

Michigan Association of District Court Magistrates Annual Conference

September 23, 2021

Current Issues with Search Warrants

Materials presented by:

Ken Stecker
Traffic Safety Resource Prosecutor
Prosecuting Attorneys Association of Michigan
steckerk@michigan.gov



PHASE I VEHICLE IN MOTION AND STOPPING SEQUENCE

Summary: In this phase, the officer is observing a vehicle in motion and how it stops when pulled over, during which time, the officer may see initial cues of a possible OVI violation. The officer may simply notice a moving traffic, equipment, or registration violation. Perhaps, the vehicle may exhibit unusual driving actions like weaving or slow speed. Driving requires “divided attention” which simply means needing to concentrate on 2 or more things simultaneously. The OVI driver’s divided attention is impaired. Reactions could be slowed, judgment or vision impaired and coordination may be poor. Based on the conduct (a simple traffic law infraction and/or OVI cues), the officer may develop REASONABLE SUSPICION to make a stop. The stopping sequence may or may not provide indicia of impairment. *Based on reasonable suspicion, the officer may move to Phase II, Personal Contact.*

COMMON VEHICLE IN MOTION CUES

Summary: The following cues have been listed as predictors of impaired driving and are defined beginning at Session 5 pg. 6 of the 2013 NHTSA Participant Guide.

PROBLEMS MAINTAINING PROPER LANE POSITION [Pg. 7 of 19]	OBSERVED [✓]	NOTES
Weaving		
Weaving across lane lines		
Straddling a lane line		
Swerving		
Turning with wide radius		
Drifting		
Almost striking object or vehicle		
Other		
SPEED AND BRAKING PROBLEMS [Pg. 8 of 19]	OBSERVED [✓]	NOTES
Stopping problems –too far, short or jerky		
Accelerating or decelerating rapidly		
Varying speed		
Slow speed – 10 m.p.h. / under the limit		
Other		

VIGILANCE PROBLEMS [Pg. 8 of 19]	OBSERVED	NOTES
Driving in opposing lanes/wrong way on one-way street	[✓]	
Slow response to traffic signal lights		
Slow/failure to respond to officer's signals		
Stopping in lane for no apparent reason		
Driving without headlights at night		
Failure to signal/signaling inconsistently with action		
Other		
JUDGMENT PROBLEMS [Pg. 9 of 19]	OBSERVED	NOTES
Following too closely	[✓]	
Improper or unsafe lane change		
Illegal or improper turn-too fast, jerky, sharp, etc.		
Driving on other than designated roadway-on shoulder, off road entirely, straight in turn only lanes, etc.		

POST STOP CLUES [Pg. 10 of 19]	OBSERVED [✓]	NOTES
Difficulty with motor vehicle controls		
Fumbling with driver license or registration		
Difficulty exiting the vehicle		
Repeating questions or comments		
Swaying, unsteady, or balance problems		
Leaning on the vehicle or other object		
Slurred speech		
Slow to respond to officer/officer must repeat		
Provides incorrect information, changes answers		
Odor of alcoholic beverage from the driver		
<i>OPTIONAL ADDITIONAL OVI MOTORCYCLE CUES [Pgs. 11-12 of 19]</i>	OBSERVED [✓]	NOTES
<i>Drifting during turn or curve</i>		
<i>Trouble with dismount</i>		
<i>Trouble with balance at a stop</i>		
<i>Turning problems – unsteady, sudden corrections, late braking, improper lean angle</i>		
<i>Inattentive to surroundings</i>		
<i>Weaving</i>		
<i>Erratic movement while going straight</i>		
<i>Operating without lights at night</i>		
<i>Recklessness</i>		
<i>Following too closely</i>		
<i>Running stop lights/signs</i>		
<i>Evasion of officer</i>		
<i>Wrong way on a street</i>		
<i>Other</i>		

STOPPING SEQUENCE

Summary: Based upon the officer's observation of a traffic, registration, or equipment violation, based upon a number of the common detection cues listed above, or a combination of both, the officer may have formed REASONABLE SUSPICION TO STOP THE VEHICLE. Cues reinforcing or giving rise to a suspicion of impairment may be exhibited during the driver's response to the command to stop because stopping places additional demands on driver's ability to divide attention. The procedures for this begin at Session 5 pg. 17 of the 2013 NHTSA Participant Guide

STOPPING INAPPROPRIATELY IN RESPONSE TO OFFICER [Pg. 17 of 19]	OBSERVED [✓]	NOTES
Attempts to flee		
Does not respond to stopping request		
Responds slowly to stopping request		
Weaves abruptly to stop		
Strike the curb/other object while stopping		
Stops suddenly		
New violations during stopping sequence:		

