

No. 89666-6

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SUPREME COURT  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

v.

RYAN QUAALE,

Respondent,

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Apr 29, 2014, 3:38 pm  
BY RONALD R. CARPENTER  
CLERK

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BRIEF AMICUS CURIAE OF  
WASHINGTON FOUNDATION FOR CRIMINAL JUSTICE

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On Behalf of the Washington Foundation for Criminal Justice:  
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## **I. IDENTITY AND INTEREST OF AMICUS**

The Washington Foundation for Criminal Justice (“WFCJ”) is a non-profit organization dedicated to educating criminal defense attorneys on representation of citizens accused of impaired driving. Since 1983, the WFCJ has held an annual seminar to educate lawyers on pertinent issues related to the defense of citizens accused of DUI.

The WFCJ has an interest in protecting the right of citizens accused of DUI and DUI related crimes to receive a fair trial. HGN testing plays a significant role in the evaluation of drivers for alcohol and drug impairment. As such, the WFCJ is committed to advocating for the proper assessment of HGN evidence in criminal prosecutions.

## **II. STATEMENT OF THE CASE**

The following facts are taken from the Court of Appeals decision,<sup>1</sup> and are provided to offer context to the legal argument that follows.

At trial on a charge of felony DUI, the arresting officer testified he was trained as a Drug Recognition Expert (“DRE”). A DRE is trained to recognize the behavior and physiological conditions associated with certain psychoactive drugs and alcohol and, from that, to form an opinion

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<sup>1</sup> *State v. Quaaile*, 177 Wn. App. 603, 312 P.3d 726 (2013).

whether a driver is impaired. A part of the DRE examination includes what is called a HGN test.

The officer administered a Horizontal Gaze Nystagmus (“HGN”) test on Mr. Quaale, but not the full DRE exam. Nystagmus is the involuntary oscillation of the eyeballs resulting from the body's attempt to maintain orientation and balance. HGN occurs in persons consuming alcohol.

The prosecutor asked the officer, “In this case, based on the HGN test alone, did you form an opinion based on your training and experience as to whether or not Mr. Quaale's ability to operate a motor vehicle was impaired?” The officer replied, “Absolutely. There was no doubt he was impaired.”

### **III. ISSUE PRESENTED ON AMICUS**

Under the rules of evidence is a law enforcement officer permitted to testify to an opinion expressing certainty that a person is impaired by alcohol or drugs based upon the administration of a HGN test? Must opinion testimony on impairment based on results of a nystagmus test

strictly adhere to the limitations on such testimony announced by this Court in *State v. Baity*<sup>2</sup>?

#### IV. ARGUMENT

The issue before the Court is incorrectly framed as a question under ER 704.<sup>3</sup> Amicus contends the scope of permissible testimony related to HGN is constrained by ER 702, and this Court has clearly demarcated the parameters of acceptable opinion testimony in *State v. Baity*.<sup>4</sup>

ER 704 states;

Testimony in the form of an opinion or inferences *otherwise admissible* is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (Emphasis added)

In this case the phrase “otherwise admissible” refers to ER 702, which states;

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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<sup>2</sup> *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000).

<sup>3</sup> “The controlling rule of evidence for admission of the trooper’s statement is ER 704.”  
Petition for Review, pgs. 6-7.

<sup>4</sup> *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000).

To be “otherwise admissible,” opinion evidence on scientific matters must satisfy standards under *Frye*<sup>5</sup> and ER 702.<sup>6</sup> This Court has recognized that HGN testing is scientific in nature; hence any opinion testimony related to this evidence must pass requirements under *Frye* and ER 702.<sup>7</sup>

Washington courts have long adopted the *Frye* standard in criminal cases.<sup>8</sup> Under *Frye*, novel scientific evidence is admissible if (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.<sup>9</sup> The *Frye* standard recognizes that because judges do not have the expertise to assess the reliability of scientific evidence, the courts must turn to experts in the particular field to help them determine the admissibility of the proffered

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<sup>5</sup> *Frye v. United States*, 293 F. 1013 (1923).

<sup>6</sup> *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999); *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).; *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999)(superseded by statute on other grounds).

<sup>7</sup> *State v. Baity*, 140 Wn.2d 1, 14, 18, 991 P.2d 1151 (2000).

