

DUI Evidence Review Checklist

Client Name: _____ BAC: _____

1. INCIDENT SITE VIDEO RECORDING

SECTION 56-5-2953. Incident site and breath test site video recording.

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 **must have his conduct at the incident site and the breath test site video recorded.**

(1)(a) **The video recording at the incident site must:**

(i) not begin later than the activation of the officer's blue lights;

(ii) include any field sobriety tests administered; and

(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

(b) A refusal to take a field sobriety test does not constitute disobeying a police command.

YES NO Video produced to us within 30 days of discovery request? (If not and no AFFIDAVIT was produced either, prepare a draft Motion to Dismiss)

YES NO Video *running* at least a few seconds before officer turns on blue lights? (If blue lights are *already running* when the video begins, then the answer to this question is NO).

YES NO Good sound on throughout entire video?
All Missing or Bad sound: _____
(time marks)

YES NO Miranda Rights completely advised to Defendant before any Field Sobriety Tests ever start?

YES NO Is the ENTIRE arrest (showing both officer and unobscured and on camera the whole time) on camera?

**** If instead of sending an Incident Video, the officer sends an Affidavit, staple that Affidavit to the front of this sheet ****

NOTES:

If at any time, *the client goes out of view* on the video, indicate and explain what you see here:

List all Questions by the Officer on Incident Video before field tests

(time mark on video)

_____ 1. _____

YES NO Asked before Client exits the vehicle?

_____ 2. _____

YES NO Asked before Client exits the vehicle?

_____ 3. _____

YES NO Asked before Client exits the vehicle?

YES NO Includes all field sobriety tests (FSTs) completely?

Tests on Video: NHTSA Standardized FSTs

(time mark on video)

HGN (horizontal gaze nystagmus)

Walk and Turn

One-Leg Stand

HGN TEST

“Prior to the administration of HGN, the eyes are checked for equal pupil size, resting nystagmus, and equal tracking (can they follow an object together). If the eyes do not track together, or if the pupils are noticeably unequal in size, the chance of medical disorders or injuries causing the nystagmus is present.” NHTSA Manual, (R8/06, Page VIII 5). There are three clues for determining whether nystagmus is present: (1) the lack of smooth pursuit; (2) distinct and sustained nystagmus at maximum deviation, and (3) onset of nystagmus prior to 45 degrees.

Prior to the HGN test, the administering officer will provide the following instructions:

- (1) “I am going to check your eyes;”
- (2) “keep your head still and follow this stimulus with your eyes only;” and
- (3) “keep following the stimulus with your eyes until I tell you to stop.”

NHTSA Manual, (R8/06, Page VIII 6). The HGN clues must be observed in that order.

If the test is conducted in accordance with NHTSA standards,

- The administering officer begins with the left eye,
- Having the stimulus approximately 12-15 inches from the suspect’s nose and slightly above eye level,
- Then each eye would be checked once for equal tracking and equal pupil size (1 pass per eye - approx. 4 seconds);
- Each eye would be checked twice for smooth pursuit (2 passes per eye – approx. 16 seconds); each eye would be checked twice for distinct nystagmus at maximum deviation (2 passes per eye – approx. 24 seconds); and
- Finally each eye would be checked twice for onset of nystagmus prior to 45 degrees deviation (2 passes per eye - approx. 32 seconds);
- Both eyes would be checked for vertical nystagmus (1 pass - approx. 4 seconds each).
- The test should last for approximately (80) eighty seconds.

There are 38 additional types of nystagmus:

(1) problems with the inner ear labyrinth; (2) irrigating the ears with warm or cold water under peculiar weather conditions; (3) influenza; (4) streptococcus infection; (5) vertigo; (6) measles; (7) syphilis; (8) arteriosclerosis; (9) muscular dystrophy; (10) multiple sclerosis; (11) Korchaff's syndrome; (12) brain hemorrhage; (13) epilepsy; (14) hypertension; (15) motion sickness; (16) sunstroke; (17) eye strain; (18) eye muscle fatigue; (19) glaucoma; (20) changes in atmospheric pressure; (21) consumption of excessive amounts of caffeine; (22) excessive exposure to nicotine; (23) aspirin; (24) circadian rhythms; (25) acute trauma to the head; (26) chronic trauma to the head; (27) some prescription drugs, tranquilizers, pain medications, anti-convulsants; (28) barbiturates; (29) disorders of the vestibular apparatus and brain stem; (30) cerebellum dysfunction; (31) heredity; (32) diet; (33) toxins; (34) exposure to solvents, PCBs, dry cleaning fumes, carbon monoxide; (35) extreme chilling; (36) lesions; (37) continuous movement of the visual field, i.e., looking from a moving train; and (38) antihistamine use.

