DUI & TRAFFIC ISSUES

ILLINOIS STATE BAR ASSOCIATION

DUI STANDARDIZED FIELD SOBRIETY TESTING {SFST’S}
PRELIMINARY BREATH TESTING {PBT}

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HISTORY AND BACKGROUND OF STANDARDIZED FIELD SOBRIETY TESTS (SFSTs)

In 1975, the National Highway Traffic Safety Administration (NHTSA) requested proposals to develop a standardized test battery easy to use on the side of the road. Marcelline Burns and her colleagues at a nonprofit Southern California Research Institute in Los Angeles got the job.

Burns, 77, is a research psychologist who calls herself the “grandma guru” of the standardized field sobriety tests. She’s had a long career developing them, testifying in courts nationwide as an expert witness in training police officers to use them correctly.

Burns final report, “Psychophysical Tests for DWI Arrests” was published in 1977. She wrote that while all six tests were sensitive to alcohol-meaning that drunk subject tended to perform worse than sober ones-the “best” tests were the three in use today. Chicago Tribune, Sunday, December 4, 2005, Section 12, Page 3.

Six tests were used in the initial stages, which was compromised of a “test group”. Tests were as follows: finger counting (thumb and fingers), finger to nose; horizontal gaze nystagmus tests (HGN); the one legged stand (OLS); the walk and turn (WAT); Also tests used by the officers prior to the formulation of the excepted three standardized tests batteries were also as follows: (1) coins on the ground and the officer ordered that only nickels and quarters be picked up; (2) having a driver lean back and touch one finger to his nose: (3) reciting the alphabet without singing. See Chicago Tribune article referenced above.

Burns’ test subjects were mostly men ages 22 to 29.

Interestingly, hundreds of thousands of drivers have been arrested- no doubt many deservedly so- on the basis of a 30-year-old study that, that had never been published in a peer-reviewed, scientific journal; never tested on a large scale with a control group; and has nothing to do with impairment from alcohol. Burns, in the tribune article, admits up front that the tests are designed only to gauge blood alcohol content, not whether you’re a menace on the road. See Chicago Tribune article referenced above.

Out of six, three were chosen to be sufficiently reliable and accurate to conduct further studies in the field, those tests were: (1) walk and turn (WAT); (2) one legged stand (OLS); and (3) Horizontal Gaze Nystagmus (HGN). Marcelline Burns and Herbert Moskowitz, Psychophysical Tests for DWI Arrest, final report, DOT-HS-802-864 (1981).

The one legged stand test and the walk and turn are “divided attention” tests that require mental concentration and physical coordination. Walk and turn by itself was 68 % accurate and the one legged stand by itself was sixty-five percent accurate and the one legged stand by itself was 65 % accurate.
The HGN and the walk and turn combined are eighty percent accurate in determining whether a subject’s blood alcohol concentration was .10 or above. The legal impairment limit at the time of the test was .10 but now it is .08.

Thus National Highway Traffic Safety Administration (NHTSA) developed and validated a battery of standardized field sobriety tests (SFSTs) which are used by law enforcement officers to improve the detection of drivers under the influence of alcohol (DUI).

The three tests, being Horizontal Gaze Nystagmus Test, Walk and Turn test, and the One Legged Stand Test, have been validated for alcohol only – not any other drugs. The police officers are relying more on these tests when the motorist agrees to perform said test. It is important that a trial attorney have a certified NHTSA manual in the courtroom at all time and, not only be able to identify the tests, but be able to inquire of the officer about the appropriate foundational requirements at cross examination and the Officer's administration of the tests.

Experts in the field acknowledge there is no correlation between performance on standardized field sobriety testing and operation of a motor vehicle. These tests are only used for alcohol impairment and not predicting a BAC of .08 or greater. The SFSTs are screening tests determining probable cause of arrest. According the NHSTA manual, the preliminary breath test should be used to confirm even the arrest decision. (625 ILCS 5/11-501.5)

Should the officer not know the NHTSA Manual: To establish the foundation of the manual:

“Officer, you would agree that your law enforcement community recognizes the National Highway Safety Administration (NHTSA) is an authoritative source of information regarding DUI enforcement?"

“And you would agree that the NHTSA’s DUI publications are recognized as authoritative in matters pertaining to DUI enforcement...”

Now, he’s generally validated any NHTSA publication. You still may have to authenticate it before Defense attorney impeaches him with it.
REQUIRED COMPLIANCE AND ADMINISTRATION OF TEST FOR VALIDATION

According to the NHTSA manual, the validity of the SFST’s are dependent on the officer’s administration, scoring, and interpretation of the test. The NHTSA manual states as follows:

“IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

(A) THE TESTS ARE PREFORMED IN A PRESCRIBE, STANDARDIZED MANNER,

(B) THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECTS PERFORMANCE,

(C) THE STANDARDIZED CRITERIA EMPLOYED TO INTERPRET THAT PERFORMANCE.

IF ANY OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS HAVE CHANGES THE VALIDITY IS COMPROMISED.”

At end of the test, examine each factor and determine how many clues have been recorded. Remember, each clue may appear several times, but still only constitutes one clue.

