

# Section V.C.

PRE-TRIAL PRACTICE

SECTION V. C.

DWI DETECTION  
AND  
STANDARDIZED FIELD SOBRIETY TESTING

GLOSSARY

ALVEOLAR BREATH - Breath from the deepest part of the lung.

BLOOD ALCOHOL CONCENTRATION (BAC) - The percentage of alcohol in a person's blood.

DIVIDED ATTENTION TEST - A test which requires the subject to concentrate on both mental and physical tasks at the same time.

DWI - Driving While Intoxicated. (Also Driving While Impaired.) Driving a vehicle while under the influence of alcohol or other drugs.

DWI DETECTION PROCESS - The entire process of identifying and gathering evidence to determine whether or not a suspect should be arrested for DWI violation. The DWI detection process has three phases:

Phase One - Vehicle In Motion  
Phase Two - Personal Contact  
Phase Three - Prearrest Screening

EVIDENCE - Any means by which some alleged fact that has been submitted to investigation may either be established or disproved. Evidence of a DWI violation may be of various types:

- a. Physical (or real) evidence: something tangible, visible, or audible.
- b. Well established facts (judicial notice).
- c. Demonstrative evidence: demonstrations performed in the courtroom.
- d. Written matter or documentation.
- e. Testimony.

FIELD SOBRIETY TEST - Any one of several roadside tests that can be used to determine whether a suspect is impaired.

HORIZONTAL GAZE NYSTAGMUS (HGN) - A field sobriety test based on the jerking of the eyeballs as the eyes gaze toward the side.

ILLEGAL PER SE - Unlawful in and of itself. Used to describe a law which makes it illegal to drive while having a statutorily prohibited Blood Alcohol Concentration (BAC).

NYSTAGMUS - An involuntary jerking of the eyeballs.

ONE LEG STAND (OLS) - A divided attention field sobriety test.

PERSONAL CONTACT - The second phase in the DWI detection process. In this phase the officer observes and interviews the driver face to face; determines whether to ask the driver to step from the vehicle; and observes the driver's exit and walk from the vehicle.

**PREARREST SCREENING** - The third phase in the DWI detection process. In this phase the officer administers field sobriety determines whether there is probable cause to arrest the driver for DWI, and administers or arranges for a preliminary breath test.

**PRELIMINARY BREATH TEST (PBT)** - A prearrest breath test administered during investigation of a possible DWI violator to obtain an indication of the person's blood alcohol concentration.

**PSYCHOPHYSICAL** - "Mind body." Used to describe field sobriety tests that measure a person's ability to perform both mental and physical tasks.

**STANDARDIZED FIELD SOBRIETY TEST BATTERY** - A battery of three test, Horizontal Gaze Nystagmus, Walk and Turn and One Leg Stand, administered and evaluated in a standardized manner so as to obtain validated indicators of impairment . . . based on NHTSA research.

**TIDAL BREATH** - Breath from the upper part of the lungs and the mouth.

**VEHICLE IN MOTION** - The first phase in DWI detection process. In this phase the officer observes the vehicle in operation, determines whether to stop the vehicle, and observes the stopping sequence.

**WALK AND TURN (WAT)** - A divided attention field sobriety test.

## **BASIC DWI LAW**

A state's basic DWI statute may be subtitled Driving While Under the Influence, or something similar. Typically the statute describes the who, what, where and how of the offense in language such as this:

It is unlawful for any person to operate or be in actual physical control of any vehicle within this state while under the influence of alcohol and/or any drug.

## **ARREST**

In order to arrest someone for basic DWI violation, a law enforcement officer must have probable cause to believe that all elements of the offense are present. That is, the officer must have probable cause to believe that:

? the person in question

? was operating or in actual physical control of

? a vehicle (truck, van, automobile, motorcycle, even bicycle, according to specific provisions in various states)

? while under the influence of alcohol, another drug, or both.

Note: In some states it is unlawful to operate a vehicle while under the influence anywhere in the State: on or off roadways, on private property, and so on. In other states, the law applies only on publicly accessible roadways.

## **CONVICTION**

In order to convict a person of DWI, it is necessary to establish that all four elements were present. With regard to under the influence, courts have generally held that phrase to mean that the ability to operate a vehicle has been affected or impaired. To convict a person of a basic DWI violation, it is usually necessary to show that the person's capability of safely operating the vehicle has been impaired. If DWI is a criminal offense, the facts must be established "beyond a reasonable doubt." If DWI is an infraction, the standard of proof may be less. In either case, it is the officer's responsibility to collect and to thoroughly document all

evidence.

## ILLEGAL PER SE LAW DESCRIPTION

Most states include in their DWI Law or Implied Consent Law a provision making it illegal to drive with a proscribed blood alcohol concentration (BAC). This provision, often called an Illegal Per Se Law, creates another drinking-driving offense which is related to, but different from the basic DWI offense. Following is a typical Illegal Per Se Provision:

It is unlawful for any person to operate or be in actual physical control of any vehicle within this state while having a blood alcohol concentration of 0.10% or more.

The Illegal Per Se Law makes an offense in and of itself to drive while having a BAC of 0.10 percent or more. To convict a driver of an Illegal Per Se Violation, it is sufficient to establish that the driver's BAC was 0.10 percent or more while operating a vehicle in the state. It is not necessary to establish that the driver was under the influence.

The Illegal Per Se Law does not replace the basic DWI law. Rather the two work together. Each defines a separate offense:

? The basic DWI Law makes it an offense to drive while under the influence of alcohol and/or any drug.

? The Illegal Per Se Law makes it an offense to drive while having more than a certain percentage of alcohol in the blood.

