

Starcher, J., concurring:

**FILED**  
July 26, 2002  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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I concur with the Court’s judgment. I write separately to point out that despite intimations to the contrary in some opinions, including the Court’s opinion in the instant case, West Virginia law does *not* permit the admission of horizontal gaze nystagmus (“HGN”) evidence as substantive evidence of intoxication, without the reliability of the HGN evidence being shown.

This Court’s leading case on horizontal gaze nystagmus in connection with the proof of intoxication<sup>1</sup> is *State v. Barker*, 179 W.Va. 194, 366 S.E.2d 642 (1988). The following language from *Barker* is explanatory on the general subject of HGN, and shows the concerns that this Court had in that case:

The HGN test is based on the principle that consumption of alcohol causes nystagmus. Nystagmus is the rhythmic oscillation of the eyes in a horizontal, vertical or rotary direction. \*\*\* Nystagmus can be congenital or can be caused by a variety of conditions affecting the brain, including ingestion of drugs such as alcohol or barbiturates. \*\*\* In general, “[i]n order for a scientific test to be initially admissible, there must be general acceptance of the scientific principle which underlies the test.” There are some scientific tests, such as ballistics tests,

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<sup>1</sup>*W.Va. Code*, 17C-5-2 [2001] prohibits operating a motor vehicle while “under the influence of alcohol, controlled substances or drugs.” In this separate opinion, I use the term “intoxication” as a shorthand term to mean this condition. Other terms commonly used in the law for this condition are “impaired” or “under the influence.”

fingerprint identification, and blood tests, which are so generally accepted in the scientific community that a trial court may take judicial notice of their reliability. \*\*\* In the present case, the State offered no evidence to demonstrate the reliability of either the HGN test or the scientific principle upon which the HGN test is based, i.e., that alcohol consumption causes nystagmus. The only testimony regarding the HGN test came from Officer Davis. Officer Davis told the jury that the HGN test “consists of the measurement of the horizontal movement of the eye as it is affected by alcohol,” and described how he performed the test. He also described the reaction of a sober person’s eye to the test, and how that reaction is affected by consumption of alcohol. *He did not, however, address the scientific reliability of the test. We, therefore, find that the lower court erred in admitting Officer Davis’ testimony concerning the HGN test.*

*One of the dangers inherent in expert testimony in regard to scientific tests is that the jury may not understand the exact nature of the test and the particular methodology of the test procedure, and may accord an undue significance to the expert testimony. It therefore seems reasonable to require, as we did in Clawson, some in camera disclosure of the methodology, scientific reliability, and results of the HGN test, as well as evidence of whether accepted test procedures were followed by qualified personnel in a particular case. A demonstration of reliability should include both testimony by expert witnesses and relevant articles and scholarly publications. \*\*\** Even if the HGN test were found to be reliable, and its results admissible, we would be left with the question of whether estimates of blood alcohol content based on a driver’s performance of the HGN test are admissible. The HGN test is a field sobriety test. A police officer’s testimony as to a driver’s performance on other field sobriety tests like finger-to-nose or walking the line, is admissible at trial as evidence that the driver was under the influence of alcohol. From the evidence presented, we are not convinced that the HGN test should be entitled to any more evidentiary value than other field sobriety tests. We note that unlike the blood, breath, and urine tests, the HGN test has not been recognized by our state legislature as a method for measuring blood alcohol content. We, therefore, find that even if the reliability of the HGN test is demonstrated, an expert’s testimony as to a driver’s performance on the test is admissible

only as evidence that the driver was under the influence. Estimates of blood alcohol content based on the HGN test are inadmissible. *Because the State did not introduce evidence of the scientific reliability of the test in this case, we do not reach the question of whether the HGN test is sufficiently reliable to be admissible.*

179 W.Va. at 146-148, 366 S.E.2d at 644-646 (emphasis added, citations omitted).

This Court held in *Barker* that HGN evidence is scientific evidence, and that there must be expert testimony as to the evidence's reliability as evidence of intoxication. In *Barker* we categorically refused to allow the HGN testimony of the police officer to come in *at all*, because there was no evidence showing the HGN evidence's scientific reliability as proof of intoxication.

