

# Garden State CLE Presents:



## Lesson Plan

# A. Introduction



**I. Significance of Evidence from Field Sobriety Testing is two-fold:**

**1. It can provide evidence establishing probable cause to believe that the defendant operated a motor vehicle while under the influence of alcohol or drugs. Apart from supporting the DWI arrest, this proof can be used to boot-strap the following:**

**a. Provide a statutory requirement to submit to a breath test under NJSA 39:4-50.2(a):**

**Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provisions of this act and at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of [R.S.39:4-50](#)**

**b. Provide police with a justification to draw an involuntary blood sample:**

**Schmerber v. California, 384 US 757 (1966)**

**c. Provide police with a “reasonable basis” to get a *Dyal* order:**

**State v. Dyal, 97 NJ 229 (1984)**

**; State v. Bodtmann, 239 NJ Super. 33 (App. Div. 1990).**

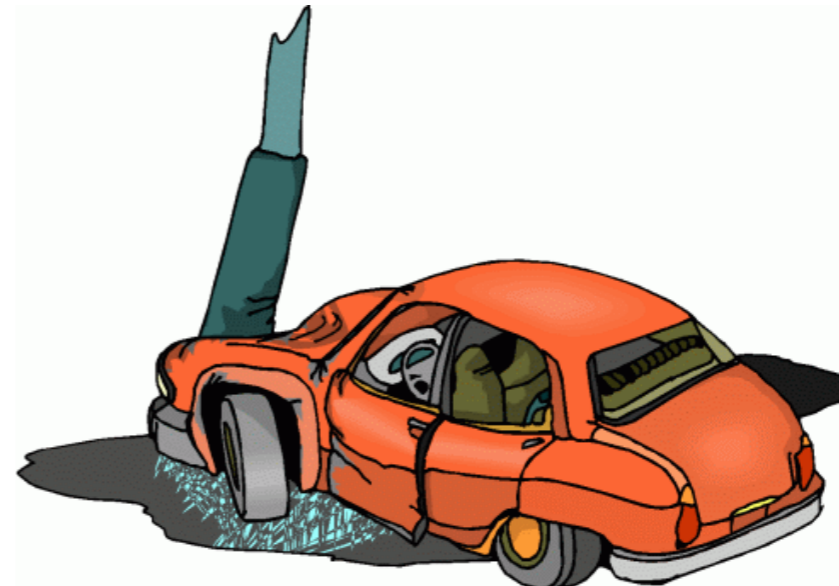


**d. Support an element of proof in a refusal prosecution under NJSA 39:4-50.4a.:**

**See generally State v. Marquez, 202 NJ 485 (2010)**

**A careful reading of the two statutes reveals four essential elements to sustain a refusal conviction: (1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test.**

**e. Authorize search of the person arrested (Chimel v. California, 395 US 752 (1969)) and impoundment of the vehicle under John's Law. (NJSA 39:4-50.23)**



**2. It can provide powerful, substantive evidence of guilty on the charge of operating a motor vehicle while under the influence of alcohol or other prohibited substances.**

**a. Under the Influence - In General**

**“Generally speaking, it means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs.” State v. Tamburro, 68 N.J. 414, 420 (1975)**



## **b. Alcohol**



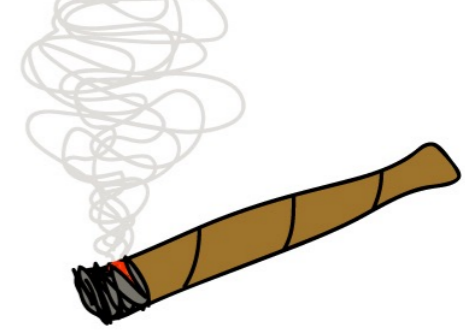
**“The expression, ‘under the influence of intoxicating liquor,’ covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental Or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.” State v. Rodgers, 91 N.J.L. 212, 215 (E & A 1917).**

