

ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DR. JOE J. WHITE, JR.,

Petitioner,

v.

NO. 11-0171

**JOE MILLER, Commissioner,
West Virginia Department of
Motor Vehicles,**

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

**JANET E. JAMES #4904
Senior Assistant Attorney General
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
Janet.E.James@wv.gov
(304) 926-3874**

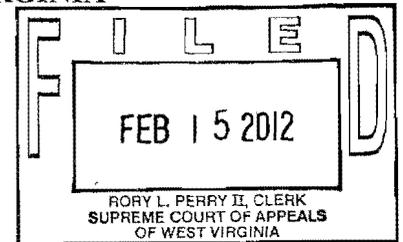


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RESPONDENT'S SUPPLEMENTAL BRIEF

Comes now the Respondent, Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles, by counsel, Janet E. James, Senior Assistant Attorney General, pursuant to the Court's order, and supplements its prior brief to address (1) West Virginia's adoption of the National Highway Safety Administration's ("NHTSA") standards for field sobriety tests; (2) peer-reviewed articles regarding the foundation, administration and *Daubert* considerations of the horizontal gaze nystagmus test ("HGN"); and (3) cases from other states on the issue of admissibility of the HGN test.

The HGN has been in use in law enforcement against drunk driving for over 30 years, and has been accepted in many jurisdictions as a valid tool for assessment of impairment by alcohol. On June 18, 2011, the American Optometric Association's House of Delegates passed Resolution 1901, which recognized the validity and reliability of the HGN test when administered properly by trained and certified police officers and when used in combination with other evidence. The resolution states as follows:

WHEREAS, drivers under the influence of alcohol pose a significant threat to the public health, safety, and welfare; and

WHEREAS, optometric scientists and the National Highway Traffic Safety Administration have shown the Horizontal Gaze Nystagmus (HGN) test to be a scientifically valid and reliable tool for trained police officers to use in field sobriety testing; now therefore be it

RESOLVED, that the American Optometric Association acknowledges the scientific validity and reliability of the HGN test as a field sobriety test when administered by properly trained and certified police officers and when used in combination with other evidence; and be it further

RESOLVED, that the American Optometric Association supports doctors of optometry as professional consultants in the use of HGN field sobriety testing.

As will be shown below, evidence from an HGN test is admissible in the context of a license revocation hearing. The driver may challenge the evidence that the arresting officer is qualified to administer the test, that the test was administered properly, and the officer's interpretation of the driver's performance on the test. Any such challenge may affect the weight given to the HGN evidence. It is not necessary to show that the test is scientifically valid: West Virginia already limits the use of the test evidence in that it cannot be used to show a specific blood alcohol content ("BAC"), and the HGN evidence cannot be given more weight than any other field sobriety test.

I. WEST VIRGINIA'S ADOPTION OF THE NATIONAL HIGHWAY SAFETY ADMINISTRATION'S STANDARDS FOR FIELD SOBRIETY TESTS.

The adoption by West Virginia of the NHTSA standards for administration of field sobriety tests is intertwined with federal funding. The Appellant concedes in his brief (at 5) that courts can

take judicial notice of the applicability of the NHTSA DUI detection standards as contained in the law enforcement training manuals issued by NHTSA. Appellee agrees with this position.

The Governor's Highway Safety Program receives funding from NHTSA to train at the State Police Academy. The state provides matching funds for the federal dollars for these purposes. The West Virginia Commission on Drunk Driving Prevention works closely with the Governor's Highway Safety Program. It receives tax dollars on sales of wine and liquor, which comprises the Drunk Driving Prevention Fund. Law enforcement agencies apply for grants from the Commission to fund drunk driving prevention. The purpose of the grants is to affect human behavior on the roadway. Grant money has been dedicated to seatbelt enforcement and speeding. However, the bulk of the money is to enforce DUI laws. Those grants are given to city, county and state police to provide training and enforcement.

All officers in West Virginia receive the same training on standard field sobriety tests ("SFST"). Testimony of Corporal Mike Holstein, Exhibit B to Petitioner's Supplemental Brief, at 77. Officers train in the West Virginia State Police Academy to become certified. *See*, W. Va. Code §§ 30-29-1 et seq. The officer's completion of Academy training with diploma shows that he or she completed the NHTSA curriculum. NHTSA provides the training manuals, and trains instructors who teach the SFST courses.

In an administrative case such as the present case, the officer submits a sworn affidavit in the form of a DUI Information Sheet with detailed information about the DUI incident including driving behavior, non-structured observations, roadside admissions, field sobriety tests, chemical tests and

structured interview information. The HGN is one of three field sobriety tests usually conducted. The DUI Information Sheet includes information as to whether the test was explained, a medical assessment, the performance of the driver and the decision points. The Commissioner reviews that information, along with all of the other information submitted, before issuing an initial Order of Revocation. The Commissioner also receives information from the Division of Health indicating the training received by every officer in the state for chemical testing and maintains it on file.

II. THIS STATE SHOULD NOT REQUIRE EXPERT TESTIMONY REGARDING THE SCIENTIFIC VALIDITY OF A WELL-PROVEN AND INVALUABLE FIELD SOBRIETY TEST IN ADMINISTRATIVE PROCEEDINGS.