Notably, in *State v. Ferrell*, 184 W.Va. 123, 138 n.4, 399 S.E.2d 834, 849 n.4 (1990), former Justice Thomas Miller, one of our state's most learned writers in the area of scientific and technical evidence, stated that in *State v. Barker* this Court had "rejected . . . the horizontal gaze nystagmus test[.]" *Id.*

We also held in Syllabus Point 2 of *Barker* that *if* the HGN evidence were determined to be scientifically reliable to show that a person is intoxicated, and therefore admissible, the HGN evidence could not in any event be used to show a certain blood alcohol level, but *at best* as a "field sobriety test" to circumstantially show that a driver was probably intoxicated.

The great weight of authority among courts is that HGN evidence is scientific

evidence. *See generally, United States v. Horn*, 185 F.Supp.2d 530 (D.Md. 2002).<sup>2</sup> The persuasive force of HGN evidence rests almost entirely upon an assertion of scientific legitimacy rather than a basis of common knowledge. *People v. Williams*, 3 Cal.App.4th 1326, 5 Cal.Rptr.2d 130 (5th Dist. 1992). In *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997), the court stated that testimony linking HGN to intoxication is “scientific, technical, or other specialized knowledge” and therefore must be offered through an expert witness. *See also State v. Duffy*, 778 A.2d 415 (N.H.2001); *State v. Doriguzzi*, 334 N.J.Super. 530, 760 A.2d 336 (2000); *State v. Torres*, 127 N.M. 20, 976 P.2d 20 (1999); *Duffy v. Director of Revenue*, 966 S.W.2d 372 (Mo.Ct.App.1998); *State v. Helms*, 348 N.C. 578, 504 S.E.2d 293 (1998); *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997); *Com. v. Sands*, 424 Mass. 184, 675 N.E.2d 421 (1997); *Com. v. Apollo*, 412 Pa.Super. 453, 603 A.2d 1023 (1992); *People v. Erickson*, 156 A.D.2d 760, 549 N.Y.S.2d 182 (1989).

*West Virginia Rule of Evidence* Rule 702 requires that scientific test results, in order to be admissible, be relevant and reliable. *Watson v. Inco Alloys Intern, Inc.*, 209 W.Va. 234, 239, 545 S.E.2d 294, 299 (2001). There is a category of evidence based on scientific methodology that is so longstanding and generally recognized that it may be judicially recognized, and, therefore, a trial court need not separately ascertain the basis for

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<sup>2</sup>*U.S. v. Horn* is a recent case that contains what appears to be at this time the most comprehensive discussion and up-to-date survey of the many state law cases on HGN evidence; I discuss *U.S. v. Horn* further *infra*.

its reliability. Syllabus Point 1, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).<sup>3</sup>

In *State v. Witte*, \_\_\_ Kan. \_\_\_, 836 P.2d 1110, 1119-1120 (1992), the court discussed the mixed state of scientific opinion regarding the reliability of HGN evidence. The court stated:

Our research indicates that the reaction within the scientific community is mixed. Some articles endorse the HGN testing and its accuracy. Other articles discuss concerns with the HGN test. \*\*\* In addition to intoxication, many other factors can cause nystagmus.

Nystagmus can be caused by problems in an individual's inner ear labyrinth. In fact, irrigating the ears with warm or cold water, not a far-fetched scenario under particular weather conditions, is a source of error. Physiological problems such as certain kinds of diseases may also result in gaze nystagmus. Influenza, streptococcus infections, vertigo, measles, syphilis, arteriosclerosis, muscular dystrophy, multiple sclerosis, Korsakof's Syndrome, brain hemorrhage, epilepsy, and other psychogenic disorders all have been shown to cause nystagmus. Furthermore, conditions such as hypertension, motion sickness, sunstroke, eyestrain, eye muscle fatigue, glaucoma, and changes in atmospheric pressure may result in gaze nystagmus. The consumption of common substances such as caffeine, nicotine, or aspirin also lead to nystagmus almost identical to that caused by alcohol consumption.

Temporary nystagmus can occur when lighting conditions are

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<sup>3</sup>Expert testimony concerning generally recognized tests is presumptively admissible and the burden of excluding such testimony is upon the side seeking exclusion. When a test is novel or not generally accepted, however, that circumstance alone meets the threshold requirement of rebutting any presumption of admissibility under this rule and the burden of proof that the test is reliable remains on the proponent. *State v. Woodall*, 182 W.Va. 15, 385 S.E.2d 253 (1989).

poor.

