12, P27, 656 N.W.2d 285, 295, 2003 N.D. LEXIS 13, *28, 2003-1 Trade Cas. (CCH) P73,945 (N.D. Jan. 28, 2003): We have not adopted the standards for admitting expert evidence articulated by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999).
 - N.D. Rule 702 allows generous use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify. *Gonzalez v. Tounjian*, 2003 ND 121, ¶ 24, 665 N.W.2d 705. An expert need not be a specialist in a highly particularized field if the expert's knowledge, training, education, and experience will assist the trier of fact. *Myer v. Rygg*, 2001 ND 123, ¶ 14, 630 N.W.2d 62.
- Generally speaking, HGN evidence is not scientific in nature. *City of Fargo v. McLaughin*, 512 N.W.2d 700 (N.D. 1994).
- Court found that HGN test is admissible as a standard field sobriety test. *City of Fargo v. McLaughin*, 512 N.W.2d 700 (N.D. 1994).
- Results of horizontal gaze nystagmus test were admissible without scientific foundation by expert testimony. *Brewer v. Ziegler*, 743 N.W.2d 391 (2007).

II. Police Officer Testimony Needed to Admit HGN Test Result

- The only foundation required is a showing of the officer's training and experience in administering the test, and a showing that the test was in fact properly administered. *City of Fargo v. McLaughin*, 512 N.W.2d 700 (N.D. 1994); *also see Sonsthagen v. Sprynczynatyk*, 663 N.W.2d 161 (N.D. 2003).
- The underlying scientific basis for horizontal gaze nystagmus (HGN) testing--that intoxicated persons exhibit nystagmus--is undisputed, even by those cases and authorities holding the test inadmissible without scientific proof in each case. It is generally accepted that a person will show a greater degree of nystagmus at higher levels of intoxication, and that a properly conducted HGN test can identify nystagmus. The Supreme Court of North Dakota takes notice of these physiological facts, and concludes that it is unnecessary to require expert testimony of these widely accepted principles. These principles comprise the only "scientific" components of the HGN test. A police officer, based upon his training in these principles, observes the objective physical manifestations of intoxication, and no expert interpretation is required. The test requires simply that the officer observe the subject's eyes following a moving object. All of the troubling factors would apply equally to the other field sobriety tests, such as the "one-leg stand" test and the "walk and turn" test, that are routinely admitted into evidence in DUI prosecutions. All of these factors can be shown through cross-examination or expert testimony, and therefore they go to the weight of the evidence, rather than its admissibility. *State v. Engelhorn*, 2016 ND 167, P1, 883 N.W.2d 852, 853, 2016 N.D. LEXIS 167, *1 (N.D. Aug. 22, 2016)

III. Purpose and Limits of HGN

- HGN test results admissible as circumstantial evidence of intoxication. *City of Fargo v.*

McLaughin, 512 N.W.2d 700 (N.D. 1994).

- The officer may not attempt to quantify a specific BAC based upon the HGN test. *City of Fargo v. McLaughin*, 512 N.W.2d 700 (N.D. 1994).