For the basic DWI offense, the chemical test result is presumptive evidence. For the Illegal Per Se offense, the chemical test result is conclusive evidence.

## PURPOSE

The principal purpose of the Illegal Per Se Law is to aid in prosecution of drinking-driving offenders. The law reduces the state's burden of proof. It is not necessary for the prosecutor to show that the driver was "under the influence." The state is not required to demonstrate that the driver's ability to drive was affected. It is sufficient for the state to show that the driver's BAC was 0.10% or more.

While the statute aids in prosecution, it does not really make drinking-driving enforcement easier. An officer must still have probable cause to believe that the driver is under the influence before an arrest can be made. The Implied Consent Law usually requires that the driver already be arrested before he or she is deemed to have consented to the chemical test. The law also requires that the arrest be made for "acts alleged to have been committed while operating a vehicle while under the influence."

Therefore the officer generally must establish probable cause that the offense has been committed and make a valid arrest before the chemical test can be administered.

## SUMMARY

Police officers dealing with drinking-driving suspects must continue to rely primarily on their own powers of detection to determine whether an arrest should be made. Usually it is impossible to obtain a legally admissible chemical test result until after the driver has been arrested. Sometimes drivers will refuse the chemical test after they have been arrested. Then the case will depend strictly upon the officer's observations and testimony. When making a DWI arrest, always assume that the chemical test evidence will not be available. It is critical that you organize and present your observations and testimony in a clear and

convincing manner. In this way, more drivers who violated drinking-driving laws will be convicted, regardless of whether they take the chemical tests, and regardless of the test results.

#### DWI DETECTION

Detection is both the most difficult task in the DWI enforcement effort, and the most important. If officers fail to detect DWI violators, the DWI countermeasures program ultimately will fail. If officers do not detect and arrest DWI violators, the prosecutor's cannot prosecute them, the courts and driver licensing officials cannot impose sanctions on them, and treatment and rehabilitation programs will go unused.

The term DWI detection has been used in many different ways. Consequently it does not mean the same thing to all police officers. For the purposes of this training, DWI detection is defined as:

**THE ENTIRE PROCESS OF IDENTIFYING AND GATHERING EVIDENCE TO DETERMINE WHETHER OR NOT A SUSPECT SHOULD BE ARRESTED FOR DWI VIOLATION.**

The detection process begins when the police officer first suspects that a DWI violation may be occurring and ends when the officer decides that there is or there is not sufficient probable cause to arrest the suspect for DWI.

Your attention may be called to a particular vehicle or individual for a variety of reasons. The precipitating event may be a loud noise; a cloud of dust; an obvious moving violation; behavior that is unusual, but not necessarily illegal; an equipment defect; or almost anything else. The initial "spark" of detection may carry with it an immediate, strong suspicion that the driver is under the influence; or only a slight, ill-formed suspicion; or even no suspicion at all at that time. In any case, it sets in motion a process wherein you focus on a particular individual and have the opportunity to observe that individual and to accumulate additional evidence.

The detection process end when you decide either to arrest or not to arrest the individual for DWI. That decision, ideally, is based on all of the evidence that has come to light since your attention first was drawn to the suspect. Effective DWI enforcers do not simply leap immediately to the arrest/no arrest decision. Rather, they proceed carefully through a series of intermediate steps, each of which helps to identify the collect evidence.

#### Detection PHASES

The typical DWI contact involves three separate and distinct phases:

Phase One: Vehicle in motion

Phase Two: Personal contact

Phase Three: Prearrest screening

In Phase One, you usually observe the driver operating the vehicle. In Phase Two, after you have stopped the vehicle, there usually is an opportunity to observe and speak with the driver face-to-face. In Phase Three, you usually have an opportunity to administer some formal structured field sobriety test to the driver to evaluate the degree of impairment. You may administer a preliminary breath test in addition to field sobriety tests to verify that alcohol is the cause of the impairment.

The DWI detection process does not always include all three phases. Sometimes there are DWI detection contacts in which Phase One is absent; that is, cases in which you have no opportunity to observe the vehicle in motion. This may occur at the scene

of an accident to which you have been called, at a roadblock, or when you have responded to a request for motorist assistance.

Sometimes there are DWI contacts in which Phase Three never occurs; that is cases in which you administer no formal tests to the driver. This may occur when the driver is grossly intoxicated or badly injured, or refuses to submit to tests.

## DWI DETECTION

Answers to questions like these can aid you in DWI detection.

Phase One:

- \* What is the driver doing?
- \* Do I have grounds to stop the driver?
- \* How does the driver respond to my signal to stop?
- \* How does the driver handle the vehicle during the stopping sequence?

Phase Two:

- \* When I approach the vehicle, what do I see?
- \* When I talk with the driver, what do I hear, see and smell?
- \* How does the driver respond to my questions?
- \* Should I instruct the driver to exit the vehicle?
- \* How does the driver exit?
- \* When the driver walks toward the side of the road, what do I see?

Phase Three:

- \* Should I administer field sobriety tests to the driver?
- \* How does the driver perform those tests?
- \* What exactly does the driver do wrong when performing the tests?
- \* Do I have probable cause to arrest for DWI?
- \* Should I administer a preliminary breath test?
- \* What are the results of the preliminary breath test?
- \* Is the impairment caused by alcohol, or drugs, or both?

## TYPICAL INVESTIGATION CUES: THE DRIVER INTERVIEW

Face to face observation and interview of the driver allow you to use three senses to gather evidence of alcohol or drug influence:

- \* the sense of sight;
- \* the sense of hearing; and
- \* the sense of smell.