An individual's circadian rhythms (biorhythms) can affect nystagmus readings-- the body reacts differently to alcohol at different times of the day. One researcher has suggested that because of this, the angle of onset should be decreased five degrees between midnight and 5 a.m. A number of driving under the influence arrests occur after midnight, which "would seem to indicate that sensitivity of HGN to alcohol is enhanced during the hours of the day when the greatest number of drunk driving arrests occur."

A prosecution-oriented group in California conducted its own research:

The study measured the correlation of police officer estimations of the angle of onset of nystagmus against chemical tests involving breath and blood samples. The data in the study revealed that there was virtually no correlation between the actual value of blood alcohol concentration and the predicted value based upon the angle of onset of nystagmus.

. . . This study points out the fact that horizontal gaze nystagmus tests should never be intended as a substitute for actual blood or breath alcohol testing. The purpose of the procedure, if any is strictly a field screening function, like other presumptive tests.

836 P.2d at 1119-1120 (citations omitted). The court concluded in *State v. Witte* that the State had not established the scientific reliability of the HGN evidence, and that the police officer's testimony about his observations could not establish that reliability. *Accord, State v. Chastain*, 256 Kan. 16, 22, 960 P.2d 756, 761 (1992).

In *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997), the Supreme Court of Mississippi held that the only allowable use of HGN evidence is to establish probable

cause to arrest and administer breath or blood tests. The court delivered a “stern warning concerning using the HGN test for reasons other than to establish probable cause. The State cannot use the results of the HGN test merely as an indicator to show that the defendant was ‘under the influence of intoxicating liquor’ . . . .” 693 So.2d at 1361. *In accord, Richbourg v. State*, 744 So.2d 352, 354 (Miss. Ct. App. 1999). *See also Graves v. State*, 761 So.2d 950, 953 (Miss. Ct. App. 2000) (an officer could testify about doing an HGN evaluation only to show probable cause to arrest a defendant and administer a breathalyzer, rather than for the impermissible purpose of indicating that HGN evidence was scientific evidence proving intoxication or impairment).<sup>4</sup>

Recently, in *State v. Doriguzzi*, \_\_\_ N.J. App. \_\_\_, 760 A.2d 336 (2000), the court held that HGN evidence is scientific evidence that must be shown to meet a reliability standard before it may be admitted. The court specifically declined to take judicial notice of the reliability of HGN evidence, holding that a survey of the relevant decisions did not provide the court with the level of certainty to generally approve of the admission of HGN evidence in future cases. The *Doriguzzi* court stated:

We emphasize that what is being sought here by the State is admission of HGN testing as an element of proof to permit the

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<sup>4</sup>*See also Williams v. State*, 10 So.2d 24, 43 (Fla. App. 1998) (Cope, J., concurring and dissenting) (discussing how in a double-blind experiment in 1996, the examiner’s opinions using HGN evaluations and other non-invasive sobriety tests were consistent with chemical test results 44% of the time in alcohol-only cases, and 56% of the time in drug and alcohol cases; stating that HGN evaluation was designed to be one of several field sobriety evaluation procedures to be conducted at roadside to aid an officer in deciding whether he has probable cause to believe that the driver is guilty of driving under the influence).

factfinder to conclude that failure of the HGN test, in combination with the failure of coordination tests, sufficiently proves defendant's guilt of driving under the influence of alcohol. \*\*\* We note a recurrent theme in the decisions from other jurisdictions that a jury may be inappropriately influenced by the apparent scientific precision of HGN testing or otherwise fail to properly understand it.

In *U.S. v. Horn, supra*, the court held that while a police officer trained in observing nystagmus could testify to the officer's observation of exaggerated nystagmus,<sup>5</sup> the officer could not testify to the significance of the nystagmus. The officer could not, without stepping outside the bounds of permissible non-scientific testimony, call HGN evidence a "test," could not say that the person "failed," and could not say that the observed nystagmus was a "clue" or "sign" of intoxication. 185 F.Supp.2d at 561.

