

# **STANDARDIZED FIELD SOBRIETY TESTING**

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## **A. SCOPE OF MATERIALS**

These materials are designed to inform the reader of the history and development of a standardized battery of field sobriety tests, the validation of certain standardized field sobriety tests, the elements of the standardized field sobriety tests, how they are administered and scored, and case law regarding the admissibility of field sobriety testing in OWI cases.

## **B. HISTORY AND DEVELOPMENT OF STANDARDIZED FIELD SOBRIETY TESTS (SFST's)**

Beginning in the 1970's, the National Highway Traffic Safety Administration (NHTSA) conducted research into the possible development and validation of a battery of standardized field sobriety tests (SFST's) which could then be used by law enforcement officers to improve the detection of drivers under the influence of alcohol (DUI).

In late 1975, extensive scientific research studies were sponsored by NHTSA through the Southern California Research Institute (SCRI) to determine which roadside field sobriety tests were accurate enough to recommend and further study.

Six tests were used in the initial stages, which was comprised of a Laboratory study:

1. The Walk-and-Turn (WAT)
2. The One-Legged Stand (OLS)
3. Horizontal Gaze Nystagmus (HGN)
4. Finger-to Nose
5. Finger Counting (Thumb and Fingers)
6. Drawing on Paper.

Out of the above six, three were chosen to be sufficiently reliable and accurate to conduct further studies in the field. Those tests were:

1. Horizontal Gaze Nystagmus
2. Walk-and-Turn
3. One-Legged Stand

Marcelline Burns & Herbert Moskowitz, *Psychophysiological Tests For DWI Arrest*, Final Report, DOT-HS-802-424 (1977).

A second study combining laboratory and field testing of sobriety tests was then performed. V. Tharp et. Al., *Development and Field Test of Psychophysiological Tests for DWI Arrest*, Final Report, DOT-HS-805-864 (1981).

A final study was performed solely in the field, employing the three-test battery previously recommended. Theodore Anderson et al., *Field Evaluation of a Behavioral Test Battery for DWI*, DOT-HS-806-475 (1983).

NHTSA analyzed the Laboratory test data and determined that:

- a) the HGN by itself was 77% accurate
- b) the Walk-and-Turn by itself was 68% accurate
- c) the One-Legged Stand by itself was 65% accurate
- d) and the HGN and WAT in combination were 80% accurate

in determining whether a subject's blood alcohol concentration was .10 or above.

Several critics and groups have questioned NHTSA's empirical data, and pointed to other significant problems that appeared in the studies. Spurgeon Cole & Ronald H. Nowaczyk, *Field Sobriety Tests: Are They Designed for Failure?* 79 PERCEP & MOTOR SKILLS, 99 (1994); Jonathon D. Cowan & Susannah G. Jaffe, *Proof and Disproof of Alcohol-induced Impairment Through Evidence of Observable Intoxication and Coordination Testing*, 9 AM. JUR. POF 3d, 459 (1990) Steve Rubenzer, Ph.D., *The Psychometrics and Science of the Standardized Field Sobriety Tests, Part 1*, The Champion, 48 (NACDL May 2003), *Part 2*, The Champion, 40 (NACDL, June 2003).

Between 1995 and 1998, three more field evaluation studies were performed. The Colorado Study utilized law enforcement personnel experienced in the use of SFSTs. It reported a correct arrest decision rate of 93%. The Florida SFST field validation study reported that correct arrest decisions were made 95% of the time when utilizing the 3-test NHTSA battery. The third study in San Diego suggested that the 3-test battery resulted in correct arrest decisions 91% of the time at BAC's of 0.08 and above. NATIONAL HIGHWAY SAFETY TRAFFIC ADMIN., U.S. DEPT. OF TRANS., *DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING*

*STUDENT MANUAL*, HS 178 R2/00, Section VIII (2000). Critics have equally questioned the empirical data and reported reliability of these studies.