## SIGHT

There are a number of things you might see during the interview that would be describable cues or evidence of alcohol or drug influence. Among them are:

- \* bloodshot eyes;

- \* soiled clothing;
- \* fumbling fingers;
- \* alcohol containers;
- \* drugs or drug paraphernalia;
- \* bruises, bumps or scratches;
- \* unusual actions.

## HEARING

Among the things you might hear during the interview that would be describable cues or evidence of alcohol or drug influence are these:

- \* slurred speech;
- \* admission of drinking;
- \* inconsistent responses;
- \* abusive language;
- \* unusual statements.

## SMELL

There are things you might smell during the interview that would be describable cues or evidence of alcohol or drug influence.

Typically these include:

- \* alcoholic beverages;
- \* marijuana;
- \* "cover up" odors like breath sprays;
- \* unusual odors.

## REQUIRED ABILITIES

Proper face to face observation and interview of the driver demands two distinct but related abilities:

- \* the ability to recognize the sensory evidence of alcohol or drug influence;
- \* the ability to describe that evidence clearly and convincingly.

Developing these abilities requires practice.

## PRE-EXIT SOBRIETY TEST

A basic purpose of the face to face observation and interview of the driver is to identify and gather evidence of alcohol or drug influence. This is the purpose of each task in each phase of DWI detection.

During the face to face observation and interview stage, it is not necessary to gather sufficient evidence to arrest the driver immediately for DWI. It is necessary only to gather enough evidence to justify requesting the driver to step from the vehicle for further investigation.

## TEST

There are a number of simple test of impairment you can administer to a driver while the driver is still behind the wheel.

Most of these simple tests apply the concept of divided attention: they require the driver to concentrate on two or more things at the same time. The tests include both question and answer test and psychophysical (mindbody) test.

While these simple tests generally are not so reliable as the more structured formal roadside sobriety test when it comes to indicating alcohol or drug influence, they can be very helpful in determining whether there is sufficient cause to request the driver to step from the vehicle.

## QUESTION AND ANSWER TESTS

The questions you ask and the way in which you ask them can constitute simple divided attention tests.

Three techniques are particularly pertinent:

- \* asking for two things simultaneously;
- \* asking interrupting or distracting questions;
- \* asking unusual questions.

An example of the first technique, asking for two things simultaneously, is requesting that the driver produce both the driver's license and the vehicle registration. Possible evidence of impairment may come to light as the driver responds to this dual request. Be alert for the driver who:

- \* forgets to produce both documents;
- \* produces documents other than the ones requested;
- \* fails to see the license, registration or both while searching through wallet or purse;
- \* fumbles or drops wallet, purse, license or registration;
- \* is unable to retrieve documents using fingertips.

The second technique, asking interrupting or distracting questions, forces the driver to divide attention between searching for the license or registration and answering a new question. While the driver is responding to the request for license, registration or both, you ask an unrelated question like, "Without looking at your watch, can you tell me what time it is right now?" Possible evidence of impairment may be disclosed by the interrupting or distracting question. Be alert for the driver who:

- \* ignores the question and concentrates only on the license or registration search;
- \* forgets to resume the search after answering the question;
- \* supplies a grossly incorrect answer to the question.

The third technique, asking unusual questions, is employed after you have obtained the driver's license and registration.

Using this technique, you seek verifying information through unusual questions. For example, while holding the driver's license, you might ask the driver, "What is your middle name?" You might then ask, "In what year did you have your fifth birthday?"

There are many such questions which the driver normally would be able to answer easily, but which might prove difficult if the driver is impaired, simply because they are unusual questions. Unusual questions require the driver to process information; this can be especially difficult when the driver does not expect to have to process information. For example, a driver may respond to the question about the middle name by giving her first name. Similarly, a driver may respond to the question about the fifth birthday year by giving his birth year. In each case the driver ignores the unusual question and responds instead to a usual - but unasked - question.

## BEHIND THE WHEEL PSYCHOPHYSICAL TESTS

Pre-exit sobriety tests also include psychophysical tests. Psychophysical tests are divided attention tests. They measure a subject's ability to handle both physical and mental tasks simultaneously.

Behind the wheel psychophysical tests may include the Alphabet, Count Down and Finger Count tests. These field tests of a driver's mental and physical impairment are often administered outside the vehicle. However, they also be given while the driver is still inside the vehicle. Whenever these tests are given, you should provide clear instruction and, if possible demonstrate what the driver should do. You must verify that the driver has the mental capacity and education

to perform the tests. This can be done by asking the driver to repeat the instructions and whether he or she understands what is required.

#### ALPHABET TEST

The Alphabet Test requires the subject to recite a part of the alphabet. You instruct the subject to recite the alphabet beginning with a letter other than A and stopping at a letter other than Z. For example, you might say to a driver, "Recite the alphabet, beginning with the letter E as in Edward and stopping with the letter P as in Paul." This divides the driver's attention because the driver must concentrate to begin at an unusual starting point and recall where to stop.

#### COUNT DOWN TEST

The Count Down Test requires the subject to count out loud 15 or more numbers in reverse sequence. For example, you might request a driver to, "Count out loud backwards, starting with the number 68 and ending with the number 53." This, too, divides attention because the driver must continuously concentrate to count backwards while trying to recall where to stop. NOTE: This test should never be given using starting and stopping points that end in 0 or 5 because these numbers are too easy to recall. For example, do not request that the driver count backwards from 65 to 50. Instead, ask the driver to count backwards from 64 to 49.

#### FINGER COUNT TEST

In this test, the subject is asked to touch the tip of the right thumb in turn the tip of each finger on the right hand while simultaneously counting up one, two, three, four; then to reverse direction on the fingers while simultaneously counting down four, three, two, one.

In each instance, note whether and how well the subject is able to perform the divided attention task.