OHIO

I. Evidentiary Admissibility

- **Follows the Daubert standard and progeny:**
 - In Daubert, the United States Supreme Court ruled that although Fed.R.Evid. 702 displaced the test for admissibility first announced in *Frye v. United States* (D.C.App.1923), 54 App. D.C. 46, 293 F. 1013, 1014 (requiring that expert testimony based on a scientific technique is admissible only if that technique is generally accepted as reliable in the scientific community), it did not remove all limits to the admissibility of purportedly scientific testimony. *Daubert*, supra, 509 U.S. at 589, 113 S. Ct. at 2794-2795, 125 L. Ed. 2d at 480. Instead, the trial court retains its role as gatekeeper by making a preliminary assessment of whether the reasoning [***28] or methodology underlying the proposed expert testimony is reliable and whether such reasoning or methodology is properly applied to the facts in issue. *Id.* at 589-590, 113 S. Ct. at 2794-2795, 125 L. Ed. 2d at 480-481. (*Miller v. Bike Ath. Co.*, 80 Ohio St. 3d 607, 618, 687 N.E.2d 735, 744, 1998 Ohio LEXIS 3, *27-28, 1998-Ohio-178, CCH Prod. Liab. Rep. P15,161 (Ohio Jan. 7, 1998))
- HGN evidence is not scientific in nature. *State v. Nagel*, 506 N.E.2d 285 (Ohio Ct. App. 1986)
- HGN test is objective in nature and does not require an expert interpretation. *State v. Nagel*, 506 N.E.2d 285 (Ohio Ct. App. 1986)
- HGN test is similar to other field sobriety tests and is admissible without expert testimony. *State v. Bresson*, 554 N.E.2d 1330 (Ohio 1990)
- Results of horizontal gaze nystagmus field sobriety test were admissible without expert testimony if test was performed in substantial compliance with testing standards. *State v. Boczar*, 862 N.E.2d 155 (Ohio 2007)
- There is a correlation between blood-alcohol concentration and nystagmus. According to the U.S. Department of Transportation, the HGN test is the single most accurate field test to use in determining whether a person is alcohol impaired. *State v. Frazee*, 2006 Ohio 3778 (Ohio Ct. App. 2006).
- A few courts have concluded that the HGN test does not involve a scientific theory, obviating the need for the application of the State's scientific evidence admission requirement. See, e.g., *State v. Bresson*, 51 Ohio St.3d 123, ("HGN test cannot be compared to other scientific tests, such as the polygraph examination, since no special equipment is required").

II. Police Officer Testimony Needed to Admit HGN Test Result

- A proper foundation consists of the officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test. *State v. Boczar*, 862 N.E.2d 155 (Ohio 2007)
- A properly qualified officer may testify at trial regarding a driver's performance on the horizontal gaze nystagmus test as to the issues of probable cause to arrest and whether the driver was operating

a vehicle while under the influence of alcohol. However, such testimony may not be admitted to show what the exact alcohol concentration level of the driver was for purposes of demonstrating a violation of Ohio Rev. Code Ann. § 4511.19(A)(2), (3), or (4). *State v. Bresson*, 51 Ohio St. 3d 123, 124, 554 N.E.2d 1330, 1332, 1990 Ohio LEXIS 238, *5 (Ohio May 30, 1990)

III. Purpose and Limits of HGN

- Testimony of defendant's nystagmus is admissible on the issue of a defendant's blood alcohol level as would be other field sobriety test results on the question of the accuracy of the chemical analysis. *State v. Bresson*, 554 N.E.2d 1330 (Ohio 1990)
- HGN is admissible as evidence that the driver is 'under the influence.' *State v. Bresson*, 554 N.E.2d 1330 (Ohio 1990).
- An officer may not testify as to what he or she believes a driver's actual or specific BAC level would be, based solely on the HGN test results. *State v. Bresson*, 554 N.E.2d 1330 (Ohio 1990)

V. Other

- Horizontal gaze nystagmus (HGN) test was admissible in prosecution for operating vehicle under the influence (OVI), although defendant was facing squad car's strobe lights when test was administered and court had concerns about test's reliability with defendant facing strobe lights; test substantially complied with National Highway Traffic Safety Administration (NHTSA) guidelines, which did not mention strobe lights as a concern. *State v. Tanner*, 938 N.E.2d 108 (2010).

