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CHALLENGING FIELD SOBRIETY TEST RESULTS IN COURT

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I. WHY FIELD SOBRIETY TESTS ARE IMPORTANT

The field sobriety tests that a police officer conducts at the roadside are a key component of a drunk driving prosecution. The police use roadside sobriety tests for two purposes:

- To determine if probable cause exists to arrest a person for driving while intoxicated, and
- As evidence of intoxication at trial.

Although the police can use evidence gathered at the roadside to arrest a person, often the roadside tests are not strong enough to convict a person at trial. However, if a police officer arrests you for driving under the influence, you can be transported to a location where an alcohol-breath test can be performed or a blood sample drawn. Typically, this evidence is stronger than roadside sobriety tests.

II. STANDARDIZED FIELD SOBRIETY TESTS

The National Highway Traffic Safety Administration (NHTSA) has developed three standardized roadside tests that are often used by police officers. Standardized means that NHTSA has established that the tests must be given in a particular manner or the results are not reliable indicators of possible alcohol intoxication.

The three NHTSA standard field sobriety tests are:

- 1) Horizontal gaze nystagmus (HGN) test.
- 2) Walk and turn test.
- 3) One-legged stand test.

These are the only three tests that have been studied to see if poor performance on them correlates with alcohol impairment. They have been shown to be only 65 to 77 percent accurate in predicting intoxication. And that is only when they are (1) used together and (2) administered in a carefully standardized fashion as prescribed by NHTSA.

The NHTSA standardized field tests are not conclusive proof and can frequently be successfully challenged in court on the grounds that:

- 1) The test does not accurately predict whether a person is intoxicated.
- 2) The test was not administered or scored correctly.
- 3) There are many innocent reasons why someone might not pass the test.

Police officers regularly use tests that have not been studied or validated, such as finger to nose, counting backward, reciting the alphabet, and many others. These can be challenged on the grounds that they have no standards for administration and no proven connection to intoxication or impaired driving.

III. THE HORIZONTAL GAZE NYSTAGMUS (HGN) TEST

A. How the HGN Test Is Supposed to Be Administered

The HGN test requires you to follow a penlight or some other object, such as the police officer's finger, with your eyes without moving your head. The purpose of the HGN test is to detect jerky eye movement, which might indicate intoxication. The presumption is that a person is intoxicated if the jerky eye movement occurs before the penlight or other target has moved 45 degrees from the center of the face.

The protocol for the HGN test is specific. For example, the target (penlight, pen, finger, etc.) must be 12 to 15 inches from the subject's eyes. In addition, the police officer must be able to recognize when he has moved the target more than 45 degrees from the center of your face. The officer is also required to give directions as the NHTSA standards require.

Under the best conditions, the HGN has widely been reported to be accurate only 77% of the time. Therefore, assuming everything is done correctly, which is a huge assumption, the HGN test is flawed. Although 77% accuracy sounds like a reasonable probability, the test for guilt at trial is beyond a reasonable doubt. However, a 77% accuracy rate will typically be sufficient to establish probable cause for an arrest.

B. How the HGN Test Is Scored

The officer looks for three indicators of intoxication when conducting the HGN test. They are as follows:

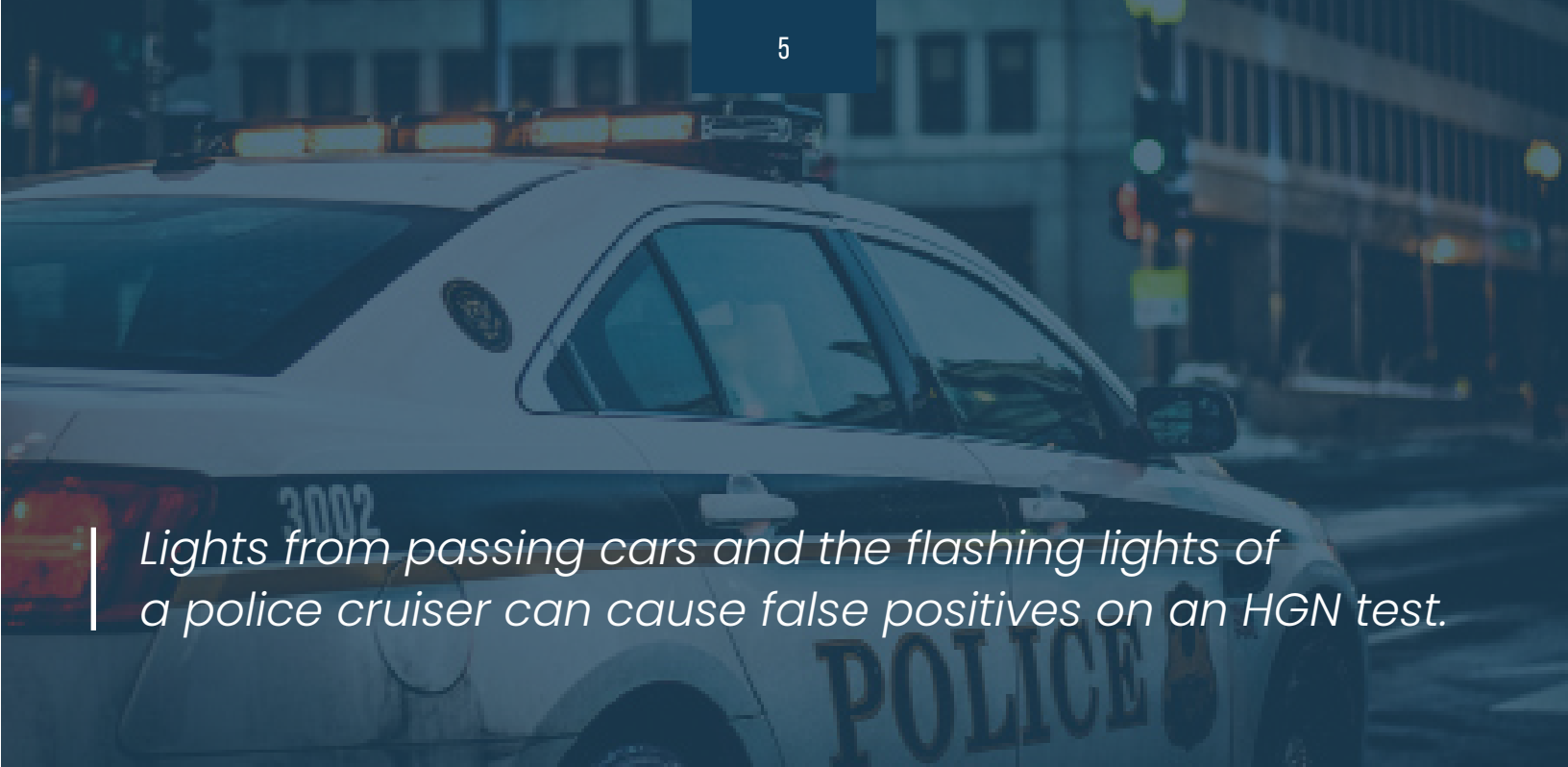
- 1) Lack of smooth pursuit of the target by the test subject's eyes.
- 2) Sustained nystagmus (jerky movement of the eye).
- 3) Nystagmus prior to the target being moved 45 degrees.

Each eye is scored; therefore, the maximum score is six points. According to NHTSA standards, four points indicate intoxication.

C. Problems with the HGN Test

Numerous experts have reported that nystagmus occurs in some individuals before the eyes move 45 degrees to the side. The assumption in the HGN test is that no significant nystagmus occurs before the eyes move 45 degrees. Furthermore, medical conditions unrelated to alcohol can cause sustained nystagmus. Therefore, the premise of the HGN test is faulty for some people.

The HGN test is often administered improperly. For the test to be valid, the target must be 12 to 15 inches from the eyes. If the target is not the proper distance, the nystagmus (jerky eye movement) may occur before the target has passed 45 degrees. In addition, lights from passing cars and the flashing lights of a police cruiser can cause false positives on an HGN test.

A photograph of a police car at night with its emergency lights flashing. The car is white with 'POLICE' written on the side. The background is dark with some city lights visible.

Lights from passing cars and the flashing lights of a police cruiser can cause false positives on an HGN test.