PHASE II PERSONAL CONTACT AND EXIT FROM VEHICLE

Summary: In this phase the officer is determining if there is sufficient cause to instruct the suspect to step from the vehicle for further testing and then observing the exit. Sometimes, the officer's decision is based on both the vehicle in motion, stopping sequence, and the officer's interview/observations of the suspect. Other times it is based only on the interview/observations (such as where the car is stopped for equipment or tag issues or where the vehicle is stationary from an accident when the officer comes on the scene.) Officer observations are based upon officer senses and divided attention tests which require the subject to concentrate on 2 or more things at the same time. Based on SUFFICIENT CAUSE, the officer may request the driver to exit the vehicle and move to Phase III, SFSTs.

SENSORY CLUES

Summary: In this section the officer makes sensory observations about the suspect. Explanation of these clues begin at Session 6 pg. 5 of the 2013 NHTSA Participant Guide.

SIGHT CLUES [Pg. 5 of 14]	OBSERVED [✓]	NOTES
Bloodshot eyes		
Soiled clothing		
Fumbling fingers		
Alcohol containers		
Drugs/drug paraphernalia		
Bruises, bumps or scratches		
Unusual actions		
HEARING CLUES [Pg. 6 of 14]	OBSERVED [✓]	NOTES
Slurred speech		
Admission of drinking		
Inconsistent responses		
Abusive language		
Unusual statements		
SMELL CLUES [Pg. 7 of 14]	OBSERVED [✓]	NOTES
Alcoholic beverages		
Marijuana		
Cover up odors like breath sprays		
Unusual odors		

DIVIDED ATTENTION CLUES

Summary: In this section the suspect must concentrate on 2 or more things at the same time. The activities include questioning techniques in which the officer may ask for 2 things at once, interrupt, distract or ask unusual questions. Activities also include psychophysical (mind/body) tasks like the Alphabet and Finger Count tests. See: Session 6 of the 2013 NHTSA Participant Guide.

QUESTIONING

Summary: Officer asks questions constituting divided attention tasks, such as asking for two things simultaneously, asking interrupting or distracting questions, or unusual questions.

SUSPECT RESPONSE TO QUESTIONS [Pg. 9-11 of 14]	OBSERVED [✓]	NOTES
Forgets to produce 2 documents requested at the same time [Pg. 10 of 14]		
Produces documents not requested [Pg. 10 of 14]		
Fails to see requested documents while searching for them [Pg. 10 of 14]		
Fumbles/drops wallet, purse, license, registration [Pg. 10 of 14]		
Is unable to retrieve documents with fingertips [Pg. 10 of 14]		
Ignores officer questions while looking for items [Pg. 10 of 14]		
Forgets to resume item search after answering a question [Pg. 10 of 14]		
Gives grossly incorrect answer [Pg. 10 of 14]		
Cannot answer an unusual question (like what is your middle name) [Pg. 11 of 14]		
Other		

ALPHABET TEST

Summary: This test requires suspect to recite a part of the alphabet. By telling suspect to begin and end on letters other than A and Z, the suspect's attention is divided as the person must concentrate to begin at an unusual starting point and, while reciting, remember where to stop. Test instructions can be found in Session 6 pg. 11 of the 2013 NHTSA Participant Guide.

DEMONSTRATIONS AND INSTRUCTIONS [Pg. 11 of 14]	ACTUAL INSTRUCTIONS GIVEN	NOTES
Officer tells subject to recite alphabet beginning with a letter other than A and stopping at a letter other than Z		
Officer listens and observes suspect perform test		

INDICATORS OF IMPAIRMENT/SUSPECT'S TEST PERFORMANCE	CLUE OBSERVED?	NOTES
Recites letter out of order		
Omits letters		
Stops during the recitation totally		
Stops during the recitation and starts over		
Begins or ends improperly		

COUNT DOWN TEST

Summary: This test requires the suspect to count out loud 15 or more numbers in reverse sequence. Test instructions can be found in Session 6 pg. 12 of the 2013 NHTSA Participant Guide.

DEMONSTRATIONS AND INSTRUCTIONS [Pg. 12 of 14]	ACTUAL INSTRUCTIONS GIVEN	NOTES
Officer tells subject to count down from one number to another in reverse sequence		
Officer Listens and observes suspect perform test		

INDICATORS OF IMPAIRMENT/SUSPECT'S TEST PERFORMANCE	CLUE OBSERVED?	NOTES
Recites numbers out of order		
Omits numbers		
Stops during the recitation totally		
Stops during the recitation and starts over		
Begins or ends improperly		

FINGER COUNT

Summary: Subject is asked to touch the tip of thumb in turn to the tip of each finger on the same hand simultaneously counting up “1, 2, 3, 4” then reversing directions on the fingers while simultaneously counting down “4,3,2,1.” This is a divided attention test. Test instructions can be found in Session 6 pg. 12 of the 2013 NHTSA Participant Guide.