<sup>8</sup> *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 602, 260 P.3d 857 (2011); citing *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

<sup>9</sup> *State v. Riker*, 123 Wn.2d at 359; citing *State v. Cauthron*, 120 Wn.2d 879, 888, 846 P.2d 502 (1993).

testimony.<sup>10</sup> In applying the test, however, “our purpose is not to second-guess the scientific community.”<sup>11</sup> Rather, the “ ‘inquiry turns on the level of recognition accorded to the scientific principle involved - we look for *general acceptance* in the appropriate scientific community.’ ”<sup>12</sup>

“Once the *Frye* standard is satisfied...the trial court resumes its role as gatekeeper and may exclude otherwise admissible evidence by applying the rules of evidence.”<sup>13</sup> At that point, “application of the science to a particular case is a matter of weight *and admissibility* under ER 702.”<sup>14</sup> In this context, “ER 702 has independent force and effect [and plays] a significant role in admissibility of scientific evidence aside from *Frye*.”<sup>15</sup> To be admissible, a court must find that “the expert testimony would be helpful to the trier of fact.”<sup>16</sup> Moreover, to be helpful, an expert’s opinion must “not mislead the jury to the prejudice of the opposing party.”<sup>17</sup>

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<sup>10</sup> *State v. Copeland*, 130 Wn.2d at 255.

<sup>11</sup> *State v. Janes*, 121 Wn.2d 220, 232, 850 P.2d 495 (1993).

<sup>12</sup> *State v. Janes*, 121 Wn.2d at 232; quoting *State v. Cauthron*, 120 Wn.2d at 887.

<sup>13</sup> *City of Fircrest v. Jensen*, 158 Wn.2d 384, 397, 143 P.3d 776 (2006).

<sup>14</sup> *State v. Gregory*, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006)(*emphasis added*).

<sup>15</sup> *State v. Copeland*, 130 Wn.2d at 259-60.

<sup>16</sup> *State v. Cauthron*, 120 Wn.2d at 890; *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003)(*citations omitted*).

<sup>17</sup> *State v. Guilliot*, 106 Wn.App. 355, 363, 22 P.3d 1266 (2001).

In several cases, including *Baity*, courts have undertaken a thorough assessment of HGN evidence in the relevant scientific community and concluded that HGN is generally accepted to be a factor in establishing alcohol impairment. But these cases have not gone so far as to permit testimony couched in terms of certainty that HGN establishes that a person is impaired by alcohol. This Court's decision in *Baity* properly restricts HGN testimony to comport with the limitations on this evidence as expressed in the relevant scientific community.

In *Baity*, this Court found the basis for HGN testing, that intoxicated people will exhibit nystagmus, to be generally accepted under *Frye*.<sup>18</sup> However, this was not the end of the Court's analysis; rather it was the beginning. *Baity* addressed the admissibility of a 12-step DRE<sup>19</sup> examination, of which HGN was one step. The Court placed clear limitations on officer testimony based upon this scientific testing;

“... an officer may not testify in a fashion that casts an aura of scientific certainty to the testimony. The officer also may not predict the specific level of drugs present in a suspect. The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs. An officer may not testify in a fashion that casts an aura of scientific

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<sup>18</sup> *State v. Baity*, at 13-14.

<sup>19</sup> “Drug Recognition Exam.”

certainty to the testimony. The officer also may not predict the specific level of drugs present in a suspect. The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs.”<sup>20</sup> (Emphasis added)

Even when accompanied by a full DRE battery this Court has limited permissible opinion testimony based on HGN to “the presence or absence of certain categories of drugs in a suspect’s system.”<sup>21</sup>

HGN is not limited to DRE investigations. Law enforcement in general uses the test as part of the field sobriety tests commonly used in Washington to investigate alcohol related DUI’s.<sup>22</sup> It is no less important to ensure that HGN opinion testimony stays within the bounds of its underlying theory where alcohol is concerned. Testimony concerning involuntary oscillation of the eyeball is not something jurors are likely to understand independent of expert testimony. Accordingly, Courts must remain vigilant so that opinion testimony on this subject matter is not conveyed to jurors in a manner that casts “an aura of scientific certainty.”<sup>23</sup> Limiting HGN testimony to show the presence of alcohol but not the specific levels of intoxication fulfills this purpose.

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<sup>20</sup> *Baity*, at 17-18.

<sup>21</sup> *Baity*, at 18.

<sup>22</sup> *Baity*, at 13.

<sup>23</sup> *Baity*, at 17-18.

The Court of Appeals' citation to the Illinois Supreme Court case *People v. McKown*<sup>24</sup> is relevant to a review of this issue.<sup>25</sup> There, the trial court engaged in a thorough *Frye* hearing similar to that in *Baity*. Compelling to the court was the fact that witnesses for both the State and defense agreed that the presence of nystagmus in the eye was indicative of alcohol consumption.<sup>26</sup> Obviously, alcohol consumption is a necessary pre-condition to alcohol impairment.<sup>27</sup> While testimony regarding nystagmus may be relevant to the issue of alcohol impairment, the evidence itself established the consumption of alcoholic beverages.<sup>28</sup> Therefore, the Court held that HGN testimony must be limited to proving that a defendant may have consumed alcohol and may, as a result, be impaired.<sup>29</sup>

The New Mexico Court of Appeals reviewed HGN under *Frye* and concluded "that the HGN has not been scientifically validated as a direct measure of impairment."<sup>30</sup> This decision was notable because it had before

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<sup>24</sup> *People v. McKown*, 924 N.E.2d 941 (Ill. 2010).