In 1986, the Advisory Committee on Highway Safety of the International Association of Chiefs of Police (IACP) passed a resolution which recommended that law enforcement agencies adopt and implement the SFST program developed by NHTSA. In 1992, IACP recommended the development of a system for the selection and training of SFST practitioners by nationally accepted standards. Many of these standards are found in the 2002 DWI Detection and Standardized Field Sobriety Testing Instructor and Student Manuals. To date, Michigan has not adopted these standards.

## **C. THE NHTSA STANDARDIZED FIELD SOBRIETY TEST BATTERY:**

- 1. HORIZONTAL GAZE NYSTAGMUS TEST**
- 2. WALK AND TURN TEST**
- 3. ONE-LEGGED STAND TEST**

The following three tests have been validated only for alcohol. One of the foremost authors on field sobriety testing, who is sometimes referred to as the creator of the 3-test SFST battery for NHTSA, is Marcelline Burns.

The NHTSA SFST battery has only been validated for the prediction of blood alcohol concentrations. Marcelline Burns acknowledges that there is no correlation between performance on standardized field sobriety tests and operation of a motor vehicle. These tests are only useful in predicting a blood alcohol concentration of .08 and above. Marcelline Burns, *Validation of Standardized Field Sobriety Test Battery at BAC's Below .10 Percent*, DOT-HS-808-839 (1998)

Formal administration and accreditation of the National Highway Traffic Safety Administration's Standardized Field Sobriety Testing program is provided through the International Association of Chiefs of Police. It is unknown to this author if any of the SFST programs run in Michigan are IACP accredited.

The validity of the SFSTs is dependent on the officer's administration, scoring and interpretation of the tests. The following language is found in the 1995, 2000, and 2002 NHTSA Student manuals:

**“IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:**

- **THE TESTS ARE PERFORMED IN THE PRESCRIBED, STANDARDIZED MANNER**
- **THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECTS PERFORMANCE**
- **THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE**

**IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.”**

In the 2000 NHTSA SFST Instructor Manual, the following language is found:

**“8. How Flexible are the Standardized Field Sobriety Tests?**

**THE STANDARDIZED FIELD SOBRIETY TESTS ARE NOT AT ALL FLEXIBLE. THEY MUST BE ADMINISTERED EACH TIME, EXACTLY AS OUTLINED IN THIS COURSE.”**

## **1. THE HORIZONTAL GAZE NYSTAGMUS TEST**

Studies have shown that the Horizontal Gaze Nystagmus test is administered wrong at least 95% of the time. Barone & Crampton, *Do Standardized Field Sobriety Tests Reliably Predict Intoxication?*, Mich. Bar Journal, Volume 84, No. 7, (July 2005). However, the relationship between the ingestion of alcohol and the onset of nystagmus is well documented. See e.g., Ascan, G., *Different types of alcohol nystagmus*, Acta. Otolaryngol. Suppl., Vol. 140, pp. 69-78 (1958). Lehti, H. *The effect of blood alcohol concentration on the onset of gaze nystagmus*, Blutalkohol, Vol. 13 pp. 411-414 (1976).

Nystagmus is a natural, normal phenomenon involving the involuntary jerking of the eyes. Alcohol and certain other drugs do not cause nystagmus, but may exaggerate or magnify it. NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANS., *DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING STUDENT MANUAL*, HS 178 R2/00, Section VIII p.3 (2000)

### **a. Causes of Exaggerated Nystagmus**

There are at least 38 possible ‘causes’ of nystagmus: problems with the inner ear labyrinth; irrigating the ears with warm or cold water; influenza; streptococcus infection; vertigo; measles; syphilis; arteriosclerosis; Korchaff’s syndrome; brain hemorrhage; epilepsy; hypertension; motion sickness; sunstroke; eye strain; eye muscle fatigue; glaucoma; changes in atmospheric

pressure; consumption of excessive amounts of caffeine; excessive exposure to nicotine; aspirin; circadian rhythms; acute head trauma; chronic head trauma; some prescription drugs; tranquilizers; pain medication and anti-convulsant medication; barbiturates; disorders of the vestibular apparatus and brain stem; cerebellum dysfunction; heredity; diet; toxins; exposure to solvents; extreme chilling; eye muscle imbalance; lesions; continuous movement of the visual field past the eyes; and antihistamine use. *Schultz v. State*, 664 A.2d 60 at 77 (Md. App. 1995)

## **b. Procedures of Horizontal Gaze Nystagmus**

The procedures for giving the standardized horizontal gaze nystagmus test are as follows:

“Begin by asking “are you wearing contact lenses”, make a note whether or not the suspect wears contact lenses before starting the test.