The testimony of Dr. Joseph Citron, an ophthalmologist, summarized in *People v. McKown*, 236 Ill.2d 278, 924 N.E.2d 941, 338 Ill.Dec. 415 (2010), shows that the HGN test need not be viewed as scientific.

Citron ... explained the meaning of the term “nystagmus,” which he described as a condition that is “usually pathologic in origin” and “not part of the normal findings in an individual.” Nystagmus itself is not a diagnosis; it is merely a description of a certain type of eye movement that may be caused by many conditions. He was unable to give a specific number of recognized causes, but agreed with the statement that the number is at least 39. Citron further testified that once an individual had consumed sufficient alcohol to “reach the threshold of central nervous system depression,” he could display nystagmus.

236 Ill.2d 285-286, 924 N.E.2d 994, 338 Ill.Dec. 420.

Thus, there is no need for expert testimony to establish the scientific reliability of the test. The observations of an administering officer are admissible to show impairment by alcohol.

Criminal proceedings are separate and distinct from administrative proceedings; however,

West Virginia caselaw relevant to HGN has intertwined analyses of both. Criminal cases have suppression hearings. Criminal cases may include juries, for whom *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) analyses are designed. Criminal cases may include bench trials with magistrates that do not specialize in DUI cases; whereas in DMV hearings the Examiners are trained and hear, almost exclusively, DUI cases. In criminal cases, exclusionary rules apply. In administrative hearings, HGN evidence is admissible, and expert testimony as to the fundamental reliability of the test serves no purpose to the factfinder.

Although 91 C.S.R. 1-3.5.2 requires the driver to assert grounds upon which an Order of Revocation can be vacated or modified, the typical grounds asserted by the driver are a simple statement such as “I was not drunk.” Nonetheless, a hearing request automatically stays the revocation until hearing. All of the information in the Commissioner’s file is available to the driver prior to the hearing. At the hearing, the information in the Commissioner’s possession is admitted pursuant to W. Va. Code § 29A-5-2(b). See, *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006); *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008) and *Groves v. Cicchirillo*, 694 S.E.2d 639 (2010). Every aspect of the HGN is subject to rebuttal through cross-examination, driver testimony and expert testimony. The Division of Motor Vehicles does not use HGN evidence to prove a BAC, nor does it argue that HGN test results should be used to conclude a particular BAC without expert testimony. HGN evidence is used in the same manner and accorded the same weight as other field sobriety tests. HGN evidence is rarely relied upon in isolation.

In *State v. Barker*, 179 W. Va. 194, 366 S.E.2d 642 (1988), a criminal appeal, this Court found that because the State did not offer evidence regarding the scientific reliability of the HGN

test, the officer's testimony about the administration and results of the test were correctly excluded. The Court stated that if the HGN test were found to be reliable, and its results admissible, the HGN test should not be accorded any more evidentiary value than other field sobriety tests, and it should not be admitted to show a particular blood alcohol content. The evidence would only be used as evidence that the driver was under the influence.

In *Boley v. Cline*, 193 W.Va. 311, 456 S.E.2d 38 (1995), an administrative appeal of a license revocation, this Court admitted the results of the HGN test subject to the restrictions set forth in *Barker, i.e.*, that the test not be used to determine a specific blood alcohol content and that the test not be given any more evidentiary weight than any other field sobriety test. The Court noted that in *Barker*, "the general nature and reliability of the HGN test was discussed." 193 W.Va. 314, 456 S.E.2d 41 (1995). The Court also relied on its prior decision in *Cunningham v. Bechtold*, 186 W.Va. 474, 413 S.E.2d 129 (1991), an administrative appeal in which the Court agreed that evidence of the driver's failure of the HGN test warranted the officer's belief that the person was DUI. The Court concluded its discussion of HGN with the following reference:

See also 2 R.E. Erwin, *Defense of Drunk Driving Cases* sec. 10.11 (3rd ed. 1995), discussing *Barker* and suggesting that the HGN test "can be considered an FST [field sobriety test] and used with or without other tests to establish probable cause for an arrest."

193 W.Va. 314, 456 S.E.2d 41.

This Court has affirmed the use of HGN evidence to establish probable cause *and* as evidence of intoxication.

In *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996), this Court found in an administrative license revocation matter that the circuit court had erred in relying on *Barker, supra*, to exclude evidence of the HGN test. This Court found that the trial court erred in requiring proof of scientific reliability in an administrative proceeding. The Court held: “*Barker* allows the admission of the results of the HGN test as evidence that the driver was under the influence of alcohol.” The Court further noted that it has approved the admission of testimony from a police officer “regarding the results of the HGN test as a field sobriety test.” 196 W. Va. 595, 474 S.E.2d 525. The *Muscatell* Court relied on *Boley v. Cline*, 193 W.Va. 311, 456 S.E.2d 38 (1995), in which this Court affirmed the revocation based on the trooper’s detection of the smell of alcohol, observation of the vehicle weaving, and the HGN test. In *Muscatell*, this Court expressly rejected the circuit court’s exclusion of HGN as evidence based on the lack of evidence establishing the test’s scientific reliability, and concluded that Trooper Brown’s testimony regarding his administration of the HGN test and his conclusions from it may properly be considered by the trier of fact.