OKLAHOMA

I. Evidentiary Admissibility

- Follows the Daubert and progeny standard of admissibility
 - The Daubert rationale replaces the Frye standard as the admissibility standard for scientific evidence. *Taylor v. State*, 889 P.2d 319 (Okla. Crim. App. 1995).
- Results of horizontal gaze nystagmus (HGN) test were admissible without scientific foundation by expert testimony, in prosecution for driving a motor vehicle while under the influence of drugs; testimony of officers who were sufficiently qualified to administer test laid proper foundation, and testimony relating to test results was not offered as independent scientifically sound evidence of defendant's intoxication, but was rather offered and admitted for same purpose as other field sobriety test evidence, which was to describe a physical act contributing to cumulative portrait of defendant as intoxicated. *Anderson v. State*, 252 P.3d 211 (2010.)
- A scientific foundation for a Horizontal Gaze Nystagmus (HGN) test is not required because field sobriety tests are not based upon scientific evidence and are not a scientific test in the sense it requires a certain scientific reliability. Therefore, neither Fry, Daubert, nor any other test establishing reliability or trustworthiness is applicable. *Anderson v. State*, 2010 OK CR 27, P1, 252 P.3d 211, 211, 2010 Okla. Crim. App. LEXIS 28, *1 (Okla. Crim. App. Dec. 21, 2010)

II. Police Officer Testimony Needed to Admit HGN Test Result

- The court has not addressed this issue.

III. Purpose and Limits of HGN

- In dicta, the court held that HGN test results could not, under Oklahoma's statutory scheme, be

used as a basis upon which to quantify appellant's alcohol level. *Yell*, 856 P.2d at 997.

- In dicta, the court stated if HGN testing was found to satisfy the *Frye* standard of admissibility, HGN test results would be considered in the same manner as other field sobriety test results. *Yell*, 856 P.2d at 997.

OREGON

I. Evidentiary Admissibility

- HGN evidence is scientific in nature. *State v. O'Key*, 899 P.2d 663 (Or. 1995).
- Oregon applies the Oregon Rules of Evidence, which is the *Daubert* standard. *State v. O'Key*, 899 P.2d 663 (Or. 1995).
- A fully contested *Daubert* hearing was held at the trial court level. The Supreme Court held HGN test results are admissible under the Oregon Rules of Evidence. *State v. O'Key*, 899 P.2d 663 (Or. 1995); *accord*, *State v. Samson*, 6 P.2d 543 (Or. 2000) (a fully contested *Daubert* hearing was held regarding the drug recognition expert and protocol, which includes HGN).
- As to whether or not a defendant “passed” or “failed” SFST’s, Oregon Supreme Court has held that such officer testimony is scientific because it draws its convincing force from a scientific proposition, namely, that exhibiting a certain number of standardized "clues" during performance of the test means that the test subject is under the influence of intoxicants. *State v. Beltran-Chavez*, 286 Ore. App. 590 *, 2017 Ore. App. LEXIS 866 (Or. Ct. App. July 6, 2017).

II. Police Officer Testimony Needed to Admit HGN Test Result

- A proper foundation consists of a showing that the officer who administered the test was properly qualified, that the test was administered properly, and that the test results were recorded accurately. *O'Key*, 899 P.2d at 670.
- When considering a challenge to the admission of evidence of a horizontal gaze nystagmus (HGN) test, an appellate court evaluates whether the state established the foundational showing that the officer who administered the test was properly qualified, the test was administered properly, and the test results were recorded accurately, in order to admit the scientific evidence as a valid indicator of impairment. West's Or.Rev. Stat. Ann. § 257–025–0020(1)(a). *State v. Ingram*, 243 P.3d 488 (2010).

IV. Purpose and Limits of HGN

- "Subject to a foundational showing that the officer who administered the test was properly qualified, the test was administered properly, and the test results were recorded accurately, HGN test evidence is admissible in a DUI proceeding to establish that a defendant was under the influence of intoxicating liquor but, under ORS 813.010(1) (a), is not admissible to prove that a defendant had a BAC [blood alcohol content] of .08 percent or more." 321 Ore. at 322-23. *State v. Fiskien*, 138 Ore. App. 396, 399, 909 P.2d 206, 207, 1996 Ore. App. LEXIS 2, *3-4 (Or. Ct. App. Jan. 3, 1996)