NHTSA-R/206 Manual, VIII-19, April 2009

Despite the training that the law enforcement officers received and the manual, the courts have diminished and deluded, in my opinion, the validity of the tests by allowing the officers to be less than stellar in the performance of these tests and, quite frankly, sloppy to not conform with the standards and get by with a lot of shoddy police work.

In the NHTSA SFST Instructor Manual, the following language in found:

“How flexible are the Standardized Field Sobriety Tests”

THE STANDARDIZED FIELD SOBRIETY TESTS ARE NOT AT ALL FLEXIBLE. THEY MUST BE ADMINISTERED EACH TIME, EXACTLY AS OUTLINED IN THIS COURSE.”
NHTSA acknowledges that officers trained to conduct SFSTs can have their skills degrade over time, and the modification to standardized procedures could result in the officer administering SFSTs according to outdated protocols. NHTSA recommends that the law enforcement agencies conduct refresher training of SFST instructors and practitioners (see National Highway Traffic Safety Administration, US Department of Transportation Development of a Standardized Field Sobriety Test Training Management Program 2001).

1. What are SFSTs?

   A. A three test battery scientifically studied documented and promoted by the National Highway Traffic Safety Administration (NHTSA) for use by law enforcement officer in the field. See NHTSA Manual HS 179 R1-03.

   B. SFSTs consist of: (1) the horizontal gaze nystagmus (HGN) test, (2) the walk and turn test and (3) the one leg stand test. The walk and turn test and the one leg stand test are divided attention tests whereas the HGN vertical gaze nystagmus is a psychophysical motor skills test. When properly administered and interpreted, all three are highly reliable tools for evaluating a DUI suspect’s degree of impairment.

   Note: Reliability is 77% for HGN, 68% for walk and turn and 65% for one leg stand tests.

   Also Note: there are non standard (non validated) tests used (See Page 18, Section L)

   C. Although Illinois does not require a police officer to take the continuing SFST training to be certified by State approved inspectors to administer the testing, the majority of States are moving towards that and, in my opinion, it is very good idea.

   Other than the DUI officers who attend the upgraded training or write a lot of DUI's, the quality of administration of SFST's is overall average.

   D. Instruction reading and note taking of field observations

**HORIZONTAL GAZE NYSTAGMUS**

Nystagmus is a natural, normal phenomenon involving involuntary jerking of the eyes. Alcohol and certain other drugs do not cause nystagmus but may exaggerate or magnify it (see NHTSA Manual, section 8, page 3). There are at least 38 possible causes of nystagmus which police officers and appellate courts are not aware of and most of the time and downplayed despite reported cases; *Schultz vs. State*, 664 A.2nd 60 (14th Dist. 1995). Some of the causes, but not limited to, inner ear problems, brain damage, eye fatigue, assumption of excessive amounts of caffeine, some prescription drugs, pain medications, etc… (See NHTSA Manual, section 8, page 6-8).

A. 38 different causes of Nystagmus, other than alcohol:

(1) Problems with the inner ear labyrinth; (2) irrigating the ears with warm or cold water under peculiar weather conditions; (3) influenza; (4) streptococcus infection; (5) vertigo; (6) measles; (7) syphilis; (8) arteriosclerosis; (9) muscular dystrophy; (10) multiple sclerosis; (11) Korchaff’s syndrome; (12) brain hemorrhage; (13) epilepsy; (14) hypertension; (15) motion sickness; (16) sunstroke; (17) eyestrain; (18) eye muscle fatigue; (19) glaucoma; (20) changes in atmospheric pressure; (21) consumption of excessive amount of caffeine; (22) excessive exposure to nicotine; (23) aspirin; (24) circadian rhythms; (25) acute trauma to the head; (26) chronic trauma to the head; (27) some prescription drugs, tranquilizers, pain medications, anti convulsants; (28) barbiturates; (29) disorders of the vestibular apparatus and brain stem; (30) cerebellum dysfunction; (31) heredity; (32) diet; (33) toxins; (34) exposure to solvents, PCBs, dry cleaning fumes, carbon monoxide; (35) extreme chilling; (36) lesions; (37) continuous movement of the visual field past the eyes; and (38) antihistamine use. *Schultz vs. State*, 664 A.2nd 60 (14th Dist. 1995).

B. Dr. Zenon Zuk States expert on McKown remand, Illinois Supreme Court Frye hearing on cross examination admitted to 125 diseases or conditions causing nystagmus.