“If the suspect is wearing eyeglasses, have them removed.

“Give the suspect the following instructions from a position of interrogation (FOR OFFICER SAFETY KEEP YOUR WEAPON AWAY FROM THE SUSPECT):

- “I am going to check your eyes.”
- “Keep your head still and follow the stimulus with your eyes only.”
- “Keep focusing on this stimulus until I tell you to stop.”

“Position the stimulus approximately 12-15 inches from the suspect’s nose and slightly above eye level. Check the suspect’s eyes for the ability to track together. Move the stimulus smoothly together or one lags behind the other. If the eyes don’t track together it could indicate a possible medical disorder, injury, or blindness.

“Next, check to see that both pupils are equal in size. If they are not, this may indicate a head injury.” “Check the suspect’s left eye by moving the stimulus to your right. Move the stimulus smoothly, at a speed that requires about two seconds to bring the suspect’s eye as far to the side as it can go. While moving the stimulus, look at the suspect’s eye and determine whether it is able to pursue smoothly. Now, move the stimulus all the way to the left, back across suspect’s face checking if the right eye pursues smoothly. Movement of the stimulus should take approximately two seconds out and two seconds back for each eye. Repeat the procedure”.

“After you have checked both eyes for lack of smooth pursuit, check the eyes for distinct nystagmus at maximum deviation beginning with the suspect’s left eye. Simply move the object to the suspect’s left side until the eye has gone as far to the side as possible. Usually, no white will be showing in the corner of the eye at maximum deviation. Hold the eye at that position for about four seconds, and observe the eye for distinct nystagmus. Move the stimulus all the way across the suspect’s face to check the right eye holding that position for approximately four

seconds. Repeat the procedure.

“After checking the eyes at maximum deviation, check for onset of nystagmus prior to 45 degrees. Start moving the stimulus to the right (suspect’s left eye) at a speed that would take about four seconds for the stimulus to reach the edge of the suspect’s shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Now, move the stimulus to the left (suspect’s right eye) at a speed that would take about four seconds for the stimulus to reach the edge of the suspect’s shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Repeat the procedure. NOTE: It is important to use the full four seconds when checking for the onset of nystagmus. If you move the stimulus too fast, you may go past the point of nystagmus or miss it altogether. If the suspect’s eyes start jerking before they reach 45 degrees, check to see that some of the white of the eye is still showing on the side closest to the ear. If no white of the eye is showing, you have either taken the eye too far to the side (that is more than 45 degrees) or the person has unusual eyes that will not deviate very far to the side.

“NOTE: Nystagmus may be due to causes other than alcohol. These other causes include seizure medications, PCP, inhalants, barbiturates, and other depressants. A large disparity between the performance of the right and left eye may indicate a medical condition.”

NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANS., *DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING STUDENT MANUAL*, HS 178 R2/00, Section VIII pp. 6-8 (2000)

### **c. Scoring of the Horizontal Gaze Nystagmus Test (Interpretation)**

The three clues for the HGN test in each eye are as follows:

- The eye cannot follow an object smoothly
- Nystagmus is distinct when the eye is at maximum deviation
- The angle of onset of nystagmus is prior to 45 degrees.

As per the NHTSA Training Manuals, if you observe four or more clues total for both eyes, it is likely that the suspect’s BAC is above 0.10. Using this criterion you will be able to classify correctly about 77% of your suspects with respect to whether they are above 0.10.

## **2. WALK-AND-TURN TEST**

### **a. Procedures for the Walk-and-Turn Test**

There are two basic parts to the Walk-and-Turn test: the balance stage and the walking stage.

Prior to the beginning of the test, always ask the suspect if he has had any injuries or other conditions which might affect his ability to walk or balance, including head, back, neck and leg injuries.