PENNSYLVANIA

I. Evidentiary Admissibility

- The Supreme Court of Pennsylvania reaffirms its adherence to the *Frye* rule; clarifies that the rule applies to an expert's methods, not his conclusions; emphasizes that the proponent of the expert scientific evidence bears the burden of proof on the *Frye* issue; and reiterates that the standard of appellate review on the *Frye* issue is the abuse of discretion standard. *Grady v. Frito-Lay, Inc.*, 576

Pa. 546, 548, 839 A.2d 1038, 1039, 2003 Pa. LEXIS 2590, *1, CCH Prod. Liab. Rep. P16,870 (Pa. Dec. 31, 2003)

- A Frye hearing was held at the trial court level in which the State called a witness in support of the foundation for HGN. The trial court found and the appellate court agreed that the State laid an inadequate foundation as the witness testified as to his own experience and belief and not regarding general acceptance in the scientific community. *Commonwealth v. Apollo*, 603 A.2d 1023 (Pa. Super. Ct. 1992); *Commonwealth v. Stringer*, 678 A.2d 1200 (Pa. Super. Ct. 1996).
- Likewise, the testimony of an officer alone is insufficient to show reliability and general acceptance. *Commonwealth v. Miller*, 532 A.2d 1186 (Pa. Super. Ct. 1987).

II. Police Officer Testimony Needed to Admit HGN Test Result

- This has not been addressed by the court.

III. Purpose and Limits of HGN

- Probable Cause—Results of horizontal gaze nystagmus (HGN) test performed by police officer following traffic stop of defendant could be used in determining probable cause for arrest of defendant for driving under the influence (DUI), even if evidence of HGN test results would not have been admissible at trial; criterion of admissibility in evidence was not to be applied to facts relied upon to show probable cause, and officer, who was trained in administration of HGN test, was permitted to rely on his observations gained from test in determining whether to arrest defendant. *Com. v. Weaver*, 76 A.3d 562 (2013).

RHODE ISLAND

I. Purpose and Limits of HGN

- Before any officer utilizes the HGN test at roadside, he/she is required by the procedural rules to assess the individual for "possible medical impairment." (Ex. C VIII-5.) The officer must initially determine if the subject's eyes exhibit equal pupil size and equal tracking, i.e., following an object together. If the eyes fail to track together or the pupils are "noticeably unequal" in size, medical disorders or injuries could be the cause of the nystagmus. (Ex. C VIII-5-"Procedures.") *State v. Scalisi*, 2009 R.I. Super. LEXIS 13, *3 (R.I. Super. Ct. 2009)

SOUTH CAROLINA

I. Evidentiary Admissibility

- HGN is not scientific in nature. *State v. Sullivan*, 426 S.E.2d 766 (S.C. 1993).
- HGN admissible in conjunction with other field sobriety tests. *State v. Sullivan*, 426 S.E.2d 766 (S.C. 1993).
- Statute requiring video recording of arrest for driving under the influence (DUI), including any field sobriety tests administered at arrest site, required that defendant's head be visible in recording during administration of horizontal gaze nystagmus (HGN) test. *State v. Gordon*, 759 S.E.2d 755 (S.C.App 2014)

II. Police Officer Testimony Needed to Admit HGN Test Result

- The court had not specifically addressed this issue, but the officer in the case received twenty hours of HGN training. *Sullivan*, 426 S.E.2d at 769.

III. Purpose and Limits of HGN

- HGN test results admissible “to elicit objective manifestations of soberness or insobriety” HGN test result is to be regarded as merely circumstantial evidence of DUI. *Sullivan*, 426 S.E.2d at 769.
- Evidence from the HGN test alone is not conclusive proof of DUI. *Sullivan*, 426 S.E.2d at 769.
- HGN test shall not constitute evidence to establish a specific degree of blood alcohol content. *Sullivan*, 426 S.E.2d at 769.

