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State v. Besaw Clerk's Record v. 2 Dckt. 39874

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LAW CLERK

In the
SUPREME COURT
of the
STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

v.

SC #39874

GEORGE JOSEPH BESAW, JR.,

Defendant-Appellant.

Appealed from the District Court of the Second
Judicial District of the State of Idaho, in and
for Nez Perce County

Honorable JEFF M. BRUDIE, District Judge

CLERK'S RECORD

VOLUME II

KENNETH K. JORGENSEN
Attorney for Plaintiff-Respondent

CHARLES M. STROSCHEIN
Attorney for Defendant-Appellant

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JUL 23 2012

Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

39874

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	SUPREME COURT NO. 39874
)	
v.)	TABLE OF CONTENTS
)	
GEORGE JOSEPH BESAW, JR.)	
)	
Defendant-Appellant.)	

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

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PATTY O. WEING
CLERK OF THE DISTRICT COURT
[Signature]
DEPUTY

1 CHARLES M. STROSCHEIN
2 CLARK and FEENEY, LLP
3 Attorneys for Defendant
4 1229 Main Street
5 P. O. Drawer 285
6 Lewiston, Idaho 83501
7 Telephone: (208)743-9516
8 Idaho State Bar No. 3058

9
10 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
11 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

12 STATE OF IDAHO,)
13) Case No. CR 2011-0000419
14 Plaintiff,)
15) **CLOSING ARGUMENT**
16 vs.)
17)
18 GEORGE J. BESAW, JR.,)
19)
20 Defendant.)

21 COMES NOW, George Besaw, by and through his undersigned Attorney of
22 Record, CHARLES M. STROSCHEIN, of the firm of Clark and Feeny, and submits this
23 written closing argument.

24 Attached hereto as Exhibit "A" are a number of e-mails and memos that were
25 developed by Idaho State Police (ISP). The e-mails and memos are bate stamped for ease
26 of reference. These items were made part of the record at the hearing on May 13, 2001.

CLOSING ARGUMENT 1

I.
**FAILURE TO COMPLY WITH THE STANDARD REQUIREMENT OF
IDAHO CODE SECTION 18-8004(4)**

1
2 The court would be wise to look at Wheeler v. Idaho Transportation Department,
3 148 Idaho 378, 223 P.3d, 761 (Ct. App. 2009). Administration regulations are subject
4 to the same principles of statutory construction as statutes. See Mason v. Donnelly Club,
5 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). The court indicated that when interpreting
6 a statute or a rule, it has to be construed as a whole to get the intent of the Legislature or
7 promulgating entity. The court has to use the literal words of the rule and the words
8 should be given their plain, obvious and rational meaning. In Wheeler the court
9 interpreted the use of the word “should”. One would have to believe that with the e-mails
10 that are part of Mr. Besaw’s record, the Court of Appeals would have determined that the
11 use of the word “should” was just a “weasel word” to get around any mandatory
12 requirement.

13
14
15 The court would be well served by reading Judge Lansing’s dissenting opinion.
16 She commented on the fact that ISP had not formally promulgated administrative rules
17 prescribing testing equipment or requirements for its maintenance and operation. She
18 noted that the ISP announced its approved breath methods through SOPs, and manuals.
19 Judge Lansing wrote that appellate courts have to treat such documents as “rules” for the
20 purpose of judicial review because they constitute the only materials by which the ISP has
21 acted upon the I.C. §§ 18-8002A and 18-8004(4) authorization for breath testing
22 standards.
23
24

25 CLOSING ARGUMENT

26 2

Judge Lansing noted:

1 “But a “standard” that is merely a recommendation, and hence optional, is
2 no standard at all - it is merely something that the officers maintaining and
operating the Intoxilyzer 5000 may do if they wish or may disregard.”

3 At p. 388

4 Judge Lansing indicated that if the rules weren't mandatory, then there could not
5 be any sort of standard:

6 “This result, however, is obviously not what is intended by the ISP. The
7 ISP clearly did intend to promulgate standards, not just make optional, take
8 or leave suggestions for how an Intoxilyzer 5000 could be maintained and
operated.”

9 At p. 389

10 Boy was Judge Lansing wrong in this assessment of ISP. Judge Lansing also notes,
11 in footnote no. 7, the problem with the use of the term “approximately”:
12

13 “There is no need here to go into an analysis of the propriety of using the
14 term “approximately” in a rule that is supposed to be setting defined
15 standards, but the problems caused by its use are as obvious as the problems
caused by the use of “should”.

16 At p. 390

17 One would have to assume that the Court of Appeals wouldn't be very happy with
18 ISPFS if they had access to all of these e-mails and the fact that the people in charge of
19 the breath testing program in Idaho simply want to use “vagueness”, “weasel words”, and
20 “wobble room”. There are no breath testing standards. Judge Lansing's dissenting opinion
21 will become the majority opinion once the court has access to these e-mails and the real
22 thought behind the so called “standards” used by ISPFS. The Wheeler court reviewed the
23
24
25

26 CLOSING ARGUMENT

1 mandatory provision of the SOP at the time of the Wheeler ALS. Those mandatory
2 provisions, like for the 15 minute wait, are now discretionary. Why!? See Exh. "3",
3 Section 6.1 (should instead of must)

4 The court has to determine the credibility and competence of the arresting officer,
5 who was also the operator of the breath machine. In this particular instance, the arresting
6 office failed to properly advise Mr. Besaw of the requirement set out in I.C. § 18-8002A.
7 Trooper Talbott specifically indicated that he did not read the bold capitalized letters at
8 the bottom of the advisory section of the advisory form. He specifically failed to read the
9 following:

10
11 **"THIS SUSPENSION FOR FAILURE OR REFUSAL OF THE**
12 **EVIDENTIARY TEST(S) IS SEPARATE FROM ANY OTHER**
13 **SUSPENSION ORDERED BY THE COURT."**

14 Mr. Besaw asked about the consequences of his CDL Class A license, the officer
15 indicated to Mr. Besaw that there wasn't any real difference or there wasn't a consequence
16 different then the advisory. On the witness stand, Trooper Talbott indicated that he
17 provided wrong information to Mr. Besaw and that there is a substantial difference in the
18 consequence for someone who has a Class A license. The court can note that the
19 consequence is a year's license suspension for a Class A license. Mr. Besaw had a Class
20 A License at the time of the arrest.
21

22 The court can look at State v. Bell, 115 Idaho 36, 764 P.26 113 (Ct. App. 1988),
23 which interprets I.C. §18-8004(4). The statute allows alcohol results, either blood, breath
24
25

or urine, to be introduced into evidence without an expert testifying regarding the same.

The Court of Appeals stated:

1
2 “The admissibility of the result of a scientific test such as the blood-alcohol
3 test in I.C. § 18-8004 turns normally on a foundation which establishes the
4 acceptability, validity, reliability and accuracy of the test and test
5 procedures. In the admission of a test result for alcohol concentration the
6 Legislature has concluded that certain foundational elements need not be
7 presented at trial unless such elements are disputed. The Legislature has
8 acknowledged that certain tests, due to a history of reliability and accuracy,
9 are presumed to be valid and acceptable... The Legislature has enacted a
10 statutory scheme which allows an expedient method for admitting a blood-
11 alcohol test result into evidence without the need for some expert
12 testimony... Inherent in this statutory scheme, however, is an awareness by
13 the Legislature of the need for uniform test procedures. An “extremely
14 reliable” test result can only be the product of a test procedure which from
15 previous use is known to be capable of producing an accurate result. This
16 benefit is best provided by strict adherence to a uniform procedure. This
17 was recognized by the Legislature and is apparent first, from the statutory
18 language which provides for the test procedure to be determined by the
19 Idaho Department of Health and Welfare, and second, by the “shall”
20 language mandating adherence to the standards set by that Department.

21 At p. 39

22 The e-mails that were produced, based on freedom of information requests,
23 regarding the changes to the Standard Operating Procedure (SOP) are replete with the use
24 of vague language, “wiggle room”, and “weasel words”. ISP Forensic Services (ISPFS)
25 has determined that it is more interested in getting past legal challenges than setting up
26 scientific standards that will follow the requirements of Bell and I.C. §18-8004(4). Also,
it’s clear that Skylar Anderson, who is currently under investigation by ISPFS was
instrumental in adapting the SOP and reference manuals that were in place at the time Mr.

Besaw was tested. The court can go through the e-mails and note that the people that are making suggestions are not scientists. There is very little science discussed in these e-mails that were generated regarding the changes to the SOPs.

The court can look at the e-mail found at page 002, where Matthew Gamette notes that there are a couple of changes he would like to make to the IDAPA rules. He states:

“They are fairly minor, but are causing all kinds of issues.”

Why is ISPFS worrying about court issues? They should be worried about scientific standards and not what makes life easier for prosecutors, ALS hearing officers and police officers.

On page 003, there is a discussion involving Skylar Anderson and the use of the term “approximately”. On page 005, there is a discussion regarding the MIP/MIC procedure as simply being a best practices provision and not a standard. On page 006, there is an e-mail from Eric Moody to Mr. Gamette, noting that he is one of the Idaho Transportation Department (ITD) hearing officers. He notes that two (2) attorneys during oral argument noted problems with the SOP that was in effect for that particular set of DUIs. Why a hearing officer for ITS is commenting to ISPFS regarding the standards that are in place is unknown.

ALS hearing officers have no business making these sorts of comments or participating in scientific standards being developed for Idaho. It is very troubling to a number of Idaho attorneys the level of contact that ITD hearing officers and their staff:

1 have with prosecutors, police officers and ISP Forensic Services. ISPFs laboratory
2 officials are not above hiding and cheating as noted in the Brady material that is at page
3 104.

4 On page 009 of the e-mails, there is a discussion about the two (2) minute window
5 between breath samples. Again, the standards should be developed based on science, not
6 on what helps prosecute drivers who have been stopped for DUIs.

7 On page 013, there is a specific e-mail from Darren Jewkes to several employees
8 of the ISPFs. Mr. Jewkes states:

9 "I am not sure if I dare ask, but are there any other parts of the SOP that
10 you feel needs immediate attention, such as changing "will" to "may" or
11 "approximately" or doing away with "monthly" etc. (Jeremy here is your
12 chance:)."

13 It is interesting to note that in this e-mail, Darren Jewkes actually uses the "(:)"
14 symbol. Is this the way scientists should be acting, is this the way standards are
15 developed?

16 On page 015, Jeremy Johnson uses the words: "... I am just suggesting putting in
17 some **wiggle room** language...", (emphasis added). Where is the science in using "wiggle
18 room" language. The ISP concern seems to be that cases are being tossed. Whether cases
19 get tossed really isn't relevant to a discussion as to the scientific standards for breath
20 testing.
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1 There are also discussions regarding the use of the 0.2 solution and the need for
2 linearity. The only one who seems to be concerned about standards is David Laycock. On
3 page 016, he notes: "I just don't think this is the time to cut back on quality standards."
4 He goes into a discussion about compliance with SOP. In fact, Jeremy Johnson notes:

5 "It is good scientific practice to check linearity because that lends credence
6 to accuracy of the numbers that the instrument generates."

7 At p. 018

8 Of course, then the e-mails note the ability to just put all sorts of language in that
9 protects the operators by having someone come in and testify around any problems. At
10 p.019

11 There is also a discussion by Jeremy Johnston noting that a mandatory word like
12 "must" would be replaced with a discretionary word like "should". Again, where is the
13 science? What would Judge Lansing say about this?

14 Again on page 020 of the e-mails, Jeremy Johnston uses the term "wiggle room"
15 regarding the 0.20 language. On page 021 the term "wiggle room" is used again
16 regarding the simulator.

17 It is also interesting to note that Jared Olson, who is the Traffic Safety Resource
18 Prosecutor for the Idaho Prosecuting Attorneys Association, seems to be instrumental in
19 making changes. Why a non-scientist prosecutor is involved in any process involving
20 generating standards must be considered suspect.
21
22
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24
25

1 It is interesting to note that Anne Nord indicates that the SOP is “an operator
2 SOP”. At p. 036.

3 There is also a discussion involving Skylar Anderson and the use of the word
4 “approximately”. He notes that he thinks the word “approximately” creates ambiguity in
5 the method and creates room for debate regarding when a performance verification is
6 valid. He notes:

7 “In this forensic lab, we all have strict deadlines regarding when we can use
8 a solution and I think BTSs are responsible enough to be held to a strict
9 standard.”

10 At p. 036

11 This language seems pretty laughable considering the investigation that Mr.
12 Anderson is under, but the words that he uses are to the point, “wiggle room” words are
13 used to create ambiguity in the method and creates debate. On page 040, Anne Nord,
14 again states:

15
16 “I want to thank both of you for all the work you have put in on these. I
17 hope we start seeing the pay off soon and some of these issues we have
18 been having with court interpretations will go away.”

19 Again, why is ISPFs worrying about court decisions instead of simply making
20 scientific standards? It is obvious that ISPFs is not interested in science. ISPFs is
21 interested in convicting DUI drivers.

22 Christine Starr, who is a prosecutor, has also had input into the development of the
23 standards. Her scientific background is not known. Most likely, she has none since she
24 is prosecutor. Jeremy Johnston notes:

25
26 CLOSING ARGUMENT

“I think we should limit it to police officers and attorneys. Defense might try to use something in the e-mail to their advantage if they find about it before the officers and prosecutors.”

1
2 At p. 051

3 At page 054, there is a discussion with Jeremy Johnston noting that he doesn't
4 want the guidelines to read as mandatory because he knows some BTSs use the nuclear
5 approach and change solutions if they get an initial failed series of tests. So again, how
6 can the current SOP be mandatory. Standards are not guidelines. The holding in State v.
7 Bell, (supra) does not support the current SOP as a standard. The current SOP so that
8 nothing is mandatory.
9

10
11 On page 055, Jared Olson, asks questions about the term “calendar month” and the
12 use of the word “should” and noted that the procedure is a suggestion. Jeremy Johnston
13 decides that he can manipulate the requirements regarding the two samples requirement
14 being approximately two (2) minutes apart. See page 063. On August 24, 2010, Jesse
15 Avery asks a question:
16

17 “According to 5.1.2 of the Sop's there should be an air blank between the
18 2 verification checks on a lifeloc. The lifeloc does not perform an air blank
19 when doing a wet check. Is there something else we need to be doing?”

20 At p. 064.

21 Matthew Gamette notes on August 24, 2010:

22 “I just talked to Jared and he is going to have a few more prosecutors read
23 the SOP over and he may have a few more comments.”

24 At p. 066

25 CLOSING ARGUMENT

26 10

Again, why is ISPFPS asking prosecutors for input regarding scientific standards. On August 25th 2010, Jared Olsen says:

“As a disclaimer, I recognize that there is absolutely no way the SOPs can be constructed in a way that will not result in attacks in court.”

At p. 068

With regard to the August 25th e-mail, Jeremy Johnson responds from page 068 through page 072. The court can note the discussion regarding the 0.8 solution, the 0.2 solution, the term “calendar month” and Jeremy Johnson’s concern about Clark & Feeney coming up with a “legit argument” for the term “routinely”. Jeremy Johnston also notes on page 070: “I removed the “open door suggestions” and just left if [sic] vague.” Jeremy Johnson decides that he is going to explain the scientific standards he has developed as follows:

“I thought that I had added enough **weasel words** to allow for different jurisdictions to use their own policies and beliefs to decide.” (emphasis added).

At p. 071

On page 072 there is a discussion about that word “should” in that it is not being mandatory; it simply allows for best practices as opposed to an actual standard.

ISP scientist Jeremy Johnson in an e-mail dated August 26, 2010, states: “Do these pants make my butt look fat?” At. page 075. The scientific scholarship that is found in these e-mails is simply mind-numbing. The level of childish comments is inappropriate.

Once again, Jared Olsen adds the real science to these comments about these SOPs

when he states:

“It would be good to get comments from some of the BTS’s, prosecutors in different jurisdictions and probably most importantly your own AGs who could forward it on to the appellate division who could offer some excellent insight. I recognize this is not a requirement of ISPFS and I just want to reaffirm my appreciation that you would allow me to comment at all. I see only benefits by us working together. So thanks again, and please let me know if you have questions or if I can be of further assistance.”

At p.079

Again, why involve prosecutors, attorney generals, and the appellate division of the attorney generals’ office in the development of legal standards. ISPFS has not developed any legal standards, it’s simply developing “weasel words”.

The court should make a determination that the “standards” in place on January 16, 2011 don’t meet the requirements of I.C. § 18-8004(4) and the holding in State v. Bell (supra). The court has a challenge in front of it. Is the court going to comply with the statutory requirements set out in I.C. § 18-8004(4) or is it simply going to follow the party line.

**II.
FAILURE TO COMPLY WITH THE STANDARD OPERATING
PROCEDURE REQUIREMENT OF A 0.20 SOLUTION**

Mr. Besaw was arrested by Trooper Talbott on January 16, 2001. Mr. Besaw blew a 0.219, insufficient and a 0.201 breath test. The performance verification check was run with a 0.8 solution, lot number 10802, bottle 0353. Idaho Code (I.C.) § 18-8004(4)

requires that breath testing be run pursuant to standards developed by the ISP. The court can also note the IDAPA rules that require standards be put into place.

The Lifeloc reference manual specifically indicates that it is not a standard. At page 4 of 34 of Exh. "2". The only standards that are currently in place is the SOP, Exhibit "3". The court can note that there are certain definitions found in the Lifeloc reference manual. Calibration is defined as: "In the field this menu is used to run performance verification checks, also known as wet checks or calibration checks. Actual re-calibration of the instrument is done by the ISP labs and is password-protected." At page 9 of 34 of Exh. "2". There is a definition of performance verification which states: "Your agency may require that only BTS handle the performance verification checks. Don't attempt performance verification checks unless you have been trained in the proper procedure." At page 24 of 34, Exh. "2". The court will find non of this in the SOP.

Exhibit "5" is the actual printout from Mr. Besaw's breath test. The court will note the additional information that is found on Exhibit "5". After the breath test sequence, there is an indication of last calibrated "cal standard" .206 and the date was August 26, 2009. Exhibit "2", page 27 of 34, has a similar printout that states similar language regarding last calibrated and last check.

The court can read the manual (Exhibit "2") and note what the machine is supposed to register regarding calibration and what was done in this particular circumstance. There is no indication of another 0.20 solution check after August 26, 2009.

1 Please review what is set out in Exh. "2", page 31 of 34. Exhibit "5" is
2 inconsistent with Exhibit "3". There is no verification on this record from the machine
3 that there was ever a 0.20 solution check after August 26, 2009.

4 Based on the definition of calibration found in Exhibit "2", page 9 of 34, the
5 requirement of the 0.20 solution calibration or wet check or performance verification
6 check is suspect.

7 Exhibit "3" is the only standard that is set out and does not have any definition of
8 calibration other than noting that it is sometimes used to define a performance verification
9 or simulator check. Exh. 3 at p. 2 of 21.

10 The Court can note the different procedure that is set out for minors in possession
11 or consumption on page 19 of 21, Exh. "3". Paragraph 18.1 has a totally different set-up
12 and doesn't make a distinction between the instruments. See Exh. "3", p. 15 of 21, para.
13 6.2. The court has to wonder why there is a difference and why there is a distinction
14 between the process that is found at 8.1 versus the process that is found in the proceeding
15 sections, 6.2. The court can look at paragraph 8.3 to confirm the fact that there is a
16 difference in the operation requirements. No explanation is given. There is no explain,
17 there is no standard, but in this particular circumstance, there are many questions that are
18 left unanswered regarding this particular breath testing device and the breath test and
19 calibrations and performance verifications that took place.
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1 In this case, there was not a 0.20 solution verification check within 24 hours of Mr.
2 Besaw's test. The SOP that was in place at the time has a requirement that there be a 0.20
3 performance verification within 24 hours. Pursuant to 5.1.4 of Exhibit "3" it specifically
4 notes that 0.20 performance verification was implemented for the sole purpose of
5 supporting the instruments results for an 18-8004C charge. Failure to timely perform a
6 0.20 performance verification will not invalidate tests performed that yield results at other
7 levels or in charges other than 18-8004C. Exhibit "3", SOP rule 5.1.4.1 states:

8 "The 0.20 performance verification satisfies the requirement for
9 performance verification within 24 hours, before or after an evidentiary test
10 at any level."

11 There is no such rule for a 0.80 solution for an excessive breath test. As was
12 argued at the time of the hearing, there has to be a specific standard in any SOP and
13 "wobble room" is not allowed. **It is clear that for a 0.20 blow, there has to be a 0.20**
14 **performance verification within 24 hours of the test. There was not and the SOP**
15 **was not complied with. As a result, there is not a valid breath test.**

17 The portable breath testing instrument inspection and certification document
18 specifically support the issue of linearity regarding breath testing in other words there
19 very reason a 0.20 solution needs to be run. The whole reason for such testing is to
20 determine the accuracy of the instrument at a 0.40 breath test, a 0.80 test and a 0.20 breath
21 test, which are all statutory limits developed by the legislature.
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1 The original monthly performance verification solution change for the 0.80
2 solution was lot 10802, bottle 0353. It is also interesting to note that the breath testing
3 specialist indicated that a non-breath testing specialist could change the solution. Counsel
4 submits that the breath testing specialist doesn't know the requirements of the SOP. Only
5 a breath testing specialist can change solutions and do performance verification solution
6 changes, not operators.

7 The breath tests results in this case should be stricken. The Standard Operating
8 Procedure (SOP) for a Lifeloc FC20 Portable Breath Machine has a specific standard for
9 performance verification. The performance verification must be run within 24 hours of
10 a breath test, either before or after evidentiary breath testing to be approved for evidentiary
11 use.
12

13 In this particular circumstance, pursuant to the log sheet, the arresting officer ran
14 a performance verification on the Lifeloc using the .08 solution. Mr. Besaw's breath test
15 was noted as .219 insufficient and .201. Pursuant to the SOP a .2 solution verification
16 solution must be performed within 24 hours. Exhibit "3", SOP § section 5.1.4 it
17 specifically notes that the .2 solution performance verification was implemented for the
18 sole purpose of supporting the instrument results for an Idaho Code § 18-8004C charge.
19

20 The Defendant had an alleged excessive breath test result and so the failure of the
21 operator to comply with the standards set out by Idaho State Patrol Forensic Services and
22 Idaho Code § 18-8004(4) and Idaho Code § 18-8002A(7)(d) requires the court to suppress
23 the breath test.
24

1 It should also be noted that § 5.1.4.1 of the Exhibit "3" SOP specifically allows the
2 .2 solution to be run for verification for any breath test result even though it's not
3 recommended. However, there is no indication that .08 performance verification can be
4 run for a .2 or above breath result. The same mistake was done with regard to the breath
5 testing done on January 6, 2011. Exhibit "4" Instrument Log. There was an excessive
6 breath result but yet the operator used the .08 solution for the performance verification.
7 Said use of the .08 solution is in violation of SOP. It is clear that arresting officer,
8 operator, and breath testing specialist failed in the requirements of this breath test and
9 performance verification.
10
11

12 It also should be noted that there are problems with this breath machine. It keeps
13 noting "insufficient" and the .08 solution is registering constantly toward the low end of
14 the range of the Certificate of Analysis of Approval for solution lot number 10802.
15

16 **III.**
17 **LACK OF TRAINING ON STANDARDS**

18 The breath testing specialist and operator in this particular case indicated that he
19 had not been trained or certified on the SOP that was put into effect on November 1,
20 2010. Therefore, he could not meet the standards set out in Masterson v. Department of
21 Transportation, 150 Idaho 126, 244 P.3d 625 (Ct. App. 2010).
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IV.
FIELD SOBRIETY TEST

The court has the ability to review the video tape regarding the field sobriety test. On the horizontal gaze nystagnus, the officer's testimony was that Mr. Besaw's pupils did not appear to be the same size. The testimony indicated that the National Highway Traffic Safety Administration Manual notes "If the eyes do not track together, or if the pupils are noticeably unequal in size, the chance of medical disorder or injuries the nystagnus is present". In this case, the pupil size was obviously noticeable because the arresting officer put that in his police report, which he testified to at the time of the hearing. Therefore, allowing the horizontal gaze nystagnus in as evidence would be improper. Scientific aura behind the testing would prejudice that. With regard to the "walk and turn" the court can note the slope that was present. The surface was not reasonably dry, wasn't level and it was certainly slippery based on the amount of water that was present. The same can be said for the "one-leg stand". The officer had no prior experience with Mr. Besaw and would not know what his ability was to perform these field tests in normal conditions. It was raining heavily in January 2011. During the course of the field sobriety test, the court can note everything on the video tape. The court can also note the difference in what the trooper was wearing and what Mr. Besaw was wearing.

The State should be allowed to introduce evidence on the field sobriety tests on the grounds of foundation, relevance, and that its probative value is substantially outweighed

1 by the danger of unfair prejudice. Allowing such evidence violates Mr. Besaw's
2 confrontation rights under the Idaho and United States Constitutions. In one study, over
3 98% of roadside HGN tests were determined to be not properly conducted. See "End-
4 Position Nystagmus as Indicator of Ethanol Intoxication", Science & Justice Journal 2001.
5 See United States vs. Horn, 185 F Supp 2d 530 (D.Md. 2002) (a copy of which is
6 attached hereto as Exhibit B) and State vs. Lasworth 42 P.3d 844 (N.M. App., 2001) (a
7 copy of which is attached hereto as Exhibit C). The appropriate test for measuring the
8 reliability of evidence is Rule 702 of the Idaho Rules of Evidence. See State vs. Gleason,
9 123 Idaho 62, 65, 844 P.2d 691 (1992). In that case, the Idaho Supreme Court questioned
10 the precedential value of State vs. Garrett, 119 Idaho 878, 811 P.2d 488 (1991). The
11 Gleason Court affirmed that at most the arresting officer could testify that a nystagmus
12 may only be an indicator of intoxication, not that it is conclusive evidence. Moreover,
13 such evidence cannot be used "to establish or infer any particular correlative BAC level
14 because nystagmus does stem from other causes other than the ingestion of alcohol." See
15 Schultz vs. State of Maryland, 665 A.2d 60, 77 (1995) and a study by Spurgeon Cole,
16 attached hereto as Exhibit D. Also see the Affidavit of Harold P. Brull in the case of
17 United States vs. Horn, attached hereto as Exhibit E and also see the Affidavit of Joel P.
18 Wiesen, Ph.D., attached hereto as Exhibit F. See Idaho Rules of Evidence, Rule 104. In
19 a more recent Court of Appeals decision, State vs. Parkinson, 128 Idaho 29, 909 P.2d 647
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1 (Ct.App.1996), the Court cites Gleason to say that the admission of expert testimony
2 regarding scientific evidence is governed by Rule 702, but goes on to "articulate the
3 inquiry envisioned by Rule 702" discussing Daubert vs. Merrell Dow Pharmaceuticals,
4 Inc., 502 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), for guidance. 128 Idaho, at
5 p. 34. Such inquiry requires,

7 a preliminary assessment of whether the reasoning or methodology
8 underlying the testimony is scientifically valid and of whether that
9 reasoning or methodology properly can be applied to the facts and issues.

10 (quoting Daubert) (emphasis added)

11 The Trial Court must make a preliminary assessment. Factors to be evaluated
12 include:

13 Whether the theory or technic in question can be tested, whether it has been
14 subjected to peer review and publication, its known or potential error rate,
15 the existence and maintenance of standards governing its use, and whether
16 it has attracted widespread acceptance within a relevant scientific
17 community. (quoting Dauber)

18 128 Idaho, at p. 34

19 The Court then synthesized, "other courts sand commentators" in listing these additional
20 factors:

- 21 1) The presence of safeguards and the technique,
- 22 2) Analogy to other scientific techniques whose results are admissible,
- 23 3) The nature and breath of inferences drawn,
- 24 4) The extent to which the basic data are verifiable by the court and jury,
- 25 5) Availability of other experts to test and evaluate the technique,
- 26 6) The probative significance of the evidence and the circumstances of the case.

(Cites omitted) Id.

1 However, the limitation in Parkinson, “just scientific expertise” has been done
2 away with the decision in U. S. Supreme Court case, Kumbo Tire vs. Carmichael, 119
3 S.Ct. 1169 (1999). In that case, the Supreme Court answered the question posed by Justice
4 Rehnquist’s dissent in Daubert vs. Merrell regarding scientific evidence. Answering
5 affirmatively, in a fairly resounding decision, Justice Breyer authored the near unanimous
6 decision. The Court decided “how Daubert applies to the testimony of engineers and other
7 experts who are not scientists.” *Id.*, at p. 1171. Answering this question, resolved a circuit
8 split, where several circuits, notably the Third, Fifth, and Eighth had indicated that
9 Daubert applied to all expert testimony while the Second, Ninth, Tenth and Eleventh
10 Circuits held that Daubert applies only to the admission of “scientific” expert testimony.
11 The Court concluded that Daubert’s strictures apply not just to “scientific” evidence, but
12 to all forms of proposed expert testimony. Kumbo 119 S.Ct., at 1171, 1175.

13
14 The Court, in stressing the importance of the gatekeeping function of a trial judge,
15 noted that its objective was to:
16

17 “ensure the reliability and relevancy of expert testimony, to make certain
18 that an expert, whether basing testimony upon professional studies or
19 personal experience, employs in the courtroom the same level of intellectual
20 rigor that characterizes the practice of an expert in the relevant field.”
21

22 *Id.*, at p. 1176.

23 In order to ensure this level of reliability, Daubert’s teaching and tests must be
24 applied to all expertise, whether it be scientific or “technical” or “other specialized”
25

1 knowledge. Kumbo, at p. 1174. These requirements must exist because all experts, not
2 just scientific ones, unlike ordinary witnesses are given this wide latitude to offer opinions
3 - including those not base upon firsthand observations or knowledge. Kumbo, at p. 1174.
4

5 While the Idaho Supreme Court has used a Rule 702 case-by-case test of reliability
6 for admission of expert testimony, the Court of Appeals has used Daubert, 509 U.S. 579
7 (1993) and similar factors, which include:

- 8
- 9 a) Whether the theory or technique in question can be tested;
 - 10 b) Whether it has been subjected to peer review and publication;
 - 11 c) Its known or potential error rate;
 - 12 d) The existence and maintenance of standards governing its use; and
 - 13 e) Whether it has attracted widespread acceptance within a relevant
14 scientific community.

15 The Idaho Court of Appeals uses the following criteria that a trial court might
16 consider when analyzing scientific evidence:

- 17 a) The presence of safeguards in the techniques;
- 18 b) Analogy to other scientific techniques whose results are admissible;
- 19 c) The nature and breadth of inference drawn;
- 20 d) The extent to which the basic data are verifiable by the court and jury;
- 21 e) Availability of other experts to test and evaluate the technique; and
- 22 f) The probative significance of the evidence in the circumstances of the case.

23 State vs. Konechny, 3 P.3d 535, 134 Idaho 410 (App.Ct.2000); Kumbo Tire vs.
24 Carmichael, 119 S.Ct. 1169 (1999); State vs. Parkinson, 909 P.2d 647, 128 Idaho 29,
25 (Idaho App. 1996).

1 The field sobriety tests administered in Mr. Besaw's case do not meet the
2 requirements of Daubert, Kumbo or Rule 702, nor can the arresting officer lay a sufficient
3 foundation to admit such evidence. Further, Mr. Besaw has no way to confront or
4 challenge the officer's observations of these presumed psychological or psychophysical
5 reaction of eyes, therefore, such evidence should not be allowed.
6

7 In using the case law set out above, the Court must determine that the field sobriety
8 tests result lack reliability and do not follow the requirements of the Rule 702 standards.
9 The factors, as noted above, cannot be met by the State in this case. Mr. Besaw requests
10 that evidence obtained against him be suppressed on the grounds that his due process and
11 other constitutional rights, as protected under the Idaho State Constitution and the United
12 States Constitution, were violated. The Court can also note cases from Kansas and Ohio.
13 In State vs. Witte, 836 p.2d 110 (Kansas 1992), the Kansas Court criticized states like
14 Idaho for accepting field sobriety tests based on State vs. Superior Court, 718 P. 2d 171
15 (Arizona). The Kansas Court noted:
16
17

18
19 "The Idaho Supreme Court also followed the Arizona opinion. The Idaho
20 Court noted that no evidence or publication had been presented that refuted
21 the Arizona opinion." State vs. Garrett, 119 Idaho 878, 881, 811 P.2d 488
(1991).

22 At pp. 1118 and 1119.

23 The Kansas Supreme Court went on to criticize the Arizona Court by outlining
24 several contrary scientific studies that dealt with the horizontal gaze nystagmus test. The
25

1 Kansas Supreme Court concluded:

2 “If the Arizona Supreme Court had had the evidence before it, it may not
3 have held that the HGN evidence satisfies the Frye admissibility
4 requirements. The reliability of the HGN test is not currently a settled
5 position in the scientific community.”

6 At p. 1121.

7 The Court may be better able to understand Mr. Besaw’s position by looking at
8 Judge Lansing’s dissenting opinion in State vs. Mazzuca, 132 Idaho 868, 979 P.2d 1226
9 (Ct.App. 1999). This case dealt with the Intoxilyzer 5000 and the foundation for the
10 evidence allowing the breath result in. Judge Lansing stated:

11 “To bolster its holding that this foundation suffices, the majority opinion
12 relies upon several cases from other jurisdictions where the expert testimony
13 was more complete. In my view, this reliance is misplaced, for expert
14 testimony given in other cases cannot substitute for an evidentiary
15 foundation properly presented before the magistrate.”

16 At p. 872.

17 Judge Lansing then went on to criticize the State vs. Garrett, supra, decision. She stated:

18 “Since then, the Idaho Supreme Court has made it crystal clear that the Frye
19 test is not to be utilized as the standard for admission of scientific or
20 technical evidence. See State vs. Faught, 127 Idaho 873, 876, 908 P.2d 556
(1995). Rather, the proper standard is stated in I.R.E. 702.”

21 At p. 872.

22 Judge Lansing concluded her dissenting opinion by stating:

23 “Thus, the admissibility of the Intoxilyzer 5000 test at issue here turns upon
24 the sufficiency of the foundational testimony presented to the magistrate in
25

26 CLOSING ARGUMENT

24

170

1 **this case**, not information contained in decisions from other courts.”
2 (emphasis original)

3 At p. 872.

4 The Court’s attention can also be drawn to a recent Eighth Circuit case, U. S. vs.
5 Iron Cloud, 171 F.3d 587, (8th Cir.1999). In this case, Iron Cloud requested a Daubert
6 hearing on the reliability of the portable breath testing device. Said evidence being an
7 Alco Sensor III. The trial judge in Mr. Iron Cloud’s case took the accuracy of the portable
8 breath test device for granted and he ignored the established procedure. It is interesting
9 that several states do not allow an Alco Sensor III to be used at trial, holding that the
10 preliminary breath tester may only be admissible to establish probable cause. See Boyd
11 vs. City of Montgomery, 472 So.2d 694, 697 (Ala.App.1985). Patrick vs. State, 750
12 S.W.2d 391, 394 (Ark. 1988), State vs. Strizich, 952 P.2d 1365, 1371 (Mont. 1997),
13 Thompson vs. State Department of Licensing, 960 P.2d 475, 477 (Wash. App. 1998). The
14 government argued in Iron Cloud that the District Court was correct in admitting the
15 results of the portable breath testing device without a Daubert hearing because the
16 technology had been in use for an extended period of time. The Court noted, however,
17 “the mere fact that a test has been used for a long time does not make it reliable.” At. P.
18 591. The Eighth Circuit goes on to state:

19 “The experts disagree on the reliability of the intoxilyzer test. The defense
20 counsel challenged the accuracy of both the PBT and the intoxilyzer test.
21 ”

1 The intoxilyzer test is measured from the use of the breath, not the blood,
2 so a ratio must be applied to get the results in the form of the blood alcohol
3 level. The defense contended that this ratio can lead to inaccuracies. The
4 government's expert conceded on cross-examination that the blood test was
the most reliable of the three tests and that the intoxilyzer tests brought
many variables into play."

5 At p. 592.

6 Moreover, the Court must note that nothing in Daubert, Kumbo, Parkinson, and
7 Rule 702 require the Court to admit opinion testimony that is connected to existing data
8 only by the ipse dixit of an expert. Kumbo, at 1179.

9 In the case at bar, the government can not satisfy the reliability, accuracy, or
10 relevancy predicates for the admission of "expert" officer opinion testimony for the
11 standardized sobriety tests given or the Defendant's performance on them for the
12 following reasons:
13

- 14 1. There is not a substantial basis as to what an average intoxicated person's
15 performance would be where a pretest practice session was not allowed;
- 16 2. There is not a substantial factual basis as to what an average non-intoxicated
17 and uncoordinated persons' performance would be where a pretest practice
18 session was not allowed;
- 19 3. There is not a substantial basis for believing the tests can distinguish
20 between an intoxicated person's performance and the normal mental and/or
21 physical faculties, of a normally coordinated and/or normally uncoordinated
22 non-intoxicated persons performance of the tests;
- 23 4. There is not a substantial factual basis for believing the witness possesses
24 any specialized medical/scientific training to proffer an expert opinion;

- 1 5. There is not a substantial basis for knowing what the defendant's normal
2 mental and/or physical faculties were supposed to be at the time of police
3 testing in order to properly and relevantly compare his normal unpracticed
4 performance and the performance observed;
- 5 6. There is not a substantial basis to believe that these tests were medically
6 tested to be medically reliable and accurate;
- 7 7. There is not a substantial basis to believe that these tests have been
8 subjected to meaningful peer review;
- 9 8 There is not a substantial basis for believing that these tests have been
10 universally accepted within the medical and/or scientific community as
11 being accurate and reliable indicators of a person being intoxicated to the
12 exclusion of other non-intoxicated reasons for not having the same normal
13 mental and/or physical faculties of a perfectly average person;
- 14 9. There is not a substantial basis for believing that either the methodology or
15 techniques utilized by the witness can be correlated to explicitly
16 distinguished between the test performance of an intoxicated person and a
17 perfectly average non-intoxicated person, and then to implicitly correlate
18 those performances and the performances of the defendant in this case.

19 In State vs. Homan, 732 N.E.2d 952, 89 Ohio St. 3d 421 (Ohio 2000), the Ohio
20 Supreme Court stated in discussing the field sobriety test:

21 “The small margins of error that characterized field sobriety tests make
22 strict compliance critical.”

23 At p. 956.

24 The Court continued:

25 “The HGN test is not the only field sobriety test that required special care
26 in its administration.”

 At p. 956.

1 The Court concluded its holding by stating:

2
3 “In contrast we find that strict compliance with standardized field sobriety
4 testing procedures is neither unrealistic nor humanly impossible in the great
5 majority of vehicle stops in which the policy choose to administer the test.”

6 At p. 957.

7 The Court can also look at State vs. Eytchison, 136 Idaho 210, 30 P.3d 988 (Idaho
8 App., 2001). The Court of Appeals in commenting on the use of an expert indicated:

9 “The admissibility of expert testimony is governed by Idaho Rule of
10 Evidence 702.”

11 At. p. 990.

12 The Trial Court in Mr. Besaw’s case is required to conduct a Rule 702 Parkinson,
13 Kumbo, hearing to determine whether or not in this particular case field sobriety tests are
14 settled science, as required in Rule 702 and Idaho Criminal Rule 12(b). The Court of
15 Appeals in the Eytchison case commented on the change of the Federal Rule 702
16 regarding expert testimony. See p. 990, footnotes 1 and 2. See also changes to Idaho
17 Criminal Rule 16(b)(7).
18
19

20 The Federal Judicial Center has developed a Reference Manual on Scientific
21 Evidence as a result of the several federal cases that have developed regarding Rule 702
22 which have been cited above. The manual states in pertinent part:

23
24 “Objections to expert evidence relating to admissibility, qualifications of
25 a witness, or existence of a privilege should be raised and decided in
26 advance of trial whenever possible.”

At. p. 53.

1 The manual cites, in a footnote, Daubert vs. Merrell Dow Pharmaceuticals, supra:

2
3 “Before admitting expert testimony, the trial court must make a ‘preliminary
4 assessment of whether the reasoning or methodology underlying the
5 testimony is scientifically valid’.” (emphasis added)

6 At p. 53.

7 The manual also states:

8 “In a criminal case in which the defense challenges the prosecution’s expert
9 testimony, a trial court may choose to proceed differently than it would in
10 a civil case, in light of factors such as the narrower scope of discovery, the
11 defense’s lack of resources and need for expert assistance, and the
12 Government’s role in developing the expertise that is now in question. AS
13 in civil cases, the Court must take into account the particular facts of the
14 case. Whatever the District Court does, a clear message that emerges from
15 the Court’s remarkably detailed factual analysis in Kumbo is that the
16 District Court must explain its choices so that the Appellate Court now has
17 an adequate basis for review.”

18 At p. 29.

19 The manual also states:

20 “Of course, even if a court has no objection to the particular methodology’s
21 relevance in proving causation, it may disagree with how it was applied in
22 the particular case. As the Supreme Court said in Joiner, ‘Nothing....
23 requires a District Court to admit opinion evidence which is connected to
24 existing data only by the ipse dixit of the expert’.”

25 At. p. 33.

26 A North Dakota Law Review (Vol. 71, No. 3, 1995) article strongly criticizes the
North Dakota decision in City of Fargo vs. McLaughlin, 512 N.W.2d 700, (N.D. 1994)

1 and the use of such cases as the State vs. Superior Court, supra, regarding field sobriety
2 tests. The Law Review article, after an extensive review of field sobriety tests and the
3 horizontal gaze nystagmus test, concluded:

4
5 “The scientific foundation of the HGNT is at best weak. Although
6 NHTSAs work claims to have found a correlation between BAC and HGNT
7 performance, this research has not been replicated by independent
8 investigators. The lack of evidence makes the continued use of HGNT’s
9 grounding in scientific principles, the admittance of such evidence in the
10 courtroom suit should be subject to the standards of admissibility of
11 scientific evidence.”

12 At p. 694.

13 The article indicated there has been minimal peer review and publication and that
14 the lack of interest in the area and the misunderstanding of findings had lead to a lack of
15 agreement within any scientific community which could be considered appropriate. The
16 last sentence of the article states:

17 “Therefore, the North Dakota Supreme Court erred in not requiring proof
18 of scientific validity through expert testimony prior to the admittance of
19 HGNT results for the purpose of showing circumstantial evidence of
20 intoxication.” (emphasis added)

21 At p. 696.

22 The science behind the field sobriety tests used in Mr. Besaw’s case must be
23 analyzed by the Trial Court.

24 State vs. Witte, 836 P.2d 110 (Kansas 1992) and State vs. Homan, 732 N.E.2d 952,
25 89 Ohio St.3d 421 (Ohio 2000) which was cited above, support Mr. Besaw’s argument

1 that cases like State vs. Superior Court and the City of Fargo vs. McLaughlin, do not meet
2 the requirements of Rule 702 of the Idaho Rules of Evidence. The State will not refute
3 the criticisms raised by State vs. Witte, nor will the State refute the North Dakota Law
4 Review article criticizing the North Dakota Supreme Court's decision regarding the
5 horizontal gaze nystagmus test.
6

7 In State vs. Garrett, (supra) the Court in a plurality opinion, determined the
8 scientific reliability of the horizontal gaze nystagmus. Chief Justice Bakes concurred in
9 the opinion while Justice McDevitt concurred in the results only. Justice Boyle filed a
10 special concurring opinion rejecting the use of the Frye standard and Justice Johnson
11 dissented. Justice Johnson advocated a standard of independent reliability. Justice
12 Johnson's dissent reflects what has been done by the Idaho and Federal Courts in recent
13 cases like Parkinson and Eytchison, Daubert and Kumbo. In State vs. Garrett, the Court
14 stated:
15
16

17 "Because the reliability of a test based on a scientifically tested phenomenon
18 should not vary from jurisdiction to jurisdiction, we examine what other
19 jurisdictions have done when HG test results are offered as evidence in DUI
20 cases."

21 At p. 880.

22 In Footnote 3, the Court states:

23 "Such 'decisions' are persuasive only as they contain analysis and reasoning
24 which recommend itself to this Court."

25 At p. 880.
26

1 The Garrett Court cited State vs. Superior Court:

2 “We have been furnished with no publications or other authority which
3 refutes the reasoned decision of the Arizona Court.”

4 At p. 881.

5 It is submitted that Mr. Garrett’s counsel did not provide an adequate argument
6 regarding filed sobriety tests. Mr. Besaw should not be held accountable for the failures
7 of Defendant counsel from a 1991 decision. Justice Johnson, in his dissent, lists succinctly
8 the problems of the holding of the plurality when he stated:

9
10 “If this {the testimony of the arresting officer} establishes the reliability for
11 admissibility for expert opinion based on new scientific methods, then we
12 must be prepared to accept the admissibility of the results of the polygraph
13 examination based on the testimony of polygraph operators, the
14 admissibility of DNA tests based on the testimony of laboratory technicians
15 who conduct the tests, and the results of other forms of ‘scientific’ testing
16 based on the testimony of those who conduct the tests. In my view, this is
17 not the type of reliability that we should require before allowing testimony
18 of the results of tests conducted based on new scientific methods. The
19 foundation should be laid by experts who have researched the tests and are
20 available to testify as to the scientific basis for the test.” (emphasis added)

21 At p. 885.

22 The State of Idaho has never provided said foundation with regard to field sobriety
23 tests. There has never been a true Rule 702 hearing as envisioned by Daubert, Kumbo,
24 Parkinson, or Konechy. The Garrett and Gleason cases are bad law and should be
25 overturned.

1 The Court may also want to look at State vs. Duffy, 778 A.2d 415 (N.H. 2000). In
2 that particular case, Mr. Duffy was arrested after performing field sobriety tests. The New
3 Hampshire Supreme Court indicated:

4
5 “The defendant also argues that the results of the HGN test were improperly
6 admitted. Because this issue is likely to arise on remand, we will address
7 it. (Cite omitted). New Hampshire Rule of Evidence 702 requires that
8 opinion evidence based upon scientific principles, must meet a threshold
9 level of reliability to be admissible. (Cite omitted). This Court has never
10 decided if the HGN test is based on scientific principles within the meaning
11 of Rule 702. The trial court did make any preliminary determination in this
12 regard. Rather, with respect to the evidence, the court noted, “It is very,
13 very, subjective in this Court’s opinion....It’s a question of what weight I
14 give it, I guess.” On remand, if the State intends to offer evidence of the
15 HGN test, it should note that this court recently ordered, in a factually and
16 procedurally similar case, that the Concord District Court hold a hearing
17 regarding the reliability of the HGN test and whether Rule 702 requires
18 preliminary findings prior to its admission.”

19 At pp. 418-419.

20 In State of New Hampshire vs. Michael Dahood, New Hampshire Case No. 99-510,
21 the Supreme Court remanded the issue of the HGN test to the District Court. It’s Order
22 stated:

23 “In denying the defendant’s motion to exclude the HGN testimony, the
24 district court relied upon the reasoning of the supreme judicial court of
25 Main in State vs. Taylor 694 A.2d 907 (Maine 1997), which took judicial
26 notice of the reliability of the HGN test. The district court also relied upon
the factual findings of a 1987 superior court order. The trial court did no,
however, hold a preliminary hearing to establish the reliability of the HGN
test.”

See Order issued by State of New Hampshire Supreme Court, June 5, 2001.

1 The Idaho Supreme Court in Garrett accepted standards that, even in the best
2 circumstances, (in the laboratory), have a 23% failure rate (HGN), a 32% failure rate
3 (walk and turn) and a 35% failure rate (one leg stand). There is a well written article by
4 Phillip B. Price and Sturgeon Cole in the April 21, 2001 magazine, The Champion
5 published by the National Association of Criminal Defense Lawyers. See Idaho Rules of
6 Evidence, Rule 104. The authors criticize the National Highway Traffic Safety
7 Administration field sobriety test validation. The author states:
8

9
10 “There has been no attempt to establish norms for the SFST. We have no
11 idea how well a sober person can perform on the SFST. How does age or
12 gender affect performance? How does fatigue or practice affect
13 performance? If an individual performs poorly at a .11% BAC, how does
14 that compare with his or her performance with a BAC of .00%? Before any
15 individual’s performance can be considered at ‘test’, that particular
16 individual’s baseline with no alcohol must be known and factored in.
17 Without answers to these basic questions, the SFST remains in the same
18 category as tarot cards.” (emphasis added)

19 At p. 42.

20 The authors then go on to discuss the number of false arrests:

21 “Of the sober individuals that were involved in the Colorado, Florida and
22 San Diego studies, the officers falsely arrested 24%, 18% and 29%,
23 respectively. That is an average of 23.6% false arrest rate. What this means
24 is that if the SFST are used as a decision of whether to arrest an individual
25 for an alcohol related offense, one out of every four sober people will be
26 falsely arrested.” (emphasis added)

At p. 42.

1 In the State vs. Gleason, case, no real “expert” was called. As Justice Johnson
2 indicated in Garrett, the “expert” in question was the individual who conducted the test.
3 In Gleason, Justice Bistline in his concurrence in result states: “The majority’s bare
4 statement that I.R.E. 702 is the appropriate test provides no guidance to the bench and bar
5 as to how to determine scientific reliability.” Justice Bistline then questions the use of
6 Rule 702 by stating:

7
8 “Questions that come to mind include: What level of scientific reliability,
9 if any, is required before evidence will assist the trier of fact? What
10 constitutes scientific reliability? How reliable does scientific evidence have
11 to be before it is admissible? On whose scale do we measure the amount of
12 reliability? What unit of measurement is being used?”

13 At p. 67.

14 There is in Gleason no Rule 702 analysis. The Rule 702 analysis, missing from
15 Gleason and Garrett, is found in cases like Daubert, Kumbo, and Parkinson. In Gehring,
16 *supra*, the Court allowed Officer Carrington to testify about his assessment of a person’s
17 sobriety, based on field sobriety tests, being 95% accurate. Officer Carrington’s testimony
18 is in stark contrast to the National Highway Traffic Safety Administration’s testing noted
19 above and other current studies. (See Horn, *supra*.)

20
21 The State may argue that Mr. Besaw is trying to overturn prior precedent. The use
22 of Idaho Rule of Evidence 702 is supported by Gleason. However, the use of a Rule 702
23 analysis is lacking, but can be expanded as required by federal case law and the Idaho
24

1 cases that have accepted the federal court reasoning. A Trial Court must do more under
2 its gatekeeping function before any field sobriety test should be allowed before a jury.

3 What scientific publications the Garrett Court refers to is unknown and not set out.
4
5 In fact, the State will not be able to support its position by pointing to any scientific
6 evidence that supports the use of the field sobriety tests let alone the horizontal gaze
7 nystagmus.

8 In State vs. Torres, 976 P.2d 20 (New Mexico 1999), the Court had at issue the
9 admissibility of the horizontal gaze nystagmus test. The Court applied a Daubert analysis
10 and determined that:

11 “The better view, however, is that the Albericio-Daubert standard is not
12 limited to novel scientific theories.” (Cites omitted)

13
14 At p. 30.

15 The Court determined that the Trial Court, pursuant to the Rules of Evidence, must
16 ensure that any and all scientific testimony or evidence admitted pursuant to Rule 702 was
17 not only relevant but reliable. At p. 32. The Court stated:

18 “Our review of the record indicates that the trial court did not consider any
19 of the required factors for assessing the evidentiary reliability of HGN
20 testing in this case, nor was there an appropriate focus on principles and
21 methodology.”

22 At p. Id.

1 The New Mexico Court commented on State vs. Superior Court, the case that the
2 Idaho Supreme Court used in State vs. Garrett. The New Mexico Court noted that part of
3 the reason the Arizona Courts may regard additional expert testimony as unnecessary is
4 that in Arizona the Courts only admit the HGN evidence for limited purposes such as
5 establishing probable cause and corroborating the result of more reliable sobriety tests
6 such as chemical analysis of breath, blood or urine. (See Superior Court, 718 P.2d 181-
7 182) At pp 31-32. Will the Trial Court allow the use of the horizontal gaze nystagmus test
8 for more than probable cause purposes? In the Torres case, no chemical analysis of Mr.
9 Torres' BAC was provided. The Torres Court also concluded that the officer's training
10 and experience was not sufficiently probative of the test's evidentiary reliability.
11
12

13 The Court stated:
14

15 "Nevertheless, we find persuasive the reasoning of other courts which have
16 held that if police officers are not qualified to testify about the scientific
17 basis underlying the HGN test, they are not competent to establish that the
18 test satisfies the relevant admissibility standard. (Cites omitted)

19 Id.

20 The Torres Court also determined that it was improper to look for scientific
21 acceptance only from reported case law. At p. 32. Shouldn't Idaho and this Trial Court
22 do the same? In the Torres case, the arresting officer testified that the National Highway
23 Traffic Safety Administration accepted the HGN testing, that the test was nationally
24 certified, and that the test was given routinely. Even with that evidence, the Court found
25

1 that his testimony was not sufficient to establish the evidentiary reliability required by

2 Daubert. The Court stated:

3 “Officer Bowdich was not qualified to testify about the scientific basis of
4 HGN testing and although his testimony let support for a conclusion that the
5 test was widely used - thus giving rise to an inference of general acceptance
6 - his testimony did not explain how the test proved intoxication. He,
7 therefore, did not assist the trier of fact in understanding the scientific
8 validity of the test”

8 At p. 33.

9 The Court also determined:

10 “We therefore determine that judicial notice of the evidentiary reliability of
11 HGN testing would be inappropriate at this time.”

12 At p. 33.

13 The record reflects that the arresting officer did not follow the requirements of the
14 NHTSA manual. See State vs. Homan, 732 N.E.2d 952 (Ohio 2000).

15 The Torres Court also addressed the issue of harmless error and found that the
16 admissions of the horizontal gaze nystagmus was not harmless error. It stated:
17

18 “Error in the admission of evidence in a criminal trial must be declared
19 prejudicial and not harmless if there is a reasonable possibility that the
20 evidence complained of might have contributed to the conviction.”
21 (emphasis added)

22 “We conclude that the error in this case was not harmless, because there is
23 a reasonable possibility that the admission of Officer Bowdich’s HGN
24 testimony might have contributed to Torres’ conviction.” (emphasis added)

24 At p. 36.

1 The Court in Wilson vs. State, 723 A.2d 494 (Maryland App. 1999) also found that
2 the decision on the HGN from State vs. Superior Court was only sufficiently reliable to
3 be a factor in establishing probable cause. At p. 499. The Wilson Court also found that
4 the admission of horizontal gaze nystagmus was not harmless error. The Court stated:

5
6 “Because we cannot say the error did not contribute to the jury’s conviction
7 as to the DUI charge, we must vacate the DUI conviction.”

8 At p. 502.

9 The Court in State vs. Helms, 504 S.E.2d 293 (N.C. 1998) found that a police
10 officer could not provide adequate foundation for the correlation between intoxication and
11 nystagmus, and therefore his testimony was not adequate foundation for the admission of
12 HGN test results. The North Carolina Court concluded that:

13
14 “Until there is sufficient scientifically reliable evidence as to the correlation
15 between intoxication and nystagmus, it is improper to permit a lay person
16 to testify as to the meaning of HGN test results.”