West Virginia’s adoption of the “*Daubert-Wilt*” standard for determining the admissibility of expert testimony in 1993 did not change the Court’s acceptance of HGN evidence, as evidenced by the fact that *Boley* and *Muscatell* were decided after *Wilt*. Indeed, the Court consistently affirmed admission of HGN evidence in several cases before and after *Wilt*: *Simon v. West Virginia Dept. of Motor Vehicles*, 181 W. Va. 267, 382 S.E.2d 320 (1989)(failure to satisfactorily complete any field sobriety tests, along with other evidence, provided probable cause to arrest); *Cunningham v. Bechtold*, 186 W.Va. 474, 413 S.E.2d 129 (1991)(The Court relied on the results of the field

¹*Wilt v. Buracker* 191 W.Va. 39, 443 S.E.2d 196 (1993).

sobriety tests, including HGN, to uphold the revocation: “Moreover, the appellant was unable to satisfactorily complete any of the field sobriety tests given to him by Officer Johnson. Thus, we find that the facts and circumstances within the knowledge of Officer Johnson were sufficient to warrant him in believing that the appellant was driving under the influence of alcohol.” 186 W.Va. 478, 413 S.E.2d 133); *Hinerman v. West Virginia Dept. of Motor Vehicles*, 189 W.Va. 353, 431 S.E.2d 692 (1993) (per curiam)(failure of three field sobriety tests, in addition to other evidence, constitutes sufficient evidence under preponderance standard to warrant administrative revocation); *Hill v. Cline*, 193 W. Va. 436, 457 S.E.2d 113 (1995)(battery of failed field sobriety tests gave rise to probable cause to arrest); *Dean v. West Virginia Dept. of Motor Vehicles*, 195 W.Va. 70, 464 S.E.2d 589 (1995)(driver failed HGN test, Commissioner rejected defense that head injuries affected HGN, this Court affirmed revocation, finding that HGN and other proof constituted sufficient evidence to revoke); *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997)(failure to properly perform field sobriety tests, along with other evidence, was sufficient to warrant revocation); *Groves v. Cicchirillo* 225 W.Va. 474, 481, 694 S.E.2d 639, 646 (2010)(“In addition, the evidence reveals that Appellee was given two field sobriety tests, the HGN test and the one-leg stand test. The results from these tests were recorded by the deputy, showing that Appellee had failed in his performance. We find that these facts provide sufficient evidence to support the conclusion that Appellee was driving a motor vehicle while under the influence of alcohol, with or without the Intoximeter results, and thus represent an adequate basis for the Commissioner to revoke Appellee's driver's license.”).

The Court has not deemed the HGN a scientific test. Thus, it has not required a *Daubert/Wilt* analysis for the admission of HGN evidence in the context of administrative proceedings. Nor should it, for such an analysis is designed to keep potentially prejudicial or irrelevant evidence from

lay jurors.

[Federal] Rule [of Evidence] 702 further requires that the evidence or testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.” This condition goes primarily to relevance. “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” 3 Weinstein & Berger ¶ 702[02], p. 702–18. See also *United States v. Downing*, 753 F.2d 1224, 1242 (CA3 1985) (“An additional consideration under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute”).

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591, 113 S.Ct. 2786, 2795 - 2796 (U.S. Cal., 1993).

In the administrative context, it is trained hearing examiners who hear the evidence. These individuals are familiar with the evidence presented in these cases every day, including HGN evidence. They do not require the protections offered by a *Daubert/Wilt* analysis. But more importantly, the HGN test does not require the analysis necessary to show the validity of a scientific test, because evidence of a driver’s performance on the test is not scientific. Expert testimony about the basis of the test would not aid in the determination of whether the officer’s observations of the driver’s condition is valid evidence. Finally, the evidence of the test is admissible in administrative hearings. Challenges to the evidence go to the weight to be given to the evidence.

Justice Starcher’s concurrence² in *State v. Dilliner*, 212 W. Va. 135, 569 S.E.2d 211 (2002) did not cause any reversal of course in the Court’s treatment of the requirements for admission of HGN evidence. Justice Starcher conceded that HGN evidence could be used to show the existence of probable cause without a showing of the HGN test’s reliability, and noted that most West

²Concurring opinions have little precedential value; and in this matter the concurrence did not relate to any of the issues addressed in the majority opinion.

Virginians cannot afford experts to testify that the test is scientifically reliable. However, *Dilliner* did not overrule *Muscatell*, which remains the law of our state. Moreover, in subsequent cases, the Court has allowed reliance on HGN evidence with no expert testimony in administrative license revocation cases.

HGN evidence is admissible at an administrative hearing pursuant to W. Va. Code §29A-5-2(b). All documents contained in the agency's file (including the DUI Information Sheet) are admissible subject to rebuttal pursuant to W. Va. Code § 29A-5-2 and 91 C.S.R. 1-3.9.4. See, *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006); *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008) and *Groves v. Cicchirillo*, 694 S.E.2d 639 (2010). Challenges to the reliability of the evidence derived from an HGN test should be left to cross-examination of the officer or evidence from the driver. Exclusion of the results of the test on the basis of scientific reliability is unnecessarily short-sighted and severe.

