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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
Respondent/Plaintiff,) Docket Number 39874-2012
)
vs.)
)
GEORGE J. BESAW JR.,)
)
Appellant/Defendant.)

APPELLANT'S REPLY BRIEF

Appeal from Judge Jay Gaskill of the Magistrate Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce.

The Honorable Chief Justice and Associate Justices of the Idaho Supreme Court

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APPELLANT'S REPLY BRIEF

I.

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COMES NOW the Appellant, George J. Besaw Jr., by and through his attorney of record, CHARLES M. STROSCHEIN of the law firm of Clark and Feeney, and responds to the State's brief.

III.

Argument

1.

THE TRIAL COURT COMMITTED ERROR IN IT'S FAILURE TO SUPPRESS THE FIELD SOBRIETY TESTS.

The State does not deny that there has never been a Idaho Rules of Evidence Rule 702 hearing on field sobriety testing in the State of Idaho. The State's brief notes: "Idaho law provides that a properly trained police officer may testify regarding field sobriety tests, including the horizontal gaze nystagnus test." State's Brief at p. 13. The State does not tell the Court what "a properly trained police officer" might be. The State does not tell the Court how a police officer might be "properly trained" to testify regarding field sobriety tests including the horizontal gaze nystagnus test. The State does not tell the Court what information the police officer must be trained on so he can testify about field sobriety tests including the horizontal gaze nystagnus test.

After the quote noted above, the State lists a string cite of cases from the State of Idaho¹. The State does not note any cases from outside the State of Idaho that have been written since *State v. Garrett*, 119 Id. 878, 811 P.3d 488 (1990) was decided. The *Garrett* court, in it's plurality decision, used the *Frye* standard which is no longer used in the State of Idaho. See *State v. Faught*, 127 Id. 873, 876, 908 P.2d 556 (1995). See also Judge Lansing dissenting opinion in

1

The years the cases were decided are as follows: 1995, 1992, 1991, 1997, 2009, 1998 and 1979.

State v. Mazzuca, 132 Id. 868, 979 P.2d 1226 (Ct. App. 1999).

The State's position is as outdated as *State v. Garrett, supra*, if the court compares both to the case law that has developed regarding field sobriety testing since 1991. In *Garrett*, the Court stated its reason for looking at cases outside Idaho:

“This court has not heretofore been presented with having to decide whether HGN tests are reliable enough for their results to be admissible at trial. However, other state courts have considered this question, and we may properly look to their opinions for guidance. **Because the reliability of a test based on a scientifically tested phenomenon should not vary from jurisdiction to jurisdiction, we examine what other jurisdictions have done when HGN test results are offered as evidence in DUI cases.**”
(emphasis added)

At p. 880.

Idaho would be outside the norm if it did not require use of the NHTSA standards for field sobriety tests. In the *Garrett* case, the Court specifically notes that it used *State v. Superior Court*, 718 P.2d 171 (Arizona 1986) to support its decision for Idaho. The Arizona Supreme Court conducted an “in-depth” analysis of HGN testing. *Garrett* at p. 881. Dr. Marcelline Burns, a research psychologist, was called to testify in Arizona as was a National Highway Traffic Safety Administration (NHTSA) consultant on field sobriety tests. The *Garrett* Court also noted that the State in Arizona submitted articles from scientific publications and research reports done on behalf of the NHTSA. A copy of this Arizona case is attached and marked Exhibit “A” for the benefit of the Court. The Court, in reviewing the Arizona case, will note that the NHTSA standards were quite pronounced in the information provided to the Arizona Court.

The Arizona Court stated as follows:

“The test’s recognized margin of error provides problems as to criminal convictions which require proof of guilt beyond a reasonable doubt. The circumstances under which the test is administered at roadside may affect the reliability of the tests results. Nystagnus may be caused by conditions other than alcohol intoxication.” (emphasis added)

At p. 881.

The Idaho Supreme Court determined the admissibility of scientific field sobriety tests like the HGN should not vary from jurisdiction to jurisdiction. Mr Besaw, in his first brief, pointed out a substantial number of state decisions in which the NHTSA standards were the foundation for properly training police officers. Without use of these national standards, a police officer’s testimony really has little value.

In *Garrett, supra*, the Court went on to discuss the qualifications of the officer who testified about the administration of the HGN. In *Besaw*, the State provided next to nothing with regard to Trooper Talbot’s qualifications. In *Garrett*, the officer was attached to the select traffic enforcement team. He was also an instructor in the use of the field sobriety tests. He attended seminars conducted by Dr. Marcelline Burns of the Southern California Research Institute. The *Garrett* Court notes:

“Dr. Burns worked with the NHTSA to develop reliable field sobriety tests, and was one of the designers of the test testifying before the Arizona trial court.”

At pp. 883.

The State cites the Court to *State v. Stevens*, 126 Id. 822 (1995). If the Court reads that decision, it will see that the evidence in question involve the officer testifying about the “National

Traffic Safety Institute” or most probably the NHTSA. In *State v. Stevens, supra*, the officer and the State were relying on field sobriety tests developed by the NHTSA. In *State v. Gleason*, 123 Id. 62 (1992), the Supreme Court calls into question the analysis of *State v. Garrett*. The *Gleason* Court stated, “It is authoritative on the issue of the scientific reliability of the HGN test evidence, however it is not authority for the appropriate test against which scientific reliability is to be measured.” At p. 65. The *Gleason* Court also noted, “This court reaffirms that the appropriate test for measuring the scientific reliability of evidence is IRE 702.” At p. 65.

In *Gleason, supra*, Deputy Wolfinger was allowed to testify about how he administered the test and about his opinion based on his observations in administering the test. He was allowed to state that nystagnus or eye jerking prior to 45 degrees is a strong indicator that the driver is under the influence of alcohol. *Gleason* at p. 64. The 45 degrees is a standard set by the National Highway Traffic Safety Administration.

The Court may want to inquire of the State: Where exactly did the field sobriety test used by Trooper Talbot on Mr. Besaw during that cold, rainy January night come from; where did the use of the stimulus to go across the eyes come from; where did walk heel to toe nine steps and turn come from; where did the standing on one leg for thirty second come from? The NHTSA manual requires compliance with its standards to have valid field sobriety test results as noted in the cases cited in the initial brief filed by Mr. Besaw.

The Court in *State v. Garrett, supra*, also cited to a California decision, *People v. Ojeda*, 225 Ca. App. 3d 404, 275 Ca. Rep. 472, 474 (1990). The decision by this California Court of Appeals actually holds as follows:

“We do not hold that HGN is a reliable indicator of alcohol intoxication, that the HGN test meets *Kelly/Frye* standards, or that nonscientists are qualified to correlate HGN with a particular level of blood alcohol. Nor do we decide the extent of personal experience with a field sobriety test an officer must have in order to use it to form an opinion on intoxication. We hold only that an officer with sufficient experience may testify, based on his or her own experience with the relationship between HGN and alcohol intoxication, to an opinion that a subject was or was not under the influence.”

At p. 409.

Part of the *Besaw* probable cause affidavit notes “field sobriety tests-meets decision points”. Gaze nystagnus yes, walk and turn yes, one leg stand yes. R. at p. 10. The alcohol influence report specifically notes certain things that have to be done or at least have to be checked off by the officer regarding the HGN, vertical nystagnus, walk and turn and one leg stand. There is even a chart that notes walk and turn and one leg stand. R. at p. 15. Where do these decision points or factors that are set out in the alcohol influence report come from? They come from the NHTSA standards for field sobriety testing. However, the NHTSA manual and its standards were not important to the magistrate or District Court.

At the time of the motion hearing, the arresting officer testified that his training regarding field sobriety test involved the NHTSA manual. Motion Hearing T. at p. 24. He testified that there were three standardized tests and that the manual required a specific standardized testing procedure **to be followed and if not, the test weren’t valid**. Motion Hearing T. at p. 25, ll. 4-8. The trooper also testified about the HGN and the requirements that are set out in the manual. Motion Hearing T. at p. 30. The trooper was also questioned about the NHTSA manual regarding HGN. He was asked about the section that states, “If the eyes do not track together or if the pupils

are noticeably unequal in size, the chance of medical disorders or other injury causing the nystagnus is present.” He agreed that this was what he was trained. He specifically noted in his police report that Mr. Besaw’s pupils were unequal in size at the time of HGN testings. Motion Hearing T. at pp. 132-133.

Mr. Besaw is not arguing that law enforcement needs some kind of medical expertise to associate nystagnus with being under the influence. Mr. Besaw has simply cited case law from Idaho and across the country that notes the use of IRE 702 and how the rule should be applied to Mr. Besaw’s case.

The State argues, “He further contends that this Court should adopt the NHTSA standards for performing field sobriety tests as a minimum standard for admission of evidence of the results of those tests.” State’s Brief at p. 14. The State has finally gotten something right in its analysis of Mr. Besaw’s argument. Without adopting the NHTSA standards, which are the basis for the HGN, walk and turn and one leg stand, how in the world would the Court ever be able to gage whether an officer’s testimony has any relevance to a DUI? What happens if one officer holds his stimulus two inches away from the person’s face and the next officer holds his stimulus twenty inches away from the person’s face for the HGN? There has to be some set of standards for any of the field sobriety tests to make any sense considering that they are based on studies done by the NHTSA and Dr. Marcelline Burns.

Without these NHTSA standards, there are no HGN, walk and turn or one leg stand. See *State vs. Witte*, 836 P.2d 110 (Kansas 1992), *United States vs. Horn*, 185 F Supp 2d 530 (D. Md. 2002), *State v. Ito*, 978 P.2d 191 (Hawaii App. 1999) and *State vs. O’Key*, 899 P.2d 687 (Oregon

1995), *People v. McKown*, 924 N.E.2d 941 (Ill. 2010) and *White v. Miller*, 724 S.E.2d 768 (W. Va. 2012).

The State continues on by arguing “adopting Besaw’s suggested legal tests would necessarily involve overturning the contrary precedent cited above.” State’s Brief at p. 14. The adoption of the NHTSA standards for field sobriety testing does not overturn precedent, it simply brings up-to-date the requirements for field sobriety testings based on all the case law that has developed since 1991.

The State, in it’s brief, noted, “...Besaw has failed to show that the magistrate or district court erred by following well established precedent in ruling that the officer could testify regarding field sobriety test he conducted.” State’s Brief at pp. 14-15. What is the well established precedent that the district court and magistrate court followed? The trial court simply cited to *State v. Ferreira*, 133 Id. 474, 988 P.2d 700 (Ct. App. 1999), to support his decision, but *Ferreira* had nothing to do with the issues before the magistrate. The District Court simply indicated that the standards for proper field sobriety testings were not relevant and unnecessary. R. at p. 648, FN 4. The field sobriety test should have been suppressed because they did not follow the standard of the NHTSA manual and the results were explained by other factors than alcohol.