DEMONSTRATIONS AND INSTRUCTIONS [Pg. 12 of 14]	ACTUAL INSTRUCTIONS GIVEN	NOTES
Officer tells subject to count and touch his/her fingers		
Officer demonstrates by counting out loud while touching thumb to fingers as described in summary		
Officer listens and observes suspect perform test		

INDICATORS OF IMPAIRMENT/SUSPECT'S TEST PERFORMANCE	CLUE OBSERVED?	NOTES
Counts out of order		
Does not correctly touch fingers to thumb		
Omits numbers		
Adds additional counts		
Stops counting out loud		
Stops totally		
Stops and starts test over		

EXIT SEQUENCE

Summary: An officer may instruct a suspect to exit a vehicle to ensure either party's safety which always takes precedent over all other concerns. However, if based on the TOTALITY of the facts THE OFFICER HAS A REASONABLE SUSPICION THE SUSPECT IS IMPAIRED by alcohol and/or drugs, the officer may instruct suspect to exit for further testing. The suspect is usually not under arrest when instructed to exit. Driver's exit and walk from vehicle may provide evidence of impairment. Exit instructions can be found in Session 6 pg. 13 of the 2013 NHTSA Participant Guide.

SUSPECT'S ACTIONS [Pg. 13 of 14]	OBSERVED [✓]	NOTES
Shows angry or unusual reactions		
Cannot follow instructions		
Cannot open vehicle door		
Leaves the vehicle in gear		
"Climbs" out of vehicle		
Leans against vehicle		
Keeps hands on vehicle for balance		
Other unusual reactions		

PHASE III PRE-ARREST SCREENING

Summary: In this phase, the officer administers 3 scientifically validated psychophysical SFSTs's– the One-Leg Stand (OLS), the Walk and Turn (WAT), and the Horizontal Gaze Nystagmus (HGN) tests. Based on these tests and on ALL other evidence from phases I and II the officer decides if there is PROBABLE CAUSE TO ARREST THE SUSPECT FOR OVI. *From Phase I, evidence has been gathered from the initial observation of the vehicle in motion and observation of the stop. From Phase II, evidence has been gathered from face-to-face observation and interview and observation of the exit from the vehicle. Phase III adds the SFSTs results as the final evidence in the determination of probable cause.*

HORIZONTAL GAZE NYSTAGMUS TESTING (HGN)

Summary: Horizontal gaze nystagmus is an involuntary jerking occurring as eyes gaze toward the side and about which the subject is unaware. In the HGN test, the officer observes the eyes of the subject as the subject follows a slowly moving object horizontally with his/her eyes. The officer is to use the tip of a pen, penlight, pencil eraser or fingertip, whichever contrasts with the background, hold it 12 – 15 inches from subject’s nose and slightly above eye level and move slowly. The officer looks for 3 indicators of impairment in each eye (**a total of 6 clues**): if the eye cannot follow a moving object smoothly, if jerking is distinct and sustained when the eye is at maximum deviation, or if the angle of onset of jerking is within 45 degrees of center. (*Nystagmus may also be due to seizure medication, other drugs or, if eyes behave differently, a medical condition.*) HGN information and test instructions can be found in Session 8 pgs. 19-39 of the 2013 NHTSA Participant Guide..

OPTIMAL TEST CONDITIONS [Pgs. 20, 46, & 56 of 62]	ACTUAL INSTRUCTIONS/ACTIONS OF THE OFFICER	SUBSTANTIAL COMPLIANCE WITH CONDITIONS?	NOTES ABOUT WHAT SUSPECT DID
Officer checked there was no wind, dust or other eye irritants? [Pg. 56 of 62]			
Officer checked there were no visual distractions impeding test (suspect was faced away from rotating or strobe lights and passing traffic)? [Pg. 56 of 62]			
Officer directed suspect to remove any glasses? [Pg. 20 of 62]			

INSTRUCTION/INITIAL POSITIONING: [Pg. 20-21, of 62]	ACTUAL TEST GIVEN	SUBSTANTIAL COMPLIANCE?	CLUE OBSERVED	SUBJECT'S RESPONSE/REACTION
Checks for eyeglasses [Pg. 20, 21 of 62]				
Verbal Instructions: [Pg. 22 of 62]				
Officer says, "I am going to check your eyes."				
Officer says, "Keep your head still and follow this stimulus with your eyes only."				
Officer says, "Keep following the stimulus with your eyes until I tell you to stop."				

