

**American Prosecutors Research Institute  
National Traffic Law Center**

**HORIZONTAL GAZE NYSTAGMUS  
STATE CASE LAW SUMMARY**

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**INTRODUCTION**

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

**Alabama**

**I. Evidentiary Admissibility**

HGN is a scientific test that must satisfy the *Frye* standard of admissibility. The Supreme Court of Alabama found that the State had not presented “sufficient evidence regarding the HGN test’s reliability or its acceptance by the scientific community to determine if the Court of Criminal Appeals correctly determined that the test meets the *Frye* standards.”

*Malone v. City of Silverhill*, 575 So.2d 106 (Ala. 1990).

**II. Police Officer Testimony Needed to Admit HGN Test Result**

The Court did not address this issue.

**III. Purpose and Limits of HGN**

The Court did not address this issue.

**Alaska**

**I. Evidentiary Admissibility**

HGN is a scientific test. It is generally accepted within the relevant scientific community.

*Ballard v. Alaska*, 955 P.2d 931, 939 (Alaska Ct. App. 1998).

**II. Police Officer Testimony Needed to Admit HGN Test Result**

A police officer may testify to the results of HGN testing as long as the government establishes a foundation that the officer has been adequately trained in the test.

*Ballard*, 955 P.2d at 941.

### **III. Purpose and Limits of HGN**

HGN testing is “a reliable indicator of a person’s alcohol consumption and, to that extent, HGN results are relevant.” The court cautioned that the HGN test could not be used to correlate the results with any particular blood-alcohol level, range of blood-alcohol levels, or level of impairment. *Ballard*, 955 P.2d at 940.

#### **Arizona**

##### **I. Evidentiary Admissibility**

HGN is a scientific test that needs to satisfy the *Frye* standard of admissibility. State has shown that HGN satisfies the *Frye* standard. *State v. Superior Court (Blake)*, 718 P.2d 171, 181 (Ariz. 1986) (seminal case on the admissibility of HGN).

##### **II. Police Officer Testimony Needed to Admit HGN Test Result**

“The proper foundation for [admitting HGN test results] . . . includes a description of the officer's training, education, and experience in administering the test and showing that proper procedures were followed.”

*Arizona ex. rel. Hamilton v. City Court of Mesa*, 799 P.2d 855, 860 (Ariz. 1990).

*See also Arizona ex. Rel. McDougall v. Ricke*, 778 P.2d 1358, 1361 (Ariz. Ct. App. 1989).

### **III. Purpose and Limits of HGN**

HGN test results are admissible to establish probable cause to arrest in a criminal hearing. *State v. Superior Court (Blake)*, 718 P.2d at 182.

“Where a chemical analysis has been conducted, the parties may introduce HGN test results in the form of estimates of BAC over .10% to challenge or corroborate that chemical analysis.”

*Ricke*, 778 P.2d at 1361.

When no chemical analysis is conducted, the use of HGN test results “is to be limited to showing a symptom or clue of impairment.”

*Hamilton*, 799 P.2d at 858.

#### **Arkansas**

##### **I. Evidentiary Admissibility**

Novel scientific evidence must meet the *Prater* (relevancy) standard for admissibility. Because law enforcement has used HGN for over thirty-five years, a *Prater* inquiry is not necessary as the test is not “novel” scientific evidence. *Whitson v. Arkansas*, 863 S.W.2d 794, 798 (Ark. 1993).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

The Court did not address this issue.

## **III. Purpose and Limits of HGN**

HGN may be admitted as evidence of impairment, but is not admissible to prove a specific BAC. *Whitson*, 863 S.W.2d at 798.

### **California**

#### **I. Evidentiary Admissibility**

HGN is a scientific test and the *Kelly/Frye* “general acceptance” standard must be applied. *California v. Leahy*, 882 P.2d 321 (Cal. 1994). *California v. Joehnk*, 35 Cal. App. 4<sup>th</sup> 1488, 1493, 42 Cal. Rptr. 2d 6, 8 (Cal. Ct. App. 1995).

“...[A] consensus drawn from a typical cross-section of the relevant, qualified scientific community accepts the HGN testing procedures....”  
*Joehnk*, 35 Cal. App. 4<sup>th</sup> at 1507, 42 Cal. Rptr. 2d at 17.

#### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer testimony is insufficient to establish “general acceptance in the relevant scientific community.” *Leahy*, 882 P2d. at 609. Also see *People v. Williams*, 3 Cal. App. 4<sup>th</sup> 1326 (Cal. Ct. App. 1992).

Police officer can give opinion, based on HGN and other test results, that defendant was intoxicated. Furthermore, police officer must testify as to the administration and result of the test. *Joehnk*, 35 Cal. App. 4<sup>th</sup> at 1508, 42 Cal. Rptr. 2d at 18.

#### **III. Purpose and Limits of HGN**

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

HGN test results may not be used to quantify the BAC level of the defendant. *California v. Loomis*, 156 Cal. App. 3d Supp. 1, 5-6, 203 Cal. Rptr. 767, 769-70 (1984).

## **Connecticut**

### **I. Evidentiary Admissibility**

Proper foundation must be established in accordance with *Daubert* prior to the introduction of HGN test results. *State v. Russo*, 773 A.2d 965 (Conn. App. Ct. 2001).

Also see, *Connecticut v. Merritt*, 647 A.2d 1021, 1028 (Conn. App. Ct. 1994). HGN must meet the *Frye* test of admissibility. In this case, the state presented no evidence to meet its burden under the *Frye* test.

HGN satisfies the *Porter* standards and is admissible. (In *State v. Porter*, 698 A.2d 739 (1997), the Connecticut Supreme Court held the *Daubert* approach should govern the admissibility of scientific evidence and expressed factors to be considered in assessing evidence.)  
*Connecticut v. Carlson*, 720 A.2d 886 (Conn. Super. Ct. 1998).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Must lay a proper foundation with a showing that the officer administering the test had the necessary qualifications and followed proper procedures. *Connecticut v. Merritt*, 647 A.2d 1021, 1028 (Conn. App. Ct. 1994).

