

HORIZONTAL GAZE NYSTAGMUS STATE CHART SUMMARY

Last Update: 01/05

	AL	AK	AZ	AR	CA	CO ¹	CT	DE	DC	FL	GA	HI	ID	IL	IN
States with case law dealing With the admissibility of HGN	X	X	X	X	X		X	X	X	X	X	X	X	X	X
States following <i>Frye</i>	X	X	X		X				X	X				X	
States following <i>Daubert</i>				X			X	X				X	X		X
States allowing HGN testimony at Both trial and probable cause hearings		X	X	X	X		X	X	X	X	X	X	X	X	X
States allowing HGN testimony for Probable cause hearings only (criminal or civil)															
States allowing testimony of correlation Between HGN and BAC			X ²							X				X	
States holding that HGN testimony Is scientific in nature	X ³	X	X	X	X		X	X	X	X	X	X	X	X	
States finding that HGN may be scientific or “just Another FST” dependant on purpose of testimony	X		X												
States holding that HGN is not scientific or allowing Admission of HGN without discussion of scientific status															X
States that have ruled HGN testimony satisfies <i>Frye/Daubert</i> and no longer require such a hearing		X	X	X	X			X	X	X	X	X	X	X	
States with <i>Frye/Daubert</i> holding of admissibility But still requiring expert testimony of principles underlying HGN to be explained to fact-finder								X							
States that have had <i>Frye/Daubert</i> hearing And found HGN to be <i>INADMISSIBLE</i>															
States that have ruled HGN is scientific but have not Yet ruled on admissibility based on <i>Frye/Daubert</i> Hearing	X														
States with cases from which HGN admissibility Can be argued (<i>dicta</i> or not on point)															

¹ No case law referring to HGN found as of 1/13/05.

² Arizona, Florida, and Illinois allow correlation of HGN to BAC in order to corroborate or attack a chemical test. *State v. Superior Court (Blake, Real Party in Interest)*, 149 Ariz. 287, 718 P.2d 189 (App. 1985); *Williams v. State*, 710 So.2d 24 (Fla. App. 1998); *People v. Buening*, 592 N.E.2d 1222 (Ill.App. 1 Dist. 1992)

³ In *Cumbe v. City of Montgomery*, 703 So.2d 423 (Ala. Crim. App. 1997), the Court of Criminal Appeals of Alabama found that any error in HGN testimony was harmless because the test was afforded no greater weight than any other FST. However, in *Ex Parte Malone* (Ala. 1990), the Alabama Supreme Court found the HGN to be scientific in nature.

	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH
States with case law dealing With the admissibility of HGN	X	X		X	X	X	X	X	X	X	X	X	X		X
States following <i>Frye</i>		X		X		X	X ⁴		X		X		X		
States following <i>Daubert</i>			X		X		X	X ⁵		X		X			X
States allowing HGN testimony at Both trial and probable cause hearings	X			X	X	X		X	X		X	X	X		X
States allowing HGN testimony for Probable cause hearings only (criminal or civil)		X ⁶								X					
States allowing testimony of correlation Between HGN and BAC															
States holding that HGN testimony Is scientific in nature		X		X		X	X	X	X	X	X	X	X		X
States finding that HGN may be scientific or “just Another FST” dependant on purpose of testimony															
States holding that HGN is not scientific or allowing Admission of HGN without discussion of scientific status	X														
States that have ruled HGN testimony satisfies <i>Frye/Daubert</i> and no longer require such a hearing				X	X	X		X	X		X	X	X		X
States with <i>Frye/Daubert</i> holding of admissibility But still requiring expert testimony of principles underlying HGN to be explained to fact-finder												X			
States that have had <i>Frye/Daubert</i> hearing And found HGN to be <i>INADMISSIBLE</i>		X													
States that have ruled HGN is scientific but have not Yet ruled on admissibility based on <i>Frye/Daubert</i> Hearing							X			X ⁷					
States with cases from which HGN admissibility Can be argued (dicta or not on point)			X											X	

⁴ “A party seeking to introduce scientific evidence may lay a foundation either by showing that the underlying scientific theory is generally accepted within the relevant scientific community, or by that the theory is reliable or valid through other means.” *Commonwealth v. Sands*, 675 n.e.2d 370 (Mass. 1997).

⁵ While Michigan is now a *Daubert* state, the case on the admissibility of HGN testimony was decided under the *Frye* standard.

⁶ *Angle v. Kansas Dept. of Revenue*, 758 P.2d 226 (Kan. App. 1988).

⁷ In *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997) the Mississippi Supreme Court held that the HGN was a scientific test that was not generally accepted in the scientific community and could not be used to prove intoxication or a showing of impairment. However, it does not appear that there was a *Frye* hearing upon which they based this ruling.

