**DUI #4 EPISODE NOTES**

**(STATE-ADMINISTERED TESTING LAW)**

**Wade: Hello folks, and welcome to episode #4 of our DUI series here on The Good Judge-ment Podcast. I’m Wade Padgett**

*Tain: And I’m Tain Kell. We want to welcome our FOP, (friend of the podcast) and guest host, Judge Ben Studdard. Welcome back, Judge Studdard!*

***Ben: \_\_\_\_\_\_ (your call)***

**Wade: In episode #1 of this series, we discussed the relevant statutes, elements of proof and penalties relating to DUI. In episode 2, we discussed the recent changes in DUI law and the impact those cases have had on the relevant statutes.**

*Tain: In episode #3, we discussed Implied Consent Law and the concept of “actual consent.” Honestly, if you missed episodes #1,2 or 3 of this DUI series, you need to listen to those episodes first. Judge Studdard, tell the folks what we are discussing today.*

***Ben: Today, we are going to discuss state-administered testing in the aftermath of the decision in Elliott. We are also going to spend some time discussing field sobriety tests.***

*Tain: I could get used to this third wheel thing – nice job Judge Studdard.*

**Wade: We have seriously discussed a number of topics relating to DUI law in prior episodes so if you missed those, you will really want to check them out as we are not going to rehash those terms and concepts today.**