SOUTH DAKOTA

I. Evidentiary Admissibility

- HGN evidence is not scientific in nature.
- Where the admissibility of scientific evidence is in question, South Dakota applies the *Daubert* standard.
- The trial court refused to allow HGN testimony without a foundational hearing. The state presented witnesses. The trial court refused to allow the HGN testimony into evidence. On appeal, the South Dakota Supreme Court held that this was an abuse of discretion and that such evidence should be admitted for a jury to consider at trial along with evidence of the other accepted field sobriety tests administered in South Dakota. *State v. Hullinger*, 649 N.W.2d 253 (S.D. 2002)

II. Police Officer Testimony Needed to Admit HGN Test Result

- Under *Daubert*, the reliability of HGN testing as an indicator of whether a person is under the influence of alcohol need not be established through expert testimony if adequate foundation is laid to establish that the officer was trained to administer the test and that the officer administered the test properly; a defendant may refute the State's HGN-test-result evidence through cross-examination and by presenting rebuttal evidence of causes, other than alcohol ingestion, of physical abnormalities detected by an HGN test. *State v. Yuel*, 840 N.W.2d 680 (2013).
- HGN evidence is admissible if the officer has been adequately trained to administer the test and the test was administered in accordance with that training. *State v. Hullinger*, 649 N.W.2d 253 (S.D. 2002)

III. Purpose and Limits of HGN

- HGN evidence should be admitted for a jury to consider at trial along with evidence of the other accepted field sobriety. *State v. Hullinger*, 649 N.W.2d 253 (S.D. 2002)
- HGN is evidence of an “abnormal mental or physical condition which is the result of indulging in any degree in alcoholic liquor and which tends to deprive [the defendant] of that clearness of intellect and control of himself which [the defendant] would otherwise possess.” *State v. Hullinger*, 649 N.W.2d 253 (S.D. 2002).

TENNESSEE

I. Evidentiary Admissibility

- HGN is a scientific in nature. *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997).

- Tennessee follows Tenn. Rules of Evidence 702 and 703, which is the *Daubert* standard. *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997).
- State provided an inadequate amount of evidence to allow the court to conclude that HGN evidence meets this standard. *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997).
- Even with the high standard set by our supreme court concerning the admissibility of the results of an HGN test at trial, nothing precludes an officer from taking into his probable cause determination his observations when the test was administered. *State v. Roscoe*, 2014 Tenn. Crim. App. LEXIS 687, *13 (Tenn. Crim. App. July 11, 2014)

III. Police Officer Testimony Needed to Admit HGN Test Result

- HGN must be offered through an expert witness. The officer may be able to testify as to the procedure and observations, but may not have the requisite knowledge to explain the underlying scientific basis of the test in order for the testimony to be meaningful to a jury. *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997).

III. Purpose and Limits of HGN

- The Court did not address this issue.

TEXAS

I. Evidentiary Admissibility

- HGN is scientific in nature. *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994).
- Texas follows the Texas rules of evidence for admissibility of scientific evidence, which is the *Daubert- Kelly* standard (The *Daubert-Kelly-Robinson* standard is basically *Daubert* with a few added factors). *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994).
- The court took judicial notice of the reliability of HGN and held that HGN admissible under the Texas Rules of Evidence. *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994).
- Results of defendant's horizontal gaze nystagmus (HGN) field sobriety test were not testimonial in nature, and thus were not subject to suppression under *Miranda*; tests did not create an express or implied assertion of fact or belief. *Campbell v. State*, 325 S.W.3d 223 (2010).
Tex.App.-Fort Worth,2010.