**[NJSA 39:4-50] “penalizes a person who drives ‘while under the influence of intoxicating liquor.’ Although prosecutions pursuant to its provisions are commonly and colloquially termed ‘drunken driving cases,’ it is settled that the statute does not require as a prerequisite to conviction that the accused be absolutely ‘drunk,’ in the sense of being sodden with alcohol. It is sufficient if the presumed offender has imbibed to the extent that his physical coordination or mental faculties are deleteriously affected.” State v. Emery, 27 N.J. 348, 355 (1958).**

**At the one pole, since ‘intoxication’ is not the expression used, it is not requisite that ‘\* \* \* the accused be absolutely ‘drunk,’ in the sense of being sodden with alcohol.’ [Citation omitted] At the other extreme, the described condition means something more than having partaken of a single drink even though, physiologically, the smallest amount of alcohol has some slight effect or influence on an individual. The obvious intention of the Legislature was to prescribe a general condition, short of intoxication, as a result of which every motor vehicle operator has to be said to be so affected in judgment or control as to make it improper for him to drive on the highways. State v. Johnson, 42 N.J. 146, 165 (1964)**



## c. Drugs



**“[A]n operator of a motor vehicle [is] under the influence of a narcotic drug within the meaning of [N.J.S.A. 39:4--50\(a\)](#) if the drug [produces] a narcotic effect 'so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway.’” State v. DiCarlo, 67 N.J. 321(1975).**

**“The thrust of the Motor Vehicle Act is safety on the highway. The particular section is addressed to the evil of operating a motor vehicle while one's physical coordination or mental faculties are substantially diminished by 'intoxicating liquor, narcotic, hallucinogenic or habit-producing drug.' Competency to operate a motor vehicle safely is the critical question.” State v. Tamburro, 68 N.J. 414, 422 (1975).**

**“[T]he driving while intoxicated statute “does not require that the particular narcotic[, hallucinogen or habit-producing drug] be identified.” The statute also does not define the quantum of narcotics, hallucinogens or habit-producing drugs required in order to violate its prohibition. Instead, as with alcohol intoxication, the issue is simple: was the defendant “under the influence” of a narcotic, hallucinogen or habit-producing drug while he operated a motor vehicle. State v. Tamburro, 68 N.J. 414, 422 (1975).**

# B. Field Sobriety Tests - In General

- a. Failure to perform may be considered as consciousness of guilt: *State v. Bryant*, 328 NJ Super. 379, 383 (2000).
- b. Are considered to be non-testimonial – *State v. Macuk*, 57 NJ 1 (1970); *State v. Green*, 09 NJ Super. 347 (App. Div. 1986).
- c. Have Long Considered as reliable evidence of intoxication —

“Our courts have long accepted the results of **field sobriety tests** as reliable evidence of intoxication.”

*State v. Morton*, 39 N.J. 512, 514-15 (1963);

*State v. Higgins*, 132 N.J. Super. 67, 70-71 (App. Div. 1975);

*State v. Pichadou*, 34 N.J. Super. 177, 180 (App. Div. 1955).



## **d. Admissible as lay testimony**

**This relates to the problem of admissibility of the testimony of two police officers with respect to certain physical tests or actions engaged in by defendant at their request shortly after his arrest. According to the officers defendant was put through tests referred to as 'finger to nose,' 'walking heel to toe,' 'standing heels and toes together (with) eyes closed,' 'standing bent, head back, eyes closed,' 'standing bent at the waist with eyes closed,' etc. They described the results of the tests, not only on the basis of their observation of his actions, but in some instances they used such terms as 'normal' and 'failure.' The Appellate Division pointed out that such conclusory expressions are not admissible if given by lay witnesses, as distinguished from persons shown to have some expert knowledge, such as physicians, or others who have had special training in use of the tests and in normal and abnormal reactions thereto.**

