

STATE OF MICHIGAN
IN THE 55TH JUDICIAL DISTRICT COURT, COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

PLAINTIFF,

FILE NO. 12-03043-SD

V

HON. DONALD L. ALLEN, JR.

[REDACTED]

OFFENSE: OWI

DEFENDANT.

ATTORNEY FOR PLAINTIFF:
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2012 DEC 10 P 3:37

STATE OF MICHIGAN
55TH JUDICIAL DISTRICT COURT

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**BRIEF IN SUPPORT OF MOTION TO SUPPRESS BASED UPON LACK
PROBABLE CAUSE TO ARREST**

INTRODUCTION

Officer Christman did not have sufficiently trustworthy information to arrest Mr.

[REDACTED] The government has put forth no evidence that any of the tests given were reliable or that Mr. **[REDACTED]** performance on them produced evidence of drunk driving.

As a result, all evidence flowing from **[REDACTED]** unlawful arrest, including the results of the breath analysis performed on October 13, 2012, should be suppressed.



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STATEMENT OF FACTS

(All statements based upon information and belief unless otherwise noted)

On or about October 13, 2012, Officer Casey Christman, of the Michigan State University Police Department (MSUPD), initiated a traffic stop on [REDACTED] vehicle. After making contact with [REDACTED] Officer Christman administered three standardized field sobriety tests (SFST) recommended by the National Highway Safety Traffic Administration (NHSTA): the horizontal gaze nystagmus (HGN), the walk-and-turn, and the one-leg stand. Officer Christman twice unsuccessfully attempted to administer a preliminary breath test (PBT) to [REDACTED] Officer Christman successfully administered the PBT to [REDACTED] on the third try. Officer Christman then arrested [REDACTED] for OWI after the administering the PBT to [REDACTED].

APPLICABLE LAW & ANALYSIS

Both the Federal and Michigan Constitutions guarantee the right of the people to be free from unreasonable searches and seizures. US Const Amend IV; Mich Const 1963, art 1, § 11. The Fourth Amendment of the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Generally, seizures are reasonable if based upon probable cause. Mich Const 1963 Art 1, §11. U.S. Const Amend IV. However, the police may arrest an individual without a warrant if the individual committed a misdemeanor in the officer's presence, the officer has reasonable cause to believe a misdemeanor punishable by more than 92 days has been committed and the defendant committed it, or if a felony has been



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committed and there is probable cause to suggest that the defendant committed the felony. MCL 764.15. *People v. Dunbar*, 264 Mich App 240, 690 NW2d 476 (2004).

I. Officer Christman Lacked Reasonable Cause to Administer SFSTs

Officer Christman lacked reasonable cause to administer standardized field sobriety tests (SFST) to [REDACTED]. Upon information and belief, before asking [REDACTED] to step out of his vehicle, Officer Christman administered the HGN to [REDACTED] while [REDACTED] was seated in his vehicle. The HGN is an analytical test developed by the National Highway Traffic Safety Administration (NHTSA) that measures involuntary jerking of the eyeball present when a person is intoxicated or impaired. NHTSA does not require that a subject be standing when an HGN is administered; however, the NHTSA does require that "the officer must administer the test in a way that ensures that the subject's eyes can be seen clearly" and "The subject should not face toward the blinking lights of a police cruiser or passing cars, which may cause optokinetic nystagmus."¹ Here, by administering the HGN while [REDACTED] was seated in his vehicle, Officer Christman did not ensure that [REDACTED] eyes could be seen in the clearest manner possible or that [REDACTED] was not facing the lights of the police cruiser or passing vehicles.

Further, the angle at which the HGN is administered is crucial to its effectiveness. The NHTSA's DWI Detection and Standardized Field Sobriety Testing Manual (relevant portion attached as **Exhibit A**) states:

It is important to know how to estimate a 45-degree angle. How far you position the stimulus from the suspect's nose is a critical factor in estimating a 45-degree angle (If the stimulus is held 12" in front of the suspect's nose, it should be moved 12" to the side to reach 45 degrees.

¹ "Horizontal Gaze Nystagmus: The Science and the Law. A Resource Guide for Judges, Prosecutors, and Law Enforcement," <http://www.nhtsa.gov/people/injury/enforce/nystagmus/hgntxt.html>



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Likewise, if the stimulus is held 15" in front of the suspect's nose, it should be moved 15" to the side to reach 45" degrees)²

Administering the HGN while [REDACTED] is seated in his vehicle significantly compromises the angle at which Officer Christman is able to administer the PBT. Further, having [REDACTED] seated in the vehicle reduces Officer Christman's ability to move the stimulus the full 12" or 15" needed to detect nystagmus.