### **III. Purpose and Limits of HGN**

HGN test results can be used to establish probable cause to arrest in a criminal hearing.  
*Connecticut v. Royce*, 616 A.2d 284, 287 (Conn. App. Ct. 1992).

## **Delaware**

### **I. Evidentiary Admissibility**

HGN evidence is scientific and must satisfy the Delaware Rules of Evidence standard.  
*Delaware v. Ruthardt*, 680 A.2d 349, 356 (Del. Super. Ct. 1996).

HGN evidence is acceptable scientific testimony under the Delaware Rules of Evidence.  
*Ruthardt*, 680 A.2d at 362.

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer may be qualified as an expert to testify about the underlying scientific principles that correlate HGN and alcohol. Delaware police receiving three-day (twenty-four hour) instruction on HGN test administration are not qualified to do this.  
*Ruthardt*, 680 A.2d at 361-62.

Police officer testimony about training and experience alone, without expert testimony, is not enough foundation to admit HGN test results.  
*Zimmerman v. Delaware*, 693 A.2d 311, 314 (Del. 1997).

### **III. Purpose and Limits of HGN**

HGN test results admissible to show probable cause in a criminal hearing.  
*Ruthardt*, 680 A.2d at 355.

HGN test results admissible to show probable cause in a civil hearing.  
*Cantrell v. Division of Motor Vehicles*, 1996 Del. Super. LEXIS 265 (Del. Super. Ct. Apr. 9, 1996).

HGN test results cannot be used to quantify the defendant's BAC. However, they can be used as substantive evidence that the defendant was "under the influence of intoxicating liquor."  
*Ruthardt*, 680 A.2d at 361-62.

### **District of Columbia**

#### **I. Evidentiary Admissibility**

The Court does not address this issue.

#### **II. Police Officer Testimony Needed to Admit HGN Test Result**

The Court used the case law of other jurisdictions to come to the conclusion that the Officer in the case could testify as an expert on the administration and the results of the HGN test. Therefore, in this case, the evidence was properly admitted using the Officer as the expert. See *Karamychev v. District of Columbia*, 772 A. 2d 806 (D.C. App. 2001).

### **III. Purpose and Limits of HGN**

The Court has not yet addressed this issue.

### **Florida**

#### **I. Evidentiary Admissibility**

The 3<sup>rd</sup> District Court found HGN to be a "quasi-scientific" test. Its application is dependent on a scientific proposition and requires a particular expertise outside the realm of common knowledge of the average person. It does not have to meet the *Frye* standard because HGN has been established and generally accepted in the relevant scientific community, and has been *Frye* tested in the legal community. The court took judicial notice that HGN is reliable based on supportive case law from other jurisdictions, numerous testifying witnesses and studies submitted. It is "no longer 'new or novel' and there is simply no need to reapply a *Frye* analysis."

*Williams v. Florida*, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998).

The 4<sup>th</sup> District Court found HGN to be a scientific test. However, because it is not novel, the *Frye* standard is not applicable. However, “[e]ven if not involving a new scientific technique, evidence of scientific tests is admissible only after demonstration of the traditional predicates for scientific evidence including the test’s general reliability, the qualifications of test administrators and technicians, and the meaning of the results.” Without this predicate, “the danger of unfair prejudice, confusion of issues or misleading the jury from admitting HGN test results outweighs any probative value.” The state did not establish the appropriate foundation for the admissibility of HGN test results.

*Florida v. Meador*, 674 So. 2d 826, 835 (Fla. Dist. Ct. App. 1996), *review denied*, 686 So. 2d 580 (Fla. 1996).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

“We take judicial notice that HGN test results are generally accepted as reliable and thus are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified DRE [Drug Recognition Expert].”

*Williams*, 710 So. 2d at 32.

Also see *Bown v. Florida*, 745 So. 2d 1108 (Fl. Dist. Ct. App. 1999) which expands *Williams*. Allows trooper to explain HGN, but district requires confirmatory blood, breath or urine test before admitting HGN into evidence.

No evidence presented as to the police officer’s qualifications nor administration of the HGN test in this case.

*Meador*, 674 So. 2d at 835.

## **III. Purpose and Limits of HGN**

The HGN test results alone, in the absence of a chemical analysis of blood, breath, or urine, are inadmissible to trigger the presumption provided by the DUI statute, and may not be used to establish a BAC of .08 percent or more.

*Williams*, 710 So. 2d at 36.

## **Georgia**

### **I. Evidentiary Admissibility**

The HGN test is admissible as a “scientifically reliable field sobriety evaluation” under the *Harper* “verifiable certainty” standard. *Manley v. Georgia*, 424 S.E.2d 818, 819-20 (Ga. Ct. App. 1992).

HGN testing is judicially noticed as a scientifically reliable test and therefore expert testimony is no longer required before the test results can be admitted.

*Hawkins v. Georgia*, 476 S.E.2d 803, 808-09 (Ga. Ct. App. 1996).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer, who received specialized training in DUI detection and worked with a DUI task force for two years, was permitted to testify that, in his opinion, defendant was under the influence. *Sieveking v. Georgia*, 469 S.E.2d 235, 219-20 (Ga. Ct. App. 1996).

A Police officer who testifies to the results, administration, and procedure of HGN may be cross-examined about those areas even if the state only offers him as a POST-certified officer. This is because the analysis and expertise needed for HGN go far beyond those needed by a lay person who observes the walk and turn or one leg stance tests. *James v. State*, 2003 WL 1540235 (Ga. App.).

## **III. Purpose and Limits of HGN**

HGN test can be admitted to show that the defendant “was under the influence of alcohol to the extent that it was less safe for him to drive.”

*Sieveking*, 469 S.E.2d at 219.