The following are the Standard Procedures for the Walk-and-Turn test:

“For standardization in the performance of this test, have the suspect assume the heel-to-toe stance by giving the following verbal instructions, accompanied by demonstrations:

- ‘Place your left foot on the line’ (real or imaginary). Demonstrate.
- ‘Place your right foot on the line ahead of the left foot, with the heel of the right foot against the toe of the left foot’. Demonstrate.
- ‘Place your arms down at your sides’. Demonstrate.
- ‘Keep this position until I tell you to begin. Do not start to walk until told to do so’
- ‘Do you understand the instructions so far?’ (Make sure suspect indicates understanding.)

“Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- ‘When I tell you to start, take nine heel-to-toe steps, turn, and take nine heel-to-toe steps back.’ (Demonstrate 3 heel-to-toe steps.)
- ‘When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this’ (Demonstrate)
- ‘While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud.’
- ‘Once you start walking, don’t stop until you have completed the test.’
- ‘Do you understand the instructions?’ (Make sure suspect understands)
- ‘Begin, and count your first step from the heel-to-toe position as ‘One’.’

NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANS., *DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING STUDENT MANUAL*, HS 178 R2/00, Section VIII pp. 9-10 (2000)

## **b. Scoring and Interpretation of the Walk-and-Turn Test**

The following are the NHTSA standardized clues for the Walk-and-Turn Test:

- Cannot keep balance while listening to instructions. Record this clue only if the suspect does not maintain the heel-to-toe position throughout the instructions. The feet must actually break apart. Don't record this clue if the suspect merely sways or uses arm for balance.
- Starts before instructions are finished. Record this clue if the suspect starts after being told not to start walking 'until I tell you to begin'.
- Stops while walking. The suspect pauses for several seconds. Do not record if the suspect is merely walking slowly.
- Does not touch heel-to-toe. Record this clue if there is more than one-half inch of space between the heel and toe on any step.
- Steps off the line. The suspect steps so that one foot is entirely off the line.
- Uses arms to balance. The suspect raises one or both arms more than 6 inches from the sides in order to maintain balance.
- Improper Turn. The suspect removes the front foot from the line while turning. Also record this clue if the suspect has not followed directions as demonstrated, i.e. spins or pivots around.
- Incorrect Number of Steps. Record this clue if the suspects takes more or fewer than nine steps in either direction.

Each clue is only scored one time even if more than one fault is seen. Two or more clues correctly classifies 68% of the suspects as having a BAC of 0.10 or above. The officer should limit his movement while the suspect is performing the test so as not to distract the suspect.

## **c. Test conditions for the Walk-and-Turn Test**

According to NHTSA, the Walk-and-Turn Test requires a line that the suspect can see, and should be performed on a dry, hard, level, nonslippery surface. Original research indicated that persons with back, leg, middle ear problems, persons 50 pounds or greater overweight, and those over 65 years of age, had difficulty performing the test. (NOTE: Later NHTSA manuals have removed the weight comment, and also inserted the phrase 'imaginary line' at the instruction phase, even though original research always used a visible line.)

Individuals wearing heels more than 2 inches high should be given the option of removing their shoes.

### **3. ONE-LEG STAND TEST**

#### **a. Procedures for the One-Leg Stand Test**

“Initiate the test by giving the following verbal instructions, followed by demonstrations.

- ‘Please stand with your feet together and your arms down at your side, like this.’ (Demonstrate)
- ‘Do not start to perform the test until I tell you to do so.’
- ‘Do you understand the instructions so far?’ (Make sure suspects indicates understanding.)

“Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- ‘When I tell you to start, raise one leg, either leg, approximately six inches off the ground, foot pointed out.’ (Demonstrate one leg stance)
- ‘You must keep both legs straight, arms at your side.’
- ‘While holding that position, count out loud in the following manner: ‘one thousand and one, one thousand and two, one thousand and three, until told to stop.’ (Demonstrate a count, as follows: ‘one thousand and one, one thousand and two, one thousand and three, etc.’ Officer should not look at his foot when conducting the demonstration - OFFICER SAFETY.)
- ‘Keep your arms at your sides at all times and keep watching the raised foot.’
- ‘Do you understand?’ (Make sure suspect indicates understanding.)
- ‘Go ahead and perform the test.’ (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.)