The HGN relies on scientific principles that are not apparent to laypeople. For example, most people understand a person could stumble due to alcohol, or the stumbling could be due to a leg that was stiff due to sitting for too long. However, most laypeople are not familiar with the relationship between intoxication and nystagmus. In addition, most people are not aware nystagmus can be caused by a myriad of factors unrelated to alcohol consumption.

Therefore, before admitting the test results, some courts require the state to present evidence by an expert that an HGN test can be used as evidence that a person was intoxicated.

If the court requires expert testimony concerning the validity of the HGN test, then the state must present an expert to explain the scientific principles that support the HGN test. The witness who provides the scientific explanation must be a person with extensive experience and/or education in science and/or medicine. Rarely, if ever, does a police officer have this expertise. However, a police officer who has received training on conducting the HGN test may qualify to testify about the correct administration of the test.

The test can be kept out of court if the state cannot produce a satisfactory expert.

IV. THE WALK AND TURN TEST

A. How the Walk and Turn Test Is Supposed to Be Administered

As the name implies, the walk and turn test requires the person suspected of driving while impaired to walk and turn. The walk and turn test consists of taking nine heel to toe steps and returning to the starting point. One would think that walking the line without stumbling or falling would be all that is required. However, more is involved than taking nine steps.

The walk and turn is a divided attention test. While walking the straight line, you must count each step, remember the correct procedure for executing the turn after nine steps, and make every step heel to toe. You are graded on several factors such as: did you start the test too soon, did you take an incorrect number of steps, did you use your arms for balance, and did you execute the turn correctly.

B. How the Walk and Turn Test Is Scored

There are eight scoring points in the NHTSA protocol for the walk and turn test. If you fail on two points, you are considered impaired according to NHTSA standards. So, if you commit the unpardonable sin of using your arms to maintain balance for a moment and miss one heel to toe step in the dark on an uneven roadside, you have failed the test.

The eight scoring points are as follows:


- 1) The subject can't balance during instructions.
- 2) The subject starts too soon.
- 3) The subject stops while walking.
- 4) The subject misses heel to toe.
- 5) The subject steps off the line.
- 6) The subject uses arms to balance.
- 7) The subject turns improperly.
- 8) The subject takes the wrong number of steps.

C. Problems with the Walk and Turn Test

The weaknesses in the walk and turn test are evident. First, you are required to walk a straight line, and often there is no line on the ground to indicate where the straight line exists. The officer will tell you to walk a straight line, and there is no objective measure to determine if you deviated from the straight line.

In addition, the scoring for the walk and turn test does not take into account the real environmental factors that exist on the roadside. For example, a small indistinguishable hole in the roadside covered by grass can make you stumble. Sitting in the driver's seat for an extended period can cause your legs or back to be stiff, which in turn can cause you to stagger, and thus, you appear intoxicated. In addition, being stopped by the police can be a stressful experience. Stress often makes it difficult to concentrate and follow directions. Consequently, if you are eager to please and you are stressed, you could start the walk and turn test before the officer says to start and that is a point against you.

Medical issues can prevent a person from successfully completing the test. There are many possibilities. Just about any medical condition affecting the ability to stand, walk, and balance could pose an issue—arthritis, tendonitis, ruptured discs, etc. Some medical conditions may be unknown to the test subject. For example, you may suffer from an undiagnosed inner-ear infection or other problem with the inner ear that affects your balance. Fatigue can cause a person to falter on the walk and turn test. Perhaps a person should not be driving when fatigue is that great; however, driving while fatigued is usually not a legally chargeable offense, but driving with too much alcohol in your system is a crime.



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Without impugning the integrity of police officers, most people see what they want to see. A police officer's career is enhanced by making drunk driving arrests. In addition, many officers feel a sense of mission in taking drunken drivers off the streets. Therefore, bias can enter into what a police officer perceives. Consequently, when there is no line drawn to walk, the police officer may perceive a deviation from a straight path that did not occur. In addition, the officer may perceive a sway in your stance that did not occur.