<sup>25</sup> *Quaale*, 177 Wn. App. at 613.

<sup>26</sup> *McKown*, at 954.

<sup>27</sup> *Id.*

<sup>28</sup> *McKown*, at 955.

<sup>29</sup> *Id.*

<sup>30</sup> *State v. Lasworth*, 42 P.3d 844, 848 (N.M.App. — 2001) (*cert. den.*, 42 P.3d 842 (N.M. — 2002)). In the mid 1970s, Dr. Marcelline Burns was contracted by National Highway Traffic Safety Administration (NHTSA) to study, develop and determine the efficacy of a

it the testimony and FST validation studies of Dr. Marcelline Burns, the researcher who was contracted by the National Highway Traffic Safety Administration (NHTSA) to study, develop and determine the efficacy of a FST battery.<sup>31</sup> The Court noted Dr. Burns' lamentation in the 1998 study concerning how the purpose of the field sobriety testing has been misunderstood:

“Many individuals, including some judges, believe that the purpose of a field sobriety test is to measure driving impairment...but it is based on the incorrect assumption that field sobriety tests are designed to measure driving impairment. Driving a motor vehicle is a very complex activity that involves a wide variety of tasks and operator capabilities. It is unlikely that complex human performance, such as that required to safely drive an automobile, can be measured at roadside.”<sup>32</sup>

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FST battery. HGN has come to be a principal component of standardized field sobriety tests (FSTs) primarily because of these studies. The results of Dr. Burns' research are contained in several studies released by NHTSA: *Psychological Tests for DWI Arrest, Final Report*, No. DOT-HS-802-424 (1977); *Development and Field Test of Psychophysical Tests for DWI Arrest*, No. DOT-HS-805-864 (1981); *A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery*, Final Report, submitted to Colorado Department of Transportation (1995); *A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery*, (1998); *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*, Final Report, submitted to U.S. Dept. of Transportation, NHTSA (1998). *Lasworth* at 844-845.

<sup>31</sup> *State v. Lasworth*, 42 P.3d 844, 844-845 (N.M.App. – 2001) (*cert. den.*, 42 P.3d 842 (N.M. – 2002)). *Psychological Tests for DWI Arrest, Final Report*, No. DOT-HS-802-424 (1977); *Development and Field Test of Psychophysical Tests for DWI Arrest*, No. DOT-HS-805-864 (1981); *A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery*, Final Report, submitted to Colorado Department of Transportation (1995); *A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery*, (1998); *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*, Final Report, submitted to U.S. Dept. of Transportation, NHTSA (1998). *Lasworth* at 844-845.

<sup>32</sup> *Lasworth*, at 847-848.

The Court described Dr. Burns' record as being "unequivocal" in stating that HGN has been validated as a means of discriminating between BACs below a given level and BACs at or above that level, but not as a direct measure of impairment.<sup>33</sup>

Finally, a United States District Court performed an exhaustive research of state case law in its assessment of HGN testimony.<sup>34</sup> This court lamented a typical shortcoming in most HGN challenges in state courts in that defendants' failed to challenge the "science" behind such tests.<sup>35</sup> After a full review of literature on HGN,<sup>36</sup> the Court found;

While I ultimately agree, in large part, with the conclusions reached by the vast majority of state courts that the results of the HGN tests are admissible as circumstantial evidence of alcohol consumption, I must do so by recognizing their limited reliability and with substantial doubts about the degree of their general

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<sup>33</sup> *Lasworth*, at 847 fn. 1.

<sup>34</sup> *United States v. Horn*, 185 F.Supp.2d 530 (Md. 2002).

<sup>35</sup> *Horn*, at 536. The Court later noted that there also are many other causes of nystagmus that are unrelated to alcohol consumption, including: problems with the inner ear labyrinth; irrigating the ears with warm or cold water; influenza; streptococcus infection; vertigo; measles; syphilis; arteriosclerosis; Korchaff's syndrome; brain hemorrhage; epilepsy; hypertension; motion sickness; sunstroke; eye strain; eye muscle fatigue; glaucoma; changes in atmospheric pressure; consumption of excessive amounts of caffeine; excessive exposure to nicotine; aspirin; circadian rhythms; acute head trauma; chronic head trauma; some prescription drugs; tranquilizers, pain medication, and anti-convulsant medicine; barbiturates; disorders of the vestibular apparatus and brain stem; cerebellum dysfunction; heredity; diet; toxins; exposure to solvents; extreme chilling; eye muscle imbalance; lesions; exposure to solvents; continuous movement of the visual field past the eyes; and antihistamine use. At 556.