## **Hawaii**

### **I. Evidentiary Admissibility**

HGN is a scientific test. The HGN test is reliable under the Hawaii Rules of Evidence and admissible as “evidence that police had probable cause to believe that a defendant was DUI.” Judicial notice of the “validity of the principles underlying HGN testing and the reliability of HGN test results” is appropriate. HGN test results can be admitted into evidence if the officer administering the test was duly qualified to conduct the test and the test was performed properly.

*Hawaii v. Ito*, 978 P.2d 191 (Haw. Ct. App. 1999).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Before HGN test results can be admitted into evidence in a particular case, however, it must be shown that (1) the officer administering the test was duly qualified to conduct and grade the test; and (2) the test was performed properly in the instant case. *Hawaii v. Ito*, 978 P.2d 191 (Haw. Ct. App. 1999), *See also Hawaii v. Toyomura*, 904 P.2d 893, 911 (Haw. 1992) and *Hawaii v. Montalbo*, 828 P.2d. 1274, 1281 (Haw. 1992).

### **III. Purpose and Limits of HGN**

HGN test can be admitted as “evidence that police had probable cause to believe that a defendant was DUI.” *Hawaii v. Ito*, 978 P.2d 191 (Haw. Ct. App. 1999).

## **Idaho**

### **I. Evidentiary Admissibility**

HGN test results admitted under the Idaho Rules of Evidence. Rule 702 is the correct test in determining the admissibility of HGN. *State v. Gleason*, 844 P.2d 691, 694 (Idaho 1992).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Officer may testify as to administration of HGN test, but not correlation of HGN and BAC. *State v. Garrett*, 811 P.2d 488, 493 (Idaho 1991).

### **III. Purpose and Limits of HGN**

“HGN test results may not be used at trial to establish the defendant's blood alcohol level . . . Although we note that in conjunction with other field sobriety tests, a positive HGN test result does supply probable cause for arrest, standing alone that result does not provide proof positive of DUI...”  
*Garrett*, 811 P.2d at 493.

HGN may be “admitted for the same purpose as other field sobriety test evidence -- a physical act on the part of [defendant] observed by the officer contributing to the cumulative portrait of [defendant] intimating intoxication in the officer's opinion.”  
*Gleason*, 844 P.2d at 695.

## **Illinois**

### **I. Evidentiary Admissibility**

HGN meets *Frye* standard of admissibility.  
*People v. Buening*, 592 N.E.2d 1222, 1227 (Ill. App. Ct. 1992).

Despite the ruling of the *Buening* appellate court, the Fourth District Court of Appeals declined to recognize HGN's general acceptance without a *Frye* hearing. The court criticized the *Buening* court for taking judicial notice of HGN's reliability based on the decisions of other jurisdictions.  
*People v. Kirk*, 681 N.E.2d 1073, 1077 (Ill. App. Ct. 1997).

The state supreme court held that the state was no longer required to show than an HGN test satisfied the Frye standard before introducing the results of the test into evidence. Absent proof by the defense that the HGN test was unsound, the State only had to show that the officer who gave the test was trained in the procedure and that the test was properly administered. *The People of the State of Illinois v. Linda Basler*, 740 N.E.2d 1 (Ill. 2000), 2000 Ill. LEXIS 1698 (Ill. 2000). (Plurality Opinion) According to Fourth Circuit, a Frye hearing must be held for HGN to be admitted. *People v. Herring*, 762 N.E.2d 1186.

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

“A proper foundation should consist of describing the officer's education and experience in administering the test and showing that the procedure was properly administered.”

*Buening*, 592 N.E.2d at 1227.

## **III. Purpose and Limits of HGN**

HGN test results may be used to establish probable cause in a criminal hearing.

*People v. Furness*, 526 N.E.2d 947, 949 (Ill. App. Ct. 1988).

HGN test results admissible to show probable cause in a civil hearing.

*People v. Hood*, 638 N.E.2d 264, 274 (Ill. App. Ct. 1994).

HGN test results may be used “to prove that the defendant is under the influence of alcohol.”

*Buening*, 592 N.E.2d at 1228.

## **Indiana**

### **I. Evidentiary Admissibility**

Results of properly administered HGN test are admissible to show impairment which may be caused by alcohol and, when accompanied by other evidence, will be sufficient to establish probable cause to believe a person may be intoxicated. *Cooper v. Indiana*, 751 N.E.2d 900, 903 (Ind. Ct. App. Feb. 2002)

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

The proper foundation for admitting HGN evidence should consist of describing the officer’s education and experience in administering the test and showing that the procedure was properly administered.

*Cooper*, 751 N.E.2d at 903.

The question of whether a trained officer might express an opinion that defendant was intoxicated based upon the results of field sobriety tests was not before the court, and thus, the court expressed no opinion concerning the admissibility of such testimony. *Cooper*, 751 N.E. 2d at 902, n. 1.

### **III. Purpose and Limits of HGN**

HGN test results, when accompanied by other evidence, will be sufficient to establish probable cause that the person may be intoxicated. *Cooper*, 751 N.E.2d at 903.

## **Iowa**

### **I. Evidentiary Admissibility**

HGN admissible as a field test under the Iowa Rules of Evidence. “[T]estimony by a properly trained police officer with respect to the administration and results of the horizontal gaze nystagmus test are admissible without need for further scientific evidence.”

*State v. Murphy*, 451 N.W.2d 154, 158 (Iowa 1990).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer may testify about HGN test results under Rule 702 if the officer is properly trained to administer the test and objectively records the results.

*Murphy*, 451 N.W.2d at 158.

### **III. Purpose and Limits of HGN**

HGN test results may be used as an indicator of intoxication. *Murphy*, 451 N.W.2d at 158.

## **Kansas**

### **I. Evidentiary Admissibility**

HGN must meet *Frye* standard of admissibility and a *Frye* hearing is required at the trial level. There was no *Frye* hearing conducted and the appellate court refused to make a determination based on the record it had. *State v. Witte*, 836 P.2d 1110, 1121 (Kan. 1992).