1. State-administered testing really involves two different sub-topics
	1. Tests conducted pre-arrest; and
	2. Tests conducted post-arrest.
2. When we discuss pre-arrest testing, we are referencing field sobriety tests and the screening tests that officers use to attempt to determine whether the driver is under the influence of intoxicants
3. Post-arrest testing is a phrase we are using on the podcast to reference Intoxilyzer 9000 breath tests, urine tests and blood tests.
4. Before we delve into the tests themselves and the law surrounding those tests, we need to take a quick side trip into Ga’s new evidence law that became effective on July 1, 2022 with the passage of HB 478
	1. We promise that we will record an few episodes on this important change in evidence law over the coming weeks. We just want to ensure everyone knows of the change and how it may impact some evidence presentation relating to DUI law.
5. Prior to July 1, 2022, the relevant standard for admitting expert testimony on any subject in a criminal case was referred to as the *Harper* standard. That was codified at O.C.G.A. § 24-7-707.
	1. That standard applicable in criminal cases was different that the applicable standard in civil cases – under Rule 702, the applicable standard in civil cases was the *Daubert* standard
	2. HB 478 repealed Rule 707 and modified Rule 702 to establish that *Daubert* was the relevant standard for the admission of expert testimony in *all cases*, both criminal and civil.
	3. As the law develops after July 1, we will all learn together how this change in the law will impact evidence presentation in all criminal cases – but particularly relating to DUI cases. Please understand that as we discuss state-administered testing in this episode, the relevant law that determined the admissibility of the evidence was the *Harper* standard which most observers feel was a relaxed standard – less demanding than the *Daubert* standard
6. **PRE-ARREST TESTING – SFST**
7. Many of you have likely heard of field sobriety tests
	1. But there is a difference between a field sobriety test and a *standardized* field sobriety test (“SFST”)
		1. And the difference is an important consideration for everyone involved in DUI litigation
8. Let’s say that an officer pulls over a car and suspects the driver of being under the influence
	1. To test whether the defendant is under the influence, the officer may ask the defendant to get out of the car, stand at a location designated by the officer and jump rope for 30 seconds
		1. Now, this is an extreme example, but let’s go with it for a moment to make a larger point
	2. Some people cannot jump rope, despite their sobriety. Jumping rope is difficult for any number of reasons
		1. People under the influence may well find it difficult to jump rope – but merely because intoxicated people find it difficult does not make that “test” a valid field sobriety test – and it definitely does not make it a standardized field sobriety test
	3. Because there are so many different reasons that a driver may be unable to jump rope, the act of jumping rope cannot be considered a SFST. To be considered a SFST, the “test” in question must bear some relationship to the driver’s level of intoxication and the test involved must have been proven with data and testing to be a reliable indicator of intoxication.
9. SFST have been approved by the National Highway Traffic Safety Administration (“NHTSA”) because of several field validation studies conducted around the country.[[1]](#endnote-1)
	1. Those field validation studies proved that if the tests were properly administered, they are scientifically proven to be accurate and can be relied upon to provide the officer with probable cause to arrest the driver for DUI.
	2. If you are interested in the actual validation studies, please see the outline for this episode which can be found at goodjudgepod.com – in the endnotes, we have information about the 1995 Colorado validation study, the 1997 Florida validation study and the 1998 San Diego validation study.
10. The reason that there are multiple different validation studies and multiple different SFST is because no single test is a 100% accurate test for intoxication levels
	1. However, when taken collectively, properly conducted SFST have proven to be a reliable indicator of a driver’s level of intoxication
11. You may have heard officers testify that during a particular SFST, the officer observed 3 or 4 “clues.” What does that mean?
	1. “Clues” in this context mean that the officer found that the suspect did not perform the test as he/she was told, evidence that the person was under the influence of intoxicants. They are “clues” that the defendant is intoxicated.
		1. For clarity, there are some who argue that the presence of a certain number of “clues” means that the defendant has a blood-alcohol level of “X.” Ga. law is clear that we will not allow witnesses to testify to that conclusion because the science behind some of the tests has not been proven to be that accurate
		2. Instead, the officer can testify to the number of “clues” observed – in other words, how the suspect performed in the SFST
		3. SFST are intended to be initial screening devices that an officer uses to determine if there is probable cause to believe that the driver is DUI.**[[2]](#endnote-2)**
			1. Therefore, there is no requirement that the defendant be advised of ICW before an Alco-Sensor test is given.**[[3]](#endnote-3)**.