III. THE HORIZONTAL GAZE NYSTAGMUS TEST IS WELL-ESTABLISHED AS A RELIABLE TOOL FOR OFFICER IN THE FIELD WHO MUST MAKE RAPID DETERMINATIONS OF INTOXICATION.

There have been six studies of HGN as a DUI detection tool, all of which have been funded by NHTSA. The first was the 1977 study,³ to determine which field sobriety tests were most effective at detecting BACs of 0.10% or over; and to determine which tests were easiest for officers to administer roadside. In the study, the researchers settled on three tests, which have become the

³Marcelline Burns and Herbert Moskowitz, *Psychophysical Tests for DWI Arrest*, U. S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-802-424 (June 1977).

standard battery of field sobriety tests (“SFST”): the one-leg stand, the walk and turn, and the HGN. The HGN was determined to be the most predictive of BACs of 0.10% or greater.

In 1981, NHTSA asked researchers to conduct further study of the three tests chosen.⁴ This study confirmed that HGN is an extremely useful tool for officers at the roadside, with a 77% accuracy rate. Again, the accuracy rate pertains to assessing those individuals who have a blood alcohol content in excess of 0.10% or higher. As Corporal Mike Holstein testified, the other 33% of people “are probably going to be intoxicated or impaired, but not necessarily at or above the .10 alcohol level.” Testimony of Corporal Mike Holstein, Exhibit B to Petitioner’s Supplemental Brief, at 80. When HGN is used in conjunction with the other field sobriety tests, its accuracy rate is even greater.

A third field study was commissioned by NHTSA in 1983⁵. That study confirmed that the HGN is the best of the three field sobriety tests in detecting BAC’s of over 0.10% if only one test is used.

In 1995, a study was conducted to report on the performance of Colorado law enforcement in using the SFST battery.⁶ The purpose was to measure the effectiveness of the SFST battery years

⁴V. Tharp, M. Burns, and H. Moskowitz, *Development and Field Test of Psychophysical Tests for DWI Arrest*, U. S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-805-864 (March 1981).

⁵Theodore E. Anderson, Robert M. Schweitz, and Monroe B. Snyder, *Field Evaluation of a Behavioral Test Battery for DWI*, U. S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-806-475 (September 1983).

⁶Marcelline Burns and Ellen W. Anderson, *A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery*, U. S. Department of Transportation, National Highway Traffic Safety Administration, and Colorado Department of Transportation, Office of Transportation Safety (November 1995).

after it was developed by NHTSA. The study found that Colorado officers made the correct decision to arrest drivers in 93% of cases, based on SFST performance.

In 1997, a study similar to the Colorado study was performed in Florida⁷, to determine whether SFSTs are reliable indices of BAC levels over the legal limit. More than 95% of officers' decisions to arrest were correct as defined by a driver BAC of 0.08% or higher.

In 1998, a similar study was conducted in California⁸ in which officers' use of SFSTs were accurate when the BAC was between 0.04% and 0.08%. Estimates at or above 0.08% BAC based solely on the SFST battery were accurate in 91% of cases; officers' estimates of whether a driver's BAC was above 0.04% but below 0.08% were accurate in 94% of decisions to arrest.

All studies showed that HGN was the most predictive of the three SFSTs at determining BAC level.

In an article by J. Stuster, "Validation of the standardized field sobriety test battery at 0.08% Blood Alcohol Concentration," *Human Factors*, Vol. 48, No. 3, Fall 2006, the results of a study funded by NHTSA were presented. The study provided statistically significant evidence of the standardized field sobriety test battery to discriminate above or below 0.08% BAC. Officers received four hours of training and their performances were verified by certified SFST instructor. They performed normal patrol duties, which included administering SFSTs to any drivers who exhibited objective behavior associated with the effects of alcohol, even if impairment was not evident.

⁷Marcelline Burns and Teresa Dioquino, *A Florida Validation Study of the Standardized Field Sobriety (S.F.S.T.) Battery*, U. S. Department of Transportation, National Highway Traffic Safety Administration, and Florida Department of Transportation, State Safety Office (1997).

⁸Jack Stuster and Marcelline Burns, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*, U. S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-808-839 (August 1998).

In an article by Fiorentino, D.D., “Validation of Sobriety Tests for the Marine Environment”, *Accid. Anal. Prev.* (2010), doi: 10.1016/j.aap.2010.11.007, four marine officers trained and experienced in administration of HGN stopped boaters both because of poor driving but also as part of a checkpoint. Several field sobriety tests were administered; however, the HGN alone correctly predicted BAC over .08% in 85% of cases.

Another article, by Nawrot, M., Nordenstrom, B., Olson, A. entitled “Disruption of Eye Movements by Ethanol Intoxication Affects Perception of Depth from Motion Parallax” *Psychological Science* Vol. 15, No. 12 (2004), showed that the effects of alcohol on eye movement may impair driving ability. Ethanol intoxication reduces the gain of the perception of depth from a motion parallax, and this produces horizontal gaze nystagmus which law enforcement’s test is designed to reveal.