V. THE ONE-LEGGED STAND TEST

A. How the One-Legged Stand Test Is Supposed to Be Administered

The one-legged stand test is simple in design. You stand with your feet together, then raise one foot approximately six inches off the ground and keep the elevated foot pointed out. Your arms are to be kept by your side. The officer will instruct you to count 1001-1002-1003 and so forth. The test will last thirty seconds. According to NHTSA protocol, four clues can be used to determine if a suspect is legally impaired.

B. How the One-Legged Stand Test Is Supposed to Be Scored

The four clues are as follows:

- 1) The subject sways while standing on one foot.
- 2) The subject uses the arms for balance.
- 3) The subject hops to maintain balance.
- 4) The subject puts the foot down before the test is complete.

The one-legged stand test is not administered to people sixty-five-years of age or older or those who are fifty pounds overweight.

According to NHTSA standards, if two or more of the clues are present, the person has failed the test.

C. Problems with the One-Legged Stand Test

The one-legged stand test has many problems. The accuracy of the One-Legged stand test is widely reported to be approximately 65%. That means that 65% of the time, the one-legged stand test correctly determines if a person has a blood alcohol level of .10 or higher. A blood alcohol level of .08 is considered legally impaired in most states for drivers who are twenty-one years of age or older and are driving a private vehicle.

Sixty-five percent accuracy is not much better than a flip of a coin to determine if a person is intoxicated. In addition, the 65% accuracy rate assumes the test is conducted in accordance with proper procedure and the results are recorded correctly. Moreover, the issue of officer bias can be a factor in the One-Legged stand test as it is in all roadside sobriety tests that require the suspect to perform physical and/or mental tasks.

Finally, many factors that have nothing to do with alcohol consumption can cause you to fail the test. Just as in the walk and turn test, the terrain may cause a person to sway. In an ideal environment, the test is conducted on a flat surface with no wind gusts. The reality is that roadside sobriety tests are not conducted in ideal conditions. Therefore, many people are charged with driving while impaired when they are innocent.

VI. NONSTANDARD FIELD SOBRIETY TESTS

Although the NHTSA approved tests are the most common, police officers often use other nonstandardized tests. Three of the most common nonstandardized tests are the finger to nose test, repeat the alphabet, and count backward.

A. Finger to Nose

As the name denotes, in the finger to nose test, you are required to extend your arms, and then with your eyes closed, touch your nose. The officer can continue this any number of times directing you to use either your left hand or right hand to touch your nose. Since NHTSA has not developed a protocol for this test, there are no standards on what constitutes a failing score and how the test should be conducted. Nor is there an established correlation between performance on the test and intoxication.

B. A-B-C or Z-Y-W

Repeating the alphabet sounds easy, but the officer can also direct you to repeat the alphabet backward or start anywhere in the sequence of the alphabet. For example, doing A-B-C-D is easy. However, the officer may direct you to start with R and go to A, or start with W and go to D. Since no standard protocol exists, the officer can give any arbitrary



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command in regards to how the alphabet should be repeated. In addition, as with all nonstandard tests, there are no objective standard criteria to determine what constitutes a failing score or even the indicators of alcohol impairment. For example, if a person pauses two seconds between letters is that too long, or should the person have three seconds?

C. Counting Backward

A police officer may direct you to count backward. The failings of this test are the same as those with reciting the alphabet.

D. Admissibility

As a matter of routine, the common nonstandard, roadside tests are admissible in a court of law. Admissible means that a piece of evidence can be introduced because it is relevant to the trial and meets the legal requirements to be used as evidence. The nonstandard tests are not based on scientific evidence that requires an expert to decipher, but rather common sense impression which most people can understand. For example, the typical juror understands that bloodshot eyes may be a sign of impairment. Similarly, most jurors also understand there are many innocent explanations for bloodshot eyes unrelated to alcohol.

Many field sobriety tests are based on the same assumption. Common knowledge indicates alcohol affects your ability to think and repeat the alphabet. However, common knowledge also indicates repeating the alphabet backward after being stopped by a police officer can be a challenge to anyone.

On cross-examination and again when addressing the jury, a defense attorney will bring out the lack of standardized procedures, lack of correlation with alcohol impairment, and many innocent reasons why someone could perform poorly on these tests.