HGN test has not achieved general acceptance within the relevant scientific community and its exclusion was appropriate. *State v. Chastain*, 960 P.2d 756 (Kan. 1998).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

The Court did not address this issue.

### **III. Purpose and Limits of HGN**

The Court did not address this issue.

## **Kentucky**

### **I. Evidentiary Admissibility**

HGN test results admitted due to defendant’s failure to object.

*Commonwealth v. Rhodes*, 949 S.W.2d 621, 623 (Ky. Ct. App. 1996).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

The Court did not address this issue.

## **III. Purpose and Limits of HGN**

The Court did not address this issue.

### **Louisiana**

#### **I. Evidentiary Admissibility**

HGN meets *Frye* standard of admissibility and with proper foundation may be admitted as evidence of intoxication.

*State v. Breitung*, 623 So. 2d 23, 25-6 (La. Ct. App. 1993).

*State v. Regan*, 601 So. 2d 5, 8 (La. Ct. App. 1992).

*State v. Armstrong*, 561 So. 2d 883, 887 (La. Ct. App. 1990).

The standard of admissibility for scientific evidence is currently the Louisiana Rules of Evidence.

*State v. Foret*, 628 So. 2d 1116 (La. 1993).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer may testify as to training in HGN procedure, certification in the administration of HGN test and that the HGN test was properly administered. *Armstrong*, 561 So. 2d at 887.

## **III. Purpose and Limits of HGN**

The HGN test may be used by the officer “to determine whether or not he [needs] to ‘go any further’ and proceed with other field tests.”

*Breitung*, 623 So. 2d at 25.

HGN test results may be admitted as evidence of intoxication.

*Armstrong*, 561 So. 2d at 887.

### **Maine**

#### **I. Evidentiary Admissibility**

Because the HGN test relies on greater scientific principles than other field sobriety tests, the reliability of the test must first be established. Either *Daubert* or *Frye* standard must be met.

*State v. Taylor*, 694 A.2d 907, 912 (Me. 1997).

The Maine Supreme Court took judicial notice of the reliability of the HGN test to detect impaired drivers.

*Taylor*, 694 A.2d at 910.

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

“A proper foundation shall consist of evidence that the officer or administrator of the HGN test is trained in the procedure and the [HGN] test was properly administered.”

*Taylor*, 694 A.2d at 912.

## **III. Purpose and Limits of HGN**

HGN test results may only be used as “evidence of probable cause to arrest without a warrant or as circumstantial evidence of intoxication. The HGN test may not be used by an officer to quantify a particular blood alcohol level in an individual case.”

*Taylor*, 694 A.2d at 912.

## **Maryland**

### **I. Evidentiary Admissibility**

HGN is scientific and must satisfy the *Frye/Reed* standard of admissibility. The Court of Appeals took judicial notice of HGN's reliability and its acceptance in the relevant scientific communities.

*Schultz v. State*, 664 A.2d 60, 74 (Md. Ct. Spec. App. 1995).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer must be properly trained or certified to administer the HGN test. [NOTE: In *Schultz*, the police officer failed to articulate the training he received in HGN testing and the evidence was excluded.]

*Schultz*, 664 A.2d at 77.

### **III. Purpose and Limits of HGN**

HGN testing may not be used to establish a specific blood alcohol level.

*Wilson v. State*, 723 A.2d 494 (Md. Ct. Spec. App. 1999).

## **Massachusetts**

### **I. Evidentiary Admissibility**

HGN is scientific and is admissible on a showing of either general acceptance in the scientific community or reliability of the scientific theory. See *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994). HGN test results are inadmissible until the Commonwealth introduces expert testimony to establish that the HGN test satisfies one of these two standards. *Commonwealth v. Sands*, 675 N.E.2d 370, 373 (Mass. 1997).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

“[T]here must be a determination as to the qualification of the individual administering the HGN test and the appropriate procedure to be followed.” In this case there was no testimony as to these facts, thus denying the defendant the opportunity to challenge the officer’s qualifications and administration of the test. *Sands*, 675 N.E.2d at 373.

## **III. Purpose and Limits of HGN**

The Court did not address this issue.

## **Michigan**

### **I. Evidentiary Admissibility**

Court found that HGN test is scientific evidence and is admissible under the *Frye* standard of admissibility.

*State v. Berger*, 551 N.W.2d 421, 424 (Mich. Ct. App. 1996).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Only foundation necessary for the introduction of HGN test results is evidence that the police officer properly performed the test and that the officer administering the test was qualified to perform it. *Berger*, 551 N.W.2d at 424.

### **III. Purpose and Limits of HGN**

HGN test results are admissible to indicate the presence of alcohol.

*Berger*, 551 N.W.2d at 424 n.1.

## **Minnesota**

### **I. Evidentiary Admissibility**

Court found that HGN meets the *Frye* standard of admissibility.

*State v. Klawitter*, 518 N.W.2d 577, 585 (Minn. 1994).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officers must testify about their training in and experience with the HGN test.

*See generally Klawitter*, 518 N.W.2d at 585-86.

### **III. Purpose and Limits of HGN**

HGN admissible as evidence of impairment as part of a Drug Evaluation Examination in the prosecution of a person charged with driving while under the influence of drugs.

*See generally Klawitter*, 518 N.W.2d at 585.

## **Mississippi**

### **I. Evidentiary Admissibility**

HGN is a scientific test. However, it is not generally accepted within the relevant scientific community and is inadmissible at trial in the State of Mississippi.

*Young v. City of Brookhaven*, 693 So.2d 1355, 1360-61 (Miss. 1997).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officers cannot testify about the correlation between the HGN test and precise blood alcohol content.

*Young*, 693 So.2d at 1361.

### **III. Purpose and Limits of HGN**

HGN test results are admissible only to prove probable cause to arrest.