The myriad of studies and decades of law enforcement experience have proven the validity of the HGN test as an indicator of impairment in the field. Use of HGN evidence to show impairment, as opposed to a specific BAC, is not scientific in nature, as chemical tests to show BAC are. It is reliable evidence of impairment due to alcohol consumption.

IV. OUT-OF-STATE AUTHORITY ON THE ISSUE OF ADMISSIBILITY OF THE HORIZONTAL GAZE NYSTAGMUS TEST.

In *People v. McKown*, 236 Ill.2d 278, 924 N.E.2d 941, 338 Ill.Dec. 415 (2010), a criminal case in which the Supreme Court of Illinois reviewed the trial court’s judgment on a remand of the case for a “*Frye*”⁹ hearing on HGN evidence, the trial court having received many peer-reviewed

⁹*Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923)

articles and heard the testimony of several expert witnesses. Because it was a criminal case, the court focused on the admissibility of the test and its results, and not on the weight to be given to the test results. The court found:

Based on our review of the initial study and the other articles provided by the State, several themes emerge. First, alcohol and CNS-depressant drugs affect the neural centers in the brain that control eye movements, as well as other centers of the brain. Second, HGN correlates highly with both an elevated blood-alcohol concentration and with cognitive impairment. Third, an individual may fail the HGN test by showing 4 or more clues despite a blood-alcohol concentration below the legal limit for driving. Such a person may or may not be impaired for driving. Fourth, to be a reliable indicator of alcohol consumption, HGN field testing must be performed in accordance with the NHTSA protocol. Fifth, police officers can be trained to distinguish HGN due to consumption of alcohol or other substances from some other common forms of nystagmus.

236 Ill.2d 298, 924 N.E.2d 952, 338 Ill.Dec. 426.

The *McKown* Court concluded:

A failed HGN test is relevant to impairment in the same manner as the smell of alcohol on the subject's breath or the presence of empty or partially empty liquor containers in his car. Each of these facts is evidence of alcohol consumption and is properly admitted into evidence on the question of impairment.

We, therefore, adopt the trial court's finding that 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.

236 Ill.2d 302-303, 924 N.E.2d 959, 338 Ill.Dec. 429.

The *McKown* court, while holding that HGN evidence meets the *Frye* standard, did not address *Daubert*¹⁰. In *McKown*, the court concluded that evidence of HGN results is admissible for the purpose of proving that a driver may have consumed alcohol and may be impaired (236 Ill.2d 303, 924 N.E.2d 955, 338 Ill.Dec. 429), and specifically rejected the defense argument that it should be used only to make a determination of the existence of probable cause.

Nationwide, courts have treated the HGN in several ways: As an observation of a physical characteristic; and as scientific evidence. In the latter case, jurisdictions are split among those who use the *Frye* standard, those who use the *Daubert* standard, and those who take judicial notice of the reliability and validity of the test.

In *State v. Baity*, 140 Wash.2d 1, 991 P.2d 1151 (2000), a criminal case, the Washington Supreme Court's decision with regard to HGN tests affirms their inherent value.

After careful review of these alternative positions, we agree the underlying scientific basis for HGN testing—an intoxicated person will exhibit nystagmus—is “undisputed, even by those cases and authorities holding the test inadmissible without scientific proof in each case.” *See State v. Superior Court*, [149 Ariz. 269, 718 P.2d 171, 177, 60 A.L.R.4th 1103 (1986)] (holding that a person will show a higher degree of nystagmus at higher levels of intoxication). Even the district court agreed with this proposition, stating:

the evidence presented in this hearing establish [sic] that the following propositions have gained general acceptance in the relevant scientific community: (1) the HGN occurs in conjunction with alcohol consumption, (2) that the onset of HGN and its distinction are strongly correlated to breath alcohol levels, ... (4) law enforcement officers can be trained to observe these phenomena and administer the test[.]

140 Wn.2d at 12-13.

¹⁰*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

When the *Baity* court referenced the use of the HGN test for the detection of driving under the influence of alcohol, it indicated that the test was used to determine “intoxication.” In fact, the *Baity* court four separate times links the HGN test and an officer’s ability from HGN evidence to determine alcohol intoxication.

- (1) “(A)n intoxicated person will exhibit nystagmus ... ”;
- (2) “In fact, the NHTSA recommends the HGN test as one of several field sobriety tests to help officers determine whether a driver is intoxicated.”;
- (3) “As the Supreme Court in North Dakota succinctly noted: ‘based upon his training in these principles, observes the objective physical manifestations of intoxication ... ’”; and
- (4) “However, none of those factors undercut the basis of the test—that intoxicated people exhibit nystagmus.”

140 Wn.2d at 12-14.

A witness testifying concerning the results of an HGN test, however, may not go beyond testimony of impairment to the recitation of a specific level of intoxication. *See State v. Baity*, 140 Wn.2d at 17 (“The officer also may not predict the specific level of drugs present in a suspect.”); and *State v. Koch*, 126 Wn.App. 589, 597, 103 P.3d 1280, *review denied*, 154 Wn.2d 1028 (Div. 2 2005) (“The district court correctly ruled that under *State v. Baity*, 140 Wn.2d 1, 17-18, 991 P.2d 1151 (2000), a witness may testify that an HGN test can show the presence of alcohol but not the specific levels of intoxicants.”). Nor may the witness “testify in a fashion that casts an aura of scientific certainty to the testimony.” 140 Wn.2d at 14.