“Observe the suspect from a safe distance. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.”

NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANS., *DWI*

**b. Scoring and Interpretation of the One-Leg Stand Test**

The NHTSA manual states that the officer should look for the following clues:

“A. The suspect sways while balancing. This refers to the side-to-side or back-and-forth motion while the suspect maintains the one-leg stand position.

B. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body to keep balance.

C. Hopping. Suspect is able to keep one foot off the ground, but resorts to hopping in order to maintain balance.

D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.”

NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANS., *DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING STUDENT MANUAL, HS 178 R2/00, Section VIII p. 13-14 (2000)*

If the suspect scores two or more clues, there is a good chance his BAC is 0.10 or above, according to the original research. Using that criterion, you will accurately classify 65% of the people tested.

Officers must remain relatively motionless and observe the suspect from a safe distance so as to not interfere. If the suspect counts slowly, terminate the test after 30 seconds.

**c. Test conditions for the One-Leg Stand Test**

According to the 2000 NHTSA Manual, the surface must be level, dry, and a non-slippery surface. Persons 65 years of age, 50 pounds or more overweight, and those with leg, back and middle ear problems will have difficulty performing the test.

However, earlier editions of the standardized field sobriety testing student manuals from NHTSA contain much stronger language, such as the following:

“Certain individuals are likely to have trouble with this test even when sober. People over 60 often have very poor balance. (Since very few elderly people are stopped at roadside, specific

guidelines have not been established for them on this test.)....In administering the test, make sure the suspects eyes are open and there is adequate lighting for him to have some frame of reference... In total darkness, the One-Leg Stand is difficult even for sober people.” NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANS., *Improved Sobriety Testing*, DOT-HS-806-512, p. 7 (1984).

## **D. SCIENTIFIC CRITICISMS OF THE STANDARDIZED FIELD SOBRIETY TESTS**

Many experts have questioned the accuracy of the standardized field sobriety tests, the statistical data behind SFSTs, and the ability of officers to properly administer and interpret SFSTs in the field.

In one particular study, individuals who were completely sober were asked to perform the sfst's and also a set of 'normal-abilities' tests. The 'normal-abilities' test was comprised of exercises and questions which should be well known to individuals, such as one's address, phone number, and walking in a normal manner. Performances for each type of test were then videotaped. 14 police officers were asked to view the videotapes of the 21 sober individuals with 0.00 blood alcohol concentrations doing sfst's and normal-abilities testing. After viewing the 21 videos of sober individuals taking the standardized field tests, the police officers' believed that forty-six percent of the individuals had "too much to drink". Fifteen percent of the officers viewing the normal-abilities videos thought the individuals had too much to drink. S. Cole & R.H. Nowaczyk, *Field Sobriety Tests: Are They Designed for Failure?*, Perceptual and Motor Skills, Vol. 79, pp. 99-104 (1994). The authors concluded that SFSTs must be held to the same standards the scientific community would expect of any reliable and valid test of behavior, and that SFSTs should be examined and judged critically.

In another study, the authors concluded that the HGN test has a high baseline error and a dose/response relationship that varied greatly depending on whether the subject's BAC was falling or rising. In 52 videotapes of actual arrests for DUI, the authors found that the HGN test was improperly administered 51 times. JL Booker, *End-position nystagmus as an indicator of ethanol intoxication*, Science and Justice 2001: 41(2): 113-116 (2001)

In another study, a series of experiments was performed at the Rutgers University Alcohol Behavior Research Laboratory to test the ability of social drinkers, bartenders, and police officers to gauge the sobriety of individuals. All three subject groups – the social drinkers, bartenders, and police officers– correctly judged the subjects level of intoxication only 25 % of the time. *Psychology, Public Policy and the Evidence for Alcohol Intoxication*, American Psychologist p.1070 (Oct. 1983).