#### THE EXIT SEQUENCE

Your decision to instruct the driver to step from the vehicle usually is made only after you have developed a definite suspicion that the driver is under the influence. Even though that suspicion may be very strong, usually the suspect is not yet under arrest when you give the instruction. How the driver steps and walks from the vehicle and his or her actions and behavior during the exit sequence may provide important evidence of alcohol or drug influence. Be alert to the driver who:

- \* shows angry or unusual reactions;
- \* cannot follow instructions;
- \* cannot open the door;
- \* leaves the vehicle in gear;
- \* "climbs" out of vehicle;
- \* leans against vehicle;
- \* keeps hands on vehicle for balance.

Proper face to face observation and interview of a driver requires the ability to recognize the sensory evidence of alcohol or drug influence and the ability to describe that evidence clearly and convincingly. Developing these abilities takes practice.

#### PSYCHOPHYSICAL TESTS

Psychophysical tests are methods of assessing a suspect's mental and physical impairment. These tests focus precisely on the abilities needed for safe driving: balance, coordination, information processing and so on.

Psychophysical testing actually begins as soon as you come into face to face contact with the suspect and begin to interview him or her. Psychophysical testing continues as the suspect steps from the vehicle and you observe the manner of the exit and walk from the vehicle. The most significant psychophysical tests usually are formal, structured tests that you administer at roadside. The entire process may be described as a three level testing process comprising:

Level One Testing - Simple, Pre-exit Tests including the Alphabet and Finger Count Tests.

Level Two Testing - Observing the Exit, noting the suspects balance, coordination, reactions and ability to follow instructions.

Level Three Testing - Formal Field Sobriety Tests, administering formal, structured roadside tests.

#### PRELIMINARY BREATH-TEST

The preliminary breath test (PBT) can help to corroborate all other evidence and to confirm your judgment as to whether the suspect is under the influence. Usually PBT results cannot be introduced as evidence against the driver in court. However, state laws vary in this regard.

#### THE ARREST DECISION

The DWI detection process concludes with the arrest decision. This decision is based on all of the evidence you have obtained during all three detection phases: an observation of the vehicle in motion and during the stopping sequence; on face to face observation and interview of the driver; and on the results of informal sobriety tests.

#### DIVIDED ATTENTION TESTS

##### INTRODUCTION

Many of the most reliable and useful psychophysical tests employ the concept of divided attention: they require the subject to concentrate on two things at once. Driving is a complex divided attention task. In order to operate a vehicle safely, drivers must simultaneously control steering, acceleration and braking; react appropriately to a constantly changing environment; and perform many other tasks.

Alcohol and many other drugs substantially reduce a person's ability to divide attention among tasks like these. Under the influence of alcohol or other drugs, drivers often must ignore the less critical tasks of driving in order to focus their impaired attention on the more critical tasks. For example, a driver may ignore a traffic signal and focus instead on speed control.

Even when they are under the influence, many people can handle a single, focused attention task fairly well. For example, a driver may be able to keep the vehicle well within the proper traffic lane, as long as the road remains fairly straight. However, most people, when under the influence, cannot satisfactorily divide their attention to handle multiple tasks at once.

The concept of divided attention has been applied to psychophysical testing. Field sobriety tests that simulate the divided attention characteristics of driving have been developed and are being used by police departments nationwide. The best of these tests exercise the same mental and physical capabilities that a person needs to drive safely:

- \* information processing;
- \* short-term memory;
- \* judgment and decision making
- \* balance;
- \* steady, sure reactions;
- \* clear vision;
- \* small muscle control;
- \* coordination of limbs.

Any test that requires a person to demonstrate two or more of these capabilities simultaneously is potentially a good psychophysical test.

Simplicity is key to divided attention field sobriety testing. It is not enough to select a test that just divides the subject's attention. The test also must be one that is reasonably simple for the average person to perform when sober. Tests that are difficult for a sober subject to perform have little or no evidentiary value.

Two divided attention field sobriety tests that have proven accurate and effective in DWI detection are the Walk and Turn and the One Leg Stand. These tests are described briefly below.

#### WALK AND TURN

Walk and Turn is a test that has been validated through extensive research sponsored by the National Highway Traffic Safety Administration (NHTSA). It is a divided attention test consisting of two stages:

- \* Instructions Stage;
- \* Walking Stage.

In the Instructions Stage the subject must stand on a line with feet in heel-to-toe position, keep arms at sides, and listen to instructions. The Instructions Stage divides the subject's attention between a balancing task (standing on the line while maintaining the heel-to-toe position) and an information processing task (listening to and remembering instruction).

In the Walking Stage the subject must take nine heel-to-toe steps down the line, turn in a prescribed way, and take nine heel-to-toe steps up the line, while counting the steps out loud. During the turn, the subject must keep one foot on the line, pivot on that foot, and use the other to take several small steps to complete the turn. The Walking Stage divides the subject's attention among a balancing task (walking heel-to-toe and turning on the line); a small muscle control task (counting out loud); and a short-term memory task (recalling the number of steps and the turning instructions).

The Walk and Turn test is administered in a standardized fashion, i.e., the same way every time. It is also interpreted in a standardized fashion. Specifically, officers administering Walk and Turn carefully observe the suspect's performance for eight clues:

- \* can't balance during instructions;
- \* starts too soon;
- \* stops while walking;
- \* doesn't touch heel-to-toe;
- \* steps off line;
- \* uses arms to balance;
- \* loses balance on turn or turns incorrectly;
- \* takes the wrong number of steps.

Sometimes, suspects cannot complete the test. Inability to complete the test occurs when the suspect:

- \* steps off the line three or more times;
- \* is in danger of falling;

\* otherwise demonstrates that he or she cannot do the test.