17 At p. 295.

18 The North Carolina Court found that the arresting officer’s testimony was that of
19 a lay person. The North Carolina Supreme Court reversed the Court of Appeals with
20 regard to the HGN test results being harmless error. The Court stated:

21
22 “We conclude that, in light of the heightened credence juries tend to give
23 scientific evidence, there is a reasonable probability that had evidence of the
24 HGN test results not been erroneously admitted, a different outcome would
25 have been reached at trial.”

1 At p. 296. See also State vs. Garrett, at pp. 881.

2 In the Montana case, Hulse vs. State Department of Justice, Motor Vehicle
3 Division, 961 P.2d 75 (Montana 1998), the Court followed the rationale from the above
4 cited case:
5

6 “No testimony was presented either through Officer Kennedy or another
7 expert witness describing the underlying scientific basis of the HGN test
8 other than Officer Kennedy’s explanation that everyone’s eye will exhibit
9 nystagmus at ‘maximum deviation’, but that ‘[w]ith the introduction of
10 alcohol into the system, the nystagmus becomes more prevalent and it
11 doesn’t cease....’ This testimony shows that Officer Kennedy was trained
12 to administer the HGN test and, in fact, administered the HGN test in
13 accordance with his training and, therefore, he was qualified to testify as to
14 both his administration of the HGN test and his evaluation of Hulse’s
15 performance. However, nothing in the evidence establishes that Officer
16 Kennedy had special training or education nor adequate knowledge
17 qualifying him as an expert to explain the correlation between alcohol
18 consumption and nystagmus, the underlying scientific basis of the HGN test.
19 Accordingly, we conclude that there was insufficient foundation for the
20 admission of evidence concerning the HGN test and the district Court
21 abused its discretion when it summarily denied Hulse’s motion in limine
22 and allowed Officer Kennedy to testify as to Hulse’s HGN test results.”

23 At p. 95.

24 In State vs. Ito, 978 P.2d 191 (Hawaii App. 1999) the Court determined that the
25 horizontal gaze nystagmus test had a 23% error rate in detecting individuals with a BAC
26 of .1% or greater and a 35% error rate in detecting persons with a .08% BAC or greater.

At p. 203. The Hawaiian Court cited State vs. O’Key, 899 P.2d 687 (Oregon 1995). The
Oregon Court noted that part of the training the officers had to undergo required them to

1 ask, before administering the HGN test, whether the person had a head injury, was ill or
2 was taking medication. The officer in Hawaii had a whole series of questions that were
3 required to be asked before the HGN test could be required. See page 204. No such
4 questions were asked of Mr. Besaw. The Hawaiian Court noted as to whether the HGN
5 test is susceptible to abuse, one of the criticisms leveled at the test is that,
6

7 “It is wholly subjective - the police officer has no physical sample to take
8 to the laboratory. Thus, the suspect is not able to have his or her expert
9 examine the evidence....[and] cannot contradict the officer’s testimony[.]
10 (Cite omitted), in our view, however, this concern is minimized as long as
11 the HGN test results are limited solely to probable cause determinations.”
12 (emphasis added)

13 At p. 204.

14 In Mr. Besaw’s case, the State does not want the field sobriety tests limited to a
15 probable cause determination, but used as evidence to prove intoxication beyond a
16 reasonable doubt. The Hawaiian Court noted that in Mississippi, the HGN test was not
17 admissible at trial but that the Supreme Court of Mississippi held that the HGN test results
18 were reliable for purposes of determining probable cause. At p. 706. The Hawaiian Court
19 in vacating the Trial Court’s determination of probable cause on the HGN test noted that
20 officers are required to check themselves “monthly with an [8x15 square template or
21 cardboard with a diagonal line drawn from one corner to another to demark 45 degrees]
22 to be sure that your accuracy has been sustained.” Footnote 10 at p. 210. The Court also
23 noted the warnings set out in the National Highway Traffic Safety Administration manual:
24
25

1 "ONLY WHEN THE TESTS ARE ADMINISTERED IN THE
2 PRESCRIBED STANDARDIZED MANNER; AND ONLY WHEN THE
3 STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S
4 PERFORMANCE; AND, ONLY WHEN THE STANDARDIZED
5 CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.
IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST
ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED."

6 At p. 210.

7 The opinion from State vs. Doriguzzi, 760 A.2d 366 (N.J. Super A.D. 2000) found
8 that it is unusual for an Appellate Court to exclusively on judicial notice and that,
9

10 "In the present case, a survey of the relevant decisions around the country
11 does not provide us with the level of certainty necessary to approve HGN
12 testing for future case. We also note that our ability to comprehend the
13 technical writings in this field or the interpretations of them by other
14 scientists is hampered by the very problem that cause our inquiry - i.e., we
15 are not scientists with technical backgrounds. While it may very well be
16 that the HGN testing can meet the Frye test, we believe that the case which
17 decides the issue for all other cases in New Jersey should be grounded in
sufficient expert testimony to assure defendants that the state alike that a
conviction for driving under the influence, when based in part on HGN
testing, is a conviction grounded in reliable scientific data. The
consequences of a drunk driving conviction are severe and may include
incarceration."

18
19 At p. 342.

20 The New Jersey Court then goes on to cite quite extensively from the Kansas
21 Supreme Court in State vs. Witte in its criticism of the State vs. Superior Court decision
22 used by Idaho to support its horizontal gaz nystagmus decision. The New Jersey Court
23 then noted an Illinois decision. The New Jersey Court stated:
24

1 “The Kirk court stated:

2 Reliance upon other court’s opinions can be problematic: Unless the
3 question of general acceptance has been thoroughly and thoughtfully
4 litigated in the previous cases....reliance on judicial practice is a hollow
5 ritual.’ McCormick Section 203, at 870, n. 20.”

6 At p. 346.

7 The Court then states:

8 “Judicial notice could become a yellow brick road for judicial acceptance
9 of bogus or at least unvalidated scientific theories or techniques.”

10 At p. 346.

11 The New Jersey Court then commented on the Arizona decision by stating:

12 “The expert retained by the prosecution in Blake, Dr. Burns, was the
13 individual who conducted the study that lead to the National Highway
14 Traffic Safety Administration’s adoption of the HGN test. Police
15 departments, in turn, have adopted the NHTSA’s recommendations. In
16 Blake, Dr. Burns supported the NHTSA’s manual and the fact that the test
17 is used by different police departments. By doing so, however, she in
18 essence referred back to her own conclusions, magnifying the opportunity
19 of error. We do not say that Dr. Burns’ conclusions on the subject are
20 flawed, only that the issue has not been fully and thoroughly litigated.”

21 At pp. 346-347.

22 The Court in the New Jersey case was also asked to find that the HGN test results
23 admitted to evidence would likely be harmless error. However, in the New Jersey case,
24 there was no breathalyzer result and the HGN test result was an integral part of the
25 decision in finding the defendant guilty. The Court then states:

26 CLOSING ARGUMENT

1 “We know it a recurrent theme in the decision from other jurisdictions that
2 a jury may be inappropriate influenced by the apparent scientific precision
3 of the HGN testing or otherwise fail to properly understand it.”

4 At p. 347.

5 The Court determined that it was not harmless error to allow the HGN test as
6 evidence and reverse the defendant’s conviction. See State vs. Barcella, 135 Idaho 191,
7 199 (Ct.App. 2000).

8 U. S. vs. Horn, 185 F Supp 2d 530 (D.Md. 2002) is also a case of extreme
9 inappropriateness and should be reviewed by the court regarding the experts call by both
10 sides, the state and the driver. The Court is asked to read this case as it has a complete
11 history of case reviews of the field sobriety tests throughout the Country.
12

13
14 **V.**
THERE IS NO 15 MINUTE WAIT

15 There are a number of Idaho cases that are on point and are discussed below. There
16 has to be a 15 minute observation period prior to breath testing. See State v. Stump, 146
17 Idaho 857 (Ct. App. 2009). The Stump case is interesting because it points to the specific
18 standard of observation required. See also Wheeler v. Idaho Transportation Department,
19 (supra).
20
21

22 In Stump, the driver was transported to the Teton County Sheriff’s office to test his
23 breath alcohol using an Intoxilyzer 5000. The arresting officer was in the same room with
24 Mr. Stump. The Court noted that there was no evidence in the record of any circumstances
25

1 or conditions inside the room which might have interfered with or impaired the arresting
2 officer's senses. Officer Hurt also advised Mr. Stump to tell him if he had belched or
3 regurgitated during the 15 minute wait.
4

5 In Defendant's case, the arresting officer did not tell Mr. Besaw that he needed to
6 advise the officer if he actually belched, burped, or the like. In Mr. Besaw's case, they were
7 outside. The Court noted in State v. DeFranco, 143 Idaho. 335, 338, 144 P.3d. 40, 43 (Ct.
8 App. 2006) that the fifteen minute monitoring period is not an odorous burden and
9 will be met if the Officer stays in close physical proximity to the test subject so the
10 Officer's senses of sight, smell and hearing can be employed.
11

12 In State v. Carson, 133 Idaho 451, (Ct. App. 1999), the Court was faced with a 15
13 minute wait that occurred in a law enforcement vehicle while the driver was being
14 transported to the Washington County Sheriffs Office to use the Intoxilyzer 5000. In that
15 case, Mr. Carson was asked if he had belched or vomited or burped, etc. during the drive.
16 The arresting officer said he intermittently observed Mr. Carson in the rearview mirror and
17 listened for any indication of belching or regurgitation. The arresting officer testified that
18 because of the late hour he encountered no traffic on the road and his police radio was quiet
19 throughout the trip. The officer then acknowledged during cross examination that is was
20 raining and that the windshield wipers were operating. The Court found that the arresting
21 officer's attention was not devoted to Mr. Carlson and that evidence presented at the motion
22
23
24
25

1 hearing and common sense, tells us that an officer's ability to use his hearing as a substitute
2 for visual observation was impeded by noise with the automobile engine, tires on the road,
3 rain and windshield wipers.

4
5 In State v. DeFranco, (supra), a similar situation to Mr. Besaw's case is presented.
6 The instrument used was the AlcoSensor III. In DeFranco, the officer left the patrol car's
7 rear door open and entered through the front passenger door, called dispatch momentarily
8 and removed his AlcoSensor equipment that had been on the front seat. He then walked to
9 the rear of the vehicle, opened the trunk and looked through a file box to find a advisory
10 form. The Court found that the observation period was not possible based on these
11 circumstances.
12

13
14 The Court noted that, as in Carson, the officer was not always in a physical position
15 to either use his sight or alternatively his senses of smell or hearing to accomplish the
16 purpose of the monitoring period.

17
18 In Besaw, it is clear from the video that Trooper Talbott's attention was distracted
19 from Mr. Besaw. It is clear that during the 15 minute wait, Trooper Talbott's attention and
20 senses were not on Mr. Besaw. It is also clear, that 21st Street was quite a busy road during
21 the period of time Mr. Besaw sat in the back of the Trooper's vehicle.

22
23 It is interesting to note the final comments by the Court of Appeals in DeFranco,
24 (supra):

1 "If an officer deviates from that practice, without beginning the fifteen
2 minute period anew, which is always an alternative in cases of uncertainty,
3 the officer risks that the breath test results will be rendered inadmissible.
Such is the result here."

4 At p.338

5 It is clear that the officer did not complete the 15 minute wait observation period.
6 He was distracted by outside influences. This is not a situation in which Mr. Besaw and the
7 officer were enclosed in a ten foot room. Mr. Besaw was sitting in the back of an ISP
8 vehicle, in a parking lot, next to one of the busiest streets in Lewiston.
9

10 The court should strike the breath test based on the fact that the 15 minute wait was
11 not complied with. The arresting law enforcement officer's senses were distracted by
12 outside influences.
13

14 The court watched the video at the time of the hearing. It is clear, during the 15
15 minute wait, that the Trooper was distracted by Lewiston police officers. There is a
16 specific reference to him telling them to leave him alone for the next four (4) minutes.
17 Instead of them leaving him alone, they continued to talk to him and he continued to talk
18 to them. He directed them to get the advisory forms. This is not a situation in which all
19 of this is happening in an enclosed room similar to what one would find with the
20 Intoxilyzer 5000 EN at the Nez Perce County Jail. Mr. Besaw was sitting in the vehicle,
21 the door was open, the Trooper was standing outside talking to at least one Lewiston police
22 officer regarding the advisory form. The court can go back and review the discussion.
23
24
25

26 CLOSING ARGUMENT

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1 During the breath testing waiting period and sequence one of the passengers got out
2 of the vehicle and approached the law enforcement vehicle. At that time, the Trooper's
3 attention was directed to the passenger, due in part to officer safety since he was there by
4 himself. His attention would have been directed away from Mr. Besaw and towards the
5 passenger. His sight and hearing was directed towards someone other than Mr. Besaw.
6

7 Please note that none of the case law cited about requires that anything be proven
8 by the driver other than the 15 minute wait wasn't followed. The case law is very clear.
9

10 On top of all of these distractions, in the middle of the breath testing sequence, the
11 officer's attention was again directed away from Mr. Besaw and to the wife of one of the
12 other passengers who had arrived, exited her vehicle, and approached the police vehicle.
13

14 There were three (3) separate distracting incidents during the 15 minute wait. It is
15 very clear that the appellate courts do not have much patience for the lack of the 15 minute
16 wait if its outside or in a vehicle.

17 In State v. Carson, (supra), the observation period was in the vehicle and the court
18 found that the observation period wasn't valid. In Carson, there were no other distracting
19 police officers, there weren't distractions of passengers or passenger's wives. Carson and
20 officer were in an enclosed car with window wipers, engine noise and tires on the road.
21 In Mr. Besaw's case there are the three interruptions by other people. There is the radio
22 traffic from dispatch during the 15 minute wait. There is the noise of the window wipers.
23
24

25
26 CLOSING ARGUMENT

48

134

1 There is the noise of passing traffic. It is clear that the 15 minute wait was not followed
2 in Besaw.

3 There is no evidence in this case, like in Carson, that some other senses replace the
4 senses of sight or hearing. There is no indication that standing outside a vehicle with
5 someone sitting inside a vehicle, that you could smell anything such as a burp or the like.
6 Obviously, the sense of touch and taste doesn't apply. The three (3) senses that were
7 applicable in this case were distracted or not realistically available during the 15 minute
8 wait. The court has to wonder why with the Intoxilyzer 5000 EN, approximately 5 or 10
9 minutes away from the location of the stop, was not used. The trooper used the Lifeloc
10 instead of the Intoxilyzer 5000 EN which is in an enclosed room at the jail, with no
11 distractions and the like.
12
13
14

15 Like in Defranco (supra) and Carson (supra), there was no proper 15 minute wait.
16 The court should make that finding. The breath test result should be stricken.

17
18 **VI.**
CONCLUSION

19 The court has a duty to grant the motion to suppress the field sobriety tests and the
20 breath test in this case.
21
22
23
24
25

1 DATED this 20 day of May, 2011.

2 CLARK and FEENEY, LLP

3
4 By 

5 Charles M. Stroschein, a member of
6 the firm. Attorneys for Defendant.

7 I hereby certify on the 20
8 day of May, 2011, a true copy
9 of the foregoing instrument

10 was: Mailed
11 Faxed
12 Hand delivered to:

13 Justin J. Coleman
14 Deputy Prosecutor
15 Nez Perce County Prosecutor's Office
16 P.O. Box 1267
17 Lewiston, ID 83501

18 CLARK and FEENEY, LLP

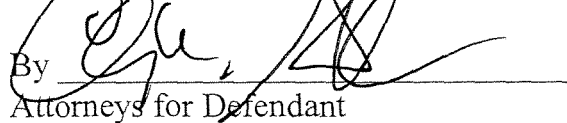
19
20 By 
21 Attorneys for Defendant
22
23
24
25

EXHIBIT A

CLOSING ARGUMENT



IDAHO STATE POLICE
NOTICE OF ACTION ON PUBLIC RECORDS REQUEST

Name of Requestor: Charles M. Stroschein Date: 12/16/2010

Address of Requestor: Clark and Feeney, LLP: charm@clarkandfeeney.com

I. Request Granted

- The requested record is enclosed.
You may inspect and photocopy the requested records during regular office hours by contacting

Records Custodian/Designee: Katrina Williams Title: Major Telephone Number: 208-884-7219

II. Request Denied in Part or Denied in its Entirety

Your request has been processed. However, after consultation with legal counsel for the Idaho State Police, your request has been denied in part; denied in its entirety pursuant to:

- Idaho Code 9-340A(1) through 9-340C(17)
Idaho Code 9-340D(1) through 9-340D(15)
Idaho Code 9-340E(5)
Idaho Code 9-342(3)(a) through 9-342(3)(e)
Other/Explanation: Record not maintained in format requested, contact records custodian for more information

The statutory exemptions cited above are found in Idaho's Public Writings Act and are not a complete listing of all other legal bases or privileges which may also apply.

You have the right to appeal this denial or partial denial of your request by filing a petition in conformance with the provisions of the Idaho Public Records Law, Title 9, Chapter 3, Idaho Code. Your petition must be filed in the 4th Judicial District Court of the State of Idaho within one hundred eighty (180) calendar days of the date of mailing of this notice.

You may request these records from the County Prosecuting Attorney's office.

III. Additional Comments:

Sincerely,

K. Ann Cronin, Special Assistant

Deputy Attorney General

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Gamette, Matthew

From: Gamette, Matthew
Sent: Monday, July 19, 2010 11:29 AM
To: Cronin, Ann; Wills, Kedrick
Cc: Grunke, Jenny; Johnston, Jeremy
Subject: IDAPA Changes Needed

Importance: High

These are the two changes we would like to make to IDAPA. They are fairly minor, but are causing all kinds of issues in court. The first one is an issue because we do not do the breath testing in a laboratory (most are done in police stations or on the road). The second is an issue that we approve solutions and not the vendors of the solutions. Attorneys have started to challenge that we do not have an approval process for a vendor. We fixed that with internal procedures, but we don't just give vendors blanket approval for any solution they make (we verify each one). These are the only changes we wanted to make but I think Stephanie also had one concern about the rules not specifying who could make changes or be in compliance with the way the rules are currently written. I don't remember the exact nature of what she thought it needed to contain.

05. Laboratory. "Laboratory" shall mean the place at which specialized devices, instruments and methods are used by trained personnel to measure the concentration of alcohol in samples of blood, breath or urine for law enforcement purposes.

05. Checks. Each breath testing instrument shall be checked on a schedule established by the Department for accuracy with a simulator solution provided by or approved by the department or by a source approved by the department. These checks shall be performed according to a procedure established by the department. (3-19-99)

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

199

Gamette, Matthew

From: Gamette, Matthew
Sent: Tuesday, July 20, 2010 1:16 PM
To: Johnston, Jeremy
Cc: Nörd, Anne
Subject: Breath Alcohol SOP Fixes—your attention required

Jeremy,

I made many changes to the Breath Alcohol SOP. I titled it Idaho Breath Alcohol SOP. I also added the current history method of doing revisions and made it revision 0. Many attorneys complained that they could not tell which version they were looking at so we will use the same format we use for everything else and since there were no previous revision numbers—starting with 0 works just fine. I added the approval footer, changed and added some vocabulary definitions, and made the wording standard as performance verification or performance verification solution. I also added some hyperlinking in the document. I will need a checklist done for this and all the other documents. Skyler and Anne felt strongly about the "approximately" issue and I will let you decide on that and any other final revisions before we publish this out to the world. Because this will be posted on the internet page, I will make it a PDF as part of the publication process. I will add a watermark when it is printed that all printed versions are not official copies. Hopefully that will drive them back to the internet for the official version.

The document is still in the same folder—let me know when you are done with your final review.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Gamette, Matthew

From: Gamette, Matthew.
Sent: Monday, August 23, 2010 9:28 AM
Subject: ISP Breath Alcohol Changes

Dear Chief, Sheriff, Prosecutor, BTS, or Breath Instrument Operator,

This communication is to inform you that we have made some changes to the breath alcohol program. I want you to be aware of these changes and the ways they may impact your operations. The ISPFS laboratory system has made the determination to pursue ASCLD/LAB 17025 accreditation in Breath Testing Instrument Calibration. As our deadlines for certification approach, you will see more and more standardization in the program. Effective today we have implemented several changes. The documents are all posted on the ISPFS Alcohol Website.

- 1) There will be two tiers of manuals for each BTS or Operator.
 - The Idaho Standard Operating Procedure (SOP) contains the methods to follow in general. This manual has been revised and updated.
 - The "training manuals" have been replaced by "reference manuals." Each instrument series has a reference manual. We found that in a number of cases the training manual and SOP had conflicting information and the courts were deciding which manual to use for interpretation. In the revised manuals we have made it very clear that the SOP is the document that should be referenced and the reference manuals are really for the BTS or Operator reference when working with the instrument menus. We tried to take out any conflicting wording. If we missed something, please let us know. **The BTS and Operators should be very familiar with the SOP.**
- 2) The vocabulary for the program is changing to conform with our accreditation guidelines. You will notice the use of "performance verification" and "performance verification solution." While the instrument software may still call for a "calibration check"—we will now be calling any checking done by a BTS or Operator in the field a "performance verification." The BTS or Operator does not perform any calibration—thus the BTS or Operator is checking the performance of the instrument (a performance verification). We know it will take some time to get used to the new vocabulary, but the only time we will use the term "calibration" is in reference to what the ISPFS analyst does in the laboratory. Again, a BTS or Operator performs and logs a performance verification using a performance verification solution from RepCo. The performance verification solution is the same thing as a simulator solution.
- 3) The Performance Verification Solution lot certifications will remain the same, but more information will be provided on the certificate regarding our explicit approval of RepCo to provide the solutions in Idaho.

We will make every effort to keep you updated on the progress of this program. We hope that the changes will have minimal impact on your operations. Feel free to contact me or Breath Alcohol Discipline Leader Jeremy Johnston using the contact information provided below.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
matthew.gamette@isp.idaho.gov
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Jeremy Johnston

201..

Gamette, Matthew

From: Gamette, Matthew
Sent: Friday, August 27, 2010 8:49 PM
Subject: Idaho Breath Alcohol SOP Updated

Importance: High

Sheriff, Chief, BTS, Prosecutor, or other stakeholder,

We have published revision 1 of the Idaho Breath Testing SOP today. The release of revision 0 gave us the opportunity to hear from many of you regarding the SOP. Thank you for your comments. You will notice in revision 1 we have temporarily suspended section 8.0 (MIP/MIC). We suspended this section due to a number of concerns over statutory authority. We are currently doing some legal research and this section will be reissued when the legal concerns have been worked out. The target date for reissue is November 1st 2010. We wanted to make you aware of this date because we will likely be issuing several new things for the MIP/MIC procedure. ISPFS will require in the procedure that all breath testing instruments used in MIP/MIC be calibrated and certified by an ISPFS laboratory. We will also require that any operator of the breath testing instrument using the MIP/MIC procedure be properly trained by a BTS or through the ISPFS training program. While the legal authority is being worked out by the Attorney General, we wanted to give agencies time to get the instruments to the ISPFS lab for certification and to accomplish any operator training that may be necessary.

While we believe that ISP has the statutory authority over breath testing instruments in Idaho, the MIP/MIC procedure will likely be presented as "best practice." If agencies elect not to certify instruments, train operators, and follow the recommended procedure, ISPFS will not provide expert testimony or other support of the results from the instruments. In essence, you will be on your own to defend your results. It should also be noted that agencies are not required to use breath testing instruments in MIP/MIC cases, but if these instruments are used, we highly recommend that agencies follow the new procedure. The procedure should be out for a comment period starting October 1st and then the final procedure will be distributed by the middle of October for agencies to work out the details before the November 1st publication date.

Lastly, when we published these procedures we quickly realized that we do not have a way to communicate with the Breath Testing Specialists around Idaho. Many of the emails were returned due to bad contact information. Because contact information changes so frequently, we have placed the responsibility on each BTS or Operator to get the information they need to be current in the program. We have set up an "ISPFS Alcohol News Release Email List" to distribute any updates or revisions. If you received this email directly, you are already registered on this list (we already manually added you to the list). If you had this email forwarded to you from a colleague, you will need to follow the instructions below to register. There is no need to register if you received this email directly. If you wish to unsubscribe, click on the link below. Each BTS, Operator, Prosecutor, Sheriff, Chief, ITD employee, etc. that wishes to receive further communication directly from the ISPFS Alcohol program will need to be on our list. While the information is available to anyone on our public website, we will only notify the individuals on our list when we make updates (for enforcement purposes). We will only register law enforcement or others involved in the investigation or prosecution of Alcohol cases in Idaho for this list.

[Click here to register](#) (must provide agency name and job title to register)

[Click here to unsubscribe](#)

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

Gamette, Matthew

From: Gamette, Matthew
Sent: Thursday, September 02, 2010 12:12 PM
To: Eric Moody
Cc: Johnston, Jeremy
Subject: Questions about the manuals

Thank you for your comments, I am forwarding them to Jeremy Johnston for review. Jeremy can email out clarification on these items. If there are any changes needed, we will put them in during our next revision. Thank you again for taking the time to communicate with us. If there is any way we can help you, do not hesitate to ask.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Eric Moody [mailto:Eric.Moody@itd.idaho.gov]
Sent: Thursday, September 02, 2010 1:08 PM
To: Gamette, Matthew
Subject: RE: Idaho Breath Alcohol SOP Updated

Mr. Gamette,

I am one of the three ITD ALS hearing officers. During oral arguments, two attorneys have already argued the two minute separation between two breath test results (SOP 6.2) did not occur with the Intoxilyzer 5000 EN. Through my BTS training, my understanding is that the Intoxilyzer 5000 EN is programmed to inform the operator when to have the driver blow. Therefore is SOP 6.2 for the Alco Sensor III and Lifeloc FC20 and not the Intoxilyzer 5000 EN?

Also I have reviewed the Intoxilyzer 5000 manual. On page 27 number 12 you have SOP III as a reference. I believe this SOP is from an old reference section number.

As a hearing officer, I really respect the time your agency has taken to update this manual and the SOPs. I hope these updates reinforce our ALS decisions.

Eric G. Moody

ALS Hearing Officer

208-332-2003

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information exempt or prohibited from disclosure under applicable law. If you are not the intended recipient of this e-mail, please notify this sender immediately and do not deliver, distribute or copy this e-mail, or disclose its contents or take any action in reliance on the information it contains.

From: Garnette, Matthew [mailto:matt@garnette@isp.idaho.gov]
Sent: Friday, August 27, 2010 8:49 PM
Subject: Idaho Breath Alcohol SOP Updated.
Importance: High

Sheriff, Chief, BTS, Prosecutor, or other stakeholder,

We have published revision 1 of the Idaho Breath Testing SOP today. The release of revision 0 gave us the opportunity to hear from many of you regarding the SOP. Thank you for your comments. You will notice in revision 1 we have temporarily suspended section 8.0 (MIP/MIC). We suspended this section due to a number of concerns over statutory authority. We are currently doing some legal research and this section will be reissued when the legal concerns have been worked out. The target date for reissue is November 1st 2010. We wanted to make you aware of this date because we will likely be issuing several new things for the MIP/MIC procedure. ISPFS will require in the procedure that all breath testing instruments used in MIP/MIC be calibrated and certified by an ISPFS laboratory. We will also require that any operator of the breath testing instrument using the MIP/MIC procedure be properly trained by a BTS or through the ISPFS training program. While the legal authority is being worked out by the Attorney General, we wanted to give agencies time to get the instruments to the ISPFS lab for certification and to accomplish any operator training that may be necessary.

While we believe that ISP has the statutory authority over breath testing instruments in Idaho, the MIP/MIC procedure will likely be presented as "best practice." If agencies elect not to certify instruments, train operators, and follow the recommended procedure, ISPFS will not provide expert testimony or other support of the results from the instruments. In essence, you will be on your own to defend your results. It should also be noted that agencies are not required to use breath testing instruments in MIP/MIC cases, but if these instruments are used, we highly recommend that agencies follow the new procedure. The procedure should be out for a comment period starting October 1st and then the final procedure will be distributed by the middle of October for agencies to work out the details before the November 1st publication date.

Lastly, when we published these procedures we quickly realized that we do not have a way to communicate with the Breath Testing Specialists around Idaho. Many of the emails were returned due to bad contact information. Because contact information changes so frequently, we have placed the responsibility on each BTS or Operator to get the information they need to be current in the program. We have set up an "ISPFS Alcohol News Release Email List" to distribute any updates or revisions. If you received this email directly, you are already registered on this list (we already manually added you to the list). If you had this email forwarded to you from a colleague, you will need to follow the instructions below to register. There is no need to register if you received this email directly. If you wish to unsubscribe, click on the link below. Each BTS, Operator, Prosecutor, Sheriff, Chief, ITD employee, etc. that wishes to receive further communication directly from the ISPFS Alcohol program will need to be on our list. While the information is available to anyone on our public website, we will only notify the individuals on our list when we make updates (for enforcement purposes). We will only register law enforcement or others involved in the investigation or prosecution of Alcohol cases in Idaho for this list.

[Click here to register](#) (must provide agency name and job title to register)

[Click here to unsubscribe](#)

Matthew Garnette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125

Gamette, Matthew

From: Gamette, Matthew
Sent: Tuesday, October 12, 2010 10:44 AM
To: Anderson, Skylee; Lewis, Lamora; Cutler, Rachel; Johnston, Jeremy; Larson, Shannon; Meade, Donna; Nord, Arne
Cc: Wills, Kedrick; Owsley, Corinna
Subject: Breath Alcohol AM 2.0 Approved.

Importance: High

Breath Alcohol AM 2.0 Portable Breath Testing Instrument Calibration and Certification has been approved and issued by the Quality Manager. It can be found on the I: drive with the other approved methods. Because each lab had a procedure to perform this initial calibration and certification, all work notes should be marked obsolete or destroyed. Each Regional BTC will now only use AM 2.0 when performing this service on portable breath testing instruments. We appreciate all the work Jeremy did to write this method and all the work reviewing this document by everyone else.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Gamette, Matthew

From: Gamette, Matthew
Sent: Saturday, October 30, 2010 10:01 AM
To: Ryan W. Tatum
Cc: Johnston, Jeremy
Subject: RE: Idaho Breath Alcohol Standard Operating Procedure Revision---EFFECTIVE NOVEMBER 1st

Importance: High

I will forward these suggestions to Jeremy Johnston (Breath Alcohol Discipline Leader) and we will see what we can do about getting these into our revision that will go live on Monday. Thank you for taking the time to give us such constructive comments. Feel free to email me at any time with suggestions and we will get them implemented in the next published revision. We will also add you to our revision committee so that you can offer the first line advise (as you suggested below). Thanks again for your time.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

-----Original Message-----

From: Ryan W. Tatum [mailto:rtatum@payettecounty.org]
Sent: Saturday, October 30, 2010 9:45 AM
To: Gamette, Matthew
Subject: RE: Idaho Breath Alcohol Standard Operating Procedure Revision---EFFECTIVE NOVEMBER 1st

Mr. Gamette,

I have two suggestions before implementing this new SOP. Additions are marked with < and > symbols. The first is to amend section 6.2 as follows:

**Section 6.2 was clarified for instrument specificity.
A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes < or more > apart for the ASIIIs and the FC20s to allow for the dissipation of potential mouth alcohol contamination.

I have found that at 2 minutes between breath samples, the second breath sample is often lower than the first sample but at 3 minutes apart, the results are often identical.

The second suggestion is to include the other charge code for Minor in Possession of Alcohol, I.C. 23-604, in section 8.0. Both charge codes are valid and each is used frequently. In the past, one statute provided a driver's license suspension and the other did not. Now they both carry the same consequences. It is currently up to officer preference as to which code to charge. By adding I.C. 23-604, we would avoid a potential court problem when an officer follows the new MIP/MIC policy but charges under I.C. 23-604 instead of the specified I.C. 23-949. The amended verbage would be as follows:

Breath testing instruments certified by ISPPS are often used in investigating violations of Idaho Code 23-949 (punishment set forth by I.C. 18-1502) < or Idaho Code 23-604 (punishment set forth by I.C.

18-1502) >, wherein a person under twenty-one (21) years of age is deemed to have possessed and consumed alcohol. Unlike the Driving Under the Influence statutes and their associations with per se limits of 0.08 and 0.20, a specific level of alcohol is not required to prove a violation of I.C. 23-949 < or I.C. 23-604 >. Now is there a requirement that the State prove the person is impaired by alcohol. Rather, the presence or absence of alcohol is a determining factor for proving the offense. Therefore, there is a different standard operating procedure associated with this type of charge. The main purpose of the procedure outlined below is to rule out mouth alcohol as a potential contributing factor to the results given during the breath testing done for MIP/MIC cases.

I would consider it a privilege to have the opportunity to provide feedback earlier in the process for future changes as a BTS and front line patrolman.

Thank you,

Dep. Ryan Tatum, BTS
Payette CSO

-----Original Message-----

From: no-reply.forensics@isp.idaho.gov
[mailto:no-reply.forensics@isp.idaho.gov]
Sent: Fri 10/29/2010 3:40 PM
To: Ryan W. Tatum
Subject: Idaho Breath Alcohol Standard Operating Procedure Revision---EFFECTIVE NOVEMBER 1st

You are receiving this email because you subscribed (or were subscribed) to the ISP Breath Alcohol List. This is notification that the Idaho Breath Alcohol Standard Operating Procedure will be revised (effective Monday November 1, 2010). This draft revision has been circulated to a panel of attorneys, scientists, and hearing examiners. Their comments have been implemented in this revision.

Below are the changes that will be in effect November 1st. We are providing them to your agency in advance of implementation so that you can be prepared and implement the changes effectively on November 1st. Please also let me know of any typographical errors or other considerations you think we may have missed.

**Clarified section 5.1.3 for the use of 0.20 solutions A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 or 0.20 performance verification solution must be performed within 24 hours, before or after an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification. Reference 5.1.4.1 for clarification on the use of the 0.20 solution in this capacity.

**Section 6.2 was clarified for instrument specificity. A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes apart for the ASIIs and the FC20s to allow for the dissipation of potential mouth alcohol contamination.

**Added section 6.2.2.3
In the event that all three samples fall outside the 0.02 correlation, and the officer suspects that mouth alcohol could have been a contributing factor, then they should restart the 15 minute observation period and retest the subject.

****Added section 6.2.2.3.1**

If the officer does not suspect that mouth alcohol was present, and that the sample variability was due to a lack of subject cooperation in providing the samples as requested, then the samples can be considered valid if all three samples are above the per se limit of prosecution.

****Added section 6.2.2.4**

If all three samples fall outside the 0.02 correlation, the officer may at their discretion elect to have a blood sample drawn for analysis in lieu of retesting the subjects breath alcohol concentration.

****Added section 8.0 for the MIP/MIC procedure: Minors in Possession/Minors in Consumption Procedure**

Breath testing instruments certified by ISPFS are often used in investigating violations of Idaho Code 23-949 (punishment set forth by I.C. 18-1502), wherein a person under twenty-one (21) years of age is deemed to have possessed and consumed alcohol. Unlike the Driving Under the Influence statutes and their associations with per se limits of 0.08 and 0.20, a specific level of alcohol is not required to prove a violation of I.C. 23-949. Nor is there a requirement that the State prove the person is impaired by alcohol. Rather, the presence or absence of alcohol is a determining factor for proving the offense. Therefore, there is a different standard operating procedure associated with this type of charge. The main purpose of the procedure outlined below is to rule out mouth alcohol as a potential contributing factor to the results given during the breath testing done for MIP/MIC cases.

8.1 15 minute observation period: The monitoring/observation period is not required for the MIP/MIC procedure. The duplicate samples, separated by approximately 2 minutes or more and within the 0.02 correlation, provide the evidence of consistent sample delivery, the absence of mouth alcohol as well as the absence of RFI (radio frequency interference) as a contributing factor to the results of the breath test.

8.2 MIP/MIC requirements:

8.2.1 The breath alcohol test must be administered by an operator currently certified in the use of that instrument.

8.2.2 The instrument used must be certified by ISPFS.

8.2.2.1 The instrument only needs to be initially certified by ISPFS. Initial certification shows that the instrument responds to alcohols and not to acetone.

8.2.2.2 The instrument used does not need to meet other requirements set forth in previous sections of this SOP. It does not need to be checked regularly or periodically with any of the 0.08 or 0.20 solutions.

8.2.3 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.

8.2.4 The officer should have the individual being tested remove all loose foreign material from their mouth before testing. The officer may allow the individual to briefly rinse their mouth out with water prior to the breath testing.

8.2.5 Any material containing alcohol left in the mouth during the entirety of the breath testing sampling could contribute to the results in the breath testing sequence. (For clarification refer to section 8.1)

8.3 Procedure:

A complete breath alcohol test includes two (2) valid breath samples taken from the subject and preceded by an air blank. The duplicate breath samples do not need to be consecutive samples. The individual breath samples should be 2 minutes or more apart, to allow for the dissipation of potential mouth alcohol contamination.

NOTE: A deficient or insufficient sample does not automatically invalidate a test sample.

8.3.1 If the subject/individual fails or refuses to provide a duplicate adequate sample as requested by the operator, the single test result will be considered valid.

8.3.1.1 The operator may repeat the testing sequence as required by circumstances.

8.3.1.2 The operator should use a new mouthpiece for each individual and for each series of tests (i.e. complete set of breath testing samples).

8.3.2 A third breath sample is required if the first two results differ by more than 0.02.

8.3.2.1 The results for duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subjects breath pathway (mouth alcohol), show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

8.3.2.2 In the event that all three samples fall outside the 0.02 correlation, and the officer suspects that mouth alcohol could have been a contributing factor, then they should administer a 15 minute observation period and then retest the subject. If mouth alcohol is not suspected, then the officer may reinstruct the individual in the proper breath sample technique and retest the subject without administering a 15 minute observation.

8.3.3 The operator should manually log test results and/or retain printouts for possible use in court.

8.3.4 The instrument should not be in passive mode for the testing of subjects for the purposes of the previous sections.

8.4 Passive mode:

8.4.1 The passive mode of testing using the Lifeloc FC20 or ASI III should be used for testing liquids or containers of liquid for the presence or absence of alcohol.

8.4.2 The passive mode can be used for screening purposes on individuals who are required to provide breath samples whenever requested by a law enforcement agency. Example may include but are not limited to:
probationers, work release, parolees, prison inmates, etc.

To remove your email address from the Forensic Services Newsletter, please click here
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<<mailto:no-reply.forensics@isp.idaho.gov?subject=Remove%20from%20Breath%20Alcohol%20List>> .

Johnston, Jeremy

From: Johnston, Jeremy
Sent: Thursday, March 27, 2008 9:50 AM
To: Jewkes, Darren
Cc: Anderson, Skylee; Laycock, Dave; Nord, Anne
Subject: RE: Seeking review and comments for proposed modification to the BrAC SOP

Here are some suggestions for changes to the SOP:

my changes are in red

Disclaimer: The changes may seem rather extensive, but most are formatting corrections because numerous prosecutors have requested to not have subsections with more than 5 numbers long. It shouldn't change the meaning of the documents, but they won't have to refer to section 2.3.1.2.1.1.2 any more.



bracSOP308.doc

The "big" changes refer to the 26 month expiration, and the one month expiration of solutions.

JJ

PS: happy reading.

-----Original Message-----

From: Jewkes, Darren
Sent: Tuesday, March 25, 2008 1:55 PM
To: Johnston, Jeremy; Anderson, Skylee; Laycock, Dave
Cc: Owsley, Corinna
Subject: Seeking review and comments for proposed modification to the BrAC SOP

Dave and I have discussed making a small clarification to the SOP to allow for the old acceptable range (0.70 - 0.90) still be used for older lot numbers that have not yet expired (ie 07801) << File: bracSOP308.doc >> , and to use the new value (+/- 10%) for new lot numbers. Please take a look at the blue highlighted portion under section 2 on page 9 and share your comments. When we reach an agreement the SOP can be sent to Corinna for final green light before it gets posted to the website. By the way, this clarification was announced in the March 2008 newsletter which was just mailed out and is posted to the website.

My comment is that if we include an expiration date for the lot number expiring in August 2008, then we will end up making another SOP change after that to remove the date reference when it is no longer valid. Rather than do this what do you think about stating that the new acceptable range of 10% only applies to lot # 07804 and subsequent lots?

I'm not sure if I dare ask, but are there any other parts of the SOP that you feel needs immediate attention such as changing "will" to "may" or "approximately" or doing away with "monthly" etc. (Jeremy, here is your chance:).

Your comments are appreciated.

Darren B. Jewkes
Idaho State Police
Forensic Services
700 S Stratford Dr

Meridian, ID 83642
(208) 884-7181
(208) 884-7197 (Fax)

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Johnston, Jeremy

From: Johnston, Jeremy
Sent: Tuesday, March 11, 2008 11:01 AM
To: Anderson, Skyler
Subject: RE: Simulators

The gist of the expiration date of the sim solutions deals with the SOP regulating when the bottle of solution needs to be changed. As of now, it reads that for the alcosensors the a single bottle of solution is good for 15-20 test and then should be changed (the intox is good for 100 tests). The problem occurs because both read that the solution should be changed every X number of tests, or after one month, whichever comes first. If the testing shows that the solution is good for 15-20 tests (or 100) why create a magic number of "or one month" and have the solutions thrown out at that time. If the solutions do lose alcohol after sitting around for more than a month, then the instruments will show that data and when it they are out of calibration, the solution is changed and they are rerun with the new solution to see if it was the solutions. There is really a built-in failsafe mechanism for a bad solution already.

The original complaint about the one month time frame came from a small agency and dealt with the 0.20 solution. They only had a few instruments and used the 0.20 solution 2-3 times to do their cal checks. Then when the month was over, they had to throw it out even though it should still be good for 15+ more checks. It was seen as a waste of money to the agency to have to buy 12 bottles of 0.20 solution a year when they could get by with about 3 if they didn't have to throw it out every month.

As for the 0.20 requirement, I am suggesting not dropping it altogether, I am just suggesting putting in some wiggle room language so that in the event that the 0.20 is not run in a calendar month, the prosecution only loses the enhanced penalty charge that the 0.20 check supports and not the entire DUI charge. DUI's deals with thresholds and for regular DUI, the threshold is 0.08. If the proper cal checks are in place to support that charge, then the charge should still be valid. The person that blows a 0.14/0.15 should not get off on a technicality because the BTS failed to run a cal check to support a charge that is not pending for that case. After all, a year and a half ago, the 0.20 check wasn't even required and the prosecution had no problems at all until they got above the 0.20 threshold for the enhanced penalty. That was the reasoning behind instituting the 0.20 check in the first place. Cases are currently being tossed because of this. It seems like it is a disservice to the state of Idaho to continue to keep that loophole open.

JJ

PS: on a personal note and off the record, there has been some serious communication problems in the BTS program and I wouldn't just discount the fact that an agency might not have known about the new SOP and testing requirements. After all, the SOP was just changed in February '08, and we were notified more than a week after the fact, and only about the addition of the FC20 to the SOP. Nothing was said about changing the acceptability requirements for the 0.08 solutions?

-----Original Message-----

From: Anderson, Skyler
Sent: Tuesday, March 11, 2008 8:53 AM
To: Laycock, Dave; Johnston, Jeremy
Cc: Jewkes, Darren
Subject: RE: Simulators

Obviously, I wasn't around to learn about the FC20 condensation issues, so I don't have any input in that respect. In terms of the one month time limit on the simulator solutions, Jeremy mentioned that there hasn't been any testing to show that it loses alcohol when it is capped and sitting around. From my blood alcohol analysis experience, the one month time limit does seem strict. I would support lengthening the expiration date of the solution, but I don't think dropping the expiration date all together is a good idea. The solution should have an expiration date, otherwise agencies will be running their solutions that are a year old and wondering why it's not working. Unfortunately, if no studies have been done to determine how stable it is, then determining when exactly that expiration date should be is impossible. Is it a study that we should run over several months on our GC/FID's?

I agree with Dave about running the 0.20 solution, it is the operator's responsibility to be following the latest SOP accordingly, and their failure to do so is either due to laziness or negligence. I was actually a witness for a DUI trial

(testifying to my blood alcohol analysis) in Challis and I saw the breath testing evidence thrown out because the agency didn't run the 0.20 solution. They didn't run the 0.20 because they supposedly didn't know about the requirement and didn't have the newest SOP. As long we communicate with the breath testing specialists and they all KNOW about the changes in SOP's, then I don't think we should drop the 0.20 requirement.

Darren and Jeremy, I will be keeping in touch with both of you about the CMI class in Kentucky. During the week of the class, I have a subpoena to testify on a murder trial in Lemhi county. As of now, they cannot reschedule or release my subpoena because they have already purchased plane tickets for other witnesses around the country to fly in. I am waiting to see if they will let me testify by telephone, if not, they may fly me in for the trial as well. But, if I miss the first three days of a five day class, what's the point in attending the class? Anyway, I'll keep you posted.

Thanks,

Skyler

-----Original Message-----

From: Laycock, Dave
Sent: Tuesday, March 11, 2008 7:30 AM
To: Johnston, Jeremy
Cc: Jewkes, Darren; Anderson, Skyler
Subject: RE: Simulators

Why do we want to go backwards? I didn't say there was not testing to show it loses alcohol just sitting there; I don't know. What happens if the simulator is on 24/7 but no tests are run? I just don't think this is the time to cut back on quality standards.

JJ, you mentioned the cases that were getting dismissed because agencies weren't running the 0.20. They could easily cure the problem simply by spending 30 minutes per month and complying with the SOP. They could even save the 0.20 and use it the next month, maybe two. Face it, most agencies would probably be happy if the SOP was trimmed down to 2 or 3 pages total.

DL

-----Original Message-----

From: Johnston, Jeremy
Sent: Monday, March 10, 2008 8:50 AM
To: Laycock, Dave
Cc: Jewkes, Darren; Anderson, Skyler
Subject: RE: Simulators

Exactly correct. If the testing reduces the alcohol, and it is a closed loop system, then why have the one month limit on the solution? If the studies show that it loses some alcohol with testing, and there isn't any testing to show that it loses alcohol just sitting there, then we should get rid of the one month limit.

JJ

PS: Skyler, to bring you up to speed, we are discussing the possibility of dropping the one month time limit on the solutions because if the solution is good and it loses alcohol with testing, why have a one month time limit on its use?

-----Original Message-----

From: Laycock, Dave
Sent: Saturday, March 08, 2008 10:05 AM
To: Johnston, Jeremy
Cc: Jewkes, Darren; Nord, Anne; Meade, Donna; Anderson, Skyler
Subject: Simulators

JJ:

Good to see you Thursday!

As far as the simulators, when we were talking about them I forgot one thing. Yes, the system on the IZ 5000 is closed loop, but there is ample evidence that ethanol is lost during testing anyway. Not as rapidly as in an open system but it does decline. Dubowski in 1991 reported a drop of 2% after 50 tests.

CLOSING ARGUMENT

0000016

Another study reported a loss of 0.3 mg/test in the closed system. The ENs might be more efficient but I haven't seen any studies. The study we did here a couple of years ago that led to the "100 test" recommendation in the SOP was done on an IZ with vapor recirculation.

Dave

214

Johnston, Jeremy

From: Johnston, Jeremy
Sent: Tuesday, February 26, 2008 7:58 AM
To: Jewkes, Darren
Subject: RE: fc20 manual feedback

I'd be OK with that, but my only concern is that we would then get questions about "what is linearity", "what does it mean", "how is it measured" and such all the time. Plus, the basic gist of the breath testing program is that the instrument has to be accurate at different thresholds and not necessarily linear. After all, we have never given any calculations or values for the R squared value of the line created by the cal checks, which is the measure of their linearity. As long as the reading is over a certain threshold, then the case will sink or swim based on the results. Plus the linearity at the 0.20 point would only be necessary for cases involving excessive consumption anyway, so we might be in the realm of dealing with the Idaho State Department of Redundancy Department. After all, we only really care about the instruments linearity, at the upper levels, when we have a case with results at or above the upper 0.20 level. In which case, if they didn't run the 0.20 check, the linearity isn't really in question because they would be using the 0.08 check and threshold for prosecution.

Personally, I think that "in support of the excessive consumption charge" actually covers both bases without being overly analytical in the SOP. Do we care if the instrument is linear at the 0.20 level if the breath sample is below the 0.20 level? As long as it is above the 0.08, our bases are covered.

JJ

PS: I think that is where we are getting lost in the translation. It is good scientific practice to check linearity because that lends credence to the accuracy of the numbers that the instrument generates. What is different with the BTS program is that we only need to know the accuracy of the numbers at the legally relevant thresholds. The numbers in between are irrelevant as long as they can be proven to be above the threshold that is being charged (excessive or not). I think that is where we are losing Dave.

-----Original Message-----

From: Jewkes, Darren
Sent: Mon 2/25/2008 4:55 PM
To: Laycock, Dave
Cc: Johnston, Jeremy; Anderson, Skyler
Subject: RE: fc20 manual feedback

OK. If I get both sides of this issue we have...

Jeremy (saying): Reasoning for the 0.20 checks should be stated in the SOP and be run in support of the excessive consumption charge. It is up to the agency to run the check. If they forget to run the 0.20 then they can still charge for 0.08 just not excessive consumption.

Dave (saying): In addition to running a 0.20 check for excessive consumption, it should also be run to demonstrate the linearity of the instrument. If we state as policy that the 0.20 checks only support excessive consumption then agencies are more likely to skip this check on a regular basis.

Did I get the gist of it right?

215

CLOSING ARGUMENT

0000018

What is wrong with stating both, as both are logically valid reasons? If we word the SOP to state both purposes then our bases are covered. The Operators have the burden of responsibility to run the test and if they don't it could be explained on the witness stand. If we state the justification(s) for the test (as policy), and the BTS or Operator fails to run the test, the case will either sink or swim on their actions. What more can we do?

DJ

-----Original Message-----

From: Laycock, Dave
Sent: Monday, February 25, 2008 10:48 AM
To: Jewkes, Darren
Subject: FW: fc20 manual feedback

-----Original Message-----

From: Johnston, Jeremy
Sent: Monday, February 25, 2008 10:38 AM
To: Laycock, Dave
Subject: RE: fc20 manual feedback

It absolutely would because the "must" would be replaced with a "should" in the case of an enhanced penalty situation. We could even change it to read that the 0.20 should be run once and month, and must be run to support an enhanced penalty charge. Then we have the best of both worlds. No enhanced charge without the 0.20, but if they don't run it, they can still charge regular DUI.

JJ

-----Original Message-----

From: Laycock, Dave
Sent: Mon 2/25/2008 10:22 AM
To: Johnston, Jeremy
Subject: RE: fc20 manual feedback

I sometimes have ALS folks call me with questions about procedure. Even if it were changed to specifically mention the enhanced penalties and the 0.20, I wonder if the failure to run it would still influence ALS.

-----Original Message-----

From: Johnston, Jeremy
Sent: Monday, February 25, 2008 10:10 AM
To: Laycock, Dave
Subject: RE: fc20 manual feedback

Correct, I'm just trying to close a loophole with the 0.20 and the "must" language that is being used by defense and the ALS to say that the instrument that was used wasn't properly usable because the 0.20 check wasn't performed according to the SOP. Some cases exactly like the one that you used as an example 0.12/0.12 are getting tossed in ALS because of breaks in the procedure. I just want to close the hole for defense.

216

CLOSING ARGUMENT

2

0000019

We should absolutely cover it in training, but unfortunately, the defense people like to use our written stuff against us and like us to say that the BTS didn't follow the procedure and that he somehow screwed things up.

JJ

-----Original Message-----

From: Laycock, Dave
Sent: Mon 2/25/2008 10:06 AM
To: Johnston, Jeremy
Cc: Meade, Donna; Nord, Anne; Jewkes, Darren
Subject: RE: fc20 manual feedback

JJ:

Good catch on the 0.20 solution and the 0.08 lot number change in the manual; fixed it!

As far as specifically saying the 0.20 is to support the enhanced penalties, that's up to Darren. I wouldn't go to court and testify that a 0.12/0.12 was invalid simply because the 0.20 wasn't run, but to me the 0.20 does help show linearity of the instrument as well as supporting the enhanced charge. It doesn't seem like we need to explain why something is in the SOP; that should be covered in training.

DL

-----Original Message-----

From: Johnston, Jeremy
Sent: Monday, February 25, 2008 9:51 AM
To: Laycock, Dave; Jewkes, Darren; Anderson, Skyler
Subject: fc20 manual feedback

I think it would be wise to put some wiggle room in the 0.20 check language. As it reads now, it says that the 0.20 must be run once a month or whenever the 0.08 solution lot is changed.

I think that if we added "In order to support an excessive consumption charge" the instrument must have a wet check using a 0.20 simulator solution once each calendar month and whenever a new lot of 0.08 simulator solution is put into service (top of page 22 of the manual). That gives us the wiggle room to say that if the 0.20 check is not done, it only invalidates an excessive consumption charge and not the DUI altogether. After all, if the instrument is checked at 0.08 and the person blows a .23/.24, does the fact that the 0.20 check mean that they can't be charged with regular DUI at all? I think that would be a disservice to the people of Idaho if we let that happen in court, because as it is written, that is the way that it is being fought by defense in court right now.

JJ

PS: Also the second paragraph of page 22 makes it seem like they have to do three checks each month. Maybe we could change it to read something like "The instrument has three chances to pass its calibration check. If the results after a total of three checks (two vapor samples per check) are not within acceptable range, the instrument must not be used for evidentiary testing until the problem is corrected." Also, might this also lead to the possibility of fuel cell fatigue. (Over four tests per hour?)

CLOSING ARGUMENT

Also, as a general rule for the entire manual. Could we change most of the language that could be read as "exact times" to be more general in order to prevent defense challenges. One example would be the warming of the simulator. It says that it "The Simulator must be warm, running for at least 15 minutes". This might cause defense to challenge because a timer wasn't kept running to document how long the simulator had be running. Could it be changed to something more general like "The simulator should be warmed by powering on the unit and allowing it to run for at approximately 15-20 minutes."

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Johnston, Jeremy

From: Anderson, Skyler
Sent: Thursday, July 08, 2010 10:49 AM
To: Johnston, Jeremy
Subject: RE: SOP quick review

I agree with yours and Anne's decision. I think passive testing should be strictly used for the officer's information and they should follow the breath testing procedure for all evidentiary reasons. I just wanted to know what our official opinion on passive testing is so I can instruct the BTS's. Thanks for all your hard work on these manuals. I'll start training Lamora once all of the procedures are approved.

Skyler Anderson
Forensic Scientist II
Idaho State Police Forensic Services
209 E. Lewis St.
Pocatello, ID 83201
208-232-9474 (FAX: 208-232-3697)

From: Johnston, Jeremy
Sent: Thursday, July 08, 2010 11:41 AM
To: Anderson, Skyler
Subject: RE: SOP quick review

Thanks for the quick reply. The passive testing was used primarily for Probation/parole screening and for open containers. The officers should use the mouthpiece procedure for obtaining the MIP/MIC results. Anne and I went around and around on the passive thing and its use for evidentiary purposes, and we really need to validate if we want to use it for something other than screening. There are so many variables with false positives for warm juices and temperature, and closeness to the actual liquid, etc, that we really can't endorse its use as anything other than for screening at this point. They officers could screen people using the passive testing prior to the actual evidentiary test, but that is up to them I guess. There really isn't any implied consent thing for providing only a single test for MIP/MIC cases. It would help them not burn through mouthpieces I guess. The passive testing really opens a can of worms instrumentally.