12. **IMPORTANT POINT:** SFST have been established as being valid when they are properly administered – in other words, to be relevant, the test must be administered properly. Otherwise, the conclusions that can be drawn from the suspect’s performance will not be a reliable indicator of intoxication.
	1. If, for example, the officer does not properly explain the WAT or OLS requirements correctly, the fact that the suspect could not “walk the line” or otherwise failed the tests may not be the product of intoxication but, instead, is the product of poor instruction from the officer. Performing the tests in accordance with the NHTSA guidelines is what makes these tests different from my jump rope example. And following those guidelines is a prerequisite to having the SFST being deemed admissible at trial.
13. **THE SFST:**
14. **WAT:** The “walk and turn” test (“WAT”) is a divided attention test that has both mental and physical components.
	1. The actual instructions for WAT are contained within the endnote.[[4]](#endnote-4)
		1. Start with foot on imaginary line, take 9 steps, turn in specific manner, 9 steps back, hands by side, count steps
	2. During a WAT test, the officer is looking for several different “clues” that the driver is impaired.
		1. Those clues are 1) driver is unable to maintain balance; 2) starts the test too soon; 3) stops while walking; 4) misses heel-toe while walking; 5) steps off of the line; 6) raises arms for balance; 7) turns improperly; and 8) incorrect number of steps.
		2. The officer can stop the test if continuing is unsafe for the suspect because the suspect nearly falls or otherwise shows that the test has the potential to harm the suspect.
		3. The presence of 2 or more clues on the WAT indicates that the suspect has a BAC at or above .08%.**[[5]](#endnote-5)**
	3. The WAT is not subject to the requirements of *Daubert* to determine its admissibility. It is “merely a well-known consequence of intoxication, ‘as obvious to the layperson as to [an] expert.’” **[[6]](#endnote-6)**
		1. An officer’s testimony about the inability of a suspect to complete the WAT does not amount to testimony regarding scientific procedures, “but instead amounts to testimony as to behavioral observations on the officer’s part.”**[[7]](#endnote-7)** Lay person opinion allowed under Rule 701.
	4. Therefore, [the WAT] and any testimony about how it was administered, including compliance with NHTSA standards, go to the weight of the evidence, not to admissibility.**[[8]](#endnote-8)**
		1. The trial court commits error when it suppresses the results of a WAT when the sole basis of the defendant’s argument is that the test was not administered properly.**[[9]](#endnote-9)**
15. **OLS:** The “one-leg stand” (“OLS”) test is also a divided attention test which involves mental and physical tasks.
	1. There are two “stages” of the OLS, the instructional stage and the balance and counting stage.
		1. The specific procedures for OLS are listed in endnote.[[10]](#endnote-10)
		2. Look at feet, hands by side, raise a foot approximately 12 inches and count by 1,000’s
	2. The officer is looking for certain “clues” during the OLS.
		1. Those clues are whether the suspect puts his/her foot down, uses arms for balance, sways or is hopping during the test.
		2. The officer is again allowed to stop the test if the test proves unsafe for the suspect.
		3. If there are 2 or more clues observed during the OLS test, the suspect’s BAC is at or above .08%.**[[11]](#endnote-11)**
	3. The OLS is not subject to the requirements of *Daubert* to determine its admissibility.
		1. It is “merely a well-known consequence of intoxication, ‘as obvious to the layperson as to [an] expert.’”**[[12]](#endnote-12)** Therefore, only subject to Rule 701.
		2. An officer’s testimony about the inability of a suspect to complete the OLS does not amount to testimony regarding scientific procedures, “but instead amounts to testimony as to behavioral observations on the officer’s part.”**[[13]](#endnote-13)**
	4. Therefore, [the OLS] and any testimony about how it was administered, including compliance with NHTSA standards, go to the weight of the evidence, not to admissibility.[[14]](#endnote-14)
		1. The trial court commits error when it suppresses the results of an OLS when the sole basis of the defendant’s argument is that the test was not administered properly. **[[15]](#endnote-15)**
16. **HGN:** Horizontal Gaze Nystagmus (“HGN”) is the test you have probably seen being administered and involves the officer using a pen or other “stimulus” which is held in front of the suspect’s face.
	1. The officer then moves the stimulus back and forth in a horizontal manner across the suspect’s field of vision.
		1. “[T]he HGN test is performed by moving a stimulus, often a pen, through the subject's vision, while the test subject keeps his vision fixed on the stimulus; the tester then looks for nystagmus in the subject's eyes, and there are ‘six validated clues; a lack of smooth pursuit in [each] eye, a distinct nystagmus at maximum deviation in [each] eye[,] and an onset of nystagmus prior to 45 degrees in [each eye.].’”**[[16]](#endnote-16)**
		2. The HGN reveals an involuntary movement or jerking of the eyes which occurs when the eyes move toward the side.
		3. The nystagmus is caused by the ingestion of depressants, inhalants or anesthetics. Alcohol is a depressant.