C. Google (Nystagmus) (“287 causes of Nystagmus)
D. 47 Different kind of Nystagmus:

(1) Acquired; (2) Anticipatory (induced); (3) Arthrokinetic (induced, somatosensory); (4) Associated (induced, Stansky’s); (5) Audio kinetic (induced); (6) Bartel’s (induced); (7) Brun’s; (8) Centripetal; (9) Cervical (neck torsion, vestibular-basilar artery insufficient); (10) Circular/Elliptic/Oblique (alternating windmill, circumduction, diagonal, elliptic, gyratory, oblique, radiary); (11) Congenital (fixation hereditary); (12) Convergence; (13) Convergence-evoked; (14) Dissociated (disjunctive; (15) Downbeat; (16) Drug Induced (barbiturate, bow tie, induced); (17) Epileptic (ictal); (18) Flash induced; (19) Gaze-evoked (deviational gaze paretic, neurasthenic, seducible, setting in); (20) Horizontal; (21) Induced (provoked); (22) Intermittent Vertical; (23) Jerk; (24) Latent/Manifest Latent (monocular fixation, unimacular); (25) Lateral Medullary; (26) Lid; (27) Miner’s (occupational); (28) Muscle Paretic (myasthenic; (29) Optokinetic (induced, optomotor, panoramic, railway, sigma); (30) Optokinetic After Induced (post optokinetic, reverse post optokinetic); (31) Pendular (talantropia); (32) Periodic/Aperiodic Alternating; (33) Physiologic (end point, fatigue); (34) Pursuit After induced; (35) Pursuit Defect; (36) Pseudo spontaneous; (37) Rebound; (38) Reflex (Baer’s); (39) See Saw; (40) Somatosensory; (41) Spontaneous; (42) Stepping Around; (43) Torsional; (44) Uniocular; (45) Upbeat; (46) Vertical; (47) Vestibular (ageotropic, geotro-pic, Bechterew’s, caloric, compensatory, electrical/faradic/gal vanic, labyrinthine, pneumatic/compression, positional/alcohol, pseudo caloric).

Also according to NHTSA, the entire test should take a minimum of 82 seconds.

For law enforcement purposes the Nystagmus must be distinct and sustained.

Vertical nystagmus (VGN) used for high amounts of alcohol or the “dip” drugs, (depressant inhalants, PCP), Schultz v. State of Maryland, (Infra) Resting nystagmus occurs when the eyes are looking straight ahead and observer sees distinct sustained nystagmus. This condition not usually seen and indicates a higher degree of the drug PCP.

If the foundation is met, this test indicates possible “alcohol impairment” and consumption of alcohol and possible alcohol impairment, but not proof beyond a reasonable doubt of person being under the influence of alcohol.
Furthermore, based on the officer’s observations, he can not indicate a specific alcohol concentration. *People v. McKown*, 236 Ill. 2d 228 (2010)

Recommended reading:
- HGN: The Science and the Law
- A Resource Guide for Judges, Prosecutors and Law Enforcement
- APRI's National Traffic Law Center, call them for a free copy at 703/549-5253 or go to www.ndaa-apri.org See NHTSA Manual HS 179 R1/03 (Page 33)
- ICLE-Defending DUI and related cases-Chapter 6 “Field Sobriety Testing”
  *People v. McKown*, 236 Ill. 2d 278 (2010)

E. Test Procedures for HGN

Procedure to assess possible medical impairment:

Prior to administering of HGN, the eyes are checked for equal pupil size, resting nystagmus, and equal tracking (can they follow an object together). If the eyes do not track together, or if the pupils are noticeably unequal in size, the chance of medical disorders or injuries causing the nystagmus is present.

Procedure of Horizontal Gaze Nystagmus testing the three clues:

The test you will use at roadside is “Horizontal Gaze Nystagmus” – an involuntary jerking of the eyes occurring as the eyes gaze toward the side. Some jerking will be seen if the eyes are moved far enough to the side.

1. The Lack of Smooth Pursuit (Clue Number One) - The eyes can be observed to jerk or ‘bounce” as they follow a smoothly moving stimulus, such as pencil or penlight. The eyes of an unimpaired person will follow smoothly, i.e., a marble rolling across a smooth pane of glass, or windshield wipers moving across a wet windshield.

2. Distinct and Sustained Nystagmus at Maximum Deviation (Clue Number Two) -Distinct and sustained nystagmus will be evident when the eye is held at maximum deviation for a minimum of four seconds. People exhibit slight jerking of the eye at maximum deviation, even when unimpaired, but this will not be evident or sustained for more than a few seconds. When impaired by alcohol, the jerking will be larger, more pronounced, sustained for more than four seconds, and easily observable.

3. Onset of Nystagmus Prior to 45 Degrees (Clue Number Three) – The point at which the eye is first seen jerking. If the jerking begins prior to 45 degrees it is evident that the person has a BAC above 0.08, as shown by the recent research.
The higher the degree of impairment, the sooner the nystagmus will be observable.

Specific Procedures

If the suspect is wearing eyeglasses, have them removed.

Give the suspect the following instructions from a safe position. (FOR OFFICER SAFETY KEEP YOUR WEAPON AWAY FROM SUSPECT):

- “I am going to check your eyes.”
- “Keep your head still and follow this stimulus with your eyes only.”
- “Keep following the stimulus with your eyes until I tell you to stop.”

Position the stimulus approximately 12-15 inches from the suspect’s nose and slightly above eye level. Check to see that both pupils are equal in size. If they are not, this may indicate a head injury. You may observe Resting Nystagmus at this time, then check the suspect’s eyes for ability to track together. Move the stimulus smoothly across the suspect’s entire field of vision. Check to see if the eyes track the stimulus together or one lags behind the other. If the eyes don’t track together it could indicate a possible medical disorder, injury, or blindness.

