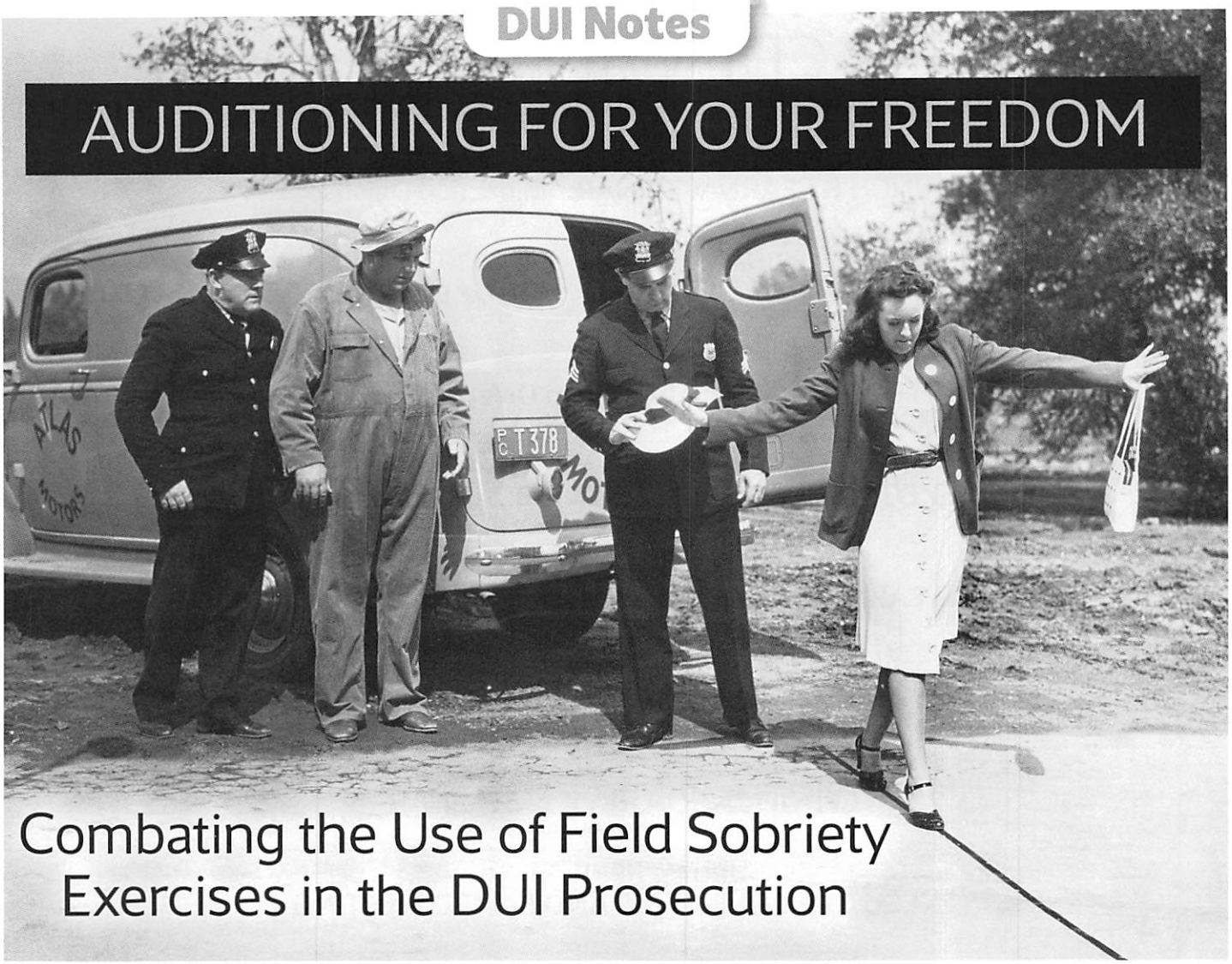
AUDITIONING FOR YOUR FREEDOM



Combating the Use of Field Sobriety Exercises in the DUI Prosecution

by Robert S. Reiff

A LOOK AT THE ORIGINS OF THE PHYSICAL SOBRIETY EXERCISES

Physical sobriety exercises have their origin in psychological and neurological testing, often administered to determine if a patient has suffered head trauma. *See* 1981 *An Assessment of Behavioral Tests to Detect Impaired Drivers* [DOT HS-806-211], citing to Thorndike, "Driver Skill and Safety" (1949) and *Duane's Clinical Ophthalmology*. Now, while consuming alcoholic beverages will not cause your client head trauma (unless they banged their head against the bars' walls), it may affect his or her ability to behave normally under the law. What is so unique about these sobriety exercises is that the police use them to gauge whether a DUI suspect is possessed of his or her normal faculties based upon their performance of what are truly abnormal tasks.