		4. While there may be purely medical conditions that can cause nystagmus, such as stroke, multiple sclerosis or head trauma, nystagmus is most often caused by ingestion of the types of drugs and alcohol and that results in HGN being declared a SFST.
	2. The proper way to administer HGN is to first determine whether the suspect is wearing eyeglasses or contact lenses.**[[17]](#endnote-17)**
	3.
	4. The officer first checks the pupils of the suspect to determine whether they are equal.**[[18]](#endnote-18)** If so, the test begins.
	5. The specific procedures for HGN are listed in the endnote.[[19]](#endnote-19)
		1. Timing of passes across field of vision important – not too slow or fast; looking for lack of smooth pursuit or nystagmus at point of max deviation
	6. As a result of the HGN testing, the presence of 4 or more clues indicate a BAC at or above .08%.**[[20]](#endnote-20)**
	7. The officer may also conduct a vertical nystagmus (VGN) test as a separate test from the HGN.
		1. The VGN is based upon the same principles as the HGN but instead of being horizontal (side-to-side), the test is conducted vertically (from top to bottom of the suspect’s field of vision).
		2. An officer is not required to conduct a VGN to be in compliance with NHTSA guidelines.**[[21]](#endnote-21)**
		3. The VGN includes two passes with the stimulus and the stimulus is held at the point of maximum deviation for 4 seconds.
	8. HGN and VGN are subject to the requirements of *Daubert* to determine their admissibility.
		1. However, HGN testing has now been accepted as a test with a state of verifiable certainty in the scientific community and the trial court is allowed to take judicial notice that the HGN/VGN test has achieved that level of scientific verifiable certainty – at least under *Harper*.
	9. The change in the applicable standard from *Harper* to *Daubert* calls into question whether the trial court can take judicial notice that the HGN test has been verified and tested under the applicable law to the point where the trial court no longer is required to perform a *Daubert* analysis.
		1. Georgia law has clearly held that there is no longer a requirement that the State prove the science behind the HGN/VGN test to be admissible and the court is not required to conduct a pretrialhearing on admissibility, even if requested to do so by the defendant.**[[22]](#endnote-22)**
		2. There are federal cases outside of the 11th Circuit which allow the trial judge to take judicial notice that HGN is generally acceptable and those cases were decided under the *Daubert* standard.[[23]](#endnote-23) However, precedent outside of the 11th Circuit is only persuasive, not binding.
		3. Assuming that the court finds or takes judicial notice of the scientific acceptance of the HGN test, for those results to be found admissible, the State must only prove that the HGN test (or the VGN test, if administered) was substantially administered in an acceptable manner and in keeping with NHTSA standards.**[[24]](#endnote-24)**
			1. The prosecutor is not required to prove the science behind the test because of the prior appellate decisions which have concluded that HGN/VGN are scientifically valid and meet the *Daubert* standard.
			2. However, the State must show that tester substantially performed the HGN/VGN testing in an acceptable manner.**[[25]](#endnote-25)**
		4. “In ruling on whether an HGN test was administered properly under law enforcement guidelines, [Georgia] courts have considered whether the arresting officer was sufficiently trained to give the test, whether the officer was experienced in administering the test, whether the officer administered the test according to the standardized techniques, and whether the officer scored or interpreted the test properly.”**[[26]](#endnote-26)**
		5. When there is a dispute as to whether the officer properly administered the test, unless it is obvious that the officer was not qualified to administer the SFST or committed a “fundamental error” in administering the test, the possibility of error goes to the weight and not the admissibility of the evidence.**[[27]](#endnote-27)**
17. **FST THAT ARE NOT SFST:** The only SFST that are recognized by the NHTSA are the WAT, OLS and HGN tests.
	1. An officer may conduct other tests but those tests may not be admissible if they are determined to be “scientific tests” which comply with *Daubert*.
	2. An example of a FST that is occasionally used in DUI cases which does not qualify as a SFST is the Romberg test (a/k/a Romberg Balance test).
		1. The procedure for the Romberg test is in the endnote.[[28]](#endnote-28)
			1. Lay head back with eyes closed- estimate 30 seconds – looking for tremors in eyelids
	3. The Romberg test has been held to be subject to a *Daubert* determination and the Georgia Supreme Court indicated that meeting the requirements of *Harper/Daubert* relating to a Romberg test is extremely unlikely.**[[29]](#endnote-29)**
18. The eye convergence test is a test that is somewhat similar to the HGN. The lack of convergence usually suggests the subject has recently ingested marijuana.
	1. Procedure for eye convergence test is in the endnote.[[30]](#endnote-30)
	2. The officer will look to see if the subject’s eyes converge (i.e. whether the subject can cross his eyes). A subject’s eyes are said to lack convergence if his eyes are unable to converge on the stimulus.