**We agree that where the significance of results of tests depends upon a conclusion of the witness as to whether the motorist's reaction is a departure from the normal or standard, such conclusion may not be given unless the examiner is shown to have some skill or training which will qualify him to make an evaluation. But on retrial of this case, even if no qualifying experience or training of the officers is shown, it does not follow that their testimony must be excluded. It is entirely proper for them to describe the tests or maneuvers they had the defendant perform and then testify as to what his Physical reaction was when he undertook to execute them. The reaction should be described in terms of what they Observed when the tests were undertaken by defendant. To illustrate, we consider that Lieutenant Castellucci's testimony was competent when, speaking of defendant's attempt to walk heel to toe, he said Morton 'was slow, swayed and stepped to the side.' Descriptions in like terms of the results of the tests are also admissible. In other words, the observed physical reactions to such tests are on the same plane as other common factual indicia that a person is under the influence of intoxicating liquor which always may be testified to by a layman. Of course the ultimate determination of defendant's intoxication within the meaning of the statute rests with the trial court on all the evidence in the case. State v. Morton, 39 NJ 512, 514-515 (1963).**

# C. HGN Testing

**The HGN test is based on the observation of three different physical manifestations which occur when a person is under the influence of alcohol: (1) the inability of a person to follow, visually, in a smooth way, an object that is moved laterally in front of the person's eyes; (2) the inability to retain focus and the likelihood of jerking of the eyeball when a person has moved his or her eye to the extreme range of peripheral vision; and (3) the reported observation that this “jerking” of the eyeball begins before the eye has moved 45 degrees from forward gaze if the individual's BAC [ (Blood Alcohol Content) ] is .10 [percent] or higher.**

**State v. Doriguzzi, 334 NJ Super. 530 (App. Div. 2000)**

**Overrules State v. Maida, 332 NJ Super. 564 (Law Div. 2000)**



# D. Psycho-Physical Testing

## 1. Standardized FST

HGN

Walk & Turn

One Leg Stand

## 2. Non-Standardized FST

Alphabet

Count backwards

Romberg

## 3. Standardized as to:

Demonstrated

Scored

Given

## 4. Examples



## 5. Evidence

- a. Effects of alcohol on the human body
- b. Relation between test and alcohol's effects
- c. Instructions to subject
- d. Demonstration of test & understanding
- e. Environment, Weather and Lighting
- f. Reporting Observed Results in Reports
- g. Reporting Observed Results at Trial



# Garden State CLE Presents:



## Lesson Plan

# FIELD SOBRIETY TESTING

Presented By  
Steven Hernandez, Esq.

# What is a Field Sobriety Test?

“Any one of several roadside tests that can be used to determine whether a suspect is impaired.”

# What are they used for?

- To establish probable cause to arrest an individual suspected of driving under the influence.

- To help establish that “the presumed offender has imbibed to the extent that his physical coordination or mental faculties are deleteriously affected.”

- **State v. Emery, 27 N.J. 348, 355 (1958).**

# History of Field Sobriety Testing

# 1977 SCRI Study

- ▣ Prepared for the U.S. Department of Transportation, National Highway Traffic Admin.
- ▣ Primary Purpose of the study was to evaluate police sobriety tests and develop more sensitive and reliable measures.

- ▣ Using a six test battery: Walk and Turn, One Leg Stand, Alcohol Gaze Nystagmus, Tracing, Romberg Balance, and variation of counting/ABCs.
  
- ▣ Out of this Study we get:
  - Alcohol Gaze Nystagmus
  - Walk and Turn
  - One Leg Stand.

# 1981 SCRI Study

- ▣ The Most Important of all of the studies.
- ▣ The results of the study have been cited in every SFST manual used to train police officers.
- ▣ Three test battery: HGN, WAT, OLS

- ▣ The study found that certain people will have difficulty doing these tests:
  - People 65 years or older
  - People with Back, Leg, Foot, or inner ear issues
  - People 50 lbs. over-weight
  
- ▣ Researchers recommended these people only be given the HGN test.