Research shows that if a suspect exhibits two or more of the clues, or cannot complete the test, the suspect's BAC is likely to be 0.10% or more. This criterion has been shown to be reliable 68 percent of the time.

#### ONE LEG STAND

The One Leg Stand test also has been validated through NHTSA's research program. It is a divided attention test consisting of two stages:

- \* Instruction Stage;
- \* Balancing and Counting Stage.

In the Instruction Stage, the subject must stand with heels together and toes slightly apart, keep arms at sides, and listen to instructions. This divides the subject's attention between a balancing task (maintaining a stance) and an information processing task (listening to and remembering instructions.)

In the Balancing and Counting Stage, the subject must stand on one foot and hold the other foot straight out and approximately six inches off the ground while simultaneously counting aloud from "one thousand and one" to "one thousand and thirty." This divides the subjects attention between balancing (standing on one foot) and small muscle control (counting out loud).

The count to "one thousand and thirty" is an important part of the One Leg Stand test. Research has shown that many impaired subjects are able to maintain one leg balance for up to 25 seconds, but that relatively few can do so for 30 seconds.

One Leg Stand is also administered and interpreted in a standardized fashion. Officers carefully observe suspects' performance and look for four specific clues:

- \* sways while balancing
- \* uses arms to balance;
- \* hops;
- \* puts foot down.

Sometimes suspects cannot complete the test. Inability to complete One Leg Stand occurs when the suspect.

- \* puts the foot down three or more times, during the 30 second count;
- \* otherwise demonstrates that he or she cannot do the test.

Research shows that, when the suspect produces two or more clues or is unable to complete the test, it is likely that his or her BAC is 0.10% or more. This criterion has been shown to be reliable 65 percent of the time.

#### HORIZONTAL GAZE NYSTAGMUS TEST

"Nystagmus" means an involuntary jerking of the eyeballs. Horizontal gaze nystagmus (HGN) refers to an involuntary jerking that occurs as the eyes gaze toward the side. In addition to being involuntary, the jerking is also unconscious. The person experiencing the nystagmus ordinarily is unaware that the jerking is happening, and is powerless to stop or control it.

Under the influence of alcohol or certain other drugs, the involuntary jerking of the eyeballs becomes much more distinct, and readily noticeable. And, as a person's blood alcohol concentration increases, the eyeballs will begin to jerk sooner as they move to the side.

Horizontal gaze nystagmus is a very reliable field sobriety test. Especially when used in combination with the divided attention tests, it will help police officers correctly distinguish suspects who are under the influence of alcohol from those who are not.

When the HGN test is administered, each eye is checked separately. And, each eye is examined for three specific clues.

F As the eyeball is moved from side to side, does it move smoothly or does it jerk noticeably? (As people become under the influence of alcohol, their eyeballs exhibit a lack of smooth movement as they move from side to side).

F When the eyeball is moved as far to the side as possible and is kept at that position for several seconds, does it jerk distinctly? (Distinct jerkiness at maximum lateral deviation of the eyeball is another clue of alcoholic influence).

F As the eyeball is drawn toward the side, does it start to jerk before it has move through a 45-degree arc? (On-set of jerkiness prior to 45-degrees is another clue of alcoholic influence.

As a person's blood alcohol concentration increases, the more likely it is that these clues will appear.

The maximum number of clues that may appear in one eye is three. The maximum number for any suspect is therefore six.

Research shows that if four or more clues are evident, it is likely that the suspect's blood alcohol concentration is 0.10%.

The reliability of this four-or-more clues criterion is 77%.

#### VERTICAL NYSTAGMUS

Vertical nystagmus refers to an involuntary jerking that occurs as the eyes gaze upward to their maximum point. Although this type of nystagmus was not examined in the research that led to the validation of the Standardized Field Sobriety Test battery, field experience has indicated that a check for vertical nystagmus has provided a reliable indicator of PCP influence.

Vertical nystagmus may also be present in subjects under the influence of central nervous system depressants, including alcohol, or inhalants. Vertical nystagmus is more likely to be present when the subject has taken high doses of CNS depressants, or inhalants.

There is only one clue to look for, the eyes jerking as the gaze is raised vertically. The Vertical Nystagmus test is very simple to administer.

1. Position the stimulus horizontally, about 15 inches in front of the subject's nose.
2. Instruct the subject to hold the head still, and follow the object with the eyes only.
3. Raise the object until the subject's eyes are elevated as far as possible.
4. Watch closely for evidence of jerking.

#### PRELIMINARY BREATH TESTING

The basic purpose of preliminary breath testing (PBT) is to demonstrate the association of alcohol with the observable evidence of the suspect's impairment. The suspect's impairment is established through sensory evidence: what the officer sees, hears and smells. The PBT provides the evidence that alcohol is the chemical basis of that impairment by yielding an on-the-spot indication of the suspect's blood alcohol concentration (BAC). The PBT provides direct indication of the BAC level. It does not indicate the level of the suspect's impairment. Impairment varies widely among individuals

with the same  
BAC level.

Preliminary breath testing, like psychophysical testing, is a stage in the pre-arrest screening of a DWI suspect. Usually the suspect is not yet under arrest when requested to submit to the preliminary breath test. The DWI incident remains at the investigative stage; the accusatory stage has not yet begun. The PBT result is only one of many factors the officer considers in determining whether the suspect should be arrested for DWI. It should never be the sole basis for a DWI arrest. Nevertheless the PBT result is an important factor because it provides the only direct indication of alcoholic influence. All other evidence, from initial observation of the vehicle in operation through formal psychophysical testing, indicates alcoholic influence indirectly, based on impairment of the suspect's mental and physical faculties.