2.
**THE TRIAL COURT COMMITTED ERROR BY NOT SUPPRESSING THE
BREATH TEST**

A.
**THE PERFORMANCE VERIFICATION OF THE LIFELOC FC20 WAS NOT
SUFFICIENT AS IT DID NOT COMPLY WITH THE REQUIREMENTS OF THE
SOP**

The ISP Trooper should have used the 0.20 solution for the preformation verification after Mr. Besaw's breath test. The State in its briefing cites only to certain subsections of the November 1, 2010, SOP to support its position, but as the Court is aware, the SOP must be read as a whole to get the full understanding of the 0.20 solution performance verification requirements. In this record, the e-mails that were generated by the ISPFS discuss the science of linearity in breath testing. These e-mails also discuss the need for the 0.20 solution with regard to 0.20 blows. Jeremy Johnston, the head of the breath testing in the State of Idaho wrote:

“As for the 0.20 requirement, I'm 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 checks supports and not the entire DUI charge. DUI's deals with thresholds and for regular DUI, the threshold is 0.08. It (sic) the proper cal checks are in place to support that charge, then the charge should 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.” (emphasis added)

R. at p. 42.

Please note Mr. Johnston's use of the term "wobble room language" in how he looks at developing the SOP. David Laycock participated in the discussion regarding the 0.20 solution.

He wrote:

"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 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 in 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 were trimmed down to 2 or 3 pages total.**"

R. at p. 43.

Isn't this last sentence about a two or three page SOP telling, and this coming from one of the employees of the ISPFS? For the State, less is more. For the drivers of Idaho, less is not more. Less violates scientific principles and due process. Please note that David Laycock cites to Dubowski as a resource for breath testing in the State of Idaho. R. at p. 43. In addition, the Court should note that there are cases from other parts of the country that deal with linearity in breath testing at different intoxication levels. See *State v. Holland*, 27 A.3d. 1212 (App. Div. N.J. 2011).

Jeremy Johnston states in an e-mail dated February 26, 2008:

"Afterall (sic), we only really care about the instruments linearity, at the upper levels, when we had a case with results at or above the upper 0.20 level. In which case, 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 if the breath sample is below the 0.20 level? As long as it is above the .08, our bases are covered.

P.S. 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)."

R. at p. 45.

Darren Jewkes states on February 25, 2008 the following:

"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 stated as policy that the 0.20 checks only support excessive consumption than agencies are more likely to skip this check on a regular basis."

R. at p. 45.

Jeremy Johnston on February 25, 2008, states:

"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 (sic) 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." (emphasis added)

R. at p. 46.

A few minute before the above noted e-mail, Jeremy Johnston writes:

"Correct, I'm just trying to close a loophole with the 0.20 and the 'must' language that is being used by defense in 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."

R. at p. 46.

The SOP is being changed based on what is happening with ALS hearings and DUI cases, not what is scientifically acceptable. The State's brief agrees. State's Brief at p. 6. These e-mails are simply discussions about what makes things easier to prosecute DUIs and get ALS suspensions upheld. R. at p. 47.

The State's brief fails to set out the complete SOP language regarding performance verification of breath testing instruments. The following is found in the SOP that took effect on November 1, 2010:

“5. Performance Verification of Breath Testing Instrument

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 may be different from those show on the bottle label.

5.1 Alco-Sensor and Lifeloc fc20-Portable Breath Testing Instrument Performance Verification

5.1.1 The Alco-Senso 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.

5.1.3 **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.**

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 come 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 or until it reaches its expiration date, whichever comes first.

NOTE: The 0.20 performance verification was implemented for the sole purpose of supporting the instruments's results for an 18-8004C charge. **Failure to timely perform a 0.20 performance verification will not invalidate tests performed that yield results at other levels or in charges other than 18-8004C.**

5.1.4.1 **The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after an evidentiary test at any level. The 0.20 performance verification solution should not be used routinely for this purpose.** (emphasis added)

Defendant's Motion Hearing Exhibit 3.

The State in its briefing does not explain why ISPFs placed the word "approximately" in 5.1.1 and why in 5.1.1 there is the phrase "and/or". This language is not consistent with 5.1.3 where the word "or" is used in reference to the 0.08 and 0.20 solution. **The SOP does not state that a 0.08 performance verification within 24 hours satisfies the requirement for an excessive breath test.** This point is consistent with the e-mails noted above. The SOP specifically indicates that a 0.20 performance verification satisfies the requirement for

performance verification within 24 hours at any evidentiary test level. SOP 5.1.4.1. The highlighted language above must mean something. The State wants to read something into the SOP which is simply not there. The reason that ISPFS uses a 0.08 and a 0.20 solution is for the benefit of linearity. Linearity is for the benefit of testing an unknown sample (the driver's breath) against a known sample which is the performance verification solution. Section 5.1.4 is just an additional provision for a monthly 0.20 solution calibration and has nothing to do with the actual breath sample testing with a driver.

Henry's Law, which is the scientific law that these breath testing machines are based on supports Mr. Besaw's argument regarding breath testing in this particular circumstance. Henry's Law describes the mechanism of exchange in the lungs which is influenced by physiological factors. Henry's Law directly explains the volume of alcohol in the simulator's vapor. Henry's Law states that in an enclosed system, at any given temperature, the concentration of a volatile substance in the air above a fluid is proportional to the concentration of the volatile substance in the fluid. In this circumstance, Mr. Besaw's breath sample is unknown while the liquid solution is known and therefore the language and meaning of the SOP supports Mr. Besaw's argument.

Why exactly would the ISPFS note anything about performance verifications using a 0.20 within 24 hours if in fact it never had to be used with excessive breath samples? Why make any reference to 0.20 at all for the 24 hour performance verification? Why not simply say a 0.08 solution applies in all circumstances. The State's position flies in the face of the idea of linearity and the whole reason for multiple solutions levels (i.e. 0.04; 0.08; 0.20) used in performance verification. State's Motion Hearing Exhibit 12.

Just the words themselves “performance verification” support Mr. Besaw’s position. When there is a solution change at the beginning or end of the month, there is no “verification” to be made because there is no breath sample to be tested. There is a calibration of the machine to make sure that it registers correctly a 0.08 and 0.20 but there is no “performance” being verified. If in fact the performance verification using a 0.20 solution was not required for excessive tests, why put extra language in the SOP that just causes confusion? If nothing else, this SOP could be considered vague which does not meet the “standard” requirements of I.C. § 18-8004(4).

Mr. Besaw has met his burden with regard to the failure of the operator to do a performance verification within 24 hours using the 0.20 solution with breath samples that were in excess of 0.20. The officer used a 0.08 solution for an excessive breath test.

B.
**THE 15 MINUTE OBSERVATION PERIOD DID NOT COMPLY WITH THE
REQUIREMENTS OF THE SOP**

The video is Defendant’s Motion Hearing Exhibit 7, hereinafter known as Exhibit 7. At 02:31:01 on Exhibit 7, Mr. Besaw was specifically noted as being arrested by the ISP officer. The start of the ALS advisory was at 02:37:15 and it ended at 02:40:10 based on the audio/video that is part of this record as Defendant’s Motion Hearing Exhibit 7. Mr. Besaw inquires at 02:40:13 about his Class A driver’s license and the trooper provided misinformation at 02:40:16 regarding this issue. Motion Hearing T. at p. 91, ll 6-25.

There is boilerplate language on the probable affidavit that states as follows: “Defendant was tested for alcohol concentrations, drugs or other intoxicating substances. The test(s)

was/were performed in compliance with Section 18-8003 and 18-8004(4) Idaho Code and the standards and methods adopted by the **Department of Law Enforcement.**” (emphasis added) R. at p. 10. There is no longer a Department of Law Enforcement so this boilerplate language is not helpful in the analysis of whether the arresting officer complied with the requirements of I.C. § 18-8002A, I.C. § 18-8004(4) and the standards and methods of ISPFS.

In Exhibit 7, the trooper did not bother to turn on the video for the backseat until after Mr. Besaw’s breath test was completed. This is his common practice not to video record the breath test.

The magistrate and the District Court simply disregarded all of the distracting contacts that were made and the common sense that should be applied here. If a trooper is talking to other law enforcement officers, passengers or people that arrive later, his focus and senses are going to be on those individuals and not on someone who is sitting below his eyesight, handcuffed sitting inside the police car in the backseat. This is not a circumstance in which Mr. Besaw’s feet were outside the vehicle and he was facing towards the outside of the car. According to the trooper, he was seated in the vehicle with his feet forward. Motion Hearing T. at p. 92, ll 14-18.

Also note, Mr Besaw’s three samples (.219, insufficient, .201) are at the outer limit of the 0.02 collation factor. SOP § 6.2.2.2. In addition, the Court can note the 0.08 performance verification checks that were noted on the log for January of 2011. Defendant’s Motion Hearing Exhibit 4. Mr. Besaw’s 0.08 performance verification noted a .073/.073. The one done prior to that on January 6, 2011, noted a .072/.073 for solution lot #10802. For the simulator solution lot #10802, the State developed a Certificate of Approval setting the target range for the 0.08

solution. The target range for solution lot #10802 is “.072 to .088 grams of ethyl alcohol/210 liters of vapor”. Attached to this Brief as Exhibit B is the State’s Certificate of Approval. The performance verification checks regarding this solution are at the lowest end of the range. The check done with the 0.08 solution on January 4, 2011, shows a .074/.075 solution test. Defendant’s Motion Hearing Exhibit 4. The solution results were not outside the range, but there is a question as to the viability of this particular solution lot. Combine this solution lot problem with the range of Mr. Besaw’s breath samples, .219, insufficient, and .201 and the Court can suspect that the trooper failed to comply with the SOP §§ 6.1.4, 6.1.4.1. and 6.1.4.3². The Court has to determine that under the circumstances something was missed by the trooper because of his distractions with the other police officers, the passenger, and the wife of the passenger who arrived on the scene prior to breath testing being completed. The trooper could have video taped Mr. Besaw in the backseat during the blow sequence, but he choose not to. The trooper could have gone to the Nez Perce County jail to have the breath test done in an enclosed environment; he choose not to.

2

The SOP states:

“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.

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 bring another 15-minute waiting period before repeating the testing sequence.

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.”

Defendant’s Motion Hearing Exhibit 4.

Mr. Besaw does not have the burden to come forward and prove anything about burping, belching, or the like. He simply has to show that the observation period was not complied with. The Court knows he was eating a hamburger shortly before breath testing was started, and he was drinking alcohol. Hamburgers and alcohol lead to gas in the stomach; this is just common sense. Once again, there does not need to be a Homer Simpson type belch for there to be burping and the like in this sort of circumstance.

The Court should find that there was not a proper observation period. With this Court's decision, the Court can instruct these officers to video the blow sequence when they have the capability and to take the drivers to an enclosed environment for the benefit of the driver and the observing officer. The Court can send a message to arresting officers who decide to do breath testing out in the field. The trooper in this case could have called for Lewiston Police Department back up since they did not want to leave him alone. Back up Lewiston Police could have fended off passengers, wives of passengers and any other distraction. The Court should find that there was not a proper observation period and Mr. Besaw's breath test should have been suppressed.

3.