VII. FIELD SOBRIETY TESTS IN COURT

A. Field Sobriety Tests Can Be Challenged

Failure of a roadside sobriety test is not conclusive evidence that you were intoxicated. The final decision of whether a person is guilty of a crime rests with the courts and not the charging officer. Although police and the district attorney try to present the results of roadside tests as overwhelming and indisputable evidence you were intoxicated, the truth is the results can frequently be explained away or even kept out of court.

There are two strategies for challenging field sobriety test results:

- 1) Requesting the judge to suppress the results (keep them out of court so they cannot be considered at all as evidence against you).
- 2) Attacking them at trial when cross-examining the arresting officer and arguing the case to the jury or judge.

Depending on the facts of the case, the attorney may try one or both.

B. Suppressing the Test Results

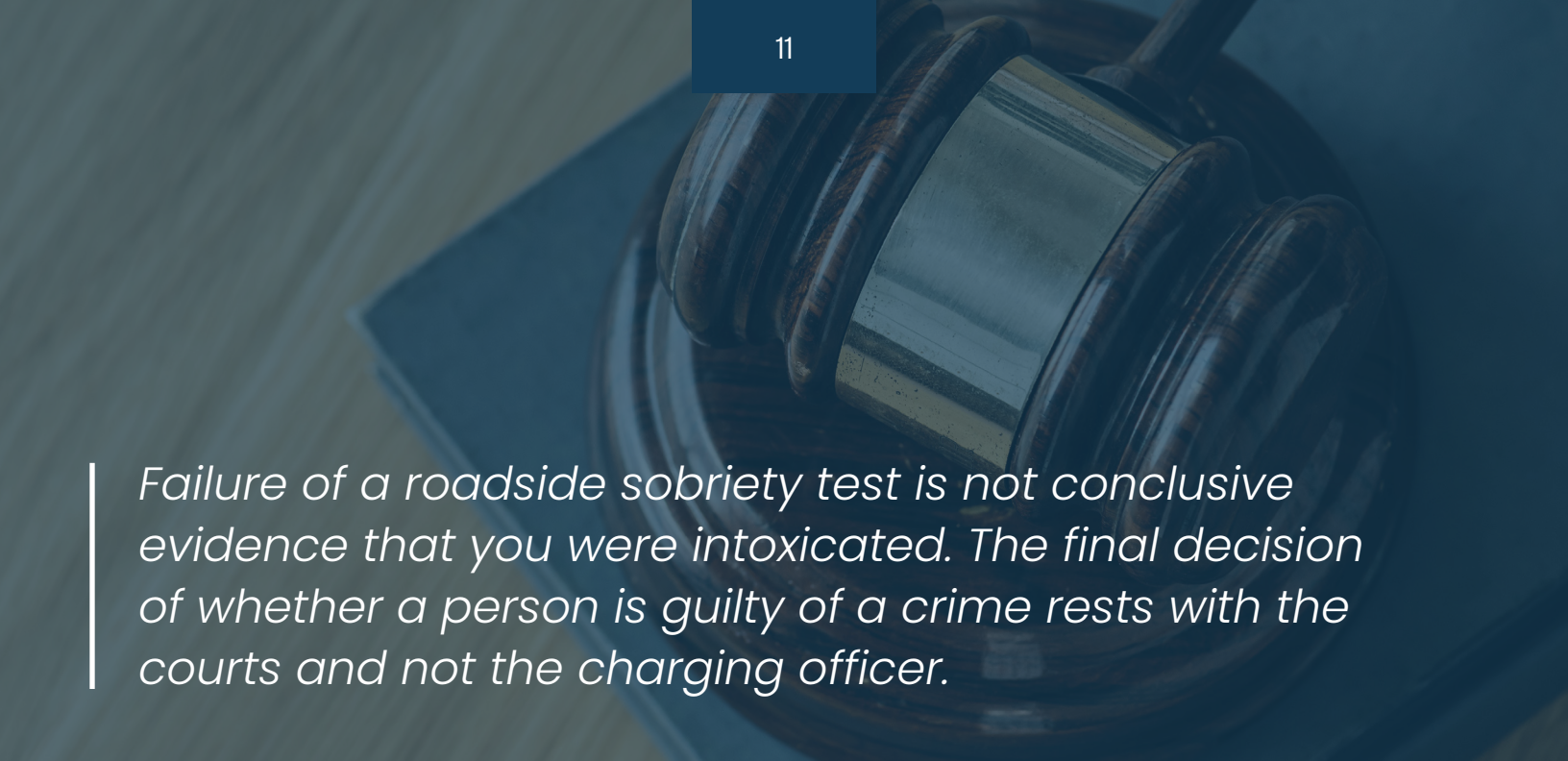
The admissibility of field sobriety tests may be challenged on the grounds that the tests lack proof that they are a reliable indicator of intoxication. Because the horizontal gaze nystagmus test (HGN) involves the science of the effects of alcohol on the movements of the eye, this test is the most often challenged and the most often ruled inadmissible.