Thanks again for the quick response.

JJ

From: Anderson, Skyler
Sent: Thursday, July 08, 2010 10:36 AM
To: Johnston, Jeremy
Subject: RE: SOP quick review

The breath alcohol test must be administered by an operator currently certified in the use of the instrument used. (Delete "used")

Everything else in Section 8 looks good to me. One question (because I anticipate it coming up in BTS classes), once we adopt this procedure, does this mean that using the Pass/Fail feature of the FC20 is not allowed for evidentiary testing of minors? I think the current procedure of obtaining breath results as if it is a normal dui case is the best practice, but if

CLOSING ARGUMENT

we do allow the Pass/Fail feature to be used, I think we should establish what the Pass/Fail limits should be or at least have a procedure for the BTS to document what Pass/Fail limits that they program into the instrument prior to testing.

The SOP has my approval.

Skyler Anderson
Forensic Scientist II
Idaho State Police Forensic Services
209 E. Lewis St.
Pocatello, ID 83201
208-232-9474 (FAX: 208-232-3597)

From: Johnston, Jeremy
Sent: Thursday, July 08, 2010 10:48 AM
To: Anderson, Skyler
Subject: SOP quick review

Just added a new section to the SOP to address the MIP/MIC charge. This was requested by many officers because some judges were requiring that the DUI procedure be followed for all evidentiary samples. For MIC parties, a duplicate sample will suffice since the threshold is only presence or absence, and the only potential problem would be from mouth alcohol from legit sources (breath spray, mouth wash, etc). The duplicate sample will catch those situations and will allow the officers to process a big party without observing 15 minutes for each person involved. Its section 8 in the SOP and I also added a line to section 6 regarding the approximate time between the duplicate samples. Don't know how I missed that in the original.

If you could review this quickly and get back to me today or tomorrow, we can still release these by the end of the week.

JJ

Jeremy Johnston
Alcohol Discipline Leader
ISP Region 1 Forensics
Coeur d'Alene, ID
208-209-8706

Johnston, Jeremy

From: Anderson, Skyler
Sent: Tuesday, August 24, 2010 7:30 AM
To: Gamette, Matthew; Johnston, Jeremy
Cc: Nord, Anne
Subject: RE: ISP Breath Alcohol Changes

I agree with all of Jeremy's proposed fixes. They were all pretty minor. I strongly agree with Jeremy about the MIP procedure. If the courts start requiring certified instruments and certified operators for underage consumption results to be considered admissible in court; in my mind, this is a good side effect of the SOP. I do not think any agency in the state should be using uncertified instruments to obtain evidentiary samples. Especially, as Jeremy said, if the operator is also uncertified and is performing passive testing.

That is all;

Skyler Anderson
Forensic Scientist II
Idaho State Police Forensic Services
209 E. Lewis St.
Pocatello, ID 83201
208-232-9474 (FAX: 208-232-3697)

-----Original Message-----

From: Gamette, Matthew
Sent: Monday, August 23, 2010 3:38 PM
To: Johnston, Jeremy
Cc: Anderson, Skyler; Nord, Anne
Subject: RE: ISP Breath Alcohol Changes

Please make the changes to the manual by downloading a copy off the I: drive and making the edits. When you hear back from Jared, Christine, and Ben please provide me with all the changes that have been agreed to by all the parties. Feel free to conference call with them or whatever you need to do so that we can make everyone happy with the wording. I will post the revisions when they have your signoff.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

-----Original Message-----

From: Johnston, Jeremy
Sent: Monday, August 23, 2010 2:56 PM
To: Olson, Jared
Cc: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

I'll try to answer your questions to the best of my abilities.

1- the spelling can be easily corrected

2- the intent of 5.1.4 was to allow for the 0.20 to be usable up until it reaches the 25 verifications regardless of the time (up until the expiration dates on the bottle if necessary) up until it fails to give good results. In section 5.2.4 we can add the same language to 5.1.4 for consistency. Instead of "several" months, what language can we use to confer the meaning we want . . . that the 0.20 can be used until it expires or gives bad results and needs to be changed?

3- 18-8004c will be changed to 18-8004C

4- 0.020 should be 0.20 correct.

5- Runs . . . series . . . doesn't matter to me. Series does sound better though. With respect to the should and suggested part of the troubleshooting guide, I tried to write it so that it was a guideline for trying to troubleshoot why the tests are low. I also wanted to explain the reasoning behind why we allow three series of samples to be taken before taking the instrument out of service. I did not want the guideline to read as mandatory because I know some BTS's that use the nuclear approach and change everything if they get a initial failed series of tests. I didn't want officers to get in trouble for "not " following the guideline and maybe changing the solution first and checking hoses and leaks second.

6- see #2 and #4

7- 5.1.5 can be used (it only differs by one period and a capital H in however) but who's counting.

Finally- correct again. I can change the language to reflect something along the lines of . . . If the third performance verification fails, then the it can be assumed that a potential source of error lies with the instrument itself.

As to the MIP/MIC procedure. That section was added in response to some northern jurisdictions interpreting the SOP for DUI as the SOP for evidentiary breath testing. They had rules that in order for the BrAC to be admissible as evidence, it had to follow the SOP for evidentiary breath testing. Thus, I wrote the section for MIP/MIC admissibility.

With respect to the use of instruments by non-certified operators and non-calibrated instruments, I see this as a huge potential for the wrongful conviction of an innocent person. After all, the instrument are not specific for ethyl alcohol, and there are multiple ways of introducing legal forms of alcohol into the breath pathway or the instrument itself. The SOP really only insures the safety and protection of the potential innocent victim that was at a party and maybe just took some cold medicine or used some breath spray. They could have been there as the designated driver?? Who knows, but without the SOP and with a single test on an un-calibrated instrument by and uncertified operator, that person could have the potential to be wrongfully convicted. With the limited checks and balances that the new SOP section provides, it should drastically reduce the likelihood of a false positive result. The blanks provide a measure of protection for the ambient alcoholic conditions of the party venue itself, and the duplicate breath sample protects against the legitimate introduction of a source of alcohol into the breath pathway. If we (meaning the law enforcement agencies) have to manage one or two more steps in order to protect the innocent, then that to me seems like those are steps that we should gladly take. (and he steps down from his soapbox)

The end

JJ
Jeremy Johnston
Alcohol Discipline Leader
ISP Region 1 Forensics
Coeur d' Alene, ID

222

208-209-8706

-----Original Message-----

From: Olson, Jared
Sent: Monday, August 23, 2010 12:04 PM
To: Gamette, Matthew; Johnston, Jeremy
Subject: RE: ISP Breath Alcohol Changes

Matthew & Jeremy,

Here are a number of things I wanted to point out after my first review of the SOP.

First, on pg. 7 in section 2 - "Safety" the word "precautions" is misspelled.

Next, in 5.1.4 is it your intention for the 0.20 solution to be valid for 1 year and 1 month if the agency is only using one instrument? In 5.2.4 it reads that the same bottle may be used for several months. I suggest these SOPs be consistent. I personally do not prefer the word "several" because I foresee silly motions being filed arguing over the meaning of the word. Much like we have seen with the term "calendar month." Can a more specific instruction be given?

Third, I would suggest anywhere where Idaho Code 18-8004C be mentioned that "c" be capitalized to be consistent with how it appears in the Idaho Code. Not a big deal, just a suggestion.

Fourth, in 5.1.4 the note states, "the 0.020 performance verification." This needs to be corrected to read 0.20. For consistency I would suggest either listing all of them two places after the decimal (easier to change) or to three places after the decimal.

Fifth, in 5.1.5 again I would suggest changing 0.080 to 0.08 for consistency. I personally do not care for the term "three runs" as this seems inconsistent to me with the definition section and other areas. Maybe this is just me, but would using the term "test series" be more accurate. In addition, we might want to have discussion about the last sentence stating, "The suggested troubleshooting procedure should be followed if the initial if the initial performance verification does not meet the acceptance criteria." I think by stating the procedure "should" be followed nixes the idea the procedure is a "suggestion." I know there is a reference in the troubleshooting SOP but I foresee it at least being challenged more than once.

Sixth, in 5.2.4 I mentioned above the inconsistent language with 5.1.4 and stating the solution is good for several months. Again, in the note section the "0.020" is incorrect.

In 5.2.5 there is the 0.080. Also the note section is a big run-on sentence. I would suggest using the exact same paragraph in 5.1.5.

Finally, I don't know exactly how to express it, but 7.1.4 is sending up a signal flare in my brain. It seems to conclusory for me that if the third performance verification fails than the "only" remaining source of error lies with the instrument itself. I was thinking of how Skylar mentioned he has been sent instruments that failed the field performance verifications but when he tested them, they were within calibration.

As I mentioned in the past, I personally am against including an SOP for minors in possession but realize I could be wrong. However, in practice many of the officers using the Alco-

Sensor or FC20 for underage drinkers are not certified operators and furthermore many times the instruments they use have never been sent to the ISPPS for certification. I know this to be the case for Boise PD and I will be sending an email to Christine and Ben regarding this. Adding the SOP seems to me that it now requires a certified instrument be used for the evidence to be admissible.

Notification is the big issue and in my experience it has been a lasting issue. I still hear stories of BTS's claiming they have never heard of the 0.20 field performance verification requirement.

If I can do anything else, please let me know. I am still technically on vacation until Wednesday or Thursday, but as you can see I have been trying to keep up with my emails.

Thanks,

Jared D. Olson
Traffic Safety Resource Prosecutor
Idaho Prosecuting Attorneys Association
700 S. Stratford Drive (Idaho POST Academy) Meridian, ID 83642
208-884-7325 (Office)
208-559-1217 (Cell)
jared.olson@post.idaho.gov
www.TSRP-Idaho.org

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-----Original Message-----

From: Gamette, Matthew
Sent: Mon 8/23/2010 12:18 PM
To: Olson, Jared
Subject: RE: ISP Breath Alcohol Changes

I composed the email Friday morning, but we have so many incorrect BTS email addresses that it kept getting rejected for sending by the ISP server. I finally got all the errors corrected so that I could send it this morning. I am still concerned that many of the BTS officers do not have the word. I used our BTS class rosters since 2006, but MANY of the emails came back as rejected. We do not have a good list of all the BTS officers in Idaho. I did send it to every Chief, Sheriff, and the city prosecutors I knew about. I know I did not get it to every city prosecutor. Getting the word out will continue to be a huge problem until we have a distribution list. It also concerns me because we will be making more changes in the near future.

Jeremy has told me that the content is not much different--just that the 5000 and 5000EN were combined into one. Some of the problem wording was removed. I have attached the old ones for your review. If you keep a list of grammatical or other problems, I will get them fixed. We will be publishing revision 1 this week because of the issue Boise City is going to have with underage drinking problems. We are going to add a note for them that the tests do not have to be done sequentially (the officer can administer other tests during the two minute wait and come back to the first subject after 2 minutes). They figure they will run 500

CLOSING ARGUMENT

tests next weekend so we want to get it revised for them ASAP. I have a feeling we will hear of other issues from prosecutors and we will compile those and get them in the manual revision. If I can get all the problems to me by Tuesday 8/25, I can get the revisions done on Wednesday so we don't have issues into the next weekend. Again, I am worried about the best method to get the word out statewide. Your thoughts are appreciated. This is my top priority this week.

Jeremy is calling Ben Harmer and Christine Starr today.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

-----Original Message-----

From: Olson, Jared
Sent: Monday, August 23, 2010 11:35 AM
To: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

Matthew,

Could you email me a copy of the prior version of the SOP. I anticipate a lot of questions being sent my way this week regarding the new SOP, so I need to get started reviewing it. I am a little concerned that it went live last Friday but the BTS's have not been notified until after it went live. But I need to do a quick review to see what if any changes might be new for the BTS. I have done a quick scan and there are a few grammatical errors and inconsistencies with the decimal points (e.g. says 0.20 and then 0.200 in the same paragraph).

I have forwarded your email to be sent to all the Idaho prosecutors that are members of the IPAA. There are a number of city prosecutors who are not members and I will work on notifying those that I know of.

Thanks,

Jared D. Olson
Traffic Safety Resource Prosecutor
Idaho Prosecuting Attorneys Association
700 S. Stratford Drive (Idaho POST Academy) Meridian, ID 83642
208-884-7325 (Office)
208-559-1217 (Cell)
jared.olson@post.idaho.gov
www.TSRP-Idaho.org

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-----Original Message-----

From: Gamette, Matthew
Sent: Mon 8/23/2010 11:11 AM

To: Benjamin Harmer
Cc: Olson, Jared
Subject: FW: ISP Breath Alcohol Changes

Please forward this to those in your office that need this information. Christine Starr from Boise City just called and was concerned about the changes we made to the underage drinking section of the SOP. She was concerned that it would take them more time to do a duplicate test. Jeremy stands by that section because of mouth alcohol issues (especially in teens at a party where they may be using alcohol based breath fresheners). She said Boise City is doing emphasis this weekend and I thought you might be involved in some of that as well. Let me know if you have concerns about the new sections.

She was also concerned that we deleted the old manuals from the website. Feel free to have the defense email me for copies of the older (non-controlled versions). I did not want to leave them up and have it become a source of confusion for the BTS or court system. We now have a process to control these documents (starting with Revision 0) and the controlled version has an issue/effective date and a revision number. I will archive these manuals in my office just like all of our other manuals for the lab system. The defense can request them through the normal discovery process.

Matthew Gamette

Idaho State Police Forensic Services

Quality Manager

From: Gamette, Matthew
Sent: Monday, August 23, 2010 9:26 AM
Subject: ISP Breath Alcohol Changes

Dear Chief, Sheriff, Prosecutor, BTS, or Breath Instrument Operator,

This communication is to inform you that we have made some changes to the breath alcohol program. I want you to be aware of these changes and the ways they may impact your operations. The ISPFs laboratory system has made the determination to pursue ASCLD/LAB 17025 accreditation in Breath Testing Instrument Calibration. As our deadlines for certification approach, you will see more and more standardization in the program. Effective today we have implemented several changes. The documents are all posted on the ISPFs Alcohol Website.

1) There will be two tiers of manuals for each BTS or Operator.

The Idaho Standard Operating Procedure (SOP)
<<http://www.isp.idaho.gov/forensic/alcohol.html>> contains the methods to follow in general. This manual has been revised and updated.

... The "training manuals" have been replaced by "reference manuals <<http://www.isp.idaho.gov/forensic/certificates.html#BATManuals>> ." Each instrument series has a reference manual. We found that in a number of cases the training manual and SOP had conflicting information and the courts were deciding which manual to use for interpretation. In the revised manuals we have made it very clear that the SOP is the document that should be referenced and the reference manuals are really for the BTS or Operator reference when working with the instrument menus. We tried to take out any conflicting wording. If we missed something, please let us know. The BTS and Operators should be very familiar with the SOP.

2) The vocabulary for the program is changing to conform with our accreditation guidelines. You will notice the use of "performance verification" and "performance verification solution." While the instrument software may still call for a "calibration check"-we will now be calling any checking done by a BTS or Operator in the field a "performance verification." The BTS or Operator does not perform any calibration--thus the BTS or Operator is checking the performance of the instrument (a performance verification). We know it will take some time to get used to the new vocabulary, but the only time we will use the term "calibration" is in reference to what the ISPPS analyst does in the laboratory. Again, a BTS or Operator performs and logs a performance verification using a performance verification solution from RepCo. The performance verification solution is the same thing as a simulator solution.

3) The Performance Verification Solution lot certifications will remain the same, but more information will be provided on the certificate regarding our explicit approval of RepCo to provide the solutions in Idaho.

We will make every effort to keep you updated on the progress of this program. We hope that the changes will have minimal impact on your operations. Feel free to contact me or Breath Alcohol Discipline Leader Jeremy Johnston using the contact information provided below.

Matthew Gamette

Idaho State Police Forensic Services

Quality Manager

matthew.gamette@isp.idaho.gov

700 South Stratford Drive Suite 125

Meridian Idaho 83642

208-884-7217 Voice

208-884-7290 Fax

Jeremy Johnston

Idaho State Police Forensic Services

CLOSING ARGUMENT

Breath Alcohol Discipline Leader

jeremy.johnston@isp.idaho.gov

208-209-8706

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**IDAHO STATE POLICE
NOTICE OF ACTION ON PUBLIC RECORDS REQUEST**

Name of Requestor: Charles Stroschein Clark and Feeney Date: 4/13/11
 Address of Requestor: Lewiston ID 83501

I. Request Granted

- The requested record is enclosed.
- You may inspect and photocopy the requested records during regular office hours by contacting

Major Kedrick Wills	Commander, Police Services	208-884-7219
Records Custodian/Designee	Title	Telephone Number

II. Request Denied in Part or Denied in its Entirety

Your request has been processed. However, after consultation with legal counsel for the Idaho State Police, your request has been denied in part; denied in its entirety pursuant to:

- | | | | |
|--|--|--|---|
| <input type="checkbox"/> Idaho Code 9-340A(1) | <input type="checkbox"/> Idaho Code 9-340C(2) | <input type="checkbox"/> Idaho Code 9-340D(1) | <input type="checkbox"/> Idaho Code 9-342(3)(a) |
| <input type="checkbox"/> Idaho Code 9-340A(2) | <input type="checkbox"/> Idaho Code 9-340C(4) | <input type="checkbox"/> Idaho Code 9-340D(3) | <input type="checkbox"/> Idaho Code 9-342(3)(b) |
| <input type="checkbox"/> Idaho Code 9-340B(1) | <input type="checkbox"/> Idaho Code 9-340C(8) | <input type="checkbox"/> Idaho Code 9-340D(11) | <input type="checkbox"/> Idaho Code 9-342(3)(d) |
| <input type="checkbox"/> Idaho Code 9-340C(1) | <input type="checkbox"/> Idaho Code 9-340C(9) | <input type="checkbox"/> Idaho Code 9-340D(15) | <input type="checkbox"/> Idaho Code 9-342(3)(e) |
| <input type="checkbox"/> No Record Found | <input type="checkbox"/> Idaho Code 9-340C(17) | <input type="checkbox"/> Idaho Code 9-340E(5) | |
| <input type="checkbox"/> Other/Explanation | | | |
| <input type="checkbox"/> Record not maintained in format requested, contact records custodian for more information | | | |
| <input type="checkbox"/> ISP is not the custodian of this record, contact | | | |
| <input type="checkbox"/> ISP cannot inform you when the requested record becomes available, contact records custodian with new request | | | |

The statutory exemptions cited above are found in Idaho's Public Writings Act and are not a complete listing of all other legal bases or privileges which may also apply.

You have the right to appeal this denial or partial denial of your request by filing a petition in conformance with the provisions of the Idaho Public Records Law, Title 9, Chapter 3, Idaho Code. Your petition must be filed in the 4th Judicial District Court of the State of Idaho within one hundred eighty (180) calendar days of the date of mailing of this notice.

You may request these records from the _____ County Prosecuting Attorney's office.

III. Additional Comments:

Sincerely,

K. Ann Cronin, Special Assistant

Deputy Attorney General

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LAW OFFICES OF
CLARK AND FEENEY, LLP
THE TRAIN STATION, SUITE 106
1229 MAIN STREET
P.O. DRAWER 285
LEWISTON, IDAHO 83501

RON T. BLEWETT
WILLIAM JEREMY CARR
PAUL THOMAS CLARK
JENNIFER B. DOUGLASS
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CONNIE TAYLOR **

TELEPHONE
(208) 743-9516
(800) 865-9516
FAX
(208) 746-9160
claw@lewiston.com

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February 4, 2011

Maj. Kedrick Wills
ISP Forensic Services
700 S. Stratford Drive
Meridian, ID 83642

Re: Freedom of Information Request

Dear Major Wills:

Pursuant to I.C. §9-338, I hereby request a copy of any and all comments supplied by sheriffs, chiefs, breath-testing specialists, prosecutors, or other stakeholders regarding Idaho's breath testing system, including revision of any SOPs, manuals, or administrative rules, pursuant to the Matthew Gamette e-mail dated August 27, 2010. Mr. Gamette's e-mail notes that he thanked the sheriff, chief, breath-testing specialist, prosecutor or other stakeholder for their comments. These comments are specifically requested in this Freedom of Information Request.

We request that certified copies of said documents be sent to our office and that if any fees are incurred that we be notified prior to what the fee schedule is or copying costs would be for this request. However, if the said information can also be provided on a computer disk that could be sent, this would be acceptable.

In addition, e-mail copies of the documents would be acceptable if the agency has that capability. My e-mail address is charm@clarkandfeeny.com. Pursuant to I.C. §9-339, a three day response is required.

Thank you for your prompt attention to my request.

Sincerely,

CLARK and FEENEY



Charles M. Stroschein

CMS:cw

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CLOSING ARGUMENT

0000033

Gamette, Matthew

From: Johnston, Jeremy
Sent: Thursday, July 08, 2010 11:47 AM
To: Gamette, Matthew
Subject: BRAC SOP

The revisions to the SOP are finished. I added the minor in consumption portions that mirror the regular testing procedure sans the 15 minute observation period. Anne and Skyler reviewed it and approved of the changes and it should be ready to go out. I will be working on the calibration/certification procedure next week and that should be ready to go shortly.

||

Jeremy Johnston
Alcohol Discipline Leader
ISP Region I Forensics
Coeur d' Alene, ID
208-209-8706

Gamette, Matthew

From: Johnston, Jeremy
Sent: Thursday, July 08, 2010 9:46 AM
To: Gamette, Matthew
Subject: reviews?

All of the reviews that are in the final review folder are ready to go. I need to update the SOP after getting feedback from some officers and Anne. I am adding a MIP/MIC section to address a truncated procedure for dealing with underage drinking parties that can circumvent the 15 minute wait as the threshold for the charge is either present or not present and not the 0.08 level.

That should be done today and ready as soon as Skyler gets done with the review.

Jeremy Johnston
Alcohol Discipline Leader
ISP Region I Forensics
Coeur d'Alene, ID
208-209-8706

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Gamette, Matthew

From: Nord, Anne
Sent: Tuesday, July 20, 2010 12:40 PM
To: Anderson, Skyler; Gamette, Matthew; Johnston, Jeremy
Subject: RE: Final AM Review

A am not fond of the term approximately either. Since this is an operator SOP, I think we should have a limit. Maybe say approximately 25 no more than 30, or whatever number is appropriate. I agree with Skyler that change should wait for Jeremy.

From: Anderson, Skyler
Sent: Tuesday, July 20, 2010 11:31 AM
To: Gamette, Matthew; Nord, Anne; Johnston, Jeremy
Subject: Final AM Review

I had to save my comments and review of the AM as a "for merge" document, because the original is still locked. The changes to the AM all look good to me. Grammatically speaking, I think it gets a little redundant by saying "performance verification solutions" repeatedly; however, I do not think we should change it because this way the method is perfectly clear, especially if someone tries to take a section of the method out of context. The only other comments that I have are the same comments I have always had about using the word "approximately." We shouldn't delete these sections without Jeremy's approval, because I believe he has an argument in support of using "approximately". Personally, I think it creates ambiguity in the method and creates room for debate regarding when a performance verification is valid. In the forensic lab, we all have strict deadlines regarding when we can use a solution and I think BTS's are responsible enough to be held to a strict standard.

That is all,

Skyler Anderson
Forensic Scientist II
Idaho State Police Forensic Services
209 E. Lewis St.
Pocatello, ID 83201
208-232-9474 (FAX: 208-232-3697)

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Gamette, Matthew

From: Gamette, Matthew
Sent: Tuesday, July 20, 2010 1:16 PM
To: Johnston, Jeremy
Cc: Nord, Anne
Subject: Breath Alcohol SOP Fixes—your attention required

Jeremy,

I made many changes to the Breath Alcohol SOP. I titled it Idaho Breath Alcohol SOP. I also added the current history method of doing revisions and made it revision 0. Many attorneys complained that they could not tell which version they were looking at so we will use the same format we use for everything else and since there were no previous revision numbers—starting with 0 works just fine. I added the approval footer, changed and added some vocabulary definitions, and made the wording standard as performance verification or performance verification solution. I also added some hyperlinking in the document. I will need a checklist done for this and all the other documents. Skyler and Anne felt strongly about the “approximately” issue and I will let you decide on that and any other final revisions before we publish this out to the world. Because this will be posted on the internet page, I will make it a PDF as part of the publication process. I will add a watermark when it is printed that all printed versions are not official copies. Hopefully that will drive them back to the internet for the official version.

The document is still in the same folder—let me know when you are done with your final review.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

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Gamette, Matthew

From: Johnston, Jeremy
Sent: Wednesday, August 18, 2010 3:22 PM
To: 'Gamette, Matthew'
Subject: RE: Manuals

BRAC SOP finished and I will do the worksheet tomorrow and fax it to you for release on Friday.

]]

From: Gamette, Matthew
Sent: Wednesday, August 18, 2010 1:21 PM
To: Johnston, Jeremy
Cc: Nord, Anne
Subject: Manuals

All the manuals are now back in your court. Sorry it took so long but it took a long time to go through all the formatting you inherited.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Gamette, Matthew

From: Johnston, Jeremy
Sent: Thursday, August 19, 2010 3:41 PM
To: Gamette, Matthew
Subject: RE: all done
Attachments: SOP criteria checklist.PDF

Here you go. Not many changes to the manuals, although I did go through the Intox manual and had to change a ton of "calibration checks" to performance verification checks. I don't think that I had done that before. Also, fixed a redundancy issue in the FC20 manual with the performance verification check being duplicated partially.

JJ

From: Gamette, Matthew
Sent: Thursday, August 19, 2010 2:34 PM
To: Johnston, Jeremy
Subject: RE: all done

I don't retain the checklists—I just check them when they are sent in to make sure you answered and addressed everything. Ready when you are.....

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Johnston, Jeremy
Sent: Thursday, August 19, 2010 3:28 PM
To: Gamette, Matthew
Subject: all done

All the reviews of the SOP and reference manuals is completed. I will now finish the checklist for the SOP and scan and fax you a copy asap.

Do you have the checklists for AM 1.0 and 3.0? I can send them too if you need them.

Jeremy Johnston
Alcohol Discipline Leader
ISP Region I Forensics
Coeur d' Alene, ID
208-209-8706

Gamette, Matthew

From: Nord, Anne
Sent: Thursday, August 19, 2010 5:23 PM
To: Gamette, Matthew; Johnston, Jeremy
Subject: RE: Breath Testing Program Updates

I wanted to thank both of you for all the work you have put in on these. I hope we start seeing the pay off soon and some of the issues we have been having with court interpretations will go away.

From: Gamette, Matthew
Sent: Thursday, August 19, 2010 4:01 PM
To: Anderson, Skyler; Lewis, Lamora; Cutler, Rachel; Johnston, Jeremy; Larson, Shannon; Meade, Donna; Nord, Anne
Cc: Wills, Kedrick
Subject: Breath Testing Program Updates
Importance: High

The Alcohol webpage has been updated with the new reference manuals for the instruments and also the SOP for BTS and operators. The same information is now posted on the I: drive. These are now the official versions and they are controlled. They have been approved by the Quality Manager in the same format that we do everything else. The reference manuals are not in the ISO number formatting because they are reference manuals for the officers to use (they are not AMs). You will notice that there are no more training manuals (only reference manuals and an SOP). An email will go out to the BTS officers in the morning.

I:\International Management System\Breath Alcohol

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

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Gamette, Matthew

From: Johnston, Jeremy
Sent: Friday, August 20, 2010 12:05 PM
To: Gamette, Matthew
Subject: RE: Please check and tell me what you would change....

That sounds good to me. Did you want to include any of my contact information if they had any questions or suggestions?

JJ

From: Gamette, Matthew
Sent: Friday, August 20, 2010 10:25 AM
To: Johnston, Jeremy
Subject: Please check and tell me what you would change....
Importance: High

Dear Chief, Sheriff, Prosecutor, BTS, or Breath Instrument Operator,

This communication is to inform you that we have made some changes to the breath alcohol program. I want you to be aware of these changes and the ways they may impact your operations. The ISPFS laboratory system has made the determination to pursue ASCLD/LAB 17025 accreditation in Breath Testing Instrument Calibration. As our deadlines for certification approach, you will see more and more standardization in the program. Effective today we have implemented several changes. The documents are all posted on the ISPFS Alcohol Website.

- 1) There will be two tiers of manuals for each BTS or Operator.
 - The Idaho Standard Operating Procedure (SOP) contains the methods to follow in general. This manual has been revised and updated.
 - The "training manuals" have been replaced by "reference manuals." Each instrument series has a reference manual. We found that in a number of cases the training manual and SOP had conflicting information and the courts were deciding which manual to use for interpretation. In the revised manuals we have made it very clear that the SOP is the document that should be referenced and the reference manuals are really for the BTS or Operator reference when working with the instrument menus. We tried to take out any conflicting wording. If we missed something, please let us know. The BTS and Operators should be very familiar with the SOP. __
- 2) The vocabulary for the program is changing to conform with our accreditation guidelines. You will notice the use of "performance verification" and "performance verification solution." While the instrument software may still call for a "calibration check"—we will now be calling any checking done by a BTS or Operator in the field a "performance verification." The BTS or Operator does not perform any calibration—thus the BTS or Operator is checking the performance of the instrument (a performance verification). We know it will take some time to get used to the new vocabulary, but the only time we will use the term "calibration" is in reference to what the ISPFS analyst does in the laboratory. Again, a BTS or Operator performs and logs a performance verification using a performance verification solution from RepCo. The performance verification solution is the same thing as a simulator solution.
- 3) The Performance Verification Solution lot certifications will remain the same, but more information will be provided on the certificate regarding our explicit approval of RepCo to provide the solutions in Idaho.

We will make every effort to keep you updated on the progress of this program. We hope that the changes will have minimal impact on your operations.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Gamette, Matthew

From: Christine Starr [CStarr@cityofboise.org]
Sent: Monday, August 23, 2010 10:37 AM
To: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

Will you call me when you have a minute. I have multiple questions as I read through this manual. 395-7888.

THANKS!
Christine

>>> On 8/23/2010 at 10:25 AM, in message
<9786F206A1C09B4A95140060614274C5055DB2DF@LOUDHOWARD.ISP.STATE.ID.US>,
"Gamette, Matthew" <matthew.gamette@isp.idaho.gov> wrote:

The 5000EN manual has been combined with the 5000 manual into the "5000 Series Manual." If the information is not there, you can direct them to me or Jeremy to obtain the information. If we get enough requests for the old manuals, we may make a new website for the old materials but I really don't want to even have those manuals up anymore because I don't want to confuse the BTS or Operators. We really wanted to make a clean break between the "old program" and the "new program."

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Christine Starr [mailto:CStarr@cityofboise.org]
Sent: Monday, August 23, 2010 10:13 AM
To: Gamette, Matthew
Cc: Mardee Russell; Susan McMikle
Subject: Re: ISP Breath Alcohol Changes

Hi Matthew,

I am reviewing our Response to Request for Discovery in light of the below changes, and I see the old materials are NOT on the web page any more. In our Response we were directing defense counsel to the web page-- who do you want us to direct them to now to get the information? Additionally, we direct them in our response to the *5000 EN Breath Testing Specialist Manual Supplement*, pg. 39 for issues relating to Acetone, but that manual is no longer on the website either. Who should we be directing them to in order to get that manual?

I appreciate any information you can provide.

THANK YOU!
Christine

CHRISTINE STARR
Assistant City Attorney
Boise City Attorney's Office
PO Box 500

Boise, Idaho 83701
cstarr@cityofboise.org
(208)384-3870
(208)384-4454 FAX

>>> On 8/23/2010 at 9:26 AM, in message
<9786F206A1C09B4A95140060614274C5055DB239@LOUDHOWARD.ISP.STATE.ID.US>,
"Gamette, Matthew" <matthew.gamette@isp.idaho.gov> wrote:
Dear Chief, Sheriff, Prosecutor, BTS, or Breath Instrument Operator,

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- 2) The vocabulary for the program is changing to conform with our accreditation guidelines. You will notice the use of "performance verification" and "performance verification solution." While the instrument software may still call for a "calibration check"—we will now be calling any checking done by a BTS or Operator in the field a "performance verification." The BTS or Operator does not perform any calibration—thus the BTS or Operator is checking the performance of the instrument (a performance verification). We know it will take some time to get used to the new vocabulary, but the only time we will use the term "calibration" is in reference to what the ISPFS analyst does in the laboratory. Again, a BTS or Operator performs and logs a performance verification using a performance verification solution from RepCo. The performance verification solution is the same thing as a simulator solution.
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We will make every effort to keep you updated on the progress of this program. We hope that the changes will have minimal impact on your operations. Feel free to contact me or Breath Alcohol Discipline Leader Jeremy Johnston using the contact information provided below.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
matthew.gamette@isp.idaho.gov
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Jérémy Johnston
Idaho State Police Forensic Services
Breath Alcohol Discipline Leader
jérémy.johnston@isp.idaho.gov
208-209-8706

Gamette, Matthew

From: Gamette, Matthew
Sent: Monday, August 23, 2010 10:28 AM
To: Christine Starr
Cc: Johnston, Jeremy
Subject: RE: ISP Breath Alcohol Changes

You can have them email me. If it gets out of hand with requests, I will set up some kind of archive website for them to get the information. I think most of the defense attorneys already have the copies of the old manual so I don't anticipate many issues.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Christine Starr [mailto:CStarr@cityofboise.org]
Sent: Monday, August 23, 2010 10:25 AM
To: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

We will be directing defense counsel to you all for the information that is no longer on the website, who do you want them to contact? If you would like, we can have them email their requests to someone in particular.

>>> On 8/23/2010 at 10:21 AM, in message
<9786F206A1C09B4A95140060614274C5055DB2D3@LOUDHOWARD.ISP.STATE.ID.US>,
"Gamette, Matthew" <matthew.gamette@isp.idaho.gov> wrote:

We will make it available by request but I did not want to leave it up and have some get confused and use the old information. Please email me if you need any of the old manuals.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Christine Starr [mailto:CStarr@cityofboise.org]
Sent: Monday, August 23, 2010 9:38 AM
To: Gamette, Matthew
Subject: Re: ISP Breath Alcohol Changes

Hi Matthew,

Thank you for this important information. I have passed it on to all our criminal attorneys. Will you continue to have the old materials on the website, given that we have to use the manual that was in place at the time of the crime/case?

Thank you,
Christine

CHRISTINE STARR
Assistant City Attorney

Boise City Attorney's Office
PO Box 500
Boise, Idaho 83701
cstarr@cityofboise.org
(208)384-3870
(208)384-4454 FAX

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<9786F206A1C09B4A95140060614274C5055DB239@LOUDHOWARD.ISP.STATE.ID.US>,
"Gamette, Matthew" <matthew.gamette@isp.idaho.gov> wrote:

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We will make every effort to keep you updated on the progress of this program. We hope that the changes will have minimal impact on your operations. Feel free to contact me or Breath Alcohol Discipline Leader Jeremy Johnston using the contact information provided below.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
matthew.gamette@isp.idaho.gov
700 South Stratford Drive Suite 12S
Meridian Idaho 83642
208-884-7217 Voice

244

208-884-7290 Fax

Jeremy Johnston
Idaho State Police Forensic Services
Breath Alcohol Discipline Leader
jeremy.johnston@isp.idaho.gov
208-209-8706

245

Gamette, Matthew

From: Gamette, Matthew
Sent: Monday, August 23, 2010 12:20 PM
To: DL Majors; DL Captains; DL Lieutenants
Subject: ISP Forensic Services Breath Alcohol Changes

Importance: High

Please forward to all Breath Testing Specialists or Breath Instrument Operators at ISP:

This communication is to inform you that we have made some changes to the breath alcohol program. I want you to be aware of these changes and the ways they may impact your operations. The ISPFs laboratory system has made the determination to pursue ASCLD/LAB 17025 accreditation in Breath Testing Instrument Calibration. As our deadlines for certification approach, you will see more and more standardization in the program. Effective today we have implemented several changes. The documents are all posted on the ISPFs Alcohol Website.

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Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
matthew.gamette@isp.idaho.gov
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Jeremy Johnston
Idaho State Police Forensic Services
Breath Alcohol Discipline Leader
jeremy.johnston@isp.idaho.gov
208-209-8706

247

Gamette, Matthew

From: Johnston, Jeremy
Sent: Monday, August 23, 2010 2:42 PM
To: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

Cool. I am sending out the response to Jared and CC the rest of everyone.

JJ

-----Original Message-----

From: Gamette, Matthew
Sent: Monday, August 23, 2010 1:40 PM
To: Johnston, Jeremy
Subject: RE: ISP Breath Alcohol Changes

Fair enough. I will have them do the registry through you and you will have to manually add them to the list. The list will automatically delete someone if the email gets kicked back a certain number of times. I will also have it set up so that all denials get sent to your email inbox. You can find out from the agency if the BTS changed or moved or what happened to the email address. Doing it manually will take more time, but it will limit it to only BTS, operators, and prosecutors. I will populate it initially with all the email addresses that we have in the access database.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

-----Original Message-----

From: Johnston, Jeremy
Sent: Monday, August 23, 2010 2:29 PM
To: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

I think we should limit it to police officers and attorneys. Defense might try to use something in the e-mail to their advantage if they find out about it before the officers and prosecutors. They'll find out anyway, but at least they won't have the initial jump that everyone else gets.

JJ

-----Original Message-----

From: Gamette, Matthew
Sent: Monday, August 23, 2010 1:27 PM
To: Johnston, Jeremy
Subject: RE: ISP Breath Alcohol Changes

I will get it set up and functional and then pass the management to you because the messages will be yours. Because I am in proximity to CJIS, I will deal with them on the front end. I am also going to have a similar list for our newsletters and news releases. I get sick of trying to update the email list every time I send something out. What do you think about who should be able to register for the BrAc list?

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Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

-----Original Message-----

From: Johnston, Jeremy
Sent: Monday, August 23, 2010 2:24 PM
To: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

Sounds good to me, but are you sure that you want to manage this. It sounds to me like this should be part of my duties. You have too much to do already.

JJ

-----Original Message-----

From: Gamette, Matthew
Sent: Monday, August 23, 2010 1:22 PM
To: Olson, Jared; Johnston, Jeremy
Cc: Wills, Kedrick
Subject: RE: ISP Breath Alcohol Changes

Jeremy is going to respond on the technical things listed below.

I spoke with our IT department and we are going to institute a "list serve" for breath alcohol. I will provide him with all the valid email addresses we have right now and they will merely have to confirm that they want to be added. Then there will be a link on the alcohol website to register new people. I figured it did not do much good to waste time limiting it to just BTS or operators (because we will have defense attys that register). I don't see that as an issue--but I am willing to listen if there is a reason to limit it to officers and prosecutors. I just thought that the information would be general enough that the defense community is going to find out that we updated something anyway. If we want to limit it, I can just manage it by manually adding email addresses as they email me to request to be added. I just figured all the rejections will come back to my email box and I can delete them from the list or find a new email address for them. They can reregister if their email address changes and I can add or delete anyone I choose. By going to this type of system, the BTS, prosecutor, or operator would be responsible for getting the information by being on the listserve. If they don't get the information--it is their own fault. We would teach them in the BTS or operator class about getting on the listserve. Thoughts???

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

CLOSING ARGUMENT

0000052

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Gamette, Matthew

From: Anderson, Skyler
Sent: Tuesday, August 24, 2010 8:30 AM
To: Gamette, Matthew; Johnston, Jeremy
Cc: Nord, Anne
Subject: RE: ISP Breath Alcohol Changes

I agree with all of Jeremy's proposed fixes. They were all pretty minor. I strongly agree with Jeremy about the MIP procedure. If the courts start requiring certified instruments and certified operators for underage consumption results to be considered admissible in court; in my mind, this is a good side effect of the SOP. I do not think any agency in the state should be using uncertified instruments to obtain evidentiary samples. Especially, as Jeremy said, if the operator is also uncertified and is performing passive testing.

That is all,

Skyler Anderson
Forensic Scientist II
Idaho State Police Forensic Services
209 E. Lewis St.
Pocatello, ID B3201
208-232-9474 (FAX: 208-232-3697)

-----Original Message-----

From: Gamette, Matthew
Sent: Monday, August 23, 2010 3:38 PM
To: Johnston, Jeremy
Cc: Anderson, Skyler; Nord, Anne
Subject: RE: ISP Breath Alcohol Changes

Please make the changes to the manual by downloading a copy off the I: drive and making the edits. When you hear back from Jared, Christine, and Ben please provide me with all the changes that have been agreed to by all the parties. Feel free to conference call with them or whatever you need to do so that we can make everyone happy with the wording. I will post the revisions when they have your signoff.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

-----Original Message-----

From: Johnston, Jeremy
Sent: Monday, August 23, 2010 2:56 PM
To: Olson, Jared
Cc: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

I'll try to answer your questions to the best of my abilities.

1- the spelling can be easily corrected

2- the intent of 5.1.4 was to allow for the 0.20 to be usable up until it reaches the 25 verifications regardless of the time (up until the expiration dates on the bottle if necessary) up until it fails to give good results. In section 5.2.4 we can add the same language to 5.1.4 for consistency. Instead of "several" months, what language can we use to confer the meaning we want . . . that the 0.20 can be used until it expires or gives bad results and needs to be changed?

3- 18-8004c will be changed to 1B-B004C

4- 0.020 should be 0.20 correct.

5- Runs . . series . . . doesn't matter to me. Series does sound better though. With respect to the should and suggested part of the troubleshooting guide, I tried to write it so that it was a guideline for trying to troubleshoot why the tests are low. I also wanted to explain the reasoning behind why we allow three series of samples to be taken before taking the instrument out of service. I did not want the guideline to read as mandatory because I know some BTS's that use the nuclear approach and change everything if they get a initial failed series of tests. I didn't want officers to get in trouble for "not " following the guideline and maybe changing the solution first and checking hoses and leaks second.

6- see #2 and #4

7- 5.1.5 can be used (it only differs by one period and a capital H in however) but who's counting.

Finally- correct again. I can change the language to reflect something along the lines of . . . If the third performance verification fails, then it can be assumed that a potential source of error lies with the instrument itself.

As to the MIP/MIC procedure. That section was added in response to some northern jurisdictions interpreting the SOP for DUI as the SOP for evidentiary breath testing. They had rules that in order for the BrAC to be admissible as evidence, it had to follow the SOP for evidentiary breath testing. Thus, I wrote the section for MIP/MIC admissibility.

With respect to the use of instruments by non-certified operators and non-calibrated instruments, I see this as a huge potential for the wrongful conviction of an innocent person. After all, the instrument are not specific for ethyl alcohol, and there are multiple ways of introducing legal forms of alcohol into the breath pathway or the instrument itself. The SOP really only insures the safety and protection of the potential innocent victim that was at a party and maybe just took some cold medicine or used some breath spray. They could have been there as the designated driver?? Who knows, but without the SOP and with a single test on an un-calibrated instrument by and uncertified operator, that person could have the potential to be wrongfully convicted. With the limited checks and balances that the new SOP section provides, it should drastically reduce the likelihood of a false positive result. The blanks provide a measure of protection for the ambient alcoholic conditions of the party venue itself, and the duplicate breath sample protects against the legitimate introduction of a source of alcohol into the breath pathway. If we (meaning the law enforcement agencies) have to manage one or two more steps in order to protect the innocent, then that to me seems like those are steps that we should gladly take. (and he steps down from his soapbox)

The end

JJ
Jeremy Johnston
Alcohol Discipline Leader
ISP Region 1 Forensics
Coeur d' Alene, ID

251

-----Original Message-----

From: Olson, Jared
Sent: Monday, August 23, 2010 12:04 PM
To: Gamette, Matthew; Johnston, Jeremy
Subject: RE: ISP Breath Alcohol Changes

Matthew & Jeremy,

Here are a number of things I wanted to point out after my first review of the SOP.

First, on pg. 7 in section 2 - "Safety" the word "precautions" is misspelled.

Next, in 5.1.4 is it your intention for the 0.20 solution to be valid for 1 year and 1 month if the agency is only using one instrument? In 5.2.4 it reads that the same bottle may be used for several months. I suggest these SOPs be consistent. I personally do not prefer the word "several" because I foresee silly motions being filed arguing over the meaning of the word. Much like we have seen with the term "calendar month." Can a more specific instruction be given?

Third, I would suggest anywhere where Idaho Code 1B-B004C be mentioned that "c" be capitalized to be consistent with how it appears in the Idaho Code. Not a big deal, just a suggestion.

Fourth, in 5.1.4 the note states, "the 0.020 performance verification." This needs to be corrected to read 0.20. For consistency I would suggest either listing all of them two places after the decimal (easier to change) or to three places after the decimal.

Fifth, in 5.1.5 again I would suggest changing 0.0B0 to 0.0B for consistency. I personally do not care for the term "three runs" as this seems inconsistent to me with the definition section and other areas. Maybe this is just me, but would using the term "test series" be more accurate. In addition, we might want to have discussion about the last sentence stating, "The suggested troubleshooting procedure should be followed if the initial if the initial performance verification does not meet the acceptance criteria." I think by stating the procedure "should" be followed nixes the idea the procedure is a "suggestion." I know there is a reference in the troubleshooting SOP but I foresee it at least being challenged more than once.

Sixth, in 5.2.4 I mentioned above the inconsistent language with 5.1.4 and stating the solution is good for several months. Again, in the note section the "0.020" is incorrect.

In 5.2.5 there is the 0.0B0. Also the note section is a big run-on sentence. I would suggest using the exact same paragraph in 5.1.5.

Finally, I don't know exactly how to express it, but 7.1.4 is sending up a signal flare in my brain. It seems to conclusory for me that if the third performance verification fails than the "only" remaining source of error lies with the instrument itself. I was thinking of how Skylar mentioned he has been sent instruments that failed the field performance verifications but when he tested them, they were within calibration.

As I mentioned in the past, I personally am against including an SOP for minors in possession but realize I could be wrong. However, in practice many of the officers using the Alco-

Sensor or FC20 for underage drinkers are not certified operators and furthermore many times the instruments they use have never been sent to the ISPF5 for certification. I know this to be the case for Boise PD and I will be sending an email to Christine and Ben regarding this. Adding the SOP seems to me that it now requires a certified instrument be used for the evidence to be admissible.

Notification is the big issue and in my experience it has been a lasting issue. I still hear stories of BTS's claiming they have never heard of the 0.20 field performance verification requirement.

If I can do anything else, please let me know. I am still technically on vacation until Wednesday or Thursday, but as you can see I have been trying to keep up with my emails.

Thanks,

Jared D. Olson
Traffic Safety Resource Prosecutor
Idaho Prosecuting Attorneys Association
700 S. Stratford Drive (Idaho POST Academy) Meridian, ID 83642
20B-BB4-7325 (Office)
208-559-1217 (Cell)
jared.olson@post.idaho.gov
www.TSRP-Idaho.org

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-----Original Message-----

From: Gamette, Matthew
Sent: Mon 8/23/2010 12:18 PM
To: Olson, Jared
Subject: RE: ISP Breath Alcohol Changes

I composed the email Friday morning, but we have so many incorrect BTS email addresses that it kept getting rejected for sending by the ISP server. I finally got all the errors corrected so that I could send it this morning. I am still concerned that many of the BTS officers do not have the word. I used our BTS class rosters since 2006, but MANY of the emails came back as rejected. We do not have a good list of all the BTS officers in Idaho. I did send it to every Chief, Sheriff, and the city prosecutors I knew about. I know I did not get it to every city prosecutor. Getting the word out will continue to be a huge problem until we have a distribution list. It also concerns me because we will be making more changes in the near future.

Jeremy has told me that the content is not much different--just that the 5000 and 5000EN were combined into one. Some of the problem wording was removed. I have attached the old ones for your review. If you keep a list of grammatical or other problems, I will get them fixed. We will be publishing revision 1 this week because of the issue Boise City is going to have with underage drinking problems. We are going to add a note for them that the tests do not have to be done sequentially (the officer can administer other tests during the two minute wait and come back to the first subject after 2 minutes). They figure they will run 500

tests next weekend so we want to get it revised for them ASAP. I have a feeling we will hear of other issues from prosecutors and we will compile those and get them in the manual revision. If I can get all the problems to me by Tuesday B/25, I can get the revisions done on Wednesday so we don't have issues into the next weekend. Again, I am worried about the best method to get the word out statewide. Your thoughts are appreciated. This is my top priority this week.

Jeremy is calling Ben Harmer and Christine Starr today.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

-----Original Message-----

From: Olson, Jared
Sent: Monday, August 23, 2010 11:35 AM
To: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

Matthew,

Could you email me a copy of the prior version of the SOP. I anticipate a lot of questions being sent my way this week regarding the new SOP, so I need to get started reviewing it. I am a little concerned that it went live last Friday but the BTS's have not been notified until after it went live. But I need to do a quick review to see what if any changes might be new for the BTS. I have done a quick scan and there are a few grammatical errors and inconsistencies with the decimal points (e.g. says 0.20 and then 0.200 in the same paragraph).

I have forwarded your email to be sent to all the Idaho prosecutors that are members of the IPAA. There are a number of city prosecutors who are not members and I will work on notifying those that I know of.

Thanks,

Jared D. Olson
Traffic Safety Resource Prosecutor
Idaho Prosecuting Attorneys Association
700 S. Stratford Drive (Idaho POST Academy) Meridian, ID B3642
20B-8B4-7325 (Office)
20B-559-1217 (Cell)
jared.olson@post.idaho.gov
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-----Original Message-----

From: Gamette, Matthew
Sent: Mon 8/23/2010 11:11 AM

To: Benjamin Harmer
Cc: Olson, Jared
Subject: FW: ISP Breath Alcohol Changes

Please forward this to those in your office that need this information. Christine Starr from Boise City just called and was concerned about the changes we made to the underage drinking section of the SOP. She was concerned that it would take them more time to do a duplicate test. Jeremy stands by that section because of mouth alcohol issues (especially in teens at a party where they may be using alcohol based breath fresheners). She said Boise City is doing emphasis this weekend and I thought you might be involved in some of that as well. Let me know if you have concerns about the new sections.

She was also concerned that we deleted the old manuals from the website. Feel free to have the defense email me for copies of the older (non-controlled versions). I did not want to leave them up and have it become a source of confusion for the BTS or court system. We now have a process to control these documents (starting with Revision 0) and the controlled version has an issue/effective date and a revision number. I will archive these manuals in my office just like all of our other manuals for the lab system. The defense can request them through the normal discovery process.

Matthew Gamette

Idaho State Police Forensic Services

Quality Manager

From: Gamette, Matthew
Sent: Monday, August 23, 2010 9:26 AM
Subject: ISP Breath Alcohol Changes

Dear Chief, Sheriff, Prosecutor, BTS, or Breath Instrument Operator,

This communication is to inform you that we have made some changes to the breath alcohol program. I want you to be aware of these changes and the ways they may impact your operations. The ISPFs laboratory system has made the determination to pursue ASCLD/LAB 17025 accreditation in Breath Testing Instrument Calibration. As our deadlines for certification approach, you will see more and more standardization in the program. Effective today we have implemented several changes. The documents are all posted on the ISPFs Alcohol Website.

1) There will be two tiers of manuals for each BTS or Operator.

The Idaho Standard Operating Procedure (SOP)
<<http://www.isp.idaho.gov/forensic/alcohol.html>> contains the methods to follow in general. This manual has been revised and updated.

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The "training manuals" have been replaced by "reference manuals <<http://www.isp.idaho.gov/forensic/certificates.html#BATManuals>> ." Each instrument series has a reference manual. We found that in a number of cases the training manual and SOP had conflicting information and the courts were deciding which manual to use for interpretation. In the revised manuals we have made it very clear that the SOP is the document that should be referenced and the reference manuals are really for the BTS or Operator reference when working with the instrument menus. We tried to take out any conflicting wording. If we missed something, please let us know. The BTS and Operators should be very familiar with the SOP.

2) The vocabulary for the program is changing to conform with our accreditation guidelines. You will notice the use of "performance verification" and "performance verification solution." While the instrument software may still call for a "calibration check"-we will now be calling any checking done by a BTS or Operator in the field a "performance verification." The BTS or Operator does not perform any calibration---thus the BTS or Operator is checking the performance of the instrument (a performance verification). We know it will take some time to get used to the new vocabulary, but the only time we will use the term "calibration" is in reference to what the ISPFs analyst does in the laboratory. Again, a BTS or Operator performs and logs a performance verification using a performance verification solution from RepCo. The performance verification solution is the same thing as a simulator solution.

3) The Performance Verification Solution lot certifications will remain the same, but more information will be provided on the certificate regarding our explicit approval of RepCo to provide the solutions in Idaho.

We will make every effort to keep you updated on the progress of this program. We hope that the changes will have minimal impact on your operations. Feel free to contact me or Breath Alcohol Discipline Leader Jeremy Johnston using the contact information provided below.

Matthew Gamette

Idaho State Police Forensic Services

Quality Manager

matthew.gamette@isp.idaho.gov

700 South Stratford Drive Suite 125

Meridian Idaho 83642

208-B84-7217 Voice

208-BB4-7290 Fax

Jeremy Johnston

Idaho State Police Forensic Services

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Breath Alcohol Discipline Leader

jeremy.johnston@isp.idaho.gov

208-209-8706

Gamette, Matthew

From: Gamette, Matthew
Sent: Monday, August 23, 2010 8:04 PM
To: Johnston, Jeremy
Subject: FW: ISP Breath Alcohol Changes

Will you please respond to this?

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Rob Neiwert [mailto:rneiwert@cassiacounty.org]
Sent: Monday, August 23, 2010 4:44 PM
To: Gamette, Matthew
Subject: RE: ISP Breath Alcohol Changes

Matthew,
Can you please tell me if there is a minimum years of service in order to be certified as a BTS.
Thanks

Lt. Rob Neiwert
Director
Mini-Cassia Criminal Justice Center
1415 Albion Ave
Burley Id 83318

Phone 208-878-1136
Fax 208-878-0235
rneiwert@cassiacounty.org

From: Gamette, Matthew [mailto:matthew.gamette@isp.idaho.gov]
Sent: Monday, August 23, 2010 9:26 AM
To: rdudley@cassiacounty.org; rneiwert@cassiacounty.org
Subject: ISP Breath Alcohol Changes

Dear Chief, Sheriff, Prosecutor, BTS, or Breath Instrument Operator,

This communication is to inform you that we have made some changes to the breath alcohol program. I want you to be aware of these changes and the ways they may impact your operations. The ISPFs laboratory system has made the determination to pursue ASCLD/LAB 17025 accreditation in Breath Testing Instrument Calibration. As our deadlines for certification approach, you will see more and more standardization in the program. Effective today we have implemented several changes. The documents are all posted on the ISPFs Alcohol Website.

- 1) There will be two tiers of manuals for each BTS or Operator.