The court in *U.S. v. Horn* held that evidence as to any significance that might be given to factually established exaggerated nystagmus in a given case must come from either judicial notice of scientific facts, from case-specific testimony by expert witnesses, or from learned treatises and recognized scientific studies relating to nystagmus and intoxication. Because of a lack of such evidence in the *U.S. v. Horn* case, including a lack of persuasive independent scientific studies in the record showing the reliability of HGN evidence (and the record in *Horn* was extremely well developed in this area), the court in *Horn* declined to take judicial notice of the scientific reliability of exaggerated HGN as a reliable indicator of

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<sup>5</sup>"Exaggerated" nystagmus means nystagmus in excess of "normal" nystagmus. *U.S. v. Horn*, 185 F.Supp.2d at 537. This distinction illustrates the subjectivity of the minute observations inherent in HGN evaluation.



intoxication. 185 F.Supp.2d at 557. I believe that the court in *U.S. v. Horn* was entirely correct in not taking judicial notice of the reliability of HGN evidence, based on the current state of scientific research, as comprehensively discussed in the court's opinion.<sup>6</sup>

This Court has discussed HGN evidence in several cases since *Barker* was decided. In *Boley v. Cline*, 193 W.Va. 311, 314, 456 S.E.2d 38, 41 (1995) (*per curiam*), we upheld a driver's license revocation that was based on evidence of erratic driving, the smell of alcohol on the driver's breath, and HGN in one eye. Former Justice Cleckley concurred in *Boley*, indicating that he believed the evidence may have been insufficient to prove intoxication, even under a preponderance standard. 193 W.Va. at 315, 464 S.E.2d at 42. In *Dean v. W.Va. D.M.V.*, 195 W.Va. 70, 464 S.E.2d 589 (1995), we also upheld a license suspension that was based in part on HGN evidence. In both *Dean* and *Boley*, there was apparently no specific challenge to the admissibility of HGN evidence based on a lack of expert testimony regarding its reliability as evidence of intoxication; in both cases we assumed that it was admissible for that purpose.

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<sup>6</sup>While I do not necessarily agree with all of the court's approach and conclusions in *U.S. v. Horn*, and while the somewhat elaborate procedural approach to HGN evidence that the court in *U.S. v. Horn* ultimately prescribes may be unnecessarily complex, the opinion's breadth and thoroughness should be a benchmark for future jurisprudence in this area. The opinion is particularly noteworthy in three areas. First, the opinion comprehensively reviews all of the scientific studies of HGN evidence, and points out their strengths and their notable shortcomings. Second, the opinion comprehensively reviews the approaches to HGN evidence taken by all of the states, and from them, derives a well-reasoned approach that draws from the best work of those courts. Third, the opinion's approach properly leaves the door open for more science to develop in this area, without prejudicing the rights of the State or individuals. All in all, the opinion in *U.S. v. Horn* is a remarkable example of a court performing its unique, independent, and vital function in a democracy.

In *Muscatell v. Cline*, 196 W.Va. 588, 595, 474 S.E.2d 518, 525 (1996), we upheld a DUI conviction where there was a challenge to HGN evidence on the grounds that there had been no expert evidence to establish the scientific reliability of the HGN evidence. We said in *Muscatell* that the trial court was wrong in reading *Barker* to require such expert evidence. 196 W.Va. at 595, 474 S.E.2d at 525. However, as shown in the foregoing-quoted excerpt from *Barker*, although the holding was not set forth in a syllabus point, *Barker* required an expert showing of the scientific reliability of HGN evidence before such evidence could be found to be admissible on the issue of intoxication. The Court's opinion in *Muscatell*, which primarily focused on a separate issue, simply misread *Barker*.

In two other cases, *Cunningham v. Bechtold*, 186 W.Va. 474, 413 S.E.2d 129 (1991), and *State v. Davis*, 195 W.Va. 79, 464 S.E.2d 598 (1995), we upheld the use of HGN evidence for the limited purpose that the HGN evaluation was designed to be used, to-wit: to provide a basis for police officers in deciding whether they have probable cause to make an arrest.

In most DUI cases, the prosecution (or the motor vehicle commissioner in a driver's license case), in addition to such evidence as erratic driving, odor of alcohol, performance on non-HGN field sobriety tests, consumption of alcohol, etc., has presumptively admissible scientific evidence to support the charge, in the form of breathalyzer machine results showing a person's blood alcohol level. The state-approved protocols for the use of such machines are designed to create scientifically reliable results, and are established by state agencies that are not in the business of prosecuting cases. The breathalyzer machine results

are objective, and appear to be accepted by every jurisdiction as scientifically reliable and presumptively admissible if properly performed. Therefore, our courts allow a witness who does not understand in detail how and why the machines actually work to testify to their results as evidence of a person's blood alcohol level.