Why do I use the term abnormal? Well, if we saw someone walking down the street in a heel-to-toe manner, more likely than not, we would think he or she was, well, strange. If we saw that same individual balancing on one leg, the other leg six inches of the ground, we would similarly look twice at them. Still, these (highly?) unusual manners of walking and standing are the standard by which the police adjudge whether your client is DUI in order to arrest them (i.e., whether she has her mental and physical faculties intact).

You may even ask the officer how well your client performed on the walk and turn exercise when she applied for her driver's license. The officer will undoubtedly look at you with a blank stare because the answer is that you do not have to be able to perform such exercises to obtain a driver's license in this or any state!

Beginning in late 1975, research studies were sponsored by the National Highway Traffic Safety Administration [hereafter referred to as NHTSA] through a contract with the Southern California Research Institute [hereafter referred to as SCRI] to determine whether and, if so, which roadside field sobriety exercises were the most accurate. SCRI traveled to law enforcement agencies throughout the United States (but not to neurologist's offices) to select the most commonly used exercises. So they started their investigative process

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by reviewing the many various exercises administered by different police officers and culling them down to "15-20 exercises that we thought might work."[1] Take a moment to think about that. They observed the literally hundreds of tests that police officers had come up with, they culled through them, and they picked the three best tests that police officers had come up with!

While scientists and doctors routinely scoff at the testing methods they used,[2] SCRI's research indicated that three of these tests, when administered in a standardized manner, were an accurate and reliable battery of exercises for distinguishing blood alcohol content above the legal limit.[3]

After setting forth extensive criteria for administering and evaluating the exercises,[4] NHTSA concluded, importantly, that the reliability, and hence, the admissibility, of sobriety exercise evidence, depended upon the manner in which they were administered:

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- **THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER**
- **THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE**
- **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.[5]

One of these studies was co-authored by Dr. Marcelline Burns, Ph.D.,[6] and sanctioned by the State of Florida Department of Transportation and the Institute of Police Technology and Management. In her study, Dr. Burns noted that during the early years of the use of sobriety exercises to determine impairment, legal challenges were relatively infrequent, but now, as then, objections Atypically focus on test validity and reliability.[7]

Dr. Burns did not question that sobriety exercises, when properly administered, "not only aid police officers in meeting their responsibility to remove alcohol-impaired drivers from the roadway, they also protect the rights of the unimpaired driver."[8] Dr. Burns noted that "if it can be shown that officers' reliance on the tests is misplaced, causing them frequently to err, then... the officers, the courts, and the driving public need to be aware that the tests are not valid and that DUI laws are not being properly enforced."[9] Dr. Burns reiterated her position in a sworn statement taken shortly thereafter:

> If you don't give the instructions properly, you don't tell them to leave their arms at their side, count their steps out loud, take nine steps, et. cetera, those are critical because the nature of the task requires them to assume the stance on the line, to stand in that position while they're given instructions, and the ability to understand and follow the instructions is part of the test. So, if they don't do that, that's important. And then whether or not the results have as much meaning as you would like them to becomes problematic.[10]

The problem is that, to my knowledge, no courts other than those in Ohio have held that in order for the results of a field sobriety exercise to serve as evidence of probable cause to arrest, or to be admitted at trial, the police must have administered the exercise in strict compliance with the very standardized testing procedures that NHTSA created to ensure the accuracy of the testing procedures.[11] So SCRI says "these are the tests you can use but only if they are administered in a standardized manner," and then that standardization does not matter (or as judges like to say, "it goes to the weight of the evidence, not the admissibility.").

It is also important to examine the difference in the terminology used by NHTSA over the years. In 1983, NHTSA noted in their training manuals that "[s]ome people have difficulty with balance even when sober. The test criteria for Walk-and-Turn is not necessarily valid for suspects 60 years of age or older, person's with injuries to their legs, or persons with inner ear disorders."[12]

In 1995, NHTSA's revised manual again noted that A[s]ome people have difficulty with balance even when sober. However, without any explanation, the manual suddenly changed the age at which the test criteria for when the Walk-and-Turn exercise is not necessarily valid to Asuspects 65 years of age or older.@[13] Why the change in age? No explanation was given.