Other criticisms noted regarding the NHTSA field studies include:

“1) The field studies validated the arrest decisions of the officers, not the SFST’s themselves;

2) The police officers and the degree of supervision in the field studies were not typical of typical DWI stops;

3) The studies are insufficiently documented for scientific papers;

4) The authors did not report the accuracy of arrest decisions for stops that were observed vs. those that were not, or for SFST’s performed under adverse climatic conditions vs. those that were not, and

5) None of the SFST field studies have been published in peer-reviewed scientific journals.”

Steve Rubenzer, Ph.D., *The Psychometrics and Science of the Standardized Field Sobriety Tests, Part 1*, The Champion, 48 (NACDL May 2003), *Part 2*, The Champion, 40 (NACDL, June 2003)

Acknowledging that officers trained in conducting SFST’s can have their skills degrade over time, and that modifications to the standardized procedures could result in an officer administering SFSTs according to outdated protocols, NHTSA recommends that law enforcement agencies conduct refresher training for SFST instructors and practitioners. NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANS., *Development of a Standardized Field Sobriety Test (SFST) Training Management System*, DOT-HS-809-400, (2001).

## E. NON-VALIDATED SOBRIETY “TESTS”

A variety of so-called field sobriety tests are employed by police officers in the field during DUI investigations. None of these ‘tests’ has been statistically validated as reliable, nor have they been accepted in the medical or scientific community for the purpose of diagnosing alcohol intoxication.

The use of the term “test’ for these non-validated exercises is a misnomer. Black’s Law Dictionary defines a test as “Something by which to ascertain the truth respecting another thing: a criterion, a gauge, a standard, or norm”. BLACK’S LAW DICTIONARY, (6<sup>th</sup> Ed. 1990) (West Publishing Co.)

Most of these non-validated ‘tests’ have arisen either from word-of-mouth between officers, or

through antiquated methods that seemingly have not been discarded. These include:

1. The “Alphabet Test” – the variations employed are endless, but most involve saying the complete alphabet (without singing it), or stating a portion of the alphabet, such as starting from E and ending at U, or saying the alphabet backwards. In addition to a total lack of validation that the test can accurately separate sober individuals from those who are under the influence, common problems with this test include that many persons have not stated the alphabet since childhood, many persons do not speak English as their primary language, and that the inability to say the alphabet may be a product of sheer nervousness. Additionally, there has not been any standardization in scoring this exercise for DUI purposes.

2. The “Finger-to-Nose Test” – having its origin somewhere in the 1950's, this test seeks to have a person touch the tip of his nose with the tip of his finger, while tilting his head back as far as possible and keeping his eyes closed. The officer then calls out each hand, left, right, left, right, and then right left in an attempt to confuse the subject. Besides a lack of validation, this exercise does not use standardized clues or scoring in order to establish what is a “pass” or “fail”.

3. The “Rhomberg Test” – having its origin in the detection of persons under the influence of drugs, the suspect is asked to close his eyes and tell the officer when 30 seconds have passed. The theory claimed is that a person under the influence of amphetamines will think 30 seconds has passed too quickly, while a central nervous depressant will cause the person to think that 30 seconds has passed too slowly. This “test” has yet to be accepted by the medical or scientific community.

5. The “Finger-to-Thumb Test” – the suspect is asked to touch his thumb to each fingertip in correct sequence starting with the index finger, and asked to count out loud “Four, three, two, one, one, two, three, four” and so forth.

## **F. LEGAL CHALLENGES TO ADMISSIBILITY OF FIELD SOBRIETY TESTS**

### **1. THE HORIZONTAL GAZE NYSTAGMUS TEST**

Presumably, when searching for scientific reliability, a Judge considers affidavits, learned writings, published and unpublished studies, and any other testimony or documents that will be helpful to the determination of admissibility. This is at least tacitly expressed in MRE 104, 401, 402 and 403, all of which suggest that suppression is warranted and appropriate when evidence is deemed “unreliable” or “irrelevant”. This “gatekeeper” function of a trial judge received new

emphasis with the Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Six years later, in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Court expanded the scope of *Daubert* to include not only “scientific” evidence but any technical or specialized knowledge as well. It appears that Michigan has now be adopted the principles set forth in *Daubert*. In the case of *Gilbert v. DaimlerChrysler.*, 470 Mich 749, 2004 WL 1632857 (July 22, 2004), the Michigan Supreme Court discussed the new obligations for trial courts under the recently amended MRE 702. The court stated that “[T]he trial court’s obligation under MRE 702 is even stronger than that contemplated by FRE 702 because Michigan’s rule specifically provides that the court’s determination is a precondition to admissibility.” *Gilbert, supra*, at n 46. *See also Nelson v. American Sterilizer Co.*, 223 Mich. App. 485 (1997).