#### ADVANTAGES OF PBT

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

- \* corroborate other evidence by demonstrating that the suspicion of alcoholic influence is consistent with the officer's observations of the suspect's mental and physical impairment.
- \* confirm the officer's own judgment helping the officer gain confidence in his or her ability to evaluate alcoholic impairment accurately, based on observations and psychophysical test. (Many officers experienced in DWI enforcement find that they rely less and less on the PBT as their confidence in their own powers of detection increases).
- \* disclose the possibility of medical complications or impairment due to drugs other than alcohol. (The PBT can confirm or deny that alcohol is the cause of the observed impairment. For example, observed psychophysical impairment coupled with a PBT result showing a very low BAC indicates an immediate need to investigate the possibility that the suspect has ingested a drug other than alcohol or suffers from a medical problem).
- \* help to establish probable cause for DWI arrest. (The role of the PBT in establishing probable cause may be affected by the evidentiary value of PBT results in your state. Refer to Unit 4, Part 4 for more information. Consult your specific PBT law, your supervisor, or the local prosecutor for clarification, if necessary).

#### LIMITATION OF PBT

Preliminary breath testing may have both evidentiary limitations and accuracy limitations. Evidentiary limitations vary with specific laws. In some states PBT results are admissible as evidence; in other states they are not admissible. Where the results are admissible, there may be differences in the weight or probative value they are given. Consult your state PBT law, your supervisor or your local prosecutor, as necessary, for clarification.

PBT instruments have accuracy limitations. Although all PBT instruments currently used by law enforcement are reasonable accurate, they are subject to the possibility of error, especially if they are not used properly. There are factors that can affect the accuracy of alcohol breath testing and analysis. Some of these factors tend to produce "high" test results; others tend to produce "low" results.

There are two common factors that tend to produce high results on a PBT or other alcohol breath test.

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

It takes approximately 15 minutes for the residual alcohol to evaporate from the mouth. Evaporation cannot be speeded up significantly by having the suspect gargle with water or in any other way.

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

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

There are two common factors that tend to produce low alcohol breath test results.

\* Cooling of the breath sample. If the captured breath sample is allowed to cool before it is analyzed, some of the alcohol vapor in the breath may turn to liquid and precipitate out of the sample. If that happens, the subsequent analysis of the breath sample will produce a low BAC result.

\* The composition of the breath sample. Breath composition means the mixture of the tidal breath and alveolar breath. Tidal breath is breath from the upper part of the lungs and the mouth. Alveolar breath is deep lung breath. Breath testing should be conducted on a sample of alveolar breath, obtained by having the subject blow into the PBT instrument until all air is expelled from the lungs.

## THE ARREST DECISION

Your arrest/no arrest decision is the culmination of the DWI detection process. Your decision is based on all the evidence you have accumulated during each detection phase.

### PHASE ONE:

- \* Initial observation of vehicle in motion;
- \* Observation of the stop.

### PHASE TWO:

- \* Face-to-face observation and interview;
- \* Observation of the exit.

### PHASE THREE:

- F Psychophysical tests;
- F Preliminary breath tests.

## ADMINISTRATIVE PROCEDURES

1. EYE GLASSES/CONTACTS
2. VERBAL INSTRUCTIONS
3. POSITION OBJECT (12-15 INCHES).

### TEST FIRST EYE

4. CHECK PURSUIT ("high speed" pass)

5. CHECK MAX. DEVIATION

6. CHECK ONSET ("low speed" pass)

TEST SECOND EYE

7. TOTAL THE SCORE

D. Test Interpretation

You should look for three clues of intoxication in each eye.

1. The eye cannot follow a moving object smoothly.
2. Jerking is distinct when the eye is at maximum deviation.
3. The angle of onset of jerking for the eye is within 45 degrees.

If, between the two eyes, four or more clues appear, it is likely that the suspect's BAC is 0.10% or more.

Using this

criterion you will be able to classify correctly about 77% of your suspects with respect to whether they are drunk or sober.

That probability was determined during limited laboratory and field testing and is given simply to help you weigh the various sobriety tests in this battery as you make your arrest decision.

E. Test Conditions

Very few test conditions will affect gaze nystagmus. Most of the test requirements given in this manual are designed

to make the observation of nystagmus as easy as possible for the officer doing the testing.

Nystagmus can be observed directly and requires no special equipment. You will need something for the suspect to follow with

the eyes, but this can be as simple as the tip of your index finger. Officers who use this test frequently have the suspect

follow a penlight. The object used should be held above eye level, so that the eyes are wide open when they look directly at

it. It should be held about 12 to 15 inches in front of the eyes for ease of focus.

PROCEDURES FOR WALK AND TURN TESTING

A. Instructions Stage: Initial Positioning and Verbal Instructions

Have the suspect assume the heel-to-toe stance by the following verbal instructions, accompanied by demonstration:

- \* Place your left foot on the line (place your own left foot on the line to demonstrate).
- \* Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot (demonstrate).
- \* Keep this position until I tell you to start walking. Do not start to walk until I tell you to do so.
- \* Do you understand the instructions so far? (Make sure suspect indicates he or she understands).

B. Demonstrations and Instructions for the Walking Stage

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

- \* When I tell you to start, you will take nine heel-to-toe steps down the line, turn around, and take nine heel-to-toe steps back up the line. (Demonstrate two or three heel-to-toe steps.)
- \* When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this (demonstrate).
- \* While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud.

- \* Once you start walking, don't stop until you have completed the test.
- \* Do you understand the instruction? (Make sure suspect indicates he or she understands).
- \* Begin, and count your first step from the heel-to-toe position as "One."