In 2000, the language apparently provided an explanation for this change, now stating that "[t]he original research indicated that individuals over 65 years of age, back, leg or middle ear problems had difficulty performing this [exercise]."[14] Except there is nothing in the studies conducted that justifies such a reclassification!

Similarly, NHTSA noted in its 1983 manual that "[s]ome people have difficulty with the One-Leg Stand even when sober. The test criteria for the One-Leg Stand is not necessarily valid for suspects 60 years of age or older, or 50 pounds or more overweight. Person's with injuries to their legs, or [with] inner ear disorders, may have difficulty with the [exercise]."[15]

In 1995, the manual was reworded to state that "[s]ome people have difficulty with the One-Leg Stand even when sober. The test criteria for the One-Leg Stand is not necessarily valid for suspects 65 years of age or older, or 50 pounds or more overweight. Person's with injuries to their legs, or [with] inner ear disorders, may have difficulty with the [exercise]."[16]

In 2002, the wording was even more radically altered, now noting that "[t]he original research indicated that certain individuals over 65 years of age, back, leg or middle ear problems, or people who are overweight by 50 or more pounds had difficulty performing this [exercise]."[17] Yet, for no reason other

than to forestall defense challenges, the language that "some people have difficulty performing this exercise even when sober" was removed.

AUDITIONING FOR THEIR FREEDOM

It is curious that in making their arrest determination, police officers believe that a citizen should be able to perform physical sobriety exercises under the extremely stressful and non-controlled settings in which they are usually performed in an audition for their freedom. It is also interesting that these suspects are often being asked to perform these exercises for the very first time.

Many years ago, my now-wife convinced me that we should take a few dance lessons at the local Arthur Murray studio in preparation for our wedding dance. "Yes, dear," I responded in a line repeated many times over 36 years of marriage. The thing is, I never could seem to ever get those dance steps right. Whether it was my large (6'4") stature or some other unknown reason, I probably looked like a giraffe trying to dance on the Serengeti (stop and try visualizing that for a moment). Aren't the field sobriety exercises on the side of that uneven roadway nothing more than a dance lesson on the roadway? And, as those of us who have been subjected to episodes of Dancing with the Stars can tell you, even with practice, some people never seem to get it right!

THE FIRST TIME IS THE WORST TIME

In fact, one of my favorite cross-examination techniques with regard to field sobriety exercises involves something I like to call the "baseball analogy."

Q: Officer, have you ever played baseball?
A: Yes, of course.
Q: The very first time you swung that bat, did you hit a home run?
A: Probably not.
Q: Chances are, you missed the ball entirely the first time you swung at that ball because it was your first attempt at that physical task.
A: That is probably correct.
Q: The exercises you offered to John Q. Public are physical tasks, are they not?
A: That is true.
Q: To your knowledge, this was the first time he was ever asked to perform these types of physical tasks.
A: To my knowledge, yes.
Q: Therefore, you cannot exclude the possibility that he would have performed these tasks much better if he had the opportunity to practice; in order for him to familiarize himself with these tasks?
A: No, I cannot.

One of the problems with these exercises is that even though the officers are warned that "certain individuals over 65 years of age, [or people with] back, leg or middle ear problems, or people who are overweight by 50 or more pounds [have trouble performing these exercises]," [18] the exercises are a "one size fits all" approach to the problem. Very simply put, you cannot judge a 20-year-old gymnast the same as a 50-year-old "weekend warrior!" They do not respond the same way to physical challenges, to pressure, to nervousness, to the ability to perform physical tasks.

When professional athletes begin their careers, they are tested, re-tested and monitored. For those involved in violent sports where head injuries may ensue, "baseline" tests are conducted to determine their physical, mental and medical starting point. No such baseline tests are administered to the general public, and the police certainly do not know if the suspect can perform these exercises at any time, under any circumstances.

And do you exercise in dress shoes or a suit? When I exercise, I bring the proper exercise equipment for the particular sport. If the exercise involves ice hockey, I bring my ice hockey bag with my ice skates. If I am going to weight train, I bring special weight training support sneakers. If I am playing softball, I bring a pair of softball cleats. But no matter the type of exercise, I am not performing them in my dress shoes! Yet, when performing these exercises in the street, or on the sidewalk, your client is almost always performing them in dress shoes! Wouldn't we quite reasonably expect that the "performance" of exercises under such circumstances might be compromised by the type of footwear being worn?