*Young*, 693 So.2d at 1361.

HGN test results cannot be used as scientific evidence to prove intoxication or as a mere showing of impairment. *Young*, 693 So.2d at 1361.

## **Missouri**

### **I. Evidentiary Admissibility**

Court found that HGN test meets the *Frye* standard of admissibility. *State v. Hill*, 865 S.W.2d 702, 704 (Mo. Ct. App. 1993), *rev'd on other grounds*, *State v. Carson*, 941 S.W.2d 518, 520 (Mo. 1997).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer must be adequately trained and able to properly administer the test.

*Hill*, 865 S.W.2d at 704.

See also, *Duffy v. Director of Revenue*, 966 S.W. 2d 372 (Mo. Ct. App. 1998). HGN not admitted at trial because the administering officer was not aware of how to properly score the test and interpret its results.

### **III. Purpose and Limits of HGN**

HGN can be admitted as evidence of intoxication. *Hill*, 865 S.W.2d at 704.

## Montana

### I. Evidentiary Admissibility

Court found that HGN is neither new nor novel; thus, *Daubert* does not apply. Court still finds that HGN must meet the state's rules of evidence that are identical to the Federal Rules of Evidence. *Hulse v. DOJ, Motor Vehicle Div.*, 961 P.2d 75, 88 (Mont. 1998).

### II. Police Officer Testimony Needed to Admit HGN Test Result

The court held that before an arresting officer may testify as to HGN results, a proper foundation must show that the officer was properly trained to administer the HGN test and that he administered the test in accordance with this training. Before the officer can testify as to the correlation between alcohol and nystagmus, a foundation must be established that the officer has special training in the underlying scientific basis of the HGN test.

*Hulse*, 961 P.2d 75 (Mont. 1998).

See Also, *State v. Crawford*, 315 Mont. 480, 68 P.3d 848 (2003), in which the court ruled that the officer's credentials were sufficient to establish his expertise, along with evidence that he was previously qualified as an expert. They relied on *Russette* (2002 MT 200), stating that to establish an expert's qualifications, the proponent of the testimony must show that the expert has special training or education and adequate knowledge on which to base an opinion.

### III. Purpose and Limits of HGN

HGN test results admissible as evidence of impairment.

*State v. Clark*, 762 P.2d 853, 856 (Mont. 1988).

## Nebraska

### I. Evidentiary Admissibility

**HGN** meets the *Frye* standard for acceptance in the relevant scientific communities, and when the test is given in conjunction with other field sobriety tests, the results are admissible for the limited purpose of establishing impairment that may be caused by alcohol.

*State v. Baue*, 607 N.W.2d 191 (Neb. 2000)

### II. Police Officer Testimony Needed to Admit HGN Test Result

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

### **III. Purpose and Limits of HGN**

“Testimony concerning **HGN** is admissible on the issue of impairment, provided that the prosecution claims no greater reliability or weight for the **HGN** evidence than it does for evidence of the defendant's performance on any of the other standard field sobriety tests, and provided further that the prosecution makes no attempt to correlate the **HGN** test result with any particular blood-alcohol level, range of blood-alcohol levels, or level of impairment.”

*State v. Baue*, 607 N.W.2d 191 (Neb. 2000) (quoting *Ballard v. State*, 955 P.2d 931, 940 (Alaska App. 1998))

### **New Hampshire**

#### **I. Evidentiary Admissibility**

In *State v. Dahoo* (Dec. 20, 2002), the N.H. Supreme Court ruled that the HGN test is admissible under N.H. Rule of Evidence 702 and *Daubert* for the limited purpose of providing circumstantial evidence of intoxication. HGN test is a scientifically reliable and valid test.

N.H. Supreme Court ruled their findings binding in *Dahoo* and that courts “will not be required to establish the scientific reliability of the HGN.”

#### **II. Police Officer Testimony Needed to Admit HGN Test Result**

“Since we have already determined that the scientific principles underlying the HGN test are reliable, a properly trained and qualified police officer may introduce the HGN test results at trial.” *State v. Dahoo*, 2002 N.H. LEXIS 179.

### **III. Purpose and Limits of HGN**

“HGN results cannot be introduced at trial for the purpose of establishing a defendant’s BAC level....[T]he results are not sufficient alone to establish intoxication.” *State v. Dahoo*, Id.

### **New Jersey**

#### **I. Evidentiary Admissibility**

In New Jersey, the party offering the results of a scientific procedure into evidence must comply with Frye and show that the procedure is generally accepted in the relevant scientific communities. A party may prove this general acceptance via “(1) testimony of knowledgeable experts[,] (2) authoritative scientific literature[, or] (3) [p]ersuasive judicial decision.” Based on the testimony of Dr. Marcelline Burns and Dr. Jack Richman, the Court found the HGN test to be generally accepted and the results thus admissible. The Court also noted the “significant number” of jurisdictions that have accepted the HGN test as admissible scientific evidence. *State v. Maida*, 2000 N.J. Super. LEXIS 276 (N.J. Super. Ct. Law Div. 2000).

**\*But See**, *State v. Doriguzzi*, 760 A.2d 336 (N.J. Super. 2000), which held that HGN is scientific evidence that must meet Frye Standard. However, in each trial, sufficient foundation evidence must be laid by expert testimony to assure defendants that a conviction for DUI, when based in part on HGN testing, is grounded in reliable scientific data. In this case, the appellate court reversed defendant's conviction because at trial no such foundation was presented. The court found that because HGN testing has not achieved general acceptance in the community, it is not a matter of which a court can take judicial notice.

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

The Court did not address this issue.

## **III. Purpose and Limits of HGN**

The Court found the HGN test admissible "as a reliable scientific indicator of likely intoxication."

