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HORIZONTAL GAZE NYSTAGMUS STATE CASE LAW SUMMARY

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. 4th 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. 4th 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.

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. 4th 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. 4th 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

HGN must meet the *Frye* test of admissibility. In this case, the state presented no evidence to meet its burden under the *Frye* test.

Connecticut v. Merritt, 647 A.2d 1021, 1028 (Conn. App. Ct. 1994).

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.

Florida

I. Evidentiary Admissibility

The 3rd 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 4th 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.

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.

Sieveling v. Georgia, 469 S.E.2d 235, 219-20 (Ga. Ct. App. 1996).

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.”

Sieveling, 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*, 2000 Ill. LEXIS 1698 (Ill. 2000)

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.

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).

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.

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.

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.

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).

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 that 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 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).

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).

III. Purpose and Limits of HGN

The Court did not address this issue.

New York

I. Evidentiary Admissibility

Quinn held that HGN test results are admissible under *Frye* standard of “general acceptance.” However, the case no longer has precedential value as it was later reversed on other grounds. *People v. Quinn*, 580 N.Y.S.2d 818, 826 (Dist. Ct. 1991), *rev’d on other grounds*, 607 N.Y.S.2d 534 (N.Y. App. Div. 1993).

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.

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).

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. Fiskien, 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.

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.
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).

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

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

The Court did not address this issue.