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0000061

CLOSING ARGUMENT

- The Idaho Standard Operating Procedure (SOP) contains the methods to follow in general. This manual has been revised and updated.
 - The "training manuals" have been replaced by "reference manuals." Each instrument series has a reference manual. We found that in a number of cases the training manual and SOP had conflicting information and the courts were deciding which manual to use for interpretation. In the revised manuals we have made it very clear that the SOP is the document that should be referenced and the reference manuals are really for the BTS or Operator reference when working with the instrument menus. We tried to take out any conflicting wording. If we missed something, please let us know. The BTS and Operators should be very familiar with the SOP.
- 2) The vocabulary for the program is changing to conform with our accreditation guidelines. You will notice the use of "performance verification" and "performance verification solution." While the instrument software may still call for a "calibration check"—we will now be calling any checking done by a BTS or Operator in the field a "performance verification." The BTS or Operator does not perform any calibration—thus the BTS or Operator is checking the performance of the instrument (a performance verification). We know it will take some time to get used to the new vocabulary, but the only time we will use the term "calibration" is in reference to what the ISPFS analyst does in the laboratory. Again, a BTS or Operator performs and logs a performance verification using a performance verification solution from RepCo. The performance verification solution is the same thing as a simulator solution.
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We will make every effort to keep you updated on the progress of this program. We hope that the changes will have minimal impact on your operations. Feel free to contact me or Breath Alcohol Discipline Leader Jeremy Johnston using the contact information provided below.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
matthew.gamette@isp.idaho.gov
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Jeremy Johnston
Idaho State Police Forensic Services
Breath Alcohol Discipline Leader
jeremy.johnston@isp.idaho.gov
208-209-8706

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Gamette, Matthew

From: Anderson, Skyler
Sent: Tuesday, August 24, 2010 7:55 AM
To: Johnston, Jeremy
Cc: Cutler, Rachel; Lewis, Lamora; Gamette, Matthew
Subject: RE: SOP additional note

It looks and sounds good to me.

Skyler Anderson
Forensic Scientist II
Idaho State Police Forensic Services
209 E. Lewis St.
Pocatello, ID 83201
208-232-9474 (FAX: 208-232-3697)

From: Johnston, Jeremy
Sent: Monday, August 23, 2010 12:33 PM
To: Anderson, Skyler
Cc: Cutler, Rachel; Lewis, Lamora; Gamette, Matthew
Subject: SOP additional note

For clarification on the MIP/MIC procedure I need to add an additional clarification to that the correct interpretation is applied. In a nutshell, it says that the breath test consists of 2 samples preceded by blanks that are approximately 2 minutes apart. I just need to add clarification that the two samples do not need to be consecutive samples. This was the original design, but was worded in such a way that could have been left open for interpretation about whether or not each person had to have two consecutive samples done in sequence which would greatly increase the time to process a large scale party.

The change would be to a note in 8.3 and will look like this:

- 8.3 A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes apart to allow for the dissipation of potential mouth alcohol contamination.

NOTE: A deficient or insufficient sample does not automatically invalidate a test sample. Additionally, it should be noted that the two samples taken for a single individual do not need to be consecutive samples as long as there is approximately 2 minutes between each sample from each individual.

Please have all comments on this interpretation back to me asap so we can get the new revision published out before the start of school and party season.

JJ

Gamette, Matthew

From: Johnston, Jeremy
Sent: Wednesday, August 25, 2010 7:22 AM
To: Gamette, Matthew
Cc: Dye, Gordon; Kelley, Sheldon
Subject: RE: ISP Breath Alcohol Changes

We can remove this requirement as there is no reasonable suspicion to believe that the area where the portable instrument performance verifications take place would be saturated with ambient alcohol to the point that it would give false readings. It was more than likely a product of trying to remain consistent with the PV checks from the portables and the intox (which does a blank in between samples).

This will be included in the proposed revision #1 that should be going out before the weekend.

JJ

Jeremy Johnston
Alcohol Discipline Leader
ISP Region 1 Forensics
Coeur d' Alene, ID
208-209-8706

From: Gamette, Matthew
Sent: Tuesday, August 24, 2010 7:54 PM
To: Johnston, Jeremy
Subject: Fw: ISP Breath Alcohol Changes

Please reply all.
Matthew Gamette

From: Avery, Jesse
To: Gamette, Matthew
Cc: Dye, Gordon; Kelley, Sheldon
Sent: Tue Aug 24 19:36:45 2010
Subject: RE: ISP Breath Alcohol Changes

According to 5.1.2 of the SOP's there should be an air blank between the 2 verification checks on a lifeloc. The lifeloc does not perform an air blank when doing a wet check. Is there something else we need to be doing?

5.1.2 The performance verification using the 0.08 and 0.20 performance verification solutions consist of two samples separated by air blanks.

Thanks
Jesse Avery
Region 3 Patrol
Idaho State Police

From: Gamette, Matthew
Sent: Mon 8/23/2010 9:26 AM
Subject: ISP Breath Alcohol Changes

Dear Chief, Sheriff, Prosecutor, BTS, or Breath Instrument Operator,

This communication is to inform you that we have made some changes to the breath alcohol program. I want you to be aware of these changes and the ways they may impact your operations. The ISPFs laboratory system has made the determination to pursue ASCLD/LAB 17025 accreditation in Breath Testing Instrument Calibration. As our deadlines for certification approach, you will see more and more standardization in the program. Effective today we have implemented several changes. The documents are all posted on the ISPFs Alcohol Website.

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We will make every effort to keep you updated on the progress of this program. We hope that the changes will have minimal impact on your operations. Feel free to contact me or Breath Alcohol Discipline Leader Jeremy Johnston using the contact information provided below.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
matthew.gamette@isp.idaho.gov
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Jeremy Johnston
Idaho State Police Forensic Services
Breath Alcohol Discipline Leader
jeremy.johnston@isp.idaho.gov

Gamette, Matthew

From: Johnston, Jeremy
Sent: Tuesday, August 24, 2010 1:38 PM
To: Gamette, Matthew
Subject: RE: Revision 1

If he could get all the changes to me by the end of Wednesday, then I can work on it from home. I'm teaching BTS classes on Thursday and Friday and will have limited time to do much else.

JJ

From: Gamette, Matthew
Sent: Tuesday, August 24, 2010 11:07 AM
To: Johnston, Jeremy
Cc: Nord, Anne
Subject: Revision 1
Importance: High

I just talked to Jared and he is going to have a few more prosecutors read the SOP over and he may have a few more comments. He said it generally reads better than the last version and he had settled down because it *did* not have as many revisions as he originally thought. He will get back to us by Thursday and I would like to publish out revision 1 on Thursday night. Boise City will have the new wording in time for their Friday MIP emphasis. He has asked for you to circulate the revisions to him on Thursday before we publish it. You should be using "track changes". That function will show deleted text and added text and will allow me just to accept the changes when I go to publish it.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

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Gamette, Matthew

From: Gamette, Matthew
Sent: Wednesday, August 25, 2010 12:49 PM
To: Johnston, Jeremy
Subject: RE: revision 1

Just make sure and check with Jared, Christine, and Ben before you go with a final draft.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Johnston, Jeremy
Sent: Wednesday, August 25, 2010 12:46 PM
To: Gamette, Matthew
Subject: revision 1

I am headed home for the day, but will be coming back in tonight to finish up the revision (if there are any more comments) so it can go out for finalization before Friday. I want to provide it to the BTS class on Friday, so they have the most current issue.

JJ

Jeremy Johnston
Alcohol Discipline Leader
ISP Region 1 Forensics
Coeur d' Alene, ID
208-209-8706

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Gamette, Matthew

From: Johnston, Jeremy
Sent: Thursday, August 26, 2010 12:51 AM
To: Olson, Jared; Gamette, Matthew; Anderson, Skyler
Cc: 'Benjamin Harmer'; 'Christine Starr'
Subject: RE: NEW sop revision
Attachments: WORKING Idaho Breath Alcohol Standard Operating Procedure Rev 1.doc

I'll add my comments and responses within the e-mail below. I've attached the newer revision #1 incorporating the changes after this e-mail. I'm now tired and going to bed . . . probably to dream about this SOP and its many challenges.

]]

-----Original Message-----

From: Olson, Jared
Sent: Wed 8/25/2010 3:14 PM
To: Johnston, Jeremy; Gamette, Matthew; Anderson, Skyler
Cc: 'Benjamin Harmer'; 'Christine Starr'
Subject: RE: NEW sop revision

Jeremy,

Here is my second round of revision suggestions. To begin, I want to apologize if my comments seem nit picky or too lawyer like. Unfortunately, it is a combination of law school and my previous work as an editor for a public relations firm and my college newspaper that has led to this annoying behavior. In fact, when I was a police officer one of my assignments was to review every officer's reports. I quickly learned that to keep friends among my colleagues I could not use a red pen. So I want to go on record that you were responsible for choosing the color red for your revisions. All kidding aside, I really appreciate the work you have put into revising the SOPs. It is certainly not an easy task and I think you have done a great job.

As a disclaimer, I recognize there is absolutely no way the SOPs can be constructed in a way that will not result in attacks in court. Therefore, some of my statements and/or suggestions may have no good solution, but I am going to put them out there just in case others may think of a solution. Or at least it can be a topic of conversation when training the Breath Testing Specialists and/or Operators. They may also be worthy of an FAQ document in the future.

1. I will start with an example: I will be the first to offer some form of legal bet that an Idaho defense lawyer will try and suppress the breath test based on the "Safety" section of the SOP. I foresee some defense lawyers arguing that the officer did not point his/her client in a direction that their expired breath was not towards the officer or other bystander, therefore the SOP was not followed and the results should not be admissible. I have seen this type of argument in blood draw cases. The defense will argue OSHA standards were not followed, therefore the collection of the blood was not safe and the results should be suppressed. Of course this does not affect the reliability of the test and the standards

are in place to protect the drawer of the blood and in the end it is not relevant during trial. I do not think any changes need to be made to the SOP, I just wanted to play Nostradamus for a minute and predict this silly defense argument.

JJ-----I'll take that bet

2. Section 5 - Last sentence of the first paragraph: change "ISP" to "ISPFS".

JJ-----changes have been made

3. 5.1.3.1 - I foresee there being questions why the 0.08 solution is only good for a calendar month, but the 0.20 solution is good for several months. I know that police agencies have complained about the added costs of the 0.20 solution, but I would argue that one suppression motion will cost the law enforcement agency more than purchasing enough 0.20 solution for a year. Let alone the added costs to the prosecutor, courts and even the defendant (although I have no sympathy for the defendant). I am just throwing out the suggestion of re-thinking whether you want consistency between the solution requirements.

JJ-----this has been discussed in classes before. Truthfully, the calendar month changes of ANY solution don't have a scientific basis. Time does not dictate the quality of the solution in a sealed system. It has always been done this way, and frankly the only reason that it has been kept in this revision is that it is easier for the BTS to get into a routine with changing the solutions once a month, instead of having to count uses and changing them whenever.

4. 5.1.3.1 --- Again I mention the term "calendar" month. This already became a source of litigation in Boise County with the judge interpreting what is meant by calendar month. Darren may have even ended up testifying in this case, but I think the BTS ended up having a sit-down with the judge to see if it could be resolved for future cases. Maybe this was isolated enough that a revision is not necessary, but I just wanted to mention it. The alternative would be to list every 30 days, but I think we can see the problems with this approach as well. So as I type, I say leave it be.

JJ-----its good to see that you came to your senses before you finished #4

5. 5.1.4 - I would suggest removing the word "indefinitely" and would not suggest using the terms "maximum" and "approximately" in the same sentence. Refer to my suggestion #3 of making the 0.20 solution and the 0.08 solution requirements consistent. In the alternative, my suggestion would be "A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications or until it reaches its expiration date, whichever comes first."

JJ-----changes have been made. I struggled with the right words to suggest that the solution could be used for 25 verifications regardless of how many times it had been put into and taken out of the simulator jar. Much better language and right to the point.

6. 5.1.4 - In the note section add apostrophe to "instruments" so that it reads ".purpose of supporting the instruments' results." or before the s if you think it is more appropriate.

JJ-----Changes have been made

7. 5.1.4 - I am interested to see how the courts will respond to the addition of this note. Some judges will probably still require all SOPs to be valid before they will automatically allow the results to be admissible absent expert testimony. However, I also

foresee the following argument: If the sole purpose of the 0.20 performance verification is to support the 0.20 charge, then should it be the solution used before/after the subject's test when they test at or above 0.20 BrAC? Do you see where I am going with this? I can hear the defense lawyer asking the BTS, "Wouldn't that be more accurate?" Maybe training and/or FAQ would be sufficient to address this. Thoughts?

JJ-----The note was only to remove the 0.20 from being used in cases not involving 18-8004C, for which it is irrelevant.

JJ-----The second part would boil down to the original argument that lead to the implementation of the 0.20 check in the first place. If the instruments calibration is linear, and you check it at 0.08. Does it remain linear through points beyond the 0.08 check point. The 0.20 was implemented solely to show that if the instrument was accurate to within 10% at the 0.08 level, that it remained linear through point beyond that . . . namely the 0.20. This is a tough one, because for all intents and purposes, scientifically, you would get a more time sensitive picture of how the instruments linearity was if you DID use the 0.20 for the +/- 24 hour check. But then again, if you have a monthly 0.20 check before and after the test in question, is it reasonable to assume that the instrument was linear through 0.20 before the test, lost its linear calibration sometime before the test in question, and then somehow regained its linear calibration in order to pass the next monthly 0.20 check? Not really. Plus, if this were to be a requirement, we would surely lose more cases due to the officer not following the SOP and just running the 0.08 like they always have. Old dogs, new trick . . .

8. 5.1.4.1 - I think we will continue to see arguments with what "routinely" means, but again I have only seen this in a few cases and do not think it merits a change.

JJ-----I think we can wait to see if Clark and Feeney can come up with a legit argument for "routinely" I'm not holding my breath.

9. 5.1.5 - I have never been a fan of the note section in this particular SOP, nor any of the subsequent changes. It seems to me that this opens an area ripe for attack because the defense can make hay with the fact that the BTS can continue to run performance verifications until they get the results they like. Now this SOP revision is a huge improvement with the addition of the Troubleshooting section, but I wonder if we can put our heads together to come up with better language? Something that simply and clearly states that there are external factors unrelated to the accuracy of the instrument itself. I also wonder if including examples needlessly opens the door for defense attacks? I realize Jeremy and Skyler could easily fend off the attack but I don't think the majority of the BTS's would fair very well. For example, what does "temperature fluctuation" mean? It seems to me that listing the example would allow the defense attorney to confuse the witness with different meanings of temperature fluctuation. Does it mean temperature of the solution? Temperature of the room? Temperature of the hoses? And so forth. Maybe the addition of the Troubleshooting Procedure alleviates all concerns. Ben? Christine? Your thoughts?

JJ-----I removed the "open door suggestions" and just left it vague.

10. 5.1.6 - in the note section change the word "insure" to "ensure." (I told you I would be a little nerdy. Technically, both are correct, but "ensure" in this context is a little more correct. Plus it is the spelling you used in other sections.) Also bold the word "Note" to be consistent with the other note sections.

JJ-----Isn't Ensure the old people drink that is packed full of old person vitamins. Its like Ovaltine or YooHoo for the elderly . . .

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11. 5.2.4 - Refer to suggestions # 5 and #6.

JJ-----refer to my comments in #5 and #6

12. 5.2.4 - Also refer to suggestion #7.

JJ-----See comments for #7

13. 6.1 - Bold the word "Note" for consistency. I really like this note, but my question is whether this can unequivocally be backed up? Do we have studies on the ready to provide if and when this note is challenged?

JJ-----done, and yes. We do these tests specifically with each BTS that comes through the class so that they can testify that they have personally done the experiments and can testify as to the results. I will be keeping detailed notes during the next BTS classes as to the items being used and their subsequent dissipation/equilibration times for a potential write up/publication.

14. 6.1.3 - This SOP has caused me to pause and I have a difficult time putting my concern into words. I question whether the SOP is potentially problematic. But in the end, do the benefits of the SOP outweigh the potential problems. I am a big proponent of collecting blood evidence when the breath test evidence can not be collected. However, there are many police agencies and prosecutors who do not agree with my line of thinking. They are against involuntary blood draws. So I pause to question whether this SOP raises an argument for the defense that an officer is mandated to collect blood evidence when the 15 minute waiting period is not completed successfully, or if the instrument malfunctions. Again, am I over-analyzing this SOP and some of the related SOPs? My vote is to keep the language in the SOPs but I do not want my own strong opinions of collecting blood evidence to cloud the best judgment.

JJ-----I thought that I had added enough weasel words to allow for different jurisdictions to use their own policies and beliefs to decide. the use of "may elect to" puts the onus on the individual officer and doesn't seem to me to be dictating that they need to take a blood or not.

15. 6.2.4 - I question whether the "provided the failure to supply the requested samples was the fault of the subject/individual and not the operator" is necessary to be included in the SOP. I agree with what the SOP is saying, but I wonder if it needlessly opens the door for the BTS and/or ISPFS to testify whether they think the failure/refusal is the defendant's fault or the operator's fault. For example, let's say the defendant provides a first breath sample but then tells the officer he will not give a second sample. There is some verbal jarring between the two for approximately two minutes. The defendant then has a change of heart and states he will give the second breath test, but the officer says it is too late, the defendant's initial refusal has been noted. Do you really want to be testifying whether in your opinion this is the fault of the defendant or of the operator?

JJ-----This would be solely between the officer and the subject. It is only there to give the defendant an "out" if the officer screws something up and tries to not use the test. Or possibly if the officer tests a subject and it gives a 0.080 and they don't want to risk taking another sample because it might come back at 0.079 and they'll lose their potential DUI and their complimentary set of steak knives.

16. 7 - As an overall suggestion for this section, I have a pet peeve with the term "pass" and "fail." I don't like the officers using it when testifying about the Standardized Field Sobriety Tests, but maybe in the scientific context it works just fine. However, I would suggest a cleaner approach would be to say the performance verification test was either

inside or outside the verification limits. I think using the term pass and fail is incorrectly connected to the instrument. We know that the most likely culprit for a performance verification outside the solution range is the simulator. But to the jury (and even many officers and prosecutors) the simulator and the instrument are one and the same. So I throw this pet peeve of mine out to see if you want to consider changing the language.

JJ-----If nothing else, I'm accommodating. Mr Wordsmith, your suggestions have been noted.

17. 7.1 - Bold the word "Note" for consistency. The question I pose is whether the word "should" in the preceding sentence, negates the note. I already threw this question out to Jeremy and just include it now for the rest to opine. I agree with Jeremy that some BTS's will take the nuclear approach and skip right to changing the solution. If they skip the second step the performance verification is still valid. This is one of those areas where I don't think a change in the SOP language is needed. I just bring it up to put it on everyone's radar, especially as a training matter. In my opinion, it should be made clear to the BTS's that if they follow the suggested troubleshooting guide they will appear to be more competent and scientific when later testifying in court.

JJ-----Note has been bolded. Should in the previous sentence should negate the note . . . unless a Judge decides that the should is actually a shall in his courtroom. In that case, the note is there to tell him/her otherwise. Also, for the arguments as to whether it was a "best practice" that the officer must follow in order to maintain the integrity of the instrument . . . blah blah blah. The note just emphasizes that the "should" is actually a "should"

18. 7.1.2 - Get ready for arguments regarding the length of your hose! Does anyone think the second sentence is too general and opens a Pandora's box? To me this SOP illustrates the difficult task Jeremy had in trying to separate the SOP from the training manual. I haven't been able to review the training manual yet, but I think the second sentence of this SOP opens up a long line of questions that most BTS's are not capable of answering. If I were a defense attorney I would take each of these phrases one by one as things that could potentially affect the accuracy of the test. Would the second sentence be better suited for the training manual? Or is it most appropriate as is?

JJ-----I decided to keep the list of potentials in this section because the BTS should be knowledgeable about the simulator hookup and proper blowing technique. Also, this is something that is trained and tested for in class, so they should know this well.

19. 7.1.4. - As I mentioned to Jeremy, I think it was Skyler who has had more than one instrument returned to the lab after failing 3 performance verifications, but when Skyler checked the instrument it was still testing accurate. Therefore, even after 3 performance verifications it was still most likely the operator, the solution, or the simulator who was the problem. Instead of stating the assumption, I would suggest the following language: "If the third performance verification falls outside the limits of the verification, the instrument must be taken out of service and sent to the ISPFS or an approved service provider." If you decide to leave it as modified the second time the word "the" is used needs to be deleted from the sentence.

JJ-----I too have had many instances where instrument that were out of tolerances in the field are perfectly fine when they come into the lab. The wording has been changed to be more succinct.

Sorry for the lengthy email, I hope we are still friends. On the bright side, I couldn't come up with 20 suggestions to make it an even list. On the dark side, I still need to review

the MIP procedures and will send my suggestions in a separate email. Thanks for even considering my thoughts and suggestions.

Jared D. Olson
Traffic Safety Resource Prosecutor
Idaho Prosecuting Attorneys Association
700 S. Stratford Drive (Idaho POST Academy)

Meridian, ID 83642
(208) 884-7325 (Office)
(208) 884-7295 (Fax)
(208) 559-1217 (Cell)
jared.olson@post.idaho.gov

www.TSRP-Idaho.org

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From: Johnston, Jeremy
Sent: Wednesday, August 25, 2010 7:45 AM
To: Gamette, Matthew; Anderson, Skyler; Olson, Jared
Cc: 'Benjamin Harmer'; 'Christine Starr'
Subject: NEW sop revision

The working revision is currently in I:\ALCOHOL\REVIEW

If you don't have access to our intranet (Ben and Christine) please email me the changes that you would like (with explanation) and I will circulate them for comments.

The changes are marked in RED.

Gamette, Matthew

From: Johnston, Jeremy
Sent: Thursday, August 26, 2010 8:11 AM
To: Olson, Jared; Gamette, Matthew; Anderson, Skyler
Cc: 'Benjamin Harmer'; 'Christine Starr'
Subject: RE: NEW sop revision

Just this morning, in discussion with David about the fun I'm having with the MIP/MIC SOP, I thought that it would also be a good idea to include specific language that does not require that the instrument used for the MIC breath test be checked with a certified solution within 24 hours.

My thinking with this is that when the instrument is initially certified it is checked for its response to alcohol, and its lack of response to acetone (the most common "other" substance challenge). Once that is done and it goes into the field, if it is only used for MIP/MIC cases, then its accuracy at the 0.08 and 0.20 levels is superfluous due to the fact that there is not a per se threshold for MIP/MIC cases. I wouldn't want to add this additional requirement for these instruments and have a case lost because the instrument is off at the 0.20 level (when the actual numeric level is not important).

My question is several parts:

-if ISPFS does have the authority to administrate MIP/MIC cases, should there be a specific section in Section 8 of the SOP that spells out the lack of necessity for the +/- 24 hours and monthly checks for these instruments?

-Should there be a requirement for testing these instruments for the accuracy of their calibration, when their accuracy is not an integral part of the investigation?

-if ISPFS does not have the authority over MIP/MIC testing as it pertains to breath alcohol testing, should section 8 even exist or should it be changed to something that is only a suggestion??

-Do these pants make my butt look fat?

Any and all input will be considered equally, except for Jared. He had to run to the store to get more red pens so you could continue to "proofread" my lack of language skills . . .

JJ

PS: You know I'm just messing with you Jared © Part 4 has already been answered . . my fat butt makes my butt look fat is the correct answer. Can anybody else tell that I haven't gotten a lot of sleep??

Jeremy Johnston
Alcohol Discipline Leader
ISP Region I Forensics
Coeur d'Alene, ID
208-209-8706

CLOSING ARGUMENT

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Gamette, Matthew

From: Benjamin Harmer [bharmer@adaweb.net]
Sent: Thursday, August 26, 2010 12:23 PM
To: Gamette, Matthew; Olson, Jared; Johnston, Jeremy; Grunke, Jenny
Cc: Christine Starr
Subject: RE: NEW sop revision

Sounds good.

Ben Harmer

From: Gamette, Matthew [mailto:matthew.gamette@isp.idaho.gov]
Sent: Thursday, August 26, 2010 12:14 PM
To: Olson, Jared; Johnston, Jeremy; Grunke, Jenny
Cc: Benjamin Harmer; Christine Starr
Subject: RE: NEW sop revision
Importance: High

I just heard back from Jared and he can either do 1 or 3. I cannot do 3 and Jeremy is teaching a BTS class so 1pm would be lunch time for him on Pacific Time and that would work well. I know Christine wanted later in the afternoon but I think 1 is the only time that will likely work today. I would like to suggest 1pm Mountain Time as a meeting time to discuss MIP/MIC. We really want to get the changes in place by tonight so that we can go live with them tomorrow but I understand there are some issues for us to work through. Let me know if this time will not work for you. The conference call instructions are:

Please call 884-7450 then press 1 and enter the conference code of 35829 and then verify by pressing 1.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Olson, Jared
Sent: Wednesday, August 25, 2010 5:46 PM
To: Johnston, Jeremy; Gamette, Matthew; Anderson, Skyler
Cc: 'Benjamin Harmer'; 'Christine Starr'
Subject: RE: NEW sop revision

Suggestions regarding MIP/MIC Procedure:

Jeremy (and previously Darren Jewkes) and I have discussed adding the MIP/MIC procedures in the past. For those who may not know, this was an issue that originally arose in Northern Idaho. I believe it spread to other areas of the state. There was a judge who required a 15 minute observation period before he would admit the BAC results in a underage drinking case. Of course, this is very problematic when you have 5, 10, 20 or even 100 kids being cited at a party. In fact, if this was the required procedure you would see a dramatic reduction in underage drinking citations because many officers would be unlikely to go through the hassle. The elements of the MIP crime are obviously very different than a DUI. Any consumption of alcohol is illegal, so a level of consumption is irrelevant.

It has been my recommendation to not include underage drinking as part of the SOPs. I base this recommendation on the fact that I.C. 23-949 does not have a similar provision as the DUI statute (18-8002A(e)) wherein the breath test is admissible, "without the necessity of producing a witness to establish the reliability of the testing procedure for examination."

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Therefore, with or without the SOP, I think the defense has the ability to attack and/or suppress the breath test results. In my opinion, the MIP/MIC procedure elevates the requirement of proving the presence of alcohol to the level of a calibrated reading in a DUI case. First, the SOP (especially if not followed) provides the defense with an avenue to attack the admissibility and/or weight of the evidence. Yet, maybe this is appropriate, but I just hate to see MIP charges become as technical as DUI cases.

Second, even if the SOP is followed, I think the defense can still argue it is not admissible without foundation being laid by an expert witness because 18-8002A(3) does not apply to I.C. 23-949. I foresee many prosecutors being blind-sided by this second approach. The defense will show up for the MIP Court trial and see if the prosecutor has an expert ready to testify. If not, the objections will start flying when the prosecutor tries to admit the breath test. However, in reality most judges will likely admit the evidence based on compliance with the SOP. But with a paying client, I would wager the issue will be appealed. So there are potential costs to this addition to the SOP.

On the other hand, I think Jeremy's reasons for including the SOP are valid. We certainly do not want to create any situations where a wrongful conviction could occur. I join him on his soapbox that we want to do the right thing, to the right people for the right reasons. Yet I would also add that in my experience officer observations accompany the breath test result, so it is not the sole offer of proof. In fact, many agencies may now decide to forgo breath testing and base their arrest decisions on physical indicators and admissions. Of course, the breath test makes it much less likely for the charge to be contested in court. Even so, the fact remains we do not want even one person wrongfully charged and even worse convicted. I also like the fact that the process will be more standardized. It never hurts to have a systematic approach to crime investigations. Finally, I have always been concerned that there are a number of Alco-Sensors (and maybe now Lifelocs) that are used for Underage Drinking party investigations that are not certified by ISPFS. This is an issue I discussed years ago with Dave Laycock. My main concern is that one of these instruments would be mistakenly used in a vehicular fatality and I honestly failed to consider the mouth alcohol issues in a underage drinking case.

This SOP is therefore a departure from previous practices and I am not saying that this is a bad thing. But in the past, the instruments have been used and ISPFS has basically said fine if you purchase and use them, but don't expect us to come and testify on an instrument that is not certified. Therefore, this SOP is basically a new official declaration saying if you are going to use a breath testing instrument in a criminal investigation, a certified instrument and a certified operator is required – specifically in MIP cases. The biggest challenge is to get the word out so that investigative resources, prosecutor resources and judicial resources are not expended in vain. Frankly, I do not know how you do this with the cat already out of the bag this past Friday. With that said, let me focus on the suggested changes for the procedures now in place:

1. 8 – I don't think the first sentence is introducing what you want it to as presently constructed. Let me see if I can offer an alternative or maybe spark another alternative: "Breath testing instruments certified by ISPFS are often used in investigating violations of Idaho Code § 23-949 (punishment set forth by I.C. § 18-1502), wherein a person under twenty-one (21) years of age is deemed to "possess" alcohol that has been consumed by the person. Unlike, the driving under the influence statutes, a specific level of alcohol is not required to prove a violation of I.C. § 23-949. Nor is it required to prove the person is impaired by alcohol. Rather, the presence or absence of alcohol is a determining factor in proving the offense. Therefore, there is a different standard operating procedure associated with this type of charge. The main purpose of these procedures is to address the potential of "mouth alcohol" in the testing sequence."
2. 8.1 – As you can see, I don't know where to properly insert the language about the difficulty of testing multiple offenders at a party. If you look at it from a sterile legal standpoint (and some judges will), just because there are multiple offenders should not matter when it comes to the best practices of collecting evidence. If the 15 minute waiting period is required for the evidence to be valid, then that is what is needed. I think under the current 8.1 you are sending a strong message that the best and most accurate result requires a 15-minute waiting period. Therefore, the best advice I can give you is to construct an SOP that clearly states why a 15 minute waiting period is not essential in this circumstance. Otherwise, in my opinion the court's are not likely to place any weight on the SOP.
3. 8.1 – Furthermore, I would suggest not using the term "officer's discretion," or "as the circumstances dictate." Court's like SOP's because it removes or limits the officer's discretion. I don't think a court is going to give much validity to an SOP that says you may choose to skip this step. "As the circumstances dictate," is much too broad to be effective in defining when an officer can skip the 15-minute waiting period. I don't think the term "may" as used in this context saves you.

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4. 8.2 - Just re-pointing out this is a new requirement that the operator of the instrument be certified. Without definitely stating it, a certified instrument is also now required. I know this has not been the practice of law enforcement in the past, nor is it currently the practice.
5. 8.3 - Requiring 2 breath tests has eliminated the usefulness of the FC20 function which shows either the presence or absence of alcohol. The only remaining reason for the function that I can see is to determine if it is alcohol in a glass. Just a thought on whether you want to continue teaching BTS's on how to use this function.
6. 8.3 - I do not think "minimum" and "approximately" go well together in an SOP. Approximately 2 minutes seems to indicate it can be either under or over two minutes but has to be close. Again, it is language ripe for arguments in court. If 2 minutes is the scientific threshold, I would state it thusly, "The duplicate breath samples should be 2 minutes or more apart to allow for the dissipation of potential mouth alcohol contamination.
7. Are you going to require the officer to check the mouth before administering the test? The DUI Evidentiary Testing Procedure implies this when discussing material should be removed from the mouth prior to the start of the 15 minute waiting period. I suggest adding the requirement that material should be removed from the mouth prior to the breath test. (8.2.2 and move current 8.2.2 to 8.2.3?)
8. 8.3 - **Bold** the word "Note" for consistency. I don't care for the language of the note - again do not use "minimum" right before "approximately." I think a better explanation is needed, and maybe an example of what you mean. Again, I just see problems with this process, but maybe I am a little dim-witted on this matter. Isn't the two minute delay with the FC20 automatic? I can't remember without looking at the Alco-Sensor - but how is it even possible to run multiple tests within the 2 minutes. Plus, I see this as a logistical nightmare for documentation purposes. I see this leaking over into the DUI realm where the defense attorney will take the wildly different results in the underage drinking context and try to paint the picture the instrument was on the fritz. I obviously need more education to be able to give recommendations on this SOP.
9. 8.3.1 - I also need a little more direction regarding the need for a third sample if the first two are not within 0.02 of one another. Again, we are not concerned with the level of intoxication. I understand the 0.02 is a safeguard against mouth alcohol, and I understand the explanation of 8.3.2.1, but if there are wildly different results between the two samples, won't it be necessary at that point for a 15 minute waiting period. I am thinking of our BTS labs. How long have breath mints, alcoholic gum or other source of mouth alcohol we would be concerned about, continued to give results? If alcohol is regurgitated from the stomach, this is not a source of mouth alcohol we need to worry about. In fact, it just bolsters our case. Is it just to eliminate the argument of the defendant providing different strengths of breath? And/or RFI? Again, I am having hard time seeing the evidentiary value without a 15 minute waiting period now being imposed if the samples are 0.02 apart.
10. 8.3.3 - Just a quick comment - I am guessing agencies already are required to keep this documentation? However, if the instruments have not been certified, have agencies been keeping the same documentation on these instruments as those used in DUI investigations? Christine would be the best person to answer this? Or the officers at BPD doing the party patrols. In addition, this SOP will likely add to the workload of ISPFS and will definitely add to the workload of prosecutor offices. I don't ever remember a defense attorney ever asking for this type of information in a MIP case, but I certainly foresee it becoming a standard practice with an SOP in place to remind them.
11. 8.3.4 - As I mentioned in a previous SOP, I question whether the "provided the failure to supply the requested samples was the fault of the subject/individual and not the operator" is necessary to be included in the SOP. I agree with what the SOP is saying, but I wonder if it needlessly opens the door for the BTS and/or ISPFS to testify whether they think the failure/refusal is the defendant's fault or the operator's fault. For example, let's say the defendant provides a first breath sample but then tells the officer he will not give a second sample. There is some verbal jarring between the two for approximately two minutes. The defendant then has a change of heart and states he will give the second breath test, but the officer says it is too late, the defendant's initial refusal has been noted. Do you really want to be testifying whether in your opinion this is the fault of the defendant or of the operator?
12. 8.3.5 - Please note, there are no civil sanctions (like driver's license suspension) for these offenders in refusing the breath test. Nor, is there a recognized consent exception to the warrant requirement, which is based on the implied consent statute in the DUI context. There may still be the "exigency exception" to the warrant requirement but I would want to really look into this. Just another hesitation I have about mixing the Underage Drinking SOP with the DUI SOP. I worry that some officers may think it is the same ball game and it clearly is not. In reality, I

think we have a long way to go before police agencies want their officers to be drawing blood in the underage drinking context. This adds to my concerns I spoke about earlier.

This is the best I can do at such short notice. I really was hoping before a new or revised SOP was in place that it would be reviewed by the various stakeholders. It would be good to get comments from some of the BTS's, prosecutors in different jurisdictions, and probably most importantly your own AG's who could forward it on to the appellate division who could offer some excellent insight. I recognize this is not a requirement of ISPFS and I just want to reaffirm my appreciation that you would allow me to comment at all. I see only benefits by us working together. So thanks again, and please let me know if you have any questions or if I can be of further assistance.

Jared D. Olson

Traffic Safety Resource Prosecutor
Idaho Prosecuting Attorneys Association
700 S. Stratford Drive (Idaho POST Academy)
Meridian, ID 83642
(208) 884-7325 (Office)
(208) 884-7295 (Fax)
(208) 559-1217 (Cell)
jared_olson@post.idaho.gov
www.TSRP-Idaho.org

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From: Johnston, Jeremy
Sent: Wednesday, August 25, 2010 7:45 AM
To: Gamette, Matthew; Anderson, Skyler; Olson, Jared
Cc: 'Benjamin Harmer'; 'Christine Starr'
Subject: NEW sop revision

The working revision is currently in I:\ALCOHOL\REVIEW

If you don't have access to our intranet (Ben and Christine) please email me the changes that you would like (with explanation) and I will circulate them for comments.

The changes are marked in RED.

Jeremy Johnston
Alcohol Discipline Leader
ISP Region 1 Forensics
Coeur d' Alene, ID
208-209-8706

In the past, it has been my recommendation to not include underage drinking as part of the SOPs. My biggest hang-up on this issue is the fact that I.C. 23-949 does not have a similar provision as the DUI statute (18-8002A) wherein the breath test is admissible "without the necessity of producing a witness to establish the reliability of the testing procedure for examination."

Therefore, with or without the SOP, I think the defense has an argument to attack and/or suppress the test results. First, if the SOP is not followed the defense now has an avenue to attack the admissibility and the weight of the evidence. I hate

to see MIP charges become as technical as DUI cases. Second, if the SOP is followed, I think the defense can argue an expert witness is required for the test to be admissible because 18-8002A(3) does not apply to 23-949. I foresee prosecutors being blind-sided by this second approach. However, in reality most judges will likely admit the evidence based on compliance with the SOP. So maybe I am putting too much thought into this and it is really not an issue. What are your thoughts?

On the other hand, I think Jeremy's reasons for including the SOP are valid. Certainly we do not want to create any situations where an argument of wrongful conviction can be raised. Yet, in my experience there are usually officer observations that corroborate the positive test for alcohol. I also do not think it is bad for the process to be standardized. It makes it easier for officers and for us if the same approach is used each time.

This brings me to the major reason I am emailing you...I do think the SOP has basically added the requirement the breath testing devices used in underage drinking investigations to be certified by the ISPFS. This is a departure from previous breath testing program managers. I know many of the Alco-Sensor III's used by Boise PD have not been approved and certified by ISPFS. You are probably already aware of this, but I wanted to send you an email just to cover the bases and head-off any potential problems with this weekend's party patrols.

Give me a call if you have any questions, concerns or additional input.

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Gamette, Matthew

From: Benjamin Harmer [bharmer@adaweb.net]
Sent: Thursday, August 26, 2010 2:14 PM
To: Johnston, Jeremy; Gamette, Matthew
Subject: FW:
Attachments: DOC_20100826125055.PDF

Please give me a call and I can talk you through these suggestions. Take them or leave them, as you choose. Thank you for letting us be involved.

Ben Harmer

From: Cassandra Barclay
Sent: Thursday, August 26, 2010 01:46 PM
To: Benjamin Harmer
Subject:

Cassie Barclay
Legal Assistant to Kari L. Higbee & Jonathan E. Roundy
Ada County Prosecutor's Office

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Idaho Standard Operating Procedure

Breath Alcohol Testing

Idaho State Police
Forensic Services

Idaho Breath Alcohol Standard Operating Procedure
Issuing Authority—ISPPS Quality Manager
Revision 0 Effective 8/20/2010
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CLOSING ARGUMENT

0000082

Glossary

Approved Vendor: A source/provider/manufacture of an approved premixed alcohol simulator solution shall be explicitly approved as a vendor of premixed alcohol simulator solutions for distribution within Idaho.

Breath Alcohol Test: A series of separate breath samples provided during a breath testing sequence.

Breath Alcohol Testing Sequence: A sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by either the instrument or the operator, but not both, and may consist of air blanks, performance verification, internal standard checks, and breath samples.

Breath Testing Specialist (BTS): An operator who has completed an advanced training class taught by an employee of the Idaho State Police Forensic Services. BTS certification is valid for 26 calendar months and expires on the last day of the 26th month.

Certificate of Analysis: A certificate stating that the premixed ethyl alcohol solutions used for performance verification have been tested and approved for use by the ISPPFS.

Certificate of Approval: A certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of an Idaho State Police Forensic Services Lab Manager, and the effective date of the instrument approval.

Changeover Class: A training class for currently certified personnel during which they are taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists attend BTS training that qualifies them to perform BTS duties related to the instrument.

Evidentiary Test: A breath test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and community service or training tests performed with the instrument.

Idaho State Police Forensic Services (ISPPFS): Formerly known as the Bureau of Forensic Services, the ISPPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPPFS is the administrative body for the breath alcohol testing program per IDAPA 11.03.01.

MIP/MIC: An abbreviation used to designate minor in possession or minor in consumption of alcohol.

Operator Certification: The condition of having satisfied the training requirements for administering breath alcohol tests as established by the ISPPFS. Operator certification is valid for 26 calendar months and expires on the last day of the 26th month.

Operator: An individual certified by the ISPPFS as qualified by training to administer breath alcohol tests.

Operator Class: An ISPPFS-approved training class for prospective or uncertified breath alcohol operators. Currently certified Breath Testing Specialists may teach operator classes.

Performance Verification: A verification of the accuracy of the breath testing instrument utilizing a simulator and a performance verification solution. Performance verification should be reported to three decimal places. While ISPPFS uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check."

Performance Verification Solution: A premixed ethyl alcohol solution used for field performance verifications. The solution is provided by and/or approved by ISPPFS.

Recertification Class: A training class for currently certified personnel, completion of which results in uninterrupted continuation of their Operator or BTS status for an additional 26 months.

Waiting Period/Monitoring Period/Deprivation Period/Observation Period: 15-minute period prior to administering a breath alcohol test, in which an officer monitors the test subject/individual.

Idaho Breath Alcohol Standard Operating Procedure
Issuing Authority—ISPPFS Quality Manager
Revision 0 Effective 8/20/2010
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Breath Alcohol Standard Operating Procedure List of Revisions

<u>SOP Section</u>	<u>Topic</u>	<u>Date of Revision</u>
2	Delete reference to ALS	June 1, 1995
2	0.02/0.20 solutions	June 1, 1995
3.2.1	Valid breath tests	October 23, 1995
2.1	Alco-Sensor calibration checks	May 1, 1996
2.2	Intoxilyzer 5000 Calibration Checks Effective June, 1996	May 1, 1996
2.1.2	0.003 agreement	June 1, 1996
2.1.2	Operators may run calibration checks	July 1, 1996
2.1.2	Re-run a solution within 24 hours	September 6, 1996
2.1	All 3 solutions run within a 24-hour period	September 6, 1996
2	All 3 solutions run within a 24-hour period	September 6, 1996
2.1.2	Re-running of a solution	September 26, 1996
2.1	All solutions run within a 48-hour period Reference to "three" removed	September 26, 1996 Oct. 8, 1996
2	All 3 solutions run within a 48-hour period	September 26, 1996
2	More than three calibration solutions	October 8, 1996
2	Solution values no longer called in to BFS	April 1, 1997
2.1	Alco-Sensor and Intoxilyzer 5000 calibration check	August 1, 1998
2.2	Calibration checks for the Intoxilyzer 5000	February 11, 1999
	Name change, all references made to the Bureau of Forensic Services were changed to Idaho State Police Forensic Services.	August 1999
1.6	Record Management	August 1, 1999
2	Deleted sections on relocating, repairing, recalibrating, and loaning of instruments from previous revision.	August 1, 1999

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0000084

CLOSING ARGUMENT

1.2, 2.1, 2.2 3	Alco-Sensor and Intoxilyzer 5000 calibration checks Deleted sections on blood and urine samples for alcohol determination	August 1, 1999 August 1, 1999
1.6	Operator certification record management	January 29, 2001
1,2, and 3 2.1, 2.2	Reformat numbering Requirement for running 0.20 simulator solution	August 18, 2006
2.2.1.1.2.2	Changed 3-sample to "two print cards".	November 27, 2006
2.2.1.1.2.2 2.1.2.1 and 2.2.4	Deleted "simulator port" and "two print cards". Simulator temperature changed from "should" to "must".	May 14, 2007 May 14, 2007
2.2.1.1.2.2	Clarification of 0.20 calibration checks.	September 18, 2007
1.2	Added the Lifeloc FC20	February 13, 2008
1.5	Deleted requirement that the new instrument utilize the same technology if the BTS is currently certified	February 13, 2008
2	Modified the accepted range for simulator solutions to +/- 10%, eliminating the +/- 0.01 provision. Added → "Established target values may be different from those shown on the bottle label!"	February 13, 2008
2.2	Added Lifeloc FC20 calibration checks Intoxilyzer 5000 calibration is now section 2.3	February 13, 2008
2	→ Modified to specifically allow use of the 0.20 during subject testing	February 13, 2008
Sections 1, 2, 3	General reformat for clarification. Combined Alcosensor and Lifeloc sections. Specifically, changed calibration requirement using the 0.20 reference solution from four (4) checks to two (2).	December 1, 2008
2.1.4, 2.2.3, 2.2.4, 2.2.5 And 2.2.10	Clarification: a "calibration check" consists of a pair of samples in sequence and both samples must be within the acceptable range before proceeding with subject testing. A 0.20 solution should be replaced every 20-25 samples. Clarified the correct procedure for performing a calibration check.	January 14, 2009
2.1.3, 2.1.4.1, 2.1.9	Clarification: Added " <i>before and after</i> " to the <u>0.08</u> and <u>0.20</u> calibration checks, within 24 hours of a subject test. The official time and date of the calibration check is the time and date recorded on the printout, or the time and date recorded in the log, whichever corresponds to the calibration check referenced in section 2.1.3 or 2.1.4.1.	July 7, 2009

Deleted: 0.080

Deleted: 0.200

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History Page

Revision #	Effective date	History
0	8/20/2010	The entire SOP was rewritten to incorporate language changes regarding performance verifications, and to clear-up ambiguities associated with the 0.20 verification and the relevance to cases not involving an <u>18-8004C</u> charge. Scope and safety sections were added. Troubleshooting, MIP/MIC sections added.

Deleted: 18-8004c

1 ↓
why not
3.0?
you can't go to
1.0 next since
we already had that

Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments

Contents:

<u>Section 2: Scope</u>	page 7
<u>Section 3: Safety</u>	page 7
<u>Section 4: Instrument and Operator Certification</u>	page 7
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<u>Section 6: Evidentiary Testing Procedure</u>	page 13
<u>Section 7: Troubleshooting</u>	page 15
<u>Section 8: MIP/MIC Procedure</u>	page 16

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1 Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments.

2 Scope

This method describes the Idaho State Police Forensic Services (ISPPFS) procedure, for use by agencies external to ISPPFS, for the analysis of breath for the presence of volatile compounds using an approved breath testing instrument. This method provides for the quantitative analysis of ethanol.

Following all the recommendations of this external procedure will establish the scientific validity and ~~set the unquestioned foundational admissibility~~ of the breath alcohol test. Failure to meet all of the recommendations within this procedure does not disqualify the breath alcohol test, but does allow for the questioning of the breath alcohol tests as it pertains to its foundation of admissibility in court. That foundation can be set, through testimony, by a breath testing specialist expert or ISPPFS expert in breath testing as to the potential ramifications of the deviation from the procedure as stated.

Don't advocate or make legal conclusions

cite statute lang

3 Safety

Within the discipline of breath alcohol testing, the general biohazard safety precautions should be followed. This is due to the potential infectious materials that may be ejected from the mouth during the sampling of the breath. Caution should be taken so as the expired breath is not directed towards the officer or other unrelated bystander.

Deleted: precautions

4 Instrument and Operator Certification

To ensure that minimum standards are met, individual breath testing instruments, operators, and breath testing specialists (BTS) must be approved and certified by the Idaho State Police Forensic Services (ISPPFS). The ISPPFS will establish and maintain a list of approved instruments by manufacturer brand or model designation for use in the state.

4.1 Approval of Breath Testing Instruments. In order to be approved and certified each instrument must meet the following criteria:

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4.1.1 The instrument shall analyze a reference sample or analytical test standard, the results of which must agree within +/- 10% of the target value or such limits set by ISPFs.

analysis's

4.1.2 The certification procedures shall be adequate and appropriate for the analyses of breath specimens for the determination of alcohol concentration for law enforcement.

4.1.3 Any other tests deemed necessary to correctly and adequately evaluate the instrument to give accurate results in routine breath alcohol testing.

4.2 The ISPFs may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof.

4.3 Operators become certified by completing a training class taught by an ISPFs certified Breath Testing Specialist (BTS). Certification is for 26 calendar months and expires the last day of the 26th month. Certification will allow the operator to perform all functions required to obtain a valid breath-alcohol test. It is the responsibility of the individual operator to maintain their current certification; the ISPFs will not notify operators that their certification is about to expire.

agreement

4.3.1 Recertification for another 26-month period is achieved by completing an ISPFs approved Operator class prior to the end of the 26th month.

4.3.2 If the individual fails to satisfactorily complete the class (including the written and practical tests), or allows their certification status to expire, he/she must retake the operator class in order to become re-certified.

you mean expired?

4.3.3 If current Operator certification is voided, the individual is not certified to run evidentiary breath alcohol tests on the instrument in question until the operator class is completed.

4.3.3.1 There are no grace periods or provisions for extension of operator certification.

4.4 Breath Testing Specialists (BTS) are Operators who have completed an advanced training class and are ISPFs-certified to perform instrument maintenance, and provide both initial and recertification training for instrument operators.

4.4.1 To obtain initial BTS certification, an individual must be currently certified as an Operator of that particular instrument. BTS certification is then obtained by completing an approved BTS training class on that same instrument.

4.4.2 Certification is valid for 26 calendar months.

- 4.4.3 If BTS certification is allowed to expire, the individual reverts to certified Operator status for 12 calendar months for that instrument. He/she may no longer perform any BTS specific duties relating to that particular instrument.
- 4.4.4 BTS certification is renewable by attending an approved BTS training class.
- 4.4.5 The Idaho State Police Forensic Services may revoke BTS certification for cause. Examples may include falsification of records, failure to perform required performance verification, failure to successfully pass a BTS re-certification class and failure to meet standards in conducting operator training.
- 4.5 Adoption of a new instrument by an agency will require updating any BTS and Operators in that agency in the use of the new instrument.
- 4.5.1 A currently certified BTS may become a certified BTS for a new instrument by completing an ISPFS approved BTS Instrumentation class.
- 4.5.2 A currently certified Operator may certify on a new instrument by completing an ISPFS approved Operator Instrumentation Class for the new instrument.
- 4.5.3 Individuals not currently certified as Operators must complete an Operator Class for each approved instrument.
- 4.6 Record maintenance and management. It is the responsibility of each individual agency to store performance verification records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of operator certification.
- 4.6.1 It is the responsibility of the agency to see that the said records are stored and maintained a minimum of (3) years in accordance with IDAPA 11.03.01.
- 4.6.1.1 Records may be subject to periodic review by the Idaho State Police Forensic Services.
- 4.6.2 The Idaho State Police Forensic Services will not be responsible for the storage of such records not generated by ISPFS.

& what may constitute grounds for revocation

does this requirement make all records ISP records? For discovery purposes?

5. Performance Verification of Breath Testing Instruments

Performance verifications aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning correctly. Performance verifications are performed using a wet bath simulator performance verification solution. The solution is provided by and/or approved by ISPFS. The ISPFS analysis establishes the target value and acceptable range of the solutions used for the verification and includes the acceptable values on the Certificate of Analysis for each solution. Note: The ISP established target values may be different from those shown on the bottle label.

5.1 Alco-Sensor and Lifeloc FC20 - Portable Breath Testing Instrument Performance Verification

5.1.1 The Alco-Sensor and Lifeloc FC20 portable breath testing instrument performance verification is run using approximately 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.

5.1.2 The performance verification using the 0.08 and 0.20 performance verification solutions consist of two samples.

Deleted: separated by air blanks

5.1.3 A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 performance verification solution must be performed within 24 hours, before or after an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification.

5.1.3.1 A 0.08 performance verification solution should be replaced with fresh solution approximately every 25 verifications or every calendar month, whichever comes first.

5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications. The same bottle of 0.20 solution may be used indefinitely for multiple months until it reaches its expiration or its maximum of approximately 25 verifications.

NOTE: The 0.20 performance verification was implemented for the sole purpose of supporting the instrument's results for an 18-8004C charge. ~~In the absence of an 18-8004C charge, the 0.20 verifications, or lack thereof, shall have no relevance to the results or the evidentiary value of the evidentiary test.~~

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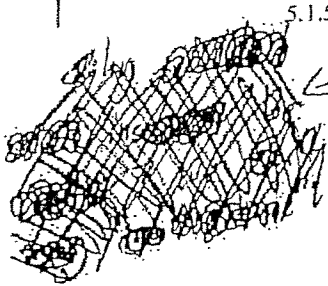
Failure to timely perform .20 performance verifications will not invalidate tests performed that yield results at other levels.

5.1.4.1 The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after an evidentiary test. The 0.20 performance verification solution should not be used routinely for this purpose.

at any level.

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5.1.5 Acceptable results for a 0.08 or 0.20 performance verification is a pair of samples (in sequence) that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFS.

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NOTE: Due to external factors associated with changing a performance verification solution (examples include: ambient air in the sample chamber, temperature fluctuation) the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three test series for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. The suggested troubleshooting procedure should be followed if the initial performance verification does not meet the acceptance criteria.

Deleted: none

5.1.6 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the performance verification results to be valid.

NOTE: The simulator may need to warm for approximately 15 minutes to insure that the metal lid is also warm. If the lid is cold, condensation of alcohol vapor may occur producing low results.

5.1.7 Performance verification solutions should only be used prior to the expiration date on the label.

5.1.8 An agency may run additional performance verification solution levels at their discretion.

5.1.9 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log, whichever corresponds to the performance verification referenced in section 5.1.3 or 5.1.4.1.

5.2 Intoxilyzer 5000/EN Performance Verification

Intoxilyzer 5000/EN instruments must have a performance verification with each evidentiary test. If the performance verification is within the acceptable range for the lot of solution being used, then the instrument will be approved and the resulting breath samples will be deemed valid for evidentiary use.

- 5.2.1 Intoxilyzer 5000/EN performance verification is run using 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.
- 5.2.2 During each evidentiary breath alcohol test using the Intoxilyzer 5000/EN, a performance verification will be performed as directed by the instrument testing sequence and recorded as SIM CHK on the printout. If the SIM CHK is not within the acceptable range for the solution lot being used, the testing sequence will abort and no breath samples will be obtained.
- 5.2.3 A two sample performance verification using a 0.08 performance verification solution should be run and results logged each time a solution is replaced with fresh solution. A 0.08 performance verification solution should be replaced with fresh solution approximately every 100 samples or every calendar month, whichever comes first.
- 5.2.4 A two sample performance verification using a 0.20 performance verification solution should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 samples. The same bottle of 0.20 solution may be used indefinitely for multiple months until it reaches its expiration or its maximum of approximately 25 verifications.

NOTE: The 0.20 performance verification was implemented for the sole purpose of supporting the instruments results for a 18-8004C charge. In the absence of an 18-8004C charge, the 0.20 verification, or lack thereof, shall have no relevance to the results or the evidentiary value of the evidentiary test.

- 5.2.5 Acceptable results for a 0.08 or 0.20 performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results for each solution lot series are included in a certificate of analysis, prepared by, and available from, the ISPFS.

NOTE: Due to external factors associated with changing a performance verification solution (examples include: ambient air in the sample chamber, temperature fluctuation) the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three test series for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. Follow the suggested troubleshooting procedure if the initial performance verification does not meet the acceptance criteria.

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Deleted: The same bottle of 0.20 solution may be used for several months.

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*not involved in evidentiary testing
 in another charge.*

- 5.2.6 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log.
- 5.2.7 Performance verification solutions should only be used prior to the expiration date as marked on the label.
- 5.2.8 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the performance verification results to be valid.
- 5.2.9 An agency may run additional performance verification solution levels at their discretion.
- 5.2.10 The BTS must set the correct acceptable range limits and performance verification solution lot number in the instrument before proceeding with evidentiary testing.

6. Evidentiary Testing Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, ~~not the blood~~, and report results as grams of alcohol in 210 liters of breath.

- 6.1 Prior to evidentiary^{ry} breath alcohol testing, the subject/individual should be monitored for at least fifteen (15) minutes. Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the start of the 15 minute waiting period. During the monitoring period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate.