### C. Test Interpretation

You may observe a number of different behaviors when a suspect performs this test. Research, however, has demonstrated that the behaviors listed below are the most likely to be observed in someone with a BAC of 0.10% or more. Look for the following clues each time this test is given:

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 intoxicated can do only one of these things. He or she 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. 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 intoxicated 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 to steady self. The suspect pauses for several seconds after one step. 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 one-half inch or more between the heel and toe on any step. Also record this clue if the suspect does not walk straight.
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. Loses balance while turning. The suspect removes the pivot foot from the line while turning. That is, record this clue if both feet are removed from the line. Also record this clue if the suspect clearly has not followed directions in turning; for example, he or she pivots in one movement instead of the several small steps movement that he or she was instructed to perform.
8. Incorrect number of steps. Record this clue if the suspect takes more or fewer than nine steps in either direction.
9. Cannot do the test. Record a failure to complete the test if the suspect steps off the line three or more times, is in danger of falling, or otherwise demonstrates that he or she cannot do the test.

Should the suspect have difficulty with this test (for example, steps off the line), have him or her repeat the test from the point of difficulty, not from the beginning. This test tends to lose its sensitivity if it is repeated several times.

Observe the suspect from 3 or 4 feet away and remain motionless while he or she performs the test. Being too close or excessive motion on your part will make it more difficult for the suspect to perform, even if sober. If the suspect exhibits two or more distinct clues on this test or fails to complete it, classify the BAC as above 0.10%. Using this criterion, you will be able to classify correctly about 68% of your suspects' BAC'S. So your decision point on the Walk and Turn test is two.

#### D. Test Conditions

Walk and Turn requires a high, dry, level, nonslipping surface with sufficient room for the suspect to complete nine heel-to-toe steps. A straight line must be clearly visible on the surface. If no line is available, it is possible to conduct the test by directing the suspect to walk in a straight line parallel with the curb, guardrail, etc. Conditions must be such that the suspect would be in no danger if he or she were to fall.

Some people have difficulty with balance even when sober. People more than 60 year of age, over 50 pounds overweight, or with physical impairments that affect their ability to balance should not be given this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes. Individuals who cannot see out of one eye may also have trouble with this test because of poor depth perception.

#### E. Combined Interpretation of Gaze Nystagmus Walk and Turn Test

The Decision Table below is designed to help you classify those suspects with a potential BAC of 0.10% or more. You will recall that the decision point on the Gaze Nystagmus Test was four clues, while on the Walk and Turn Test was two. However, a suspect may score higher on one test and lower on the other. How do you make your decision? Find the box on the Decision Table where the two test results intersect and see if it falls in the shaded area. (For example, suppose a suspect produced only three clues on the Gaze Nystagmus but two clues on the Walk and Turn. Is he intoxicated? The Decision Table says yes. But if he scored three on the Gaze Nystagmus and only one on the Walk and Turn, the Table says his or her BAC is probably below 0.10%.)

Using this method, your chances of correctly classifying your suspects as to whether their BAC's are above or below about 8011/o.

NOTE: If a suspect fails to complete the Walk and Turn Test, that can be treated as if he or she produced nine clues on that test.

#### PROCEDURES FOR ONE LEG STAND TESTING

##### A. Instruction Stage: Initial Positioning and Verbal Instructions

Initiate the test by giving the following verbal instruction, accompanied by demonstrations.

- \* Please stand with your heels together and your arms down at the sides, like this (demonstrate).
- \* Do not start to perform the test until I tell you to do so.
- \* Do you understand the instructions so far? (Make sure suspect indicates he or she understands)

##### B. Demonstrations and instructions for the Balancing and Counting Stage

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

- \* When I tell you to stand on one leg, holding the other foot out in front, like this (demonstrate one leg stance).
- \* You may stand on either leg that you wish
- \* Keep the raised foot about 6 inches off the ground, like this (demonstrate).
- \* While you are standing, you will count out loud for 30 seconds, like this (demonstrate a count, as follows: "one-one thousand, two-one thousand, and so on, all the way to thirty-one thousand").

- \* Throughout the entire test, keep your arms at the sides at all times, and keep watching the raised foot.
- \* Do not hop or sway while you are standing.
- \* Do you understand? (Make sure suspect indicates he or she understands).
- \* Go ahead and perform the test.

### C. Test Interpretation

You may observe a number of different behaviors when a suspect performs this test. Researchers, however, have found that those behaviors listed below are the most likely to be observed in someone with a BAC of 0.10% or higher. Look for the following clues each time the One Leg Stand test is given.

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. He or she moves the arms 6 or more inches from the side of the body in order to keep balance.
3. Hopping. He or she is able to keep one foot off the ground, but resorts to hopping on the anchor foot in order to maintain balance.
4. Puts foot down. The suspect is not able to maintain the one-leg-stand position, putting the foot down one or more times during the 30-second count.
5. Cannot do test. Record a failure to complete the test if the suspect puts the foot down three or more times during the 30-second count.

Remember that time is critical in this test. Research has shown that a person with a BAC of 0.10% can maintain his balance for up to 25 seconds, but seldom as long as 30.

If an individual produces two or more clues or fails to complete the One Leg Stand, there is a good chance the BAC is 0.10% or higher. SO your decision point on this test is two. Using that criterion, you will correctly classify about 65% of the people you test as to whether their BAC's are above or below 0.10%.

Observe the suspect from at least 3 feet away, and remain as motionless as possible while he or she is performing the test, so as not to interfere with the test. If the suspect puts the foot down, instruct him or her to pick up the foot again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds have actually elapsed.