TESTING: PRELIMINARY CHECK [Pg. 20-23 of 62]	ACTUAL TEST GIVEN	SUBSTANTIAL COMPLIANCE?	CLUE OBSERVED	SUBJECT'S RESPONSE/REACTION
Officer positions stimulus approx. 12 – 15 inches from suspect's nose and slightly above eye level. [Pg. 20, 22 of 62]				
Officer checks to see that both pupils are equal in size (<i>Unequal size may indicate head injury</i>) [Pg. 20, 23 of 62]				
Officer checks for "resting" nystagmus – jerking as eyes look straight ahead (<i>May indicate medical impairment or drugs like PCP</i>). [Pg. 20, 23 of 62]				
Officer moves stimulus smoothly across suspect's entire field of vision to see if eyes track together or one lags behind the other (<i>Lack of tracking together may indicate medical disorder, injury, or blindness</i>). [Pg. 20, 23 of 62]				
Officer begins looking for all 3 clues (below) on left eye. This is then repeated on the right eye. [Pg. 20, 23 of 62]				

CLUE: LACK OF SMOOTH PURSUIT Subject's eyes are checked to see if they move side to side smoothly or noticeably jerking (Clue #1). [Pg. 26-29 of 62]	ACTUAL TEST GIVEN	SUBSTANTIAL COMPLIANCE?	CLUE OBSERVED	SUBJECT'S RESPONSE/REACTION
1. Officer moves stimulus smoothly at a speed requiring about 2 seconds bringing suspect's <u>left eye</u> from center to as far to the right side (maximum deviation) as it can go. [Pg. 28 of 62]				
2. Officer, while moving stimulus looks at suspect's left eye to see if it is pursuing stimulus smoothly. [Pg. 27 of 62]				
3. Officer moves stimulus smoothly at a speed requiring about 2 seconds all the way back across the subject's face bringing suspect's right eye to as far to the left side (max. deviation) as it can go. [Pg. 28 of 62]				
4. Officer while moving stimulus looks at suspect's right eye to see if it pursues smoothly. [Pg. 26, 28 of 62]				
5. Officer repeats the four above steps.				
Officer notes if nystagmus found in left eye (1 clue) or right eye (1 clue). Total clues observed: [Pg. 26 of 62]				
TOTAL CLUES OBSERVED:				SUSPECT TEST RESULT: PASS FAIL

CLUE: DISTINCT AND SUSTAINED NYSTAGMUS AT MAXIMUM DEVIATION Suspect's eyes are checked to see if they exhibit distinct and sustained jerking when the eye is held at max deviation for at least 4 seconds (Clue #2). [Pg. 30-31 of 62]	ACTUAL TEST GIVEN	SUBSTANTIAL COMPLIANCE?	CLUE OBSERVED	SUBJECT'S RESPONSE/REACTION
1. Officer checks left eye by moving stimulus to suspect's <u>left</u> side until eye has gone as far to the side as possible and holds eye at that position at least 4 but less than 30 seconds. [Pg. 31 of 62]				
2. While at max deviation, officer checks for distinct and sustained nystagmus. [Pg. 31 of 62]				
3. Officer moves stimulus across suspect's face to check the right eye holding eye at max deviation at right side and holds eye at that position at least 4 but less than 30 seconds. [Pg. 30 of 62]				
4. While at max deviation, officer checks for distinct and sustained nystagmus. [Pg. 31 of 62]				
5. Officer repeats the four above steps.				
Officer notes if nystagmus found in left eye (1 clue) or right eye (1 clue). Total clues observed:				
TOTAL CLUES OBSERVED:			SUSPECT TEST RESULT: PASS FAIL	

CLUE: ONSET OF NYSTAGMUS PRIOR TO 45 DEGREES: Suspect's eyes are checked to see if they start to jerk prior to a 45 degree angle (Clue #3). [Pg. of 32-37 of 62]	ACTUAL TEST GIVEN	SUBSTANTIAL COMPLIANCE?	CLUE OBSERVED	SUBJECT'S RESPONSE/REACTION
1. Officer moves the stimulus towards the right (suspect's left eye) at a speed that would take about 4 seconds for the stimulus to reach the edge of suspect's shoulder. [Pg. 34 of 62]				
2. Officer watches eye for any sign of jerking and, if seen, stops and verifies that the jerking continues. Officer is careful to check to see that some white of the eye is still showing on the side closest to ear to be sure the eye has not been taken further than 45 degrees. [Pg. 34 of 52]				
3. Officer moves the stimulus to the left (over suspect's right eye) at a speed that would take about 4 seconds for the stimulus to reach the edge of the suspect's shoulder. [Pg. 34 of 52]				
4. Officer watches eye for any sign of jerking and, if seen, stops and verifies that the jerking continues. [Pg. 34 of 52]				
5. Officer repeats the four above steps.				
Officer notes if nystagmus found in left eye (1 clue) or right eye (1 clue). Total clues observed:				
TOTAL CLUES OBSERVED:				SUSPECT TEST RESULT: PASS FAIL