NOTE: If a foreign object/material is left in the mouth during the entirety of the 15 minute monitoring period, any potential external alcohol contamination will come into equilibrium with the subject/individual's body water and/or dissipate so as not to interfere with the results of the subsequent breath alcohol test.

- 6.1.1 The breath alcohol test must be administered by an operator currently certified in the use of the instrument used. ~~e~~
- 6.1.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.
- 6.1.3 The operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.
- 6.1.4 During the monitoring period, the operator must be alert for any event that might influence the accuracy of the breath alcohol test.

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6.1.4.1 The operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the operator should begin another 15-minute waiting period before repeating the testing sequence.

6.1.4.2 If, during the 15-minute waiting period, the subject/individual vomits or regurgitates material from the stomach into the subject/individual's breath pathway, the 15-minute waiting period must begin again.

6.1.4.3 If there is doubt as to the events occurring during the 15 minute monitoring period, the officer should look at results of the duplicate breath samples for evidence of potential alcohol contamination. For clarification see section 6.2.2.2.

Can we also say that 2 valid res w/in the .01 agreement the test is valid no matter what is in the air

6.2 A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes apart to allow for the dissipation of potential mouth alcohol contamination.

NOTE: A deficient or insufficient sample does not automatically invalidate a test sample.

6.2.1 If the subject/individual fails or refuses to provide a ~~second or third~~ *duplicate,* adequate sample as requested by the operator, the single test result may be considered valid.

6.2.1.1 The operator may repeat the testing sequence as required by circumstances.

6.2.1.2 The operator should use a new ~~mouthpiece~~ *not bold* for each series of tests.

6.2.2 A third breath sample is required if the first two results differ by more than 0.02.

6.2.2.1 Unless mouth alcohol is indicated or suspected, it is not necessary to repeat the 15-minute waiting period to obtain a third breath sample.

6.2.2.2 The results for ~~a~~ *g* duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individual's breath pathway, show consistent sample delivery, and indicate ~~the~~ *g* absence of RFI as a contributing factor to the breath results.

if any,

- 6.2.3 The operator should log test results and retain printouts for possible use in court. ~~The log of the results or the instrument printouts can be used as the official legal record for court purposes.~~
- 6.2.4 If a subject/individual fails or refuses to provide a ~~second or third sample~~ as requested by the operator, the results obtained are still considered valid by the ISPFS, provided the failure to supply the requested samples was the fault of the subject/individual and not the operator.
- 6.2.5 If ~~the second or third samples are~~ *a duplicate sample is* lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.

[no legal conclusion]

duplicate

7. Troubleshooting Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results ~~that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.~~

no legal conclusions + duplicate

- 7.1 Performance verification: If, when performing the periodic performance verification, the instrument falls outside the limits of the verification, the troubleshooting guide should be used.

NOTE: This is a guide for troubleshooting failed performance verifications and the procedure is recommended to streamline and isolate the potential cause of the problem. Strict adherence to the guidelines is not required.

- 7.1.1 The three sources of error when performing the periodic performance verifications are in the simulator setup and operator technique, the simulator performance verification solution, and the instrument calibration itself.
- 7.1.2 If the first performance verification fails, the simulator setup and technique of the operator performing the verification should be evaluated. The simulator should be evaluated to ensure that it is hooked up properly, uses short hoses, is properly warmed, is within temperature, the operator blow technique is not too hard or soft, and that the operator does not stop blowing until after the sample is taken.
 - 7.1.2.1 The performance verification should be run a second time
 - 7.1.2.2 If the performance verification passes on the second try, the instrument passes the performance verification.
- 7.1.3 If the second performance verification fails, *on the second try* then the performance verification solution should be evaluated. *next*

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7.1.3.1 The performance verification solution should be changed to a fresh solution.

7.1.3.2 The solution should be warmed for approximately 15 minutes, or until the temperature is within range, and the simulator lid is as warm as the simulator jar.

7.1.3.3 The performance verification may then be repeated.

7.1.4 If the third performance verification fails, then it can be assumed that a potential source of error lies within the instrument itself. At this point the instrument must be taken out of service and sent to ISPFs or an approved service provider.

Deleted: If the third performance verification fails, then the only remaining source of error lies with the instrument itself

7.1.5 Upon return from service, the instrument should be evaluated by ISPFs before being put back into service.

7.2 Thermometers:

7.2.1 If a bubble forms in the thermometer, the operator or BTS can place the thermometer in a freezer to draw the mercury (or equivalent) into the bulb of the thermometer. This should disperse the bubble.

8. MIP/MIC Procedure

Since the testing threshold (presence or absence) for a minor in possession/minor in consumption charge is different from an 18-8004 charge and the numeric thresholds, there is a different procedure associated with these special circumstances. In many instances, an underage drinking party may consist of multiple subjects/individuals that need to be tested and the sheer number of individuals does not lend itself to observing a 15 minute waiting period for each person. The potential for "mouth alcohol" is still a factor and should be addressed in the testing sequence.

8.1 15 minute observation period: At the officer's discretion, or as the circumstances dictate, the regular DUI procedure (Section 6) may be followed in order to obtain a breath sample from the subject/individual. Otherwise, a shortened procedure can be followed

8.2 MIP/MIC procedure:

8.2.1 The breath alcohol test must be administered by an operator currently certified in the use of the instrument ~~used~~

8.2.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.

8.3 A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath

redundant
or do you mean recertified?

yikes

yikes

293

samples should be at a minimum approximately 2 minutes apart or greater to allow for the dissipation of potential mouth alcohol contamination. ✓

NOTE: A deficient or insufficient sample does not automatically invalidate a test sample. Additionally, it should be noted that the two samples taken for a single individual do not need to be consecutive samples as long as there is at a minimum approximately 2 minutes or greater between each sample from each individual.

8.3.1 If the subject/individual fails or refuses to provide a ~~second or third~~ *duplicate* adequate sample as requested by the operator, the single test result may be considered valid.

8.3.1.1 The operator may repeat the testing sequence as required by circumstances.

8.3.1.2 The operator should use a new mouthpiece for each series of tests.

8.3.2 A third breath sample is required if the first two results differ by more than 0.02.

8.3.2.1 The results for a duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individual's breath pathway, show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

8.3.3 The operator should log test results and retain printouts ~~for possible use in court. The log of the results or the instrument printouts can be used as the official legal record for court purposes.~~

8.3.4 If a subject/individual fails or refuses to provide a ~~second or third~~ *duplicate* sample as requested by the operator, the results obtained are still considered valid by the ISPFS, provided the failure to supply the requested samples was the fault of the subject/individual and not the operator.

8.3.5 If ~~the second or third samples are~~ *a duplicate sample is* lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.

Gamette, Matthew

From: Christine Starr [CStarr@cityofboise.org]
Sent: Thursday, August 26, 2010 3:16 PM
To: Gamette, Matthew
Subject: Re: MIP/MIC Conference Call

Sounds great! Thank you!

>>> On 8/26/2010 at 3:12 PM, in message
<9786F206A1C09B4A95140060614274C50570A991@LOUDHOWARD.ISP.STATE.ID.US>,
"Gamette, Matthew" <matthew.gamette@isp.idaho.gov> wrote:

In reference to our conference call today with Ben Harmer, Jared Olson, Christine Starr, Jeremy Johnston, Jenny Grunke, and Matthew Gamette:

- Jeremy will delete section 8 (MIP/MIC) from the SOP until we can do the research on statutory requirements and obligations for ISPFs. The wording to be added for a revision 1 place holder is "The previous version of this section has been withdrawn from publication and will be replaced by an updated version that is pending statutory and legal review. Please disregard and destroy any copies of the previous version of this section."
- Matthew will draft an email to all BTS, Operators, Sheriffs, and Chiefs letting them know that a new MIP/MIC procedure will be coming out Nov 1st requiring calibrated instruments and trained operators if they choose to use these instruments in MIP/MIC cases and have ISP back up the science behind the testing. This will give them the lead time to get the instruments in and calibrated and the operators trained.
- Jeremy and Matthew will draft a new MIP/MIC procedure to be circulated for review October 1st. We will accept comments until October 22nd and then the BTSs will be circulated the final wording for a November 1st implementation. The procedure will require calibration of instruments used, trained operators, and two tests a minimum of two minutes apart. The procedure will also outline the difference between DUJ testing and MIP/MIC.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

Gamette, Matthew

From: Benjamin Harmer [bharmer@adaweb.net]
Sent: Thursday, August 26, 2010 3:17 PM
To: Gamette, Matthew; Wills, Kedrick; Christine Starr; Olson, Jared; Grunke, Jenny
Cc: Cutler, Rachel; Johnston, Jeremy; Anderson, Skyler; Lewis, Lamora
Subject: RE: MIP/MIC Conference Call

Will it also address the use of Lifeloc passive mode testing (pos or neg for alcohol, no levels indicated)?

Ben Harmer

From: Gamette, Matthew [mailto:matthew.gamette@isp.idaho.gov]
Sent: Thursday, August 26, 2010 03:12 PM
To: Wills, Kedrick; Benjamin Harmer; Christine Starr; Olson, Jared; Grunke, Jenny
Cc: Cutler, Rachel; Johnston, Jeremy; Anderson, Skyler; Lewis, Lamora
Subject: MIP/MIC Conference Call

In reference to our conference call today with Ben Harmer, Jared Olson, Christine Starr, Jeremy Johnston, Jenny Grunke, and Matthew Gamette:

- Jeremy will delete section 8 (MIP/MIC) from the SOP until we can do the research on statutory requirements and obligations for ISPFS. The wording to be added for a revision 1 place holder is "The previous version of this section has been withdrawn from publication and will be replaced by an updated version that is pending statutory and legal review. Please disregard and destroy any copies of the previous version of this section."
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Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

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Gamette, Matthew

From: Johnston, Jeremy
Sent: Friday, August 27, 2010 8:39 AM
To: Gamette, Matthew
Subject: RE: MIP/MIC Conference Call

That would be great. I'm swamped.

JJ

PS: I contemplated doing this last night from home again, but then I thought twice about it and put the gun back in the box.

From: Gamette, Matthew
Sent: Friday, August 27, 2010 7:38 AM
To: Johnston, Jeremy
Subject: RE: MIP/MIC Conference Call

I can put these in if you do not have time but the history page needs to be revised and we need to update all the footers with today's issue date.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager

From: Johnston, Jeremy
Sent: Friday, August 27, 2010 8:29 AM
To: Gamette, Matthew; 'Benjamin Harmer'; 'Christine Starr'; Olson, Jared; Grunke, Jenny
Cc: Cutler, Rachel; Anderson, Skyler; Lewis, Lamora
Subject: RE: MIP/MIC Conference Call

Here is the finalized revision 1 of the SOP. All the changes and language modifications have been added to the best of my ability. Thank you all for your input and legal expertise with this document.

Please review this as soon as possible as we want to publish this out today before the weekend "party patrol" for Ada county and Boise.

Thanks again,

JJ

Jeremy Johnston
Alcohol Discipline Leader
ISP Region I Forensics
Coeur d'Alene, ID
208-209-8706

Gamette, Matthew

From: Benjamin Harmer [bharmer@adaweb.net]
Sent: Friday, August 27, 2010 9:22 AM
To: Johnston, Jeremy; Gamette, Matthew; Christine Starr; Olson, Jared; Grunke, Jenny
Cc: Cutler, Rachel; Anderson, Skyler; Lewis, Lamora
Subject: RE: MIP/MIC Conference Call

Looks good. I like whoever added the "outside the verification limits" language. Very wordsmithy (yes, I just made that word up).

Ben Harmer

From: Johnston, Jeremy [mailto:Jeremy.Johnston@isp.idaho.gov]
Sent: Friday, August 27, 2010 08:29 AM
To: Gamette, Matthew; Benjamin Harmer; Christine Starr; Olson, Jared; Grunke, Jenny
Cc: Cutler, Rachel; Anderson, Skyler; Lewis, Lamora
Subject: RE: MIP/MIC Conference Call

Here is the finalized revision 1 of the SOP. All the changes and language modifications have been added to the best of my ability. Thank you all for your input and legal expertise with this document.

Please review this as soon as possible as we want to publish this out today before the weekend "party patrol" for Ada county and Boise.

Thanks again,

JJ

Jeremy Johnston
Alcohol Discipline Leader
ISP Region 1 Forensics
Coeur d' Alene, ID
208-209-8706

From: Gamette, Matthew
Sent: Thursday, August 26, 2010 2:12 PM
To: Wills, Kedrick; Benjamin Harmer; Christine Starr; Olson, Jared; Grunke, Jenny
Cc: Cutler, Rachel; Johnston, Jeremy; Anderson, Skyler; Lewis, Lamora
Subject: MIP/MIC Conference Call

In reference to our conference call today with Ben Harmer, Jared Olson, Christine Starr, Jeremy Johnston, Jenny Grunke, and Matthew Gamette:

- Jeremy will delete section 8 (MIP/MIC) from the SOP until we can do the research on statutory requirements and obligations for ISPFs. The wording to be added for a revision 1 place holder is "The previous version of this section has been withdrawn from publication and will be replaced by an updated version that is pending statutory and legal review. Please disregard and destroy any copies of the previous version of this section."

- Matthew will draft an email to all BTS, Operators, Sheriffs, and Chiefs letting them know that a new MIP/MIC procedure will be coming out Nov 1st requiring calibrated instruments and trained operators if they choose to use these instruments in MIP/MIC cases and have ISP back up the science behind the testing. This will give them the lead time to get the instruments in and calibrated and the operators trained.
- Jeremy and Matthew will draft a new MIP/MIC procedure to be circulated for review October 1st. We will accept comments until October 22nd and then the BTSS will be circulated the final wording for a November 1st implementation. The procedure will require calibration of instruments used, trained operators, and two tests a minimum of two minutes apart. The procedure will also outline the difference between DUI testing and MIP/MIC.

Matthew Gamette
Idaho State Police Forensic Services
Quality Manager
700 South Stratford Drive Suite 125
Meridian Idaho 83642
208-884-7217 Voice
208-884-7290 Fax

RECEIVED
MAY 03 2011

MEMORANDUM

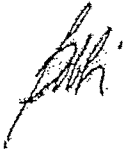
DATE: May 3, 2011

TO:	Phillip B. Heersink	Hand Delivery
	Kelly Whizing	Hand Delivery
	Virginia Bond	Hand Delivery
	Shane Darrington	Fax: 965-8280
	Alisa Massoth	Hand Delivery
	Dart Burrows	Hand Delivery
	Tyler Rounds	Fax: 459-6908
	Steve Fogelson	Hand Delivery

FROM: Barbara J. (Bobbi) Richart
 Chief Deputy Prosecuting Attorney
 Payette County

RE: Possible Brady/Giglio Material
 Idaho State Police Forensics Lab

I am attaching copies of correspondence received today from Major Kedrick Wills, Idaho State Police Forensic Services Commander.



300



Colonel G. Jerry Russell
Director

Idaho State Police

Service Since 1939



C.L. "Butch" Otter
Governor

TO: IDAHO COUNTY PROSECUTING ATTORNEYS
AND IDAHO MUNICIPAL ATTORNEYS

RE: POSSIBLE *BRADY/GIGLIO* MATERIAL
Idaho State Police, Forensics Lab Manager Skyler Anderson

DATE: MAY 3, 2011

The purpose of this letter is to advise you of potential *Brady/Giglio* material that has recently been identified concerning an ISP Forensic Laboratory scientist. The situation is as follows.

On February 24, 2011, ISP Capt. Clark Rollins received an Idaho State Police Administrative Incident Report from ISP Lab Improvement Manager Matthew Gamette regarding Skyler Anderson. Gamette alleged that Mr. Anderson maintained an ongoing unauthorized quantity of controlled narcotics for display purposes, outside the practices of the Forensics Quality Manual and without proper documentation, tracking and auditing. During yearly audits of the Region 5 lab facility, Mr. Anderson and others intentionally hid the unauthorized "display drugs" from auditors to avoid detection of this practice. Mr. Anderson personally hid the drugs from auditors on at least four occasions.

ISP Det. Julie Donahue investigated this individual. Her written reports are available at your request. Please feel free to contact me if you have any questions at 208-884-7207.

Sincerely,

Major Kedrick Wills
Forensic Services Commander
Idaho State Police

700 S. Stratford Drive, Meridian, Idaho 83642-6202 • (208)884-7000 • Fax (208)884-7090

EQUAL OPPORTUNITY EMPLOYER

CLOSING ARGUMENT

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301



Idaho State Police

Service Since 1939



Colonel G. Jerry Russell
Director

C.L. "Butch" Ortner
Governor

TO: IDAHO COUNTY PROSECUTING ATTORNEYS
AND IDAHO MUNICIPAL ATTORNEYS

RE: POSSIBLE *BRADY/GIGLIO* MATERIAL
Idaho State Police, Forensic Scientist Lamora Lewis

DATE: MAY 3, 2011

The purpose of this letter is to advise you of potential *Brady/Giglio* material that has recently been identified concerning an ISP Forensic Laboratory scientist. The situation is as follows.

On February 23, 2011, at approximately 4:45 p.m., ISP Headquarters Lab Manager Skyler Anderson and Region 5 Lab Manager Shannon Larson had a telephone conversation. Mr. Anderson told Ms. Larson that there was a box of drugs in the Region 5 Lab that was used for "tours" and "show and tell." He also told Ms. Larson that the drugs in the box were not tracked and were untraceable. He told her the box of drugs might be in the vault, but since there was an audit coming up, it might be somewhere else. Mr. Anderson told Ms. Larson that Lamora Lewis would know where the box was. When Ms. Larson asked Ms. Lewis about the box of drugs that was used for "tours," Ms. Lewis climbed up on the drug bench, lifted the ceiling tiles, and pulled out a box of drugs. When interviewed, she explained how she became involved in this intentional deception. She stated that she knew that intentionally hiding the box from auditors was wrong and stated "because if you are hiding it obviously something is wrong, but I know I should have said something."

ISP Det. Julie Donahue investigated this individual. Her written reports are available at your request. Please feel free to call me if you have any questions at 208-884-7207.

Sincerely,

Major Kedrick Wills
Forensic Services Commander
Idaho State Police

700 S. Stratford Drive, Meridian, Idaho 83642-6202 • (208)884-7000 • Fax (208)884-7090

EQUAL OPPORTUNITY EMPLOYER

CLOSING ARGUMENT

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302

Colonel G. Jerry Russell
Director

Idaho State Police

Service Since 1939

C.L. "Butch" Otter
Governor

TO: IDAHO COUNTY PROSECUTING ATTORNEYS
AND IDAHO MUNICIPAL ATTORNEYS .

RE: POSSIBLE *BRADY/GIGLIO* MATERIAL
Idaho State Police, Forensic Lab Scientist Susan Williamson

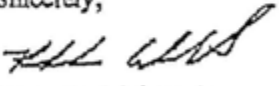
DATE: MAY 3, 2011

The purpose of this letter is to advise you of potential *Brady/Giglio* material that has recently been identified concerning an ISP Forensic Laboratory scientist. The situation is as follows.

In 2003, ISP Scientist Susan Williamson ordered Gamma-hydroxybutyric Acid (GHB) with verbal approval from her then immediate supervisor. She submitted the proper DEA forms, but did not check the ISP Forensic Quality Manual's authorized amounts and ordered more than the manual allowed. Ms. Williamson deliberately kept the GHB secreted within the lab on the top shelf of her evidence vault, on the very back of the shelf, and most recently kept it in a secure area in a friction lid can. When asked why she put it there, she said that she put it there because she knew no one would find it there. All the documentation was kept with it and the unused amount was completely accounted for. When asked if she had ever hidden anything else from inspectors or auditors, she said "No, this is my only skeleton in my closet."

ISP Det. Julie Donahue investigated this individual. Her written reports are available at your request. If you have any questions, please feel free to call me at (208) 884-7207.

Sincerely,


Major Kedrick Wills
Forensic Services Commander
Idaho State Police

700 S. Stratford Drive, Meridian, Idaho 83642-6202 • (208) 884-7000 • Fax (208) 884-7090

EQUAL OPPORTUNITY EMPLOYER

CLOSING ARGUMENT

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EXHIBIT B

CLOSING ARGUMENT



U.S. v. Horn
185 F.Supp.2d 530
D.Md.,2002.
Jan. 31, 2002. (Approx. 36 pages)



58 Fed. R. Evid. Serv. 357

Defendant charged, under Assimilative Crimes Act, with driving while intoxicated (DWI) moved to exclude evidence of his performance on field sobriety tests. The District Court, Grimm, United States Magistrate Judge, held that: (1) test results were admissible on issue of whether there was probable cause for arrest, but not for purpose of proving specific blood alcohol content (BAC); (2) arresting officer could testify with respect to his observations of defendant's performance of tests, but could not suggest that tests were objective indicators of intoxication; (3) if government introduced evidence that defendant exhibited nystagmus, defendant could bring out fact that there were many causes of nystagmus other than alcohol ingestion; and (4) arresting officer could give lay opinion testimony that defendant was driving while intoxicated.

Ordered accordingly.

West Headnotes

[1] KeyCite Notes

- ~48A Automobiles
- ~48AIX Evidence of Sobriety Tests
- ~48Ak411 k. In General. Most Cited Cases

Results of properly conducted standard field sobriety tests may be considered to determine whether probable cause exists to charge driver with driving while intoxicated (DWI) or driving under influence of alcohol (DUI).

[2] KeyCite Notes

- ~48A Automobiles
- ~48AIX Evidence of Sobriety Tests
- ~48Ak411 k. In General. Most Cited Cases

Results of standard field sobriety tests, either individually or collectively, are not admissible for purpose of proving specific blood alcohol content (BAC) of a driver charged with driving while intoxicated (DWI) or driving under influence of alcohol (DUI). Fed. Rules Evid. Rule 702, 28 U.S.C.A.

[3] KeyCite Notes

- ~35 Arrest
- ~35II On Criminal Charges
- ~35k63 Officers and Assistants, Arrest Without Warrant
- ~35k63.4 Probable or Reasonable Cause
- ~35k63.4(2) k. What Constitutes Such Cause in General. Most Cited Cases

306

All that is required to establish probable cause to arrest suspect is reasonably trustworthy information that would support reasonable belief that suspect committed offense. U.S.C.A. Const. Amend. 4.

[4] KeyCite Notes

- ~110 Criminal Law
 - ~110XVII Evidence
 - ~110XVII(A) Judicial Notice
 - ~110k304 Judicial Notice
 - ~110k304(3) k. Physiological Facts. Most Cited Cases

- ~110 Criminal Law
 - ~110XVII Evidence
 - ~110XVII(R) Opinion Evidence
 - ~110k468 Subjects of Expert Testimony
 - ~110k476 k. Cause and Effect. Most Cited Cases

There is well-recognized, but by no means exclusive, causal connection between ingestion of alcohol and detectable presence of exaggerated horizontal gaze nystagmus in person's eyes, which may be judicially noticed by court, proved by expert testimony or otherwise established. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

[5] KeyCite Notes

- ~48A Automobiles
 - ~48AIX Evidence of Sobriety Tests
 - ~48Ak411 k. In General. Most Cited Cases
- ~110 Criminal Law
 - ~110XVII Evidence
 - ~110XVII(R) Opinion Evidence
 - ~110k449 Witnesses in General
 - ~110k449.1 k. In General; Subjects of Opinion Evidence. Most Cited Cases
- ~110 Criminal Law
 - ~110XVII Evidence
 - ~110XVII(R) Opinion Evidence
 - ~110k449 Witnesses in General
 - ~110k457 k. Intoxication. Most Cited Cases

Police officer trained and qualified to perform standard field sobriety tests may testify with respect to his or her observations of subject's performance of these tests, if properly administered, to include observation of nystagmus, and these observations are admissible as circumstantial evidence that defendant was driving while intoxicated (DWI) or driving under influence of alcohol (DUI); but 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. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[6] KeyCite Notes 

- ~110 Criminal Law
 - ~110XVII Evidence
 - ~110XVII(A) Judicial Notice
 - ~110k304 Judicial Notice
 - ~110k304(1) k. In General. Most Cited Cases


- ~110 Criminal Law
 - ~110XVII Evidence
 - ~110XVII(R) Opinion Evidence
 - ~110k449 Witnesses in General
 - ~110k466 k. Cross-Examination. Most Cited Cases

If government introduces evidence that driving while intoxicated (DWI) or driving under influence of alcohol (DUI) defendant exhibited nystagmus when officer performed horizontal gaze nystagmus test, defendant may bring out either during cross examination of prosecution witnesses or by asking court to take judicial notice of fact that there are many causes of nystagmus other than alcohol ingestion.

[7] KeyCite Notes 

- ~110 Criminal Law
 - ~110XVII Evidence
 - ~110XVII(R) Opinion Evidence
 - ~110k449 Witnesses in General
 - ~110k457 k. Intoxication. Most Cited Cases

If otherwise admissible, police officer may give lay opinion testimony that defendant was driving while intoxicated or under influence of alcohol; officer may not, however, bolster such testimony by reference to any scientific, technical or specialized information learned from law enforcement or traffic safety instruction, and must confine his or her testimony to helpful firsthand observations of defendant. Fed.Rules Evid.Rule 701, 28 U.S.C.A.

[8] KeyCite Notes 

- ~110 Criminal Law
 - ~110XX Trial
 - ~110XX(A) Preliminary Proceedings
 - ~110k632 Dockets and Pretrial Procedure
 - ~110k632(3) Motions
 - ~110k632(4) k. Motions in Limine. Most Cited Cases

Rules of evidence, except those dealing with privileges, are inapplicable during pretrial hearings on admissibility of evidence. Fed.Rules Evid.Rules 104(a), 1101(d)(1), 28 U.S.C.A.

[9] KeyCite Notes 

- ~110 Criminal Law
- ~110XVII Evidence
 - ~110XVII(R) Opinion Evidence
 - ~110k482 Examination of Experts
 - ~110k486 Facts Forming Basis of Opinion
 - ~110k486(2) k. Necessity and Sufficiency. Most Cited Cases

Proffered expert testimony must be excluded if it is not product of reliable methods or principles that reliably have been applied to facts of particular case. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[10] KeyCite Notes 

- ~110 Criminal Law
- ~110XVII Evidence
 - ~110XVII(A) Judicial Notice
 - ~110k304 Judicial Notice
 - ~110k304(1) k. In General. Most Cited Cases

Doctrine of judicial notice is predicated upon assumption that source materials from which court takes judicial notice are reliable.

*532 Sasha Natapoff, Asst.Fed.Public, Defender, Baltimore, MD, for Eric D. Horn.

MEMORANDUM AND ORDER

GRIMM, United States Magistrate Judge.

At approximately 10:35 p.m. on June 28, 2000, Sergeant Eric D. Horn attempted to enter the Harford Road gate of the Army facility located at Aberdeen Proving Ground, Maryland. Officer Daniel L. Jarrell stopped Horn's vehicle for an identification check. As a result of his observations of Horn, Jarrell suspected that Horn was driving under the influence of alcohol, and he was detained and questioned. Three standard field sobriety tests ("SFSTs") were administered: the "walk and turn" test, the "one leg stand" test and the "horizontal gaze nystagmus" test. [FN1] As a result of his performance on these tests, Horn was charged with driving while intoxicated under Md.Code Ann., Transp. II § 21-902 (1999 Repl. Vol.), [FN2] as assimilated by 18 U.S.C. §§ 7, 13, the Assimilative Crimes Act, a Class A misdemeanor.

FN1. Horn was given the opportunity to take a Breathalyzer test but refused, as he is entitled to do under Maryland law. Md.Code Ann., Cts & Jud. Proc. § 10-309 (1998 Repl.Vol. & 2001 Supp.).

FN2. At the time of Horn's arrest, Md.Code Ann., Transp. II § 21-902 stated in pertinent part:

(1) Driving a Relevent ~~(1) Driving a Relevent~~ *operated or intoxicated per se.--(1) A person may not drive or*

attempt to drive any vehicle while intoxicated.

(2) A person may not drive or attempt to drive any vehicle while the person is intoxicated per se.

(b) *Driving while under the influence of alcohol.*--A person may not drive or attempt to drive any vehicle while under the influence of alcohol.

Effective September 30, 2001, § 21-902 was amended; a person is now charged with either (a) driving under the influence of alcohol or under the influence of alcohol per se or (b) driving while impaired by alcohol. Md.Code Ann., Transp. II § 21-902 (2001 Supp.). Subsection(a), driving under the influence, is now the most serious charge. The change in lexicon is a result partly because of the change in the level of proof, in the form of blood alcohol content results obtained from breathalyzer tests, needed to convict under each subsection. For purposes of this opinion, this Court will continue to employ the driving while intoxicated and driving while under the influence language prevalent in most state court opinions.

[1] [2] [3] [4] [5] [6] [7] Horn has filed a motion *in limine* to exclude the evidence of his performance on the field sobriety tests, asserting that it is inadmissible under newly revised Fed.R.Evid. 702 and the *Daubert/Kumho Tire* decisions. [FN3] The Government has filed an opposition, and Horn has filed a reply. In addition, a two day evidentiary hearing was held, pursuant to Fed.R.Evid. 104(a), on November 19 and 20, 2001, and additional testimonial and documentary evidence was received, which is discussed in detail below. At the conclusion of this hearing, the following ruling was made from the bench, the Court also announcing its intention subsequently to issue a written opinion on this case of first impression: [FN4]

FN3. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

FN4. Research has not revealed any other federal case on this subject applying newly revised Rule 702 and the *Daubert/Kumho Tire* tests. There have been a few prior federal cases to consider the admissibility of horizontal gaze nystagmus evidence but never with the factual record of this case or a challenge to this evidence such as rendered here. *See*,

e.g., *United States v. Daras*, 1998 WL 726748 (4th Cir.1998)(unpublished opinion) (court discussed in passing the SFSTs but did not analyze their admissibility as scientific or technical evidence because the evidence exclusive of the tests was sufficient to establish the defendant's guilt); *United States v. Ross*, CR No. 97-972M (D.Md. February 9, 2000) (unpublished memorandum order, in which Judge Connelly of this Court

commented with his characteristic thoroughness and thoughtfulness on the state court

decisions and narrowly held that SFST evidence is sufficient to establish probable cause to administer a breathalyzer test); United States v. Everett, 972 F.Supp. 1313 (D.Nev.1997) (holding that "drug recognition examiner" testimony was governed by Rule 702 but not by Daubert on the basis that the testimony was not scientific in nature but utilizing the Daubert factors in analyzing the evidence).

(1) The results of properly conducted SFSTs may be considered to determine *533 whether probable cause exists to charge a driver with driving while intoxicated ("DWI") or under the influence of alcohol ("DUI"); [FN5]

FN5. Horn did not contest the Government's entitlement to rely on the results of properly conducted SFSTs for probable cause determinations related to DWI/DUI charges. To establish probable cause to arrest a

suspect all that is required is reasonably trustworthy information that would support a reasonable belief that the suspect committed an offense. Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). Probable cause determinations turn on practical, nontechnical determinations. Id. Thus, regardless of whether SFSTs are admissible as evidence, they may establish probable cause to arrest a motorist for DWI/DUI.

(2) The results of the SFSTs, either individually or collectively, are not admissible for the purpose of proving the specific blood alcohol content ("BAC") of a driver charged with DWI/DUI; [FN6]

FN6. The Government acknowledged during the Rule 104(a) hearing that it was not seeking to admit the results of the SFSTs to prove Horn's specific BAC. Nonetheless, this opinion must discuss the admissibility of the SFSTs for this purpose to fully explain the ruling made regarding their use as circumstantial evidence of intoxication or impairment.

(3) There is a well-recognized, but by no means exclusive, causal connection between the ingestion of alcohol and the detectable presence of exaggerated horizontal gaze nystagmus in a person's eyes, [FN7] which may be judicially noticed by the Court pursuant to Fed.R.Evid. 201, proved by expert testimony or otherwise;

FN7. As will be discussed below, nystagmus always is present in the human eye but certain conditions, including alcohol ingestion, can cause an exaggeration of the nystagmus such that it is more readily observable. In this opinion, use of the phrase "nystagmus" or "horizontal gaze nystagmus" being "caused" by alcohol refers to the exaggeration of this natural condition and does not suggest, absent any alcohol, there would not be any nystagmus at all.

(4) A police officer trained and qualified to perform SFSTs may testify with respect to his or her observations of a subject's performance of these tests, if properly administered, to include the

observation of nystagmus, and these observations are admissible as circumstantial evidence that the defendant was driving while intoxicated or under the influence. In so doing, however, the officer may not use value-added descriptive language to characterize the subject's performance of the SFSTs, such as saying that the subject "failed the test" or "exhibited" a certain number of "standardized clues" during the test;

(5) If the Government introduces evidence that a defendant exhibited nystagmus when the officer performed the horizontal gaze nystagmus test, the defendant may bring out either during cross examination of the prosecution witnesses or by asking the Court to take judicial notice of the fact that there are many causes of nystagmus other than alcohol ingestion; and


(6) If otherwise admissible under Fed.R.Evid. 701, a police officer may give lay opinion testimony that a defendant was driving while intoxicated or under the influence of alcohol. In doing so, however, the officer may not bolster the lay opinion testimony by reference to any scientific, *534 technical or specialized information learned from law enforcement or traffic safety instruction, but must confine his or her testimony to helpful firsthand observations of the defendant.

The issues addressed in this case likely will recur, given the large number of Class A and B misdemeanors prosecuted in this district under the Assimilative Crimes Act. Moreover, the admissibility of SFSTs implicates recent changes to the federal rules of evidence, as well as a large body of state cases on this topic, primarily decided under a different evidentiary standard than that governing the admissibility of the results of SFSTs in federal court. [FN8] Accordingly, this opinion will discuss the basis for the above rulings in more detail below.

FN8. See, e.g., Kay v. United States, 255 F.2d 476 (4th Cir.1958) (The Assimilative Crimes Act "does not generally adopt state

procedures ... and federal, rather than state, rules of evidence are applicable under the Act."); U.S. v. Sauls, 981 F.Supp. 909, 915 (D.Md.1997).

1. Applicable Rules of Evidence

[8]  Fed. R. of Evid. 104(a) requires the Court to make preliminary determinations regarding the admissibility of evidence, the qualifications of witnesses and the existence of privileges, and Rule 104 (a) now permits the Court to make definitive pretrial evidentiary rulings *in limine*. During Rule 104(a) hearings the rules of evidence, except those dealing with privileges, are inapplicable, permitting the Court greater latitude to consider affidavits such as those filed by Horn and the Government. Fed. Rules of Evid. 104(a), 1101(d)(1).

Whether the results of SFSTs are admissible depends first on the purpose for which they are offered. Fed. Rule of Evid. 105. Second, the SFSTs must be relevant and not excessively prejudicial for the purposes offered. Fed. Rules of Evid. 401, 403. Third, if the SFSTs are introduced by the testimony of a sponsoring witness who is testifying as to scientific, technical or specialized matters, the admissibility of the SFSTs is dependent on whether the witness's testimony meets the requirements of newly revised Fed. Rule of Evid. 702 and the *Daubert/Kumho Tire* standards. Finally, Fed. Rule of Evid. 102 emphasizes that interpretations of the rules of evidence should be made with an eye towards promptly, fairly, efficiently and inexpensively adjudicating cases.

In this case, the results of SFSTs potentially could be offered for the following purposes: (1) to establish probable cause to arrest and charge a defendant with DWI/DUI, (2) as direct evidence of the specific BAC of a defendant who performed the SFSTs or (3) as circumstantial proof that a defendant was driving while intoxicated or under the influence of alcohol. Horn has acknowledged that the tests may be used to determine probable cause, as the overwhelming majority of cases have held, [FN9]

and the Government acknowledges that they are not admissible to prove the defendant's specific BAC, a conclusion almost universally reached by state courts, including Maryland. [FN10] Accordingly, the task at hand is to determine to what extent the results of SFSTs are admissible as circumstantial proof that a driver has consumed alcohol and was driving while intoxicated or under its influence. Because the results of the SFSTs invariably are introduced by the testimony of an arresting *535 police officer, and, as will be seen, may involve application of scientific, technical or other specialized information, the requirements of Rule 702, as recently revised, are of paramount importance.

FN9. See, e.g., Ballard v. State, 955 P.2d 931 (Alaska Ct.App.1998); State v. Superior Court, 149 Ariz. 269, 718 P.2d 171, 176-78 (1986); State v. Ito, 90 Hawai'i 225, 978 P.2d 191 (App.1999); State v. Baue, 258 Neb. 968, 607 N.W.2d 191, 197 (2000) and Appendix.

FN10. See cases cited infra at p. 552, and Appendix.

Rule 702 permits testimony in the form of an opinion or otherwise regarding scientific, technical or specialized matters from a qualified expert, provided the testimony is based on (a) sufficient facts or data, (b) is the result of methods or principles that are reliable and (c) is the result of reliable application of the methods or principles to the facts of the particular case. These three requirements, added in December 2000, are complimentary to, but not identical with, the four non-exclusive evaluative factors identified by the Supreme Court in the Daubert/Kumho Tire cases: (a) whether the opinions offered are testable; (b) whether the methods or principles used to reach the opinions have been subject to peer review evaluation; (c) whether a known error rate can be identified with respect to the methods or principles underlying the opinion, and, finally, (d) whether the opinion rests on methodology that is generally accepted within the relevant scientific or technical community. [FN11]

FN11. Daubert, 509 U.S. at 593-94, 113 S.Ct. 2786; Kumho Tire, 526 U.S. at 141, 119 S.Ct. 1167.

As further will be seen, almost the entire universe of published case law regarding the admissibility of SFST evidence comes from the state courts, as would be expected, given the fact that there is no uniform federal traffic code, and DWI/DUI cases in federal court usually come about as a result of assimilating state drunk driving laws under 18 U.S.C. §§ 7 and 13. This is significant because the vast majority of the state cases that have analyzed this issue have done so under the Frye [FN12] standard for admitting scientific or technical evidence: whether the methods or principles have gained general acceptance within the relevant scientific or technical community. [FN13] While this test has continued vitality as one of the four Daubert/Kumho Tire factors, a federal court must do more in determining the admissibility of scientific, technical or specialized evidence than focus on general acceptance.

FN12. Frye v. United States, 293 F. 1013 (D.C.Cir.1923).

FN13. See state cases cited *infra* at pp. 551 - 552 and Appendix.

The starting point for this analysis is the SFSTs themselves, followed by a discussion of the evidence produced by the parties in this case regarding their reliability and then a consideration of the state cases that have focused on this issue.

2. The SFSTs

The three SFSTs that are the subject of this case were developed on behalf of the National Highway Traffic Safety Administration ("NHTSA") beginning in the 1970's. They are discussed in detail by a series of NHTSA publications, including:

- * a student manual for DWI detection and standardized field sobriety testing;
- * a June 1977 final report prepared for NHTSA by Marcelline Burns, Ph.D. [FN14] *536 and Herbert Moskowitz, Ph.D. of the Southern California Research Institute ("SCRI") titled "Psychophysical Tests for DWI Arrests" (the "1977 Report");

FN14. Dr. Burns is perhaps the most ardent advocate of the SFSTs at issue in this case, having participated in the original NHTSA studies that developed them, and thereafter as an ubiquitous--and peripatetic-- prosecution expert witness testifying in favor of their accuracy and reliability in a host of state cases, over a course of many years. See

cases cited *infra* at pp. 552 - 553. Despite her enthusiasm for the tests that she helped to develop, few, if any, courts have agreed with her that the SFSTs, taken alone or collectively, are sufficiently reliable to be used as direct evidence of specific BAC, as a review of the state cases listed in the Appendix to this opinion readily demonstrates. Dr. Burns has achieved, however, nearly universal success in persuading state courts that the SFSTs developed by SCRI, if properly administered, are admissible as circumstantial evidence of alcohol ingestion.

- * a March 1981 final report prepared for NHTSA by Dr. Burns and the SCRI titled "Development and Field Test of Psychophysical Tests for DWI Arrest" (the "1981 Final Report");
- * a September 1983 NHTSA Technical Report, authored by Theodore E. Anderson, Robert M. Schweitz and Monroe B. Snyder, titled "Field Evaluation Of A Behavioral Test Battery For DWI" (the "1983 Field Evaluation");
- * a November 1995 study of the SFSTs funded by NHTSA and conducted by Dr. Burns and the Pitkin County Sheriff's Office, Colorado, titled "A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery" (the "1995 Colorado Validation Study"); and
- * an undated study, authored by Dr. Burns and a sergeant of the Pinellas County Sheriff's Office, Florida, titled "A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery (the "Florida Validation Study")". (Gov't. Opposition Memo. Exhs. 2-7).

These studies are very significant, as they have been cited repeatedly by the state courts in their opinions regarding the admissibility of SFSTs in connection with assessment of the reliability of the SFSTs and their general acceptance within the law enforcement and traffic safety communities. They also are important in this case because they have been the subject of critical analysis by Horn's experts, who provided detailed testimony regarding the limitations of these studies and the extent to which the SFSTs are reliable and valid tests for driver intoxication or alcohol impairment. [FN15]

FN15. This underscores an important point. When analyzing the many state decisions regarding the admissibility of SFST evidence, care must be taken to focus on the factual basis supporting the rulings made. In many instances, the primary evidence that the court had before it regarding the reliability of SFSTs was Dr. Burns' testimony and the above described NHTSA, Colorado and Florida studies, as well as testimony from law enforcement officers with a vested interest in the use of the SFSTs. In most, but not all, instances, the defendant in the state cases simply did not mount a challenge to the "science" underlying the SFSTs. This is not

the case here, where Horn has provided a spirited and detailed attack on the tests' reliability. This highlights an inherent limitation in the process of judicial evaluation of the reliability and validity of any scientific or technical evidence: the court must, under Rule 104(a), act as the "gatekeeper" to decide whether the evidence is reliable and admissible. The court, however, is limited in its ability to do so by the quantitative and qualitative nature of the evidence produced by the parties, whatever research the court itself may do, and any help it may derive from courts that have addressed the issue before it. This process unavoidably takes place on a continuum, and a court faced with the present task of deciding the admissibility of scientific evidence must exercise care to consider whether new developments or evidence require a reevaluation of the conclusions previously reached by courts that did not have the benefit of the more recent information. In short, neither science and technology may rest on past accomplishments--nor may the courts.

The three SFSTs developed by the research sponsored by NHTSA are summarized in the NHTSA student manual. (Gov't. Opposition Memo., Ex.2). The manual describes the tests and evaluations conducted to develop the SFSTs, then provides detailed instruction on how to administer and score each of the three tests.

*537 The most "scientific" or "technical" of the three is the Horizontal Gaze Nystagmus Test ("HGN Test"). Nystagmus is "the involuntary jerking of the eyes, occurring as the eyes gaze toward the side. Also, nystagmus is a natural, normal phenomenon. Alcohol and certain other drugs do not cause this phenomenon, they merely exaggerate it or magnify it." *Id.* at VIII-12. Horizontal gaze nystagmus "occurs as the eyes move to the side." *Id.* at VIII-13. The HGN SFST requires the investigating officer to look for three "clues": (1) the inability of the suspect to follow a slowly moving stimulus smoothly with his or her eyes, (2) the presence of "distinct" nystagmus when the suspect has moved his or her eyes as far to the left or right as possible (referred to as holding the eyes at "maximum deviation") and held them in this position for approximately four seconds and (3) the presence of nystagmus before the eyes have moved 45 degrees to the left or right (which, the manual states, usually means that the subject has a BAC above 0.10). *Id.* at VIII- 14-15. The officer is trained to look for each of the above three "clues" for each of the suspect's eyes, meaning there are six possible "clues." If the officer observes four or more clues the manual asserts that "it is likely that the suspect's BAC is above 0.10 [and][u]sing this criterion [one] will be able to classify correctly about 77% of [one's] suspects with respect to whether they are above 0.10." *Id.* at VIII-17. If the results of the HGN test are offered to establish that the suspect's BAC is above 0.10, [FN16] it is readily apparent that much depends on the investigating officer properly performing the HGN test procedures and on his or her subjective evaluation of the presence of the "standardized clues." Indeed, the manual itself cautions with respect to each of the SFSTs:

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FN16. At the time of Horn's arrest, Maryland law stated that, "if at the time of [taking the breathalyzer test], a person has an alcohol concentration of at least .07 but less than .10" such results would be "prima facie evidence that the defendant was driving with alcohol in the defendant's blood." Md.Code Ann., Cts. & Jud. Proc. § 10-307 (1998 Repl.Vol.). Effective September 30, 2001, a blood alcohol concentration between 0.07 and 0.08 will be prima facie evidence that the person was driving while impaired by alcohol. If the person's BAC is .08 or higher, the defendant shall be considered under the influence of alcohol per se. Md.Code Ann., Cts. & Jud. Proc. § 10-307(d), (g) (2001 Supp.).

[the tests are valid] *only* when ... administered in the prescribed, standardized manner; and *only* when the standardized clues are used to assess the suspect's performance; and, *only* when 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.

Id. at VIII-12 (emphasis in original).

The Walk and Turn ("WAT") test requires the suspect to place his feet in the heel-to-toe stance on a straight line. The subject then is instructed to place his right foot on the line ahead of the left foot, with the heel of the right foot against the toe of the left. The suspect also is told to keep his arms down at his side and to maintain this position until the officer instructs him to begin the test. *Id.* at VIII-18. Once told to start, the suspect is to take nine heel-to-toe steps down the line, then to turn around in a prescribed manner, and take nine heel-to-toe steps back up the line. *Id.* While walking, the suspect is to keep his hands at his side, watch his feet, and count his steps out loud. *Id.* at VIII-19. Also, the suspect is told not to stop the test until completed, once told to start. *Id.*

As with the HGN test, the Manual asserts that there are standardized clues, *538 eight in all, [FN17] that "[r]esearch ... has demonstrated ... are the most likely to be observed in someone with a BAC above 0.10." *Id.* at VIII-19. Further, it states "[i]f the suspect exhibits two or more distinct clues on this test or fails to complete it, classify the suspect's BAC as above 0.10. Using this criterion, you will be able to correctly classify about 68% of your suspects." *Id.* at VIII-21. Once again, it is the officer's subjective evaluation of the suspect that results in the determination of whether a "clue" is present or not, and, if only two of the eight "standardized clues" are detected, NHTSA asserts that the suspect's BAC is 0.10 or more.

FN17. The eight clues are the inability to keep balance while listening to instructions, starting the test before the instructions are finished, stopping to steady one's self, failure to touch heel-to-toe, stepping off the line, using arms for balance, improper turning, and taking an incorrect number of steps. *Id.* at VIII-20.

The third SFST is the One Leg Stand ("OLS") test. In this test the suspect is told to stand with her feet together, arms at her sides. She then is told not to start the test until told to do so. To perform the OLS test, the suspect must raise whichever leg she chooses, approximately six inches from the ground, toes pointed out. *Id.* at VIII-23. While holding this position, the suspect then must count out loud for thirty seconds, by saying "one-one thousand, two-one thousand," etc. *Id.* The NHTSA manual identifies four "standardized clues" for the OLS test [FN18] and instructs law enforcement officers that "[i]f an individual shows two or more clues or fails to complete the [test] ... there is a good chance the BAC is above 0.10. Using that criterion, [one] will correctly classify about 65% of the people [one] test[s] as to whether their BACs are above or below 0.10." *Id.* at VIII-24.

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FN18. The four clues are swaying while balancing, using arms for balance, hopping, and putting a foot down. *Id.* at VIII-24.

The NHTSA Manual advises that when the WAT and HGN tests are combined, using a decision matrix developed for NHTSA, an officer can "achieve 80% accuracy" in differentiating suspects with BACs in excess of 0.10. *Id.* at VIII-5. These conclusions are supported, it is claimed, by the results of research and testing done by Dr. Burns and her company that was reported in the 1981 Final Report, the 1983 Field Evaluation, the 1995 Colorado Validation Study and the Florida Validation Study. [FN19] *Id.* at Exs. 4-8.

FN19. The Florida Validation Study is undated. During the Rule 104(a) hearing, there was testimony from Spurgeon Cole, Ph.D., one of Horn's witnesses, that a third validation test had been done in San Diego, but it was not offered as an exhibit. Dr. Cole did testify, however, as to its conclusions and the defects in its design.

As next will be seen, Horn's experts have challenged the reliability, validity and relevance of the SFSTs to prove driver intoxication and are sharply critical of the claims of accuracy advanced in the NHTSA publications and the so-called validation studies. They have framed these objections in terms of the factors discussed in the Daubert/Kumho Tire decisions, as amplified by this Court in Samuel v. Ford Motor Co., 96 F.Supp.2d 491 (D.Md.2000).

3. Horn's Challenges to the Reliability/Validity of SFST Evidence

[9] ^{KE} Rule 702 prohibits expert testimony if it is not the product of *reliable* methods or principles that *reliably* have been applied to the facts of the particular case. In the context of scientific or technical *539 testing, such as may be the case with SFSTs, reliability means the ability of a test to be duplicated, producing the same or substantially same results when successively performed under the same conditions. Daubert, 509 U.S. at 595, 113 S.Ct. 2786; Samuel, 96 F.Supp.2d at 494. Thus, for the SFSTs, if reliable, it would be expected that different officers, viewing the same suspect performing the SFSTs, would reach the same conclusion regarding the level of the suspect's impairment or intoxication. Alternatively, the same officer re-testing the same suspect with the same BAC as when first tested would reach the same conclusion.

A related, though distinct concept, deals with the *validity* of a test. A test is valid if it has a logical nexus with the issue to be determined in a case. Daubert, 509 U.S. at 591, 113 S.Ct. 2786; Samuel, 96 F.Supp.2d at 494. In the context of SFSTs, they are valid if there is a logical nexus between what the tests measure and the true ability of a driver safely to operate a motor vehicle. Thus, for example, does the fact that a suspect missed two "cues" in the WAT test mean that the driver cannot safely drive a car, or does it simply mean that the driver has some inability to perform the test that is unrelated to his or her ability to drive? Horn has challenged both the reliability and validity of the SFSTs.

During the Rule 104(a) proceedings, Horn produced four experts, three of whom submitted affidavits, and two of whom also testified: Yale Caplan, Ph.D. (former chief toxicologist for the State of Maryland and former scientific director of the Maryland Alcohol Testing Program); Spurgeon Cole, Ph.D. (Professor of Psychology, Clemson University and author of a series of articles critical of the SFSTs); Harold P. Brull (a licensed psychologist and consultant specializing in industrial/organizational psychology, particularly the definition and measurement of human attributes in employment and related settings); and Joel Wiesen, Ph.D. (an industrial psychologist with special

expertise in experimental psychology, psychometrics and statistics. Dr. Wiesen worked for more than ten years for the Massachusetts Division of Personnel Administration, developing and validating civil service examinations and is an independent consultant in the field of development and validation of human performance tests).

In his testimony and published writings, Dr. Cole was highly critical of the reliability of the SFSTs if used to prove the precise level of a suspect's alcohol intoxication or impairment. His 1994 article "Field Sobriety Tests: Are They Designed for Failure?," published in the journal *Perceptual and Motor Skills*, analyzed the 1977 Report, the 1981 Final Report, and the 1983 Field Evaluation report published by NHTSA regarding the SFSTs. (Def's.Memo, Ex. C.).

Dr. Cole observed the following:

- (1) 47% of the subjects tested in the 1977 NHTSA laboratory study who would have been arrested by the testing officers for driving while intoxicated (BAC of 0.10 or greater) actually had BACs below 0.10;
- (2) in the 1981 Final Report, 32% of the participants in the lab study were incorrectly judged by the testing officers as having BACs of 0.10 or greater; and
- (3) the accepted reliability coefficient for standardized clinical tests is .85 or higher, yet the reliability coefficients for the SFSTs, as reported in the NHTSA studies, ranged from .61 to .72 for the individual tests and .77 for individuals that were tested on two different occasions while dosed to the exact same BAC. More alarmingly, inter-rater reliability *540 rates (where different officers score each subject) ranged from .34 to .60, with an over-all rate of .57.

Id. at 100.

Dr. Cole theorized that the SFSTs, particularly the WAT and OLS tests, required subjects to perform unfamiliar, unpracticed motions and noted that a very few miscues result in a conclusion that the subject failed and had a BAC in excess of 0.10. *Id.* His hypothesis was that individuals could be classified as intoxicated/impaired as a result of unfamiliarity with the test, rather than actual BAC. *Id.* He tested this hypothesis by videotaping twenty- one completely sober individuals performing either "normal-abilities tests" (such as reciting their addresses or phone numbers or walking in a normal manner) or the WAT and OLS tests. *Id.* at 99-102. The results of the study were that 46% of the officers that viewed the videotape of the sober individuals performing the SFSTs rated the subjects as having had too much to drink, as compared to only 15% reaching this decision after seeing the videotape of the subjects performing the normal-abilities tests. *Id.* at 102. Dr. Cole concluded: [The SFSTs] must be held to the same standards the scientific community would expect of any reliable and valid test of behavior. This study brings the validity of field sobriety tests into question. If law enforcement officials and the courts wish to continue to use field sobriety tests as evidence of driving impairment, then further study needs to be conducted addressing the direct relationship of performance on these and other tests with driving. To date, research has concentrated on the relationship between test performance and BAC and officers' perception of impairment. This study indicates that these perceptions may be faulty.

Id. at 103.

During his testimony at the Rule 104(a) hearing, Dr. Cole repeated his criticism of the reliability of the 1977, 1981 and 1983 studies but also testified about the Colorado, Florida and San Diego studies performed by Dr. Burns, styled as "field validation studies." This testimony echoed Dr. Cole's written criticisms about the SFSTs' reliability as precise predictors of the level of alcohol intoxication and the SFST's validity as a measure of driver impairment in his 1994 article, co-authored with Ronald H. Nowaczyk, titled "Separating Myth from Fact: A Review of Research on the Field Sobriety Tests" and published in the *Champion* journal of the South Carolina Bar Association. Def's. Reply Memo, Exh. 1.

Dr. Cole's primary criticisms, as discussed in his 1994 article, include, first, that the 1981 Final Report published by NHTSA claims an 80% accuracy rate for users of the SFSTs. This is misleading because when the actual data is examined with respect to the success rate of using the SFSTs to differentiate between drivers with BACs above 0.10 and those without, the critical population, the officers had "a

50/50 chance of being correct just on the basis of guessing." *Id.* at 539.

Second, the SFSTs have a combined test-retest reliability rates of .77, while the scientific community "expects reliability coefficients to be in the upper .80s or .90 for a test to be scientifically reliable." *Id.* at 540. When different officers tested the same subjects at the same BAC dose level on different days the reliability was only .59--a 41% error rate. Dr. Cole contrasted these substandard reliability coefficients with that of the BAC machine, which is .96 or 96% reliable. *Id.* at 540-41.

Third, Dr. Cole argued that in order for the SFSTs to be valid predictors of BAC *541 they must "not only identify individuals above a BAC level of 0.10 as 'failing', but also identify individuals below .10 as 'passing'." *Id.* at 541. The data from the NHTSA 1977 Report, however, shows that the validity of the HGN, OLS and WAT SFSTs was ".67, .48, and .55, respectively, with a combined validity coefficient of .67." *Id.* This means that use of the SFSTs results in an unacceptably high erroneous arrest rate, if the tests are used by the officer to make arrest decisions based on BAC levels being in excess of .10.