# Other Studies

- ▣ 1983 SFST Field Evaluation
- ▣ 1995 Colorado Validation Study
- ▣ 1998 Florida Validation Study
- ▣ 1998 San Diego Validation Study

# San Diego Validation Study

- ▣ Used to detect BACs at 0.08 BAC
- ▣ Two Important takeaways from this study

- ▣ Horizontal Gaze Nystagmus lacks the face validity because it does not appear to be linked to the requirements of driving a motor vehicle. The reasoning is correct, but it is based on the incorrect assumption that field sobriety tests are designed to measure driving impairment.

- ▣ “It is unlikely that complex human performance, such as that required to safely drive an automobile, can be measured at the roadside....The link between BAC and driving impairment is a separate issue, involving entirely different research methods.”

# Horizontal Gaze Nystagmus



Involuntary jerking of the eyes occurring as the eyes gaze to the side.

# Categories of Nystagmus

- **Vestibular**
  - Rotational
  - Post-rotational
  - Caloric
  - Positional alcohol  
nystagmus
- **Neural**
  - Optokinetic
  - Physiological
  - Gaze
    - Horizontal
    - Vertical
    - Resting
- **Pathological disorders and diseases**

# Administrative Procedures

1. Eyeglasses
2. Verbal instructions
3. Position object (12-15 inches) (30-38 cm)
4. Pupil size and resting nystagmus
5. Equal tracking



# Administrative Procedures

6. Check for lack of smooth pursuit



7. Check for distinct and sustained nystagmus at maximum deviation

8. Check for onset of nystagmus prior to 45 degrees

9. Total the clues

10. Check for Vertical Gaze Nystagmus

Check each eye independently beginning with the suspect's left and compare.

# Three Clues of Horizontal Gaze Nystagmus

- Lack of smooth pursuit.
- Distinct and sustained nystagmus at maximum deviation.
- Onset of nystagmus prior to 45 degrees.

# Clue Number 1



Lack of smooth pursuit

- Start with the left eye
- Stimulus should be moved slowly (2 second per eye)
- Each test should be done twice!

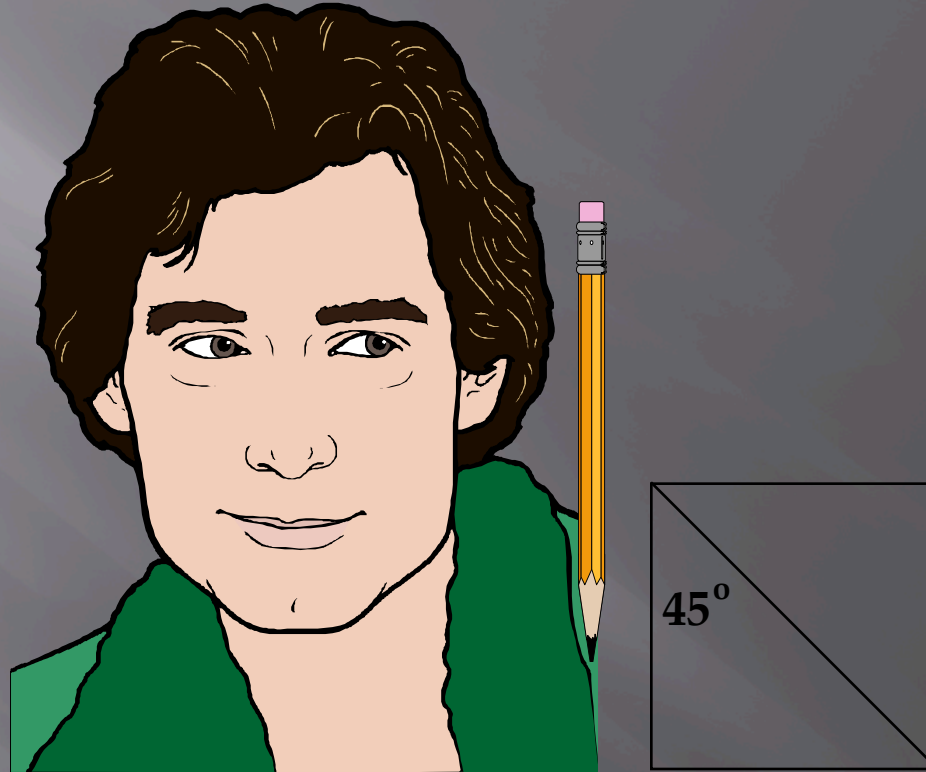
# Clue Number 2



Distinct and sustained  
nystagmus at maximum deviation

- Start with the subjects left eye
- Move stimulus until there is no white showing in the corner
- Hold the stimulus there for four seconds
- Each Eye should be checked twice!