TESTING VERTICAL NYSTAGMUS: Suspect's eyes are checked to see if they jerk up and down when the eyes gaze upward at maximum elevation. [Pg. 39 of 62]	ACTUAL TEST GIVEN	SUBSTANTIAL COMPLIANCE?	CLUE OBSERVED	SUBJECT'S RESPONSE/REACTION
1. Officer positions stimulus horizontally, 12-15 inches in front of suspect's nose.				
2. Officer says, "Hold your head still and follow the object with your eyes only."				
3. Officer raises the stimulus until the suspect's eyes are elevated as far as possible and holds there for about 4 seconds.				
4. Officer watches eyes in this position for jerking.				
Officer notes if vertical nystagmus is observed during 4 second hold.				
TOTAL CLUES OBSERVED:				SUSPECT TEST RESULT: PASS FAIL

TOTAL NUMBER OF CLUES OBSERVED ON HGN (max 6 – Vertical not included)		SUSPECT TEST RESULT: PASSED FAILED
--	--	------------------------------------

BASED ON THE OFFICER'S CONDUCT COURT FINDS: SUBSTANTIAL COMPLIANCE TEST RESULTS ADMISSIBLE	NO SUBSTANTIAL COMPLIANCE TEST RESULTS INADMISSIBLE
---	--

WALK AND TURN TESTING (WAT)

Summary: In the walk and turn test, the subject is directed to take nine steps, heel-to-toe, along a straight line. After taking these steps, the suspect must turn on one foot and return, in the same manner, in the opposite direction. The officer looks for eight indicators of impairment: (1) if the suspect cannot keep balance while listening to instructions, (2) begins before the instructions are finished, (3) stops while walking, (4) does not touch heel-to-toe, (5) steps off the line, (6) uses arms to balance, (6) makes an improper turn or (8) takes an incorrect number of steps. The officer is to observe the suspect from a safe distance and limit movement which may distract the suspect during the test. If the suspect has difficulty with the test (for example, steps off the line), the officer gives instructions to continue from that point, not from the beginning. WAT test instructions can be found in Session 8 pgs. 40-48 of the 2013 NHTSA Participant Guide.

TEST CONDITIONS [Pg. 41, 46 of 62]	ACTUAL INSTRUCTIONS/ACTIONS OF THE OFFICER	SUBSTANTIAL COMPLIANCE WITH CONDITIONS?	NOTES ABOUT WHAT SUSPECT DID
Officer directed suspect to reasonably dry, hard, level, non-slippery surface? [Pg. 41 of 62]			
Officer limited movement during test so as not to distract suspect? [Pg. 46 of 62]			
Officer provided sufficient room for suspect to complete nine heel-to-to steps? [Pg. 41 of 62]			
Officer noted if suspect was over 65 (how much)? If yes, what did officer do? [Pg. 41 of 62]			
Officer inquired if suspect had bad back, leg or inner ear problems? If yes, what did officer do? [Pg. 41 of 62]			
Officer determined if suspect wearing heels more than 2" height and, if so, gave opportunity to remove shoes? [Pg. 41 of 62]			

INSTRUCTION/INITIAL POSITIONING: Subject stands heel-to-toe, arms at sides, listens to instructions. This divides attention between balancing task (maintaining stance) and info processing task (listening and remembering instructions). [Pg. 42 of 62]	ACTUAL INSTRUCTIONS GIVEN	SUBSTANTIAL COMPLIANCE WITH INSTRUCTIONS?	SUBJECT'S RESPONSE/REACTION
A. Officer says, "Place your left foot on the line." (Real or imaginary)			
Officer demonstrates the above			
B. Officer says, "Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot."			
Officer demonstrates the above			
C. Officer says, "Place your arms down at your sides."			
Officer demonstrates the above			
D. Officer says, "Maintain this position until I have completed the instructions. Do not start to walk until told to do so."			
E. Officer says, "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)			