Fourth, Dr. Cole was particularly critical of claims that the NHTSA SFSTs have been "validated" in a "field setting." In this regard, he stated that the 1977 and 1981 NHTSA studies were done in a laboratory setting, and the difference in conditions in a controlled lab are dramatically dissimilar from field conditions that can be expected when officers employ SFSTs at all times of day and night in widely disparate weather and traffic conditions and where issues of officer safety may influence how the test is performed. [FN20] *Id.* at 542. Dr. Cole stated that the NHTSA 1983 Field Evaluation purported to be a field validation study, but it failed to meet the recommendations of the authors of the NHTSA 1981 Final Report that the SFSTs be validated in the field for eighteen months in locations across the country. *Id.* Dr. Cole also stated that Dr. Burns herself has testified that the SFSTs have not been adequately field tested. [FN21] *Id.*

FN20. This criticism is especially significant in light of the third evaluative factor in Rule 702. This factor requires that the expert's opinion testimony be based on the use of principles/methods themselves reliable but that also reliably have been applied to the facts of the particular case. Thus, even if the SFSTs are determined to be reliable measures of driver intoxication, an officer's testimony about their use in a particular case could not be allowed absent a showing that the officer properly had administered the tests.

FN21. During his testimony, Dr. Cole stated that the Colorado, Florida and San Diego "validation" studies performed by Dr. Burns with various sheriff's departments do not cure the defects contained in the original reports. The three studies involved officers that made stops of

drivers that were driving unsafely, and the officers evaluated them using the SFSTs, but also had the benefit of preliminary breath analysis tests, in many instances, and the studies do not permit a critical reviewer to determine whether the officer's arrest decision was based on the SFSTs alone, or on the totality of the information available to the officer, including the results of the breath test. Thus, the studies were not controlled, and there were multiple variables that affected the ultimate decision. He concluded, therefore, that these "validation" studies were scientifically unacceptable.

Finally, Dr. Cole disputed the claims of proponents of the SFSTs that the studies regarding them have

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been published in peer review journals. The 1977 and 1981 field studies were published in technical reports by NHTSA, but those reports excluded the "methods and results" sections because they were thought to be too lengthy. *Id.* at 543. Cole concluded "[i]t is difficult to see how the NHTSA could claim that the FST is accepted in the scientific community, when results of studies on the validation of the FST have never appeared in a scientific peer reviewed journal, which is a basic requirement for acceptance by the scientific community." *Id.* Cole concluded:

Because of its widespread use, the FST battery has been *assumed* to be a reliable and valid predictor of driving impairment. NHTSA has done little to dispel that assumption. Law enforcement cannot be blamed for its use of the FST battery. Training documents refer to NHTSA reports and provide what appears to be supporting evidence for the validity of the FST battery. In addition, there is little doubt that individuals who have high BAC levels will *542 have difficulty in performing the FST battery. However, what the law enforcement community and the courts fail to realize is that the FST battery may mislead the officer on the road to incorrectly judge individuals who are not impaired. The FST battery to be valid must discriminate accurately between the impaired and non-impaired driver. NHTSA's own research on that issue ... has not been subjected to peer review by the scientific community. In addition, a careful reading of the reports themselves provides support for the inadequacy of the FST battery. The reports include low reliability estimates for the tests, false arrest rates between 32 and 46.5 percent, and a field test of the FST that was flawed because the officers in many cases had breathalyzer results at the time of the arrest. NHTSA clearly ignored the printed recommendations of its own researchers in conducting that field study.

Id. at 546. (Emphasis in original).

Hom also introduced the affidavit of Joel P. Wiesen, Ph.D. Dr. Wiesen is an industrial psychologist with special expertise in experimental psychology, psychometrics and statistics. His experience includes more than ten years working with the Commonwealth of Massachusetts developing civil service examinations and an equal number of years as an independent consultant in the area of test development and validation. In addition, he is a published author of a mechanical aptitude test used nationwide. Although he is most familiar with written tests, he does have experience in the development of human performance tests. Defs. Reply Memo, Exh.6 at 1.

Dr. Wiesen reviewed the NHTSA 1977 Report, the 1981 Final Report, the 1983 Field Evaluation, the 1995 Colorado Validation Study, the undated Florida Validation Study, and the NHTSA student manual for the SFSTs. He was highly critical of these studies, as the following summary illustrates:

[FN22]

FN22. The information reported in the chart is found in Defs. Reply Memo, Ex.6 at 1-13.

1977 Report	1981 Report (Lab & Field Phases)	1983 Report	1995 Colo. Study	Fla. Study
1. In the lab the HGN test was administered using a chin rest which facilitated making HGN	1. Serious flaws include 20% false positive evaluation of intoxic.; very high	1. Report seriously flawed, does not meet professional standards of testing community.	1. Report describes results of impaired driving arrests from seven Colorado law enforcement	1. Report too incomplete to permit meaningful evaluation.

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ns. This was not done in the field.

rates in reliability if using SFSTs to predict BAC.

ganizations. Report too incomplete to draw any conclusions about the validity of the test.

2. A single set of data was used to determine criterion score and to evaluate accuracy of test, which artificially inflates estimate of accuracy.

2. HGN test affected by time of day, no adjustment in scoring.

2. Failure to monitor data collection by officers. Cannot tell if decisions based on SFSTs or prelim. breath test (PBT).

2. Methodology results and data sections of report are missing.

2. Methodology not described, and data regarding methodology not provided in report.

3. Tests are not age & gender neutral, and age/gender differences can affect ability to perform SFSTs.

3. Test/retest reliability rates very low.

3. Arrest decisions made on PBT results as well as SFSTs. Not possible to tell reliability of SFSTs.

3. Data generated by "volunteer" officers--suggesting possible bias.

3. Data incompletely described.

4. In lab tests officers were monitored to insure correct performance of tests, not done in field.

4. Report states testing officers did not necessarily base decisions on results of SFSTs, making validity suspect.

4. Authors fail to report the data from N.C. Test site -over 25% of data for whole test.

4. No monitoring of data collection to verify reporting methodology. Officers merely reported results.

5. Test results differ in statistically

5. Authors admit field test data not appropriate

5. No statistical tests conducted on data.

5. Results unclear, particularly because

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significant respects depending on time of day that HGN test was performed, yet test scoring did not account for difference in time of day test was administered.

te for statistical significance testing, and could be biased.

two different arrest standards used (one for intoxication, another for impaired)

6. The study was not peer reviewed, and would not have been accepted if offered.

6. High error rates. 28.6% of subjects with "legal" BAC arrested, and 50% of subjects w/ BAC > 0.10 not arrested.

6. SFSTs not administered in standard fashion.

7. Officers selected for study not representative of police officers across the board.

7. Author s acknowledged "extreme caution " needed in analyzing data collect ed in stud y. Accuracy of data suspect .

8. Authors reported that in field some officers forgot or ignored s - tandardiz - ed procedure to administer

SFSTs.

*543 Dr. Wiesen concluded his evaluation of the SFST reports with the following observation: the studies give only a general indication of the level of potential validity of the tests as described in the NHTSA manual.... Rather than the five studies supporting each other, they evaluate somewhat different combinations of test content and test scoring. The differences are large enough to change the validity and accuracy of the tests. The older studies are probably less germane, due to the changes in test content and scoring over time. The reports for the newer studies are grossly inadequate. Given this, and in light of the specific critiques above (which are not exhaustive), I can only conclude that the field sobriety tests do not meet reasonable professional and scientific standards.

Id. at 12-13.

Harold P. Brull testified on behalf of Horn and supplied an affidavit as well. Mr. Brull is a licensed psychologist with many years experience consulting in connection with the design and implementation of procedures to measure human attributes, especially in employment settings. He has designed and evaluated tests and procedures measuring human *544 characteristics for over twenty years. Def's. Reply Memo, Exh. 5 at 2.

Mr. Brull reviewed the NHTSA 1977 Report, the 1981 Final Report, the 1983 Field Evaluation, the 1995 Colorado Validation Study, the Florida Validation Study, and the NHTSA officer training manual. Among his general observations of these materials was the opinion that there was a complete absence of evidence "which would allow one to predict a known error rate in the field," where there is no ability to control the performance of the SFSTs like there is in a laboratory setting. Def's. Reply Memo, Exh. 4 at 6. He was especially critical of the assertions in the Florida and Colorado studies regarding the reliability of the SFSTs, primarily because of their use of lower BAC thresholds (0.05 and above instead of 0.10), the fact that the population of drivers evaluated were those stopped because of unsafe driving and the complete absence of any data in the reports to enable meaningful evaluation. *Id.* at 6-7. He further expressed the opinion that none of the reports was published in peer review literature. While Brull was not critical of the methodology used in the 1977 and 1981 laboratory studies, he stated that the results from these studies were inconclusive, and the subsequent field tests "simply do not contain sufficient detail or rigor to support any hypothesis that field sobriety studies, as conducted by police officers in the field, are valid and reliable." *Id.* at 7.

Brull's evaluation of the data contained in the 1977 and 1981 reports was consistent with that of Dr. Cole and Dr. Wiesen. Regarding the 1981 Final Report, he observed that "the degree of predictive error in the field appeared to be substantially larger than in the laboratory," and that "[w]hile training clearly brought about improvement, it does not compare favorably to the laboratory condition and is [sic] a margin of error substantially higher than one would find acceptable for predicting with any degree of certainty." *Id.* at 11.

Brull was most critical of the Colorado and Florida "validation" studies. He noted that they "are merely summary reports, without foundation, of findings," and suffered from a "serious methodological flaw," in that the tests were done on actual motorists stopped by officers because their driving was unsafe, leading the officers automatically to suspect that they were intoxicated. *Id.* Use of this population likely will produce results that Brull characterized as "highly inflated." *Id.* He further noted that these field studies predicted 90% accuracy in identifying drivers with BAC's above 0.05, a level only one half that used in the earlier tests and below the level of legal intoxication. While the validation studies provided no data to assess the accuracy of the SFSTs in identifying drivers with BACs of 0.10 or higher, Brull suspected that the accuracy rate would be far lower than 90%. *Id.* at 12. Brull's final conclusions were summarized as follows:

- (1) the laboratory studies that form the foundation of the SFSTs (the 1977 and 1981 studies) were well designed;
- (2) the accuracy of the SFSTs, even under laboratory conditions, is less than desired and below the

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level expected for tests of human performance;

(3) the field studies were not well documented, produced unknown error rates, but which, if known, likely would have been unacceptable in real world situations; [FN23]

FN23. The concern about the reliability of SFSTs performed by officers in the field under actual stop and detain conditions is not fanciful, given the fact that the NHTSA officer training manual itself cautions that the reliability of the SFSTs depends on strict compliance with the standardized procedures. Gov't. Opposition Memo, Exh. 2 at VIII-12. Further, there is clear evidence that given the conditions under which SFSTs actually are performed in real life situations, officers often do not follow the prescribed methodology. *See* Def's. Reply Memo, Exh.8 at 116 ("End-position nystagmus as an indicator of ethanol intoxication," *Science and Justice Journal* 2001)(author studied videotapes of actual traffic stops where HGN test was administered. Over 98% of the roadside HGN tests were improperly conducted); 1981 Final Report at 18-19 (stating

that officers did not necessarily follow the standardized decision criteria used with the SFSTs). The fact that officers may not perform the SFSTs properly in the field has special significance when evaluated under Rule 702, as the third factor in that rule requires the court to find that the opinion testimony is based on reliable methods or principles that reliably were applied to the facts of the particular case. Thus, if reliable methods exist, but are not used in a particular instance, the results of the misapplication of the methodology are not admissible.

*545 (4) the error rate of SFSTs as actually performed by officers in the field is unknown;

(5) the only peer review article analyzing the SFST's was written by Dr. Cole and is highly critical of the accuracy of the SFSTs.

Id. at 14.

Finally, Horn offered the affidavit of Yale H. Caplan, Ph.D., Defs.' Motion, Ex. E. Dr. Caplan has more than thirty years experience in the field of forensic toxicology and alcohol and drug testing. He served for many years as the chief toxicologist for the Maryland Medical Examiner's office and now is a consultant in the field of toxicology. *Id.* Dr. Caplan stated that a determination that a person is impaired by alcohol consumption may be made in one of two fashions: by direct evidence of impairment derived from the chemical analysis of a breath or blood specimen; or indirectly by assessing performance indicators of the subject through field sobriety tests. *Id.* With respect to the latter, Dr. Caplan stated:

Although physiological assessments (e.g. standardized field sobriety tests) when coupled with the odor of alcohol on breath and alcohol's relatively high epidemiological prevalence in drivers may suggest alcohol as the causative agent, the use of drugs or the concomitant use of alcohol and drugs or other medical conditions must be considered as causes for the impairment. In fact, field sobriety tests alone were never designed for or demonstrated to be unequivocally capable of indicating alcohol impairment.

Id. He expressed the following opinions: (1) that field sobriety tests can be used to define impairment but that a specific blood/breath alcohol test is needed to confirm that the cause of the impairment is alcohol ingestion; (2) that an alcohol test of a suspect's breath or blood can alone be used to establish impairment, but field sobriety tests alone cannot establish alcohol impairment "with absolute certainty." *Id.*

4. The Government's Evidence

In response to the evidence submitted by Horn, the Government introduced the affidavit of Officer

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Jarrell, the arresting officer, describing the stop, detention and arrest of Horn and the SFSTs administered to him. The Government also introduced the 1977, 1981, and 1983 NHTSA reports, the California and Florida "validation studies," the NHTSA student manual regarding the SFSTs, and an article titled "Horizontal Gaze Nystagmus: The Science & the Law," published by the American Prosecutors Research Institute's National Traffic Law Center ("NTLC"). [FN24] Gov't. Opposition Memo, Exhs. 1-7.

FN24. The NTLC was "created in cooperation with ... (NHTSA) and works closely with NHTSA and the National Association of Prosecutor Coordinators to develop training programs." The NTLC is a program of the American Prosecutors Research Institute, the principal function of which "is to enhance prosecution in America." Gov't. Opposition Memo, Exh. 1 at 2. The forward to this publication was written by Dr. Marcelline Burns.

*546 Additionally, the Government introduced the affidavit of Lieutenant Colonel Jeff C. Rabin, O.D., Ph.D., a licensed optometrist on active duty in the Army, assigned as the Director of Refractive Research at the Walter Reed Army Institute for Research, Walter Reed Army Medical Center. [FN25] *Id.* Exh. 8. Colonel Rabin, who also testified at the Rule 104(a) hearing, has testified as an expert witness on the effects of alcohol and drugs on eye movements, given presentations to Army doctors and optometrists on this subject and reviewed the NHTSA publications regarding the HGN and other SFSTs. *Id.* Exhs. 8, 9. His affidavit and trial testimony confirmed the fact that alcohol ingestion can enhance the presence of nystagmus in the human eye at BAC levels as low as .04. He expressed the opinion that "there is a very good correlation between the results of the ... [HGN] test and breath analysis for intoxication." *Id.* He also stated that the three "clues" that officers are taught to look for in connection with the HGN SFST "are indicative of alcohol consumption with possible intoxication." *Id.* Colonel Rabin expressed his belief that police officers could be trained adequately to administer the HGN test and interpret its results.

FN25. The Government also had intended to introduce the affidavit of Sergeant Thomas Woodward of the Maryland State Police but ultimately was unable to do so.

Colonel Rabin's testimony was consistent with his affidavit. He did acknowledge, however, that he acquired his knowledge of, and formed his opinions about, the SFSTs in connection with performing duties as an expert witness for Army prosecutors in two courts martial, not as a result of any independent research that he had done as an optometrist. It further was acknowledged that Colonel Rabin was not asked to analyze in any detail the reliability and validity of the NHTSA SFST studies, and he had no opinion on this subject. Further, the references to the HGN SFST that he read in peer review literature published by the American Journal of Optometry was based primarily on the NHTSA studies, rather than any independent research by that organization. He also acknowledged, in response to questions from the Court, that there are many causes of exaggerated nystagmus in the human eye that are unrelated to the ingestion of alcohol.

DISCUSSION

A. The State Case Law

State courts have wrestled with the admissibility of SFST results in drunk driving cases since 1986, when the Supreme Court of Arizona decided State v. Superior Court, 149 Ariz. 269, 718 P.2d 171 (1986). In that decision, based on the testimony before the trial court by Dr. Burns and three police

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officers, and using the *Frye* [FN26] test, the court held that the results of a HGN test were sufficiently reliable to be used to establish probable cause to arrest a motorist for DWI/DUI, and that it had achieved general acceptance among behavioral psychologists, highway safety experts, neurologists and law enforcement personnel. *Id.*, 718 P.2d at 180. The court therefore held that HGN evidence was admissible to prove driver intoxication/impairment. [FN27] *Id.* at 181.

FN26. *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

FN27. The court cautioned that it was not ruling that HGN test results were admissible to prove that a driver had a BAC in excess of 0.10 "in the absence of a laboratory chemical analysis." *Id.*, 718 P.2d at 181. In *State v. City Court of the City of Mesa*, 165 Ariz. 514, 799 P.2d 855 (1990), the Arizona Supreme Court clarified that in cases where no independently admissible chemical test of a driver's BAC had been performed, HGN evidence was admissible only as circumstantial evidence that the driver had consumed alcohol and not to prove a specific BAC. *Id.*, 799 P.2d at 860.

*547 Since the 1986 Arizona decision, a majority of the states have ruled on the admissibility of HGN and SFST evidence. A reading of these cases reveals that there are a core of decisions that have attempted to undertake a thorough review of the facts relating to admissibility of SFST evidence. Other state courts have relied more on the rulings of courts that previously had addressed the issue than on their own independent evaluation. It would unnecessarily lengthen this opinion to discuss all the state cases in detail. Thus, the Appendix attached to this opinion includes a chart that identifies the majority of state cases and briefly summarizes their holdings. [FN28] I will, however, discuss certain of the state cases in this opinion, as they are essential to understanding the rulings reached herein.

FN28. The Appendix is intended to aid future courts called upon to research the issues presented in this case. The Court gratefully acknowledges the assistance of Ms. Jennifer Warfield, Mr. Kevin Cross, Ms. Jennifer Thomas, and Mr. Rodney Butler, interns who worked tirelessly on the Appendix. If the future of the legal profession may be predicted by these law students' work, it is a bright one. It also should be noted that, in addition to appointed counsel, Horn was also represented by Mr. Ryan Potter, a law student in the University of Maryland's much respected clinical law program. Admitted to practice under Local Rule 702, and under the skillful supervision of Professor Jerry Deise, these clinical law students offer significant assistance to their clients while concomitantly gaining invaluable trial experience. Ms. Claudia Diamond, my law clerk, also was instrumental in helping to revise and edit this opinion for which I am also very thankful.

Maryland's appellate cases discussing the admissibility of HGN and other SFST evidence fall into the category of state court cases that have undertaken a comprehensive evaluation of the admissibility of this evidence. The principal case, *Schultz v. State*, 106 Md.App. 145, 664 A.2d 60 (1995), has been cited repeatedly by other state courts in support of their own rulings on the admissibility of SFST evidence.

The defendant in *Schultz* was convicted of DUI. At the trial in the circuit court, the state's only evidence that the driver was driving under the influence of alcohol came from the arresting officer.

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Accordingly, the Court of Special Appeals was deprived of any evidence of record regarding the reliability of the HGN test. Its decision in *Schultz* was based on the court's own evaluation of other cases and the published literature regarding the HGN test from which the court took judicial notice of its reliability and general acceptance. *Id.*, 664 A.2d at 69-74. In doing so, the court observed that under *548 Rule 5-702 [FN29] of the Maryland Rules of Evidence, it was required to apply the *Frye* test, adopted in Maryland in *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978). [FN30] In doing so, the court used a three prong test to determine whether HGN evidence satisfied the *Frye/Reed* test: (1) whether the scientific theory underlying the HGN test was *reliable*; (2) whether the *methods* used in connection with the HGN test had been accepted by scientists familiar with the test and its use; and (3) whether the police officer in the case at bar properly had been trained to administer the test and administered it properly. [FN31] *Id.*, 664 A.2d at 64. The *Schultz* court based its findings regarding the HGN test on the Arizona Court's decision in *State v. Superior Court*, the decisions of other state courts, as well as its reading of various studies and articles. *Id.* at 72-73. Its consideration regarding the reliability of the HGN test, however, is most significant with respect to the ruling made in this decision. Because it lacked the robust evidentiary record available to this court regarding the reliability of the HGN, OLS, WAT tests, the Court of Special Appeals was required to look at case law and published materials to determine whether the HGN test was reliable and generally accepted. The primary bases for its conclusion that it was, and that it therefore could take judicial notice of this fact, were a decision by the Texas Supreme Court in *Emerson v. State*, 880 S.W.2d 759 (Tex.Crim.App.1994), a 1986 article authored by Edward B. Tenney and published in the *New Hampshire Bar Journal*, [FN32] and the NHTSA 1983 Field Evaluation. *Id.* at 73 and n. 12.

FN29. The Maryland rules of evidence were adopted in 1994 after the *Daubert* decision had been rendered by the United States Supreme Court. In the commentary to Rule 5-702, which is the state equivalent to Fed.R.Evid. 702, the drafters, however, noted that it was not their intent to adopt the *Daubert* test, then widely viewed as applicable only to issues regarding the admissibility of scientific evidence. Instead, the Maryland rule was intended to maintain the *Frye* test, which had been adopted by the state in the case of *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978). To this day, Maryland has declined to adopt the *Daubert*

test. *Burrall v. State*, 352 Md. 707, 724 A.2d 65, 80 (1999) ("We have not abandoned *Frye* or *Reed*."); *Clark v. State*, 140 Md.App. 540, 781 A.2d 913, 935 & n. 13 (2001); *State v. Gross*, 134 Md.App. 528, 760 A.2d 725, 757 (2000); *Schultz*, 664 A.2d at 64 n. 3. Thus, in federal court, under the most recent version of Rule 702 and the *Daubert/Kumho Tire* decisions, the proponent of any expert testimony, whether scientific, technical or the product of some specialized knowledge, must undertake an analysis of reliability of the methods/principles underlying the opinion, as well as the reliability of the application of the methodology used by the expert to the particular facts of the case. Under Maryland evidence law, the *Frye/Reed* test applies only to introduction of scientific evidence, and Rule 5-702 alone covers all other types of expert opinion testimony.

FN30. Maryland cases routinely refer to the *Frye* test as the "*Frye/Reed*" test. This opinion will as well.

FN31. As noted at pp. 534 - 535, in December 2000 the Federal Rules of Evidence were

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amended. Among the rules that were changed was Rule 702, the expert opinion rule. The amendment added three additional foundational requirements before expert testimony in any

subject, whether scientific, technical or other specialized knowledge, is admissible: the opinion must be based on *sufficient facts or data*; it must be the product of *methods* and *principles* shown to be *reliable*, and the proponent must show that the methods/principles *reliably had been applied* to the facts of the case at hand. These factors are required by the rule itself and are independent from the factors identified by the Supreme Court in the *Daubert/Kumho Tire* decisions. The Maryland Rules of Evidence did not adopt the 2000 changes to the federal rules, and the Maryland expert opinion rule, Rule 5-702, does not contain the three additional foundational requirements as does Rule 702.

FN32. Edward B. Tenney, *The Horizontal Gaze Nystagmus Test and the Admissibility of Scientific Evidence*, 27 *New Hampshire Bar Journal* 179 (1986) (hereinafter "Tenney article").

In *Emerson*, the Texas court based its conclusions regarding the reliability of the HGN test on the NHTSA studies. *Emerson*, 880 S.W.2d at 766-67. The Tenney article cited only the NHTSA studies regarding the scientific basis for the HGN test and reached the conclusion that "[i]f the State of New Hampshire is still a true *Frye* jurisdiction, then the likelihood that results from horizontal gaze nystagmus testing will be admitted into evidence in this state is extremely thin," [FN33] making it a questionable source to cite for the reliability *549 of HGN testing. Finally, the conclusions of the NHTSA 1983 Field Evaluation have been aggressively challenged by Horn's experts in this case. In short, the foundation of the Court of Special Appeals' decision that the HGN test was sufficiently reliable and generally accepted rests on taking judicial notice of studies and articles that, at the time of their publication, had not been subject to the type of critical evaluation presented in this case.

FN33. Tenney article at 187.

[10]  The doctrine of judicial notice is predicated upon the assumption that the source materials from which the court takes judicial notice are reliable. [FN34] Where, as here, that reliability has been challenged, the court cannot disregard the challenge, simply because a legion of earlier court decisions reached conclusions based on reference to the same then-unchallenged authority. For the reasons that will be explained below, on the record before me, I cannot agree that the HGN, WAT and OLS tests, singly or in combination, have been shown to be as reliable as asserted by Dr. Burns, the NHTSA publications, and the publications of the communities of law enforcement officers and state prosecutors. While I ultimately agree, in large part, with the conclusions reached by the vast majority of state courts that the results of the HGN tests are admissible as circumstantial evidence of alcohol consumption, I must do so by recognizing their limited reliability and with substantial doubts about the degree of their general acceptance within an unbiased scientific or technical community.

FN34. Indeed, in this regard, the Maryland and Federal Rules of Evidence are
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substantially identical. Rule 5-201 and Fed.R.Evid. 201 permit the taking of judicial notice of adjudicative facts if: (a) the facts are generally known within the territorial jurisdiction of the court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Obviously, the scientific basis underlying HGN tests is not a matter generally known within the state; so, if judicial notice is to be taken, it must be by reference to sources whose accuracy cannot reasonably be questioned. While the sources relied on in the Schultz case may not have been subject to reasonable question at the time that court considered them, given the lack of any evidentiary facts in the record regarding the reliability of the HGN test, and the fact that judicial notice was taken on appeal-not at the trial level where the parties might have had an opportunity to develop a factual basis to challenge the propriety of judicial notice--the same cannot be

said given the record in this case. Further, Rule 201(e) and 5- 201(e) permit a party to be heard on the propriety of taking judicial notice, which did not occur in the Schultz case because judicial notice was taken on appeal. As one commentator has noted "where judicial notice of an adjudicative fact is taken by an appellate court on its own motion, an issue arises as to whether the provisions of Rule 201(e) concerning an opportunity to be heard are to be applied. At the moment, the question is unresolved." Graham, *Handbook of Federal Evidence* § 201.07 (5th ed.2001). In any event, Rule 201(g) provides that in criminal cases, the court must instruct the jury that "it may, but is not required to, accept as conclusive any fact judicially noted." Implicitly, the rule would permit a defendant in a criminal case to offer evidence to rebut any adjudicative fact noticed by the Court. Thus, if a Court took judicial notice of the reliability and general acceptance of the HGN test, the defendant initially could object to it doing so under Rule 201(e). Then, if unsuccessful in preventing the court from taking judicial notice, the defendant could introduce evidence contesting the fact judicially noted.

This is not to say that I am critical of the decisions in Schultz or the other state courts. To the contrary, they are, for the most part, well- reasoned and written, based on the information then available to the deciding courts and the inherent limitations of the process by which courts receive proof--either from evidence introduced by the parties themselves or by the taking of judicial notice from decisions of other courts or published materials. The *550 Court of Special Appeals itself noted the danger inherent in such a process:

We note with some caution the dissent in Emerson, supra, which initially noted that, by taking judicial notice of the reliability of HGN testing and technique, the appellate court had relieved the State of its burden of establishing the reliability of the test at trial. We acknowledge that we, in taking judicial notice of the reliability of the test ... are likewise relieving the State of that burden. We shall, nevertheless, take judicial notice that HGN testing, a scientific test, is sufficiently reliable and generally accepted in the relevant scientific community.... To do otherwise at this stage in the development of the science would leave to individual courts within the twenty-three jurisdictions of this State (and the various courts and judges within each jurisdiction) to determine, on a case-by-case basis, the scientific reliability of the test. In each of the various jurisdictions, the determination of the reliability and acceptability of such evidence would depend upon the competence, energy, and schedules (and even budgets) of the various prosecutors throughout the State in obtaining, and producing the attendance of experts at the thousands of trials involving alcohol related offenses in which HGN testing is sought to be admitted. Disparate results and decisions might result in many instances, not from the actual scientific reliability of the tests themselves, but from the differing

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abilities and resources of prosecutors and the availability of witnesses from the scientific community. Schultz, 664 A.2d at 74.

The practical truth of the above reasoning cannot be denied. None today can doubt the serious public safety concerns related to driving by intoxicated or impaired motorists or the magnitude of this problem. [FN35] Neither can it be disputed that, given the volume of DWI/DUI cases, the press of other criminal cases, and the limited resources and time of prosecutors to prepare them for trial, it is highly desirable to have available a simple, inexpensive, and reliable test that can be administered by police officers on the road, which would facilitate a prompt and inexpensive trial. Indeed, Rule 102 would militate in favor of interpreting the rules of evidence in such a fashion as to accomplish this end, if fairly possible. What cannot be lost in the process, however, is the requirement that the trial be a fair one and that the sum of the evidence introduced against the defendant must be sufficiently probative to prove guilt beyond a reasonable doubt. [FN36] Expedient as it may be for courts to take judicial notice of scientific or technical matters to resolve the crush of DWI/DUI cases, this cannot be done in the face of legitimate challenges to the reliability and accuracy of the tests sought to be judicially *551 noticed. As will be seen, there is a place in the prosecutor's arsenal for SFST evidence, but it must not be cloaked in an aura of false reliability, lest the fact finder, like the protagonist in the Thomas Dolby song, be "blinded by science" or "hit by technology." [FN37]

FN35. In FY 2000/2001, 35,962 DWI/DUI cases were filed in Maryland. *Administrative Office of the Maryland Courts Judicial Information System*, Maryland District Court Traffic System Citation Statistics, Report No. A70TM214, Run Date July 15, 2001.

FN36. In addition, if local prosecutors may lack sufficient resources to prove the reliability and general acceptance of the SFSTs, which it is their burden to do in the first instance, it can be expected, *a fortiori*, that individual defendants charged with DWI and DUI will have even fewer resources to challenge the science and technology underlying these tests. If, once accepted by the application of the judicial notice rule, SFSTs are ever after immune from reconsideration, even in the face of new evidence challenging their reliability, then the burden will have been shifted from the state or government to establish the admissibility of the SFSTs to the

defendant to disprove their admissibility. This is a high price to pay in the interest of conserving limited prosecutorial resources.

FN37. "She blinded me with science! And hit me with technology."

Thomas Dolby, "She Blinded Me With Science," <http://www.prebble.com/sheblinded.htm>. See also State v. Ferrer, 95 Hawai'i 409, 23 P.3d 744, 765 n. 6 (App.2001)(quoting State v. O'Key, 321 Or. 285, 899 P.2d 663, 672 n. 6) (jurors may be "overly impressed with the aura of reliability surrounding scientific evidence").

From a review of the state court decisions regarding the admissibility of HGN evidence in particular, and SFST evidence in general, a number of observations may be made. First, most of the states that

have ruled that HGN evidence is admissible have not allowed it to be used to prove specific BAC but instead only as circumstantial proof of intoxication or impairment. *See, e.g., Ballard v. State*, 955 P.2d 931 (Alaska Ct.App.1998); *State v. City Court of the City of Mesa*, 165 Ariz. 514, 799 P.2d 855 (1990); *State v. Ruthardt*, 680 A.2d 349 (Del.Super.Ct.1996); *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991); *State v. Buening*, 229 Ill.App.3d 538, 170 Ill.Dec. 542, 592 N.E.2d 1222 (1992); *State v. Taylor*, 694 A.2d 907 (Me.1997); *Wilson v. State*, 124 Md.App. 543, 723 A.2d 494 (1999); *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000); *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D.1994); *State v. Bresson*, 51 Ohio St.3d 123, 554 N.E.2d 1330 (1990); *State v. O'Key*, 321 Or. 285, 899 P.2d 663 (1995); *State v. Sullivan*, 310 S.C. 311, 426 S.E.2d 766 (1993); *Emerson v. State*, 880 S.W.2d 759 (Tex.Crim.App.1994).

Second, most of the states that have ruled that HGN evidence is admissible have employed the *Frye* standard requiring general acceptance of the test within the relevant scientific or technical community. *See, e.g., Malone v. City of Silverhill*, 575 So.2d 101 (Ala.Crim.App.1989); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986); *People v. Leahy*, 8 Cal.4th 587, 34 Cal.Rptr.2d 663, 882 P.2d 321 (1994); *Williams v. State*, 710 So.2d 24 (Fla.Dist.Ct.App.1998); *Hawkins v. State*, 223 Ga.App. 34, 476 S.E.2d 803 (1996); *Garrett*, 119 Idaho 878, 811 P.2d 488 (1991); *State v. Buening*, 229 Ill.App.3d 538, 170 Ill.Dec. 542, 592 N.E.2d 1222 (1992); *State v. Witte*, 251 Kan. 313, 836 P.2d 1110 (1992); *State v. Armstrong*, 561 So.2d 883 (La.Ct.App.1990); *Schultz*, 106 Md.App. 145, 664 A.2d 60 (1995); *People v. Berger*, 217 Mich.App. 213, 551 N.W.2d 421 (1996); *State v. Klawitter*, 518 N.W.2d 577 (Minn.1994); *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000); *State v. Cissne*, 72 Wash.App. 677, 865 P.2d 564 (1994). Some courts, however, have used other evidentiary standards. *See, e.g., Connecticut v. Russo*, 62 Conn.App. 129, 773 A.2d 965 (2001) (remanding case to trial court to evaluate admissibility of HGN evidence under *Daubert* standard adopted by the Connecticut Supreme Court in 1997); *State v. Ito*, 90 Hawai'i 225, 978 P.2d 191 (App.1999); *Hulse v. State*, 289 Mont. 1, 961 P.2d 75 (1998); [FN38] *552 *New Hampshire v. Duffy*, 778 A.2d 415 (N.H.2001) (using state evidence Rule 702 that requires showing of reliability before HGN evidence can be admitted; remanding to trial court to hold a hearing on the test's reliability); *State v. Torres*, [FN39] 127 N.M. 20, 976 P.2d 20 (1999) (reversing trial court's ruling that HGN evidence was admissible, remanding for hearing using *Daubert* test). [FN40]

FN38. The *Hulse* court held that neither the *Frye* nor *Daubert* tests were applicable to admissibility of HGN evidence because those tests were restricted to admissibility of "novel" scientific evidence and HGN test was not "novel" science. 961 P.2d at 91. Instead, the court applied Montana Evidence Rule 702, which was identical to the then current version of Fed.R.Evid. 702. The court did not rule on the admissibility of HGN evidence in a DWI/DUI criminal trial, as the appeal arose from a trial court decision denying Hulse's petition to reinstate driving privileges after they were suspended because Hulse refused to take a breathalyzer, and the only legal issues presented were the existence of

probable cause to arrest for DWI/DUI, and the driver's refusal to take a breath test. *Id.* at 91-92.

FN39. In *Torres*, the court made several significant rulings. First, it held that police officers are not qualified to testify about the scientific bases underlying the HGN test and are not competent to establish that the test is reliable. 976 P.2d at 32. It further held that it "is improper to look for scientific acceptance only from reported case law," and it declined to take judicial notice of the reliability of the HGN test because "[w]e are not

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persuaded that HGN testing is 'a subject of common and general knowledge,' or a matter 'well established and authoritatively settled.' " *Id.* at 33. Finally, the court held that, although a qualified expert was needed to testify about the reliability of the HGN test and its results, a properly trained police officer could testify about the administration of the test "after an appropriate foundation regarding such [scientific] knowledge has been laid by another, scientific expert." *Id.* at 34. The care taken by the *Torres* court illustrates the difference in application of the *Daubert* test from the *Frye* test. *Daubert* requires analysis of the methodology used, its reliability and validity. *Frye*, on the other hand, may tempt a court faced with determining the admissibility simply to see what other courts

have done in the past, as well as review publications supplied by the parties, or found by the court's own efforts, without engaging in the sometimes difficult analysis of the reliability of the science or technology underlying those sources.

FN40. *Ito* used Hawaii Evidence Rule 702, which, in addition to the requirements of the then current version of Fed.R.Evid. 702, added the provision that the court "may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert." 978 P.2d at 200. The court held that judicial notice of the reliability of HGN evidence was not proper under Hawaii Evidence Rule 201 but that judicial notice of its reliability was proper under Hawaii common law which permits a trial court to take judicial notice of facts judicially noticed in case law from other jurisdictions. *Id.* at 208- 09. In doing so, the court relied heavily on the Maryland *Schultz* opinion.

Third, of the state cases where the courts undertook the task of evaluating the admissibility of HGN evidence, the NHTSA studies and, in many instances, the testimony of Dr. Burns, figured prominently in their conclusions that the HGN tests were admissible as evidence of intoxication or impairment. *See, e.g., Ballard v. State*, 955 P.2d 931 (Alaska Ct.App.1998)(court relied on trial testimony of Dr. Burns, NHTSA training video and testimony of state trooper. Defendant called a psychology professor and neuro- ophthalmologist); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986) (court considered trial court testimony of Dr. Burns, two police officers, NHTSA studies, and published articles on HGN test); *People v. Joehnk*, 35 Cal.App.4th 1488, 42 Cal.Rptr.2d 6 (1995) (court considered trial testimony of Dr. Burns, NHTSA studies, testimony of a "criminalist" and a toxicologist. Defendant called an emergency room doctor to testify); *State v. Ruthardt*, 680 A.2d 349 (Del.Super.Ct.1996) (court considered trial testimony of Dr. Burns, NHTSA studies, testimony of police officer, behavioral optometrist and neuro-ophthalmologist, defense introduced testimony of Dr. Cole, one of the defense witnesses in the pending case); *Williams v. State*, 710 So.2d 24 (Fla.Ct.App.1998) (Dr. Burns, a neurologist and three state doctors called as witnesses by the state); *Hawkins v. State*, 223 Ga.App. 34, 476 S.E.2d 803 (1996) (court relied on NHTSA studies, other state court rulings and articles); *State v. Hill*, 865 S.W.2d 702 (Mo.Ct.App.1993) *553 (Dr. Burns only witness called at trial on HGN test); *State v. O'Key*, 321 Or. 285, 899 P.2d 663 (1995)(court considered testimony of Dr. Burns, an optometrist, police officer and NHTSA studies). Finally, those courts that did not undertake an independent evaluation of the admissibility of HGN evidence tended simply to cite to the decisions of other state courts. *See, e.g., Malone v. City of Silverhill*, 575 So.2d 101 (Ala.Crim.App.1989); *Hawkins v. State*, 223 Ga.App. 34, 476 S.E.2d 803 (1996); *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991); *State v. Buening*, 229 Ill.App.3d 538,

170 Ill.Dec. 542, 592 N.E.2d 1222 (1992); *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990); *State v. Breitung*, 623 So.2d 23 (La.Ct.App.1993); *State v. Bresson*, 51 Ohio St.3d 123, 554 N.E.2d 1330 (1990); *State v. Cissne*, 72 Wash.App. 677, 865 P.2d 564 (1994); *State v. Zivcic*, 229 Wis.2d 119, 598 N.W.2d 565 (1999).

B. Difference between Daubert/Kumho Tire/New Rule 702 and Frye.

The difference in approach between the *Daubert/Kumho Tire* /New Rule 702 and the *Frye* tests reveals an unmistakable irony. The *Frye* approach to admissibility of scientific evidence was criticized widely as being too "rigid" because it would deny admissibility to evidence that was the result of new scientific discovery that, while factually sound and methodologically reliable, had not yet gained general acceptance. Christopher Mueller & Laird Kirkpatrick, *Evidence* § 7.8 (4th ed.1995); 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6266 (1997). Under the *Daubert* test, however, general acceptance was but one of the evaluative factors and, provided the evidence at issue was subject to being tested, did not suffer from an unacceptably high error rate and favorably had been peer reviewed, the evidence would be admitted because it was reliable. Under *Daubert*, therefore, it was expected that it would be easier to admit evidence that was the product of new science or technology.

In practice, however, it often seems as though the opposite has occurred--application of *Daubert/Kumho Tire* analysis results in the exclusion of evidence that might otherwise have been admitted under *Frye*. Although this may have been an unexpected outcome, it can be explained by the difference in methodology undertaken by the trial courts when measuring proffered evidence under *Daubert/Kumho Tire*, as opposed to *Frye*. Under *Daubert*, the parties and the trial court are forced to reckon with the factors that really do determine whether the evidence is reliable, relevant and "fits" the case at issue. Focusing on the tests used to develop the evidence, the error rates involved, what the learned publications in the field have said when evaluating it critically, and then, finally, whether it has come be generally accepted, is a difficult task. But, if undertaken as intended, it does expose evidentiary weaknesses that otherwise would be overlooked if, following the dictates of *Frye*, all that is needed to admit the evidence is the testimony of one or more experts in the field that the evidence at issue derives from methods or procedures that have become generally accepted. *Wright & Gold*, 29 *Federal Practice and Procedures* § 6266 ("Daubert's focus upon multiple criteria for scientific validity compels the lower courts to abandon long existing per se rules of admissibility or inadmissibility grounded upon the Frye standard.").

Daubert's challenge is unmistakable. While courts may be skilled at research and analysis, the task of deciding the admissibility of new or difficult scientific or technical evidence involves subject matters that are highly specialized, and there is a *554 risk that the court, forced to resolve an issue without the luxury of unlimited time to reflect on it, will get it wrong. This is especially true because judges do not determine the reliability of scientific or technical issues in the abstract but rather in the context of deciding a specific dispute. [FN41]

[FN41]. Justice Stephen Breyer, all too aware of this problem, wrote in the introduction to the *Reference Manual on Scientific Evidence* 4 (2d ed.2000):

[M]ost judges lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims. Judges are typically generalists, dealing with cases that can vary widely in subject matter. Our primary objective is usually process-related: seeing that a decision is reached in a timely way. And the decision of a law court typically ... focuses on a particular event and specific individualized evidence.

See also Mueller & Kirkpatrick, *Evidence* § 7.8 (4th ed. 1995) ("The main difficulty

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[with the Daubert case] is that courts are ill equipped to make independent judgments on the validity of science. Most judges are not scientists, and they do not have the time to spend at trial or beforehand to make fully considered decisions on validity.").

The principle shortcoming of *Frye* was that it excused the court from even having to try to understand the evidence at issue. 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 702.05[1] (2d ed. 1997) (Under *Frye* "[t]he court itself did not have to comprehend the science involved ... [it] only had to assure itself that among the people involved in the field, the technique was acceptable as reliable."). Further, given the impact of the *stare decisis* doctrine, once a court, relying on *Frye*, had ruled that a doctrine or principle had attained general acceptance, it was all too easy for subsequent courts simply to follow suit. Before long, a body of case law could develop stating that a methodology had achieved general acceptance without there ever having been a contested, detailed examination of the underpinnings of that methodology. The admissibility of SFST evidence illustrates this hazard, as a review of the state cases reveals that, despite more than sixteen years of case law relating to this evidence, the number of instances where there have been factually well-developed and detailed challenges to the reliability and validity of the tests is extremely small.

Following the *Kumho Tire* decision and the December 2000 changes to Rule 702, a detailed analysis of the factual sufficiency and reliability of the methodology underlying expert testimony is required for all scientific, technical or specialized evidence, not just "novel scientific" evidence. This has required, at times, a reexamination of the admissibility of evidence that long has been admitted under the *Frye* test, which may result in exclusion of evidence that for years routinely has been admitted. See, e.g., *United States v. Llera Plaza*, 179 F.Supp.2d 523 (E.D.Pa.2002) (excluding aspects of evidence of latent fingerprint identification evidence on the basis of *Daubert/Kumho Tire* and Rule 702 analysis). As lawyers and courts become fully aware of the relatively recent additional requirements of *Kumho Tire* and revised Rule 702, this process of reexamination can be expected to continue. It may mean, in a very real sense, that "everything old is new again" with respect to some scientific and technical evidentiary matters long considered settled. Alarmists may see this as undesirable, envisioning courtrooms populated by mad scientists in white lab coats and overzealous judges in black robes, busily undoing established precedent. The more probable outcome is that judges, lawyers and expert witnesses will have to learn to be comfortable refocusing their thinking about the building blocks of what truly makes evidence that is beyond the knowledge and experience of lay persons *555 useful to them in resolving disputes. The beneficiaries of this new approach will be the jurors that have to decide increasingly complex cases. *Daubert*, *Kumho Tire*, and now Rule 702 have given us our marching orders, and it is up to the participants in the litigation process to get in step.

C. Applying *Daubert/Kumho Tire* and Rule 702 in this Case

Many of the state cases debate whether SFST evidence is "scientific" or "novel science," and therefore subject to *Frye* analysis in the first instance. [FN42] Under the Federal Rules of Evidence, this debate is irrelevant, as newly revised Rule 702 and the *Daubert/Kumho Tire* cases require the same analysis for any evidence that is to be offered under Rule 702. Thus, if the SFSTs in this case 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* and Rule 702 must be evaluated by the district court under Rule 104(a) before such evidence may be admitted. [FN43]

FN42. See, e.g., *Schultz v. State*, 106 Md.App. 145, 664 A.2d 60 (1995) (discussing whether HGN and other SFSTs are "scientific evidence"); *Hulse v. State*, 289 Mont. 1, 961 P.2d 75 (1998).

FN43. If offered only as circumstantial evidence of intoxication/impairment, the HGN test still clearly invokes scientific and technical underpinnings. The WAT and OLS SFSTs, however, involve only observations of the suspect's performance, and therefore, it may be argued that they are not couched in science and technology if used for that purpose.

With regards to the HGN test, from the testimony before me, the materials submitted for my review by counsel, my review of all of the state cases decided to date, and many of the articles cited in those cases, it cannot be disputed that there is a sufficient factual basis to support the causal connection between observable exaggerated horizontal gaze nystagmus in a suspect's eye and the ingestion of alcohol by that person. This connection is so well established that it is appropriate to be judicially noted under Rule 201. FN44 That being said, however, it must quickly be added that there also are many other causes of nystagmus that are unrelated to alcohol consumption. The Schultz court identified thirty-eight possible causes of *556 nystagmus, FN45 and, in his testimony, Colonel Rabin agreed that most of the Schultz factors did, or possibly could, cause nystagmus in humans. Thus, the detectable presence of exaggerated HGN in a driver clearly is circumstantial, not direct, evidence of alcohol consumption.

FN44. The existence of a causal connection between alcohol ingestion and observable horizontal gaze nystagmus is the type of discrete adjudicative fact that properly may be judicially noticed under Rule 201 because it is a fact that can be accurately and readily determined by resort to sources whose accuracy cannot reasonably be questioned. This use of judicial notice is far more narrow than attempting to take judicial notice, as did the Court of Special Appeals in Schultz, that the SFSTs have attained general acceptance within the relevant scientific or technical community. Alternatively, the government may prove the causal relationship between alcohol consumption and exaggerated nystagmus by expert testimony, but in this regard I agree with the New Mexico Supreme Court's decision in State v. Torres, which held that a police officer is unlikely to have the qualifications needed to testify under Rule 702 as to the scientific principles underlying the HGN test or as to whether there is a causal link between alcohol use and exaggerated nystagmus. 976 P.2d at 32, 34. Accordingly, asking the court to take judicial notice of this causal connection likely will be the most frequent method used by the government to prove this essential fact. An alternative would be to use learned treatises, under Rule 803 (18), if a proper foundation first is established. The police officer will, of course, be qualified to testify

as to the training received in how to administer the HGN test, and to demonstrate his or her qualifications properly to administer it. Because Officer Jarrell did not testify at the Rule 104(a) hearing, there is no factual basis before me at this time to permit me to make findings regarding the final factor under Rule 702, i.e., whether Jarrell properly administered and interpreted the SFSTs given to Horn.

FN45. The court recognized the following causes or possible causes of nystagmus:
problems with the inner ear labyrinth; irrigating the ears with warm or cold water;

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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 medicine; 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. 664 A.2d at 77. The fact that there are many other

causes of nystagmus in the human eye also is the type of adjudicative fact that may be judicially noticed under Rule 201. Thus, the defendant in a DWI/DUI case may ask the court to judicially notice this fact, once the government has proved the causal connection between alcohol ingestion and exaggerated nystagmus. Alternatively, the defendant may seek to prove the non-alcohol related causes of nystagmus by other means, such as the testimony of an expert witness, cross examination of any such witness called by the government or through a properly admitted learned treatise. (Fed. Rule of Evid. Rule 803 (18)).

As for the sufficiency of the facts and data underlying the assertions in the NHTSA articles that SFSTs are reliable in predicting specific BAC, the testimony of Horn's experts, as well as the literature that is critical of these studies, establishes that presently there is insufficient data to support these claims of accuracy. The early NHTSA laboratory tests were too limited to support the claims of accuracy, and the subsequent field and validation testing insufficient to establish the reliability and validity of the tests if used to establish specific BAC. Indeed, the great weight of the state authority, including that in Maryland, agrees that BAC levels may not be proved by SFST test results alone, and I adopt that holding here.

The conclusion I have reached regarding the reliability of the methods and principles underlying the SFSTs takes into account the evidence introduced by Horn about the methods used to develop these tests, and the error rates associated therewith--the first two Daubert/Kumho Tire factors. This alone precludes their admissibility to prove specific BAC, and it therefore is not necessary to discuss in detail whether the many articles written about these tests constitute peer review analysis or something else, and whether they generally have been accepted in a relevant, unbiased scientific or technical community, the third and fourth Daubert/Kumho Tire factors. I do note, however, the testimony of Horn's experts that the NHTSA publications regarding the SFSTs do not constitute peer review publications, a conclusion that seems correct. As Dr. Cole testified, peer review as contemplated by Daubert and Kumho Tire must involve critical analysis that can expose any weaknesses in the methodology or principles underlying the conclusions being reviewed.

Further, as testified to by Horn's experts, the process of selection of articles for publication in a peer review journal involves an evaluation by one or more experts in the field, to insure that the article meets the rigors of that field. Under this standard, most of the publications regarding the SFST tests, including the publications *557 in bar journals, likely do not meet this criteria.

Similarly, despite the conclusion of many state courts that the SFSTs have received general acceptance among criminologists, law enforcement personnel, highway safety experts and prosecutors, I remain skeptical whether this is sufficient for purposes of Daubert and Kumho Tire. Acceptance by a relevant scientific or technical community implies that that community has the expertise critically to evaluate the methods and principles that underlie the test or opinion in question.

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However skilled law enforcement officials, highway safety specialists, prosecutors and criminologists may be in their fields, the record before me provides scant comfort that these communities have the expertise needed to evaluate the methods and procedures underlying human performance tests such as the SFSTs. Some might say the same about judges, without fear of too much disagreement, but judges are the ones obligated to do so by Rule 104(a) when the admissibility of evidence is challenged. As to the conclusion of the state courts, more often than not expressed in passing and without analysis, that the SFSTs generally are accepted among psychologists like Dr. Burns, the evidence presented to me by the three psychologists called by Horn leads me, respectfully, to beg to differ. Thus, based on the foregoing, I conclude that the SFST evidence in this case does not, at this time, meet the requirements of Daubert/Kumho Tire and Rule 702 as to be admissible as direct evidence of intoxication or impairment.

A more difficult question, however, is whether the SFSTs may be used as circumstantial evidence of alcohol consumption and, if so, just how. The state courts overwhelmingly have concluded that the results of SFSTs are admissible as circumstantial evidence of alcohol consumption but have offered little guidance about what exactly the testifying officer may tell the fact finder about the SFSTs, their administration, and the performance of the suspect when doing them. The possibilities range from simply describing the tests--without explaining the scientific or technical bases underlying them or their claimed accuracy rates and describing only what the officer observed when they were performed, absent any opinions regarding whether the suspect "passed" or "failed" or assessment of the degree of intoxication or impairment--to a full explanation of the tests, their claimed accuracy, the number of "standardized clues" the suspect missed, and an opinion that the suspect "failed" the test--in short everything up to testimony about the specific BAC of the driver.

On the record before me there are not sufficient facts or data about the OLS and WAT SFSTs to support the conclusion that, if a suspect exhibits two out of eight possible clues on the WAT test or two out of four clues on the OLS, he has "failed" the tests. To the contrary, Horn introduced Dr. Cole's study that showed an alarmingly high error rate when police officers were asked to evaluate completely sober subjects performing the WAT and OLS. [FN46] Def's. Motion Exh. C. To permit a police officer to testify about each of the SFSTs in detail, their claimed accuracy rates, the number of standardized clues applicable to each, the number of clues exhibited by the suspect, and then offer an opinion about whether he or she passed or failed, stopping just short of expressing an opinion as to specific BAC, invites the risk of allowing through the back door of circumstantial *558 proof evidence that is not reliable enough to enter through the front door of direct proof of intoxication or impairment. Such testimony clearly is technical, if not scientific, and may not be admitted unless shown to be reliable under the standards imposed by Rule 702 and Daubert/Kumho Tire, which has not been done in this case.

[FN46]. See *supra* at pp. 539 - 540. Cole reported that 46% of the officers that observed videotaped subjects with BAC levels of .0% performing the WAT and OLS tests reported that the subjects had had too much to drink to be driving.

There is no factual basis before me to support the NHTSA claims of accuracy for the WAT and OLS tests or to support the conclusions about the total number of standardized clues that should be looked for or that missing a stated number means the subject failed the test. There is very little before me that suggests that the WAT and OLS tests are anything more than standardized procedures police officers use to enable them to observe a suspect's coordination, balance, concentration, speech, ability to follow instructions, mood and general physical condition--all of which are visual cues that laypersons, using ordinary experience, associate with reaching opinions about whether someone has been drinking.

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Indeed, in *Crampton v. State*, 71 Md.App. 375, 525 A.2d 1087 (1987) the Maryland Court of Special Appeals described field sobriety tests--other than the HGN test--administered by police to motorists as follows:

field sobriety tests are essentially personal observations of a police officer which determine a suspect's balance and ability to speak with recollection. There is nothing 'new' or perhaps even 'scientific' about the exercises that an officer requests a suspect to perform. Those sobriety tests have been approved by the National Highway Traffic Safety Administration and are simply guidelines for police officers to utilize in order to observe more precisely a suspect's coordination. It requires no particular scientific skill or training for a police officer, or any other competent person, to ascertain whether someone performing simple tasks is to a degree affected by alcohol. The field sobriety tests are designed to reveal objective information about a driver's coordination.... The *Frye-Reed* test does not apply to those field sobriety tests because the latter are essentially empirical observations, involving no controversial, new or 'scientific' technique. Their use is guided by practical experience, not theory.

Id., 525 A.2d at 1093-94. The same conclusion has been reached by many other state courts that have considered this issue. For example, in *State v. Ferrer*, 95 Hawai'i 409, 23 P.3d 744 (App.2001), the court stated:

It is generally recognized, however, that the foundational requirements for admission of psychomotor FST evidence differ from the foundational requirements for admission of HGN evidence.

Psychomotor FSTs test balance and divided attention, or the ability to perform multiple tasks simultaneously. While balancing is not necessarily a factor in driving, the lack of balance is an indicator that there may be other problems. Poor divided attention skills relate directly to a driver's exercise of judgment and ability to respond to the numerous stimuli presented during driving. The tests involving coordination (including the walk-and-turn and the one-leg-stand) are probative of the ability to drive, as they examine control over the subject's own movements. Because evidence procured by administration of psychomotor FSTs is within the common experience of the ordinary citizen, the majority of courts that have addressed the issue generally consider psychomotor FSTs to be nonscientific evidence.