THE TRIAL COURT ERRED IN ITS FAILURE TO FIND A LACK OF STANDARDS IN BREATH TESTING AS REQUIRED BY IDAHO CODE § 18-8004(4)

The State calls the argument made from Appellate's Brief pp. 31-40 a "diatribe" but does acknowledge that the SOPs were changed because trial courts were not giving the State the

decisions that they wanted. State’s Brief at p. 6, FN 1³. The State does not address section 3 of Mr. Besaw’s first brief other than calling it a “diatribe.” However, the Court should consider that ISPFS has not complied with the requirements of I.C. §18-8004(4). Idaho Code Section 18-8002A(7)(d) specifically notes as grounds for vacating a license suspension: “The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4) Idaho Code...”.

The State did not deny in its responding brief that the SOP and “breath testing standards” were changed as a result of the reasons set out in the emails that were made part of this record. R. at pp. 29-141. Emails were provided by the Idaho State police in response to a Freedom of Information Request regarding why the changes were made to the SOP. R. at pp. 70, 198, 229-230.

The State does not address *Wheeler v. Idaho Transportation Department*, 148 Idaho 378, 223 P.3d 761 (Ct. App. 2009). Judge Lansing specifically indicated in her dissent that if the ISP breath standards were not mandatory, then they could not be any sort of standard at all. In addition, the State fails to address the holding in *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1998) and its analysis of Idaho Code Section 18-8004(4).

3

“Because Besaw does not link his diatribe about the amendments to the standard operating procedures to any relevant legal standards (Appellant’s brief pp. 31-40), the state will respond only by noting that altering the procedures was a perfectly legitimate exercise where trial courts had given those procedures unexpected interpretations or where reliable BAC testing was being suppressed due to minor oversights that did not actually effect the reliability of the testing.”

The State's basic position is that ISP can set anything as a standard, and the courts and drivers in the State have to accept this position. The State's position is that ISP could issue a single page, one sentence standard saying that "Whatever ISPFs says goes. Trust us, we're the police." End of standard.

The August 20, 2010, SOP's Scope Section states: "Following all the **recommendations** of this external procedure will establish the scientific validity and set the **unquestioned** foundational admissibility of the breath alcohol test." (emphasis added) See R. at p. 563. ISPFs decided that what it writes would be "unquestioned" despite what all the case law holds regarding what a driver can challenge. Please note all the deletions that occurred to the SOP on August 27, 2010, just a scant seven days after the new SOP was put into effect⁴. Defendant's Motion Hearing Exhibit 3 at p. 5 of 21.

The November 1, 2010, SOP under "Scope" sets out: "Following all the **recommendations** of this external procedure will establish the **scientific** validity of the breath alcohol test. Failure to meet all the recommendations within this procedure does not disqualify the breath test." (emphasis added) Defendant's Exhibit 3 at p. 7 of 21. The ISPFs has determined that the SOP is just a "recommendation" that can be explained away by some BTS. The State does not explain why there was any scientific need for changes to the SOP and the long standing use of BTS manuals as standards. The State does not cite to any case law in its responsive brief

4

The SOP states: "Deletions and/or additions to section 2, 4.3.3, 4.4.1, 4.4.3, 4.4.5, 4.6.1.1, 5.1.2, 5.1.4, 5.1.4.1, 5.1.5, 5.2.4, 5.2.5, 6, 6.2.1, 6.2.3, 6.2.4, 7, 7.1, 7.1.1, 7.1.2, 7.1.2.2, 7.1.3, 7.1.4, 7.1.5, 8." Defendant's Motion Hearing Exhibit 3, at p. 5 of 21.

regarding this issue.

In *Masterson v. Idaho Department of Transportation*, 150 Idaho 126, 244 P.3d 625 (Ct. App. 2010), the Court looked at the Intoxilyzer 5000 and 5000EN manuals and noted the internal parts and technology utilized by the two instruments were different. The Court used the Intoxilyzer 5000 and 5000EN manuals as a part of its analysis of **standards** while noting the inconsistencies between the SOP and the manuals.

In *Hubbard v. Department of Transportation*, 152 Id. 879, 276 P.3d 751 (Ct. App. 2012), the Court quoted *Gibbar v. State of Idaho, Department of Transportation*, 143 Id. 937, 155 P.3d 1176, (Ct. App. 2006):

“In *Gibbar*, we interpreted Idaho Code Section 18-8002A(7)(c) and (d) ‘as permitting (administrative license suspension) petitioners to challenge the results of their BAC tests by proving that the testing equipment was inaccurate or was not functioning properly because the State has adopted procedures that do not ensure accuracy and property functioning.’ *Gibbar*, 143 Id. at 947, 155 P.3d at 1186.”

At p. 755.

The Court went on to note that in *State v. Hartwig*, 112 Id. 370, 732 P.2d 339 (Ct. App. 1987), the reliability and performance of the machine is still subject to challenge. Prior to August 20, 2010, breath testing standards included the BTS Manual and SOP. The BTS manual had different sections that dealt with the programming and functioning of the machine, the training of the operators in the maintenance and the operation of breath testing devices.

The SOP Subsection 6.2 dated August 20, 2010, states:

“**A complete breath alcohol test includes two (2)** valid breath samples taken during the testing sequence and proceeded by air blanks. The

duplicate breath samples should be approximately two minutes apart to allow for the dissipation of potential mouth alcohol contamination.” (emphasis original)

Now examined the SOP’s 6.2 dated November 1, 2010, which states:

“**A complete breath test includes two (2)** valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately two minutes apart, or more, for the ASIII and the CS20 to allow for the dissipation of potential mouth alcohol contamination.” (emphasis original)

There is a difference with a distinction between these two SOPs and the language noted.

The e-mail generated by Eric Moody to Mr Gammette on September 2, 2010, notes that during oral argument, two attorneys argued the two minute separation between two breath test results (SOP 6.2) do not occur with the Intoxilyzer 5000EN. R. at p. 33. Mr. Moody follows up and notes that the Intoxilyzer 5000EN does not have this two minute wait period but the Alcosensor III and the Lifeloc FC 20 do. R. at p. 33. He inquires as to whether this SOP 6.2 only deals with the Alcosensor III and the Lifeloc FC 20 but not the Intoxilyzer 5000.

As of August 20, 2010, there would not have been one Intoxilyzer 5000 or one Intoxilyzer 5000EN in the State of Idaho that complied with the two minute wait period because the machines are not programmed for the two minute wait.

In November of 2010, ISPFSS added the language regarding the Alcosensor III and the Lifeloc FC 20 to Section 6.2 because that is the way these machines are programmed. These machines are programmed for the two minute wait because that is what the international and national standards are for breath testing. The International Organization of Legal Metrology (OIML) is a worldwide, intergovernmental organization whose primary aim is to harmonize

regulation and metrological controls applied by national metrological services or related organizations of its member states such as the United States of America. The United States organization is the National Safety Council on alcohol and other drugs. Both organizations endorse a minimum of two samples taken not less than two or more than ten minutes apart. This standard is cited by Dubowski on page 310 of his article, K.M. Dubowski, "Quality Assurance in Breath Alcohol Analysis." *Journal of Analytical Toxicology*, Volume 18: pp. 306-311 (1994).

The State's brief does not describe scientific standards are or how a scientific standard can be discretionary. Judge Lansing did not seem to think standards could be discretionary in her dissent in *Wheeler v. Idaho Transportation Department*, 148 Id. 378, 223 P.3d, 761 (Ct. App. 2009). The State does not explain exactly how the standard regarding the 15 minute observation period went from a mandatory monitoring period to a discretionary monitoring period, from "must" to "should".

The State also does not cite to *In Re Schroeder*, 147 Id. 476, 210 P.3d 584 (Ct. App. 2009). This is the case that probably started ISP's journey to it's current SOP. The Court in *In Re Schroeder* specifically noted that the SOP and the Intoxilyzer 5000 manual were in conflict with respect to the circumstances in which the monitoring period must be restarted. The Court indicated that Intoxilyzer 5000 manual governed because it was more specific:

"Here, the SOP is more general, for it applies to various breath testing devices approved by the ISP, whereas the Intoxilyzer 5000 manual is written exclusively for that instrument and is therefore less likely to have been written in a way that might sacrifice specific detail for broad applicability."

At p. 480.

One of the e-mail generated by Matthew Gammette to chiefs, sheriffs, prosecutors, breath testing specialists and breath instrument operators specifically noted:

“The Idaho Standard Operating Procedure (SOP) contains the method 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 the 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 have tried to take out any conflicting wording. If we have missed something, please let us know. The BTS and operators should be very familiar with the SOP.” (bold emphasis added) (underlining original)

R. at p. 31.

Because of the *Schroeder* case, ISPFS has dumbed down the standards to something that is not based on “specific detail” and are just recommendations. There is no indication that there was any scientific peer review of these new SOPs. The SOP does not meet the requirements of the legislative history Judge Lansing noted in *State v. Turbyfill*, 2012 WL 4465773, FN 2.

ISPFS has violated the mandate from the legislature. ISPFS has simply made the breath testing system so pliable that there are no standards that ISPFS cannot over come by sending Jeremy Johnston or some breath testing specialist into to testify. Why exactly is Mr. Gammette asking chiefs of police, sheriffs, and prosecutors for input in developing “scientific standards” for breath testing in the State of Idaho? The State in it’s responding brief does not answer why these non-scientists were asked about setting scientific standards in the new SOP.

It does not take a scientist to figure out that discretionary language and “wiggle” words

and vagueness do not amount to scientific standards that should be relied on by the courts. The Court can also note another e-mail sent from Matthew Gammette to chiefs of police, prosecutors and other “stakeholders” in which he notes that on August 27, 2010, ISPFS published a revision 1 of the Idaho Breath Testing SOP. He notes the release of revision 0 gave ISPFS the opportunity to hear from prosecutors, etc., regarding the SOP. He thanks them for their comments and notes that ISPFS is doing some “legal research” regarding sections of the SOP. R. at p. 32. Why exactly are scientific standards being developed based on legal research? The legislature passed I.C. § 18-8004(4) requiring valid scientific methods of breath testing. ISPFS has made rules that weaken the breath testing standards so much that basically if the police get a result, it is admissible. Therefore, ISPFS has taken this delegation of authority to an unconstitutional level.

If the Court upholds ISPFS’s actions with regard to breath testing “standards” in this state, then the Court can only assume that ISPFS will continue to dumb down the standards until there is just a single page SOP that says “What ISPFS say goes. Trust us, we’re the police.”

Mr. Besaw has tried to point out the flawed system used by ISPFS with regard to breath testing in the State of Idaho. The e-mails that are found in Mr. Besaw’s record show how ISPFS develop its “standards” for breath testing. These standards are not compliant with forensic science.

There was a recently published book by the Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council. Strengthening Forensic Science in the United States: A Path Forward (2009). This book was generated as a result of Congress directing the National Academy of Sciences to undertake a study regarding forensic science. Preface at p.

xix. The book discusses: the fundamentals of scientific method as applies to forensic practice; falsifiability and replication and peer review of scientific publications; the assessment of forensic methods and technology; the collection and analysis of forensic data; and accuracy and error rates of forensic analysis. The report for Congress noted the lack of standards. There was no uniformity in certification of forensic practitioners or the accreditation of crime laboratories. At p. 6. The study by the Congressional Committee determined the need for requirements for measurement of error such as would be found in breath testing, noting that there are inherent limitation of the measurement technique. A range of factors are present and can affect the accuracy of laboratory analysis. Such factors may include deficiencies in the reference materials used in the analysis, equipment errors, environmental conditions that lay outside the range which the method was validated, sample mix ups and contamination, transcription errors and more.