DEMONSTRATIONS AND INSTRUCTIONS FOR WALKING STAGE [Pg. 46 of 62]	ACTUAL INSTRUCTIONS GIVEN	SUBSTANTIAL COMPLIANCE?	SUBJECT'S RESPONSE/REACTION
Officer says, "When I tell you to start, take nine heel-to-toe steps on the line, turn and take nine heel-to-toe steps back down the line."			
Officer demonstrates heel-to-toe steps.			
Officer says, "When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot."			
Officer demonstrates the turn			
Officer says, "While you are walking: Keep your arms at your sides; Watch your feet at all times; and Count your steps out loud."			
Officer says, "Once you start walking, don't stop until you have completed the test."			
Officer says, "Do you understand the instructions?" (Make sure suspect indicates understanding.)			
Officer says, "Begin, the test."			
<i>If suspect has difficulty with test (for example, steps off the line) officer instructs to continue from that point, not from the beginning.</i>			

INDICATORS OF IMPAIRMENT/SUSPECT'S TEST PERFORMANCE 8 CLUES POSSIBLE (2 or more clues means failed test)	CLUE OBSERVED?	DETAILS OF CLUE OBSERVATION
1. Cannot keep balance while listening to instructions. Suspect must balance heel-to-toe on line while listening. If suspect does not maintain heel-to-toe position and feet break apart, this is a clue. Suspect's use of arms or swaying while still heel-to-toe is <u>not</u> a clue. [Pg. 44 of 62]		
2. Starts before instructions finished. If suspect begins to walk before told to begin, this is a clue. [Pg. 45 of 62]		
3. Stops while walking. Requires suspect to actually stop walking. Walking slowly is not a clue. [Pg. 45 of 62]		
4. Does not touch heel-to-toe. Suspect leaves a space of more than one half inch between heel and toe on <u>any</u> step is a clue. [Pg. 45 of 62]		
5. Steps off the line. Suspect steps so one foot is <u>entirely</u> off the line. [Pg. 45 of 62]		
6. Uses arms to balance. Suspect raises <u>one</u> or both arms more than 6" from sides to maintain balance. [Pg. 45 of 62]		
7. Improper turn. Suspect: removes front foot from line while turning <u>or</u> does not turn as demonstrated (spins, pivots, etc.) [Pg. 45 of 62]		
8. Incorrect number of steps. Suspect takes more or fewer than 9 steps in either direction. [Pg. 45 of 62]		
TOTAL NUMBER CLUES OBSERVED (max 8) ¹ :		SUSPECT TEST RESULT: PASSED FAILED
BASED ON THE OFFICER'S CONDUCT COURT FINDS: SUBSTANTIAL COMPLIANCE TEST RESULTS ADMISSIBLE		NO SUBSTANTIAL COMPLIANCE TEST RESULTS INADMISSIBLE

¹ If suspect exhibits the same clue more than once during the WAR or OLS it is to be recorded as only one clue. [Pg. 60 of 62]

ONE-LEG STAND TESTING (OLS)

Summary: In the one-leg stand test, the suspect is instructed to stand and raise one leg, either leg, with foot approximately 6 inches off the ground keeping raised foot parallel to ground. Suspect further instructed while looking at raised foot to count out loud by thousands (one thousand-one, one thousand-two, etc.) until told to put the foot down. The officer is to time the test for 30 seconds. The officer looks for 4 indicators of impairments: (1) swaying while balancing, (2) using arms to balance, (3) hopping to maintain balance, and (4) putting the foot down. This divides suspect's attention between balancing (standing on one foot) and small muscle group (counting out loud). The officer is to observe the suspect from a safe distance and remain motionless during the test so as not to interfere. If the suspect puts the foot down, the officer gives instructions to pick the foot up again and to continue counting from the point at which the foot touched the ground. OSL test instructions can be found in Session 8 pgs. 49-53 of the 2013 NHTSA Participant Guide.

TEST CONDITIONS [Pg. 49, 51 of 62]	ACTUAL INSTRUCTIONS/ACTIONS OF THE OFFICER	SUBSTANTIAL COMPLIANCE WITH CONDITIONS?	NOTES ABOUT WHAT SUSPECT DID
Officer directed suspect to reasonably dry, hard, level, non-slippery surface? [Pg. 49 of 62] (Required)			
Officer limited movement during test so as not to distract suspect? [Pg. 53 of 62]			
Officer positioned suspect in safe place? [Pg. 49 of 62]			
Officer noted if suspect was over 65 (how much)? [Pg. 49 of 62]			
Officer inquired if suspect had bad back, leg or inner ear problems? If yes, what did officer do? [Pg. 49 of 62]			
Officer determined if suspect was overweight by 50 or more pounds? If yes, what did officer do? [Pg. 49 of 62]			
Officer determined if suspect as wearing heels more than 2 inches high and, if so, gave opportunity to remove shoes? [Pg. 49 of 62]			