II. Police Officer Testimony Needed to Admit HGN Test Result

- Proof that the police officer is certified in the administration of the HGN test by the Texas Commission on Law Enforcement Officer Standards and Education satisfies this requirement. *Emerson*, 880 S.W.2d at 769; *Gullat v. State*, 74 S.W.3d 880 (Tex.App.-Waco, 2002)
- Testimony of an officer's extensive training and experience is sufficient foundation for HGN testimony. *Kerr v. State*, 921 S.W.2d 498 (Tex. App.-Fort Worth, 1996); *Ellis v. State*, 86 S.W.3d 759 (Tex.App.-Waco, 2002)

III. Purpose and Limits of HGN

- HGN admissible to prove intoxication, but not prove precise BAC. *Emerson*, 880 S.W.2d at 769; *Gullat v. State*, 74 S.W.3d 880 (Tex.App.-Waco, 2002).
- It is generally impermissible for a witness in a case for driving while intoxicated (DWI) to correlate a defendant's performance on the horizontal gaze nystagmus test to a conclusion that his blood-alcohol concentration exceeds the legal limit. *Jordy v. State*, 413 S.W.3d 227 (2013).

- Defendant opened door to otherwise inadmissible evidence on redirect examination that National Highway Transportation and Safety Association (NHTSA) manual correlated four out of six clues under horizontal gaze nystagmus (HGN) test with blood alcohol content of 0.10 or higher, in trial for driving while intoxicated (DWI), by eliciting from expert on cross-examination that manual did not explicitly state that certain number of clues on HGN test equated to loss of normal use of person's mental or physical faculties. *Jordy v. State*, 413 S.W.3d 227 (2013).

UTAH

I. Evidentiary Admissibility

- HGN is not scientific in nature, under the theory upon which it was presented to the court. *Salt Lake City v. Garcia*, 912 P.2d 997 (Utah Ct. App. 1996).
- The HGN test is admissible as other field sobriety tests. *Salt Lake City v. Garcia*, 912 P.2d 997 (Utah Ct. App. 1996).
- Court reserved judgment as to the scientific reliability of HGN. *Salt Lake City v. Garcia*, 912 P.2d 997 (Utah Ct. App. 1996).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Police officer need only testify as to training, experience and observations when HGN admitted as a field test. *Garcia*, 912 P.2d at 1001.

III. Purpose and Limits of HGN

- HGN is admissible as any other field sobriety test as evidence of impairment. *Garcia*, 912 P.2d at 1000-01.
- A witness may not testify that HGN is a scientifically accurate means of determining alcohol or drug impairment. *Salt Lake City v. Garcia*, 912 P.2d 997 (Utah Ct. App. 1996).

VERMONT

I. Evidentiary Admissibility

- Not addressed: Because the Court concluded that the odor of alcohol, admission to drinking, and watery and bloodshot eyes provided a sufficient basis for the trooper to proceed with the PBT, we need not consider whether the district court properly suppressed the trooper's testimony concerning the results of the HGN test. *State v. Mara*, 987 A.2d 939 (2009).
- Vermont (HGN was mentioned in the context of a refusal being admissible as evidence of probative guilt. “*The HGN test elicits a person's physical, rather than testimonial, response, and therefore does not trigger the privilege against self-incrimination.*” *State v. Blouin*, 168 Vt. 119, 121 (Vt. 1998)

II. Police Officer Testimony Needed to Admit HGN Test Result

- Not addressed in the case law.

III. Purpose and Limits of HGN

- Not addressed in the case law.

VIRGINIA

I. Evidentiary Admissibility

- Not addressed in the case law.

II. Police Officer Testimony Needed to Admit HGN Test Result

- Not addressed in the case law.

III. Purpose and Limits of HGN

- Not addressed in the case law.

WASHINGTON

I. Evidentiary Admissibility

- HGN is scientific in nature.
- Washington applies the *Frye* standard of admissibility.
- A fully contested *Frye* hearing was held at the trial court level on the issue of the admissibility of both the Drug Evaluation and Classification program and the HGN test. HGN testing is not novel and has been used as a field sobriety test for “decades” *State v. Baity*, 991 P.2d 1151 (Wash. 2000).
- Horizontal gaze nystagmus (HGN) rests on assertion of scientific legitimacy, and the *Frye* standard for determining scientific reliability must be met if such test results are to be introduced as evidence of intoxication in prosecution for driving while intoxicated (DWI). *State v. Cissne*, 865 P.2d 564 (1994).