The HGN must be administered in a specified way to reveal signs of intoxication. The NHTSA training manual itself warns:

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

-THE TESTS ARE ADMINISTERED IN THE PRESECRIVED, STANDARDIZED MANNER

-THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE

-THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TESTS ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED. (NHTSA Student Manual at VIII-19)(no emphasis added).

The prosecution will likely argue that Officer Christman again administered the HGN while [REDACTED] was standing after Officer Christman ordered [REDACTED] to step out of his vehicle. However, Officer Christman cannot use the HGN administered while [REDACTED] was seated as legal justification for either administering more SFSTs or arresting [REDACTED] because the HGN was not administered properly.

II. Officer Christman Lacked Sufficiently Trustworthy Information to Form Probable Cause to Arrest [REDACTED] At the Moment [REDACTED] Was Arrested

² "Concepts and Principles of the Standardized Field Sobriety Tests." VIII-8. *DWI Detection and Standardized Field Sobriety Testing*. US Department of Transportation- NHTSA. August 2006 Edition.



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Because [REDACTED] arrest was warrantless, the prosecutor must prove that Officer [REDACTED] had sufficient probable cause to arrest [REDACTED] *at the moment before the arrest was made*. Probable cause is more than a "bare suspicion." *Brinegar v United States*, 338 US 160; 69 SCt 1302 (1949). Rather, probable cause exists when "by a reasonable ground of suspicion, [the evidence is] is supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged." *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

Probable cause must be established before an arrest is made, with the facts known to the officer at that time. *People v. Champion*, 452 Mich 92; 549 NW2d 849 (1996). An objective standard is used in evaluating whether there was probable cause to arrest. *Michigan v Chesternut*, 486 US 567, 574; 108 SCt 1975 (1988): "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and the people would be secure in their person, houses, papers, and effects, only in the discretion of the police." *Rivera v Murphy*, 979 F2d 259, 263 (1st Cir 1992).

Officer Christman will likely testify that the SFSTs he administered to [REDACTED] provided probable cause for his arrest. Officer Christman administered the HGN, walk-and-turn, and one-legged stand. All three tests are promulgated by the National Highway Traffic Safety Administration (NHTSA).³ This means that the SFSTs must be administered in a specified way in order for the test to reveal signs of intoxication.

Courts across the country have recognized the importance of proper administration of SFSTs. In *US v Horn*, 185 F Supp 530 (2002)(attached as **Exhibit B**), the court held that results of *properly conducted* SFST may be used in a probable determination.

³ See *DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing*, National Highway Traffic Safety Administration (NHTSA), February 2006 Student Edition.



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However, the results of the SFST are not admissible to prove a specific blood alcohol content (BAC) of a driver. *Id.* at 560-61. Similarly, in *State v Homan*, 89 Ohio St.3d 421; 733 NE2d 952 (2000), the Ohio Supreme Court held "the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures." *Id.* at 424. While Michigan has not adopted a similar rule for all SFSTs, Michigan does require proper administration of the HGN as a prerequisite for admissibility. In *People v Berger*, 217 Mich App 213, 218; 551 NW2d 421 (1996), the court held that foundation for admission of the HGN into evidence is that the HGN was properly administered and the officer was qualified to administer the HGN. Here, the prosecution has put forth no evidence as to whether the any of the SFSTs were administered properly. If the prosecution does not produce any evidence or testimony that the SFST were administered in compliance with NHTSA standards, the results of the SFST cannot be used to establish probable cause for [REDACTED] arrest.

Officer Christman will likely also use the result of the PBT administered to [REDACTED] [REDACTED] to support his determination that there was probable cause to arrest [REDACTED] [REDACTED] for OWI. PBT results are generally inadmissible in the prosecutor's case in chief. MCL 257.625a(2)(b)(i). However, the results of the PBT may be admitted to assist the court in determining the validity of an arrest in an OWI case. *Id.* Here, the court should not consider the result of the PBT administered to [REDACTED] because Officer Christman did not administer the PBT in compliance with the Michigan Administrative Rules. Mich Admin Rule 325.2655(2) provides:

(2) A procedure that is used in conjunction with preliminary breath alcohol analysis shall be approved by the department and shall be in compliance with all of the following provisions:



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(b) A person may be administered a breath test on a preliminary breath alcohol test instrument only after it has been determined that the person has not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes. (emphasis added).