	3. There have been numerous cases which have cited the fact that eye convergence tests were admitted during the trial, but I have been unable to find a case where the eye convergence test has been ruled upon based upon *Harper* or *Daubert.***[[31]](#endnote-31)**
19. **ALCO-SENSOR:** An Alco-Sensor is a FST that is not included within the group of SFST.
	1. When an Alco-Sensor test is administered, the officer may only report that the test was positive or negative for the presence of alcohol. The actual Alco-Sensor device has not been proven to have sufficient scientific reliability to make the Alco-Sensor reading a SFST.
	2. The officer is allowed to conduct an Alco-Sensor test but cannot reveal the numeric reading that is produced on the Alco-Sensor.**[[32]](#endnote-32)**
		1. The officer can only state that the reading was positive or negative for the presence of alcohol. “Alco-Sensor results are not used to establish blood alcohol content. Rather, ‘the Alco-Sensor is used as an initial screening device to aid the police officer in determining probable cause to arrest a motorist suspected of driving under the influence of alcohol.’”**[[33]](#endnote-33)**
	3. Additionally, a defendant’s refusal to submit to an Alco-Sensor is not admissible evidence.[[34]](#endnote-34) Such a refusal would not be admissible in a motion to suppress or in a trial. Listen to episode 2 for a more complete discussion.
20. **POST-ARREST TESTING:** O.C.G.A. § 40-6-392 addresses the circumstances under which the results of the state-administered testing is admissible. That statute is set forth in the endnote.[[35]](#endnote-35)
21. If the procedures demanded by the statute are followed, the results are admissible. On the other hand, if those procedures are not followed, the results are not admissible.[[36]](#endnote-36) However, the requirements of O.C.G.A. § 40-6-392 only apply to state-administered tests.[[37]](#endnote-37)
	1. Therefore, any testing that is performed “at the request or direction of a law enforcement officer” must follow the requirements of § 40-6-392.[[38]](#endnote-38)
		1. It is of no consequence whether the person collecting the sample is a hospital laboratory employee or a person employed by the GBI and is not a law enforcement officer himself/herself.
		2. If the test was conducted at the request of or under the direction of a law enforcement officer, the testing procedures must comply with DOFS policy.
		3. By comparison, where a test is conducted in connection with medical treatment of the driver and not at the request or at the direction of a law enforcement officer, their admission into evidence is not governed by the mandates of § 40-6-392 but would have to be admitted under the general rules of evidence.
	2. It is important to note that § 40-6-392(a)(2) does not apply to blood draws for the purpose of testing for the presence of drugs.
		1. The statute specifically states that it applies to blood draws “for the purpose of determining the alcoholic content therein.”
		2. Where the test is being conducted for the presence of illegal drugs, the statute does not apply.[[39]](#endnote-39) If the officer requests the blood draw for the purpose of determining both the alcohol content and any drug content, the statute does apply.[[40]](#endnote-40)
	3. O.C.G.A. § 40-6-392(e)(1) provides that a certification by the office of the Secretary of State that the person who drew the blood was a licensed or certified physician, physician assistant, registered nurse, practical nurse, medical technologist, medical laboratory technician, or phlebotomist at the time the blood was drawn can be admitted at trial but MUST be accompanied by testimony, under oath, by the person who drew the blood or that person’s supervisor or medical records custodian.[[41]](#endnote-41)
22. **INTOXILYZER 9000** Georgia officers began using the Intoxilyzer Model 9000, manufactured by CMI, Inc. in approximately 2013.**[[42]](#endnote-42)**
	1. The DOFS has established that the Model 9000 became the approved device and that it replaced the Model 5000 as the approved device for law enforcement officers to use in conducting breath tests.
	2. The DOFS rules established that December 31, 2015 was the last date that a law enforcement agency could use the Model 5000 to conduct breath tests.
	3. At trial, the State will be required to submit the inspection certificates on the particular device that was used to test the driver’s breath sample, assuming the officer requested a breath test at the time of reading the ICW.
	4. The inspection certificates are not “testimonial” and, therefore, there is no violation of *Crawford* in admitting the inspection certificates.**[[43]](#endnote-43)**
	5. The State is not required to produce the person who performed the inspection at the trial.**[[44]](#endnote-44)**
	6. The State will merely need to lay the foundation that proves the inspection certificates are “business records” to overcome any hearsay objection.**[[45]](#endnote-45)**
	7. Additionally, the test results produced by the Intoxilyzer machine are not “testimonial” and are admissible.**[[46]](#endnote-46)**
23. We are not going to get into all of the litigation that resulted in an unnatural knowledge of a portion of the Intox machine known as a “Tagucci cell” or the other litigation relating to the operation of the Intox machine. Couple of reasons: 1) this episode is already too long; and 2) under the current state of the law, we have some serious doubts about how often law enforcement officers will be relying upon breath tests in pursuing DUI cases.