II. Police Officer Testimony Needed to Admit HGN Test Result

- A properly qualified officer may testify on HGN. *State v. Baity*, 991 P.2d 1151 (Wash. 2000).

III. Purpose and Limits of HGN

- HGN is indicative of intoxication. *State v. Baity*, 991 P.2d 1151 (Wash. 2000).
- HGN test can show the presence of alcohol but not the specific levels of alcohol. *State v. Koch*, 991 P.2d 1280 (Wash. Ct. App. 2005)

WEST VIRGINIA

I. Evidentiary Admissibility

- HGN evidence is scientific in nature.
- At the time of the consideration of HGN evidence, West Virginia applied the *Frye* standard of admissibility.
- The state attempted to admit HGN as a correlation to BAC. The court held this was error without some sort of a *Frye* hearing.
- HGN should be afforded no more weight than any other field sobriety test. It is admissible to show that the driver is under the influence. *State v. Barker*, 366 S.E.2d 642 (W. Va. 1988) (Abrogated by

State v. Nichols, 541 S.E.2d 310 (1999) on other grounds).

The West Virginia Supreme Court modified *State v. Barker* to the extent that the *Daubert* analysis of FRE 702 is applicable to the question of admissibility of expert testimony under the West Virginia Rules of Evidence Rule 702. *Wilt v. Buracker*, 443 S.E. 2d 196 (W.Va. 1993).

II. Police Officer Testimony Needed to Admit HGN Test Result

- Police officer's training consisted of a one-day, eight-hour training session conducted by the state police. Officer testified to giving the HGN test about 100 times. Court did not reach question of whether this would be enough to allow the officer to testify about the HGN test results. *Barker*, 366 S.E.2d at 644. Abrogated by *State v. Nichols*, 541 S.E.2d 310 (1999) on other grounds.

III. Purpose and Limits of HGN

- HGN test results admissible to show probable cause in a civil hearing. *Muscatell v. Cline*, 474 S.E.2d 518, 525 (W. Va. 1996). *Boley v. Cline*, 456 S.E.2d 38, 41 (W. Va. 1995).
- If the reliability of the HGN test is demonstrated, an expert's testimony as to a driver's performance on the test is admissible only as evidence that the driver was under the influence. *Barker*, 366 S.E.2d at 646. Abrogated by *State v. Nichols*, 541 S.E.2d 310 (1999) on other grounds).
- The West Virginia Supreme Court of Appeals held: (1) results of horizontal gaze nystagmus (HGN) test are entitled to no greater weight than other field sobriety tests; (2) driver's license cannot be administratively revoked solely and exclusively on the results of the driver's HGN test; (3) no error occurred in driver's license revocation proceeding with regard to the use of HGN test;..." *White v. Miller*, 724 S.E.2d 768 (2012).
- The horizontal gaze nystagmus (HGN) test is a field sobriety test, and a driver's performance on the test is admissible as evidence that the driver may have consumed alcohol and may, therefore, be impaired; results of the HGN test are entitled to no greater weight in a license revocation proceeding than other field sobriety tests, such as the walk-and-turn test and the one-leg stand test. *White v. Miller*, 724 S.E.2d 768 (2012).
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IV. Other

- Police officer's alleged failure to properly administer horizontal gaze nystagmus test did not preclude admission of evidence regarding licensee's performance on test in administrative driver's license revocation proceeding stemming from driving under the influence (DUI) arrest; licensee failed to question officer regarding officer's performance of the test in accordance with the law, and any failure by officer to properly conduct test went to the weight of the evidence, not its admissibility. *Dale v. McCormick*, 749 S.E.2d 227 (2013).