“Begin by asking “are you wearing contact lenses”, make a not whether or not the suspect wears contact lenses before starting the test.

“If the suspect is wearing eyeglasses, have then removed.

“Give the suspect the following instructions from a position of interrogation (FOR OFFICER SAFETY KEEP YOUR WEAPON AWAY FROM THE SUSPECT):

- “I am going to check your eyes.”
- “Keep your head still and follow the stimulus with your eyes only.”
- “Keep focusing on this stimulus until I tell you to stop.”

“Position the stimulus approximately 12-15 inches from the suspect’s nose and slightly above eye level. Check the suspect’s eyes for the ability to track together. Move the stimulus smoothly together or if one lags behind the other. If the eyes don’t track together it could indicate a possible medical disorder, injury, or blindness.

“Next, check to see that both pupils are equal in size. If they are not, this may indicate a head injury.

NHTSA Manual HS 178 R/206, Section VIII-5 & VIII-6 (April 2009)
“Check the suspect’s left eye by moving the stimulus to your right. Move the stimulus smoothly, at a speed that requires about two seconds to bring the suspect’s eye as far to the side as it can go. While moving the stimulus, look at the suspect’s eye and determine whether it is able to pursue smoothly. Now, move the stimulus all the way to the left, back across suspect’s face checking if the right eye pursues smoothly. Movement of the stimulus should take approximately two seconds out of tow seconds back for each eye. (Repeat the procedure).

“After you have checked both eyes for lack of smooth pursuit check the eyes for distinct nystagmus at maximum deviation beginning with the suspect’s left eye. Simply move the object to the suspect’s left side until the eye has gone as far to the side as possible. Usually, not white will be showing in the corner of the eye at maximum deviation. Hold the eye at the position for about four seconds, and observe the eye for distinct nystagmus. Move the stimulus all the way across the suspect’s face to check the right eye holding that position for approximately four seconds. (Repeat the procedure).

“After checking the eyes at a maximum deviation, check for onset of nystagmus prior to 45 degrees. Start moving the stimulus to the right (suspect’s left eye) at a speed that would take about four seconds for the stimulus to reach the edge of the suspect’s shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Now, move the stimulus to the left (suspect’s right eye) at a speed that would take about four seconds for the stimulus to reach the edge of the suspect’s shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Repeat the procedure. NOTE: It is important to use the full four seconds when checking for the onset of nystagmus. If you move the stimulus too fast, you may go past the point of nystagmus or miss it all together. If the suspect’s eyes start jerking before they reach 45 degrees check to see that some of the white of the eye is still showing on the side closest to the ear. If no whit of the eye is showing, you have either taken the eye too far to the side (that is more than 45 degrees) or the person has unusual eyes that will not deviate very far to the side.

“NOTE: Nystagmus may be due to causes other than alcohol. These other causes include seizure medications, PCP, inhalants, barbiturates, and other depressants. A large disparity between the performance of the right and left eye may indicate a medical condition.” NHTSA Student Manual HS 178 R2/206 Section VIII P.7-8 (April 2009).
F. TEST INTERPRETATION

You should look for three clues of nystagmus in each eye:

- The eye cannot follow an object smoothly.
- Nystagmus is distinct when the eye is at maximum deviation for a minimum of four seconds.
- The angle of onset of nystagmus is prior to 45 degrees

Based on the original research, if you observe four or more clues it is likely that the suspects BAC is above 0.08. Using this criterion you will be able to classify about 77% of your suspects accurately. This was determined during laboratory and field testing and helps you weigh the various field sobriety tests in this battery as you make your arrest decision. NHTSA Manual HS 178 R/206, Section VIII-8 (April 2009)

As a “pretest” the officer should use a stimulus to see if the eyes are of equal pupil size, equal tracking and NO resting nystagmus. If not, there is a medical problem and the test should not be administered.

Per the NHSTA Training Manuals, if an officer observes four or more clues total for both eyes, it is likely that the suspect’s BAC is above 0.08; however, see People v. McKown (Infra), where 4 clues = 0.04 BAC (Dr. Citek’s Testimony)

In McKown (Infra), the Court held “Evidence of HGN field sobriety testing, when performed according to the NHTSA protocol by a properly trained officer, is admissible under the Frye test for the purpose of showing whether the subject has likely consumed alcohol and may be impaired.

“We hasten to add, however, that the HGN test would not be included within the observations of the officer because, unlike the other psychomotor tests such as the walk-and-turn and one-leg stand, the HGN involves observations a layperson would not make in assessing an individual’s sobriety, and is not within a juror’s common understanding.” (Citations omitted.)

“Both the National Highway Traffic and Safety Administration manual and the Ohio Supreme court recognize that any deviation from the testing protocol renders the HGN test results unreliable.”

“The decisions in Schmitt and Homan make clear that absent strict compliance in the realm of any FST, such as the HGN, that is not a psychomotor test within the observations a layperson would make in assessing an individual’s sobriety, and is not within a juror’s common understanding, will not satisfy the threshold reliability standard for the admission of expert testimony pursuant to Evid. R. 702.” (Emphasis added.).
QUESTIONS TO BE CONSIDERED:

1. Can or should HGN be given while a motorist is sitting in their vehicle?
2. Can the HGN be administered while the individual is lying prone in the most common situation, strapped to an emergency gurney?