Occasionally, I will have an older police officer who has handled his share of DUI cases from the early days when the standardized field sobriety testing was not routinely followed by his department. In reminiscing about the old days, I will mention some of the long since discarded field sobriety exercises that he may have administered early in his career, such as throwing coins on the ground. After I have gotten the officer to admit that such exercises were determined to be an inaccurate gauge of an individual's sobriety, I ask how many letters of apology the officer later wrote? When they look at me quizzically, I asked how many letters of apology were sent to those who were erroneously arrested based upon these now-discarded exercises. The answer is none, of course. Which opens up the follow-up question: can you guarantee that the exercises administered today will not be discarded as inaccurate 10 years from now?

INJURIES, ILLNESSES AND MEDICAL CONDITIONS THAT MAY IMPAIR AN INDIVIDUAL'S ABILITY TO PERFORM SUCH EXERCISES

Most officers do not even ask the suspect if they have ever suffered any type of injury that might impair their ability to perform the exercises. The few that do often ask the wrong question, asking the subject if Athere is anything that would prevent you from performing these exercises? The problem with that question is that the officer should not be attempting to determine if your client is unable to perform the exercises, he should be attempting to determine if their performance will be affected by factors unrelated to whether they are under the influence of alcohol or controlled substances.

Timing is another important aspect

of the investigation. Asking the subject if "there is anything that would prevent you from performing these exercises" before telling them what the instructions are, or what they are going to be asked to do, will often not illicit a proper response. For some reason, police officers don't seem to understand that to the average citizen, speaking up about their medical problems, while on the side of the roadway, to a uniformed and armed officer is an unlikely thing. This is the reason that we all don't win a million dollars on game shows such as *Jeopardy*; when under pressure, most people will forget to provide important details or will freeze up, even if it concerns important matters.

How many times have you had a stressful situation arise, let's say in a motion or trial, and you then wished, afterwards, that you said or did something different? How can it be reasonably expected that I know that the leg I broke way back when I was in high school would impair my ability to perform a One-Leg Stand exercise? Certainly a recent injury may come to your mind. But recent injuries are not the only ones that would impair your performance of the exercises. A test which relies on a suspect's self-diagnosis of what may affect her performance is often not an accurate one.

We don't have to look at sporting event (although it never hurts to remind the judge and jury of this fact) to know that nervousness will affect someone=s performance of such exercises. The fact that a person suspected by the police of committing a criminal offense is nervous, a given under such circumstances, has to affect their performance of these exercises. Yet, this is often not factored into the officer's evaluation of them. In a society where it has been said that death is less feared than public speaking, how can we not consider this fear factor?

DON'T OVERLOOK THE MENTAL CASE

A police officer's opinion that your client did not properly perform one or a series of physical sobriety exercises is critical to the prosecution's sustaining its burden of proof, especially in an impairment case. However, the most overlooked area of the roadside exercises involves the mental aspect of it. The ability to follow instructions is seen as a very important indicator of whether someone is under the influence of alcohol.[19] Yet most officers and attorneys do not pay attention to the suspect's mental faculties.

It is in this aspect of the case that it is important to understand the dichotomy between the physical and mental faculties of an individual and use it to your advantage. Particularly where there is not a specific note in any police report as to your client's inability to follow the instructions for the exercises, have the officer repeat the litany of directions he or she ordered your client to perform. Make note of each direction given, systematically going over each instruction, and elicit how your client performed each instructive (mental) task as instructed. Thereafter, have the officer agree that although the suspect may have been unable to perform certain physical portions of the exercises, she was able to follow each and every instruction in an attempt to do so nonetheless.

Most officers will concede that field sobriety exercises are also known as divided attention tasks, and that the mental aspects are weighed as heavily as the physical. You may even be able to get the officer to admit that the defendant had her normal mental faculties, even though her physical performance of the exercises may have been lacking!

READ THE MANUALS, LEARN THE MANUALS, LIVE THE MANUALS

Remember, a sway is not always a sway, so to speak. Know when your client's actions do not equal the improper performance of the exercise by obtaining local and national guidelines for these exercises.[20]

You may learn, as I did, that a sway of up to two inches is acceptable for the Romberg balance exercise or that moving your arms up to 6 inches from your body is acceptable for the balance, walk and turn or one-leg stand exercises.[21]

You should know that "[t]he Walk-and-Turn [Exercise] requires a designated straight line..."[22] Knowing what is permitted, and what the officer should instruct your client to do (in case they do it wrong), is very important!

