IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	**:**	**Case No. 0207004756**
v.	**:**	***Motion in Limine***
KURT C. BROWN	**:**	

ORDER

Defendant Kurt C. Brown (hereinafter "Defendant") has brought a motion *in limine* before this Court. Defendant challenges the admission of evidence concerning his performance on the field sobriety tests, asserting that it is inadmissible under Rule 702 of the Delaware Rules of Evidence and the United States Supreme Court decisions in Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). For the reasons stated below, this Court grants a modified version of Defendant's original motion.

This Court finds persuasive the opinion rendered in United States v. Horn, 185 F.Supp.2d 530 (D.Md. 2002). The Court there held that a police officer trained and qualified to administer NTSHA approved field sobriety tests may testify with respect to his/her observations of the suspect's performance of these tests, and these

observations are admissible as circumstantial evidence that the suspect had been driving under the influence. Id. At 533. However, the officer may not use "value-added descriptive language to characterize the subject's performance of the [tests], such as saying that the subject 'failed the test' or 'exhibited' a certain number of 'standardized clues' during the test". Id. While an officer may thus give lay opinion testimony that a suspect was driving under the influence of alcohol, he/she may not "bolster the lay opinion testimony by reference to any scientific, technical or specialized information learned from law enforcement or traffic safety instruction, but must confine his or her testimony to helpful firsthand observations of the defendant". Id. at 533-34. The Court in Horn, after an exhaustive hearing as to the reliability of NTSHA field tests as indicators of impairment, was not satisfied that the NTSHA tests were scientificly reliable under Daubert.

The task thus before this Court is to apply Horn to the context of this particular case. As an initial matter, this Court is satisfied that the concerns articulated in Horn are not implicated with respect to the admission in to evidence of the results of the horizontal gaze nystagmus (or "HGN") test. The Delaware Superior Court has

previously held that, when a proper foundation has been established and when properly administered and scored by a qualified officer, the HGN test is a reasonable reliable scientific indicator of alcohol impairment and is therefore admissible. See State v. Ruthardt, 680 A.2d 349, 360 (Del. Super. 1996).

However, with respect to the admission of results from the "alphabet" test, the "counting" test, and the "finger count" test, the Horn reliability concerns become apparent in the case before this Court. The results of these three field sobriety tests do not constitute scientific evidence as a matter of law, nor are any of these "exercises" even recognized as sufficiently reliable indicators of alcohol impairment by the National Traffic Safety Administration. The presentation of this evidence by an "expert" in DUI detection (police officer) portrays these exercises in an improper light as science. Therefore, the State must refrain from using "value-added descriptive language" or any "scientific, technical or specialized information learned from law enforcement or traffic safety instruction" in connection with evidence obtained from Defendant's performance of the "alphabet", "counting", and "finger count" tests. The State may, however, present the testimony of witness(es) consisting of "helpful

firsthand observations" of Defendant's performance of these three tests.

Accordingly, the State in the matter before this Court must introduce evidence in a manner consistent with the opinion rendered in United States v. Horn, *supra.*

IT IS SO ORDERED this _____ day of January, A.D., 2003.

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Rosemary B. Beauregard, Judge