THE WALK-AND-TURN TEST

G. Procedures for the Walk-and-Turn Test

The following are the NHTSA standardized clues for the Walk and Turn Test:

1. Instructions Stage: Initial Positioning and Verbal Instructions
   
   For standardization in the performance of this test, have the suspect assume the heel-to-toe stance by giving the following verbal instructions, accompanied by demonstrations:
   
   • “Place your left foot on the line” (real or imaginary). Demonstrate.
   • “Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot.” Demonstrate.
   • “Place your arms down at your sides.” Demonstrate.
   • “Maintain this position until I have completed the instructions. Do not start to walk until told to do so.”
   • “Do you understand the instructions so far?” (Make sure suspect indicated understanding.)

2. Demonstrations and Instructions for the Walking Stage

   Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:
   
   • “When I tell you to start, take nine heel-to-toe steps, turn, and take nine heel-to-toe steps back.” (Demonstrate 3 heel-to-toe steps.)
   • “When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this.” (Demonstrate).
   • “While you are walking, keep your arms at your sides, watch your feet at all times, and count you steps out loud.”
   • “Once you start walking, don’t stop until you have completed the test.”
• “Do you understand the instructions?” (Make sure suspect understands.)
• “Begin, and count your first step from the heel-to-toe position as ‘One.’”

3. Test Interpretation

You may observe a number of different behaviors when a suspect performs this test. Original research demonstrated that the behaviors listed below are likely to be observed in someone with a BAC above 0.08. Look for the following clues each time this test is given:

A. Cannot keep balance while listening to instructions. Two tasks are required at the beginning of this test. The suspect must balance heel-to-toe on the line, and at the same time, listen carefully to the instructions. Typically, the person who is impaired can do only one of these things. The suspect may listen to the instructions, but not keep balance. Record this clue if the suspect does not maintain the heel-to-toe position throughout the instructions. (Feet must actually break apart). Do not record this clue if the suspect sways or uses the arms to balance but maintains the heel-to-toe position.

B. Starts before instructions are finished. The impaired person may also keep balance, but not listen to the instructions. Since you specifically instructed the suspect not to start walking “until I tell you to begin,” record this clue if the suspect does not wait.

C. Stops while walking. The suspect pauses for several seconds. Do not record if suspect is merely walking slowly.

D. Does not touch heel-to-toe. The suspect leaves a space of more than one-half inch between the heel and toe on any step.

E. Steps off the line. The suspect steps so that one foot is entirely off the line.

F. Uses arms to balance. The suspect raises one or both arms more than 6 inches from the sides in order to maintain balance.

G. Improper Turn. The suspect removes the front foot from the line while turning. Also record this clue if the suspect has not followed directions as demonstrated, i.e. spins or pivots around.

H. Incorrect Number of Steps. Record this clue if the suspect takes more or fewer than nine steps in either direction.
Note: If suspect can’t do the test, record observed clues and document the reason for not completing the test, e.g. suspect’s safety.

If the suspect has difficulty with the test (for example, steps off the line), continue from that point, not from the beginning. This test may lose its sensitivity if it is repeated several times.

Observe the suspect from a safe distance and limit your movement which may distract the suspect during the test. Always consider officer safety.

Based on original research, if the suspect exhibits two or more clues on this test or fails to complete it, classify the suspects BAC as above 0.08.

H. Test Conditions for the Walk-and-Turn Test

4. Test Conditions

Walk and Turn test requires a designated straight line, and should be conducted on a reasonably dry, hard, level, non-slippery surface. There should be sufficient room for suspects to complete nine heel-to-toe steps. Note: Recent field validation studies have indicated that varying environmental conditions have not affected a suspect’s ability to perform this test.

The original research indicated that individuals over 65 years of age, back, leg or inner ear problems had difficulty performing this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

5. Combined Interpretation of Horizontal Gaze Nystagmus and Walk and Turn Tests

Based on the original research, combining four or more clues of HGN and two or more clues of the Walk and Turn, suspects can be classified as above 0.08 BAC 80% of the time.

Each clue is only scored one time even if more than one fault is seen. Using this criterion, you will be able to accurately classify 68% of your suspects.

NHTSA Manual HS 178 R/206, Section VIII-11 (April 2009)
ONE-LEGGED STAND TEST

I. Procedures for One-Legged Stand Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

   Initiate the test by giving the following verbal instructions, followed by demonstrations.

   • “Please stand with your feet together and your arms down at your side, like this.” (Demonstrate)

   • “Do not start to perform the test until I tell you to do so.”

   • “Do you understand the instructions so far?’ (Make sure suspect indicates understanding)”

2. Demonstrations and Instructions for the Balance and Counting Stage

   Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

   • “When I tell you to start, raise one leg, either leg, with the foot approximately six inches off the ground, keeping your raised foot parallel to the ground.” (Demonstrate one leg stance)

   • “You must keep both legs straight, arms at your side.”