SHOULD POLICE OFFICERS BE ALLOWED TO CALL THESE EXERCISES TESTS, OR TO GIVE THEIR OPINION CONCERNING WHETHER THE DEFENDANT WAS DUI?

I am of the opinion that you should always petition the court to enter an order in limine to preclude the prosecution's witnesses from calling the field sobriety exercises tests, or from allowing the witnesses, especially police officers, from giving their opinion concerning a defendant's alleged impairment.

"Impairment of the driver's normal faculties' is [a] critical determination in a DUI prosecution."[23] This is particularly true where the officer's probable cause determination to arrest (which is a much lower standard than "beyond a reasonable doubt" to convict) a DUI defendant is based predominantly upon his or her performance of the physical sobriety exercises.

In *State v. Meador*, the defendant challenged the admissibility of his performance of the physical sobriety exercises administered because they lacked scientific reliability and probative value of impairment and, alternatively, were otherwise highly prejudicial.

After reviewing myriad scientific data and precedent from across the country, and hearing from experts in the field, the court determined that "[i]t is entirely appropriate for the jury to consider the simply physical tasks which comprise the field-sobriety tests."[24] This is because "[j]urors do not require any special expertise to interpret performance of these tasks."[25]

Therefore, the court found that "evidence of the police officer's observations of the results of the defendant's

performing the walk-and-turn test, the one-legged stand test, the balance test and the finger-to-nose test should be treated no differently than testimony of lay witnesses (officers, in this case) concerning their observations about the driver's conduct and appearance.... The police officer's observations of the field sobriety exercises, other than the HGN test, should be placed in the same category as other commonly understood signs of impairment, such as glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol or driving patterns."[26] The defendant's argument that the utterly unusual exercises did not test his Anormal faculties was deemed to go to "the weight of the evidence and not its admissibility."[27]

However, because of the significance a jury may attach to police officers' testimony, in particular an officer's lay observation as to signs of impairment in a DUI case, the court limited such testimony in two important respects.[28] First, the court precluded any reference to the sobriety exercises by using terms such as "test, pass, fail, or points, because they create] a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment, as such terms give these layperson observations an aura of scientific validity. Therefore, such terms should be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment."[29] Second, the court limited the officers' testimony in another significant respect as well.

> While the psychomotor tests are admissible, we agree with defendants that any attempt to attach significance to defendants' performance of these exercises beyond that attributable to any of the other observations of a defendant's arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value.[30]
>
> Therefore, [t]he likelihood of unfair prejudice does not outweigh the probative value as long as the witnesses simply describe their observations.... As long as the testimony by the officers is restricted to lay observations...the probative value of the psychomotor testing is not outweighed by the danger of unfair prejudice.[31]

In sum, the court held that officers are to be prevented from testifying as to their ultimate opinion that a DUI defendant is impaired based upon any of the investigation conducted, for such lay testimony invades the jury's province with misleading, scientific-appearing, but unscientific information.[32] Testimony concerning the results of field sobriety exercises are thus to be treated as lay observations of intoxication and not as "scientific evidence of impairment."[33]

By the same token, no officer should be permitted to testify as to his or her opinion that a defendant was impaired or "under the influence to the extent that his normal faculties are impaired. Such lay testimony beyond mere observations will impart precisely the same danger of unfair evidence upon and present the same aura of scientific reliability to the jury as that precluded in *Meador* as the ultimate determination of impairment is the jury's alone.[34]

The proper use of words and phrases can be crucial to the defense of your client. Begin using the proper verbiage before you ever meet the jury panel, and try to indoctrinate the judge to get him or her to use these words and phrases as well. The following are some of the terms that you should (and should not) be using:

- *Exercises*, not tests
- *Performance of the exercises*, not took the tests.
- Permitted to administer exercises and/or the breath tests, not that the officer is certified to administer field sobriety exercises. In most cases, the only formal training the officer received in handling DUI cases took place at the police academy during his initial training, a 40-hour course during a several month training period. Some officers also receive a permit to administer breath tests, but they are not certified to do so.
- The officer made the determination that *probable cause* existed to make an arrest, not that they determined that the defendant was impaired (or guilty or intoxicated).
- That the officer *assumed* certain things (such as the ability to balance on one leg for 30 seconds under any circumstances) to be true.
- That the officer *ignored* certain things (such as the fact that your client had a bad knee).
- That the officer *failed* (to ensure accurate examination; to ask about medical limitations that the person may have).
- That the officer *attempted* to administer these exercises on a roadway graded for drainage at night.