*559 *Id.*, 23 P.3d at 760-62 (citations omitted). [FN47] As the Florida District Court of Appeals said in *State v. Meador*, 674 So.2d 826 (Fla.App.1996):

FN47. The court cites to decisions from Alabama, Arizona, California, Georgia, Illinois, Maryland, Massachusetts, New York, Pennsylvania, Florida

and Oregon that have reached the same conclusion about the nature of psychomotor FSTs like the WAT and OLS tests. *Id.*, 23 P.3d at 760-62.

While the psychomotor FSTs are admissible, we agree with defendants that any attempt to attach significance to defendants' performance on these exercises is beyond that attributable to any of the other observations of a defendant's conduct at the time of the arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value. The likelihood of unfair prejudice does not outweigh the probative value as long as the witness simply describe their observations. 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 an aura of scientific validity. Therefore, such terms should be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment.

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Id. at 832.

I agree with this reasoning. If offered as circumstantial evidence of alcohol intoxication or impairment, the probative value of the SFSTs derives from their basic nature as observations of human behavior, which is not scientific, technical or specialized knowledge. To interject into this essentially descriptive process technical terminology regarding the number of "standardized clues" that should be looked for or opinions of the officer that the subject "failed" the "test," especially when such testimony cannot be shown to have resulted from reliable methodology, unfairly cloaks it with unearned credibility. Any probative value these terms may have is substantially outweighed by the danger of unfair prejudice resulting from words that imply reliability. I therefore hold that when testifying about the SFSTs a police officer must be limited to describing the procedure administered and the observations of how the defendant performed it, without resort to terms such as "test," [FN48] "standardized clues," "pass" or "fail," unless the government first has established a foundation that satisfies Rule 702 and the Daubert/Kumho Tire factors regarding the reliability and validity of the scientific or technical underpinnings of the NHTSA assertions that there are a stated number of clues that support an opinion that the suspect has "failed" the test.

FN48. It would be preferable to refer to the standardized field sobriety tests as "procedures," rather than tests, as the use of the word test implies that there is an accepted method of determining whether the person performing it passed or failed, and this has not been shown in this

case. I recognize, however, that the HGN, WAT and OLS procedures have been referred to as field sobriety "tests" for so many years, that it is likely that it will be impossible to stop using this terminology altogether. Occasional reference to the HGN, WAT and OLS procedures as "tests" should not alone be grounds for a mistrial in a jury case. However, repeated use of the word "test" to describe these procedures, particularly when testifying as to how the defendant actually performed them, would be improper.

This is not to say that a police officer may not express an opinion as a lay witness that the defendant was intoxicated or impaired, if otherwise admissible under *560 Rule 701. As recently amended, Rule 701 permits lay opinion testimony if: (a) rationally based upon the perception of the witness, (b) helpful to the fact finder and (c) if the opinion does *not* involve scientific, technical or specialized information. [FN49] There is near universal agreement that lay opinion testimony about whether someone was intoxicated is admissible if it meets the above criteria. *See, e.g., Singletary v. Secretary of Health*, 623 F.2d 217, 219 (2d Cir.1980) ("The testimony of lay witnesses has always been admissible with regard to drunkenness."); *United States v. Mastberg*, 503 F.2d 465 (9th Cir.1974); *Malone v. City of Silverhill*, 575 So.2d 101 (Ala.Crim.App.1990); *State v. Lummus*, 190 Ariz. 569, 950 P.2d 1190 (App.1997); *Wrigley v. State*, 248 Ga.App. 387, 546 S.E.2d 794, 798 (2001) ("A police officer may give opinion testimony as to the state of sobriety of a DUI suspect and whether appellant was under the influence."); *State v. Ferrer*, 95 Hawai'i 409, 23 P.3d 744 (App.2001); *Com. v. Bowen*, 52 Mass.App.Ct. 1110, 754 N.E.2d 1083, 2001 WL 1014539 (2001); *State v. Hall*, 353 N.W.2d 37, 43 (S.D.1984); *Beats v. State*, 2000 WL 921684 (Tex.App.2000) ("A lay witness, including a police officer, may express an opinion about a person's intoxication."). *See also* John W. Strong, *McCormick on Evidence* § 11 (5th ed. 1999) ("The so-called 'collective fact' or 'short-hand rendition rule' [permits] opinions on such subjects as ... a person's intoxication."); Graham, *Handbook of Federal Evidence* § 701.1 (5th ed.2001)(lay witness permitted to offer opinion testimony that a person was intoxicated); Mueller and Kirkpatrick, *Evidence* § 7.4 (4th ed. 1995) ("One common example [of the collective facts doctrine] is lay testimony that someone was intoxicated, and here the witness is

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not confined to descriptions of glazed eyes, problems in speech or motor coordination, changes in behavior or mood or affect, but may say directly (assuming adequate observation and common experience) that the person seemed drunk or under the influence").

FN49. Maryland's equivalent evidence rule, 5-701, does not contain

the third requirement imposed by the federal rule.

In DWI/DUI cases, however, the third requirement of Rule 701, that the lay opinion is "not based on scientific, technical, or other specialized knowledge," will take on great importance. A police officer certainly may testify about his or her observations of a defendant's appearance, coordination, mood, ability to follow instructions, balance, the presence of the smell of an alcoholic beverage, as well as the presence of exaggerated HGN, and the observations of the defendant's performance of the SFSTs--consistent with the limitations discussed above. The officer should not, however, 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. Just where the line should be drawn must be left to the discretion of the trial judge, but the officer's testimony under Rule 701 must not be allowed to creep from that of a layperson to that of an expert--and the line of demarcation is crossed if the opinion ceases to be based on observation and becomes one founded on scientific, specialized or technological knowledge.

CONCLUSION

To summarize, the Court holds that the following rulings apply to the case at bar:

(1) The results of properly administered WAT, OLS and HGN SFSTs may be admitted into evidence in a DWI/DUI case *561 only as circumstantial evidence of intoxication or impairment but not as direct evidence of specific BAC. Recognizing that Officer Jarrell, the arresting police officer in this case, may be the sponsor for this evidence, he must first establish his qualifications to administer the test. Unless qualified as an expert witness under Rule 702 to express scientific or technical opinions regarding the reliability of the methods and principles underlying the SFSTs, Officer Jarrell's foundational testimony will be limited to the instruction and training received and experience he has in administering the tests and may not include opinions about the tests' accuracy rates. If Officer Jarrell testifies about the results of the HGN test, he may testify as to his qualifications to detect exaggerated HGN, and his observations of exaggerated HGN in the Horn, but may not, absent being qualified under Rule 702 to do so, testify as to the causal nexus between alcohol consumption and exaggerated HGN. When testifying about Horn's performance of the SFSTs, Officer Jarrell may describe the SFSTs he required Horn to perform and describe Horn's performance, but Officer Jarrell may not use language such as "test," "standardized clues" or express the opinion that Horn "passed" or "failed," because the government has not shown, under Rule 702 and the Daubert/Kumho Tire decisions, that these conclusions are based on sufficient facts or data and are derived from reliable methods or principles.

(2) The government may prove the causal connection between exaggerated HGN in Horn's eyes and alcohol consumption by one of the following means: asking the court to take judicial notice of it under Rule 201; the testimony of an expert qualified under Rule 702; or through learned treatises, introduced in accordance with Rule 803(18). In response to proof of the causal connection between alcohol consumption and exaggerated HGN, Horn may prove that there are other causes of HGN than alcohol by one of the following methods: asking the court to take judicial notice of this fact under Rule 201; cross-examining any expert called by the government; by calling a defense expert witness, qualified under Rule 702, or through learned treatises, introduced in accordance with Rule 803(18).

(3) Assuming the government can establish the elements of Rule 701, Officer Jarrell may give lay

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opinion testimony that Horn was intoxicated or impaired by alcohol. Such testimony must be based on Officer Jarrell's observations of Horn and may not include scientific, technical or specialized information.

Appendix

STATE	CASE	HOLDING
4th CIRCUIT	U.S. v. Daras, 1998 W L 726748 (4th Cir.1998). (Unpublished opinio n).	Held WAT and OLS were not scientific so no expert needed. Would have applied Daubert to HGN test but there was no need to because breathalyzer, WAT, and OLS were sufficient.
MARYLAND	Schultz v. State, 60 (Md.App.1995).	Court took judicial notice of reliability of the HGN test, leaving only the officer's qualifications to administer the test and the administration of the test in question. HGN is not reliable enough to determine precise BAC. Applied Frye/Reid standard.
	Wilson v. State, 723 A.2d 494 (Md.App.1999).	Cites to Shultz, above, and holds that HGN is not admissible for determining precise BAC or even estimates.
ALABAMA	Malone v. City of Sil verhill, 575 So.2d 101 (Ala.Crim.App.1989) , rev'd on other grounds, E x Parte Malone, 575 So.2d 1 06 (1990).	HGN testing satisfies Frye standard and is admissible --provided a proper foundation has been laid regarding police officer's qualifications and reliability of the HGN test and its underlying scientific principals.
ALASKA	Ballard v. State, 955 P.2d 931 (Alaska Ct.App. 1998).	HGN meets Frye standard if the test results are admitted for the limited purpose of establishing that a person has consumed alcohol and is therefore potentially impaired. HGN evidence may be a factor in determining

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intoxication but may not be used to quantify a BAC.

State v. Coon 974 P.2 d 386
(Alaska 1999)

Adopts Daubert standard and holds the voice spectograph analysis evidence is admissible under Daubert.

ARIZONA

State v. Superior Cou rt, 149
Ariz. 269, 718 P.2d 171
(Ariz.1986).

HGN test is sufficiently reliable to establish probable cause to arrest and satisfies Frye standard for scientific evidence. HGN cannot be used to establish precise BAC.

State v. Ricke, 161 A riz.
462, 778 P.2d 1358
(Ariz.App.1989).

Frye test was used. Court held that the officer may state his opinion that based on the results of the HGN test the defendant's BAC was above .10 --but only to corroborate chemical testing. HGN may be used as independent evidence to prove DUI.

State v. City Court o f City
Mesa, 165 Ariz. 514 , 799
P.2d 855 (Ariz.1990).

Clarifying the holding in State v. Superior Court above: HGN test satisfies Frye for limited purposes. HGN results may be used in the absence of chemical tests to show whether a person is under the influence in the same manner as other field sobriety tests and opinions of intoxication. "In such a case, HGN test results may be admitted only for the purpose of permitting the officer to testify that, based on his training and experience, the results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion. The proper foundation for such testimony, which

the state may lay in the presence of the jury, includes a description of the officer's training, education, and experience in administering the test and a showing that the test was administered properly. The foundation may not include any discussion regarding accuracy with which HGN test results correlate to, or predict, a BAC of greater or less than .10%." 799 P.2d at 859-860.

ARKANSAS

Whitson v. State, 314 Ark. 458, 863 S.W.2d 794 (Ark.1993).

Holding that the results of the HGN test are relevant to show alcohol consumption in conjunction with other field sobriety tests. The court highlighted the fact that HGN test was not used to quantify BAC so the test need not be evaluated as novel scientific evidence. Court notes they apply the "Prater" test (a more liberal test than the Frye standard) to novel science.

CALIFORNIA

People v. Leahy, 8 Ca 1.4th 587, 34 Cal.Rptr.2d 663, 882 P.2d 321 (Cal.1 994).

HGN testing is a "new scientific technique" and must satisfy Kelly/Frye standard. Remanded for Kelly hearing regarding general acceptance.

People v. Williams, 3 Cal.App.4th 1326, 5 Cal.Rptr.2d 130 (Cal.Ct.App.1992).

Police officer is not qualified to give expert opinion that nystagmus was caused by alcohol consumption. His experience does allow him to administer HGN and observe signs of nystagmus. Concluded that results of HGN testing might be admissible if linked to

qualified expert testimony. Question of whether the Frye/Kelly test applies was not decided because it was not ripe.

 People v. Joehnk, 35
 Cal.App.4th 1488, 42
 Cal.Rptr.2d 6 (Cal. Ct.App.
 4th 1995).

Applied Kelly/Frye standard. Held that, in this case, sufficient evidence was introduced to show that a majority of the scientific community accepts that nystagmus can be caused by alcohol consumption and HGN can be used in conjunction with other tests and observations in determining that the defendant was intoxicated.

 COLORADO

CONNECTICUT State v. Russo, 62 Conn.App.
 129, 773 A.2d 965
 (Conn.App.Ct.2001)

Proper foundation must be established in accordance with Daubert prior to introduction of HGN test results.

 DELAWARE State v. Ruthardt, 680 A.2d
 349 (Del.Super.Ct.1996).

HGN is scientific testimony and must satisfy rules of evidence: (1) the expert being offered is qualified; (2) the evidence offered is otherwise admissible, relevant and reliable; (3) the specialized knowledge being offered will assist the trier-of-fact in understanding the evidence or in determining a factual issue; (4) The scientific technique and its underlying principles are reasonably relied upon by the experts in the field; and (5) such evidence would not create unfair prejudice, confusion of issues or mislead the jury. HGN results may

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be admitted to corroborate or attack chemical analysis but not to quantify BAC. Absent chemical analysis the results are admissible, as is other evidence of defendant's behavior, to circumstantially prove driver was under the influence.

FLORIDA

Williams v. State, 71 0 So.2d 24. (Fla. Dist Ct.A pp.1998)

Uses Frye test. Holds that the HGN test is "quasi-scientific" and is already generally accepted in the scientific community and therefore there is no need for trial courts to continue to reapply a Frye analysis. Once a proper foundation has been laid that the test was correctly administered by a qualified DRE (drug recognition expert), judicial notice can be taken that HGN test results are generally accepted as reliable and are admissible. HGN cannot be used to establish precise BAC.

Bowen v. State, 745 S o.2d 1108 (Fl.Dist.Ct.Ap p.1999)

Expands Williams above. Trooper was allowed to explain to jury the roadside sobriety testing he performed, including the HGN test. However, in this district, before the HGN evidence is admissible, there must be a confirmatory blood, breath, or urine test. Trooper explained how he administered the HGN and that movements of the defendant's eyes suggested intoxication.

GEORGIA

Hawkins v. State, 223 Ga.App. 34, 476 S.E.2d 803 (Ga.Ct.App.1996).

Uses the Frye test. HGN is generally accepted and therefore can be

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admitted into evidence without first obtaining experts regarding HGN's scientific validity.

HAWAII

State v. Ito, 90 Hawa i'i 225, 978 P.2d 191 (Hawai'i.Ct.App.199 9).

Uses Hawaii Rules of Evidence 702 & 703 for admissibility of scientific or technical evidence. This test is more probative than Frye and much closer to Daubert as it allows inquiry into "reliability." Court held, (1) HGN test results have been sufficiently established to be reliable and are therefore admissible as evidence that police had probable cause to believe defendant was DUI; (2) court may take judicial notice of the validity of the principles underlying HGN; (3) before admitting HGN into evidence, it must be shown that (a) officer administering test was duly qualified to conduct test and grade it, and (b) test was performed properly in the case. Case remanded for further proceedings because of indications that test was not properly performed.

State v. Ferrer, 95 H awai'i 409, 23 P.3d 744 (Hawai'i.Ct.App.200 1).

FSTs, such as OLS and WAT (but excluding HGN) are non-scientific in nature and an officer may testify about his/her own observations and opinions in regards to those FSTs. An officer, however, cannot testify that a person "failed" or "passed" these tests without first laying a proper foundation.

IDAHO

CLOSING ARGUMENT

State v. Garrett, 119 Idaho

Uses Frye test. HGN can

878, 811 P.2d 488 (Idaho
1991).

be used as
circumstantial evidence
of intoxication. HGN
tests may not be used
at trial to establish
BAC in absence of
chemical testing.

ILLINOIS

People v. Buening, 22 9
Ill.App.3d 538, 170
Ill.Dec. 542, 592 N .E.2d
1222 (Ill.App.Ct.19 92).

HGN satisfies Frye
standard and may be
admitted as evidence of
intoxication provided
proper foundation has
been laid. HGN cannot
be used to establish
precise BAC.

People v. Basler, 193 Ill.2d
545, 251 Ill.Dec. 1 71, 740
N.E.2d 1 (Ill.2000)

Holds that, unless
Defendant offers
evidence to show HGN is
scientifically unsound,
a Frye hearing is not
required. Officer's
training and proper
administration of the
test in question is
required.

INDIANA

IOWA

State v. Murphy, 451 N.W.2d
154 (Iowa 1990).

Held that testimony given
by a properly trained
officer with respect to
the administration and
results of the HGN test
is admissible without
further scientific
evidence. Officer could
testify that it was his
opinion based on the
field sobriety tests,
the defendant was under
the influence. However,
officer cannot make an
unequivocal comment
about defendant's
guilt.

KANSAS

State v. Witte, 251 K an. 313,
836 P.2d 1110 (Kan. 1992).

HGN test results are
scientific evidence and
must satisfy Frye
standard. The
reliability of HGN test
in the scientific
community is not a
settled proposition.
Remanded for trial
court to decide if HGN
satisfies Frye.

 State v. Chastain, 26 5 Kan. 16, 960 P.2d 756 (Kan.1998).
 Court concluded that HGN test had not achieved general acceptance within the relevant scientific community and its exclusion was appropriate.

 KENTUCKY Com. v. Rhodes, 949 S .W.2d 621 (Ky.Ct.App.1996).
 No foundation was laid at trial as to the officer's qualifications for administering HGN. This was not properly objected to, however, and thus it could not be concluded that his testimony was erroneously admitted.

 LOUISIANA State v. Armstrong, 5 61 So.2d 883 (La.Ct.App.1990)
 Held that HGN test satisfies Frye standard and with proper foundation may be admitted as evidence of intoxication. Proper foundation requires establishing officer's qualifications for administering and interpreting results.

 State v. Breitung, 62 3 So.2d 23 (La.Ct.App.1993) .
 Affirming Armstrong.

 MAINE State v. Taylor, 694 A.2d 907 (Me.1997)
 Held that, as long as the officer is properly trained and evidence establishes the test was properly administered, test is admissible but not to quantify exact BAC.

 MARYLAND SEE ABOVE

 MASSACHUSETTS Com. v. Sands, 424 Ma ss. 184, 675 N.E.2d 370 (Mas s.1997).
 Held that HGN test relies on scientific theory and expert testimony is required to meet either Daubert or Frye standard. Officer's qualifications to administer the test and proper administration of the test must also be established.

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MICHIGAN

People v. Berger, 217
Mich.App. 213, 551 N.W.2d
421 (Mich.Ct.App.19 96).

Recognized that HGN test
is scientific evidence
and that its general
acceptance and
reliability have been
established to satisfy
Frye standard.
Expressed no opinion
regarding the use of
HGN to quantify BAC.

MINNESOTA

State v. Klawitter, 5 18
N.W.2d 577 (Minn.19 94).

Affirms trial courts
ruling that HGN
satisfies Frye standard
and concludes that HGN
results are admissible
when sufficient
foundation has been
laid.

MISSISSIPPI

Young v. City of Brookhaven,
693 So.2d 1355 (Miss.1997).

Uses Frye standard and
finds HGN is a
scientific test but is
not generally accepted
within the scientific
community. Therefore it
is inadmissible before
a jury. HGN test can be
used to show probable
cause at a probable
cause hearing.

MISSOURI

State v. Hill, 865 S. W.2d 702
(Mo.Ct.App.1993).

Uses the Frye standard.
State established HGN
general acceptance at
trial. Court found that
when properly
administered by someone
adequately trained, the
HGN test is admissible
as evidence of
intoxication. In this
case, the officer
testified that in his
experience, someone who
performs as defendant
did on the HGN test
would register above a
.10 BAC on a
breathalyzer. His
testimony was not
objected to at trial,
and the court found
that his testimony did
not amount to plain
error. This case was
later overruled on
other grounds in State
v. Carson 941 S.W.2d

518 (Mo.1997).

 Duffy v. Director of Revenue, FSTs (such as WAT and
 966 S.W.2d 372 OLS) can be used to
 (Mo.Ct.App.1998). establish probable
 cause without first
 laying a Frye
 foundation. HGN was
 considered a scientific
 test, and court found
 it should not have been
 admitted at trial
 because the
 administering officer
 was not aware how to
 properly score it and
 interpret its results.

MONTANA

Hulse v. State, 289 Mont. 1, HGN test is not "novel"
 961 P.2d 75 (Mont.1998). scientific evidence,
 therefore Daubert
 standard need not be
 met. Must satisfy Mont.
 Evid. Rule 702. State
 must show proper
 administration of the
 test, officer's
 training, and establish
 a scientific basis for
 the reliability of the
 test under Rule 702.

NEBRASKA

State v. Baue, 258 Neb. 968, Held that HGN test meets
 607 N.W.2d 191 (Neb.2000). the Frye standard for
 acceptance and is
 admissible for the
 limited purposes of
 showing the person had
 an impairment that may
 have been caused by
 alcohol but not
 admissible for proving
 precise BAC.

NEVADA

NEW HAMPSHIRE

State v. Duffy, 778 A.2d 415 HGN test is based on
 (N.H.2001). scientific principals.
 As such it must meet a
 threshold of
 reliability to be
 admissible pursuant to
 N.H. R. Evid. 702

NEW JERSEY

State v. Doriguzzi, 334 HGN is a scientific test
 N.J.Super. 530, 760 A.2d and must meet Frye
 336 standard to be
 (N.J.Super.Ct.App.Div.2000) admissible.

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NEW MEXICO

State v. Torres, 127 N.M. 20,
976 P.2d 20 (N.M.19 99).

HGN is scientific and thus subject to Daubert. Only after a scientific expert establishes the evidentiary reliability of the scientific principles underlying the test may a qualified police officer testify about administering of the test. Court also noted that judicial notice of the reliability of HGN would be inappropriate at this time.

NEW YORK

People v. Erickson, 1 56
A.D.2d 760, 549 N.Y .S.2d
182 (N.Y.App.Div.19 89).

Before HGN evidence is introduced, a proper foundation as to its scientific acceptance or reliability must be laid. Although foundation was not introduced at trial, court found this was a harmless error because of the amount of evidence against defendant.

NORTH CAROLINA

State v. Helms, 348 N .C. 578,
504 S.E.2d 293 (N.C .1998).

HGN is a scientific test and thus a proper foundation, such as expert testimony of its reliability, must be laid before it is admissible.

NORTH DAKOTA

City of Fargo v. McLaughlin,
512 N.W.2d 700 (N.D .1994).

With proper foundation regarding officer's qualifications and the proper administration of the test in the case at bar, HGN evidence is admissible only as circumstantial evidence of intoxication and not as a means of quantifying BAC.

OHIO

State v. Bresson, 51 Ohio
St.3d 123, 554 N.E. 2d 1330
(Ohio 1990).

A properly qualified officer may testify regarding a driver's performance on the HGN test and whether the driver was under the influence but not to

quantify BAC. Also holding that admission of the HGN test is no different from any other field sobriety test.

OKLAHOMA

Yell v. State, 856 P. 2d 996
(Okla.Crim.App.1993)

Uses Frye test and holds HGN test results cannot be used to quantify BAC. (In 1995, this court abandoned Frye test and adopted Daubert in Taylor v. State, 889 P.2d 319 (Okla.Crim.App.1995)).

OREGON

State v. O'Key, 321 O r. 285,
899 P.2d 663 (Or.19 95)

Uses Daubert factors and holds that HGN admissible to show a person is under the influence but not to quantify BAC. This limited admissibility, however, is still subject to a foundational showing that the officer who administered the test was properly qualified, the test was administered properly, and the results were recorded accurately.

PENNSYLVANIA

Com. v. Apollo, 412 P a.Super.
453, 603 A.2d 1023
(Pa.Super.Ct.1992).

Held that PA uses Frye standard. Trial court excluded HGN on the grounds that Frye standard had not been met by the evidence presented by prosecution. Trial court's order to exclude HGN was affirmed.

RHODE ISLAND

SOUTH CAROLINA

State v. Sullivan, 31 0 S.C.
311, 426 S.E.2d 766
(S.C.1993).

HGN evidence may be used to indicate insobriety but is not conclusive proof of DUI and may not be used to quantify BAC.

SOUTH DAKOTA

TENNESSEE

State v. Murphy, 953 S.W.2d

HGN test is scientific

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200 (Tenn.1997).

evidence, and, therefore, it must be offered through an expert witness and satisfy the requirements of Tenn. Rules of Evid. 702 and 703.

TEXAS	Emerson v. State, 880 S.W.2d 759 (Tex.Crim.App.1994).	Uses Daubert. Testimony concerning HGN test is admissible as expert testimony provided the theory underlying the test is valid and technique applied correctly. Not accurate enough to prove precise BAC.
UTAH	Salt Lake City v. Garcia, 912 P.2d 997 (Utah Ct.App.1996).	Officer's testimony regarding HGN testing was limited to only his training, experience and observations without relying on underlying scientific basis and was thus admissible. Evidence was not offered as scientific and therefore did not have to meet applicable scientific standard (and court did not address what that standard would have been.).
VERMONT		
VIRGINIA		
WASHINGTON	State v. Cissne, 72 Wash.App. 677, 865 P.2d 564 (Wash.Ct.App.1994).	Held HGN testing must meet Frye standard and remanded for lower court's determination of the question.
WEST VIRGINIA	State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (1988).	Frye test was used. HGN test results cannot be used to estimate BAC but can be used to show that driver was under the influence. Because the State needed to bring in evidence to demonstrate HGN's reliability, the court

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reversed and remanded.
This case was overruled
on other grounds in
State v. Nichols, 208
W.Va. 432, 541 S.E.2d
310. (W.Va.1999).

WISCONSIN

State v. Zivcic, 229 Wis.2d
119, 598 N.W.2d 565
(Wis.Ct.App.1999).

A properly qualified
officer may testify
regarding HGN results.

WYOMING

Smith v. State ex rel .
Wyoming Dept. of Tr ansp.,
11 P.3d 931 (Wyo.20 00).

Held that a properly
qualified police
officer may testify
regarding results of
HGN test at an
administrative hearing.
Additionally, under
Wyoming law an
administrative agency,
acting in a quasi
judicial or judicial
role, does not need to
satisfy technical rules
of evidence so Daubert
does not apply.

D.Md.,2002.
U.S. v. Horn
185 F.Supp.2d 530, 58 Fed. R. Evid. Serv. 357
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EXHIBIT C



H

State v. Lasworth

42 P.3d 844

N.M.App., 2001.

Dec. 7, 2001. (Approx. 7 pages)



2002-NMCA-029


Defendant was convicted, following a bench trial, in the District Court, Santa Fe County, Michael E. Vigil, D.J., of driving under the influence. Defendant appealed. The Court of Appeals, Alarid, J., held that results of defendant's horizontal gaze nystagmus (HGN) field sobriety test (FST) did not meet sufficient evidentiary standards to be admissible. Affirmed.

West Headnotes

[1] KeyCite Notes 

- ↔ 110 Criminal Law
- ↔ 110XVII Evidence
- ↔ 110XVII(I) Competency in General
- ↔ 110k388 Experiments and Tests; Scientific and Survey Evidence
- ↔ 110k388.1 k. In General. Most Cited Cases

Before scientific evidence may be admitted, the proponent must satisfy the trial court that the technique used to derive the evidence has scientific validity--there must be proof of the technique's ability to show what it purports to show.

[2] KeyCite Notes 


- ↔ 110 Criminal Law
- ↔ 110XVII Evidence
- ↔ 110XVII(I) Competency in General
- ↔ 110k388 Experiments and Tests; Scientific and Survey Evidence
- ↔ 110k388.1 k. In General. Most Cited Cases

Scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.

[3] KeyCite Notes 

- ↔ 48A Automobiles
- ↔ 48AIX Evidence of Sobriety Tests
- ↔ 48Ak411 k. In General. Most Cited Cases

The objective of the horizontal gaze nystagmus (HGN) field sobriety test (FST) test is to discriminate between drivers above and below the statutory blood alcohol limit, not to measure driving impairment, and the link between blood alcohol content and driving impairment is a separate issue, involving entirely different research methods.

[4] KeyCite Notes 

CLOSING ARGUMENT

↔48A Automobiles

↔48AIX Evidence of Sobriety Tests

↔48Ak411 k. In General. Most Cited Cases

↔110 Criminal Law

↔110XVII Evidence

↔110XVII(I) Competency in General

↔110k388 Experiments and Tests; Scientific and Survey Evidence

↔110k388.2 k. Particular Tests or Experiments. Most Cited Cases

Results of defendant's horizontal gaze nystagmus (HGN) field sobriety test (FST) did not meet sufficient evidentiary standards to be admissible in prosecution for driving under the influence, even though behavioral psychologist who testified was qualified in abstract to design and conduct studies of HGN; psychologist did not provide information concerning the effects of relatively low alcohol levels on the physiological mechanisms that produce HGN, and lack of scientific information was given to indicate how physiological cues that make up a HGN FST varied with a defendant's blood alcohol content in such a manner that the HGN FST could have provided statistically valid and reliable evidence at varying criterion blood alcohol contents.

****844 *739** Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellant.

Todd Hotchkiss, Roderick T. Frechette, II, Frechette & Associates, P.C., Albuquerque, NM, for Appellee.

OPINION

ALARID, Judge.

INTRODUCTION

{1} In State v. Torres, 1999-NMSC-010, ¶ 30, 127 N.M. 20, 976 P.2d 20, the Supreme Court held that the results of a horizontal gaze nystagmus (HGN) field sobriety test constitute scientific evidence within the meaning of Rule 11-702 NMRA 2001 when offered by the State against a defendant in a prosecution for driving while intoxicated; and, that HGN test results may not be admitted unless the State, as the proponent of HGN evidence, has demonstrated that such evidence meets the evidentiary reliability standard adopted by the Supreme Court in State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993). In the present case, the district court, applying Torres, ruled that the results of Defendant's HGN test were inadmissible at trial. We affirm.

Overview of HGN and Standardized Field Sobriety Tests

{2} HGN has come to be a principal component of standardized field sobriety tests ***740 **845** (FSTs) as the result of a series of studies conducted under the auspices of the National Highway Traffic Safety Administration (NHTSA). In the mid 1970s, Drs. Marcelline Burns and Herbert Moskowitz, doing business as the Southern California Research Institute, were awarded a contract by the NHTSA to conduct laboratory studies of various FSTs then in use around the country, with the goal of identifying the most effective battery of FSTs. The results of the research were published in 1977. M. Burns and H. Moskowitz, *Psychological Tests for DWI Arrest, Final Report*, No. DOT-HS-802-424 (1977) (hereafter the 1977 Report). The 1977 Report recommended a battery of three FSTs: one-leg-stand, walk-and-turn, and HGN. According to Dr. Burns and Dr. Moskowitz, the combined scores from the proposed three-test FST battery correctly discriminated between subjects having blood alcohol concentrations (BACs) below 0.10 percent and those having BACs at or above 0.10 percent eighty-three percent of the time.

{3} NHTSA sponsored a further study to standardize administration and scoring of the FSTs. The results of this second study were published in 1981. V. Tharp, M. Burns, and H. Moskowitz,

Development and Field Test of Psychophysical Tests for DWI Arrest, No. DOT-HS-805-864 (1981). The researchers reported that in the laboratory, police officers trained in the administration of the three-test battery were able to discriminate between subjects whose BAC was below 0.10 percent and those whose BAC was at or above this level eighty-one percent of the time.

{4} NHTSA funded a third study. The purpose of this study was to evaluate the effectiveness of the three-test battery in the field. Researchers concluded that a properly-administered HGN test would correctly identify a suspect as having a BAC at or above 0.10 percent seventy-seven percent of the time, and that when the HGN and walk-and-turn results were combined using a decision matrix, the two tests would correctly identify a suspect as having a BAC at or greater than 0.10 percent eighty percent of the time. T. Anderson, R. Schweitz, and M. Snyder, *Field Evaluation of a Behavioral Test Battery for DWI*, No. DOT-HS-806-475 (1983).

{5} There have been further studies validating the NHTSA standardized FST battery, including studies in Colorado, M. Burns and E. Anderson, *A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery*, Final Report, submitted to Colorado Department of Transportation (1995) (hereafter 1995 Colorado Report); Florida, M. Burns and T. Dioquino, *A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery*, (1998); and California, J. Stuster and M. Burns, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*, Final Report, submitted to U.S. Dept. of Transportation, NHTSA (1998) (hereafter 1998 Final Report). In the 1998 Final Report, researchers concluded that the NHTSA's three-test FST battery enabled officers in the field to accurately estimate whether a motorist's BAC was at or above 0.08 percent ninety-one percent of the time.

{6} The 1995 Colorado Report describes the HGN FST as follows:

The basic requirements for examination of the eyes for HGN are only that the officer must be able to see the subject's eyes and the subject must be able to see the stimulus object. No special apparatus or conditions are necessary. The officer instructs the subject to hold his/her head still and to follow the movement of a stimulus (e.g., a pen, penlight, or finger) with the eyes. The officer observes each of the subject's eyes for three signs:

(1) the ability of the eye to smoothly track or pursue the stimulus as it moves left and right in the subject's visual field.

A lack of smooth pursuit movement is consistent with the presence of a D-I-P [depressants-inhalants-phencyclidine] drug.

(2) the presence and the amplitude of a jerking movement, which may occur when the eyes have deviated as far as possible to the extreme side of the visual field.

A distinct jerking is consistent with the presence of a D-I-P drug.

**846 *741 (3) the angle of the eye's gaze when the first nystagmus jerking occurs; i.e., the angle of onset.

Jerking which occurs prior to a 45 degree angle of gaze and persists when the stimulus is held in one position indicates the presence of a D I P drug.

1995 Colorado Report, *supra*, at 20.

Procedural History

{7} Defendant was arrested on September 10, 1998. The arresting officer had observed Defendant traveling in the wrong direction on the on ramp leading from State Road 599 to northbound I-25. After stopping Defendant's car, the arresting officer noted that Defendant "displayed signs of impairment." The arresting officer administered a "Standardized Field Sobriety Test." Based on the results of this test, the officer arrested Defendant. Defendant submitted to a breath alcohol test, which indicated a BAC of 0.09 percent. Defendant was convicted in Santa Fe County Magistrate Court of driving while under the influence in violation of NMSA 1978, § 66-8-102.

{8} Defendant appealed to the First Judicial District Court. The district court conducted a trial de novo on February 4, and March 3, 2000. The case was tried to the court without a jury. At the beginning of the trial, the prosecutor explained to the district court that the State intended to present an expert who would validate the HGN FST under the standards of *Alberico* and *Torres*. However,


due to scheduling problems, the expert could not appear until later in the trial. The district court proposed that the State go ahead and present its lay HGN evidence, with the understanding that the court would disregard this testimony if the State's expert was unable to establish a foundation for its admission. During the first day of trial, the district court heard testimony from the arresting officer, who recounted his training and experience in administering the NHTSA's standardized FSTs. The arresting officer provided a detailed description of the FSTs he administered to Defendant. The officer testified that on the HGN FST, Defendant demonstrated a "lack of smooth pursuit" in both eyes, "distinct nystagmus at maximum deviation" in both eyes, and an "angle of onset of nystagmus" of approximately forty degrees. The officer testified that he observed six cues, the maximum possible under the standardized HGN FST. The officer stated that, based on his training and experience, the presence of all six HGN cues indicated Defendant was "under the influence" of alcohol or another central nervous system depressant, an inhalant, or PCP at the time of the test. After the first day of testimony, the trial was continued.

{9} On March 3, 2000, the trial resumed. The State tendered Marcelline Burns, Ph.D., as its expert on HGN testing. Dr. Burns' twenty-one page curriculum vitae was marked and admitted. Dr. Burns holds a bachelor's degree, a master's degree, and a doctoral degree in psychology. Dr. Burns recounted her role in the development and validation of the NHTSA's standardized FST battery. Dr. Burns testified that she has qualified as an expert witness on the HGN FST in at least twenty-six states.

{10} Defense counsel objected to the State's proffer of Dr. Burns as an expert. In response to voir dire by defense counsel, Dr. Burns conceded that she is not a medical doctor, and, that as a psychologist, she is primarily interested in behavioral measurements. The district court explained that it understood *Torres* to require that HGN evidence must be both scientifically *valid* and scientifically *reliable*. The district court believed that Dr. Burns was qualified to speak to the second, "reliability," prong. However, in the district court's view, Dr. Burns was not qualified by herself to establish the first, "validity," prong. In the district court's view, the State should have called an expert in a discipline such as biology or medicine, rather than a behavioral psychologist, to explain how the amount of alcohol a person consumes correlates with HGN. The district court expressed its concern that without such testimony, it could not rule out the possibility that the correlation between BAC and HGN claimed by Dr. Burns was a "coincidence." Because the State could satisfy only the second prong of the *Torres* test, the district court ruled that the arresting officer's testimony *742 **847 regarding the results of the HGN FST were inadmissible.

{11} At the State's request, the district court continued the trial to enable the State to appeal the ruling excluding evidence of the results of the HGN FST. We have jurisdiction pursuant to NMSA 1978, § 39-3-3(B)(2) (1972).

DISCUSSION

[1]  {12} Before scientific evidence may be admitted, the proponent must satisfy the trial court that the technique used to derive the evidence has scientific validity--there must be "proof of the technique's ability to show what it purports to show." *Alberico*, 116 N.M. at 167, 861 P.2d at 203. We begin by deciding what it is that the HGN FST "purports to show."

{13} Dr. Burns, the State's expert, is a leading--perhaps the foremost-- proponent of the HGN FST. Dr. Burns was involved in the original NHTSA-funded research, as well as many of the subsequent studies of the NHTSA's standardized FST battery. Although the original goal of the NHTSA research was "[t]o develop more sensitive tests that would provide more reliable evidence of impairment," 1977 Report, Technical Summary, that approach was abandoned during the development of the NHTSA standardized FST battery. Dr. Burns testified that the HGN FST was validated by comparing arrest/release decisions based upon the results of the NHTSA's standardized FSTs against the subjects' BACs as subsequently measured by breath alcohol or blood alcohol tests. [FN1]

phrase "horizontal gaze nystagmus as a measure of impairment" into a series of questions, and, that in responding to these questions, Dr. Burns did not take issue with the State's characterization of HGN "as a measure of impairment." In our view, any inference that may be drawn from Dr. Burns' failure to correct the State's characterization of

HGN as a "measure of impairment" does not overcome her testimony on direct examination and her unequivocal published statements that the HGN FST has been validated as a means of discriminating between BACs below a given level and BACs at or above that level, and not as a direct measure of impairment.

{14} In the 1998 Final Report, Dr. Burns explained how the limitations imposed by this methodology have been misunderstood:

The only appropriate criterion measure to assess the accuracy of SFSTs is BAC. Measures of impairment are irrelevant because performance of the SFSTs must be correlated with BAC level, rather than driving performance. BAC provides an objective and reliable measure that states have recognized as presumptive and/or per se evidence of impairment, depending on the statute.


....

Many individuals, including some judges, believe that the purpose of a field sobriety test is to measure driving impairment. For this reason, they tend to expect tests to possess "face validity," that is, tests that appear to be related to actual driving tasks. Tests of physical and cognitive abilities, such as balance, reaction time, and information processing, have face validity, to varying degrees, based on the involvement of these abilities in driving tasks; that is, the tests seem to be relevant "on the face of it." Horizontal gaze nystagmus lacks face validity because it does not appear to be linked to the requirements of driving a motor vehicle. The reasoning is correct, but it is based on the incorrect assumption that field sobriety tests are designed to measure driving impairment.

Driving a motor vehicle is a very complex activity that involves a wide variety of tasks and operator capabilities. It is unlikely that complex human performance, such as that required to safely drive an automobile, can be measured at roadside. The constraints imposed by roadside testing conditions were recognized by the developers of NHTSA's SFST battery. As a consequence, they pursued the development of tests that would provide *statistically valid and reliable indications of a driver's BAC, rather than indications of driving impairment. The link between BAC and driving impairment is a separate issue, involving entirely different research methods.*

**848 *743 1998 Final Report, *supra*, at 10, 27-28 (emphasis added). [FN2]


FN2. The 1998 Final Study is available online at the National Highway Traffic Safety Administration's website: <http://www.nhtsa.dot.gov/people/injury/alc0hol/limit.08/> ! *SFSTREP.pdf*.

[2]  {15} "[S]cientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). As Dr. Burns has observed, "the objective of the test is to discriminate between drivers above and below the statutory BAC limit, *not to measure driving impairment.*" 1998 Final Report, *supra*, at 28 (emphasis added). Based on Dr. Burns' testimony and our own review of the 1995 Colorado Report, as well as her published statements, we conclude that the HGN FST has not been scientifically validated as a direct measure of impairment. We conclude that the sole purpose for

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which the HGN FST arguably has been scientifically validated is to discriminate between drivers above and below the statutory BAC limit, which in New Mexico is 0.08 percent. [FN3]

FN3. The standardized FSTs initially were validated as means of discriminating between BACs at or above 0.10 and those below this level. In the 1998 Final Report, Dr. Burns concluded that the standardized FST battery was a valid and "extremely accurate" means of discriminating between BACs above and below the 0.08 percent level and she suggested that the FST battery can be used to accurately discriminate BACs above or below 0.04 percent. 1998 Final Report, *supra*, at 26.

[3]  {16} The State argues that Dr. Burns was qualified to establish the validity of the HGN FST and lay a foundation for the arresting officer's testimony that Defendant was "under the influence" at the time the FST was administered. In making this argument, the State erroneously assumes that the HGN FST measures impairment. However, as noted above, "the objective of the test is to discriminate between drivers above and below the statutory BAC limit, *not to measure driving impairment*," and "[t]he link between BAC and driving impairment is a separate issue, involving entirely different research methods." Thus, in order to lay a foundation for the admission of the arresting officer's statement that Defendant was under the influence of alcohol or another central nervous system depressant, the State was required to establish two predicates: first, that the HGN FST is a scientifically valid means of discriminating between BACs below 0.08 percent and those at or above 0.08 percent; and, second, that a BAC at or above 0.08 percent correlates with diminishment of Defendant's mental or physical driving skills. Dr. Burns appears to have been called to testify as to the first predicate.

{17} The State argues that the district court abused its discretion by ruling that Dr. Burns was not able to explain how alcohol caused the eye movements observed by the arresting officer. At trial, Dr. Burns testified that "[a]lcohol is a central nervous system depressant and as it depresses the brain, which is the part that we are concerned about here, it affects the reticular formation, the brainstem, and that disrupts or causes a dysfunction in the muscle and neural control of the eyes." Dr. Burns conceded that she herself had not conducted studies or experiments to determine how and why alcohol causes HGN and that her understanding of the mechanisms that produce HGN was based upon her review of the published results of studies by other researchers. However, Dr. Burns also testified that her knowledge of the physiological causes of HGN was sufficient to allow her to design and carry out studies correlating the HGN FST with BAC.

{18} Some minimal level of knowledge of the underlying substantive area of science is necessary even to design a statistical study. See 1 David L. Faigman, *et al.*, *Modern Scientific Evidence: The Law and Science of Expert Testimony* § 3-1.2 (1997) (hereafter *Modern Scientific Evidence*) (noting "choice of which data to examine" may require subject matter expertise in addition to knowledge of applied statistics). Dr. Burns testified that her knowledge of the physiological basis of HGN was sufficient for her to design and carry out studies of the HGN FST. There was no evidence refuting Dr. Burns' testimony on this point. Dr. Burns' understanding of the causes of HGN therefore appears to have been sufficient for her to design and conduct studies to verify whether the HGN FST can be used to discriminate between BAC below and above a given level.

**849 { *744 19} Evidence that Dr. Burns was qualified in the abstract to design and conduct studies of HGN does not mean that she in fact designed and conducted scientifically sound studies. See *Modern Scientific Evidence*, *supra*, § 1-3.3.3 (observing that "even the highest quality [scientific] journals sometimes publish work that is later found to be wrong"). The district court appears to have been concerned that without a more detailed understanding of the causes of HGN, the court could not

be sure the results obtained by Dr. Burns and other HGN researchers were not a " coincidence."

[4] ^{KC} {20} We share the district court's concern. In the 1995 Colorado study, 234 motorists who were stopped subsequently submitted to a breath- or blood-test, thereby enabling the researchers to compare the subject's measured BAC with the arrest-release decision dictated by the FSTs. 1995 Colorado Report at 13. At the time of the Colorado study, a BAC of 0.05 percent or greater provided grounds for arrest under Colorado law. *Id.* at v. The mean BAC of the 234 motorists was 0.152 percent, or *over three times* the statutory limit under Colorado law. *Id.* at 16. Of the 234 motorists, 184 had BACs at or above the statutory limit of 0.05 percent, *id.* at 14, table 4; and, of these 184 motorists, 133 had BACs at or above 0.10, or *over twice* the statutory limit, *id.* at 17. The driving behaviors that led the officers participating in the study to stop a motorist in the first place clearly were selecting out of the general driving population a highly intoxicated group of test subjects. If the officers had simply arrested every one of the 234 motorists, without even administering the FSTs, seventy-nine percent (184 of 234) of their arrest-release decisions would have been correct. In the actual study, the researchers concluded that arrest-release decisions based on the FSTs were correct eighty-six percent of the time. *Id.* at 14. Thus, administration of the FSTs did not dramatically improve the overall percentage of correct decisions. Further, among motorists whose BACs fell in the range between 0.03 to 0.07 percent (0.05 percent +/- 0.02 percent), arrest-release decisions based on the FSTs were correct only 57 percent (21 of 37) of the time. 1995 Colorado Report, Appendix IV. We share the district court's concern that some coincidental factor, such as the driving behaviors that led an officer to stop a motorist in the first place, were largely responsible for the claimed ability of the FSTs to discriminate between motorists above and below the statutory BAC. *See Modern Scientific Evidence, supra*, § 3-5.2.3 (discussing "confounding variable"--factor omitted from the researcher's analysis, which in fact drives correlation noted by the researcher).

{21} Further, Dr. Burns stated in the 1995 Colorado Report that "[i]t is possible that lack of smooth pursuit and distinct nystagmus at maximum deviation occur at low BACs with some subjects but not with others, or on some occasions but not others.... Research has not yet clearly defined HGN signs for low BACs." 1995 Colorado Report at 21. Dr. Burns noted that there is evidence that "smooth pursuit movement breaks down at BACs as low as 0.04%" and that "controlled laboratory research at low BACs is needed to examine the three HGN signs." *Id.* at 20. These statements suggest that the HGN FST may be prone to false positives under New Mexico law. *See NMSA 1978, § 66-8- 110(B) (1)* (1978, as amended through 1993) (establishing presumption that motorist whose BAC is 0.05 percent or less is not under the influence of intoxicating liquor). We think that it would have been reasonable for the district court to want to know more about the effects of relatively low alcohol levels on the physiological mechanisms that produce HGN.

{22} Lastly, we note that although the HGN FST was originally validated as a means of discriminating between BACs below 0.10 percent and those at or above 0.10 percent, in the 1995 Colorado Report the FST battery was used to discriminate between BACs below 0.05 percent and those at or above 0.05 percent. Further, in the 1995 Colorado Validation Study, Dr. Burns suggested that the standardized FSTs also are effective when the criterion for arrest is 0.08 percent. 1995 Colorado Report at 15. The district court could reasonably have wanted to hear a more detailed scientific explanation of how the physiological cues that make up the HGN FST vary with a subject's BAC in such a remarkable manner that the HGN FST can provide statistically valid and reliable evidence at varying criterion BACs.

**850 {*745 23} *Torres* required the district court to conduct a searching, de novo inquiry into the validity of the HGN FST, not to merely rubber stamp the decisions of courts in other jurisdictions that have admitted such evidence. It is the district court, not the expert, however qualified, who makes the ultimate determination of the validity of scientific evidence. The district court was not required to accede to the State's take-it-or-leave-it proffer of Dr. Burns, and it did not abuse its discretion in requiring the State to produce an expert who could explain in greater detail than Dr. Burns the

physiological and pharmacological basis of the six cues that make up the HGN FST.

{24} In its reply brief, the State argues that the district court misapplied *Torres* by reading *Torres* to require testimony from a medical doctor, and that it was on this narrow basis that the district court rejected Dr. Burns. Although some of the district court's remarks could be understood as a request for testimony from a medical doctor, in other places the district court expressed its concern more broadly, using the terms "biological or physical or medical evidence," "some basis biologically or medically," "the biological, medical explanation." Our review of the entire transcript of Defendant's trial satisfies us that the district court remained open to any witness who was capable of providing biological, physical, or medical evidence about the relationship of HGN to a subject's BAC.

{25} We note an alternate statutory rationale for upholding the exclusion of HGN evidence. This alternate ground follows from our recognition that the HGN FST has been validated, if at all, solely as a means of discriminating between BACs at or above a given level, and BACs below that level.

{26} NMSA 1978, § 66-8-107(A) (1978, as amended through 1993) provides that "[a]ny person who operates a motor vehicle within this state shall be deemed to have given consent ... to *chemical* tests of his breath or blood or both, *approved by the scientific laboratory division of the department of health.*" (Emphasis added). NMSA 1978, § 66-8-110(A) (1978, as amended through 1993), provides that "[t]he results of a test performed pursuant to the *Implied Consent Act* [66-8-105 to 66-8-112 NMSA 1978] may be introduced into evidence in any civil action or criminal action arising out of the acts alleged to have been committed by the person tested for driving a motor vehicle while under the influence of intoxicating liquor or drugs." (Emphasis added). Lastly, Section 66-8-110(E) provides that "[t]he determination of alcohol concentration *shall* be based on the grams of alcohol *in one hundred milliliters of blood* or the grams of alcohol *in two hundred ten liters of breath.*" (Emphasis added).

{27} The statutes cited in the preceding paragraph were enacted by Chapter 35 of 1978 N.M. Laws, which created the Motor Vehicle Code. In 1978 when the Motor Vehicle Code was enacted, Dr. Burns and her colleagues had only recently published the first laboratory study advocating the adoption of HGN as a FST. In view of the experimental status of the HGN FST in 1978, it is not surprising that the Legislature did not include HGN as a method of proving a suspect's BAC. Although the HGN FST has come to be widely known and widely used subsequent to the enactment of the Motor Vehicle Code in 1978, the Legislature has not amended the Motor Vehicle Code to authorize a conviction [FN4] based upon the results of non-chemical BAC tests such as the HGN FST.

FN4. Nothing in our discussion of the Motor Vehicle Code should be understood as foreclosing the use of the results of an HGN FST to establish probable cause for arresting a motorist or to establish "reasonable grounds" for administering a chemical BAC test. See § 66-8-107 (1978, as amended through 1993).

CONCLUSION

{28} The decision of the trial court excluding the results of Defendant's horizontal gaze nystagmus field sobriety test is affirmed.

{29} **IT IS SO ORDERED.**

WE CONCUR: JONATHAN B. SUTIN, Judge, and IRA ROBINSON, Judge.

N.M.App., 2001.

State v. Lasworth

42 P.3d 844, 131 N.M. 739, 2002-NMCA-029

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EXHIBIT D

Field Sobriety Tests: Are they designed for failure?

Spurgeon Cole & Ronald H. Nowaczyk¹

Clemson University

Running Head: Field Sobriety Tests

Abstract

Field sobriety tests have been used by law enforcement officers to identify impaired drivers. The reliability and predictive validity of these tests have been questioned, however. Two groups of law enforcement officers viewed videotapes of sober individuals performing a variety of field sobriety tests or normal-abilities tests (e.g., reciting one's address and phone number or walking in a normal manner). Officers judged a significantly larger number of the individuals as being impaired when they performed the field sobriety tests than when they performed the normal-abilities tests. The need to reevaluate the predictive validity of field sobriety tests is discussed.

Field Sobriety Tests: Are they designed for failure?

Field sobriety tests (FST) have been used throughout this century by police officers to help them determine if an individual is too impaired to drive an automobile. A classic paper by Bjerver and Goldberg (1951) examined the relationship between performance on the FST and driving. Over the past two decades the National Highway Transportation Safety Administration (NHTSA) has funded several studies to examine the effectiveness of FST in predicting a person's ability to drive (e.g., Anderson, Schweitz & Snyder, 1983; Burns & Moskowitz, 1977; Tharp, Burns & Moskowitz, 1981).

In a 1977 report, Burns and Moskowitz examined a number of different tests commonly used by officers. Based on the results from a laboratory study, they recommended three tests, the Horizontal Gaze Nystagmus (HGN) test, the Walk-and-Turn test and the One-Leg stand test for further research. The HGN measures the onset of gaze nystagmus which is influenced by alcohol consumption as well as other physiological factors. The other two tests are motor-coordination tests. The Walk-and-Turn test requires a person to stand on a line in a heel-to-toe position while listening to instructions and then to take nine-steps in a heel-to-toe fashion, pivot and take nine more steps along a straight line. The one-leg stand requires an individual to stand with arms at the side and extend one foot six inches off the ground and maintain that position for 30 seconds without extending the arms or losing one's balance. Although these tests seemed to hold the most promise, the authors report that false alarms are a concern. In the 1977 study, 47 percent of those subjects who would have been arrested based on test performance actually had a blood alcohol concentration (BAC)-lower than .10, the decision level used by officers.

A 1981 report by Tharp, Burns & Moskowitz employed the three previously mentioned tests in another laboratory study. Although the error rate improved somewhat, 32 percent of the participants judged to have BACs greater than .10 actually had BACs lower than .10, the decision point used by many states for assuming driving impairment. Reliability coefficients for scoring of these tests were often below accepted levels for standardized tests. Test-retest reliability coefficients ranged from .61 to .72 for individual tests and .77 for the total test score for 77 individuals who were dosed to the same BAC level on two occasions. Interrater reliability coefficients, based on having different officers score performance on each occasion were even lower, ranging from .34 to .60 with a .57 for overall test score.

Problems in scoring can be attributed, in part, to the lack of standardization across many of the FST studies. In addition, a few miscues in performance can result in an individual being scored as impaired (Anderson, Schweitz & Snyder, 1983). For example, a person is viewed as impaired for missing 2 of 9 points on the Walk-and-Turn test or 2 of 5 points on the One-Leg stand test. The stringent scoring criteria as well as subjectivity in determining whether or not a point should be awarded may account for the low reliability coefficients as well as the high false positive rates. The fact that these tests are largely unfamiliar to most people and not well practiced may make it more difficult for people to perform them. As few as two miscues in performance can result in an individual being classified as being impaired because of alcohol consumption when the problem may actually be the result on unfamiliarity with the test.

To test this hypothesis, individuals who were completely sober were asked to perform several FSTs and several "normal-abilities" tests which should be well-

known to individuals. These latter tests included answering personal data questions, such as stating one's address and phone number, as well as walking in a normal manner. Performance on the FSTs and "normal-abilities" tests was videotaped. Law enforcement officers were asked to view these tapes and determine if these individuals were impaired ("too drunk to drive"). If the FSTs are difficult to perform under normal circumstances then we can expect officers to incorrectly judge individuals as being impaired on the basis of the FST performance as compared with the normal-abilities tests.