   • “While holding that position, count out loud in the following manner: ‘one thousand and one, one thousand and two, one thousand and three, until told to stop.” (Demonstrate a count, as follows: ‘one thousand and one, one thousand and two, one thousand and three, etc.’ Officer should not look at his foot when conducting the demonstration - OFFICER SAFETY.)

   • “Keep your arms at your sides at all times and keep watching the raised foot.”

   • “Do you understand?” (Make sure suspect indicates understanding)

   • “Go ahead and perform the test.” (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.”)
Observe the suspect from a safe distance. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.”

NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., US DEPT OF TRANS., DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING STUDENT MANUAL, HS 178 R2/06, Section VIII-12 (April 2009).

J. Scoring and Test Interpretation of the One-Legged Stand Test

3. Test Interpretation

You may observe a number of different behaviors when a suspect performs this test. The original research found the behaviors listed below are the most likely to be observed in someone with a BAC above 0.08. Look for the following clues each time the One Leg Stand test is administered.

A. The suspect sways while balancing. This refers to the side-to-side or back-and-forth motion while the suspect maintains the one-legged stand position.

B. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body to keep balance.

C. Hopping. Suspect is able to keep one foot off the ground, but resorts to hopping in order to maintain balance.

D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.”

Note: If suspect can’t do the test, record observed clues and document the reason for not completing the test, e.g. suspect’s safety.

Remember that time is critical in this test. The original research has shown a person with a BAC above 0.08 can maintain balance of up to 25 seconds, but seldom as long as 30.
Based on original research, if an individual shows two or more clues, or fail to complete the One Leg Stand, there is a good chance the BAC is 0.08 or above. Using that criterion, the officer will accurately classify 65% of the people you test as to whether their BAC’s are above 0.08.

Observe the suspect from a safe distance and remain as motionless as possible during the test so as not to interfere. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.

K. Test conditions for the One-Legged Stand Test

4. Test Conditions

One Leg Stand requires a reasonably dry, hard level, and non slippery surface. Suspect’s safety should be considered at all times.

The original research indicated that certain individuals over 65 years of age, back, leg, or inner ear problems, or people who are overweight by 50 or more pounds had difficult performing this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

5. Taking Field Notes on Suspects Performance of Field Sobriety Tests

For purposes of the arrest report and courtroom testimony, it is not enough to record the total number of clues on the three tests. The number of clues is important to the police officer in the field because it helps determine whether there is probable cause to arrest. But to secure a conviction, more descriptive evidence is needed.

The officer must be able to describe how the suspect performed on the test, and exactly what the suspect did.

The standard note taking guide provided in this Manual is designed to help you develop a clear description of the suspect’s performance on the tests.
L. NON-STANDARD/NON-VALIDATED SOBRIETY “TESTS”

A variety of so-called sobriety tests are employed by police officers in the field during DUI investigations. None of these “tests” have been statistically validated as reliable, nor have they been accepted in the medical or scientific community for the purpose of diagnosing alcohol intoxication. They are not one of the three standardized field sobriety tests and courts have been more liberal in allowing admission of these tests for “what its worth.”

These tests have either arisen from training at a police academy prior to recognition of field sobriety tests and/or from word of mouth between police officers. These include:

1. finger-to-nose test
2. alphabet
3. “finger-to-thumb”
4. pick up coins
5. Rhomberg (30 second closed eyes counting)
6. hand-pat
7. count backwards

Sometimes when the motorist has severe physical disabilities, i.e. bad back, inured knees or legs, prosthesis, or glass eye, these tests cannot be performed. Remember these are “non-standardized” and have not been validated. Nothing has been done to make them validated nor reliable nor are they accepted in the medical and scientific community as being able to diagnose alcohol intoxication.

M. PRELIMINARY BREATH TESTING

The basic purpose of preliminary breath testing (PBT) is to demonstrate the association of alcohol with the observable evidence of the suspect’s impairment. The suspect’s impairment is established through sensory evidence: what the officer sees, hears, and smells. The PBT provides the evidence that alcohol is the chemical basis of that impairment by yielding an on the spot indication of the suspect’s blood alcohol concentration (BAC). The PBT provides direct indication of the BAC level. It does not indicate the level of the suspect’s impairment. Impairment varies widely among individuals with the same BAC level.
Preliminary breath testing, like psychophysical testing, is a stage in the pre arrest screening of a DWI suspect. Usually the suspect is not yet under arrest when requested to submit to the preliminary breath test. The DWI incident remains at the investigative stage; the accusatory state has not yet begun. The PBT result is only one of many factors the officer considers in determining whether the suspect should be arrested for DWI. It should never be the sole basis for a DWI arrest. The PBT result is an important factor because it provides direct indication of alcohol impairment. All other evidence, from initial observation of the vehicle in operation through formal psychophysical testing, indicates alcohol impairment.

ADVANTAGES OF PBT

A PBT offers several important advantages for DWI detections. It may:

- Corroborate other evidence by demonstrating that the suspicion of alcohol impairment is consistent with the officer’s observations of the suspect’s mental and physical impairment.

- Confirm the officer’s own judgment and help gain confidence in evaluating alcohol impairment accurately, based on observations and psychophysical tests. (Many officers experienced a DWI enforcement find that they rely less and less on the PBT as their confidence in their own powers of detection increases.)