### **New Mexico**

#### **I. Evidentiary Admissibility**

HGN is a scientific test. New Mexico follows the *Daubert* standard, which requires a showing of reliability before scientific evidence can be admitted. The court held that a scientific expert must testify to the underlying scientific reliability of HGN and that a police officer cannot qualify as a scientific expert. Because the State failed to present sufficient evidence regarding the HGN test's reliability, the court remanded the case stating it would be appropriate for the trial court, on remand, to make the initial determination of whether HGN testing satisfies *Daubert*. In addition, the court found HGN to be "beyond common and general knowledge" and declined to take judicial notice of HGN reliability. *State v. Torres*, 976 P.2d 20 (N.M. 1999).

*State v. Lasworth*, 42 P.3d 844 (Ct. App. N.M. 2001), cert. denied (2002). Results of HGN test were inadmissible at trial (*State v. Torres*, 976 P.2d 20 (N.M. 1999)). The State needed to prove that HGN was both valid and reliable.

State called Dr. Marceline Burns as a witness (reliability) but did not call an expert in a discipline such as biology or medicine to explain how the amount of alcohol a person consumes correlates with HGN (validity).

#### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officers can qualify as non-scientific experts based on their training and experience. Non-scientific experts may testify about the administration of the test and specific results of the test provided another scientific expert first establishes the reliability of the scientific principles underlying the test. In order to establish the "technical or specialized knowledge" required to qualify as an expert in the administration of the HGN test, "there must be a showing: (1) that the expert has the ability and training to administer the HGN test properly, and (2) that the expert did, in fact, administer the HGN test properly at the time and upon the person in question."

*State v. Torres*, 976 P.2d 20 (N.M. 1999).

*State v. Lasworth*, 42 P.3d 844 (Ct. App. N.M. 2001), cert. denied (2002). Court believed that state had to show that presence of HGN (BAC above .08) correlates with diminishment of driver's mental or physical driving skills (which it failed to do) & a correlation between presence of HGN and BAC above or below .08 (which it did through testimony of Dr. Burns). Court did not preclude use of results of HGN to establish probable cause for arrest or to establish grounds for administering a chemical BAC test.

### **III. Purpose and Limits of HGN**

The Court did not address this issue.

## **New York**

### **I. Evidentiary Admissibility**

Prue holds that HGN test results are admissible under *Frye* standard of "general acceptance." *People v. Prue*, Indictment No. I-5-2001, Franklin County Court (November 2001).

In *Gallup*, the court said that it was only necessary to conduct a foundational inquiry into the techniques and the tester's qualifications for admissibility. *People v. Gallup*, Memorandum and order #13094, 302 A.D.2d 681 (3<sup>rd</sup> Dept)( 2003).

The Court allowed the introduction of HGN and the results because it was properly administered and the burden of establishing that HGN is a reliable indicator of intoxication is generally accepted in the relevant scientific community was satisfied. *People v. William Miley*, NYLJ 12/6/02 p.30 col. 6 (Nassau Co. Ct 2002).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

The People must lay a proper evidentiary foundation in order for HGN results to be admissible at trial.

### **III. Purpose and Limits of HGN**

The Court held that HGN is generally accepted in the relevant scientific community as a reliable indicator of intoxication.

## **North Carolina**

### **I. Evidentiary Admissibility**

HGN is a scientific test. It "does not measure behavior a lay person would commonly associate with intoxication but rather represents specialized knowledge that must be presented to the jury by a qualified expert." As a result, "until there is sufficient scientifically reliable evidence as to the correlation between intoxication and nystagmus, it is improper to permit a lay person to testify as to the meaning of HGN test results." *State v. Helms*, 504 S.E.2d 293 (N.C. 1998).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

Testimony of one police officer, whose training consisted of a “forty hour training class dealing with the HGN test”, was inadequate foundation for admission of HGN test results.

*Helms*, 504 S.E.2d 293 (N.C. 1998).

## **III. Purpose and Limits of HGN**

HGN test results are evidence of impairment. *Helms*, 504 S.E.2d 293 (N.C. 1998).

## **North Dakota**

### **I. Evidentiary Admissibility**

Court found that HGN test is admissible as a standard field sobriety test.

*City of Fargo v. McLaughlin*, 512 N.W.2d 700, 706 (N.D. 1994).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer must testify as to training and experience and that the test was properly administered.

*City of Fargo*, 512 N.W.2d at 708.

### **III. Purpose and Limits of HGN**

“ . . . HGN test results admissible only as circumstantial evidence of intoxication, and the officer may not attempt to quantify a specific BAC based upon the HGN test.”

*City of Fargo*, 512 N.W.2d at 708.

## **Ohio**

### **I. Evidentiary Admissibility**

HGN test is objective in nature and does not require an expert interpretation.

*State v. Nagel*, 506 N.E.2d 285, 286 (Ohio Ct. App. 1986).

Court determined that HGN was a reliable indicator of intoxication without specifically ruling on whether HGN meets *Frye* or some other standard of admissibility.

*State v. Bresson*, 554 N.E.2d 1330, 1334 (Ohio 1990).

Court held that SFSTs, including HGN, must be administered in *strict compliance* with NHTSA’s directives in order for the test results to be admissible. *State v. Homan*, 732 N.E.2d 952 (Ohio 2000).

However, the Ohio Supreme Court ruled that the Homan decision does not preclude officers from testifying to observations even if SFSTs are barred. *Ohio v. Schmitt*, 101 Ohio St. 3d 79, 2004.

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer need only testify to training in HGN procedure, knowledge of the test and ability to interpret results. *Bresson*, 554 N.E.2d at 1336.

## **III. Purpose and Limits of HGN**

HGN can be used to establish probable cause to arrest and as substantive evidence of a defendant's guilt or innocence in a trial for DUI, but not to determine defendant's BAC. *Bresson*, 554 N.E.2d at 1336.

## **Oklahoma**

### **I. Evidentiary Admissibility**

HGN test results excluded because state failed to lay adequate foundation regarding HGN's scientific admissibility under the *Frye* standard of admissibility. Police officer's testimony alone was insufficient. *Yell v. State*, 856 P.2d 996, 996-97 (Okla. Crim. App. 1993).