And make sure that you do not allow the officer to claim that he is certified to administer field sobriety exercises;[35] usually, the only training the officer received in handling DUI cases took place at the police academy during his initial training.

HAS ANYONE EVER PASSED THE OFFICER'S TESTS?

Did you know that, at last count, there are 93 possible clues for the walk-and-turn exercise? Or that there are 151 possible clues for the one-leg-stand exercise? So if the officer claims that your client failed the exercises because he exhibited five clues for the Walk & Turn, or six clues for the One Leg Stand, isn't the officer mis grading them (especially under the Areasonable doubt grading system)? Does the officer give the suspect credit for the portions of the exercise they performed correctly? And how can their grading system be fair if they don't tell them what passing is? Pretrial, determine if the officer has ever stopped a person suspected of being intoxicated, admin-

istrated to them sobriety exercises and then determined that she was *not* DUI.[36] This will work to your advantage either way. Not only will it establish that people drive erratically and then are determined not to be DUI after performing these subjective exercises, but if the officer says that it has *never* happened to him, it shows that he is not fairly evaluating whether your client is impaired but instead merely gathering evidence.

ONE FINAL POINT: THE HORIZONTAL GAZE NYSTAGMUS TEST AS ADMINISTERED BY POLICE OFFICERS

Scientists and medical experts scoff at the use of these field sobriety tests, exercises or whatever you call them. When I told my neurologist when he was evaluating me at his office that he was asking me to perform the same tests that police officers used to supposedly detect impaired drivers, he could only mutter under his breath something about police science being an oxymoron (or he called the police morons; I'm not sure).

Ophthalmologists will tell you that the book *Duane's Clinical Ophthalmology* is their training bible. So what does the bible of ophthalmology think about police officers attempting to use the horizontal gaze nystagmus test to determine alcohol impairment? Well, let's see:

> Unfortunately, that alcohol can produce horizontal gaze-evoked nystagmus has led to a 'roadside sobriety' test conducted by law-enforcement officers. Nystagmus as an indicator of alcohol intoxication is fraught with extraordinary pitfalls; many normal individuals have physiologic end-point nystagmus; small doses of tranquilizers that wouldn't interfere with driving ability can produce nystagmus, nystagmus may be congenital or consequent to structural neurologic disease; and often a neuro-ophthalmologist or sophisticated oculographer is required to determine whether nystagmus is pathologic.
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> *Duane's Clinical Ophthalmology* (Updated July 01, 2013), chapter 11 at p. 2 (emphasis added). 🏛

[1] From the April 17, 1998, testimony of Marcelline Burns, Ph.D., in an examination under oath she gave in Los Angeles, California to noted DUI defense attorney Bruce Kapsack, at pp. 10-14 (hereafter referred to as "Burns Deposition").

[2] See, eg. "Crying Wolf: What Never Before Published Data Proves About Standardized Field Sobriety Tests," *Trial Talk* (August/September 2018).

[3] See "Concepts and Principles of the Standardized Field Sobriety Tests," from NHTSA's *DWI Detection and Standardized Field Sobriety Testing Participant Manual* (Participant Manual) (2000).

[4] *Id.* at VIII-1-3.

[5] *Id.* at VIII-3 (emphasis and capitalization as originally supplied). Interestingly, while the SCRI placed such emphasis on the need to administer these exercises in a standardized manner (or their validity would be compromised), beginning with the release of their 2004, this language was curiously removed from all NHTSA training manuals. See *DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing Manual.* This of course leads me to wonder why something that was so important for them to post in bold and all capital letters would be eliminated from consideration entirely.

[6] See *A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery* [hereafter referred to as "Validation Study"], co-authored with Pinellas County Sheriff's Office Sergeant Teresa Dioquino. Dr. Burns is a clinical psychologist and founder and a director of the SCRI, to whom NHTSA turned for its primary research. Indeed, Dr. Burns was one of the supervisors of the 1977 and 1981 NHTSA studies. *State v. Meador*, 674 So.2d at 829. In addition to the Florida validation study, Dr. Burns co-authored the Colorado validation study and has testified in numerous states on the subject of field sobriety tests.