### D. Test Conditions

One Leg Stand requires a hard, dry, level, nonslippery surface. There should be adequate lighting for the suspect to have some visual frame of reference; in total darkness, One Leg is difficult even for sober people. Conditions must be such that the suspect would be in no danger if he or she were to fall. Some people have difficulty with One-Leg Stand even when sober. People more than 60 years of age, more than 50% overweight, or with physical impairments that interfere with balance should not be given this test. Individuals wearing heels more than 2 inches high would be given the opportunity to remove the shoes.

Taking Field Notes on Suspects Performance of Field Sobriety Tests

For purposes of the arrest report and courtroom testimony, it is not enough simply to report the suspect's "score" (total number of clues) on the three tests. The number of clues is important to the police officer in the field because it helps him or her determine whether there is probable cause to arrest. But to secure a conviction, much more descriptive evidence is needed.

The officer must be able to describe how the suspect performed on the tests, and exactly what the suspect did when he or she performed tests. '

The standard note taking guide provided in this Manual is designed to help you develop a clear description of the suspect's performance on the tests.

#### Taking Field Notes on Horizontal Gaze Nystagmus Testing

The section on the horizontal gaze nystagmus test appears on the bottom of the guide's front side.

First, make sure that you inquire whether the suspect is wearing contact lenses. Check the "No" or "Yes" box to record the suspect's response.

Complete the entire test for the first eye, writing or otherwise indicating "yes" or "no" for each nystagmus clue.

\* Write "yes" if the clue is present;

\* Write "no" if the clue is present.

In the section labeled "other," record any facts, circumstances, conditions or observations that may be relevant to this test.

\* Examples of additional evidence of alcohol impairment emerging during nystagmus test:

- suspect unable to keep head still;
- suspect swaying noticeably;
- suspect utters incriminating statements.

\* Examples of conditions that may interfere with suspects performance of the nystagmus test:

- Suspect has one artificial eye, or very weak vision in one eye (indicate which eye);
- Wind, dust, etc. (irritating suspect's eyes);
- numerous visual or other distractions impeding the test.

#### Taking Field Notes on Walk and Turn Testing

The section on the walk and turn test appears at the top of the guide's back side.

The first two clues, "cannot keep balance", and "starts too soon", apply only during the instructions stage, write "2" in the box alongside the "cannot keep balance" clue. Similarly, if the suspect never "starts too soon," write "0" in that box.

Don't simply leave boxes blank. If a particular clue never shows up, write "0" in the corresponding box.

Record the next

five clues separately for the walk up the line, and then down the line.

1. If a suspect stops walking, record how many times he or she does so.

\* how many times during the first nine steps;

\* how many times during the second nine steps.

2. If suspect fails to touch heel-to-toe, record how many times this happens.

3. If suspect steps off the line while walking, record how many times this happens.

4. If suspect uses arms to balance, give some indication of how often or how long this happens,

- \* Example: suspect raised arms from sides three times; write "3" in box.
- \* Example: suspect held arms away from sides during 3 through 7; write "steps 3-7 in the box.
- \* Example: suspect "flapped" arms continuously; write "const. flaps" in the box.

5. Record the actual number of steps taken by suspect in each direction.

For the next point, "loses balance while turning," try to record a description of the turn.

- \* Example: "turned correctly;"
- \* Example: "stumbled, to left;"
- \* Example: "turned to wrong direction;"
- \* Example: "no small steps."

If you note that the suspect "cannot perform test" indicate explicitly why you did so.

- \* Example: "off line five times;"
- \* Example: "staggered six steps to right, nearly fell;"
- \* Example: "leg locked after fifth step;"

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

In the section labeled "other", record any facts, circumstances, conditions or observations that may be relevant to this test.

\* Examples of additional evidence of alcohol impairment emerging during walk and turn test:

- suspect verbally miscounts steps;
- suspect utters incriminating statements.

\* Examples of conditions that may interfere with suspects performance of the walk and turn test:

- wind/weather condition;
- suspect's age, weight;
- suspect's footwear.

#### Taking Field Notes on the Combined Interpretation of Nystagmus and Walk and Turn

The decision table for combining nystagmus and walk and turn scores appears on the upper right of the page. Along the top of the table, circle the number corresponding to the suspect's nystagmus clues. Along the left side of the table, circle the number corresponding to the suspects walk and turn clues.

On the "intersection" line immediately below the table, check either "shaded" or "unshaded."

- \* Check "shaded" if the intersection of the two test results falls in the black or shaded area of the table;
- \* Check "unshaded" if the intersection falls in the white or unshaded area,

Remember: Combined interpretation of nystagmus and walk and turn is more reliable than either test, separately. By using the decision table, you can correctly classify about 80% of your suspects in terms of whether their BAC's are above or below 0.10%.

#### Taking Field Notes on One Leg Stand Testing

The section on the One Leg Stand test appears midway down the page.

Record the suspect's performance separately for the first 10 seconds of the test; for the middle 10 seconds; and for the final 10 seconds. By recording when things happen as well as what happens, you will be able to prepare a much more descriptive arrest report.

For each clue, record how often it appears during each time interval.

1. If suspect sways, indicate how often he or she swayed during each interval.

\* Example: zero times during the first 10 seconds; once during middle 10 seconds; continuously during final 10 seconds.

2. If suspect uses arm to balance, indicate how often arms were raised during each time interval.

3. If suspect hops, indicate how many hops were taken during each time interval.

4. If suspect puts foot down, indicate how many times the foot came down during each time interval.

If you note that the suspect "cannot perform test" indicate explicitly why you did so.

\* Example: "foot down four times;"

\* Example: "staggered three steps to right, then fell;"

\* Example: "continuous hopping, flaying arms, nearly falling."

At the end of the test, examine each scoring factor and determine how many distinct clues have appeared.

Remember: A clue may appear several times, but still constitutes only one distinct clue.