**Wade: Well let’s recap what we’ve learned today. Not all tests that could prove that a person is intoxicated is admissible as a field sobriety test.**

*Tain: The passage of HB 478 (the Daubert standard) is going to be very impactful on the admission of evidence in all criminal cases, but particularly relating to DUI cases.*

***Ben: There are some SFST that are considered “non-scientific” tests. The WAT and OLS tests are admissible, despite the relevant standard for expert testimony. However, the HGN test will require expert testimony. The officer administering the test can be qualified as the necessary expert to have the evidence admitted, but the foundation must be laid as to that officer’s training, education, and experience.***

**Wade: As always, this episode outline that can be found at goodjudgepod.com, together with citations to authority for all of these different points of law we have discussed. There is some very valuable information and citations in the endnotes to this outline in particular so go and check it out.**

*Tain: Please follow The Good Judge-ment podcast on your favorite platform and “like” us, it helps others find our work!*

**I’m Wade Padgett**

***I’m Ben Studdard***

*And I’m Tain Kell… [insert funny thing – consider something about jumping rope….]*

1. The SFST were subjected to rigorous validation studies on three different occasions and in three different locations. In 1995, Colorado conducted a field validation study for the first time of three tests, the HGN, WAT and OLS. Those tests revealed that when the tests were conducted correctly, the result was 93% correct in determining whether a driver was impaired over the legal limit. In 1997, Florida conducted a separate field validation study. The Florida validation study used a .08% standard and determined that when the HGN, WAT and OLS tests were properly administered, the tests were 95% correct in determining whether the driver was impaired over the legal limit. In 1998, San Diego, California conducted a separate field validation study where they evaluated the HGN, the WAT and the OLS tests. Specifically, the officers in the San Diego validation study focused the majority of their attention on the HGN results and if the officer observed 2 clues under the HGN, the driver had a BAC of .04% or more and if the officer observed 4 clues under the HGN, the driver had a BAC of .08% or more. The results were 91% correct that the driver’s BAC level was .08% or more when the results of all 3 tests were considered and compared to the actual BAC which was determined by blood testing. [↑](#endnote-ref-1)
2. *Rowell v. State,* 312 Ga. App. 559, 567 (2011); *Keenan v. State*, 263 Ga. 569, 571 (1993). [↑](#endnote-ref-2)
3. *Tunali v. State,* 311 Ga. App. 844, 847 (2011), citing *Keenan v. State*, 263 Ga. 569, 571 (1993); *Hernandez v. State*, 297 Ga. App. 177, 179 (2009); *State v. Turnquest*, 305 Ga. 758, 774-775 (2019). [↑](#endnote-ref-3)
4. The officer will tell the defendant to assume a heel-toe stance on a surface that is generally flat and smooth. The officer will specifically advise the defendant to put their left foot on an imaginary line and then put their right foot in front of the left foot in a heel-toe position. The defendant is told to put their arms by their sides and not to start until they are told to do so. The officer usually stops here and ensures that the defendant understands the instructions given to that point. Assuming the defendant indicates that he/she understands, the officer will tell the defendant to take nine steps down the imaginary line, turn in a specific manner and then take nine heel-to-toe steps back to the beginning point. The turn procedures are described by the officer as including the obligation to, while keeping the front foot on the line, take several small steps until facing in the opposite direction and then to resume the exercise by taking nine heel-to-toe steps back to the point of beginning. While walking the defendant is told to look down at their feet, count out loud, keep their arms by their side and once they begin, do not stop until the test is over. Once again, the defendant is asked if they understand the instructions. [↑](#endnote-ref-4)
5. Without any additional information, the San Diego validation study showed that 2 clues on the WAT was 79% accurate in determining that the driver had a BAC at or above .08%. That is exactly why they conduct multiple tests; 79% is not enough but when added with the results of other tests, the reliability of the SFST increases dramatically. [↑](#endnote-ref-5)
6. *Mitchell v. State*, 301 Ga. 563, 565-566 (2017), overruled on other grounds by *State v. Turnquest*, 305 Ga. 758, n. 15 (2019), citing *Stewart v. State*, 280 Ga. App. 366 (2006) and *Hawkins v. State*, 223 Ga. App. 34, 36 (1996). [↑](#endnote-ref-6)
7. *State v. Smith*, 329 Ga. App. 646, 649 (2014), citing *State v. Pastorini*, 222 Ga. App. 316-318-319 (1996), overruled on other grounds by *State v. Turnquest*, 305 Ga. 758, n. 15 (2019). [↑](#endnote-ref-7)
8. *State v. Smith*, 329 Ga. App. 646, 649 (2014), citing § 24-7-701 relating to lay witness opinion testimony. [↑](#endnote-ref-8)
9. *State v. Smith*, 329 Ga. App. 646, 649 (2014). [↑](#endnote-ref-9)
10. The instructional stage begins with the officer instructing the suspect to stand straight with their feet together and their arms by their sides. They are told to maintain that position until told otherwise. The suspect is then asked if he/she understands the instructions. The officer then tells the suspect to lift either leg six inches off the ground and count by “thousands” (i.e. “one-thousand-one, one-thousand-two, etc.”) until being told to stop. While counting, the suspect is told to look down at his/her foot that is raised, count out loud, keep arms by his/her side and keep his/her legs straight. If the suspect indicates that he/she understands the instructions, the suspect is told to begin. The suspect then begins the balance and counting stage of the test. [↑](#endnote-ref-10)