[7] Validation Study at p. 3.

[8] *Id.* at p. 6.

[9] *Id.* at p. 5.

[10] Burns Deposition at pp. 32-33.

[11] See *State v. Homan*, 732 N.E.2d 952 (Ohio), reconsideration denied, 736 N.E.2d 27 (Ohio 2000). And cf. *State v. Meador*, 674 So.2d 826, 830 (Fla. 4th DCA 1996).

[12] 1983 Field Sobriety Testing Manual at p. VIII-21 (emphasis added).

[13] 1995 Manual at p. VIII-21 (emphasis added).

[14] 2000 Manual at p. VIII-12 (emphasis added). The 2002 manual stated the same.

[15] 1983 Field Sobriety Testing Manual at p. VIII-25 (emphasis added).

[16] 1995 Manual at p. VIII-25 (emphasis added).

[17] 15 2000 Manual at p. VIII-14 (emphasis added). The 2002 manual stated the same.

[18] See U.S. Department of Transportation, National Highway Traffic Safety Administration, Standardized Field Sobriety Testing Student Manual (2002), at p. VIII-11 & 14.

[19] See U.S. Department of Transportation, National Highway Traffic Safety Administration, Improved Sobriety Testing, at p. 2. See also Florida Highway Patrol Improved Sobriety Testing; and State of Florida, Department of Highway Safety and Motor Vehicles, Standardized Field Sobriety Testing–Screening Procedures.

[20] See www.nhtsa.gov/standardized-field-sobriety-test-training-downloads.

[21] See Florida Standardized Field Sobriety Testing Screening Procedures Manual at pp. 25, 26 and 28.

[22] See NHTSA Standardized Field Sobriety Testing Student Manual (2002) at p. VIII-11 (emphasis added).

[23] *State v. Meador*, 674 So.2d 826, 830 (Fla. 4th DCA 1996).

[24] *Id.* at 831, quoting *People v. Sides*, 556 N.E.2d 778, 779-80 (Ill. App. 3d 1990). See also *State v. Ferrer*, 2000 WL 310294 (Haw. App.) (officer may not state their conclusion that a subject "failed" the field sobriety exercises); *State v. Ybanez*, 1 FLW Supp. 547 (Fla. St. Johns County Ct. 1993) (sobriety exercises are not scientific tests); *State v. Thompson*, 1 FLW Supp. 463 (Fla. Polk County Ct. 1993) ("[the] ordinary experiences of jurors will allow them to examine th[e] evidence and make a proper determination as to whether or not the defendant is impaired").

[25] *Meador* at 831.

[26] *Id.* at 831-32 (emphasis added). The court declined to extend its analysis to the horizontal gaze nystagmus exercise, finding that it should not be admitted as a lay observation of intoxication "because HGN constitutes scientific evidence." *Id.* at 836.

[27] *Id.* at 832.

[28] The court also felt it necessary to limit the officers' testimony in light of the fact that the studies it reviewed "revealed that there is no reliable numerical correlation between performance on the field sobriety tests and breath alcohol concentration, let alone impairment." *Id.* at 832. While sobriety exercises may tend to increase the accuracy of the decision-making process, "[w]hat the studies do not show... is that the tasks have any enhanced scientific reliability not readily observable by the average lay person. Further, the tests' flaws prevent the State from accurately quantifying the relevancy of the tasks." *Id.*

[29] *Id.* at 833 (citations omitted).

[30] *Id.* at 832.

[31] *Id.* (emphasis added). The court also noted that "[c]ertainly in an individual case, depending on the totality of the facts and the nature of the testimony, a trial court might very well be within its discretion to exclude such evidence pursuant to section 90.403." *Id.* at 832.

[32] In so ruling, the court implicitly overruled *City of Orlando v. Newell*, 232 So.2d 413 (Fla. 4th DCA 1970), which had permitted officers to testify not only as to their "observations of a defendant's acts, conduct, appearance and statements, but also to give opinion testimony of impaired based on their observations." *Meador* at 831. And see *Jones v. State*, 95 So.3d 426 (Fla. 4th DCA 2012) (officer's subjective interpretations of defendant's statements, while not an ultimate opinion regarding guilt, still improperly bolstered the prosecution's case); *McKeon v. State*, 16 So.3d 247 (Fla. 4th DCA

2009) (improper for arresting officer to state that he only arrests half of the DUI suspects that he investigates; conviction reversed).