The *Daubert* rationale replaces the *Frye* standard as the admissibility standard for scientific evidence. *Taylor v. State*, 889 P.2d 319, 328-29 (Okla. Crim. App. 1995).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer testified to training on how to administer HGN test and how the test was administered in this case. Officer also testified as to his training in analyzing HGN test results. *Yell*, 856 P.2d at 997.

## **III. Purpose and Limits of HGN**

If HGN testing was found to satisfy the *Frye* standard of admissibility, HGN test results would be considered in the same manner as other field sobriety test results. HGN test results are inadmissible as scientific evidence creating a presumption of intoxication. *Yell*, 856 P.2d at 997.

## **Oregon**

### **I. Evidentiary Admissibility**

HGN test results are admissible under the Oregon Rules of Evidence. HGN test results are scientific in nature, are relevant in a DUI trial, and are not unfairly prejudicial to the defendant. *State v. O'Key*, 899 P.2d 663, 687 (Or. 1995).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

“Admissibility is subject to a foundational showing that the officer who administered the test was properly qualified, that the test was administered properly, and that the test results were recorded accurately.” *O'Key*, 899 P.2d at 670.

## **III. Purpose and Limits of HGN**

“... HGN test results are admissible to establish that a person was under the influence of intoxicating liquor, but is not admissible...to establish a person's BAC....” *O'Key*, 899 P.2d at 689-90.

Officer may not testify that, based on HGN test results, the defendant's BAC was over .10. *State v. Fiskan*, 909 P.2d 206, 207 (Or. Ct. App. 1996).

## **Pennsylvania**

### **I. Evidentiary Admissibility**

The state laid an inadequate foundation for the admissibility of HGN under the *Frye/Topa* standard. *Commonwealth v. Moore*, 635 A.2d 625, 629 (Pa. Super. Ct. 1993).  
*Commonwealth v. Apollo*, 603 A.2d 1023, 1028 (Pa. Super. Ct. 1992).  
*Commonwealth v. Miller*, 532 A.2d 1186, 1189-90 (Pa. Super. Ct. 1987).

Testimony of police officer is insufficient to establish scientific reliability of HGN test. *Moore*, 635 A.2d at 692.  
*Miller*, 532 A.2d at 1189-90.

Testimony of behavioral optometrist did not establish general acceptance of HGN test. *Apollo*, 603 A.2d at 1027-28.

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

County detective certified as HGN instructor. Court did not comment on whether this would be enough foundation to allow the detective to testify about HGN test results. *Moore*, 635 A.2d 629.

Police officer had one-day course on HGN. Court did not comment on whether this would be enough foundation to allow the officer to testify about HGN test results. *Miller*, 603 A.2d at 1189.

### **III. Purpose and Limits of HGN**

Not addressed by court.

## **South Carolina**

### **I. Evidentiary Admissibility**

HGN admissible in conjunction with other field sobriety tests. By implication, HGN is not regarded as a scientific test. *State v. Sullivan*, 426 S.E.2d 766, 769 (S.C. 1993).

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Police officer given twenty hours of HGN training. *Sullivan*, 426 S.E.2d at 769.

### **III. Purpose and Limits of HGN**

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

## **South Dakota**

### **I. Evidentiary Admissibility**

If it can be shown that a horizontal gaze nystagmus test was properly administered by a trained officer, such evidence should be admitted for a jury to consider at trial along with evidence of the other accepted field sobriety tests administered in South Dakota. *STATE v. HULLINGER*, 2002 SD 83; 649 N.W.2d 253 (S.D.S.Ct. 2002); 2002 S.D. LEXIS 99

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

Officer may testify if properly trained and test properly administered. At the pretrial hearing, the State presented three witnesses: 1) Monte Farnsworth, training director for the Office of Highway Safety at the Division of Criminal Investigation Law Enforcement Training Academy; 2) Deputy Ludwig; and 3) Dr. Larry Menning, optometrist and expert witness. South Dakota follows a *Daubert* standard in use of expert witnesses.

### **III. Purpose and Limits of HGN**

The Court did not address this issue.

## **Tennessee**

### **I. Evidentiary Admissibility**

HGN is a scientific test. To be admissible at trial, such evidence must satisfy the requirements of Tenn. Rules of Evidence 702 and 703. State provided an inadequate amount of evidence to allow the court to conclude that HGN evidence meets this standard. *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

HGN must be offered through an expert witness. To qualify as an expert, a police officer must establish that he is qualified by his “knowledge, skill, experience, training or education” to provide expert testimony to “substantially assist the trier of fact to understand the evidence or determine a fact in issue.” Although the court did not rule out the possibility that the officer can be considered an expert, the court set a high level of proof. In this case, the court felt that although the officer had attended law enforcement training in DUI offender apprehension and the HGN test, this training was not enough to establish him as an expert. *State v. Grindstaff*, 1998 Tenn. Crim. App. Lexis 339 (March 23, 1998).

## **III. Purpose and Limits of HGN**

The Court did not address this issue.

### **Texas**

#### **I. Evidentiary Admissibility**

HGN admissible under the Texas Rules of Evidence. *Emerson v. State*, 880 S.W.2d 759, 769 (Tex. Crim. App. 1994).

#### **II. Police Officer Testimony Needed to Admit HGN Test Result**

A police officer must qualify as an expert on the HGN test, specifically concerning its administration and technique, before testifying about a defendant’s performance on the test. Proof that the police officer is certified in the administration of the HGN test by the Texas Commission on Law Enforcement Officer Standards and Education satisfies this requirement. *Emerson*, 880 S.W.2d at 769.

#### **III. Purpose and Limits of HGN**

HGN admissible to prove intoxication, but not accurate enough to prove precise BAC. *Emerson*, 880 S.W.2d at 769.