Prior to *Kumho Tire*, some courts treated some FSTs as mere observations that could be admitted without scientific foundation. Such reasoning is no longer available in federal court: as the within discussion demonstrates, each of the three SFSTs are the sort of specialized knowledge that *Kumho Tire* brought within the purview of *Daubert* and therefore are inadmissible without proper foundation. *See, e.g., Volk v. United States*, 57 F. Supp.2d 888, 894n.3 (N. D. Cal. 1999) (FSTs are “specialized knowledge” subject to *Kumho Tire* and Fed. R.Evid. 702).

Even before *Kumho Tire*, the majority of courts to consider the issue held that the HGN test is a scientific test that requires an evidentiary foundation. *See, e.g., State v. Witte*, 251 Kan. 313, 320, 836 P.2d 1110, 1114 (1992) (listing cases); *see also Schultz v. State*, 106 Md. App. 145, 664 A.2d 60 (1995) (following 17 other states courts in holding that HGN is scientific test requiring foundation). Accordingly, and because of the highly specialized nature of the test, HGN should be assessed under the *Daubert/Kumho/Rule 702* requirements for reliability and usefulness.

## 2. WALK AND TURN, ONE-LEGGED STAND

The admissibility of a defendant’s performance of field sobriety tests, and the admissibility of testimony interpreting the results of field sobriety tests, including the Walk-and-Turn Test and One-Legged Stand Test, is the subject of great controversy across the United States.

In Michigan, there are very few cases discussing these issues, but there have been some interesting decisions from Illinois. In *People v. Sides*, 199 Ill. App. 3d 203, 556 N.E. 2d 778, 145 Ill. Dec. 160 (4<sup>th</sup> Dist. 1990), the Court held that the ‘finger-to-nose test’, the ‘walk-and-turn test’, and the ‘one-leg stand test’ (sic) “were not so abstruse as to require a foundation other than the experience of the officer administering them”, citing to *People v. Vega*, 145 Ill. App. 3d 996, 1000-01, 99 Ill. Dec. 808, 496 N.E.2d 501 (1986).

The *Sides* court did suggest that it was for the *jury* to decide what conclusions should be drawn when a defendant does poorly on field sobriety tests. This logic would seem to suggest that a police officer is not entitled to offer an interpretation of the results of field sobriety tests, as such evidence would invade the province of the jury. It is this writer’s opinion that this position

ought to be adopted in Michigan.

In *People v. Bostelman*, 325 Ill. App. 3d 22, 756 N.E.2d 953, 258 Ill.Dec. 679 (2d Dist. 2001), the Court concluded that an officer is not required to establish that he has any previous experience or formal training in the administration of field sobriety tests in order to testify about the defendant's performance on field sobriety tests. Further, the Court stated that "the field sobriety tests measured abilities that are tested innumerable times throughout the average day of the normally active person", stating:

"Indeed, so fundamental are such exercises of balance, coordination, and basic cognition to the activity of the average person that 'even a layperson is competent to testify regarding a person's intoxication from alcohol, because such observations are within the competence of all adults of normal experience.'" *People v. Bostelman*, 325 Ill.App.3d at 33.

Other jurisdictions appear more critical regarding the admissibility of field sobriety tests, and regarding an officer's ability to interpret the results of field sobriety tests. In *State v. Homan*, 89 Ohio St. 3d 421, 732 N.E.2d 952 (S.Ct. 1999) the Ohio Supreme Court held that police must strictly comply with established, standardized procedures in administering field sobriety tests, or the evidence is inadmissible. The *Homan* Court reviewed the NHTSA field sobriety test data, and stated that "the small margins of error that characterize field sobriety tests makes strict compliance critical."