<sup>36</sup> *Horn*, 538-546.

acceptance within an unbiased scientific or technical community.<sup>37</sup>

However, the court's most sage remarks related to the conflict HGN "scientific" testimony can have with the fundamental need to protect the accused's right to a fair trial.

The practical truth of the above reasoning cannot be denied. None today can doubt the serious public safety concerns related to driving by intoxicated or impaired motorists or the magnitude of this problem. Neither can it be disputed that, given the volume of DWI/DUI cases, the press of other criminal cases, and the limited resources and time of prosecutors to prepare them for trial, it is highly desirable to have available a simple, inexpensive, and reliable test that can be administered by police officers on the road, which would facilitate a prompt and inexpensive trial. Indeed, Rule 102 would militate in favor of interpreting the rules of evidence in such a fashion as to accomplish this end, if fairly possible. What cannot be lost in the process, however, is the requirement that the trial be a fair one and that the sum of the evidence introduced against the defendant must be sufficiently probative to prove guilt beyond a reasonable doubt. Expedient as it may be for courts to take judicial notice of scientific or technical matters to resolve the crush of DWI/DUI cases, this cannot be done in the face of legitimate challenges to the reliability and accuracy of the tests sought to be judicially noticed. As will be seen, there is a place in the prosecutor's arsenal for SFST evidence, but it must not be cloaked in an aura of false reliability, lest the fact finder, like the protagonist in the Thomas Dolby song, be "blinded by science" or "hit by technology."<sup>38</sup>

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<sup>37</sup> *Horn*, at 549.

<sup>38</sup> *Horn*, 550-551.

Placing appropriate limitations on scientific opinion testimony is important if jurors are not to be misled, and necessary if they are to reach verdicts consistent with the science relied upon. After all, a scientific theory/technique found to be generally acceptable or valid for one purpose does not establish its acceptability or validity for another.<sup>39</sup>

In this context, it is clear that HGN has never been validated or generally accepted as a test to determine a person's level of impairment with any degree of certainty. Rather, HGN can be merely a symptom associated with the consumption of alcohol or other substances, or it can also be indicative of numerous other physical conditions totally unrelated to the use of impairing substances. The fact that individuals who are impaired by alcohol display HGN, however, does not establish a link between HGN and impairment. Rather, the link is between HGN and the consumption of alcohol. Whether an individual is impaired by their consumption of alcohol is a different question altogether. HGN creates an inference of consumption, but is incapable of concluding a person's ability to operate a motor vehicle is impaired.

The testimony in *Quaale* was improper because it conveyed an

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<sup>39</sup> Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 *Jurimetrics J.* 249, 258 (1986).

opinion of certainty that not only the defendant was impaired by alcohol, but his ability to operate a motor vehicle was impaired. This testimony violated the clear limitations imposed by this Court on HGN testimony in *Baity* where this Court stated an officer should not testify “in a fashion that casts an aura of scientific certainty to the testimony.” The State cannot by-pass this admonition by couching the testimony in the form of an opinion. This approach makes a mockery of science by placing significance in the officer’s opinion at the expense of the limitations and uncertainties inherent in the evidence itself.

#### **IV. CONCLUSION**

Many of the cases cited above reference an extensive trial court record including studies of HGN testing and criticisms thereof. The parties did not present such a record to the trial court in *Quaale*. This highlights a significant problem. As noted in *Horn*, only through an extensive review of these materials can a trial court understand the uncertainties inherent in HGN evidence. Nonetheless, *Baity* serves as the necessary guide for HGN evidence in Washington trial courts.

HGN evidence has been found to satisfy *Frye* and ER 702. But contrary to the State’s argument, this does not open a portal through ER 704 to offer opinion testimony exceeding the limitations of HGN

evidence. The WFCJ asks this Court to recognize *Baity* and the limitations on HGN evidence in its decision in the present case, and reject the State's arguments under ER 704.

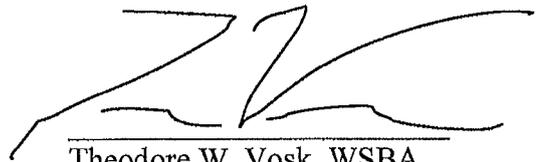
Respectfully submitted the 29<sup>th</sup> day of April, 2014.

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Dear Clerk,

Attached for filing in this matter, State of Washington v. Ryan Quaale - Case #89666-6, are the following documents:  
(1) Motion of Washington Foundation for Criminal Justice to File Amicus Curiae Memorandum  
(2) Brief Amicus Curiae of Washington Foundation for Criminal Justice  
(3) Declaration of Service

All other parties are being served a copy of these items by US Mail. Please contact us if there are any problems with the attachments coming through in this submission.

Shannon O'Leary

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