While *Baity* did not allow testimony regarding specific levels of impairment, it expressly approved the use of HGN evidence in support of an officer's opinion that the driver was impaired by alcohol based upon the HGN test results.

The defense in *Baity* asserted that notwithstanding HGN's acceptance in the relevant scientific communities, many factors make HGN testing unreliable including the possibility of false positives and other possible physiological causes of nystagmus. Holding that such concerns can be explored through cross examination and thus go to the weight of the HGN testimony rather than its admissibility, the court said:

However, none of those factors undercut the basis of the test—that intoxicated people exhibit nystagmus. Furthermore, the factors noted by the defense would apply equally to the other field sobriety tests that are routinely used in DUI arrests. All of those factors can be shown through cross-examination, and they therefore go to the weight of the evidence, rather than its admissibility. *See United States v. Everett*, 972 F.Supp. 1313, 1320 (D.Nev.1997) (noting the validity of the DRE's conclusions or accuracy of his or her observations is subject to cross-examination or other methods of impeachment); *see also Ortiz*, 119 Wn.2d at 311, 831 P.2d 1060 (noting it was for the jury to decide what weight should be attached to the witness' testimony).

Although HGN testing is scientific in nature it is generally accepted in the relevant scientific communities. Thus, we hold the forensic application of HGN to drug intoxication in the DRE context satisfies *Frye*.

140 Wn.2d at 14.

The *Baity* court recognized that the HGN test has been utilized in DUI arrests in other states for decades, and has generally been accepted in the scientific community because an intoxicated person's eyes will exhibit nystagmus.

A number of jurisdictions have held that "the scientific reliability of the HGN test has been established without the need for expert testimony in a particular case." *City of Fargo v. McLaughlin*, 512 N.W.2d 700, 705 (N.D.1994) (citing numerous jurisdictions that have accepted HGN testing without the need for expert testimony). Still other jurisdictions have held HGN testing is not scientific because it simply involves an officer's objective observations of the subject's physical characteristics.

See, e.g., Whitson v. State, 314 Ark. 458, 863 S.W.2d 794 (1993); *State v. Bresson*, 51 Ohio St.3d 123, 129, 554 N.E.2d 1330 (1990) (“HGN test cannot be compared to other scientific tests, such as polygraph examination, since no special equipment is required.”). Accordingly, these jurisdictions have held that HGN testing is no different than any other field sobriety test. *See McLaughlin*, 512 N.W.2d at 706 (“These cases equate HGN test results to a physical manifestation, like the staggering gait of a drunk.”). Finally, several jurisdictions require HGN testing to satisfy the *Frye* general acceptance standard before HGN results are admitted. *See People v. Leahy*, 8 Cal.4th 587, 882 P.2d 321, 34 Cal.Rptr.2d 663 (1994). *Accord State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171, 177, 60 A.L.R.4th 1103 (1986).

140 Wn.2d at 12-13.

Notwithstanding HGN’s general acceptance in the scientific communities, the defense asserted in *Baity* that many factors make HGN testing unreliable, including the possibility of false positives and other possible physiological causes of nystagmus. Holding that such concerns go to the weight of HGN testimony, not its admissibility, the court said:

However, none of those factors undercut the basis of the test—that intoxicated people exhibit nystagmus. Furthermore, the factors noted by the defense would apply equally to the other field sobriety tests that are routinely used in DUI arrests. All of those factors can be shown through cross-examination, and they therefore go to the weight of the evidence, rather than its admissibility. 140 Wn.2d at 14 (citation omitted)

The Washington Supreme Court decreed in *State v. Kalakosky* that “courts should not automatically exclude scientific evidence whenever the forensic analyst deviates from correct test protocol in any minor respect; rather the deviation would have to materially affect the test outcome to warrant exclusion.” *State v. Kalakosky*, 121 Wn.2d at 543, *citing* IMWINKELREID, THE DEBATE IN THE DNA CASES OVER THE FOUNDATION FOR THE ADMISSION OF SCIENTIFIC EVIDENCE: THE IMPORTANCE OF HUMAN ERROR AS A CAUSE OF FORENSIC MISANALYSIS, 69 Wash. U.L.Q. 19, 46 (1991). This position is consistent with that taken by other courts. *See, e.g. United States v. Martinez*, 3 F.3d 1191, 1198 (8th Cir. 1993), *cert. denied*, 510 U.S. 1062 (1994) (“An allegation of failure to

properly apply a scientific principle should provide the basis for exclusion of an expert opinion only if ‘a reliable methodology was so altered ... as to skew the methodology itself ...’” (quoting *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 858 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991)).

An officer’s observations about a driver’s alcohol impairment or sobriety should not be excluded just because the officer may not have exactly followed a training manual. Deviations from a training manual may be proper fodder for cross examination, but do not justify excluding the SFST evidence.

Nebraska courts routinely permit qualified officers to testify to field sobriety test results, including HGN, as non-experts. *State v. Liebel*, 2002 Neb. App. LEXIS 225 (Neb. Ct. App. August 27, 2002)(not designated for permanent publication); *State v. Baue*, 258 Neb. 968, 986, 607 N.W.2d 191, 204 (2000).