Upon information and belief, Officer Christman administered the PBT to [REDACTED] approximately 12 minutes after Officer Christman made contact with [REDACTED]. Approximately 3 minutes later, Officer Christman asked [REDACTED] to spit out his gum. However, Officer Christman did not determine whether [REDACTED] had smoked, regurgitated, or placed anything in his mouth before Officer Christman made contact with Mr. [REDACTED]. The purpose of administrative rules devices is to ensure to the accuracy the test results. *People v Tipolt*, 198 Mich App 44, 46; 497 NW2d 198 (1993). Failure to meet foundational requirements imposed by the administrative rules will preclude the use of the test results. *Id.* Therefore, the result of the PBT should not be considered in this probable cause analysis.

III. Evidence Obtained in Violation of the Fourth Amendment is Subject to Exclusion

Evidence obtained in violation of an accused citizen's Fourth Amendment rights is subject to exclusion, *Wong Sun v US*, 371 US 471; 83 SCt 407 (1963). The prosecution must show that the taint is purged and the evidence was derived from a source independent of the constitutional violation, *Nix v Williams*, 467 US 431; 104 SCt 2501 (1984). Here, the evidence obtained in violation of [REDACTED] 4th Amendment rights includes all statements made by [REDACTED] after his arrest and the results of the breath analysis performed on [REDACTED] on October 13, 2012. There would have been no means for the officer to obtain [REDACTED] breath but for detaining him long enough to effectuate the breath collection. The trooper's arrest was



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necessary to prolong the detention on these facts. There was no other basis or illegal activity on which to detain [REDACTED].

CONCLUSION

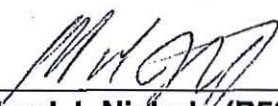
For the reasons stated above, [REDACTED] respectfully requests that the evidence discussed above be suppressed as it was obtained in violation of both MCL 257.625a and in violation of [REDACTED] 4th Amendment rights.

Respectfully submitted,

THE NICHOLS LAW FIRM, PLLC

Date: Dec 10, 2012

BY: _____


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EXHIBIT A



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- o The results of this study provide a clear evidence of the validity of the 3-test battery. To support arrest decisions at above or below 0.08, it strongly suggests that the SFSTs also accurately discriminate BACs at 0.04 and above.

OVERVIEW OF NYSTAGMUS

Nystagmus

Nystagmus is defined as an involuntary jerking of the eyes. Alcohol and certain other drugs cause Horizontal Gaze Nystagmus.

Categories of Nystagmus

There are three general categories of nystagmus:

1. Vestibular Nystagmus is caused by movement or action to the vestibular system.
 - A. Types of vestibular nystagmus:
 - o Rotational Nystagmus occurs when the person is spun around or rotated rapidly, causing the fluid in the inner ear to be disturbed. If it were possible to observe the eyes of a rotating person, they would be seen to jerk noticeably.
 - o Post Rotational Nystagmus is closely related to rotational nystagmus: when the person stops spinning, the fluid in the inner ear remains disturbed for a period of time, and the eyes continue to jerk:
 - o Caloric Nystagmus occurs when fluid motion in the canals of the vestibular system is stimulated by temperature as by putting warm water in one ear and cold in the other.
 - o Positional Alcohol Nystagmus (PAN) occurs when a foreign fluid, such as alcohol, that alters the specific gravity of the blood is in unequal concentrations in the blood and the vestibular system.
2. Nystagmus can also result directly from neural activity:
 - o Optokinetic Nystagmus occurs when the eyes fixate on an object that suddenly moves out of sight, or when the eyes watch sharply contrasting moving images.

Examples of optokinetic nystagmus include watching strobe lights, rotating lights, or rapidly moving traffic in close proximity. The Horizontal Gaze Nystagmus test will not be influenced by optokinetic nystagmus when administered properly.

- o Physiological Nystagmus is a natural nystagmus that keeps the sensory cells of the eye from tiring. It is the most common type of nystagmus. It happens to all of us, all the time. This type of nystagmus produces extremely minor tremors or jerks of the eyes. These tremors are generally too small to be seen with the naked eye. Physiological nystagmus will have no impact on our Standardized Field Sobriety Tests, because its tremors are generally invisible.

- o Gaze Nystagmus occurs as the eyes move from the center position. Gaze nystagmus is separated into three types:

- (1) Horizontal Gaze Nystagmus occurs as the eyes move to the side. It is the observation of the eyes for Horizontal Gaze Nystagmus that provides the first and most accurate test in the Standardized Field Sobriety Test battery. Although this type of nystagmus is most accurate for determining alcohol impairment, its presence may also indicate use of certain other drugs.
- (2) Vertical Gaze Nystagmus is an involuntary jerking of the eyes (up and down) which occurs when the eyes gaze upward at maximum elevation. The presence of this type of nystagmus is associated with high doses of alcohol for that individual and certain other drugs. The drugs that cause Vertical Gaze Nystagmus are the same ones that cause Horizontal Gaze Nystagmus.