Method

Subjects & Design

Fourteen police officers from the local municipality or county sheriff's office rated the performance of 21 individuals who had completed the field sobriety and "normal-abilities" tests. All individuals and officers were paid for their participation. The individuals performed both field sobriety tests as well as normal abilities tests. Half of the officers were assigned to each condition in which they viewed performance on either the field sobriety or "normal abilities" tests.

Tests Performed

Each participant performed six FSTs and four "normal-abilities" tests in the same order in an indoor setting. The FSTs included the walk-and-turn test, alphabet recitation, one-leg stand, a one-leg stand while tilting backward with the eyes closed and touching the nose, a one-leg stand with counting; and a one-leg extension test. The four "normal abilities" tests included counting from 1 to 10, reciting either one's Social Security Number, driver's license number or date of birth, reciting one's home address and phone number, and walking in a normal manner, turning around and walking back to the starting point. Standard

instructions for each test were read by the experimenter and were included on the videotape.

Procedure

Each officer watched a videotape of the 21 individuals performing one of the two sets of tests. The order of performance of the individuals was the same for both the FSTs and "normal-abilities" tests. The officers were allowed to take notes and were asked "Do you feel, as a law enforcement officer, that the following subjects, based on field sobriety tests performed on videotape, have had too much to drink to drive?" Their response, either "yes" or "no," was recorded for each individual. Each officer participated in individual sessions.

Results

The decision "too much to drink" or not was entered into a mixed factorial ANOVA with type of test (sobriety and normal) and participant as the independent variables. There was a significant difference as a function of test, $F(1, 12) = 7.19, p < .01$. There were 46 percent "too much to drink" decisions for the sobriety-test videotapes and only 15 percent in the normal-abilities test videotapes. As expected there was a significant difference among individuals, $F(20, 240) = 8.91, p < .01$, as well as a significant interaction with type of test, $F(20, 240) = 3.94, p < .01$. A post hoc comparisons test revealed that there were significant differences in the decisions for 10 participants. For nine of these individuals, they were judged to "have had too much to drink" more when they performed the sobriety tests than the normal abilities tests. For three of these individuals, the difference was dramatic. All seven officers who saw the sobriety test performance rated these individuals as having had too much to drink. However, when the normal abilities tests were given, only one officer for two of these individuals and none of the officers for the

other individual reached the decision that the individual had too much to drink. One participant showed a significant reversal, that is, the person was perceived as having had too much to drink more often from the normal abilities test than from the field sobriety tests.

Discussion

The data indicate that judgments of impairment are influenced by the type of test performed. An individual was more likely to be judged as impaired on the basis of FST performance than on performance of the normal-abilities tests. Even without alcohol, the number of errors made by individuals performing the FSTs was sufficient for officers to judge that the individuals had had too much to drink. These findings are consistent with other studies reporting sizable percentages of individuals judged to be impaired when they were not (Burns & Moskowitz, 1977; Tharp, Burns & Moskowitz, 1981).

While standardization of test instructions, administration and scoring may reduce the number of incorrect classifications, the major obstacle may be the FSTs themselves. The fact that these tests require unfamiliar and unpracticed motor sequences may put an individual at a disadvantage when performing them. To the law enforcement officer who has demonstrated the tests many times, the motor sequences may seem easy and straightforward. It may also be that to the casual observer the tests are also easy to perform. Yet, when an untrained individual actually performs the tests, then the difficulty of performing the tests at an acceptable level may become evident.

The reliance on FST performance by law enforcement officers in their decision to arrest or not and by juries in their decision as whether or not to convict a person of driving under the influence underscores the need to examine FSTs

critically. They must be held to the same standards the scientific community would expect of any reliable and valid test of behavior. This study brings the validity of FSTs into question. If law enforcement officials and the courts wish to continue to use FSTs as evidence of driving impairment, then further study needs to be conducted addressing the direct relationship of performance on these and other tests with driving. To date, research has concentrated on the relationship between test performance and BAC and officers' perceptions of impairment. This study indicates that these perceptions may be faulty.

References

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- Burns, M. & Moskowitz, H. (1977). Psychophysical tests for DWI arrest. Final Report, DOT-HS-802-424, NHTSA.
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Footnotes

¹Requests for reprints can be sent to either author at the Department of Psychology, Clemson University, Clemson, SC 29634. The authors wish to thank Ronnie Cole for his assistance in the completion of this study and Jack Davenport for his comments on an earlier draft of this manuscript.

EXHIBIT E

Affidavit of Harold P. Brull in the case of United State v. Horn

Case No. 00-946PWG

October 30, 2001MY BACKGROUND AND EXPERIENCE

My name is Harold P. Brull. My position is Senior Vice President, Public Sector Services for Personnel Decisions International (PDI). PDI is one of the world's largest industrial/organizational psychology consulting organizations with 18 U.S. offices and 19 international operations, and a staff of almost 1,000. Industrial/organizational psychology involves the definition and measurement of human attributes, particularly in employment settings.

I have been employed at PDI since 1978. In my professional capacity, I have designed and evaluated results from thousands of tests and procedures designed to measure varying quantities of specific attributes in individuals. I have worked with over 1,000 law enforcement agencies ranging in size from among the nation's largest to extremely small jurisdictions. I have taught at a variety of university settings, including Cornell University, the University of Minnesota, St. Olaf College, and the Southern Police Institute.

My educational background includes a bachelor's degree in biochemistry from Cornell University, a master's in educational psychology from the State University of New York at Cortland, and my current status as a Ph.D. candidate in educational psychology at the University of Minnesota. I am a licensed psychologist in the state of Minnesota since 1981. I am also president-elect of the International Personnel Management Association Assessment Council (IPMAAC), an organization of assessment experts operating in local, state, and national governmental settings.

Overview

For the purpose of this engagement, I was asked to review several pieces of literature that formed the basis for the use of field sobriety tests (FSTs). These tests purport to identify whether an individual has consumed alcohol, and in sufficient quantity, to exceed a threshold of impairment.

Prior to this engagement, I have had no experience, directly or indirectly, with FSTs. Rather, I viewed the evidence supplied as I would any scientific foundation for a measure which attempts to assess a human physiological, psychological, or behavioral characteristic.

Research Question

Based upon the material supplied, I have been asked to render an expert opinion as to the following questions:

- Do the procedures described accurately measure the condition in question? [An ingestion of alcohol in sufficient quantity to elevate an individual's blood alcohol concentration (BAC) to a level exceeding legal limits.]

- Has the research upon which these results are based been conducted in accordance with generally accepted scientific principles?
- Do the publications that I reviewed support the following legal criteria?
 - Is the evidence susceptible to testing?
 - Does it have a known error rate?
 - Has it been subject to peer review?
 - Is it generally accepted by the relevant scientific community?

The remainder of this affidavit attempts to answer these questions.

Definitions

Prior to a discussion of individual studies, several important terms and concepts must be discussed. This is particularly salient because the legal system, common word usage, and even the scientific community often use terms with little regard to their precise meaning. For example:

Validity - Validity refers to the accuracy of inferences drawn from a particular test or procedure. Thus, validity is not an inherent property of the instrument itself, but of how it is used. In lay terms, the question becomes, "What conclusions can we accurately draw from the data?" Thus, in the instance of field sobriety tests, the question, "Has the subject consumed alcohol?" is a very different question than, "Has the subject consumed sufficient alcohol to sustain an arrest and conviction?" It may be the case that field sobriety tests are valid in determining probable cause, but not in demonstrating unequivocally that a person is impaired by alcohol.

Reliability - Reliability is the property of a measurement to remain stable under different conditions. Reliability is a necessary, but not sufficient, ingredient for validity. Thus, a bathroom scale which gave a dramatically different reading each time it was stepped upon by the same person would be said to be unreliable. As such, it could not give a valid (accurate) reading of a person's weight. Reliability places an upper limit on validity.

Reliability by itself, however, does not guarantee validity. A bathroom scale which consistently gives a reading of 147 pounds when stepped on repeatedly, may still be inaccurate. Reliability estimates may take a number of different forms. For field sobriety tests, the two most salient are as follows:

Test/Re-test reliability - This refers to achievement of the same test result with the same individual under the same conditions at different points in time. It would be considered unreliable and unacceptable if the same individual with the same blood alcohol concentration produced different field sobriety test scores.

Inter-rater Reliability - For those measurements involving human judgement, inter-rater reliability refers to the likelihood that different test administrators would arrive at the same conclusion. This is of particular interest for the current inquiry, since the population of law enforcement officers administering FSTs is quite large.

Criterion - also known as dependent variable. This refers to the state or condition which is to be

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predicted. Although different states use different criteria, for scientific inquiry, the criterion is generally a specific blood alcohol concentration (BAC).

Predictor - In this instance, the predictor is a single component of the field sobriety test battery, or the battery as a whole. The scientific question becomes, "To what degree do changes in the predictor correlate with (predict) changes in the criteria?"

Error Variance - This refers to differences in the predictor which are unrelated to differences in the criterion. As error variance increases, the certainty with which one can state inferences decreases. This is represented by the following diagram:

Field Sobriety Test (Predictor)

(Criterion) Not "Impaired" "Pass" "Fail" Correct negative False positive "Impaired" False negative Correct positive

Of the four possibilities represented by the diagram, two, the false positive and false negative, represent error variance. Both are of interest. A false negative (passing the field sobriety test but being impaired) potentially leaves dangerous individuals on the highway. A false positive renders an incorrect judgement about an individual being impaired which may then have inappropriate negative consequences for that person.

For the purposes of this issue, there are three sources of error variance:

- The test itself - What confidence can be placed, even under ideal conditions, in test results?
- The test administrator (officer) - To what extent do actions of the test administrator produce FST results unrelated to BAC?
- Environmental conditions - To what extent do these produce differences in FST results not accountable to BAC?
- The subject (arrestee) - To what extent do attributes of the subject, other than ingestion of alcohol, impact test results?

The literature supplied will now be examined to answer these questions.

Literature Reviewed

I reviewed the following documents for the purpose of rendering my opinion:

- Psychophysical Tests for DWI Arrest, U.S. Department of Transportation, contract no. DOT-HS-5-01242, June 1997, final report.
- Development and Field Test of Psychophysical Tests for DWI Arrest, Tharp, Burns, and Moskowitz, Southern California Research Institute, March 1981, final report for U.S.

Department of Transportation, contract no. DOT-HS-8-01970.

- Field Evaluation of a Behavioral Test Battery for DWI, September 1983, Office of Driver and Pedestrian Research, Problem-Behavior Research Division, U.S. Department of Transportation, NHTSA Technical Note, DOT-HS-806-475.
- Field Sobriety Tests: Are They Designed for Failure? Cole and Nowaczyk, *Perceptual and Motor Skills*, 1994, 79, 99-104.
- A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery, Burns and Anderson, final report submitted to Colorado Department of Transportation, November 1995.
- A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery, Burns and Dioquino (undated).
- DWI Detection and Standardized Field Sobriety Testing, student manual, U.S. Department of Transportation, National Highway Traffic Safety Administration (undated).
- Letter from Yale Caplan to Sasha Natapoff, dated 15 February 2001, and accompanying curriculum vita.

GENERAL CONCLUSIONS

The Science of FSTs

There is absolutely no question that the use of FSTs to predict impairment or blood alcohol concentrations is a scientific question. Neither the fact that the tests are behavioral or, in some cases, do not require mechanical devices, obviates this fact. The measurement of pulse by one's fingers applied to an artery is no less a scientific test than the measurement of body temperature via a thermometer. The behaviors required of a field sobriety test are not analogous to those of driving a car. One must make an inference from the former to the latter. This is comparable to an instrument reading from which one makes an inference regarding aspects of an individual's health (e.g., elevated body temperature as an indication of infection).

Sufficiency of Research Evidence

Based upon the documents reviewed, it is a reasonable question to ask whether field sobriety tests rest on a solid foundation of scientific inquiry. This foundation might reasonably include the questions raised in the legal community by the Daubert principles.

- Susceptibility to testing
- Known error rate
- Peer review status
- General acceptance by the scientific community

Each of these are discussed briefly below and in greater detail later in the report.

As for the susceptibility for testing, the predictive equation lends itself well to scientific testing. Whether in the laboratory or in the field, field sobriety test scores can be compared to a known criterion, namely blood alcohol concentration. Given that the issue is susceptible to testing, the question then becomes whether there has been sufficient research conducted to establish a known error rate.

The question of known error rate relates to the question of testing adequacy. Have sufficient tests been conducted so that the known error rate of a particular predictor may be, with any degree of certainty, stated? The answer, based on the documents I have reviewed, is an unequivocal negative.

It is of concern that the initial laboratory results have never been replicated by any other researchers or conditions lending themselves to peer review. Both the 1977 and 1981 studies were conducted by the same research organization and apparently, the same principal investigators. To establish a known laboratory error rate, one would wish to see comparable results by independent observation. However, a far more critical flaw is the complete absence, based on the documents available to me, of any evidence which would allow one to predict a known error rate in the field.

The statement by the authors of the Florida validation study (Page 2) quoting the Colorado study, "The obtained data demonstrated that more than 90% of the officers' decisions to arrest drivers were confirmed by analysis of breath and blood specimens," is simply an erroneous, misleading, and exaggerated statement regarding accuracy. The factual basis for this assertion is that over 90% of drivers arrested in the Colorado study had BAC levels above 0.05%. The average driver across the country arrested for DWI has a BAC of 0.17%. (1981, Page 19.) The combination of low BAC threshold (0.05% vs. 0.10%) and likelihood of severely intoxicated individuals being stopped makes this finding a vastly inflated estimate of predictive accuracy. Neither the Florida or Colorado studies, nor any other documents available to my review, gave any meaningful data to predict known error rate under actual field conditions.

This issue of accuracy is directly applicable to the question of peer review. One simply has more faith in results which are independently reviewed by professional colleagues. Neither of the original laboratory results or the Florida and Colorado field results meet this criteria. In fact, a single principal author, Marcelline Burns, is a principal in all results. Given that the studies all appear to be funded by federal or state traffic agencies, lack of peer review is particularly troublesome. The author's statements might lead one to believe that FSTs' error rate is less than 10%. However, this is not the case; the actual error rate must be higher by some unknown amount. Such an assertion would unlikely be permitted in a peer-reviewed article.

While the initial laboratory studies establish a baseline error rate, the field studies which I reviewed do not allow for comparable estimation of error rate in the field.

Since field sobriety tests, by their nature, are conducted in the field, this question is of paramount importance. Field studies are more difficult to control than laboratory studies. The unwanted influence of extraneous factors (error variance) almost always weakens the certainty of the experimental results.

Only one of the studies I reviewed is subject to peer review. In the scientific community, this

generally means publication in a "refereed journal;" i.e., a publication where content is judged of sufficient scientific value by professionals in the field. This study, by Cole and Mowaczyk, published in Perceptual and Motor Skills is highly critical of field sobriety tests as predictor of intoxication.

The remainder of studies, while potentially well-designed and conducted, are contract works by federal and state government agencies. As such, they may be considered as payment for delivery of a "product" to the contracting agency. They therefore represent a potential bias toward proving that field sobriety tests "work."

Regarding the question of general acceptance by the scientific community, the documents I reviewed lead me to quite different conclusions, depending upon which study is examined. The original laboratory studies, although conducted under National Highway Traffic Safety Administration (NHTSA) auspices, appears to represent solid scientific inquiry and rigorous methodology. The same, however, cannot be said regarding field studies. The initial field study in the 1981 NHTSA report was inconclusive. The documents at my disposal regarding subsequent field studies simply do not contain sufficient detail or rigor to support any hypothesis that field sobriety studies, as conducted by police officers in the field, are valid and reliable.

This last finding is particularly problematic because many of the potential sources of error in the field are simply unknowable at a later point. That is, factors which may introduce error and impact test results are simply not reproducible or subject to documentation at a later point. These might include psychological conditions on the part of the subject, interpretive skill on the part of the officer, or the impact of environmental conditions upon test results. Thus, an FST finding, presented in court, might be given erroneous deference which cannot be countered by knowable, presentable evidence which might refute it.

SPECIFIC FINDINGS FROM DOCUMENT REVIEW

Laboratory Studies

Preliminary Comments

Virtually all of the information regarding field sobriety tests rests on a foundation of laboratory studies conducted in 1977 and 1981 by the Southern California Research Institute under the auspices of the National Highway Traffic Safety Administration.

Based on the information supplied to me, I find no other laboratory studies which confirm the original findings. Nor do I find any peer-reviewed research which would support or corroborate the NHTSA studies. Nevertheless, I can state that the study design, methodology, and reporting appear to meet requirements for scientific inquiry and have been conducted with care and credibility.

The relationship of laboratory studies to actual use in the field must also be explored. I agree only partially with Marcelline Burns (co-author of the original laboratory studies) and Ellen Anderson in their introduction to the Colorado validation study (Page 1) when they state, "...it should be recognized that the laboratory data are only indirectly enlightening about current roadside use of the

tests." Since laboratory data represents measurement under "ideal" conditions, limitations in the technique which are apparent in the laboratory can only be exacerbated by the uncontrollable variables which occur in the "real world." To this, the Colorado study authors agree: "In particular, note that controlled laboratory conditions are less variable and, therefore, may be less challenging than the highly varied conditions which officers routinely encounter in the field" (Page 1).

With this foundation, let's examine the laboratory data to assess with what degree of confidence, FST results, under the most ideal conditions, can be viewed as reliable and valid predictors of blood alcohol concentration.

Reliability

As stated, this is the index of stability in a test score. Without sufficient reliability, validity is impossible because different inferences are likely to be drawn under what should be the same conditions. In other words, any differences are the result of error variance, rather than valid variance. Reliability establishes an upper limit for validity.

Even under controlled laboratory conditions, the use of field sobriety tests does not appear to meet generally accepted scientific standards. The inter-rater reliability regarding arrest/no arrest decisions is .59. This estimate of reliability is even lower than that of the FST results themselves. This makes sense in that the raters are obviously incorporating additional, non-standardized information into their decisions. Thus, test score alone is not accounting for arrest/no arrest decisions. Even raters chosen for the laboratory studies are making decisions using data outside of FST results. This use of additional, non-standardized or tested data is likely even more pronounced by the wider range of officers in actual field conditions. These officers are thus more likely to present FST results as "proof" of their arrest decisions, even though they are basing their decision on other factors.

The same difficulties with reliability are demonstrated with test/re-test reliability estimates. In this case, the same subject who has consumed the same amount of alcohol is tested again. These differences directly translate into roadside situations where factors other than BAC impact the individual's ability to perform on field sobriety tests. The researchers measured test/re-test reliability under two conditions: having the same officer make the evaluation on the person at a different point in time, and having two different officers (1981, Page 35). The test/re-test reliability with the same officer making the decision for the same individual is .77. This reliability estimate, obtained under laboratory conditions, probably represents an optimistic estimate. As such, it certainly does not support any definitive statement regarding an individual's BAC. The results by different officers are even more disturbing. The total FST score achieved by the same subject with the same BAC measured by different officers (.57) is simply not high enough to warrant any precise estimate of an individual's BAC. The authors appear to agree: "Tests/re-test reliabilities for psychomotor tests are typically on the order of 0.7." (Guilford and Fruchter, 1978; 1981, Page 34.)

Review of the 1981 studies indicates that the reliability for arrest decisions (Page 35) is substantially higher for different officers observing the same subject under the same BAC. Thus, an arresting officer's contention that an individual's BAC is over the legal limit is clearly incorporating other information. Based upon the laboratory data, it is likely that the basis upon which the officer is making such a claim lies well beyond FST results and is thus not subject to scientific inquiry or

proof. This has tremendous implication for the actual administration of FSTs in the field. It suggests that different officers administering the same tests are likely to achieve quite different outcomes, depending upon other, non-testable factors.

Validity

Reliability is a necessary, but not sufficient, condition for validity. The question remains as to the accuracy of field sobriety tests. This represents an error rate of nearly 50%, comparable to deciding whether a person should be arrested by flipping a coin. The 1977 study shows 47 of 101 arrest scores to be inaccurate based upon the criterion of BAC equal to or greater than 0.10% (Page 25).

A large proportion of these "false alarms" (incorrect arrests) occurred in the 0.08% - 0.10% category. However, mistaken arrests range from .054% to .096% (Page 36).

The authors minimize these findings by explaining that, in the field, officers more typically arrest drivers with higher BACs. While this data appears to be supported by nationwide demographic research, "the average BAC of those arrested for DWI across the United States is 0.17%" (1981, Page 19), this may be irrelevant in any particular case. What can be deduced from this finding is that individuals whose blood alcohol count is near the legal limit, but not exceeding it, are most likely to be misclassified as failing the FST. Again, giving any deference to the finding that a failed FST means a BAC above legal limits is simply not warranted by this data. In fact, the 1977 laboratory results indicate six people who would have been arrested even though they consumed no alcohol at all (Page 26).

The 1977 authors admit (Page 41), "Again, it should be pointed out that all the evidence from these data suggests it is unrealistic to attempt to use behavioral tests to discriminate BACs in the plus or minus .02% margin around a given level." They further state (1977, Page 27) that "decision errors occur most often with middle-range levels of intoxication."

Results were somewhat better in the 1981 study, probably resulting from an optimized set of decision rules for the FST. However, results still are not strong enough to support definitive statements of impairment based on FST score. For example, 1981 results are as follows (Page 22):

Eleven percent of subjects with placebo doses (no alcohol) would be arrested
Twenty-two percent of subjects having BACs at 0.05% would be arrested

Thus, as BAC approaches, but does not reach, legally-defined limits, the probability of an officer's arrest decision increases dramatically. The number of false positives (incorrect arrest decisions) becomes quite large at BAC levels well below 0.10%.

The issue of validity (accuracy) also can be examined by looking more closely at individual officer performance. This relates directly to the issue of validity by introducing potential unreliability on the part of the officer. If one looks at the 1981 officer group, it varied considerably:

Experience, 1-19 years
DWI stops, 5-10,000

The following interesting results emerge. The most accurate officer in terms of correctly arresting people who had BACs equal to or above 0.10% was an officer with 3,500 stops. The least accurate officer was one with 5,000 stops. Thus, street experience alone does not seem to account for accuracy among officers.

Summary

The 1977 and 1981 studies show that even under laboratory conditions, individuals with the same BAC produce different FST results when measured at different times by different officers. Even under these optimal conditions, the error rates for decisions based upon FST results are higher than one would expect or require for a reasonable measure of scientific certainty.

Field Evaluation

Introduction

The situation becomes even more problematic when one attempts to move the inquiry into the field. Unfortunately, the 1981 study's attempt to extend its research to the field did not allow any definitive results. "As a result, trends are reported, but the data are not appropriate for significance testing; the assumption of underlying statistics which would be of interest are not met by the data." (1981, Page 54.)

What is of interest is that the degree of predictive error in the field appeared to be substantially larger than in the laboratory. "For eleven officers for whom we have some data, the average BAC estimate was off by 0.077% before training, and the average BAC estimate was off by 0.0537% after training." (1981, Page 63.) Compare this to the error rate of BAC estimate by the officers in the laboratory study (1981, Page 21). Here, the difference between officer estimate and actual BAC ranged from .0230% to .0344%, averaging about 0.03%. Even after training, officers in the field were far less accurate than officers in the laboratory.

While training clearly brought about improvement, it does not compare favorably to the laboratory condition and is a margin of error substantially higher than one would find acceptable for predicting with any degree of certainty.

Reliability

One of the most disturbing findings from the 1981 field sobriety study is that training did not always appear to "take." "Unfortunately, some officers forgot or ignored most of the administrative procedures, except those associated with nystagmus, by the time of their second post-training ride-along." (1981, Page 70.)

Note that this second ride-along occurred less than one month after training.

The 1981 authors conclude under laboratory conditions, and in the hands of adequately trained personnel, the test battery is a sensitive index of BAC and of impairment (1981, Page 72). However, in answer to the question, "Were officers better able to discriminate 0.10% as a result of using the test battery?" the authors conclude definitive answers to the question cannot be offered (1981, Page 73). They continue, "Major effort is needed for a subsequent field evaluation." (1981, Page 73.)

Subsequent Field Evaluations

Among the documents offered for my review were validation studies conducted in Colorado (1995) and Florida. However, the information supplied to me is not sufficient to classify these findings as studies. They are merely summary reports, without foundation, of findings.

In addition, they suffer from a serious methodological flaw. Given the fact that many, but by no means all, actual DWI stops in the field occur with drivers who are severely impaired, any accuracy data from this research design is likely to be highly inflated. Thus, statements such as "field sobriety

tests are 90% correct" are quite meaningless. While this figure may be true for the average arrestee (BAC equals 0.17%), it may be quite erroneous in any other given situation.

The Colorado and Florida studies, co-authored by an original Southern California Research Institute author, are highly supportive of FSTs. Again, the studies, or the summaries available to me, do not represent peer-reviewed publications. They appear to be conducted under contract to agencies who clearly have a vested interest in a particular outcome. The presence of misleading statements the obtained data (from the Colorado study) demonstrated that more than 90% of the officers' decisions to arrest drivers were confirmed by analysis of breath and blood specimens fails to mention that the criteria for the Colorado study was a blood alcohol count of 0.05% (Page 2). The accuracy figure would be far lower using a criterion of 0.10%.

A 1983 NHTSA technical note evaluated the effectiveness of FSTs in the field. The result, while potentially useful, is not compelling:

The accuracy of the combined procedure for all police agencies was 83%.

This accuracy figure ranges from 75% to 96% depending on what agency conducted the tests.

"Of the misclassifications, 16% involved classification of a driver's BAC as greater than or equal to 0.10% when his/her BAC was less than 0.10%."

Only 1 percent of misclassifications involve classifying a driver's BAC as less than 0.10% when his/her BAC was greater than or equal to 0.10%.

Using figures from the 1983 study, field sobrieties improved the accuracy of officers, but still resulted in 31 false positives (incorrect arrests) of 200 individuals presented (Page 10). This figure is, however, an exaggerated estimate of FST accuracy. As the authors note, "...in the great majority of the cases, PBT data were available to the officers for a driver before he was arrested. Thus, most arrest decisions were based on PBT data, rather than just test battery data." (1983, Page 9.) Given the fact that virtually all of the misclassifications were false positives, this study demonstrates that there is some unknown probability, higher than 15%, that an FST "failure" would lead an officer to an incorrect assumption that the driver's BAC was equal to or greater than 0.10%.

The use of standardized FSTs appears to increase officers' confidence and make them more likely to arrest drivers who, using the 0.10% criteria, should not be arrested.

The final conclusion, "The results of the field evaluation indicate that the test battery appears to be about as effective as the use of PBTs in improving the BAC distribution of those arrested (e.g., a reduction of false positives)" (Page 11), clearly puts the accuracy of field sobriety tests on par with preliminary breath testing devices (PBTs). My understanding is that PBT results are notoriously unreliable and are therefore not admissible in court proceedings.

Cole Article

The article, "Field Sobriety Tests: Are They Designed for Failure?" by Cole and Nowaczyk represents the only peer-reviewed document available for my review. Their study was designed to "...test the hypothesis that sober individuals will find the field sobriety tests difficult to perform and,

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as a result, will be judged to be impaired by officers viewing their performance.” (Page 100.)

All of the subjects in the Cole and Nowaczyk study had BACs of 0.0. They were then asked to perform two of the three standard FST procedures. Unfortunately, the authors did not use the horizontal gaze nystagmus test because it did not lend itself to videotape review. This means that one cannot completely transfer findings from this study to the field situation.

The results, however, are quite startling. Out of 21 subjects, only three individuals were rated as “unimpaired” by all officers on both the field sobriety and normal-abilities tests (Page 102). “Forty-six percent of the officers’ decisions were that an individual had ‘too much to drink’ from viewing the field sobriety tests.”

These were individuals who had BACs of 0.0. Clearly, a finding of failure to perform adequately on two of the standardized field sobriety test battery with no alcohol in one’s system seriously undermines the confidence in FSTs as a predictor of alcohol impairment.

The authors’ conclusion, “Even without alcohol, the number of errors made by individuals performing the field sobriety tests was sufficient for officers to judge that the individuals had had too much to drink.” (Page 103.) “The fact that these tests require unfamiliar and unpracticed motor sequences may put an individual at a disadvantage when performing them.” (Page 103.)

Officer Confidence

There is also an issue regarding officer confidence and FST results/arrest decisions. The Florida study states, “Experience and confidence have a direct bearing on an officer’s skill with roadside tests.” (Page 3.) The student manual for DWI detection and standardized field sobriety testing makes repeated assertions regarding the validity of FSTs: “Your first task in Phase Three is to administer three scientifically validated psychophysical (field) sobriety tests.” (Page VII-I.) “The most significant psychophysical tests are the three scientifically validated structured tests that you administer at roadside.” (VII-I.) “Walk-And-Turn is a test that has been validated through extensive research sponsored by the National Highway Traffic Safety Administration (NHTSA).” All of these clearly are designed to give the arresting officer confidence that these procedures will be an accurate measure of the arrest/don’t arrest decision. This confidence, however, might be compelling in a courtroom, but nonetheless is not supported by the evidence.

Finally, the Florida authors appear to have a vested interest in squelching the legal controversy which appears to plague their findings:

“For more than a decade now, however, defense counsel in many jurisdictions has sought to prevent the admission of testimony about a defendant’s performance of the three tests.” (Page 3.)

“Since it seems unlikely in the extreme that they [traffic officers] would continue to rely on tests which repeatedly lead to decision errors, it is a reasonable assumption than more often than not their roadside decisions to arrest are supported by measured BACs.” (Page 3.)

“If, on the other hand, it can be shown that officers typically making correct decisions, based on the SFSTs, perhaps the legal controversy that has centered on them for more than a

decade can be diffused and court time can be devoted to more substantive issues." (Page 5.)
And finally, "There appears to be little basis for continuing legal challenge." (Page 6.)

It is understandable that the authors have a stake in putting legal controversy around the accuracy of FSTs to rest. Unfortunately, the evidence which I was able to review would clearly indicate that more research is required before any definitive statement can be made regarding FSTs' predictive accuracy.

CONCLUSION

After almost 25 years of use, the debate regarding the accuracy of FSTs continues. Based upon review of the documents available to me, I can draw the following conclusions:

The laboratory studies which form the foundation for FST use appear to be well-designed. The accuracy of FSTs, even under laboratory conditions, is less than desired or expected for measures of this type.
The field studies available for my review were not well documented and produced unknown error rates that are likely to be unacceptable in real world situations.
The error rate of FSTs in the field as actually conducted by police officers is unknown.
The one article subject to peer review is highly critical of FST accuracy.
The issue of general acceptance by the scientific community is unanswerable given the information provided to me. The refereed article and the letter by Dr. Yale Caplan would appear to indicate that at least these members of the scientific community do not give FST results the weight of scientific proof.

In conclusion, it would appear that FSTs represent a useful tool in a traffic officer's armamentarium. They would serve as a helpful preliminary indicator that further inquiry is required to ascertain driver impairment due to alcohol. They were neither designed nor seem to support, without other stronger data, the contention that an individual is legally impaired.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: November 7, 2001

Harold P. Brull
Sr. Vice President
Personnel Decisions International
45 S. 7th St., Suite 2000
Minneapolis, Minnesota 55402
612/337-8233

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EXHIBIT F

AFFIDAVIT OF JOEL P. WIESEN, Ph.D.

I, Joel P. Wiesen, do hereby affirm and state as follows:

1. Education and Experience.

I am an industrial psychologist, specializing in the development of fair, valid tests of human abilities. I was awarded a Ph.D in Psychology from Lehigh University in 1975. My major field of doctoral study was experimental psychology and my minor field of study was psychometrics and statistics. My graduate studies included courses in both psychology and mathematics. I have taught undergraduate and graduate-level courses in statistics and research methods at Northeastern University and elsewhere.

For over ten years I worked for the Division of Personnel Administration, which is the agency of the Commonwealth of Massachusetts responsible for administering the civil service examination program for both the state and municipal civil service employees, covering some 70,000 state employees and some 200 cities and towns. My responsibilities included the development and validation of examinations, supervision and management of a staff of examiners who developed civil service examinations, as well as the oversight and review of examinations prepared by various consultants hired for this purpose. I also advised the agency and served as an expert in various matters related to test development and validation.

For the past 10 years I have been an independent consultant and have specialized in the development and validation of tests, mainly tests used for personnel selection purposes. Since 1980, I have done work for and advised private and public organizations in the area of test development and validation. Some of these organizations are: Cummins Engine Company, Bell Atlantic (now Verizon), T.J. Maxx, the Commonwealth of Pennsylvania, the Commonwealth of Virginia, the Commonwealth of Massachusetts, the state of Maryland, the city of Oklahoma City, the city of Springfield, Massachusetts, the city of Orlando, and the U.S. Department of Justice.

I am also a published test author, having developed a test of mechanical aptitude which is now used nationwide in some Fortune 250 companies as well as many smaller companies. Although I develop and use mostly written tests, I have worked with and developed human performance tests, including tests of physical abilities for jobs, especially for the job of fire fighter.

I am a member of the following professional societies and organizations: American Psychological Association, American Psychological Society ("Founding Fellow"), the Society for Industrial and Organizational Psychology, the Personnel Testing Council of Metropolitan Washington, the American Statistical Association, the Assessment Council of the International Personnel Management Association, and the New England Society for Applied Psychology. I was elected and served as president of the last two organizations.

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I have also served as a reviewer for professional societies, including journal reviewer for the International Personnel Management Association, and reviewer for several annual conferences of the Society of Industrial and Organizational Psychology and of the Assessment Council of the International Personnel Management Association. In this role, I reviewed manuscripts submitted for acceptance for the journal or for presentation at annual conferences.

In addition, I make presentations at national conferences and other professional meetings on various aspects of testing, including such topics as: test development, test validation, and test fairness. These conferences include: the American Psychological Association, the Society of Industrial and Organizational Psychology, and the Assessment Council of the International Personnel Management Association.

I am a licensed psychologist in Massachusetts and Pennsylvania.

2. My Charge

I was asked by the Office of the Federal Public Defender to review certain publications and, based on those publications, to evaluate the Field Sobriety Test (FST) as I would evaluate any other test of human capacity, report on its quality and validity as a test, and offer my opinion as to whether the FST meets the scientific standards of my profession.

3. Criteria for Evaluating Tests and Testing Research

New tests of human performance must live up to certain professional criteria prior to being accepted by psychologists as valid and useful measures. Over 50 years ago, the American Psychological Association developed and published a set of guidelines for psychological testing, and these are periodically updated.

In 1999, a 15-chapter book entitled, "Standards for Educational and Psychological Testing," was jointly issued by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education. These standards are accepted in and followed by the professional testing community, although each standard may not apply to every test or testing situation. The book defines "test" as:

"An evaluative device or procedure in which a sample of an examinee's behavior in a specified domain is obtained and subsequently evaluated and scored using a standardized process." (p.183)

FSTs fall under this definition of a test since they involve measuring specific behaviors of people in a standardized manner.

In the field of industrial psychology, as in the other fields of psychology which use tests, these 1999 standards are used by test users (the person or agency responsible for the choice and

administration of a test, and the interpretation of test scores), test publishers, and test authors as criteria for the evaluation of tests and testing practices. To the extent that the applicable standards are not followed or met, a test user should tend to avoid using a given test, especially for high-consequence decision making. To the extent that a test does not meet these standards, it is also less likely the test will be published or used by testing professionals. If tests are used which do not meet the applicable standards, the test results will be treated as less valid.

4. Summary

My opinions on the scientific acceptability of the FST are based on my review and analysis of the following five publications:

1. Burns and Moskowitz, 1977, "Psychophysical Tests for DWI Arrest"
2. Tharp, Burns, and Moskowitz, 1981, "Development and Field Test of Psychophysical Tests for DWI Arrest" (volume 1 only)
3. Anderson, Schweitz, & Snyder, 1983, "Field Evaluation of a Behavioral Test Battery for DWI"
4. Burns & Anderson, 1995, "A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery"
5. Burns & Dioquino, undated, "A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery"

In addition, I reviewed parts of Chapters VI, VII, and VIII of the "DWI Detection and Standardized Field Sobriety Testing", an undated publication of the National Highway Safety Administration. I did not evaluate this manual, but did note the procedures described for the FST on some of the pages in Chapter VIII.

These publications, singly and taken together, show only that the FST may have promise as a psychological test. The five studies fall short of meeting professional standards in several important areas related to testing and related to behavioral science research. More and better research is needed before the scientific community can be assured that the FST is a fair, reliable, valid predictor of intoxication. If any of these studies were submitted for publication in a peer-reviewed research publication, in my opinion they would be rejected due to their serious shortcomings in methodology and data analysis.

5. Burns and Moskowitz (1977)

This report is flawed in several very serious ways. Considered as a whole, this report does not meet the professional standards of the testing community. Some of the major shortcomings of the report include:

a. The test studied and evaluated is different from the test used in the field.

In Burns and Moskowitz (1977) chin-rest and angle indicating equipment was used for the nystagmus test (p.13, next to last ¶; p. 14; p. 48, fourth ¶), and this equipment was said to be the reason that their data showed "a substantially larger BAC-nystagmus correlation than reported in the data from Finland" (p.48, second ¶). However, later reports indicate that this equipment is not provided for use by police officers in the field. As a result, the accuracy of the FST in the field will be significantly below that reported in the 1977 study.

b. Overt bias in the evaluation of test accuracy.

In evaluating the FST accuracy, Burns and Moskowitz (1977) report that "borderline cases are assumed to fall into the non-error category" (p. 28, last sentence). In plain language, the authors artificially inflated the accuracy of the test by this method of dealing with people who fall at the borderline. Thus, the accuracy for the FST is less than they report.

c. The evaluation of accuracy capitalizes on chance.

The authors both develop the criterion score based on the data they collect, and then evaluate the accuracy of the categorizations based on this same set of data (see last ¶ on p. 28). It is well known in the field that this type of approach artificially inflates the estimate of the accuracy. A better approach involves what is called "cross validation" where the evaluation is done with a second set of data (sometimes "held out" from the original analysis). There is no simple way to evaluate the extent to which the results are biased by the method Burns and Moskowitz chose for this part of their data analysis, but it is clear based on their methodology that the FST accuracy is less than they report.

d. The test is not neutral with respect to age and gender.

The authors report that older people and women will tend to have higher scores and therefore be categorized as intoxicated more often than younger people or men (p. 34, fourth ¶; p. 119, third ¶; and p. 121). This lack of neutrality is not explored in detail in their report. This type of bias is a serious threat to the valid use of any test.

e. The officers were being watched.

The officers in this study were being watched by a member of the authors' staff (1977, p. 16, first ¶). As a result of the ever-present "trained observers", the police officers may have been more motivated than police officers in the field to carefully follow the test administration and scoring procedures. Therefore, the accuracy of the test seen in this study is likely to be a maximum, rather than to be representative of the FST accuracy

when used by police officers in the field.

f. The study is unacceptable for journal publication.

Peer-reviewed professional research journals commonly reject for publication reports with deficiencies such as those described above. Due to its errors and shortcomings, it is highly unlikely that the Burns and Moskowitz (1977) report would have been accepted for publication by the Journal of Applied Psychology, or by a similar professional research journal, had it been submitted for publication.

6. Tharp, Burns and Moskowitz (1981): The Laboratory Study

This report describes two studies: a laboratory evaluation (described in Chapter 2) and a field evaluation (described in Chapters 3 and 4). I will separately consider these two parts of the report. The laboratory evaluation of the report is flawed in several very serious ways. Considered as a whole, this part of the report does not live up to the professional standards of the testing community. Some of the major shortcomings of the report include:

a. Many false positives.

Of the people tested who had no alcohol, about 20% were classified as too impaired to drive (known as "false positives"); 18% were so classified by officers and 21% by observers, that is, the authors' staff (p. 20, second ¶; p.22, the first two entries in column 3). This is a high rate of incorrect classification of absolutely sober people.

b. The "mean absolute" error is high.

The authors calculated the difference between the actual blood alcohol content (BAC) and the BAC estimated by the police officer who administered the FST, and then found the average of these differences, ignoring the direction of the difference (they refer to this as the "mean absolute value," p. 21, Table 3). They report the average difference to be .030% (p. 20, first ¶). Although the authors do not give the distribution of these errors, it is reasonable to think that about half of the officers' BAC estimates based on the FST are wrong by more than .03%. So, for example, half the time the FST predicted a BAC of .10% the actual BAC would be either less than .07% or more than .13%. This amount of error is high in relation to the range of BAC being considered.

c. Test results vary with time of day and scoring does not account for time of day.

The test score for the horizontal gaze nystagmus (HGN) test depends, in part, on the "angle of onset" (p. 87, line C2). The authors report a statistically significant decrease in the angle of onset for people in the alcohol group tested after midnight (p.9, last ¶). This means that the test score varies based on the time of day the test is administered. The report does not address the implications of this statistically significant finding.

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d. Over-reliance on pilot work.

"Pilot work" usually refers to a small-scale investigation intended to refine a study's data collection methods. Usually pilot work is done with relatively few people, and the exact procedure used and results obtained may not be reported. In contrast, usually a "study" is done with a sufficient number of people to reach scientifically sound conclusions, and a full report of the data collection methodology and the data analysis is provided.

The authors used "pilot work with gaze nystagmus" to "rule out a number of unimportant variables" including: stimulus brightness, room brightness, fixation distance, velocity of the stimulus movement, monocular versus binocular fixation, instructions to inhibit nystagmus, and vertical positioning of the eye. These seven variables are all potentially important, since they are likely to occur often in real-life applications. Most of this pilot work is not reported in any detail (p.7, fourth ¶). Without a full study clarifying the effect of such variables, the standardization of the test is called into question.

e. Agreement between officers is low.

The 1981 study included a retest of 145 participants who returned a second time to be tested under the same alcohol dose (p. 34, fourth ¶). That the dose was the same for the two sessions is seen in the correlations of .96 to .97 reported in Table 14 (p. 35). The degree of agreement between raters for the total FST score is reported in terms of test-retest reliability to be .57 or .62, depending on whether officers' or observers' data are considered (rightmost column, p. 35). Usually inter-rater reliability of .8 (or even .9) or more is achievable. Reliability around .6, as in this study, is extremely low.

f. Test administration procedure changed over time.

In the 1981 report, the test-taker follows the visual stimulus with both eyes (1981, p. 85, last ¶). In the 1977 report, the test-taker was instructed to cover one eye when taking the test (1977, p. 90, ¶ 2). This may constitute a new version of the test. The studies do not tell us to what extent the evaluations of the earlier versions of the test accurately describe the new version.

g. Police Officers did not follow the decision criteria.

The authors give the decision criteria in Appendix B, but also state that they "were not necessarily followed by the testers" (i.e., by the police officers, p. 19, first ¶). In other words, police officers did not necessarily use the FST results to decide whether the person tested was too impaired to drive and to estimate the BAC. Not only does this mean that

the test results (correct or incorrect arrest decisions) cannot be attributed to the FSTs alone, but it indicates that officers in the field will not follow the decision guidelines.

h. False positive rates calculated on people tested on two days.

The authors report false positive rates in Table 8 (p. 27) which are based on 441 testings. But only 296 people were tested (p.15), so Table 8 includes data from 145 people who returned on another day and tested a second time. Table 4 (p. 22) shows a much lower error rate for the placebo dose people on the second day of testing, as compared to their first day of testing. In the real world people are not called back on another day, given the same dose of alcohol, and then retested. This means that the false positive rates reported in Table 8 are artificially low.

7. Evaluation of Tharp, Burns and Moskowitz (1981): The Field Study

The field evaluation of the 1981 report is flawed in several very serious ways. Considered as a whole, this part of the report does not meet the professional standards of the testing community. Some of the major shortcomings of the report include:

a. Authors say the data are not appropriate for statistical significance testing.

The authors say “the data are not appropriate for significance testing” (p. 54, last ¶). This is a very serious and worrisome statement. Tests of statistical significance are fundamental to this type of research, since they are the main method by which hypotheses are tested and conclusions drawn. That the data cannot be tested with statistical tests is a fundamental flaw in the study.

b. Authors report that the data were biased.

The authors report that the “data obtained during the ride-alongs may be biased” (p. 57, number 2, second ¶). Specifically, they say that most officers waited until the end of their shifts to fill out the data forms, by which time they probably knew the BAC levels based on the breath tests (p. 63, ¶b). The only field data the authors consider valid are for 73 arrestees who were given blood or urine tests, and these are reported to be a “biased sample” in part because about one third of them were suspected of being under the influence of drugs other than alcohol (p. 63, ¶b and ¶c). For this reason, the accuracy of the test as reported in this study is artificially inflated, rather than representative of the FST accuracy when used by police officers in the field with people who are not on drugs other than alcohol.

c. No analysis of the data by ethnic group.

Some physiological measures vary by ethnic group. Although the authors collected ethnic group identification (p. 44, first line; p. 52, section 3), and although the 1977 report indicated gender and age differences in FST performance, the authors failed to report data by ethnic group (p. 58). A reviewer thus cannot tell if the test operates equally across ethnic groups.

d. The "mean absolute" error is high.

The authors calculated the difference between the actual BAC and the BAC estimated by the police officer who administered the FST, and then found the average of these differences, ignoring the direction of the difference. They report that, after training, the officers' average difference is .0537% (p. 63, last ¶, and p. 64). Although the authors do not give the distribution of these errors, the implication is that about half of the officers' BAC estimates based on the FST are off by more than .0537%. This is high in relation to the range of BAC being considered, which would in turn lead to a high proportion of false arrests. This is reflected in the authors' report that only half of the people with a BAC of .10% to .149% would be arrested, and that 28.6% of the people with BAC of .05 to .099 (i.e., legal drivers) would be arrested (p. 66). Both the low detection rate and the high number of false positives are based on data collected after the police officers were trained (p. 66).

e. An unspecified number of police officers had problems scoring the tests.

The authors report that most officers had "little problem" scoring the balance test, but do not report how many did have problems, nor what the problems were (p. 42, first ¶). The authors report that by the end of training "very few questions remained" but do not report how many or what these questions were (p. 42, end of third ¶). If the officers had trouble learning the procedure when trained by the authors' staff, then it may be that officers in operational settings will have even less clarity about how to administer and score the FST.

f. Sample of police officers is biased.

The authors started the field evaluation study with 20 police officers, but only used data from 11 of them, because the other 9 did not provide data which the authors deemed useable (p. 54, last ¶; p. 64). This sample is both small and biased through self-selection. The authors say that 5 of the 9 officers who did not provide useable data had a "poor attitude" or showed "lack of cooperation" (p. 54, last ¶). Since the laboratory study showed considerable difference between officers in their success in using the FST (see, e.g., p. 26), the sample of more motivated or more cooperative officers may not be representative. For this reason, the accuracy of the test as reported in this study is

artificially inflated, rather than representative of the FST accuracy when used by police officers in the field.

g. The test scoring system changed over time.

The field evaluation part of the 1981 report presents a scoring system for the FST (p. 44, table 17). This system has 9 "checkmarks" or points for the walk and turn (WAT), 5 checkmarks for the one legged stand (OLS), and 8 for the HGN, for a total of 22 possible points. However in Appendix B another scoring system is presented (p. 87-88), with 10 "checkmarks" or points for the WAT, 7 checkmarks for the OLS, and 8 for the HGN, for a total of 25 possible points. Further, the scoring system "decision criteria" described by the authors (p. 88) uses scores from the individual tests, and therefore deviates from the total number of points approach used in the 1977 report (1977, p. 28, section C). To the extent that the test administration scoring system changed, we have a new version of the test. This is true even across the two parts of the 1981 report itself, as just described. As a result, the scores on the changed test may be higher or lower, or the accuracy or correlation with criteria of interest may have changed. Since the new and old versions of the test were not compared, the evaluations of the earlier versions of the test may not be applicable to the new version.

h. Test administration and scoring in the field is uneven in quality.

The authors report that in the field some police officers (number not given) "forgot or ignored most of the administration procedures" other than for the nystagmus test, but the officers did not recognize they forgot (p. 70, first ¶). They also indicate that officers are reluctant to use any scoring system (p. 69, next to last ¶). Both of these are serious threats to the validity of the FST as used in the field. Even the report by Anderson, Schweitz, and Snyder states that Tharp, Burns and Moskowitz "did not use a standardized procedure for combining [the test] results and reaching an arrest/no arrest decision" (1983, p. 3, second ¶). To the extent that the combining of test results was left to the judgment of the individual officers, the FST scoring was not standardized.

8. Evaluation of Anderson, Schweitz, and Snyder (1983)

This report describes a field study in which FSTs were administered by police officers to drivers stopped for suspicion of driving while intoxicated. One might expect this study to be more objective and better than the previous reports, since it was conducted by different researchers. Unfortunately, this report too is flawed in several very serious ways. Considered as a whole, this report does not meet the professional standards of the testing community. Some of the major shortcomings of the report include:

- a. Data collection procedures were unmonitored and so cannot be trusted.

The data collection procedures were designed to “minimize the possibility that knowledge of PBT [breath test] results would be available to officers before administering or recording battery scores” (p. 6, third ¶), but the authors report that “no statements can be made as to how closely the requested data collection procedures were followed” (p. 6, third ¶). If the PBT was administered before the FST, the scoring of the FST would likely be intentionally or unintentionally biased in favor of the accuracy of the FST. As a result, it is not possible to trust the results of this study.

- b. The arrest decisions were made based on breath analysis as well as FST.

The criterion for this study was the accuracy of the police officers’ arrest decisions. However, the authors report that “most arrest decisions were based on PBT [breath test] data, rather than just test battery data” (p. 9, ¶ 2). To the extent that the FST was not individually evaluated, the study can make no statement as to the accuracy or usefulness of the FST.

- c. The relevant data (from North Carolina) are not presented in full.

A little more than one quarter of the data collected on the FST came from North Carolina, the only jurisdiction which did not administer the PBT (p. 7, third ¶; p. 9, third ¶). The authors do not report all the FST data from this jurisdiction, but only the data for two of the three tests which comprise the FST, saying “Only those cases for which the combined 2 test score (sic) indicated there should be an arrest were included in this data set” (p. 9, third ¶). Since data for the full FST were not presented, the full FST cannot be evaluated based on this report.

- d. No statistical tests were conducted.

The authors draw conclusions based on inspection of data, but do not conduct statistical tests to support their observations (p. 9, last ¶). That no statistical tests were used is highly unusual for this type of study, and makes the conclusions suspect.

- e. The FST was not administered in a standard fashion.

The administration of the FST was not standardized. The police officers in the field decided which and how many of the three parts of the standard FST to give (p. 7, Table 1). The authors provide no reason for this non-standard administration of the FST. The authors report a new system for scoring the tests that has two types of cutoffs: a cutoff on each test “if it was the only one used” (p. 4, third ¶), and a cutoff based on specific scores on the WAT, and HGN tests combined (p. 4, Figure 1). The cutoffs reported for the WAT are not the same when used alone and with the HGN test. In the narrative for the

WAT test, the authors say "If the test score is greater than 1, classify the subject as having a BAC of above 0.10%" (p. 4, next to last ¶). In contrast, Figure 1 on the same page shows that people with WAT scores of 2, 3, 4, or 5 should pass if the HGN score is low enough. Because of the non-standard test administration and scoring, the results of the study cannot be definitely attributed to the full FST or to any of its component tests.

f. Two different devices were used to measure BAC.

The authors report using two different devices for measuring BAC, one more precise than the other (p. 7, ¶ 2). They also report that the more accurate measure was available only for people arrested, and that most of the measurements were made using the less precise device (p. 7, ¶ 2 and Table 1, last column). To the extent that the BAC measurement device was giving scores that were generally too high or too low, the evaluation of the FST accuracy is similarly flawed.

g. The authors suggest extreme caution in analyzing the data.

The authors say "Two major reasons make it necessary to be extremely cautious in analyzing the data collected in this study" (p. 9, second ¶). The first, lack of random assignment of officers to conditions, means that officers chose to give or not give the FST. It may be that officers who chose not to give the FST will not do so as faithfully or well as those officers who volunteered to give the FST, especially since officer motivation was identified in earlier reports as an important, relevant variable. Further, on p. 8 the authors say "the accuracy figures in Table 2 cannot be considered as applying to the entire population of drivers expected to be stopped by the police on suspicion of DWI" (p. 8, ¶ 2). I accept the authors' statements that the analysis of the data and the conclusions drawn are limited by these matters.

9. Evaluation of Burns and Anderson, A Colorado Validation Study (1995)

This report describes a study based on information drawn from impaired driving arrests in seven Colorado law enforcement agencies. This report is too incomplete to form the basis of an opinion regarding test validity. Specific flaws include:

- a. Sections IV and V are missing, which appear to include the methodology, results and data analysis. Without these sections it is impossible to evaluate the quality of the study or rely on its conclusions.
- b. Data was provided by volunteer officers (p. 2, column 2, first ¶). The use of volunteer officers raise a serious question of bias since officer motivation was identified in earlier reports as an important, relevant variable.

- c. No checks on the data reporting methodology were described. Police merely reported results. Officers may well have provided data only from those FSTs for which they had high confidence, particularly since there was no check on whether breath test results were also available.
- d. Results were unclear. The authors report that "officers' decisions to arrest and release were 86% correct," without defining "correct decision" (p. 5, column 1, third ¶). This lack of clarity is compounded by the use of two standards for arrest: between .05 - .10, driving while impaired; and greater than or equal to .10, driving under the influence (p. 2, column 1, first ¶).

10. Evaluation of Burns and Dioquino, A Florida Validation Study (undated)

Like the 1995 report, this report is too incomplete to allow for meaningful evaluation. Specific flaws include:

- a. Complete sections – III and IV, including the methodology – are missing. Methodology was not described at all in the report as provided to me.
- b. The data is incompletely described. The authors refer, variously, to "379 records," the "BACs of 256 drivers," and "313 cases" without explaining why the number changed (p. 4, second ¶; p. 5, first ¶).

11. Evaluation of all five studies.

Although all five reports concern FSTs, the procedures for administering the tests, the scoring of the tests, and the criteria change from study to study, sometimes in important ways. The five studies thus cannot be taken together to validate any particular version of the FST.

The scoring procedures changed over studies. The 1977 study used a single cutoff of 28 points (1977, p. 28, last ¶). The 1983 study used a scoring approach which had cutoffs on each of the three tests, as well as cutoffs based on specific combinations of the HGN and WAT tests (1983, p. 4). The BAC of interest also changed. The 1995 study describes two limits: .05% and .10%. Earlier, the test had been validated only for .10% (1977, p. 28, last ¶).

These changes are meaningful. What may be true for one set of test administration instructions, or for one scoring procedure, or for one criterion, may not be true for another. Thus the studies give only a general indication of the level of potential validity of the tests as described in the NHTSA manual: "DWI Detection and Standardized Field Sobriety Testing." Rather than the five studies supporting each other, they evaluate somewhat different combinations of test content and test scoring. The differences are large enough to change the validity and accuracy of the tests. The older studies are probably less germane, due to the changes in test content and scoring over time. The reports for the newer studies are grossly inadequate. Given this, and in

light of the specific critiques above (which are not exhaustive) I can only conclude that the field sobriety tests do not meet reasonable professional and scientific standards.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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Joel P. Wiesen
Director
Applied Personnel Research
27 Judith Road
Newton, MA 02459
(617) 244-8859