### **Utah**

#### **I. Evidentiary Admissibility**

HGN test admissible as other field sobriety test. Court reserved judgment as to the scientific reliability of HGN. *Salt Lake City v. Garcia*, 912 P.2d 997, 1001 (Utah Ct. App. 1996).

#### **II. Police Officer Testimony Needed to Admit HGN Test Result**

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

### **III. Purpose and Limits of HGN**

Admissible as any other field sobriety test. *Garcia*, 912 P.2d at 1000-01.

#### **Washington**

##### **I. Evidentiary Admissibility**

It is “undisputed” in the relevant scientific communities that “an intoxicated person will exhibit nystagmus”. HGN testing is not novel and has been used as a field sobriety test for “decades” and is administered the same whether investigating alcohol impairment or drug impairment. Thus, the use of HGN in drug and alcohol impaired driving cases is acceptable. *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (Wash. 2000).

“[T]he *Frye* standard applies to the admission of evidence based on HGN testing, unless . . . the State is able to prove that it rests on scientific principles and uses techniques which are not ‘novel’ and are readily understandable by ordinary persons.” The state failed to present any evidence to this fact and the court declined to take judicial notice of HGN. *State v. Cissne*, 865 P.2d 564, 569 (Wash. Ct. App. 1994).

##### **II. Police Officer Testimony Needed to Admit HGN Test Result**

The Court did not address this issue.

### **III. Purpose and Limits of HGN**

The Court did not address this issue.

#### **West Virginia**

##### **I. Evidentiary Admissibility**

The state did not present evidence for the court to reach “the question of whether the HGN test is sufficiently reliable to be admissible.” However, the court did conclude “that even if the reliability of the HGN test is demonstrated, an expert’s testimony as to a driver’s performance on the test is admissible only as evidence that the driver was under the influence. Estimates of blood alcohol content based on the HGN test are inadmissible.” *State v. Barker*, 366 S.E.2d 642, 646 (W. Va. 1988).

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

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

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

## **III. Purpose and Limits of HGN**

HGN test results admissible to show probable cause in a civil hearing. *Muscatell v. Cline*, 474 S.E.2d 518, 525 (W. Va. 1996). *Boley v. Cline*, 456 S.E.2d 38, 41 (W. Va. 1995).

“[I]f the reliability of the HGN test is demonstrated, an expert's testimony as to a driver's performance on the test is admissible only as evidence that the driver was under the influence,” the same as other field sobriety tests. *Barker*, 366 S.E.2d at 646.

## **Wisconsin**

### **I. Evidentiary Admissibility**

The court held that the HGN test results are admissible in this case because the test results were not the only evidence. The results were accompanied by the expert testimony of the officer. *State v. Zivcic*, 598 N.W.2d 565 (Wisc. Ct. App. 1999). **See also**, *State v. Maxon*, 633 N.W. 2d 278 (Wisc. Ct. App. 2001)

### **II. Police Officer Testimony Needed to Admit HGN Test Result**

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

### **III. Purpose and Limits of HGN**

The Court did not address this issue.

## **Wyoming**

### **I. Evidentiary Admissibility**

SFSTs, including HGN, are admissible to establish probable cause when administered in *substantial compliance* with NHTSA guidelines. Strict compliance is not necessary. The court took judicial notice of the number of states that allow HGN evidence on the basis of the “officer’s training, experience and ability to administer the test”. *Smith v. Wyoming*, 2000 Wyo. LEXIS 202 (Wyo. October 4, 2000).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

A police officer that is properly trained to administer and evaluate the HGN test can testify to HGN results.

*Smith v. Wyoming*, 2000 Wyo. LEXIS 202 (Wyo. October 4, 2000).

## **III. Purpose and Limits of HGN**

HGN test results are admissible to show probable cause.

*Smith v. Wyoming*, 2000 Wyo. LEXIS 202 (Wyo. October 4, 2000).

## **United States**

### **I. Evidentiary Admissibility**

*U.S. V. Eric D. Horn*, 185 F. Supp. 2d 530 (D. Maryland 2002) In this case, U.S. District Court in Maryland made the first application of the newly revised FRE 702 to the HGN and other SFSTs.

Results of properly administered WAT, OLS and HGN, SFSTs may be admitted into evidence in a DWI/DUI case only as circumstantial evidence of intoxication or impairment but not as direct evidence of specific BAC.

Officer must first establish his qualifications to administer the test - training and experience, not opinion about accuracy rate of test or causal connection between alcohol consumption and exaggerated HGN.

Government may prove causal connection by: judicial notice, expert testimony, or learned treatise.

Horn may prove other causes by: judicial notice, cross-examination of state's expert, defense expert, or learned treatise.

*U.S. V. Daras*, 1998 WL 726748 (4<sup>th</sup> Cir. 1998)(*Unpublished opinion*). WAT and OLS were not scientific so no expert needed. Court would have applied *Daubert* to HGN test, but there was no need to because breathalyzer, WAT and OLS were sufficient.

HGN test was admitted as part of series of field tests. Its admission was not challenged on appeal.

*U.S. v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989).

## **II. Police Officer Testimony Needed to Admit HGN Test Result**

Foundation for HGN must address validity & reliability under FRE 702. In *Horn*, prosecution had a medical doctor and a police officer, but defense used behavioral psychologist to attack HGN literature of Dr. Marceline Burns and others.

### III. Purpose and Limits of HGN

SFSTs may be admitted into evidence in a DWI/DUI case only as circumstantial evidence of intoxication or impairment but not as direct evidence of specific BAC. *Horn*.

Properly qualified, Officer may give opinion of intoxication or impairment by alcohol. *Horn*.

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Note: The following states were not listed above due to a lack of case law discussion on HGN:

Colorado

Nevada

Rhode Island

Vermont( HGN was mentioned in the context of a refusal being admissible as evidence of probative guilt. State v. Blouin, 168 Vt. 119 (Vt. 1998)

Virginia

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