**To: Clay Abbott**

**From: John Stride**

**Date: September 31, 2011**

**Re: Recorded HGN tests as demonstrative evidence**

*Question*: Are recorded HGN tests admissible during trial to explain the test administration procedure and observations to a jury?

*Short Answer*: Yes, as demonstrative evidence to assist the jury in understanding the test and observations.

*Context:* The Texas Rules of Evidence do not specifically address demonstrative evidence. But, over the years, the appellate courts have reached the topic. Demonstrative evidence has been accepted in any number of cases on appeal. Typically, it has been acknowledged and even approved for the display of (actual and similar) firearms, demonstrations with anatomically correct dolls, and witness reenactments.

*Cases:* As of last week of September 2011, only three Texas intermediate court opinions—one published and two unpublished—have addressed the propriety of a HGN tests as demonstrative evidence. All three involve recorded demonstrations (video, DVD, and CD), not live performances. Two of those cases arose in Denton County and were affirmed by the Second Court of Appeals. The third opinion, from the Twelfth Court of Appeals in Tyler—affirming a case arising in Smith County—is the only ruling issued by another Texas appellate court. No issue on this topic is currently pending before the Court of Criminal Appeals. Also, a search for cases arising in other states was unfruitful. The three Texas cases are discussed in the order the opinions were issued:

***Thrasher v. State*, No. 12.09-00223-CR, 2010 Tex. App. LEXIS 4973 (Tex. App.—Tyler, June 30, 2010, no pet.) (not designated for publication).**

The car video of the stop was unusable. Before the officer testified on the conducting the defendant’s HGN test, the State showed a DPS video used to train officers on the administration of the HGN test. The admitted video was taped in a laboratory setting during daylight and demonstrated the clues a trooper should look for when conducting an HGN test. The defense lodged six objections: (1) denial of confrontation; (2) video not probative because individual not proven intoxicated; (3) admission would confuse and mislead the jury; (4) inadmissible under Rule 403; (5) inadmissible under the 7th Amendment; and (6) inadmissible under the state Due Course of Law provision. The trial court overruled the objections.

On appeal, the defense complained that the conditions under which the tape was made were completely dissimilar to those at the time of the stop and, thus, the tape was inadmissible under Rules 401 and 403. The Court held that because the complaint on appeal failed to comport with the objections at trial, the issue was forfeited. But, gratuitously, the court went on to explain that video was admissible to aid the jury in understanding the oral testimony adduced at trial. The testimony explained the movement of the eyes and that conditions in the lab were rarely the same as those on the street.

*Commentary*: It seems the court appreciated it might have been a tad technical in finding the complaint forfeited. Of more interest, however, is that the video was shown before any testimony from the sponsoring witness. Better practice might be to have the officer provide preliminary testimony explaining HGN and then use the video to assist with the testimony. In this way, the video would more clearly be demonstrative evidence and not direct or substantive evidence. Moreover, a jury instruction on the weight of demonstrative evidence would seem appropriate. *See, e.g., Hartsock,* below.

***Hartsock v. State*, 322 S.W.3d. 775 (Tex. App.—Fort Worth, August 19, 2010, no pet.).**

During trial, the State offered—for demonstrative purposes only—a DVD featuring videos showing a person’s eyes with and without nystagmus. The trial court held a hearing out of the presence of the jury. An officer testified that the DVD is a training tool, he had seen the videos in the DA’s office during a training session, and the videos would assist him with his testimony. He did not know who created the videos. The defense objected that the officer could not vouch for the authorship, authenticity, or scientific principles applied in the videos. The trial court overruled the objection.

Before the jury, the officer testified that the defendant’s eyes were not on the DVD, but the videos would help the jury understand how eyes appear with and without HGN. The trial court instructed the jury that the videos did not show the defendant’s eyes or indicate the level of alcohol consumed to produce the HGN, and were shown simply to aid it with the understanding the officer’s testimony about his observations. The DVD was played and the officer testified that he saw six clues in the DVD’s second video and they were the same six he saw in the defendant’s eyes.

On appeal, the defendant complained that the trial court wrongly admitted the DVD as demonstrative evidence. More specifically, he asserted that because the officer did not know who made the videos or the qualifications of the HGN administrator on the videos, the State failed to offer proof that the scientific technique judicially noticed as reliable in *Emerson v. State*, 880 S.W.2d 759, 768-89 (Tex. Crim. App. 1994), was followed in making the videos.

After providing a summary of the case law on demonstrative evidence, the court concluded that the admission of the DVD was not improper. The DVD was not used, the court opined, as a scientific method of proof that the defendant was intoxicated, but to assist the jury in understanding HGN. Also, the officer authenticated and identified the DVD as one he had viewed in the DA’s office. Finally, the record did not indicate that the DVD was used as direct or substantive evidence to support the defendant’s intoxication.

*Commentary*: This case engages in a much fuller analysis than *Thrasher*, above, and provides a more useful framework for using HGN tests as demonstrative evidence. The trial court’s instructions were a thoughtful precaution.

***Redfearn v. State*, No. 02-09-00270-CR, 2010 Tex. App. LEXIS 7018 (Tex. App.—Fort Worth, August 26, 2010, pet. ref’d) (not designated for publication).**

During the testimony of the officer performing the HGN test at the time of the stop, the State introduced a CD [*sic*] to assist the officer in explaining the effects of alcohol on a person’s eyes with and without increased nystagmus. The trial court overruled the defense objections and permitted the officer to use the CD during his testimony. The officer related that he had viewed the CD before trial and that it depicted an example of nystagmus due to alcohol and it would help the jury understand his testimony regarding the HGN test he administered to the defendant. He used the CD to explain to the jury what he looked for while administering the test. The defendant displayed six out of six indicators of intoxication.

On appeal, the defense argued that the CD was inadmissible under Rules 403 and 701. Also, the officer’s testimony on administering the HGN test was inadmissible. The court held that the CD was not offered as substantive evidence of the defendant’s intoxication but as a tool to assist the officer in explaining the HGN test he performed on the defendant. Therefore, it was admissible as demonstrative evidence. Additionally, the probative value of its contents were not substantially outweighed the danger it would unfairly prejudice the jurors.

*Commentary*: This opinion is conclusory and unhelpful except to the extent that it confirms the court’s position in *Hartsock,* above. Also, the opinion leads one to believe the CD was actually a DVD.

*Conclusion*: Recorded HGN tests are admissible if offered as demonstrative evidence to assist an officer testifying about the administration of a defendant’s HGN and the officer’s observations during the test. As a precautionary matter, the trial court should give jury instructions to restrict the jury’s use of the evidence. The evidence is most appropriately offered while the officer is testifying—not before or afterwards.