11. The San Diego validation study showed that the presence of 2 or more clues during the OLS test was 83% accurate in predicting that the suspect’s BAC was at or above .08%. [↑](#endnote-ref-11)
12. *Mitchell v. State*, 301 Ga. 563, 565-566 (2017), overruled on other grounds by *State v. Turnquest*, 305 Ga. 758, n. 15 (2019), citing *Stewart v. State*, 280 Ga. App. 366 (2006) and *Hawkins v. State*, 223 Ga. App. 34, 36 (1996). [↑](#endnote-ref-12)
13. *State v. Smith*, 329 Ga. App. 646, 649 (2014), citing *State v. Pastorini*, 222 Ga. App. 316-318-319 (1996), overruled by *State v. Turnquest*, 305 Ga. 758, n. 15 (2019). [↑](#endnote-ref-13)
14. *State v. Smith*, 329 Ga. App. 646, 649 (2014), citing § 24-7-701 relating to lay witness opinion testimony. [↑](#endnote-ref-14)
15. *State v. Smith*, 329 Ga. App. 646, 649 (2014). [↑](#endnote-ref-15)
16. *Walsh v. State*, 303 Ga. 276, n. 1 (2018). [↑](#endnote-ref-16)
17. *Walsh v. State*, 303 Ga. 276, n. 1 (2018) (conducting HGN testing while the suspect wore his/her eyeglasses is a “substantial deviation” from how the officer was trained to conduct the testing and having a suspect wear his/her eyeglasses during HGN testing renders the test inadmissible). [↑](#endnote-ref-17)
18. If the pupils are not equal in size to each other, it is possible that the suspect has a history of head trauma that would suggest that conducting HGN testing would not reveal reliable results. [↑](#endnote-ref-18)
19. The officer gives verbal instructions to the suspect to keep their hands by their side and to follow the stimulus with their eyes and not move their head in an attempt to follow the stimulus. The officer makes 2-4 passes with the stimulus, starting near the nose of the suspect and moving out to a point where the eyes appear to be at the extreme edge of the suspect’s eye socket and then moving across to the other extreme edge of the suspect’s field of vision. The officer moves the stimulus across the field of vision 2-4 times and each pass should take approximately 2 seconds. State v. Culler, 351 Ga. App. 19, 26 (2019). (Failure to make the passes more quickly than 2 seconds out and two seconds back will render the results of “lack of smooth pursuit” in the overall HGN SFST unreliable). Therefore, the stimulus is not moving too fast or too slowly for the officer to watch the tracking of the suspect’s eyes. These first passes are looking for whether the eyes track equally and smoothly. The officer will then continue the passes and stop at the point of maximum deviation (the extreme edge of the suspect’s field of vision). The officer will stop at the point of maximum deviation for approximately 4 seconds. The officer is looking for signs that the eyes cannot stay focused on the stimulus or whether the eyes start jerking when attempting to look at the stimulus at the point of maximum deviation. The officer then does the same thing at the point of maximum deviation with the other eye of the suspect. The officer will then make 4 additional passes from one extreme point to the other in an attempt to determine whether the eyes show signs of nystagmus before the eyes reach a 45 degree angle from the nose. [↑](#endnote-ref-19)
20. The San Diego validation study revealed that HGN with 4 or more clues accurately predicted a BAC at .08% or more with 88% accuracy. See *State v. Culler*, 351 Ga. App. 19, 28 (2019), citing *Parker v. State*, 307 Ga. App. 61, 64 (2010). [↑](#endnote-ref-20)
21. It should be noted that if the officer observes any nystagmus in connection with the VGN, shows that the level of intoxication for this particular defendant is higher than that particular suspect’s normal level of intoxication. It can also reveal the use of a dissociative anesthetic. A dissociative anesthetic would include nitrous oxide, ketamine, DXM or PCP (“Angel Dust”). [↑](#endnote-ref-21)
22. *Walsh v. State*, 303 Ga. 276, 811 S.E.2d 353 (2018), citing *Hawkins v. State*, 223 Ga. App. 34, 37–38 (1996). *United States v. Nguyen*, No. CR F 06-0075 AWI, 2008 WL 540230, at \*11 (E.D. Cal. Feb. 25, 2008). *Walsh* was decided under the *Harper* standard. *Nguyen* was decided under *Daubert* but was based upon prior California law. [↑](#endnote-ref-22)
23. *United States v. Nguyen*, No. CR F 06-0075 AWI, 2008 WL 540230, at \*11 (E.D. Cal. Feb. 25, 2008). [↑](#endnote-ref-23)
24. *Stewart v. State*, 280 Ga. App. 366, 369 (2006), citing *State v. Tousley*, 271 Ga. App. 874, 879 (2005); *State v. Culler*, 351 Ga. App. 19, 26 (2019)(“to have any evidentiary value, the State must prove ‘that the person performing the test substantially performed the [same] in an acceptable manner’”). [↑](#endnote-ref-24)
25. *Walsh v. State*, 303 Ga. 276, 811 S.E.2d 353 (2018)., citing *Spencer v. State*, 302 Ga. 133, 135 (2017); *State v. Culler*, 351 Ga. App. 19, 26 (2019). [↑](#endnote-ref-25)
26. *Walsh v. State*, 303 Ga. 276, 811 S.E.2d 353 (2018)., citing *State v. Tousley*, 271 Ga. App. 874, 879-880 (2005). (“To show that the officer substantially performed the HGN test in an acceptable manner, the State may have the arresting officer testify both as a fact witness, regarding how he or she administered and interpreted the test, and as an expert witness, giving an opinion that he or she administered and interpreted the test properly under law enforcement guidelines.”) [↑](#endnote-ref-26)
27. *Rowell v. State*, 312 Ga. App. 559, 562-563 (2011). [↑](#endnote-ref-27)
28. In the Romberg test, the suspect is instructed to shut his/her eyes, tilt his/her head backward and estimate the passage of 30 seconds. When the suspect believes that 30 seconds has passed, the suspect should bring his/her head forward, open the eyes and say “stop.” The “clues” normally associated with the Romberg test is eye tremors (i.e. the suspect’s eyelids flutter when the eyes are closed and the head is tilted backward) and the time estimation is “off” by more than 5 seconds. [↑](#endnote-ref-28)