INSTRUCTION/INITIAL POSITIONING: Subject stands feet together, arms at sides, listens to instructions. This divides attention between balancing task (maintaining stance) and info processing task (listening and remembering instructions). [Pgs. 50-51 of 62]	ACTUAL INSTRUCTIONS GIVEN	SUBSTANTIAL COMPLIANCE WITH INSTRUCTIONS?	SUBJECT'S RESPONSE/REACTION
A. Officer says, "Please stand with your feet together and your arms down at the sides, like this." [Pg. 50 of 62]			
Officer demonstrates the above [Pg. 50 of 62]			
B. Officer says, "Do not start to perform the test until I tell you to do so." [Pg. 50 of 62]			
C. Officer says, "Do you understand the instructions so far?" (Make sure suspect indicates understanding.) [Pg. 51 of 62]			

DEMONSTRATIONS & INSTRUCTIONS FOR BALANCE & COUNTING STAGE [Pg. 50-51 of 62]	ACTUAL INSTRUCTIONS GIVEN	SUBSTANTIAL COMPLIANCE?	SUBJECT'S RESPONSE/REACTION
Officer says, "When I tell you to start, raise one leg, either leg, approximately six inches off the ground." [Pg. 50 of 62]			
Officer demonstrates the above [Pg. 50 of 62]			
Officer says, "Keep both legs straight and your arms at your side." [Pg. 50 of 62]			
Officer says, "While holding that position, count out loud in the following manner: 'one thousand one, one thousand two, one thousand three, ' and so on until told to stop." [Pg. 50 of 62]			
Officer demonstrates count, as follows: "one thousand and one, one thousand and two, one thousand and three, etc." Officer should not look at his foot when conducting the demonstration. Officer keeps arms at his sides. [Pg. 50 of 62]			
Officer says, "Keep your arms at your sides at all times and keep watching the raised foot." [Pg. 51 of 62]			
Officer says, "Do you understand?" (Make sure suspect indicates understanding) [Pg. 51 of 62]			
Officer says, "Go ahead and perform the test." [Pg. 51 of 62]			
Officer times the test for 30 seconds. Officer stops the test after 30 seconds. [Pg. 51 of 62]			
<i>If the subject puts the foot down he/she are told to pick the foot up again and the officer resumes counting from the point at which the foot touched the ground [Pg. 51 of 62]</i>			

INDICATORS OF IMPAIRMENT/SUSPECT'S TEST PERFORMANCE 4 CLUES POSSIBLE (2 or more clues means failed test) [pg. 51-53 of 62]	CLUE OBSERVED	DETAILS OF CLUE OBSERVATION
1. The suspect sways while balancing. This refers to side-by-side or back-and-forth motion while the suspect maintains the one-leg stand position. [pg. 51 of 62]		
2. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body in order to keep balance. [pg. 52 of 62]		
3. Hopping. Suspect is able to keep one foot off the ground, but resorts to hopping in order to maintain balance. [pg. 52 of 62]		
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. [pg. 52 of 62]		
<i>If suspect cannot do test or puts foot down three or more times, record as if all four clues were observed. [pg. 53 of 62]</i>		
TOTAL NUMBER OF CLUES OBSERVED (max 4):		SUSPECT TEST RESULT: PASSED FAILED

BASED ON THE OFFICER'S CONDUCT COURT FINDS: SUBSTANTIAL COMPLIANCE TEST RESULTS ADMISSIBLE	NO SUBSTANTIAL COMPLIANCE TEST RESULTS INADMISSIBLE
---	--

Three Phases of an OWI Investigation

Phase 1: Vehicle in Motion – In this phase, the officer is observing how the vehicle is being operated and how it stops when pulled over, during which time the officer may see initial signs of a possible OWI violation. Following are 24 cues which police may use to detect impaired drivers. The driving cues were developed from a list of more than 100 that have been found to predict BACs of 0.08 percent or greater.

Problems Maintaining Proper Lane Position

- (1) Weaving
- (2) Swerving
- (3) Weaving across lane lines
- (4) Straddling a lane line
- (5) Drifting
- (6) Turning with a wide radius
- (7) Almost striking a vehicle or other object

Problems with Speed and Braking

- (8) Stopping problems (too far, too short, or too jerky)
- (9) Accelerating or decelerating for no apparent reason
- (10) Varying speed
- (11) Slow speed (10+ mph under limit)

Vigilance Problems

- (12) Driving in opposing lanes or wrong way on one-way
- (13) Slow response to traffic signals
- (14) Slow or failure to respond to officer's signals
- (15) Stopping in lane for no apparent reason
- (16) Driving without headlights at night
- (17) Failure to signal or signal inconsistent with action

Judgment Problems

- (18) Following too closely
- (19) Improper or unsafe lane change
- (20) Illegal or improper turn (too fast, jerky, sharp, etc.)
- (21) Driving on other than the designated roadway
- (22) Stopping inappropriately in response to officer
- (23) Inappropriate or unusual behavior (throwing, arguing, etc.)
- (24) Appearing to be impaired

Studies have shown that there is a 65% probability that the driver is intoxicated if weaving plus one of the other above listed cues are present. If any two cues other than weaving are present, the probability that the driver is intoxicated is at least 50 percent. The presence of some cues alone (such as swerving,

accelerating for no reason or driving on other than the designated roadway) have probabilities greater than 70 percent.