The report noted that with regard to breath testing that there has to be a confidence interval for the range of breath testing that would supply a high probability of containing the true alcohol level. At p. 117.

The report also criticizes forensic science laboratories that are administered by law enforcement agencies. The report notes the forensic laboratories should be independent or autonomous from law enforcement agencies. At pp. 183 - 184.

There is a specific notation regarding **standards** for quality control: “Standards provide the foundation against which performance, reliability, and validity can be accessed. Adherence to standards reduces biases, and proves consistency, and enhances the validity and reliability of results. Standards reduce variability resulting from idiosyncratic tendencies of the individual

examiner.” At p. 201.

The report also notes that there are many scientific organizations that have set standards. It cites to the National Institute of Standards and Technology (NIST). No where in this report to Congress is there any indication that standards are set by way of “wobble room”, “vagueness”, and discretionary standards.

In this case, ISPFS violated the mandate of the statutory provision of I.C. § 18-8004(4). The ISPFS did not have the authority to enter into a wholesale change of breath standards from mandatory to discretionary. The procedure used was improper, it was not based on scientific standards. The SOP was based on what ISPFS gleaned would help in DUI cases and ALS administrative hearings. The State’s brief agrees. State’s Brief at p. 6.

Please note that the Idaho Supreme Court has determined an action is capricious if it was done without a rational basis. In *American Law Association of Idaho/Nevada v. State*, 142 Id. 544, 130 P.3d 1082 (2006), the Court found it was arbitrary if the agency action was done in disregard of the facts and circumstances presented or without adequate determining principles. What was the rational basis for making the SOP a discretionary document? There was a disregard of scientific principles, facts and circumstances making the current SOP arbitrary.

The e-mails noted in this case make it clear that ISPFS failed to comply with the mandate of I.C. § 18-8004(4). A substantial right of Mr. Besaw has been prejudiced, his ability to earn a living by way of his CDL driver’s license. Of course, Mr. Besaw’s case has a wider application to all drivers since the breath testing system is being challenged.

CONCLUSION

The breath test results should have been suppressed. The field sobriety test should have been suppressed. This Court is requested to direct the magistrate court on remand to suppress the breath tests and field sobriety tests.

DATED this 5 day of December, 2012.

CLARK and FEENEY, LLP

~~/Charles M. Stroschein~~

By _____
Charles M. Stroschein, a member of
the firm. Attorneys for Appellant.

I hereby certify on the 5
day of December, 2012, a true copy
of the foregoing instrument

was: Mailed
 Faxed
 Hand delivered
 Overnight mail to:

KENNETH K. JORGENSEN
Idaho Deputy Attorney General
Box 83720
Boise, ID 83720

CLARK and FEENEY, LLP

~~/Charles M. Stroschein~~

By _____
Attorneys for Appellant

EXHIBIT A



Supreme Court of Arizona, In Banc.
 The STATE of Arizona, Petitioner,
 v.

The SUPERIOR COURT of the State of Arizona,
 In and For the COUNTY OF COCHISE, and the
 Hon. James L. Riley, Division III, Respondent,
 and
 Frederick Andrew BLAKE, Real Party in Interest.

No. 18343-PR.
 April 7, 1986.

A special action was instituted by the State to review an order of the respondent court dismissing a DWI prosecution on ground that sobriety test known as horizontal gaze nystagmus, or HGN, test was insufficiently reliable to be considered in determining probable cause to arrest. The Court of Appeals, 149 Ariz. 287, 718 P.2d 189, vacated dismissal of prosecution and remanded, and defendant sought review. The Supreme Court, Feldman, J., held that: (1) HGN test was shown to be sufficiently reliable to be used in establishing probable cause for arrest, and (2) HGN test satisfied *Frye* test for admissibility of scientific evidence and was admissible for limited purpose of corroborating chemical sobriety tests.

Opinion affirmed as modified, dismissal vacated and case remanded.

West Headnotes

[1] **Criminal Law 110** ⚡ **388.1**

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
 (Formerly 35k63.5(1))

Evidence helping to give reasonable suspicion justifying limited *Terry* stop is not required to pass *Frye* test for admissibility of scientific evidence. U.S.C.A. Const.Amend. 4.

[2] **Automobiles 48A** ⚡ **349(2.1)**

48A Automobiles
 48AVII Offenses
 48AVII(B) Prosecution
 48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
 48Ak349(2) Grounds
 48Ak349(2.1) k. In general. Most

Cited Cases

(Formerly 48Ak349(2), 48Ak349)

Weaving of automobile in traffic lane was a specific and articulable fact which justified investigative stop of automobile. U.S.C.A. Const.Amend. 4.

[3] **Automobiles 48A** ⚡ **414**

48A Automobiles
 48AIX Evidence of Sobriety Tests
 48Ak414 k. Right to take sample or conduct test; initiating procedure. Most Cited Cases
 (Formerly 48Ak349)

Officer stopping motorist on suspicion that motorist is driving while intoxicated is entitled to conduct standard and reasonable tests to discover whether motorist is in fact intoxicated if nothing in initial stages of stop serves to dispel officer's suspicions. U.S.C.A. Const.Amend. 4.

[4] **Automobiles 48A** ⚡ **349(6)**

48A Automobiles
 48AVII Offenses
 48AVII(B) Prosecution
 48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
 48Ak349(2) Grounds
 48Ak349(6) k. Intoxication. Most Cited Cases

(Formerly 48Ak349)

Stopping automobile and administering standard and reasonable tests to discover whether motorist is intoxicated is more analogous to a limited *Terry* stop than to formal arrest; refusing to follow *People v. Carlson*, 677 P.2d 310 (Colo.) U.S.C.A. Const.Amend. 4.

[5] **Automobiles 48A** ⤵ **349(17)**

48A Automobiles

48AVII Offenses

48AVII(B) Prosecution

48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(14) Conduct of Arrest, Stop, or Inquiry

48Ak349(17) k. Detention, and length and character thereof. Most Cited Cases (Formerly 48Ak349)

Roadside sobriety tests that do not involve long delay or unreasonable intrusion may be justified by officer's reasonable suspicion, based on specific and articulable facts, that driver is intoxicated. U.S.C.A. Const.Amend. 4.

[6] **Automobiles 48A** ⤵ **419**

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak417 Grounds for Test

48Ak419 k. Grounds or cause; necessity for arrest. Most Cited Cases (Formerly 48Ak349)

Motorist's erratic driving, appearance and smell of alcohol were specific and articulable facts giving arresting officer sufficient grounds to administer roadside sobriety tests.

[7] **Arrest 35** ⤵ **63.4(18)**

35 Arrest

35II On Criminal Charges

35k63 Officers and Assistants, Arrest Without Warrant

35k63.4 Probable or Reasonable Cause

35k63.4(18) k. Evidence. Most Cited

Cases

Evidence helping to establish probable cause to arrest is not required to pass *Frye* test for admissibility of scientific evidence.

[8] **Automobiles 48A** ⤵ **422.1**

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak422 Conduct and Proof of Test; Foundation or Predicate

48Ak422.1 k. In general. Most Cited Cases

(Formerly 48Ak422, 48Ak349)

Evidence established that "horizontal gaze nystagmus test" administered by trained officer was sufficiently trustworthy to be used to help establish probable cause to arrest for driving while intoxicated. A.R.S. § 28-692; U.S.C.A. Const.Amend. 4.

[9] **Automobiles 48A** ⤵ **349(6)**

48A Automobiles

48AVII Offenses

48AVII(B) Prosecution

48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit

48Ak349(2) Grounds

48Ak349(6) k. Intoxication. Most Cited Cases

(Formerly 48Ak349)

Defendant's erratic driving, fair performance on traditional sobriety tests, smell of alcohol on his breath, his appearance and his score on the horizontal gaze nystagmus test were sufficient to establish probable cause to arrest defendant for driving under the influence. A.R.S. § 28-692.

[10] **Automobiles 48A** ⤵ **411**

48A Automobiles

48AIX Evidence of Sobriety Tests

48Ak411 k. In general. Most Cited Cases

(Formerly 110k388)

Appropriate disciplines to consider in determ-

ining whether horizontal gaze nystagmus test for intoxication meets general acceptance requirement of *Frye* test for admissibility of scientific evidence include behavioral psychology, highway safety and, to a lesser extent, neurology and criminalistics.

[11] Criminal Law 110 ⚡ 388.1

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

(Formerly 110k388(1), 110k388)

General acceptance requirement of *Frye* test for admissibility of scientific evidence does not necessitate showing of universal acceptance of the reliability of scientific principle or procedure under scrutiny.

[12] Automobiles 48A ⚡ 411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
(Formerly 110k388)

"Horizontal gaze nystagmus test" for intoxication satisfies *Frye* standard for admissibility of scientific evidence.

[13] Automobiles 48A ⚡ 422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases
(Formerly 48Ak422, 110k388)

Testimony describing results of horizontal gaze nystagmus, or HGN, test administered to defendant is admissible on issue of defendant's blood alcohol level if proper foundation as to techniques used and testing officer's ability to use techniques is laid;

evidence of HGN test, however, is not admissible to prove requisite blood alcohol level in absence of a laboratory chemical analysis of blood, breath or urine. A.R.S. § 28-692.

[14] Automobiles 48A ⚡ 355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving while intoxicated. Most Cited Cases

Regardless of quality and abundance of other evidence, driver may not be convicted of driving under the influence without chemical analysis of blood, breath or urine showing proscribed blood alcohol content. A.R.S. § 28-692, subd. B.

[15] Automobiles 48A ⚡ 353(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak353 Presumptions and Burden of Proof
48Ak353(6) k. Driving while intoxicated. Most Cited Cases
(Formerly 48Ak353)

Statutory presumption that driver having blood alcohol of 0.10 percent or more by weight is presumed to be under influence of intoxicating liquor must rest on chemical analysis of defendant's blood, urine, breath or other bodily substance and may not rest on blood alcohol level estimate derived from horizontal gaze nystagmus test. A.R.S. § 28-692, subd. E.

[16] Automobiles 48A ⚡ 411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
(Formerly 110k388)
Results of horizontal gaze nystagmus test are

admissible only to corroborate challenged accuracy of results of chemical tests for blood alcohol level and are not admissible in any criminal case as direct independent evidence to quantify blood alcohol content. A.R.S. § 28-692.

****172 *270** Alan K. Polley, Cochise Co. Atty. by Dennis L. Lusk, Deputy Co. Atty., Bisbee, for petitioner.

Robert F. Arentz, Cochise Co. Public Defender, Bisbee, for real party in interest.