# Clue Number 3



Onset of nystagmus prior to 45 degrees

- Start with the left eye
- The Stimulus is moved slowly (four seconds) to get to the subjects shoulder
- The Officer stops when he sees nystagmus
- Each test is done twice per eye

# Vertical Gaze Nystagmus



- Stimulus is moved vertically until eyes are elevated as far as possible
- The stimulus is held for four seconds
- Officer cannot see VGN if he does not first see HGN!
- Test is to be done twice!

- The clues are Progressive!
- The clues are duplicative!

# Horizontal Gaze Nystagmus Test Criterion



4 or more clues indicates BAC above 0.10  
(77% accurate)

# So, how long should it take to properly administer HGN?

- ▣ Check for Equal Tracking = 2 seconds!
- ▣ Before VGN = 80 Seconds!
  - Smooth Pursuit = 16 Seconds
  - Sustained/Distinct + 32 Seconds
  - Onset + 32 Seconds
- ▣ Add in VGN + 8 Seconds

88 Seconds!

# Walk and Turn

(Divided Attention Test -  
Mental Task and Physical Task)

- Instructions Stage
- Walking Stage



# Administrative Procedures

## 1. Verbal Instructions:

- Assume heel-toe stance
- Arms down at sides
- Don't start until told

## 2. 9 heel-to-toe Steps, Turn, 9 heel-to-toe Steps

## 3. Turn Procedures:

- Turn around on line
- Several small steps

## 4. While Walking:

- Keep watching feet
- Arms down at sides
- Count steps out loud
- Don't stop during walk

# Walk and Turn Test Clues

- 1. Cannot keep balance while listening to the 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.
- 2. Starts before the 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.
- 3. Stops while walking. The suspect pauses for several seconds. Do not record this clue if the suspect is merely walking slowly.
- 4. 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.

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

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

7. 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.

8. Incorrect number of steps. Record this clue if the suspect takes more or fewer than nine steps in either direction.

# Walk and Turn Test Criterion



2 or more clues indicates BAC above 0.10  
(68% accurate)

# Test Conditions for WAT

- ▣ 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.

# One-Leg Stand

(Divided Attention Test -  
Mental Task and Physical Task)

- Instructions Stage
- Balance and Counting Stage



# Administrative Procedures

## Instructions Stage:

- Stand straight, feet together
- Keep arms at sides
- Maintain position until told otherwise

# Administrative Procedures

## Balance and Counting Stage:

- Raise one leg, either leg
- Keep raised foot approximately six inches (15 cm) off ground, foot parallel to the ground
- Keep both legs straight
- Keep eyes on elevated foot
- Count out loud in the following manner: “One thousand and one, one thousand and two, one thousand and three and so on”, until told to stop

Note: It's important for the officer to time the 30 second count for the test.

# One Leg Stand Clues!

- ❑ 1. The suspect sways while balancing. This refers to side-to-side or back-and forth motion while the suspect maintains the one-leg stand position.
- ❑ 2. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body in order to keep balance.
- ❑ 3. Hopping. Suspect is able to keep one foot off the ground, but resorts to hopping in order to maintain balance.
- ❑ 4. Puts foot down. The suspect is not able to maintain the one-leg stand position

# One-Leg Stand Test Criterion



**2 or more clues indicates BAC above 0.10  
(65% accurate)**

# TEST CONDITIONS FOR OLS

- ▣ 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 difficulty performing this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- o THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER
- o THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE
- o THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, 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.