Phase 2: Personal Contact – In this phase, the officer is determining, based upon face-to-face interview and observation of the driver, whether there is sufficient reason to instruct the suspect to step out from the vehicle.

Face-to-face observation and interview of the driver allows the officer to use three senses to gather evidence of alcohol and/or drug influence:

Sight:

-bloodshot eyes, soiled clothing, fumbling fingers, alcohol containers, drugs or drug paraphernalia, bruises, bumps or scratches, unusual actions

Hearing:

-slurred speech, admission of drinking, inconsistent responses, abusive language, unusual statements

Smell:

-alcoholic beverages, marijuana, “cover up” odors like breath sprays, unusual odors

Pre-Exit Questioning of the Driver:

Asking for two things simultaneously, be alert for the driver who:

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

Asking interrupting or distracting questions, be alert for the driver who:

-ignores the question and concentrates only on the license, insurance, and registration search; forgets to resume the search after answering the question; supplies a grossly incorrect answer to the question

Asking Unusual Questions

-For example, while holding the driver’s license the officer may ask the driver, “What is your middle name?”

Exit Sequence:

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 and/or drug influence and the ability to describe that evidence clearly and convincingly.

Phase 3: Pre-Arrest Screening: In this phase, the officer administers the three scientifically validated psychophysical Standardized Field Sobriety Tests (SFSTs).

Horizontal Gaze Nystagmus (HGN) Test – The HGN test is the most reliable field sobriety test. HGN refers to an involuntary jerking occurring as the eyes gaze toward the side. Involuntary jerking of the eyes becomes readily noticeable when a person is impaired.

In administering the HGN test, the officer has the suspect follow the motion of a small stimulus (approximately 12-15 inches from the subject's face) with the eyes only. The stimulus may be the tip of a pen or penlight.

When the HGN test is administered, the officer always begins with the subject's left eye. Each eye is examined for three specific clues.

-as the eye moves from side to side, does it move smoothly or does it jerk noticeably?

-when the eye moves as far to the side as possible and is kept at that position for several seconds (minimum of four seconds), does it jerk distinctly?

-as the eye moves toward the side, does it start to jerk prior to a 45-degree angle?

The maximum number of clues that appear in one eye is three. The maximum total number for any subject is six. Research shows that if four or more clues are evident, the test is 88% percent reliable at indicating a person's BAC is .08 grams or higher.

Walk and Turn (WAT) – It is a divided-attention test consisting of two stages: 1) Instruction Stage and 2) Walking Stage.

The WAT Test consists of eight clues: 1) can't balance during instructions; 2) starts too soon; 3) stops while walking; 4) doesn't touch heel-to-toe; 5) steps off line; 6) uses arms to balance; 7) loses balance on turn or turns incorrectly; and 8) takes the wrong number of steps.

Research shows that if a subject exhibits two or more of the clues, the test is 79% reliable at indicating a person's BAC is .08 grams or higher.

One-Leg Stand (OLS) – It is a divided-attention test consisting of two stages: 1) Instruction Stage and 2) Balance and Counting Stage.

The OLS consists of four clues: 1) sways while balancing; 2) uses arms to balance; 3) hops; and 4) puts foot down.

Research shows that, when the suspect produces two or more clues, the test is 83% reliable at indicating a person's BAC is .08 grams or higher.

Preliminary Breath Test (PBT) – The basic purpose of a PBT is to demonstrate the association of alcohol with the observable evidence of the subject's impairment. The PBT result is only one of many factors the officer considers in determining whether the subject should be arrested for OWI. It should never be the sole basis for an OWI arrest. In Michigan, the PBT has evidentiary limitations.

The Arrest Decision: Your arrest/no arrest decision is “based on the totality of the circumstances” of the three phases of an OWI investigation. If all the evidence, taken together, establishes probable cause to believe an OWI has been committed, you should arrest the subject for OWI.

Prepared by:

Kenneth Stecker/Kinga Canike

Traffic Safety Resource Prosecutors

Prosecuting Attorneys Association of Michigan

This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the National Highway Traffic Safety Administration.