HGN evidence, however, as demonstrated hereinabove, is not objective. HGN observation and evaluation relies entirely on a brief, subjective observation of transitory phenomena by a non-scientist, under field conditions that are ordinarily distracting and stressful. There is a high level of controversy as to the reliability of HGN evidence to prove intoxication, with many jurisdictions firmly rejecting the suggestion that HGN evidence be accepted as a standard, generally accepted, and presumptively admissible *indicium* of intoxication that may be presented to a fact-finder as such without independent expert testimony showing the scientific reliability of such evidence in a given case.

While some jurisdictions have concluded that HGN evidence is reliable and presumptively admissible to show intoxication without a showing of the scientific reliability of the evidence for that purpose in a given case, *see, e.g., State v. O'Key*, 321 Or. 285, 899 P.2d 663 (1995), the majority of courts have taken the approach that we took in *State v. Barker, supra*. *See, e.g., Horn, Young, and Doriguzzi, supra*. *See generally, Unreliability of the Horizontal Gaze Nystagmus Test*, 4 Am.Jur. Proof of Facts 439; *Horizontal Gaze Nystagmus Test: Use in Impaired Driving Prosecution*, 60 A.L.R.4th 1129; *Can Your Eyes Be Used Against You? The Use of the Horizontal Gaze Nystagmus Test in the Courtroom*, 84 Journal of Criminal Law and Criminology 203 (1993).

As the previous discussion indicates, the areas of potential scientific weakness and unreliability with respect to HGN evidence are numerous. For example, many conditions other than alcohol consumption can cause nystagmus -- and apparently many people have nystagmus naturally. It also appears that alcohol-related nystagmus can persist for hours after blood alcohol level declines to zero. The court in *Horn* noted that while there is little dispute that exaggerated nystagmus is caused by the *consumption* of alcohol (and other conditions), 185 F.Supp.2d at 555, proof of the consumption of alcohol is not the same thing as proof of intoxication. Another example of HGN evidence's unreliability is shown by one reported study where, under controlled conditions, double-blind evaluations of intoxication based on HGN evidence and similar non-invasive sobriety tests were *no better than chance*. See *Williams v. State, supra*, 710 So.2d at 43.)

Of course, it may be argued that these are the sorts of weaknesses in HGN evidence that a defense lawyer can bring out in cross-examination. But ordinarily, as in the instant case, the testifying witness, a police officer, knows little or nothing one way or another about these scientific issues. No matter how knowledgeable and incisive a defense lawyer may be regarding the potential for errors in HGN evidence, if the testifying officer simply and truthfully says, "I don't know anything about 'natural nystagmus' or any of those other areas; I simply perform the test and draw the conclusions about intoxication as I was taught to" -- then even the best cross-examination cannot get much traction, and will not go very far to impeach the officer's testimony. The prosecution or commissioner will point out that the officer properly administered a "scientific test;" and a fact-finder will be inclined to accept the

results, particularly without expert evidence to the contrary. *See Young, supra*, 693 So.2d at 1360.

As Justice Davis reiterated in a recent opinion, *State v. Leep*, \_\_\_ W.Va. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, No. 30018, June 19, 2002, slip op. at \_\_\_, “[o]ne of the dangers inherent in expert testimony in regard to scientific tests is that the jury may not understand the exact nature of the test and the particular methodology of the test procedure and accord an undue significance to the expert testimony.” (*quoting State v. Clawson*, 165 W. Va. 588, 621, 270 S.E.2d 659, 678 (1980).)

In this regard, it must be recognized that thousands of West Virginians are criminally and civilly prosecuted for DUI each year; and most of them are of modest means. Some do not have lawyers, and even if they do, the vast majority of accused drivers cannot afford scientific experts to challenge HGN evidence of intoxication presented by police officers who are in good faith merely repeating what they have been taught about that evidence. Under these conditions, where liberty and valuable property interests are at stake, our legal system has a particularly strong “basic fairness” obligation to see that the evidence that is regularly used by the State in these proceedings, where most defenses must necessarily be limited in time and cost, meets a threshold of well-established scientific reliability.<sup>7</sup> HGN

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<sup>7</sup>This is not the place to discuss the various approaches or standards that are evolving for courts considering scientific, technical, expert, opinion, or other such evidence. Some would say that the more recent *Daubert/Wilt* “relevant and reliable” approach to scientific evidence is more liberal than the earlier *Frye* “generally accepted” approach. *See Davis, Justice Robin Jean, et al.*, “An Analysis of the Development of Admitting Expert Testimony (continued...)”