WISCONSIN

I. Evidentiary Admissibility

- HGN evidence is not scientific in nature.
- HGN test results are admissible. *State v. Zivcic*, 598 N.W.2d 565 (Wisc. Ct. App. 1999);
- Time-of-trial horizontal gaze nystagmus (HGN) test that defendant performed outside jury's presence in prosecution for operating a motor vehicle while intoxicated (OWI) was not

“testimonial,” but was physical evidence, and, therefore, defendant's constitutional privilege against self-incrimination was not violated by admission of evidence that he showed zero out of six indicia of impairment on that test, administered after defense counsel suggested on cross-examination of arresting officer that defendant's diabetes may have affected his performance on a time-of-arrest HGN test and defendant testified that he did not drink any alcohol the day of trial or the night before. *State v. Schmidt*, 825 N.W.2d 521 (2012).

II. Police Officer Testimony Needed to Admit HGN Test Result

- A police officer who is properly trained to administer and evaluate the HGN test can testify to the test results. A second expert witness is not needed. *State v. Zivcic*, 598 N.W.2d 565 (Wisc. Ct. App. 1999).

III. Purpose and Limits of HGN

- HGN evidence may be admitted where admission of the test results is accompanied by the testimony of a police officer who is properly trained to administer and evaluate the test. *State v. Zivcic*, 598 N.W.2d 565 (Wisc. Ct. App. 1999).

WYOMING

I. Evidentiary Admissibility

- The classification of HGN as scientific or not has not been addressed.
- SFSTs, including HGN, are admissible to establish probable cause when administered in substantial compliance with NHTSA guidelines. *Smith v. State ex rel. Wyoming DOT*, 11 P.3d 931 (Wyo. 2000)

II. Police Officer Testimony Needed to Admit HGN Test Result

- A police officer that is properly trained to administer and evaluate the HGN test and describe how they were administered can testify to HGN results. *Smith v. State ex rel. Wyoming DOT*, 11 P.3d 931 (Wyo. 2000); *Bradshaw v. Wyo. DOT Drivers' License Div.*, 135 P.3d 612 (Wyo. 2006).

III. Purpose and Limits of HGN

- HGN test results are admissible to show probable cause. *Smith*, 11 P.3d 931.

UNITED STATES

I. Evidentiary Admissibility

- HGN is not scientific in nature if evidence is limited to the observations being circumstantial evidence that defendant was driving while intoxicated (DWI) or driving under influence of alcohol. *United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002)
- If the SFSTs are being offered as direct evidence of intoxication or impairment, they then become cloaked in a scientific or technical aura, and the factors articulated in *Daubert/Kumho Tire* must be evaluated. *United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002)
- A fully contested Daubert hearing was held at the trial court level. *United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002).

- HGN and the other SFSTs are admissible as circumstantial evidence of impairment. *United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002)

II. Police Officer Testimony Needed to Admit HGN Test Result

- Officer must first establish his qualifications to administer the test based on training and experience.
- The administration of the horizontal gaze nystagmus test and the interpretation of the test results are subjects beyond the ken of a lay juror, and thus, any challenge to the results of the test must be based on expert testimony. *Reiver v. District of Columbia*, 925 F.Supp.2d 1 (2013).
- Horizontal gaze nystagmus (HGN) test for intoxication is a scientific test, and thus, any testimony regarding the HGN test is scientific testimony subject to the evidentiary rule and case law governing expert testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A. *U.S. v. Van Hazel*, 468 F.Supp.2d 792 (2006).

III. Purpose and Limits of HGN

- SFSTs may be admitted into evidence in a DWI/DUI case only as circumstantial evidence of intoxication or impairment. *Horn*, 85 F. Supp. 2d 530.
- Officer may not use value-added descriptive language to characterize subject's performance of tests, such as saying that subject “failed test” or “exhibited” certain number of “standardized clues” during test. *Horn*, 85 F. Supp. 2d 530.
- HGN may not be used as direct evidence of specific BAC. *Horn*, 85 F. Supp. 2d 530.
- Properly qualified, Officer may give opinion of intoxication or impairment by alcohol. *Horn*, 85 F. Supp. 2d 530.

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