The HGN process is easy to administer and understand. Accordingly, this Court should permit officers to testify to their opinions regarding the results of HGN tests as lay witnesses. See, *State v. Reiter*, Mun. App. No. 57-2004 (N.J. Sup. Ct. Nov. 30, 2004); *State v. Vitolo*, Mun. App. No. 32-2004 (N.J. Sup.Ct. Nov. 29, 2004). Officers need not testify to scientific principles; rather, the HGN draws from known principles of science and generally accepted observable effects of alcohol that are incorporated into their training and experience. The “scientific” principles are not new, novel or particularly complex. HGN opinions may be offered as non-scientific assertions: opinions based on the totality of the observations.

One of the first cases to determine that the HGN test satisfied the *Frye* standard was *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986). After making this determination, the court concluded that “with proper foundation as to the techniques used and the officer's ability to use it ... 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." *Id.* at 279, 718 P.2d at 181. A majority of jurisdictions have arrived at similar conclusions. See, e.g., *State v. Zivcic*, 229 Wis.2d 119, 128, 598 N.W.2d 565, 570 (1999) (“[a]s long as the HGN test results are accompanied by the testimony of a law enforcement officer who is properly trained to administer and evaluate the test,” evidence is admissible); *Ballard v. State*, *supra* (holding police officer may testify to results of HGN testing if government establishes officer adequately trained in administration and assessment of test); *Williams v. State*, 710 So.2d 24, 32 (Fla.App.1998) (noting “HGN test results are generally accepted as reliable and thus are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified [person]”); *State v. Taylor*, 694 A.2d 907 (Me.1997) (holding proper foundation for admission of HGN test is evidence that officer or administrator of test is trained in procedure and test properly administered); *People v. Berger*, 217 Mich.App. 213, 551 N.W.2d 421 (1996) (holding because HGN test satisfied *Frye* standard, only foundation necessary for introduction of evidence regarding HGN test is evidence that test properly performed and officer administering test qualified to perform it); *Schultz v. State*, 106 Md.App. 145, 664 A.2d 60 (1995) (holding HGN results admissible in future cases without reference to *Frye* standard if officer properly qualified and test conducted properly); *People v. Leahy*, 8 Cal.4th 587, 882 P.2d 321, 34 Cal.Rptr.2d 663 (1994) (holding once *Frye* standard met in published opinion regarding HGN, prosecution not required to submit expert testimony to jury, and police officers are sufficient to testify to results of HGN tests); *State v. Hill*, 865 S.W.2d 702 (Mo.App.1993), *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518 (Mo.1997) (holding when properly administered by adequately trained personnel, HGN test admissible as evidence of intoxication); *State v. Armstrong*, 561 So.2d 883 (La.App.1990) (proper foundation for admitting HGN test is showing officer trained in procedure, certified in its administration, and procedure properly administered).

State v. Baue, 258 Neb. 968, 986-987, 607 N.W.2d 191, 205 (Neb.,2000).

In *Baue*, the Supreme Court of Nebraska concluded that the results of an HGN test are admissible and relevant to show that an individual is impaired.¹¹ That court further held that the HGN cannot be given more weight than other standard field sobriety tests, and HGN evidence may not be used to prove a specific blood alcohol content, subject to the following foundational requirements:

We conclude that the majority view is sound, and adopt the view that 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.

258 Neb. 987, 607 N.W.2d 205.

In *State v. O'Key*, 321 Or. 285, 899 P.2d 663(1995) the Oregon Supreme Court noted:

Several courts consider the HGN test no more scientific than other field sobriety tests. *See, e.g., State v. Sullivan*, 310 S.C. 311, 426 S.E.2d 766 (1993); *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990); *State v. Bresson*, 51 Ohio St.3d 123, 554 N.E.2d 1330 (1990). The rationale for this approach is that the HGN test is not based on scientific expertise, but only on the personal observations of the officer who administered the test.

321 Or. 296, 899 P.2d 674.

And,

Other courts have rejected that analysis, holding that the HGN test is a scientific technique, requiring compliance with the appropriate foundational showing for the admission of scientific evidence. *See, e.g., Leahy*, 8 Cal.4th at 587, 34 Cal.Rptr.2d at 663, 882 P.2d at 321; *Yell v. State*, 856 P.2d 996 (Okla.Crim.App.1993); *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986); *State v. Witte*, 251 Kan. 313, 836

¹¹The Nebraska court also held that HGN evidence, standing alone, is not sufficient to prove DUI beyond a reasonable doubt. 258 Neb. 985, 607 N.W.2d 204.

P.2d 1110 (1992); *State v. Cissne*, 72 Wash.App. 677, 865 P.2d 564 (1994). The rationale for this latter approach is that the HGN test is distinguished from other field sobriety tests because science, rather than common knowledge, provides the legitimacy for HGN testing.

321 Or. 296, 899 P.2d 674 - 675.

The *O'Key* Court found that HGN is scientific evidence, and set forth a *Daubert* analysis. That court concluded:

We hold that, 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 ^[footnote omitted] but, under ORS 813.010(1)(a), is not admissible to prove that a defendant had a BAC of .08 percent or more.