	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT
States with case law dealing With the admissibility of HGN	X	X	X	X	X	X	X	X	X		X	X	X	X	X
States following <i>Frye</i>	X		X				X		X						
States following <i>Daubert</i>		X						X				X	X	X	
States allowing HGN testimony at Both trial and probable cause hearings			X		X	X		X			X	X		X	X
States allowing HGN testimony for Probable cause hearings only (criminal or civil)	X						X		X				X		
States allowing testimony of correlation Between HGN and BAC															
States holding that HGN testimony Is scientific in nature	X	X	X	X			X	X	X				X	X	
States finding that HGN may be scientific or “just Another FST” dependant on purpose of testimony															
States holding that HGN is not scientific or allowing Admission of HGN without discussion of scientific status					X ⁸	X					X	X			X
States that have ruled HGN testimony satisfies <i>Frye/Daubert</i> and no longer require such a hearing			X ⁹					X						X	
States with <i>Frye/Daubert</i> holding of admissibility But still requiring expert testimony of principles underlying HGN to be explained to fact-finder															
States that have had <i>Frye/Daubert</i> hearing And found HGN to be <i>INADMISSIBLE</i>															
States that have ruled HGN is scientific but have not Yet ruled on admissibility based on <i>Frye/Daubert</i> Hearing	X ¹⁰	X ¹¹		X			X		X ¹²				X		
States with cases from which HGN admissibility Can be argued (dicta or not on point)										X					

⁸ The decisions in these states leave open the possibility that under some circumstances, HGN may be scientific and the state required to lay the proper foundation. *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994); *Salt Lake City v. Garcia*, 912 p.2d.997 (Utah App. 1996). In the cited cases, however, HGN testimony is admissible as any other field sobriety test to show impairment.

⁹ In dicta, as issue was not properly preserved. The court stated that the County Court, had the issue been raised, “could have declined to hold a *Frye* hearing and taken judicial notice of the HGN procedure. . . .” *People v. Gallup*, 302 A.D.2d 681(N.Y.App.Div. 2003).

¹⁰ A law division case found general acceptance. *State v. Maida*, 753 A.2d 1240 (N.J. Super. 2000). “However, absent a similar determination by this court or our Supreme Court, the trial courts in this State are not at liberty to admit evidence of newly-devised scientific technology unless the general acceptance thereof is demonstrated by expert testimony, authoritative scientific and legal writings or judicial opinions.” *State v. Doriguzzi*, 760 A.2d 336 (N.J.Super. 2000). In *Doriguzzi*, there was no *Frye* hearing and the court declined to take judicial notice without such a hearing.

¹¹ In *State v. Torres*, 976 P.2d 20 (N.M. 1999), the Supreme Court required a *Daubert* hearing that included a scientific expert to show the evidentiary reliability of HGN. After such a hearing, the New Mexico Court of Appeals held that the testimony of Dr. Marcelline Burns *did not* provide the court with sufficient information to find the test reliable. *State v. Laswroth*, 42 P.3d 844 (N.M.App. 2001).

¹² In *Commonwealth v. Apollo*, 603 A.2d 1023 (Pa.Super. 1992), the Superior Court stated that an expert called by the People during a *Frye* hearing on the admissibility of HGN did not establish general acceptance because he testified largely from his own personal views and observations.

	VT	VA	WA	WV	WI	WY	US								
States with case law dealing With the admissibility of HGN			X	X	X	X ¹³	X								
States following <i>Frye</i>			X	X											
States following <i>Daubert</i>	X	X				X	X								
States allowing HGN testimony at Both trial and probable cause hearings		X ¹⁴	X	X	X		X ¹⁵								
States allowing HGN testimony for Probable cause hearings only (criminal or civil)						X									
States allowing testimony of correlation Between HGN and BAC															
States holding that HGN testimony Is scientific in nature			X												
States finding that HGN may be scientific or “just Another FST” dependant on purpose of testimony				X ¹⁶			X								
States holding that HGN is not scientific or allowing Admission of HGN without discussion of scientific status					X										
States that have ruled HGN testimony satisfies <i>Frye/Daubert</i> and no longer require such a hearing			X												
States with <i>Frye/Daubert</i> holding of admissibility But still requiring expert testimony of principles underlying HGN to be explained to fact-finder															
States that have had <i>Frye/Daubert</i> hearing And found HGN to be <i>INADMISSIBLE</i>															
States that have ruled HGN is scientific but have not Yet ruled on admissibility based on <i>Frye/Daubert</i> Hearing				X			X								
States with cases from which HGN admissibility Can be argued (dicta or not on point)		X													

¹³ The Court decided HGN admissibility in an administrative hearing. *Smith v. State*, 11 P.3d 931 (Wyo. 2000).

¹⁴ There are two cases in which a conviction was upheld with use of HGN testimony. This testimony was not at issue on appeal. *Lemond v. Commonwealth*, 454 S.E.2d 31 (Va.App. 1995); *Ramos v. Commonwealth*, 516 S.E.2d 737 (Va.App. 1999).

¹⁵ “If offered as circumstantial evidence of alcohol intoxication or impairment, the probative value of the SFSTs derives from their basic nature as observations of human behavior, which is not scientific, technical or specialized knowledge. . . . when testifying about the SFSTs a police officer must be limited to describing the procedure administered and the observations of how the defendant performed it, without resort to terms such as “test,” n48 “standardized clues,” “pass” or “fail,” unless the government first has established a foundation that satisfies Rule 702 and the *Daubert/Kumho Tire* factors regarding the reliability and validity of the scientific or technical underpinnings of the NHTSA assertions that there are a stated number of clues that support an opinion that the suspect has “failed” the test.” *U.S. v. Horn*, 185 F.Supp.2d 530 (U.S.Dist. 2002)

¹⁶ The West Virginia Courts allow HGN testimony as long as it is given no more weight than other FSTs. The decisions seem to leave open the possibility that a *Frye* hearing may result in use of HGN for direct evidence of impairment or perhaps correlation of BAC and HGN. *State v. Barker*, 366 S.E.2d 642 (W.Va. 1988); *Muscatell v. Cline*, 474 S.E.2d 518 (W.Va. 1996).