[33] *Id.* at 831 (emphasis added).

[34] In fact, any opinion rendered by the officer would necessarily be based mostly, if not solely, upon his or her observations of the defendant during the administration of the field sobriety exercises. See *Martinez v. State*, 761 So.2d 1074, 1078-1081 (Fla. 2000) (a witness' opinion as to the guilt or innocence of the accused is not admissible); *Sosa-Valdez v. State*, 785 So.2d 633 (Fla. 3d DCA 2001) (by testifying that the victim was not involved in some sort of setup, the officer was in effect saying that the defendants were guilty); *Rivera v. State*, 807 So.2d 721 (Fla. 3d DCA 2002) (conviction reversed because of police officer's testimony that he was one hundred percent sure that he got the right guy).

[35] See *Sheppard v. State*, 2014 Fla. LEXIS 2717.

[36] And see *McKeon v. State*, 16 So.3d 247 (Fla. 4th DCA 2009) (improper for arresting officer to state that he only arrests half of the DUI suspects that he investigates; conviction reversed).

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one county because he or she is in court in another county or it is asking for a memo of law, caselaw or advise concerning a legal issue, FACDL members help each other like lawyers in a big firm.

There is no question that many times in multi-defendant cases we flip our clients on each other's clients. There are times we point the finger at each other's clients in trial as the true culprit or at least the main culprit. There are times that we consult with the same potential client in an effort to get that business for ourselves. We represent our client's interests over others, we compete for business, and we compete for results. However, that does not mean we cannot help each other out when needed. But, covering cases for each other and providing sample motions, memos of law or caselaw are only a small part of how FACDL helps the criminal defense bar. What you may not realize is that FACDL is doing a lot more for you and your practice than you may know.

LEGISLATION

We have a Legislative Committee chaired this year by **Russell Smith** and **Aaron Wayt** and we have a lobbyist—**Jorge Chamizo**, with Floridian Partners. FACDL tracks what laws are being proposed to determine what effect the law will have on the criminal justice system. If something needs to be challenged, amended or addressed we are there on the front lines. Additionally, we support legislation that can have a positive impact on the criminal justice system. We also craft and propose legislation. This year we are working on a bill that could make recording interrogations a law enforcement requirement. When the goal is transparency in the criminal justice system relying on note taking is antiquated. If this is successful, no jury will have to question if our clients confessed or not. That is just one example of how FACDL represents the interests of the criminal defense bar in Tallahassee and Washington.

APPEALS

FACDL has an Amicus Committee, chaired by **Diana Johnson**. FACDL has submitted briefs on various subjects and issues. We filed a brief successfully challenging the unlawful sneak and peak search warrants in a mass surveillance case. We submitted amicus briefs concerning Felon's Voting Rights, Juvenile Minimum Mandatory Sentencing, Juvenile Life without Parole, the Confrontation Clause and supported motions in the trial court concerning Virtual Probation Violation Hearings. When a request is made to support or oppose an issue important to our practice, FACDL responds. That type of support can and sometimes does make a difference.

EDUCATION

We have a Continuing legal Education Committee chaired by **Sabrina Puglisi**. In years past, FACDL regularly produced a seminar at The Annual Meeting, Blood Breath and Tears, Board Certification and Death is Different. This year COVID threw us a curveball. Board Certification and the Annual Meeting seminars were lined up and ready to go when everything shut down. We missed those because we could not go live, but the CLE committee was tasked with coming up with alternatives to provide education to our membership. They met the challenge and FACDL has so far produced a variety of interesting and informative virtual web based live seminars. BBT has successfully been transitioned to Zoom-based and a lunch and learn virtual series will take us into 2021.

PUBLICITY

We have a Communications Committee chaired by **Teri Sopp**. This committee has worked overtime identifying current events and issues relevant to criminal justice that FACDL has weighed in with press releases and public statements. As a result, FACDL has been quoted and featured in local, state and national media concerning our positions on a variety of subjects. We publicly supported the removal of a mural from the Baker County Courthouse containing an image of the Ku Klux Klan as a romanticized symbol of law and order. We have

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Volume 32 No. 4 | A Publication of the Florida Association of Criminal Defense Lawyers | Winter 2020

Motion for Change of Venue

34TH ANNUAL MEETING

JULY 15-17, 2021

BOCA RATON RESORT & CLUB

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See full "Order" on pages 4-5.