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ONE MINUTE BRIEF

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NUMBER: 2019-05 **DATE:** 02-19-19 **BY:** Devallis Rutledge **TOPIC:** HGN Expert Opinion

ISSUE: Can police officers qualify as experts on the use of a defendant's horizontal gaze nystagmus in determining whether the defendant was DUI?

Consumption of alcohol (and some other causes) can result in an inability of the eye to maintain a steady fix on an object held in front of a person's face and then moved to the left and right, without the eyeball involuntarily jerking or bouncing ("nystagmus"). Law enforcement officers trained to administer and observe HGN testing note the angle at which onset of nystagmus occurs, and the amount of bouncing at different angles.

Officers use the result as **one of multiple indicators** that the person was driving under the influence. Can officers then qualify as experts to testify to an opinion as to the significance of the defendant's observed HGN as it relates to driving under the influence, or must there be additional expert testimony from a criminalist or other scientific expert witness?

- A person can give an expert opinion in court if s/he has special training and experience on a matter that is sufficiently beyond common experience that his or her opinion would assist the trier of fact. Evidence Code §§ 720, 801. If the opinion is based on a new scientific technique, there must first be proof that such technique meets the reliability standard of general acceptance within the relevant scientific community. *People v. Kelly* (1976) 17 Cal.3d 24, 30.

- In *People v. Leahy* (1994) 8 Cal.4th 587, 605-09, the California Supreme Court said that HGN testing was (then) a new scientific technique, and that police testimony could not establish the **scientific** acceptance needed to satisfy *Kelly*. But the court also said, "*Once it has been shown that HGN testing is generally accepted in the scientific community, no reason exists why police officers should be deemed unqualified to administer and report the*

results of those tests. Thus, **in future cases**, once the Kelly standard has been met, **as reflected by a published appellate precedent**, the prosecution will **not be required to submit expert testimony** to confirm a police officer's evaluation of an HGN test." *Id.*, at 611.

- The published appellate precedent affirming that HGN tests **are** scientifically accepted evidence came the very next year: "[W]e conclude that a consensus drawn from a typical cross-section of the relevant, qualified scientific community **accepts** the HGN testing procedures used in this case as a useful tool when combined with other tests and observations in reaching an **opinion whether a defendant was intoxicated.**" *People v. Joehnk* (1995) 35 Cal.App.4th 1488, 1507-08. Nevertheless, twenty years later...

- Eddie Randolph, stopped by two CHP officers for errant driving, exhibited physical symptoms of being under the influence, admitted drinking, failed field sobriety tests, showed observable HGN, and refused to take a PAS or to give a breath or blood sample. He was arrested and prosecuted for violating VC § 23152(a). The prosecution proffered expert opinion from the highly-trained and experienced CHP officers as to the use of HGN as one factor to support their opinion that Randolph drove under the influence. The trial court rejected the proffer and dismissed the case. The Court of Appeal has reversed:

*"[W]hen read together, Leahy and Joehnk establish that an officer, **with adequate training and experience** in performing the test, as in this case, **without additional expert testimony**, may now testify as to the significance of a defendant's performance on an HGN test."* *People v. Randolph* (2018) 28 Cal.App.5th 602, 612, review denied January 30, 2019.

Of course, if a relatively-inexperienced officer might not qualify as an expert, or if it is anticipated that the defense may call a criminalist or other scientist in a "battle of the experts" with arresting officers, prosecutors may decide to arrange additional expert testimony to fortify the officers' opinions.

BOTTOM LINE: Properly-qualified law enforcement officers may give expert opinions as to the administration, results and significance of HGN tests given to drivers suspected of DUI.

(Emphases added in quoted material.)

This information was current as of publication date. It is not intended as legal advice. It is recommended that readers check for subsequent developments, and consult legal advisors to ensure currency after publication. Local policies and procedures regarding application should be observed.