Note: There is no drug that will cause Vertical Gaze Nystagmus that does not cause Horizontal Gaze Nystagmus. If Vertical Gaze Nystagmus is present and Horizontal Gaze Nystagmus is not, it could be a medical condition.

- (3) Resting Nystagmus is referred to as a jerking of the eyes as they look straight ahead. Its presence usually indicates a pathology or high doses of a Dissociative Anesthetic drug such as PCP. If detected, take precautions. (**OFFICER SAFETY.**)

3. Nystagmus may also be caused by certain pathological disorders. They include brain tumors and other brain damage or some diseases of the inner ear. These pathological disorders occur in very few people and in even fewer drivers.

Medical Impairment

The examinations that you can conduct to assess possible medical impairment include:

- o Pupil size
- o Resting Nystagmus
- o Tracking ability

PROCEDURES

Procedures to Assess Possible Medical Impairment

Prior to administration of HGN, the eyes are checked for equal pupil size, resting nystagmus, and equal tracking (can they follow an object together). If the eyes do not track together, or if the pupils are noticeably unequal in size, the chance of medical disorders or injuries causing the nystagmus is present.

Procedures of Horizontal Gaze Nystagmus Testing: The Three Clues

The test you will use at roadside is "Horizontal Gaze Nystagmus" -- an involuntary jerking of the eyes occurring as the eyes gaze toward the side. Some jerking will be seen if the eyes are moved far enough to the side.

1. The Lack of Smooth Pursuit (Clue Number One) - The eyes can be observed to jerk or "bounce" as they follow a smoothly moving stimulus, such as a pencil or penlight. The eyes of an unimpaired person will follow smoothly, i.e., a marble rolling across a smooth pane of glass, or windshield wipers moving across a wet windshield.
2. Distinct and Sustained Nystagmus At Maximum Deviation (Clue Number Two) - Distinct and sustained nystagmus will be evident when the eye is held at maximum deviation for a minimum of four seconds. People exhibit slight jerking of the eye at maximum deviation, even when unimpaired, but this will not be evident or sustained for more than a few seconds. When impaired by alcohol, the jerking will be larger, more pronounced, sustained for more than four seconds, and easily observable.
3. Onset of Nystagmus Prior To 45 Degrees (Clue Number Three) - The point at which the eye is first seen jerking. If the jerking begins prior to 45 degrees it is evident that the person has a BAC above 0.08, as shown by recent research.

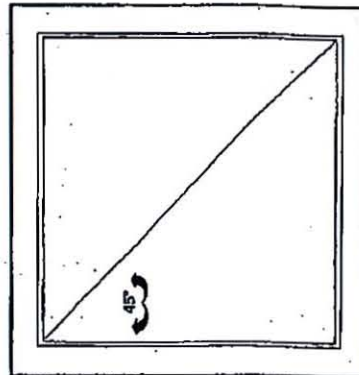
The higher the degree of impairment, the sooner the nystagmus will be observable.

Estimating a 45-Degree Angle

It is important to know how to estimate a 45-degree angle. How far you position the stimulus from the suspect's nose is a critical factor in estimating a 45-degree angle. (i.e., If the stimulus is held 12" in front of the suspect's nose, it should be moved 12" to the side to reach 45 degrees. Likewise, if the stimulus is held 15" in front of the suspect's nose, it should be moved 15" to the side to reach 45 degrees.)

For practice, a 45-degree template can be prepared by making a 15"-square cardboard and connecting its opposite corners with a diagonal line.

To use this device, hold it up so that the person's nose is above the diagonal line. Be certain that one edge of the template is centered on the nose and perpendicular to (or, at right angles to) the face. Have the person you are examining follow a penlight or some other object until suspect is looking down the 45-degree diagonal. Note the position of the eye. With practice, you should be able to recognize this angle without using the template.



Specific Procedures

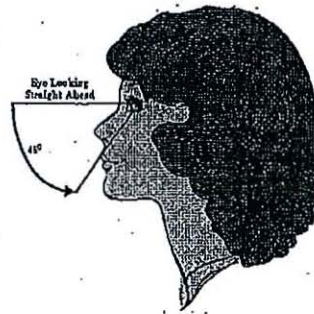
If the suspect is wearing eyeglasses, have them removed.

Give the suspect the following instructions from a safe position. **(FOR OFFICER SAFETY KEEP YOUR WEAPON AWAY FROM THE SUSPECT):**

- o "I am going to check your eyes."
- o "Keep your head still and follow this stimulus with your eyes only."
- o "Keep following the stimulus with your eyes until I tell you to stop."