321 Or. 322-323, 899 P.2d 689 - 690.

In *State v. Witte*, 251 Kan. 313, 836 P.2d 1110 (1992), the Supreme Court of Kansas applied the *Frye* test to HGN in a criminal case:

1. The horizontal gaze nystagmus test is distinguished from other field sobriety tests in that science, rather than common knowledge, provides the legitimacy for horizontal gaze nystagmus testing.
2. Horizontal gaze nystagmus test results are scientific evidence. As such, the foundation requirements for admissibility enunciated in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), must be satisfied.
3. The *Frye* test requires that, before expert scientific opinion may be received in evidence, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. If a new scientific technique's validity generally has not been accepted as reliable or is only regarded as an experimental technique, then expert testimony based on its results should not be admitted into evidence.

4. The State has the burden of satisfying the *Frye* test by proving: (1) The reliability of the underlying scientific theory upon which the horizontal gaze nystagmus test is based (*i.e.*, that the nystagmus of the eye is, in fact, an indicator of alcohol consumption to the degree that it influences or impairs the ability to drive); (2) the method used to test horizontal gaze nystagmus is a valid test to measure or perceive that phenomenon, particularly if the method actually conducted by the law enforcement officer administering the test.

251 Kan. 313, 836 P.2d 1111.

It is important to note that the bulk of these cases, while instructive as to the validity and acceptance of HGN as an indicator of impairment, are criminal prosecutions. For purposes of administrative license revocation proceedings, where no jury is involved, the burden of proof is different, and evidentiary standards are relaxed, evidence of the test contained in the Respondent's file is admissible, and further evidence from the officer and the driver, if offered, go to the weight, not admissibility, of the evidence.

V. THE HGN TEST IS SUFFICIENTLY WELL-ESTABLISHED THAT COURTS COULD TAKE JUDICIAL NOTICE OF ITS SCIENTIFIC RELIABILITY.

In *State v. Taylor*, 694 A.2d 907 (1997), the Maine Supreme Court took judicial notice of the reliability of HGN tests in making determinations of probable cause for arrest and for purposes of establishing criminal guilt in DUI cases.

A similar result was reached in *Williams v. State*, 710 So. 2d 24 (Fla. Dist. Ct. App. 3d Dist. 1998) and *State v. Ito*, 90 Haw. 225, 978 P. 2d 191 (Ct. App. 1999), as amended, (May 14, 1999) and as amended, (May 24, 2999)(found the theory and general technique to be reliable). See also, *Emerson v. State*, 880 S.W.2d 759, 768-69 (Tex. Crim. App. 1994).

In *Baue, supra*, the Nebraska Supreme Court found that the principles upon which HGN were based were generally accepted in the relevant scientific community. Thus, the court found, the HGN test met the standard for admissibility of scientific evidence. In *Baue*, the arresting officer testified as a lay witness regarding the results of the HGN test that he administered to the arrestee. As a result of *Baue*, Nebraska courts may take judicial notice of the reliability and validity of HGN. 34 Creighton L. Rev. 321, 350 (2000).

CONCLUSION

An officer must decide in a very short time whether to detain, arrest or let a driver go once he has been stopped. In the case of a drunk driver, HGN is rarely the sole evidence relied upon by the officer. HGN was designed to be used in a battery of three field sobriety tests, and is one of many clues as to whether an individual is impaired, all of which must be gathered very quickly. In the interest of protecting ourselves from drunk drivers, then, it is necessary that officers be enabled to continue offering testimony as to the results of the HGN tests they administer. That evidence should be used, subject to challenges from the defense and the weight given to it by the trier of fact, to establish the reasonableness of the officer's belief that the person was driving under the influence, and as evidence of intoxication. There should not be a requirement that the underlying NHTSA studies be proven, time and time again, to be scientific evidence. To the extent that this is required, officers will be denied a valuable and reliable tool for assessment of impairment.

This Court should find that evidence from an arresting officer that a person exhibited symptoms of horizontal nystagmus, is sufficient, as lay testimony, to support an officer's finding that

the person was DUI. It should be permitted to support the officer's reasonable grounds to believe that the person was impaired, and it should constitute evidence of impairment.

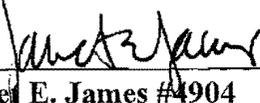
WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests the *Final Order* entered by the Circuit Court of Kanawha County on December 13, 2010 be affirmed by this Court.

Respectfully submitted,

**JOE MILLER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

By counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**



Janet E. James #4904
Senior Assistant Attorney General
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304) 926-3874

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DR. JOE J. WHITE, JR.,

Petitioner,

v.

NO. 11-0171

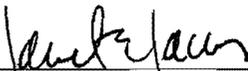
JOE MILLER, Commissioner,
West Virginia Department of
Motor Vehicles,

Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing *Respondent's Supplemental Brief* were served upon the opposing party by depositing true copies thereof, postage prepaid, in the regular course of the United States mail, this 15th day of February, 2011, addressed as follows:

Carter Zerbe, Esquire
Post Office Box 3667
Charleston, West Virginia 25336



JANET E. JAMES