- Disclose the possibility of medical complications or impairment due to drugs other than alcohol. (The PBT can confirm or deny that alcohol is the cause of the observed impairment. For example, observed psychophysical impairment coupled with a PBT result showing a very low BAC indicates an immediate need to investigate the possibility that the suspect has ingested a drug other than alcohol or suffers from a medical problem.)

- Help to establish probable cause for a DWI arrest. (The role of the PBT in establishing probable cause may be affected by the evidentiary value of PBT results in your state. Consult your specific PBT law, your supervisor, or the local prosecutor for clarification, if necessary.)

LIMITATIONS OF PBT

Preliminary breath testing may have both evidentiary limitations and accuracy limitations. Evidentiary limitations vary with specific laws. In some states PBT results are admissible as evidence; in other state they are not admissible. Where the results are admissible, there may be differences in the weight or value they are given. Consult your state PBT law, your supervisor or your local prosecutor, as necessary, for clarification.
PBT instruments have accuracy limitations. Although all PBT instruments currently used by law enforcement are reasonably accurate, they are subject to the possibility of error, especially if they are not used properly. There are factors that can affect the accuracy of preliminary breath testing devices. Some of these factors tend to produce “high” test results; others tend to produce “low” results.

There are two common factors that tend to produce high results on a PBT.

- **Residual mouth alcohol.** After a person takes a drink, some of the alcohol will remain in the mouth tissues. If the person exhales too soon after drinking, the breath sample will pick up some of this leftover mouth alcohol. In this case, the breath sample will contain an additional amount of alcohol and the test result will be higher than the true BAC.

  It takes approximately 15 minutes for the residual alcohol to evaporate from the mouth.

  The only sure way to eliminate this factor is to make sure the suspect does not take any alcohol for at least 15 to 20 minutes before conducting a breath test. Remember, too, that most mouthwashes, breath sprays, cough syrups, etc. contain alcohol and will produce residual mouth alcohol. Therefore, it is always best not to permit the suspect to put anything in their mouth for at least 15 to 20 minutes prior to testing.

- **Breath Contaminants.** Some types of preliminary breath tests might react to certain substances other than alcohol. For example, substances such as ether, chloroform, acetone, acetaldehyde, and cigarette smoke conceivably could produce a positive reaction on certain devices. If so, the test would be contaminated and its result would be higher than a true BAC. Normal characteristics of breath samples, such as halitosis, food odors, etc. do not affect accuracy.

There are two common factors that tend to produce low PBT results.

- **Cooling of the breath sample.** If the captured breath sample is allowed to cool before it is analyzed, some of the alcohol vapor in the breath may turn to liquid and precipitate out of the sample. If that happens, the subsequent analysis of the breath sample will produce a low BAC result.
• The composition of the breath sample. Breath composition means the mixture of the tidal breath and alveolar breath. Tidal breath is breath from the upper part of the lungs and the mouth. Alveolar breath is deep lung breath. Breath testing should be conducted on a sample of alveolar breath, obtained by having the subject blow into the PBT instrument until all air is expelled from the lungs.

Radio frequency interference (RFI) can produce either high or low test results, or can prevent a breath test device from producing any result. Care should be exercised when utilizing a PBT around radio equipment.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., US DEPT OF TRANS., DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING STUDENT MANUAL, HS 178 R2/06, Section VIII-7 through VIII-9 (April 2009).

Preliminary Breath Testing (PBT). 625 ILCS 5/11-501.5 (attached statute)

1. If the officer decides that after the completion of the SFSTS and a reasonable suspicion exists to arrest the motorist for DUI (emphasis added), the officer may offer the motorist a PBT. This is a matter of strategy as if there is clearly a basis for the arrest and then giving the PBT in which the motorist confirms same may scare the motorist from giving off an evidentiary breath test after the arrest. (Note: “Well officer, I already gave you one test; I’m not going to give you another.”)

2. Young or inexperienced officers want to use the PBT to “overkill” their case when they have clear probable cause for arrest and then run into a refusal situation where the motorist will not render an evidentiary test.

3. On the same hand, if it looks like alcohol impairment and the motorist and the PBT is properly administered with a low PBT result that may lead the officer to engage in further investigation for evidence of a type of a drug.

4. PBT must be on the approved list by Illinois State Police and certified every 93 days. (ISP Rules & Regulations for Breath, Blood, Urine, and PBT, 20 Ill. Admin. Code 1286.240 and .250)

5. Administering PBT officer and ASA should know about the operation of PBT’s 1286.260

6. Specific manufacturer’s requirements to be followed.
5/11-501.5 Preliminary Breath Screening Tests
§ 11-501.5 Preliminary Breath Screening Test.

(a) If a law enforcement officer has reasonable suspicion to believe that a person is violating or has violated Section 11-501 or a similar provision of a local ordinance the officer prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a portable device approved by the Department of State Police. The person may refuse the tests. The results of this preliminary breath screening test may be used by law enforcement officer for the purpose of assisting with the determination of whether to require a chemical test as authorized under Sections 11-501.1 and 11-501.2 may be requested by the officer regardless of the result of the preliminary breath screening test, if probable cause for an arrest exists. The result of a preliminary breath screening test may be used by the defendant as evidence in any administrative or court proceeding involving a violation of Section 11-501 or 11-501.1.