Position the stimulus approximately 12-15 inches from the suspect's nose and slightly above eye level. Check to see that both pupils are equal in size. If they are not, this may indicate a head injury. You may observe Resting Nystagmus at this time, then check the suspect's eyes for the ability to track together. Move the stimulus smoothly across the suspect's entire field of vision. Check to see if the eyes track the stimulus together or one lags behind the other. If the eyes don't track together it could indicate a possible medical disorder, injury, or blindness.

Check the suspect's left eye by moving the stimulus to your right. Move the stimulus smoothly, at a speed that requires approximately two seconds to bring the suspect's eye as far to the side as it can go. While moving the stimulus, look at the suspect's eye and determine whether it is able to pursue smoothly. Now, move the stimulus all the way to the left, back across suspect's face checking if the right eye pursues smoothly. Movement of the stimulus should take approximately two seconds out and two seconds back for each eye. Repeat the procedure.



After you have checked both eyes for lack of smooth pursuit, check the eyes for distinct and sustained nystagmus at maximum deviation beginning with the suspect's left eye. Simply move the object to the suspect's left side until the eye has gone as far to the side as possible. Usually, no white will be showing in the corner of the eye at maximum deviation. Hold the eye at that position for a minimum of four seconds, and observe the eye for distinct and sustained nystagmus. Move the stimulus all the way across the suspect's face to check the right eye holding that position for a minimum of four seconds. Repeat the procedure.

Note: Fatigue Nystagmus. This type of nystagmus may begin if a subject's eyes are held at maximum deviation for more than 30 seconds.

Next, check for onset of nystagmus prior to 45 degrees. Start moving the stimulus towards the right (suspect's left eye) at a speed that would take approximately four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Now, move the stimulus to the left (suspect's right eye) at a speed that would take approximately four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Repeat the procedure. NOTE: It is important to use the full four seconds when checking for onset of nystagmus. If you move the stimulus too fast, you may go past the point of onset or miss it altogether.

If the suspect's eyes start jerking before they reach 45 degrees, check to see that some white of the eye is still showing on the side closest to the ear. If no white of the eye is showing, you either have taken the eye too far to the side (that is more than 45 degrees) or the person has unusual eyes that will not deviate very far to the side.

ADMINISTRATIVE PROCEDURES

1. CHECK FOR EYEGLASSES
2. VERBAL INSTRUCTIONS
3. POSITION STIMULUS (12-15 INCHES)
4. EQUAL PUPIL SIZE AND RESTING NYSTAGMUS
5. TRACKING
6. LACK OF SMOOTH PURSUIT
7. DIST. & SUSTAINED NYSTAGMUS @ MAX. DEV.
8. ONSET OF NYSTAGMUS PRIOR TO 45°
9. TOTAL THE CLUES
10. CHECK FOR VERTICAL GAZE NYSTAGMUS

NOTE: Nystagmus may be due to causes other than alcohol. These other causes include seizure medications and some other drugs. A large disparity between the performance of the right and left eye may indicate a medical condition.

Test Interpretation

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

1. The eye cannot follow a moving object smoothly.
2. Nystagmus is distinct and sustained when the eye is held at maximum deviation for a minimum of four seconds.
3. The angle of onset of nystagmus is prior to 45 degrees.

Based on the original research, if you observe four or more clues it is likely that the suspect's BAC is above 0.10. Using this criterion you will be able to classify about 77% of your suspects accurately. This was determined during laboratory and field testing and helps you weigh the various field sobriety tests in this battery as you make your arrest decision.

Vertical Gaze Nystagmus

The Vertical Gaze Nystagmus test is simple to administer. During the Vertical Gaze Nystagmus test, look for jerking as the eyes move up and are held for approximately four seconds at maximum elevation.

1. Position the stimulus horizontally, about 12-15 inches in front of the suspect's nose.
2. Instruct the suspect to hold the head still, and follow the object with the eyes only.
3. Raise the object until the suspect's eyes are elevated as far as possible.
4. Hold for approximately four seconds.
5. Watch closely for evidence of jerking.

Horizontal and Vertical Gaze Nystagmus can be observed directly and does not require special equipment. You will need a contrasting stimulus for the suspect to follow with their eyes. This can be the tip of your index finger, penlight, or pen. The stimulus used should be held slightly above eye level, so that the eyes are wide open when they look directly at it. It should be held approximately 12-15 inches in front of the nose. Remain aware of your position in relation to the suspect at all times.

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- o **THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER**
- o **THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE**
- o **THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.**

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

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