Pima Co. Public Defender by Carla G. Ryan, Asst. Public Defender, Tucson, Thomas E. Collins, Maricopa Co. Atty. by Thomas E. Collins, Maricopa Co. Atty., and Patrick Sullivan, Deputy Co. Atty., Phoenix, Frederick S. Dean, Tucson City Atty. by Frederick S. Dean, Tucson City Atty., and R. William Call and Elisabeth C. Sotelo, Asst. City Attys., Tucson, Robert K. Corbin, Atty. Gen. by Robert K. Corbin, Atty. Gen., and Samuel Ruiz, Asst. Atty. Gen., Phoenix, Steven D. Neely, Pima Co. Atty. by Steven D. Neely, Pima County Atty., and John R. Gustafson and Sandra M. Hansen, Deputy Co. Attys., Tucson, for amicus curiae.

FELDMAN, Justice.

Frederick Andrew Blake, real party in interest, sought review of an opinion of the court of appeals that vacated the trial court's dismissal of his prosecution. *State v. Superior Court*, 149 Ariz. 287, 718 P.2d 189 (Ariz.App.1985). We granted review because this is a case of first impression which presents significant issues of statewide importance to law enforcement. Rule 23, Ariz.R.Civ.App.P 17A A.R.S. We have jurisdiction under Ariz. Const. art. 6, § 5(3) and A.R.S. § 12-120.24. The issues raised are

1. whether the horizontal gaze nystagmus test is sufficiently reliable to establish probable cause for arrest for DUI, and

****173 *271** 2. whether horizontal gaze nystagmus test results are sufficiently reliable to be intro-

duced in evidence at trial.

FACTS

In the early morning hours of March 18, 1985, Frederick Blake was driving a car on State Route 92, south of Sierra Vista. He was stopped by Officer Hohn who had observed the vehicle meandering within its lane, and who therefore suspected Blake of driving under the influence of alcohol. Noting, also, that Blake's appearance and breath indicated intoxication, the officer had Blake perform a battery of six field sobriety tests, including the horizontal gaze nystagmus (HGN) test. Nystagmus is an involuntary jerking of the eyeball. The jerking may be aggravated by central nervous system depressants such as alcohol or barbiturates. See THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1980 (14th ed. 1982). Horizontal gaze nystagmus is the inability of the eyes to maintain visual fixation as they are turned to the side.

In the HGN test the driver is asked to cover one eye and focus the other on an object (usually a pen) held by the officer at the driver's eye level. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeball to detect involuntary jerking. The test is repeated with the other eye. By observing (1) the inability of each eye to track movement smoothly, (2) pronounced nystagmus at maximum deviation and (3) onset of the nystagmus at an angle less than 45 degrees in relation to the center point, the officer can estimate whether the driver's blood alcohol content (BAC) exceeds the legal limit of .10 percent. Officer Hohn had been trained in the use of the HGN test and certified to administer it by the Arizona Law Enforcement Officer Advisory Council (ALEOC) pursuant to A.R.S. § 41-1822(4).

Blake's performance of the first three standard field sobriety tests was "fair" and did not amount to probable cause to arrest Blake for DUI. As a result of the HGN test, however, the officer estimated that Blake had a BAC in excess of .10 percent. Blake's performance on the last two tests strengthened his

conclusion. Having also smelled a strong odor of alcohol on Blake's breath and noticed Blake's slurred speech and bloodshot, watery and dilated eyes, Officer Hohn then arrested Blake on a charge of felony DUI in violation of A.R.S. § 28-692. Hohn then transported Blake to the police station where he administered an intoxilyzer test which showed that Blake had a BAC of .163 percent.

Blake made two motions to the trial court: to dismiss the prosecution for lack of probable cause to arrest and to preclude the admission of testimony of the HGN test and its results at trial. At the evidentiary hearing on these two motions the state presented evidence regarding the principles and use of HGN testing from Dr. Marcelline Burns, a research psychologist who studies the effect of alcohol on behavior, Sgt. Richard Studdard of the Los Angeles Police Department, and Sgt. Jeffrey Raynor and Officer Robert Hohn of the Arizona Department of Public Safety.

Dr. Burns, Director of the Southern California Research Institute (SCRI or Institute) testified that the Institute had received research contracts from the National Highway Traffic Safety Administration (NHTSA) to develop the best possible field sobriety tests. The result of this research was a three-test battery, which included the walk and turn, the one-leg stand, and the HGN. This battery could be administered without special equipment, required no more than five minutes in most cases, and resulted in 83 percent accuracy in determining BAC above and below .10 percent. Dr. Burns testified that all field sobriety tests help the police officers to estimate BAC. The HGN test is based on the known principle that certain toxic substances, including alcohol, cause nystagmus. The SCRI study found HGN to be the best single index of intoxication, because it is an involuntary response. BAC can even be estimated from the angle of onset of the involuntary jerking: 50 degrees**174 *272 minus the angle of the gaze at the onset of eye oscillation equals the BAC.^{FN1} Dr. Burns testified that the HGN test had been accepted as valid by the highway safety field,

including the NHTSA, Finnish researchers, state agencies such as the California Highway Patrol, Arizona Highway Patrol, Washington State Police, and numerous city agencies. Finally, the state offered in evidence an HGN training manual developed by the NHTSA for its nationwide program to train law enforcement officers. Both the manual and training program were based on the Institute's studies.

FN1. Thus, nystagmus at 45° corresponds to a blood alcohol content (BAC) of 0.05%; nystagmus at 40° to a BAC of 0.10%; nystagmus at 35° to a BAC of 0.15%; and nystagmus at 30° > >> to a BAC of 0.20%. See 1 R. ERWIN, DEFENSE OF DRUNK DRIVING CASES (3d ed. 1985) § 8.15A[1]. At BACs above 0.20%, a person's eyes may not be able to follow a moving object. Tharp, *Gaze Nystagmus As A Roadside Sobriety Test 6* (unpublished paper available through SCRI). It should be noted however that when officers administer the test they do not necessarily measure the angle of onset; instead they look for three characteristics of high BAC: inability of smooth pursuit, distinct jerkiness at maximum deviation and onset of jerkiness prior to 45° > >>. We do not address the admissibility of quantified BAC estimates based on angle of onset of nystagmus.

Sgt. Studdard is currently a supervisor in charge of DUI enforcement for the City of Los Angeles and a consultant to NHTSA on field sobriety testing. Based on his field work administering the HGN test and his participation in double blind studies at the Institute, he testified that the accuracy rate of the HGN test in estimating whether the level of BAC exceeds .10 percent is between 80 and 90 percent. According to Studdard the margin of inaccuracy is caused by the fact that certain drugs, such as barbiturates, cause the same effects as alcohol. We take notice, however, that nystagmus may also

indicate a number of neurological conditions, and the presence of any of these would also affect the accuracy of the HGN-based estimate of blood alcohol content. See *infra* at 177. Both Sgt. Studdard and Sgt. Raynor, who currently administers the HGN training program for the State of Arizona, testified that the HGN test is especially useful in detecting violations where a driver with BAC over .10 percent is able to pull himself together sufficiently to pass the traditional field sobriety tests and thus avoid arrest and subsequent chemical testing.

Sgt. Raynor testified that the traditional field sobriety tests are not sensitive enough to detect dangerously impaired drivers with BAC between .10 percent and .14 percent and that the police officers thus must permit them to drive on.^{FN2} Sgt. Raynor also testified as to the rigor and requirements of the Arizona training and certification program.

FN2. It is claimed that three times as many drivers on the road have BACs in the .10% to .14% range than in the .15% to .19% range, but those arrested are in the latter group, 2 to 1. Anderson, Schweitz & Snyder, *Field Evaluation of a Behavioral Test Battery for DWI*, U.S. Department of Transportation Rep. No. DOT HS-806-475 (1983) (included in state's evidence).

At the close of the evidentiary hearing, the trial court concluded that HGN represented a new scientific principle and was therefore subject to the *Frye* standard of admissibility. *Frye v. United States*, 293 Fed. 1013 (D.C.Cir.1923). The court ruled the HGN test did not satisfy *Frye*, was therefore unreliable, and could not form the basis of probable cause. The court granted Blake's motion to dismiss.

The state filed a petition for special action^{FN3} in the court of appeals, which accepted jurisdiction and granted relief. The court of appeals noted that

the *Frye* standard applies only to the admissibility of evidence at trial, not to probable cause for arrest. It stated that probable cause requires only reasonably trustworthy information sufficient to lead a reasonable person to believe that an offense has been committed and that the person to be arrested committed the offense. 149 Ariz. at 271, 718 P.2d at 173. The court of appeals found HGN sufficiently reliable to **175 *273 provide probable cause. *Id.* 149 Ariz. at 273, 718 P.2d at 175. The court of appeals held that the HGN test satisfied *Frye* and would be admissible, except that there was insufficient foundation as to the arresting officer's proficiency in administering the test. *Id.* The court vacated the trial court's order and remanded for further proceedings.

FN3. In Arizona, relief formerly obtained by writs of mandamus or prohibition is now obtained by "Special Action". See Rule 1. Arizona Rules of Procedure for Special Actions, 17A A.R.S.

DISCUSSION

1. Was Blake's Arrest Legal?

Blake contends that the trial court correctly dismissed the prosecution after ruling that the HGN test did not meet the *Frye* standard. Because probable cause was established by "an unreliable test, the HGN, which has not had its trustworthiness corroborated," the arrest was illegal, and later discovered evidence, such as the intoxilyzer results, cannot be used in evidence.

The Pima County Public Defender, appearing amicus, argues that any roadside sobriety test is a full search and must, therefore, be founded on probable cause. Because the arresting officer testified that he did not have probable cause to arrest even after the performance of the traditional field tests, amicus argues that he did not have the requisite probable cause to administer the HGN test. For this contention amicus relies on *People v. Carlson*, 677 P.2d 310, 317 (Colo.1984), in which the Colorado Supreme Court held that "roadside sobriety testing constitutes a full 'search' in the constitutional sense

of that term and therefore must be supported by probable cause.”

[1] For the reasons set forth below we agree with both of the state's arguments. First, administration of roadside, performance-based sobriety tests does not require probable cause. Second, neither evidence that forms the basis for probable cause nor that required to raise a reasonable suspicion need be tested under the *Frye* rule.

Did the Stop Followed by Field Sobriety Tests Violate the Fourth Amendment?

[2] The fourth amendment to the United States Constitution guarantees the right to be secure against unreasonable search and seizure. This guarantee requires arrests to be based on probable cause and permits limited investigatory stops based only on an articulable reasonable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such stops are permitted although they constitute seizures under the fourth amendment. See *State v. Graciano*, 134 Ariz. 35, 37, 653 P.2d 683, 685 (1982). Officer Hohn testified that he stopped Blake because Blake's car had been weaving in its lane, and he suspected the driver to be under the influence of alcohol. We find that Blake's weaving was a specific and articulable fact which justified an investigative stop. The next question is whether this reasonable suspicion also justified compelling Blake to perform roadside sobriety tests.

An investigatory stop may include a safety frisk for weapons as well as questions to dispel the officer's reasonable suspicions. *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880. While all this may be done without the probable cause required for arrest, an arrest may occur before the moment the police officer either accuses the suspect of a specific offense or formally takes him into custody. It may be deemed to have occurred substantially before that time, perhaps during questioning. See *State v. Winegar* 147 Ariz. 440, 711 P.2d 579, 586 (1985).