Even if the court does not accept the notion that field sobriety tests need scientific backing to be admissible, the admissibility of the tests may be challenged on the ground that the tests are valid only if they are administered in a reliable manner and they weren't. If there is a video of you performing the tests, your attorney can analyze it to identify any errors the officer made in administering the test and then point them out to the court. Even when there is no video, the officer can be questioned on how he or she administered the test. Officers often unwittingly reveal their errors.

C. Attacking the Test Results at Trial

When attacking field sobriety test results at trial, your attorney can again bring up the lack of scientific backing and errors in administering the test when cross-examining the arresting officer and arguing the case to the jury or judge. He or she may also raise one or more of the following issues with the officer:

- **The environment.** The ground where you were tested may have been sloped or had other irregularities that made it hard or even impossible for you to balance or keep your footing. Darkness, wind, dust, bad weather, glare from passing traffic or lights in your eyes from the police cruiser can all affect test performance.
- **Your physical condition.** Fatigue, lack of coordination, stress, medical conditions, and high heeled shoes are more reasons to explain poor test performance. Nystagmus can be caused by a number of reasons other than alcohol intoxication. It occurs naturally in some people. Also, fatigue, illness, hypertension, and common drugs like caffeine or aspirin may contribute to nystagmus.



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- **Inadequate instructions.** Despite the complexity of the instructions, police officers often explain and demonstrate the test only once, and in as little as ten to fifteen seconds. You are then unrealistically expected to have instant retention of the instructions.
- **No basis for comparison.** The officer has no idea how you would have done on the tests if you had no alcohol in your system. How can the officer know that poor performance was due to alcohol impairment? Perhaps you are not very well coordinated.
- **Officer's lack of knowledge.** The prosecutor will tout the arresting officer's knowledge, experience, and training in administering and evaluating field sobriety tests. One way to challenge this expertise is to ask the officer why the test is administered in a certain manner. Often, the officer does not know.
- **Discrepancies in the officer's testimony.** Usually, your attorney will have access to the reports filed by the arresting officer and any discrepancy the attorney finds between what the officer testifies to as a witness and what is in the report becomes evidence to attack the validity of the test.
- **You look sober in the video.** If there is a video of you performing the tests and you look sober to the average person, it can be used as evidence that the officer was wrong, biased, or overly picky in scoring the tests.

D. A Police Officer's Attitude and Training Can Affect the Trial

The demeanor and the training of the arresting officer can also become an issue at trial. A defense attorney can examine the training and experience of an officer. On occasion, an officer has not received the proper training and does not have the needed certification to administer and score the tests. In such a case, the evidence can often be suppressed.

Subjective factors also sway a jury. When an attorney starts questioning a police officer about relatively small discrepancies in the testimony concerning how a field sobriety test was administered, many officers become defensive. An officer's negative attitude and defensiveness frequently turn a jury and judge off.

VIII. SUMMING UP

Do not panic if you have failed a roadside sobriety test. NHTSA tests must be administered according to the protocol established by NHTSA. A discrepancy in the protocol and how the test was administered may be grounds for dismissing the test results altogether. In addition, roadside tests have several vulnerabilities that an attorney can exploit at trial. In the end, roadside tests are not conclusive and a defense attorney can develop trial tactics to discredit them based on the facts of each case.