(b) The Department of State Police shall create a pilot program to establish the effectiveness of pupillometer technology (the measurement of the pupil’s reaction to light) as a noninvasive technique to detect and measure possible impairment of any person who drives or is in actual physical control of a motor vehicle resulting from the suspected usage of alcohol, other drugs or drugs, intoxicating compound or compounds or any combination thereof. This technology shall also be sued to detect fatigue levels of the operator of a Commercial Motor Vehicle as defined in Section 6-500(6), pursuant to Section 18b-105 (Part 395-Hours of Service of Drivers) of the Illinois Vehicle Code. A State Police Officer may request that the operator of a commercial motor vehicle have his or her eyes examined or tested with pupillometer device. The person may refuse the examination or test. The State Police officer shall have a device readily available able to limit undue delays.

If a State Police Officer has reasonable suspicion to believe that a person is violating or has violated Section 11-501, the officer may use the pupillometer technology, when available. The officer, prior to an arrest, may request the person to have his or her eyes examined or tested with pupillometer device. The person may refuse the examination or test. The results of this examination or test may be used bythe officer for the purpose of assisting with the determination of whether to require a chemical test as authorized under Section 11-501.1 and 11-501.2 and the appropriate type of test to request. Any chemical test authorized under Section 11-501.1 and 11-501.2 may be requested by the officer regardless of the result of the pupillometer examination or test, if probable cause for an arrest exists. The result of the examination or test may be used by the Defendant as evidence in any administrative or court proceeding involving a violation of 11-501 or 11-501.1.

LIMITATIONS OF PBT

1. Only reasonably accurate.

2. Residual mouth alcohol causes false high reading (20 minute wait).

3. Breath contaminants (smoke, mints, chewing tobacco, etc. can cause false high reading).

PBT CASE LAW

- People v. Mayo, 203 Ill. App. 3d 328 (1990)

N. STANDARDIZED FIELD SOBRIETY TESTS (CASE LAW)
• State v. Homan, 89 Ohio State 3d 421, 732 N.E.2d 952 (Ohio Supreme Court 1999)
• People v. Basler, 193 Ill.App.2d 545 (Illinois Supreme Court 2000)
• People vs. Herring, 327 Ill.App.3d 259 (4th Dist. 2002)
• Fry vs. United States, 239 F.1013 (D.C. Circuit Court 1923)
• People vs. Kirk, 289 Ill.App.3d 326 (4th Dist. 1997)
• People vs. Bostelman, 325 Ill.App.3d 22 (2nd Dist. 2001)
• People vs. Sides, 199 Ill.App.3d 203 (4th Dist. 1990)
• United States vs. Horn, 185 F. Supp. 2d 530 (US Dist. Ct. Maryland 01/31/02)
• People v. Wiebler, 266 Ill.App.3rd 336 (1994)
• People v. Buening, 229 Ill.App.3rd 538 (5th Dist. 1992)
• People v. Dakuras, 172 Ill.App.3rd 865 (2nd Dist 1988)
• State v. Meador, 674 So.2nd 826 (Florida Appellate 1996)
• James v. State, 260 Ga.App.536 (Appellate Court Georgia)
• State v. Nagel, 880 P. 2d 451 (Oregon Sup. Ct. 1994), held that field sobriety testing constitutes a search (i.e. Washington have statutes requiring all police officers to be certified in SFST’s).
• People v. McKown, 236 Ill. 2d 578 (2010)
• Washington courts further in State v. Baity, 140 Wn.2d 1, 991 P.2d 1151 (2000) and State v. Cissne, 72 Wn.App. 677, 865 P.2d 564 (1994), have held that at the very least, HGN is a scientific procedure.

[Washington State Criminal Justice Training Commission and Spokane Police Training Center, basic law enforcement academy rules and regulations 2004. They have also held that this is the same program established with the cooperation of the IACP, which is the International Association of Chiefs of Police and NHTSA and recognized throughout the United States.]

A trial judge or jury is not suited, absent expert testimony, to determine whether a given deviation from the testing protocol found in the NHTSA manual renders the results, of the HGN test unreliable. The potential arises that the State may try to have the Officer qualified as an expert to testify that his method did not skew the results even though he did not follow the procedure. This creates statistical analysis, not the methodology utilized by NHTSA in determining the reliability of the HGN, or the effect of any deviation from standard protocol.

O. Miranda Issues
1. Until the motorist is actually placed under arrest for driving while under the influence, Miranda Warnings are not required to be read.

2. Any statements made whether solicited or unsolicited by the motorist prior to being placed into custody, the use of the SFST's can be used against the motorist pre-arrest.

3. Also the motorist, prior to arrest, does not have a right to contact an attorney.

4. For a suspect’s Fifth Amendment Right/Miranda Warnings to apply there must be three things:
   • In custody;
   • Interrogation; and
   • By a police officer.

5. However, what is not clear is when the officer goes to the hospital to visit the suspect in the emergency room is whether or not Miranda applies.