In this case we confront the difficult area

between the physical stop of defendant and the articulation of the charge. We must draw the line, however fine, between investigatory questioning that is permissible *before* the arrest and acts permissible only *after* the charges have been made. See *People v. Milham*, 159 Cal.App.3d 487, 500, 205 Cal.Rptr. 688, 697 (1984) (at scene of fatal car accident, field sobriety tests were investigatory). In a sense this is a ****176 *274** question of first impression. Our cases in the past have presumed that roadside sobriety tests are incident to the stop, and that chemical tests, such as the intoxilyzer, are incident to the arrest. See *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983).

Any examination of a person with a view to discovering evidence of guilt to be used in a prosecution of a criminal action is a search. The fourth amendment does not prohibit all warrantless searches, only those that are unreasonable. *State v. Hutton*, 110 Ariz. 339, 341, 519 P.2d 38, 40 (1974); *State v. Grijalva*, 111 Ariz. 476, 478, 533 P.2d 533, 535, cert. denied, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975). Whether the fourth amendment permits a warrantless search supported only by reasonable suspicion depends on the nature of both the governmental interest and the intrusion into a citizen's personal security. *State v. Grijalva, supra*. Thus, the necessity of the search is balanced against the invasion of the privacy of the citizen that the search entails. *Id.*

We have held that the state has a compelling interest in removing drunk drivers from the highways. *Fuenning v. Superior Court*, 139 Ariz. at 595, 680 P.2d at 126. The legislature has recognized the threat of drunk drivers and enacted A.R.S. § 28-692(B), which makes it *per se* illegal to drive with a BAC of .10 percent or more, a level at which virtually everyone's driving ability is impaired. *Id.* Against this compelling state interest we are to weigh the substantiality of the intrusion or inconvenience of roadside sobriety tests that measure physical performance of the suspected drunk driver.

In *Terry* the Supreme Court stated:

718 P.2d 171
 149 Ariz. 269, 718 P.2d 171, 60 A.L.R.4th 1103
 (Cite as: 149 Ariz. 269, 718 P.2d 171)

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

392 U.S. at 30, 88 S.Ct. at 1884.

[3][4] We think *Terry* is on point: the threat to public safety posed by a person driving under the influence of alcohol is as great as the threat posed by a person illegally concealing a gun. If nothing in the initial stages of the stop serves to dispel the highway patrol officer's reasonable suspicion, fear for the safety of others on the highway entitles him to conduct a "carefully limited search" by observing the driver's conduct and performance of standard, reasonable tests to discover whether the driver is drunk. The battery of roadside sobriety tests is such a limited search. The duration and atmosphere of the usual traffic stop make it more analogous to a so-called *Terry* stop than to a formal arrest. See *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984). We refuse to adopt the rule of *People v. Carlson*, *supra*.

[5][6] We hold, therefore, that roadside sobriety tests that do not involve long delay or unreasonable intrusion, although searches under the fourth amendment, may be justified by an officer's reasonable suspicion (based on specific, articulable facts) that the driver is intoxicated. We further find that Blake's erratic driving, appearance and smell of alcohol were specific, articulable facts which gave the officer sufficient grounds to administer roadside sobriety tests, including HGN.

Is the HGN Test Sufficiently Reliable to Establish Probable Cause for Arrest?

Observing Blake's performance of the tests, the officer put him under arrest and took him to the station for chemical testing **177 *275 for BAC. Blake argues the arrest was invalid for lack of probable cause and that the information obtained by later chemical testing is therefore inadmissible.

[7] Probable cause may not rest on mere suspicion but neither must it rest on evidence sufficient to convict.

In dealing with probable cause ... we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable [people], not legal technicians, act.

Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949). Information sufficient to raise a suspicion of criminal behavior by definition need not pass tests of admissibility under our rules of evidence. It has long been the rule that an arresting officer has probable cause if he has reasonably trustworthy information sufficient to lead a responsible person to believe an offense has been committed and that the person to be arrested committed it. See *id.* at 175-76, 69 S.Ct. at 1310-11, *State v. Nelson*, 129 Ariz. 582, 586, 633 P.2d 391, 395 (1981). We now must determine whether the HGN test provides reasonably trustworthy information, sufficient to lead a reasonable person to believe a driver is intoxicated.

Nystagmus is a well known physiological phenomenon, defined and described in such tomes as WEBSTER'S NEW COLLEGIATE DICTIONARY (1980), DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (25th ed. 1974), 7 ENCYCLOPAEDIA BRITANNICA, MICROPAEDIA (15th ed. 1974) and STEDMAN'S MEDICAL DICTIONARY (5th Lawyer's ed. 1982). That it can be caused by ingestion of alcohol is also accepted in medical literature.

Jerk nystagmus ... is characterized by a slow drift, usually away from the direction of gaze, followed by a quick jerk of recovery in the direction of gaze. A motor disorder, *it may be congenital or due to a variety of conditions affecting the brain, including ingestion of drugs such as alcohol and barbiturates, palsy of lateral or vertical gaze, disorders of the vestibular apparatus and brainstem and cerebellar dysfunction.*

THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1980 (14th ed. 1982) (emphasis added). Even before the Institute's federal grant, the relationship between BAC and nystagmus was recognized by some highway safety agencies as a tool to detect those illegally driving under the influence of alcohol. Burns & Moskowitz, *Psychophysical Tests for DWI Arrest*, U.S. Department of Transportation Rep. No. DOT-HS-802-424 (1977), at 80. In its federally funded study, the Institute discovered that of the six most sensitive field sobriety tests being used by the police around the country, the HGN was the most reliable and precise indicator of the proscribed level of BAC. *Id.* at 39.

Judicial assessment of whether the arresting officer had probable cause need not rest, however, on whether the information relied on is universally known. The arresting officer is entitled to draw specific reasonable inferences from the facts in light of his own experience, as well as the transmitted experience of other police officers. See *Terry v. Ohio*, *supra*; *State v. Ochoa*, 112 Ariz. 582, 585-86, 544 P.2d 1097, 1100-01 (1976). In this case Officer Hohn's experience included training in DUI detection and field administrations of the HGN test. His administration of the test did not cause him to arrest everyone he tested. He testified that although he had logged over 150 field administrations of the test battery, he had made only six DUI arrests. On the evening of Blake's arrest Officer Hohn had made between eight and twelve DUI stops, had given the battery to all, but found probable cause to arrest only Blake.

Testimony also showed that Officer Hohn's

personal experience is the result of the transmitted experience of countless other trained highway safety officers. Dr. Burns testified that in a survey of the first 800 officers trained, over 80 percent rated HGN as the most sensitive roadside sobriety test and found the test battery to have increased their accuracy in recognizing the impaired driver. Sgt. Studdard, who estimated**178 *276 he had administered the HGN test on the street to several thousand individuals, had seen only one or two people in whom the nystagmus did not correlate to the BAC. He testified that he had trained numerous agencies in Arizona, Michigan, New York, Arkansas, Louisiana, North Carolina and Maryland in the use of HGN. He found that the officers' accuracy rate in determining BAC was between 80 and 90 percent.

[8][9] We conclude that the testimony presented at the evidentiary hearing regarding the reliability of the HGN test establishes that in the hands of a trained officer the test is reasonably trustworthy and may be used to help establish probable cause to arrest. We further find that Blake's driving, his "fair performance" on the traditional sobriety tests, the smell of alcohol on his breath, his appearance and his score on the HGN test could lead a reasonable person to believe Blake was driving with a BAC in excess of .10 percent in violation of A.R.S. § 28-692. Taken together there was more than sufficient evidence to establish probable cause. *People v. Milham*, 159 Cal.App.3d 487, 495, 205 Cal.Rptr. 688, 693 (1984); *People v. Trevisanut*, 160 Cal.App.3d Supp. 12, 17, 207 Cal.Rptr 921, 924 (Cal.Super 1984). Because the trial court ruled that admissibility under *Frye* was a prerequisite for evidence used to establish probable cause, we vacate the trial court's order of dismissal of the case and remand the matter for trial.

2. Are HGN Test Results Admissible Evidence?

Our holding that when administered by properly trained and certified police officers the HGN test is sufficiently reliable to be used to establish probable cause does not mean the test results may

be admitted in evidence on the question of guilt or innocence. In *Fuening v. Superior Court*, *supra*, we held that if a defendant challenges the intoxilyzer test results, the conduct that provided probable cause becomes relevant to the question of the accuracy of the chemical analysis which allegedly showed that the driver's BAC exceeded .10 percent, and thus may be admissible. We stated such admissible testimony might include "the manner in which he was driving [and] the manner in which he performed the field sobriety tests...." 139 Ariz. at 599. 680 P.2d at 130.

Unless the results of the HGN test are also admissible under our rules of evidence, when a driver challenges the chemical test results, the state may find itself in the position of being able to support the arrest with the results of the traditional field sobriety tests, but not the more probative HGN test results. This result is not unique.

Much evidence of real and substantial probative value goes out on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury.

Brinegar v. United States, 338 U.S. at 173, 69 S.Ct. at 1309.

The "Frye Rule"

The HGN test is a different type of test from balancing on one leg or walking a straight line because it rests almost entirely upon an assertion of scientific legitimacy rather than a basis of common knowledge. Different rules therefore apply to determine its admissibility. See *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 195, 644 P.2d 1266, 1281 (1982); cf. *State v. Roscoe*, 145 Ariz. 212, 700 P.2d 1312 (1984). It is to this question of HGN's admissibility that we now address ourselves.

Rules of evidence are aimed at preventing jury confusion, prejudice and undue consumption of time and trial resources. *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); Rule 403, Ariz.R.Evid., 17A A.R.S. Scientific evidence is a source of particular

judicial caution. Because "science" is often accepted in our society as synonymous with truth, there is a substantial risk that the jury may give undue weight to such evidence. M. UDALL & J. LIVERMORE, LAW OF EVIDENCE § 102 (2d ed. 1982). If a technique has an "enormous effect in resolving completely a matter in controversy," **179 *277 it must be demonstrably reliable before it is admissible. *Id.*

Before expert opinion evidence based on a novel scientific principle can be admitted, the rule of *Frye v. United States*, *supra*, requires that the theory relied on be in conformity with a generally accepted explanatory theory. See *Collins*, 132 Ariz. at 195, 644 P.2d at 1281. The purpose of this requirement is to assure the reliability of the testimony. Because HGN is a new technique based upon scientific principles, its reliability is to be measured against the *Frye* standard. *Id.* *Frye* screens out unreliable scientific evidence because under its standard

it is not enough that a qualified expert, or even several experts, testify that a particular scientific technique is valid; *Frye* imposes a special burden—the technique must be generally accepted by the relevant scientific community.

Symposium on Science and Rules of Evidence, 99 F.R.D. 187, 189 (1984) (emphasis in original). Recognizing that judges and juries are not always in a position to assess the validity of the claims made by an expert witness before making findings of fact, *Frye* guarantees that reliability will be assessed by those in the best position to do so: members of the relevant scientific field who can dispassionately study and test the new theory.