29. *Mitchell v. State*, 201 Ga. 563, 567 (2017) (“We conclude that, on the basis of the evidence presented at the hearing in this case, admissibility of the Romberg test is subject to the *Harper* standard. The significance of eyelid tremors or an individual's “internal clock,” how they may be affected by the consumption of alcohol, and particularly whether a range of five seconds above or below the actual passage of 30 seconds establishes impairment, are not matters of common sense or experience, nor are they obvious to the average lay observer. The trial court therefore erred in failing to conduct a *Harper* analysis, whether through the evaluation of expert testimony or through the examination of exhibits, treatises, or the law of other jurisdictions.”) The *Mitchell* decision included several endnotes that suggest that other states have also considered the Romberg test a/k/a Romberg Balance test and have not found that it was scientifically sound to prove what officers allege it proves) [↑](#endnote-ref-29)
30. In the eye convergence test, the officer holds a pen or other stimulus about 15 inches from the subject’s face and point the tip of the pen toward the subject’s nose. The officer will then ask the subject to hold his head still and follow the pen with his eyes. The officer then moves the pen in a slow circle. Once the officer determines the subject is following the pen, the officer brings it in slowly and steadily towards the bridge of the subject’s nose. The officer does not touch the suspect with the pen but comes very close to the bridge of the suspect’s nose. [↑](#endnote-ref-30)
31. *Campbell v. State*, 313 Ga. App. 436 (2011); *Crum v. State*, 194 Ga. App. 271 (1990). [↑](#endnote-ref-31)
32. *Hopkins v. State*, 283 Ga. App. 654, (2007); *Capps v. State*, 273 Ga. App. 696 (2005); *Heller v. State*, 234 Ga. App. 630 (1998). [↑](#endnote-ref-32)
33. *Schoolfield v. State*, 251 Ga. App. 52, n. 3 (2001); *Stephens v. State*, 271 Ga. App. 634, n. 1 (2005). [↑](#endnote-ref-33)
34. *State v. Bradberry*, 357 Ga. App. 60, 65-66 (2020). The decision in *Bradberry* specifically overruled prior case law which would have allowed evidence of a refusal to submit to an Alco-Sensor test to be admitted, such as *MacMaster v. State*, 344 Ga. App. 222 (2018). [↑](#endnote-ref-34)
35. (a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40–6–391, evidence of the amount of alcohol or drug in a person's blood, urine, breath, or other bodily substance at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply: (1)(A) Chemical analysis of the person's blood, urine, breath, or other bodily substance, to be considered valid under this Code section, shall have been performed according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation on a machine which was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order and by an individual possessing a valid permit issued by the Division of Forensic Sciences for this purpose. The Division of Forensic Sciences of the Georgia Bureau of Investigation shall approve satisfactory techniques or methods to ascertain the qualifications and competence of individuals to conduct analyses and to issue permits, along with requirements for properly operating and maintaining any testing instruments, and to issue certificates certifying that instruments have met those requirements, which certificates and permits shall be subject to termination or revocation at the discretion of the Division of Forensic Sciences.(2) When a person shall undergo a chemical test at the request of a law enforcement officer, only a physician, registered nurse, laboratory technician, emergency medical technician, or other qualified person may withdraw blood for the purpose of determining the alcoholic content therein, provided that this limitation shall not apply to the taking of breath or urine specimens.... [↑](#endnote-ref-35)
36. *State v. Padgett*, 329 Ga. App. 747, 750 (2014), citing *Perano v. State*, 250 Ga. 704 (1983). [↑](#endnote-ref-36)
37. *State v. Carter*, 292 Ga. App. 322, 323 (2008); *Dixon v. State*, 227 Ga. App. 533, 534 (1997). [↑](#endnote-ref-37)
38. *Oldham v. State*, 205 Ga. App. 268, 269 (1992), cited in *State v. Padgett*, 329 Ga. App. 747, 750 (2014). [↑](#endnote-ref-38)
39. *Jackson v. State*, 340 Ga. App. 228, 231 (2017); *Hynes v. State*, 341 Ga. App. 500, 512 (2017). [↑](#endnote-ref-39)
40. *Carr v. State*, 222 Ga. App. 776, 777-778 (1996). [↑](#endnote-ref-40)
41. O.C.G.A. §40-6-392(e)(1). [↑](#endnote-ref-41)
42. There was a period of time where DUI defense lawyers repeatedly attempted to have Georgia judges demand that CMI turn over their “source code” for the Intoxilyzer machine. This is an extreme event and because it has not met with any success, I will not address it more fully herein. However, if presented with any type of request to subpoena a witness from CMI (they are located in Kentucky), you should probably refer to *Phillips v. State*, 324 Ga. App. 728 (2013); *Holowiak v. State*, 333 Ga. App. 606 (2015); *Smith v. State,* 338 Ga. App. 62 (2016) and *Cronkite v. State*, 293 Ga. 476 (2013). The new Code section for Uniform Act to Secure the Attendance of Witnesses from Without the State is found at O.C.G.A. §24-13-94. [↑](#endnote-ref-42)
43. *Smith v. State*, 338 Ga. App. 635, 639 (2016). [↑](#endnote-ref-43)
44. *Smith v. State*, 338 Ga. App. 635, 639 (2016). [↑](#endnote-ref-44)
45. See the evidence paper produced as part of the certification process for information on how a foundation can be laid for admission of “business records” under O.C.G.A. §24-8-803(6) and §24-9-902(11). [↑](#endnote-ref-45)
46. *Phillips v. State*, 324 Ga. App. 728, 733 (2013). [↑](#endnote-ref-46)