evidence simply does not meet that test.<sup>8</sup>

Based on all of the foregoing discussion, in accord with the well-reasoned

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<sup>7</sup>(...continued)

in Federal Courts and the Impact of That Development on West Virginia Jurisprudence,” \_\_\_\_ *W.Va.L.Rev.* \_\_\_\_ (200\_\_) (forthcoming). Regardless of the formulation of the approach or standard used, constitutional due process clearly requires courts to take a hard look at the admissibility of scientific test evidence that is regularly used against citizens in criminal and administrative cases by the State, and that is presented by witnesses who do not understand the underlying science. The constitutional necessity for such a “hard look” at scientific, etc. evidence is not so compellingly presented when equally matched civil litigants are presenting a battle of “duelling experts.” In the latter case, cross-examination and jury weight and credibility determinations can address issues of reliability more effectively and fairly than in the former case.

<sup>8</sup>Courts are generally in accord that non-HGN “field sobriety test” evidence, such as a person’s performance of tasks like walk-and-turn, one-legged stand, etc., is not scientific evidence and is admissible on the issue of intoxication without expert testimony as to its reliability -- because, like other lay observation evidence like slurred speech, emotional lability, etc., such evidence draws for its persuasive force on the common understanding of lay persons of the effects of intoxication on human behavior. In *State v. Ferrer*, 95 Hawai’i 409, 23 P.3d 744 (2001), the court stated:

It is generally recognized, however, that the foundational requirements for admission of psychomotor FST [field sobriety test] evidence differ from the foundational requirements for admission of HGN evidence. Psychomotor FSTs test balance and divided attention, or the ability to perform multiple tasks simultaneously. While balancing is not necessarily a factor in driving, the lack of balance is an indicator that there may be other problems. Poor divided attention skills relate directly to a driver’s exercise of judgment and ability to respond to the numerous stimuli presented during driving. The tests involving coordination (including the walk-and-turn and the one-leg-stand) are probative of the ability to drive, as they examine control over the subject’s own movements. Because evidence procured by administration of psychomotor FSTs is within the common experience of the ordinary citizen, the majority of courts that have addressed the issue generally consider psychomotor FSTs to be nonscientific evidence.

decisions of many courts, and as required by our prior holding in *Barker, supra*, it is clear that evidence of horizontal gaze nystagmus (“HGN”) is not admissible in a civil or criminal proceeding to show that a person drove a motor vehicle under the influence of alcohol, controlled substances, or drugs in violation of *W.Va. Code*, 17C-5-2 [2001] unless there is specific proof using expert testimony of the scientific reliability of the HGN evidence in the particular case to make such a showing. The training of a police officer to perform HGN observations and evaluations does not provide the officer with the expert qualifications to establish HGN evidence’s scientific reliability. *See State v. Barker*, 179 W.Va. 194, 366 S.E.2d 642 (1988). To the extent that this principle conflicts with language in this Court’s opinions in *Boley v. Cline*, 193 W.Va. 311, 456 S.E.2d 38 (1995) (*per curiam*); *Dean v. W.Va. DMV*, 195 W.Va. 70, 464 S.E.2d 589 (1995); *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996) -- and the instant case -- those cases erroneously state the law.

Horizontal gaze nystagmus (“HGN”) observations may be relied upon by a law enforcement officer in deciding whether there is probable cause to believe that a person is intoxicated. If the officer’s basis for believing that there was probable cause is challenged, and the officer has been trained in observing and evaluating HGN, evidence regarding HGN observations (if otherwise admissible), may only be admitted for the purpose of showing probable cause, without a separate showing of the HGN evidence’s reliability.<sup>9</sup>

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<sup>9</sup>The State may of course put on expert testimony in a given case to seek to establish the reliability of HGN evidence in that case. That circumstance would present the questions for the tribunal: first, whether to admit the HGN evidence; and second, if the evidence is (continued...)

I am authorized to state that Justice Albright joins in this separate opinion, and concurs specially with the comments herein discussing *Muscatell, supra*, an opinion of this Court that he authored.

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<sup>9</sup>(...continued)  
admitted, whether and how much to credit the evidence. Police officers and prosecutors presenting evidence in DUI cases place the results of those cases in jeopardy if they do not comply with the requirements of *Barker*.