If the scientific principle has gained general acceptance in the particular field in which it belongs, evidence resulting from its application is admissible, "subject to a foundational showing that the expert was qualified, the technique was properly used, and the results were accurately recorded." *Collins*, 132 Ariz. at 196. 644 P.2d at 1282. To determine

whether the HGN test satisfies the test of general acceptance we must (1) identify the appropriate scientific community whose acceptance of the nystagmus principles and validity of the HGN test is required, and (2) determine whether there is general acceptance of both the scientific principle and the technique applying the theory. See *Symposium*, 99 F.R.D. at 193; M. UDALL & J. LIVERMORE, *supra*. The admissibility of HGN test results under the *Frye* standard is an issue of first impression. Our search has not brought to light any reported American case law ruling on the issue.^{FN4}

FN4. We have discovered two cases that discuss the *admissibility* of nystagmus on the question of BAC. *People v. Loomis*, 156 Cal.App.3d Supp. 1, 203 Cal.Rptr 767 (Cal.Super.1984); *State v. Nagel*, Ohio Ct.App. No. 2100, filed Feb. 5, 1986. In *Loomis* the superior court held the municipal court had erred in allowing the officer to testify as to his opinion based on training, experience and the number of times he had given the test. The court in dictum then stated that it *would also have been error* to admit the officer's testimony as an expert opinion because the state had failed to demonstrate that the nystagmus test was reliable by showing it had gained general acceptance in the particular field in which it belongs, as required by *Frye*. In *Nagel*, the court of appeals affirmed the trial court's admission of testimony on HGN. Rejecting appellant's argument that it was inadmissible because the testifying officer was not an expert and there was no scientific basis for the HGN test, the court held nystagmus is objectively observable and requires no expert interpretation.

The state argues that the relevant scientific community is that of law enforcement and highway safety agencies and behavioral psychologists. Public defender amicus contends that we should disregard these sources and argues that the HGN phe-

nomenon requires assessment by scientists in the fields of neurology, ophthalmology, pharmacology and criminalistics. It claims that narrowing the field deprives the general scientific community of the time needed to evaluate the procedure before it is examined by the legal community. We agree that validation studies must be performed by scientists other than those who have professional and personal interest in the outcome of the evaluation. *Collins*, 132 Ariz. at 199, 644 P.2d at 1285.

We believe, however, that the relevant scientific community that must be shown to have accepted a new scientific procedure is often self-selecting. Scientists who have no interest in a new scientific principle are unlikely to evaluate it, even if a court determines they are part of a relevant scientific community. The HGN test measures ****180 *278** a behavioral phenomenon: specifically the effects of alcohol on one aspect of human behavior, the movement of the eye. Thus, it stands to reason that experimental psychologists in the area of behavioral psychology would be interested in verifying the validity of the HGN test and should be included in the relevant scientific community. Similarly, the problem of alcohol's effect on driving ability is a major concern to scientists in the area of highway safety and they, too, should be included.

We disagree with the defendant's implication that those in the field of highway safety or law enforcement are necessarily biased. We believe the National Highway Traffic Safety Administration's interest in funding research to identify the drunk driver is not subject to question in this instance. The NHTSA was addressing a complex problem: every state has either a presumptive or "per se illegal" law that makes reference to BAC (typically .10 percent). Officers whose task it is to remove violators of these laws from the roads may, upon initial suspicion, administer behavioral tests, but until recently the relationship of the tests to specific BAC levels was not well documented. The purpose of NHTSA's program was to develop a test battery to assist officers in discriminating between those

drivers who are in violation of these laws and those who are not. Furthermore, it is not to the advantage of law enforcement in the highway safety field to have an unreliable field sobriety test. It is inefficient to arrest and transport a driver for chemical testing, only to find that he is not in violation of the law. We believe that the work of highway safety professionals and behavioral psychologists who study effects of alcohol on behavior is directly affected by the claims and application of the HGN test, so that both these groups must be included in the relevant scientific community.

[10] We are not forced to come to the same conclusion with respect to neurologists, pharmacologists, ophthalmologists and criminalists. Although it is true that the form of nystagmus that concerns us is the result of a neurological malfunction, we agree with Dr. Burns who testified that "the field of neurology does not concern itself specifically with alcohol effects on performance and even more specifically with field sobriety." She did state, however, that a "very small segment of the neurology community" concerns itself with the effects and has produced some literature. No argument has been made why the fields of pharmacology, ophthalmology and criminalistics (beyond those concerned with detecting violators of DUI laws) should be included in the relevant scientific community and no convincing reason occurs to us. We conclude, therefore, that to determine whether the HGN test satisfies the *Frye* requirement of general acceptance the appropriate disciplines include behavioral psychology, highway safety and, to a lesser extent, neurology and criminalistics.

We now turn to the question of whether there has been general acceptance of both the HGN test and its underlying principle. The burden of proving general acceptance is on the proponent of the new technique; it may be proved by expert testimony and scientific and legal literature. We have already summarized the expert testimony presented by the state, *supra* at 173. In addition, the state submitted both scientific publications and reports of research

done for the United States Department of Transportation. These are listed in Appendix A.

At the evidentiary hearing Blake presented no evidence to refute either the substance of the expert opinion testimony or the contention that it had general acceptance. Blake and public defender amicus instead argued that there is a paucity of literature and that the appropriate scientific disciplines have not yet had the opportunity to duplicate and evaluate Dr. Burns' work.

Our own research is listed in Appendix B. The literature demonstrates to our satisfaction that those professionals who have investigated the subject do not dispute the strong correlation between BAC and the ****181 *279** different types of nystagmus. *Cf. State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962) (concluding that lie detector tests have not been accorded such recognition). Furthermore, those who have investigated the relation between BAC and nystagmus as the eye follows a moving object have uniformly found that the higher the BAC, the earlier the onset of involuntary jerking of the eyeball. Although the publications are not voluminous, they have been before the relevant communities a considerable period of time for any opposing views to have surfaced. *See* Appendix B.

[11] Based on all the evidence we conclude there has been sufficient scrutiny of the HGN test to permit a conclusion as to reliability. The "general acceptance" requirement does not necessitate a showing of universal acceptance of the reliability of the scientific principle and procedure. *United States v. Brown*, 557 F.2d 541, 556 (6th Cir 1977) (unanimity of scientific opinion is not required); J. RICHARDSON, MODERN SCIENTIFIC EVIDENCE 164 (2d ed.1974) ("substantial majority" is sufficient to show general acceptance). Neither must the principle and procedure be absolutely accurate or certain. *State v. Valdez*, 91 Ariz. at 280, 371 P.2d at 898.

[12][13] We believe that the HGN test satisfies the *Frye* standard. The evidence demonstrates that

the following propositions have gained general acceptance in the relevant scientific community: (1) HGN occurs in conjunction with alcohol consumption; (2) its onset and distinctness are correlated to BAC; (3) BAC in excess of .10 percent can be estimated with reasonable accuracy from the combination of the eyes' tracking ability, the angle of onset of nystagmus and the degree of nystagmus at maximum deviation; and (4) officers can be trained to observe these phenomena sufficiently to estimate accurately whether BAC is above or below .10 percent. We therefore hold that, with proper foundation as to the techniques used and the officer's ability to use it (*see Collins*, 132 Ariz. at 196, 644 P.2d at 1282), testimony of defendant's nystagmus is admissible on the issue of a defendant's blood alcohol level as would be other field sobriety test results on the question of the accuracy of the chemical analysis.

Our holding *does not mean* that evidence of nystagmus is admissible to prove BAC of .10 percent or more in the absence of a laboratory chemical analysis of blood, breath or urine. Such a use of HGN test results would raise a number of due process problems different from those associated with the chemical testing of bodily fluids. The arresting officer's "reading" of the HGN test cannot be verified or duplicated by an independent party. *See Scales v. City Court of Mesa*, 122 Ariz. 231, 594 P.2d 97 (1979). The test's recognized margin of error provides problems as to criminal convictions which require proof of guilt beyond a reasonable doubt. The circumstances under which the test is administered at roadside may affect the reliability of the test results. Nystagmus may be caused by conditions other than alcohol intoxication. And finally, the far more accurate chemical testing devices are readily available.

Our limitation on the use of HGN test results is also consistent with Arizona's DUI statute. When referring to the tests to be administered to determine BAC, the statute speaks in terms of *taking* blood, urine and breath samples from the defendant

for *analysis*. *See* A.R.S. § 28-692(H). Clearly, BAC under § 12-692 is to be determined deductively from analysis of bodily fluids, not inductively from observation of involuntary bodily movements.

[14][15][16] We also hold, therefore, that regardless of the quality and abundance of other evidence, a person may not be convicted of a violation of A.R.S. § 28-692(B) without chemical analysis of blood, breath or urine showing a proscribed blood alcohol content pursuant to title 28, article 5 of the Arizona revised statutes. Similarly, the presumption under A.R.S. § 28- *280 692(E)(3) that a defendant was under the influence of intoxicating liquor in violation of subsection (A) must also rest on chemical "analysis of the defendant's blood, urine, breath or other bodily substance," A.R.S. § 28- **182 692(E), as the statute clearly states, and not on a BAC estimate based on nystagmus. Thus, evidence of HGN test results is admissible, as is other evidence in subsection (B) cases, only to corroborate the challenged accuracy of the chemical test results. *See Fuenning v. Superior Court*, 139 Ariz. at 599, 680 P.2d at 130. It is admissible in subsection (A) cases for the same purpose and, also, as evidence that the driver is "under the influence." It is *not admissible* in any criminal case as direct independent evidence to *quantify* blood alcohol content.

CONCLUSION

We find that the horizontal gaze nystagmus test properly administered by a trained police officer is sufficiently reliable to be a factor in establishing probable cause to arrest a driver for violating A.R.S. § 28-692(B). We further find that the horizontal gaze nystagmus test satisfies the *Frye* test for reliability and may be admitted in evidence to corroborate or attack, but not to quantify, the chemical analysis of the accused's blood alcohol content. It may not be used to establish the accused's level of blood alcohol in the absence of a chemical analysis showing the proscribed level in the accused's blood, breath or urine. In subsection (A) prosecutions it is admissible, as is other evidence of defendant's behavior, to prove that he was "under the influence."

We approve the court of appeals' opinion, as modified, vacate the trial court's dismissal of the Blake prosecution for violation of A.R.S. § 28-692(B), and remand for proceedings not inconsistent with this opinion.

HOLOHAN, C.J., GORDON, V.C.J., and HAYS and CAMERON, JJ., concur.

APPENDIX A

1. Anderson, Schweitz & Snyder, *Field Evaluation of a Behavioral Test Battery for DWI*, U.S. Dept. of Transportation Rep. No. DOT-HS-806-475 (1983) (field evaluation of the field sobriety test battery (HGN, one leg stand, and walk and turn) conducted by police officers from four jurisdictions indicated that battery was approximately 80 percent effective in determining BAC above and below .10 percent).

2. Burns & Moskowitz, *Psychophysical Tests for DWI Arrest*, U.S. Dept. of Transportation Rep. No. DOT-HS-802-424 (1977) (recommended the three-test battery developed by SCRI (one leg stand, walk and turn, and HGN) to aid officers in discriminating BAC level).