In *United States v. Horn*, 00-946-PWG (U.S. Dist. Ct. Maryland 2002) the District Court held that SFST's do not meet sufficient criteria to be used as direct evidence of intoxication. The court further held that, although the SFSTs may be circumstantial evidence of impairment, that the use of descriptive terminology by a police officer that a subject passed or failed the tests, or that the subject exhibited certain clues, or that there is an elusive scoring criteria, unfairly cloaks field sobriety tests with 'unearned credibility'. "The officer should not be permitted to interject technical or specialized comments to embellish the opinion based on any special training or experience he or she has in investigating DWI/DUI cases." Further, improperly administered field sobriety tests were held to be inadmissible.

Similarly, in *State v. Meador*, 674 So.2d 826 (Fla.App. 1996) the court held that although a defendant's performance on psychomotor FSTs were admissible, any attempt by a police officer to attach significance to a defendant's performance was inadmissible. "Reference to the exercises by using terms such as 'test', 'fail', or 'points', however, creates a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment, as such terms give these layperson observations the aura of scientific validity."

## **G. CROSS-EXAMINATION OF FIELD SOBRIETY**

# TESTS

Clearly, all of the previous information in this chapter is material in determining how to cross-examine a proponent of field sobriety ‘tests’ which are not in compliance with NHTSA standards, and those which have not been validated by the medical or scientific community.

The more critical question is : How do I get this information before the trier of fact?

Prior to trial, defense counsel should determine whether the arresting officer received any field sobriety training, when he received the training, and what agency provided the training. Ask the officer whether he or she received any materials in the course, such as a field sobriety training manual. Ask whether the officer still has the manuals in his or her possession.

Finally, always ask whether the officer’s training was in compliance with NHTSA standards. Ask whether the officer considers NHTSA authoritative in the area of field sobriety testing. If you have other agencies’ manuals, ask whether the officer would consider that agency to be authoritative on the topic of SFSTs:

“Would you consider the National Highway Safety Administration to be authoritative and reliable in the area of field sobriety testing?”

Certified copies of public records are admissible and self-authenticating. A witness may be cross-examined by use of a publication or article where any witness acknowledges that the document or author is considered authoritative and reliable.

Once the witness acknowledges the authoritative nature of a field sobriety manual, have the witness admit that they are not as qualified as the persons who wrote the manuals, and lack the qualifications to disagree with the manuals.

If the officer is not conducting the SFSTs in compliance with NHTSA standards, confront the officer directly. The reliability of the officer’s testing, and his ultimate opinion regarding a subjects intoxication, is directly dependent on the manner in which the tests were administered and/or interpreted.

If the officer is employing tests which have not been validated, point it out. “Isn’t it true that the National Highway Safety Administration has failed to validate the (finger-to-nose exercise) as capable of separating intoxicated individuals from sober ones?” “Do you consider yourself to have more expertise in this area than then U.S. Department of Transportation?”

Similarly, prosecutors should validate officers who conduct the SFSTs as required by NHTSA. Prosecutors may wish to point out that proper SFSTs are an acceptable means of testing individuals across the country for intoxication. (The SFSTs may not be direct proof of

intoxication beyond a reasonable doubt, but they can be an effective method for detecting DWI offenders under certain circumstances).

Defense attorneys should explore the possibility of employing experts in the field of Standardized Field Sobriety Testing. A qualified expert will tell you that when SFSTs are improperly administered or interpreted, the effect will be that the officer will arrest people that he or she shouldn't have, and will fail to arrest persons who should have been arrested.

Possible motions in limine should be pursued, limiting the testimony of police officers to actual observations only, and prohibiting such terms as pass, fail, etc., because such terms are misleading and invade the province of the trier of fact, as noted in the Horn and Meador decisions previously discussed.

## **H. CONCLUSION**

The area of field sobriety testing is developing rapidly, as science advances, and as the case law develops regarding the admissibility of evidence in this area. Any prosecutor or defense attorney who practices in this area would be well advised to attend a Standardized Field Sobriety Testing Certification Course to further enhance their skills in this area of the law.

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