3. Compton, *Use of the Gaze Nystagmus Test to Screen Drivers at DWI Sobriety Checkpoints*, U.S. Dept. of Transportation (1984) (field evaluation of HGN test administered to drivers through car window in approximately 40 seconds: "the nystagmus test scores identified 95% of the impaired drivers" at 2; 15 percent false positive for sober drivers, *id.*).

4. 1 R. ERWIN, *DEFENSE OF DRUNK DRIVING CASES* (3d ed. 1985) ("A strong correlation exists between the BAC and the angle of onset of [gaze] nystagmus." *Id.* at § 8.15A[3]).

5. Rashbass, *The Relationship Between Saccadic and Smooth Tracking Eye Movements*, 159 J. PHYSIOL. 326 (1961) (barbiturate drugs interfere with smooth tracking eye movement).

6. Tharp, Burns & Moskowitz, *Development*

and Field Test of Psychophysical Tests for DWI Arrests, U.S. Dept. of Transportation Rep. No. DOT-HS-805-864 (1981) (standardized procedures for administering and scoring the SCRI three-test battery; participating officers able to classify 81 percent of volunteers above or below .10 percent).

7. Wilkinson, Kime & Purnell, *Alcohol and Human Eye Movement*, 97 BRAIN 785 (1974) (oral dose of ethyl alcohol impaired smooth pursuit eye movement of all human subjects).

*281 APPENDIX B

1. Aschan, *Different Types of Alcohol Nystagmus*, 140 ACTA OTOLARYNGOL SUPP. 69 (Sweden 1958) ("From a medico-legal viewpoint, simultaneous recording of AGN [Alcohol Gaze Nystagmus] and PAN [positional alcoholic nystagmus] should be of value, since it will show in which phase the patient's blood alcohol curve is...").

**183 2. Aschan & Bergstedt, *Positional Alcoholic Nystagmus in Man Following Repeated Alcohol Doses*, 80 ACTA OTOLARYNGOL SUPP. 330 (Sweden 1975) (abstract available on DIALOG, file 173:Embase 1975-79) (degree of intoxication influences both PAN I and PAN II).

3. Aschan, Bergstedt, Goldberg & Laurell, *Positional Nystagmus in Man During and After Alcohol Intoxication*, 17 Q.J. OF STUD. ON ALCOHOL, Sept. 1956, at 381. Study distinguishing two types of alcohol-induced nystagmus, PAN (positional alcoholic nystagmus) I and PAN II, found intensity of PAN I, with onset about one-half hour after alcohol ingestion, was proportional to amount of alcohol taken.

4. Baloh, Sharma, Moskowitz & Griffith, *Effect of Alcohol and Marijuana on Eye Movements*, 50 AVIAT. SPACE ENVIRON. MED., Jan. 1979, at 18 (abstract available on DIALOG, file 153:Medline 1979-79) (smooth pursuit eye movement effects of alcohol overshadowed those of marijuana).

5. Barnes, *The Effects of Ethyl Alcohol on Visual Pursuit and Suppression of the Vestibulo-Ocular Reflex*, 406 ACTA OTOLARYNGOL SUPP. 161 (Sweden 1984) (ethyl alcohol disrupted visual pursuit eye movement by increasing number of nystagmic "catch-up saccades").
6. Church & Williams, *Dose- and Time-Dependent Effects of Ethanol*, 54 ELECTROEN-CEPHALOGRAPHY & CLIN. NEUROPHYSIOL., Aug. 1982, at 161 (abstract available on DIALOG, file 11:Psychinfo 1967-85 or file 72:Embase 1982-85) (positional alcohol nystagmus increased with dose levels of ethanol).
7. Fregly, Bergstedt & Graybiel, *Relationships Between Blood Alcohol, Positional Alcohol Nystagmus and Postural Equilibrium*, 28 Q.J. OF STUD. ON ALCOHOL, March 1967, at 11, 17 (declines from baseline performance levels correlated with peak PAN I responses and peak blood alcohol levels).
8. Goldberg, *Effects and After-Effects of Alcohol, Tranquilizers and Fatigue on Ocular Phenomena*, ALCOHOL AND ROAD TRAFFIC 123 (1963) (of different types of nystagmus, alcohol gaze nystagmus is the most easily observed).
9. Helzer, *Detecting DUIs Through the Use of Nystagmus*, LAW AND ORDER, Oct. 1984, at 93 (nystagmus is "a powerful tool for officers to use at roadside to determine BAC of stopped drivers ... [O]fficers can learn to estimate BACs to within an average of 0.02 percent of chemical test readings." *Id.* at 94).
10. Lehti, *The Effect of Blood Alcohol Concentration on the Onset of Gaze Nystagmus*, 136 BLUTALKOHOL 414 (West Germany 1976) (abstract available on DIALOG, file 173:Embase 1975-79) (noted a statistically highly significant correlation between BAC and the angle of onset of nystagmus with respect to the midpoint of the field of vision).
11. Mizoi, Hishida & Maeba, *Diagnosis of Alcohol Intoxication by the Optokinetic Test*, 30 Q.J. OF STUD. ON ALCOHOL 1 (March-June 1969) (optokinetic nystagmus, ocular adaptation to movement of object before eyes, can also be used to detect central nervous system impairment caused by alcohol. Optokinetic nystagmus is inhibited at BAC of only .051 percent and can be detected by optokinetic nystagmus test. Before dosage subjects could follow a speed of 90 degrees per second; after, less than 70 degrees per second).
12. Murphree, Price & Greenberg, *Effect of Congeners in Alcoholic Beverages on the Incidence of Nystagmus*, 27 Q.J. OF STUD. ON ALCOHOL, June 1966, at 201 (positional nystagmus is a consistent, sensitive indicator of alcohol intoxication).
13. Nathan, Zare, Ferneau & Lowenstein, *Effects of Congener Differences in Alcoholic Beverages on the Behavior of Alcoholics*, 5 Q.J. OF STUD. ON ALCOHOL SUPP., May 1970, at 87 (abstract available on DIALOG, file 11:Psychinfo 1967-85) (incidence of nystagmus and other nystagmoid movements increased with duration of drinking).
14. Norris, *The Correlation of Angle of Onset of Nystagmus With Blood Alcohol **184 *282 Level: Report of a Field Trial*, CALIF. ASS'N CRIMINALISTICS NEWSLETTER, June 1985, at 21 (The relationship between the ingestion of alcohol and the onset of various kinds of nystagmus "appears to be well documented." *Id.* "While nystagmus appears to be useful as a roadside sobriety test, at this time, its use to predict a person's blood alcohol level does not appear to be warranted." *Id.* at 22).
15. Nuotto, Palva & Seppala, *Naloxone Ethanol Interaction in Experimental and Clinical Situations*, 54 ACTA PHARMACOL. TOXICOL. 278 (1984) (abstract available on DIALOG, file 5::Biosis Previews 1981-86) (ethanol alone does not independently induce nystagmus).

16. Oosterveld, Meineri & Paolucci, *Quantitative Effect of Linear Acceleration on Positional Alcohol Nystagmus*, 45 AEROSPACE MEDICINE, July 1974, at 695 (G-loading brings about PAN even when subject has not ingested alcohol; however when subjects ingested alcohol, no PAN was found when subjects were in supine position, even with G-force at 3).

17. Penttila, Lehti & Lonqvist, *Nystagmus and Disturbances in Psychomotor Functions Induced by Psychotropic Drug Therapy*, 1974 PSYCHIAT. FENN. 315 (abstract available on DIALOG, file 173:Embase 1975-79) (psychotropic drugs induce nystagmus).

18. Savolainen, Riihimaki, Vaheri & Linnoila, *Effects of Xylene and Alcohol on Vestibular and Visual Functions in Man*, SCAND. J. WORK ENVIRON. HEALTH 94 (Sweden 1980) (abstract available on DIALOG, file 172:Embase 1980-81 on file 5:Biosis Previews 1981-86) (the effects of alcohol on vestibular functions (e.g. positional nystagmus) were dose-dependent).

19. Seelmeyer, *Nystagmus, A Valid DUI Test*, LAW AND ORDER, July 1985, at 29 (horizontal gaze nystagmus test is used in "at least one law enforcement agency in each of the 50 states" and is "a legitimate method of establishing probable cause." *Id.*).

20. Tharp, Moskowitz & Burns, *Circadian Effects on Alcohol Gaze Nystagmus* (paper presented at 20th annual meeting of Society for Psychophysiological Research), abstract in 18 PSYCHOPHYSIOLOGY, March 1981 (highly significant correlation between angle of onset of AGN and BAC).

21. Umeda & Sakata, *Alcohol and the Oculomotor System*, 87 ANNALS OF OTOTOLOGY, RHINOLOGY & LARYNGOLOGY, May-June 1978, at 392 (in volunteers whose "caloric eye tracking pattern" (CETP) was normal before alcohol intake, influence of alcohol on oculomotor sys-

tem appeared consistently in the following order: (1) abnormality of CETP, (2) positional alcohol nystagmus, (3) abnormality of eye tracking pattern, (4) alcohol gaze nystagmus).

22. Zyo, *Medico-Legal and Psychiatric Studies on the Alcoholic Intoxicated Offender*, 30 JAPANESE J. OF LEGAL MED., No. 3, 1976, at 169 (abstract available on DIALOG, file 21:National Criminal Justice Reference Service 1972-85) (recommends use of nystagmus test to determine somatic and mental symptoms of alcohol intoxication as well as BAC).

Ariz., 1986.

State v. Superior Court In and For Cochise County
149 Ariz. 269, 718 P.2d 171, 60 A.L.R.4th 1103

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EXHIBIT B



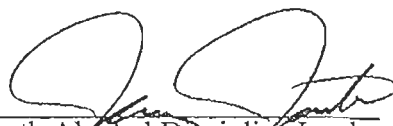
Idaho State Police Forensic Services

CERTIFICATE OF APPROVAL

The Idaho State Police Forensic Services (ISPFS) hereby certifies and approves Alcohol Simulator Solution Lot Number 10802 (a product manufactured by RepCo Marketing Inc.) to be used to conduct performance verification checks within the State of Idaho in accordance with the analytical methods, policies and/or procedures promulgated by the Department governing breath alcohol examinations. ISPFS also approves of the manufacturer of this solution (RepCo Marketing Inc.) to provide Alcohol Simulator Solution Lot Number 10802 in the State of Idaho. This lot has a target value of 0.080 with a range of 0.072 to 0.088 grams of ethyl alcohol/210 liters of vapor.


The expiration date for this lot number is August 9th, 2012 at 11:59 PM.

8-31-10
Date


Breath Alcohol Discipline Leader

STATE OF IDAHO)
) ss.
County of Kootenai)

On this 31st day of August, in the year 2010, before me, JoAnn Hutchison, a notary public, personally appeared Jeremy Johnston, known to me to be the person whose name is subscribed to the within instrument as a Forensic Scientist for the Idaho State Police Forensic Services, and acknowledge to me that he executed the same as such Scientist.

 Notary Public
My Commission Expires: 12/15/2015