NOTES:

WALK AND TURN (WAT) TEST

There are two stages of the walk and turn test: Instructional stage and Walking Stage. During the "instructional stage," the tested individual is required to place the left foot on an imaginary line with the right foot in front of it touching heel-to-toe and to keep the arms down to the side. The tested individual is told not to begin the test until told to do so and asked if they understand. There are two (2) possible clues to observe during this stage: loss of balance and starting too soon. The NHTSA provides the following instructions for the Walk and Turn test:

- (1) "Place your left foot on the line" (real or imaginary). Demonstrate;
- (2) "Place your right foot on the line ahead of the left foot, with the heel of your right foot against the toe of your left foot." Demonstrate;
- (3) "Place your arms down at your sides." Demonstrate;
- (4) "Maintain this position until I have completed the instructions. Do not start to walk until told to do so."
- (5) "Do you understand the instructions so far?" (Make sure the suspect indicates understanding);
- (6) "When I tell you to start, take nine heel-to-toe steps, turn, and take nine heel-to-toe steps back." (Demonstrate 3 heel-to-toe steps);
- (7) When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this." (Demonstrate);
- (8) "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud.";
- (9) "Once you start walking, don't stop until you have completed the test.";
- (10) "Do you understand the instruction?" (Make sure the suspect understands);
- (11) "Begin and count your first step from the heel-to-toe position as 'One'"
- (12) The officer is required to tell the suspect to make a turn by "keeping the front foot on the line, and turn by taking a series of small steps with the other foot";

NHTSA Manual (R8/06, Page VIII-9, Instructions 1 and 2). Notably, the WAT test requires a designated straight line. NHTSA Manual (R8/06, Page VIII-11).

There is a eight (8) point scoring system for the WAT test, whether the suspect:

- (1) cannot keep balance while listening to the instructions;
- (2) starts 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;
- (7) improper turn; and
- (8) incorrect number of steps. NHTSA Manual (R8/06, Page VIII-10 and 11).

The officer is to note if the tested individual cannot perform the test.

NOTES:

ONE-LEG-STAND (OLS) TEST

There are two stages of the one OLS test.

The first stage is the "instructional stage," where the tested individual is to place both feet together and keep their arms down at their sides. The tested individual is told not to begin the test until told to do so and asked if they understand. There are no clues scored during this stage of the one leg stand test.

The second stage is the balance and counting stage, where the officer provides the following verbal instructions, accompanied by demonstrations:

- (1) "When I tell you to start, raise one leg, either leg, approximately six inches (6") off the ground, foot pointed out." (Demonstrate one leg stance.)
- (2) "You must keep both legs straight, arms at your side."
- (3) "While holding that position, count out loud in the following manner: one thousand and one, one thousand and two, one thousand and three, until told to stop." (Demonstrate a 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 SAFETY.)
- (4) "Keep your arms at your sides at all times and keep watching the raised foot"
- (5) "Do you understand?" (Make sure the suspect indicates understanding)
- (6) "Go ahead and perform the test." (Officer should always time the thirty seconds. Test should be discontinued after 30 seconds.)

NOTES:

Non-Standardized FSTs

(time mark on video)

Stand w/ Feet together and tip the head backwards

Count officer's fingers

ABCs

Rhomberg stationary balance test (feet together, head leans back to look up to the sky, holding arms out to the side)

Finger-to-Nose

Hand-Pat Test

Tests Mentioned on Incident Report:

Yes No

Does the incident report match the video-same tests?

NHTSA Standardized FSTs

- HGN (horizontal gaze nystagmus)
- Walk and Turn
- One-Leg Stand

Non-Standardized FSTs

- Stand w/ Feet together and tip the head backwards
- Count officer's fingers
- ABCs
- Rhomberg stationary balance test (feet together, head leans back to look up to the sky, holding arms out to the side)
- Finger-to-Nose
- Hand-Pat Test

YES NO

Shows Advisement of *all 4* Miranda Rights?

(time mark on video)

_____ YES NO (1) The right to remain silent

YES NO (2) Anything the client says can be used against the client in a court of law

YES NO (3) Client has the right to an attorney

YES NO (4) If client cannot afford an attorney, one will be appointed to him.

YES NO

Video shows the arrest itself on camera? Time of arrest: _____

List all Questions by the Officer on Incident Video

(time mark on video)

1. Question: _____

Client Answer: _____

YES NO Asked before Miranda advisement?

2. Question: _____

Client Answer: _____

YES NO Asked before Miranda advisement?

3. Question: _____

Client Answer: _____

YES NO Asked before Miranda advisement?

_____ 4. Question: _____

Client Answer: _____

YES NO Asked before Miranda advisement?

_____ 5. Question: _____

Client Answer: _____

YES NO Asked before Miranda advisement?

_____ 6. Question: _____

Client Answer: _____

YES NO Asked before Miranda advisement?

Additional Notes on Incident Site Video:

2. BREATH TEST SITE VIDEO RECORDING

SECTION 56-5-2953. Incident site and breath test site video recording.

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 **must have his conduct at the incident site and the breath test site video recorded.**

(2) **The video recording at the breath test site must:**

(a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;

(b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and

(c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.

(3) The video recordings of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action.

Time Video Begins: _____

YES NO Refusal?

YES NO N/A _____ Entire refusal(s) has client on-camera?
(time mark)

YES NO If breath test was taken, full 20 minutes of client constantly on video before the test?

Time Breath Test Begins: _____ How Much Time Since Arrest: _____

YES NO _____ Shows client being told (s)he is being video recorded?
(time mark)

YES NO _____ Shows client *on-camera* during entire breath test?
(time mark)

YES NO _____ Shows client being told (s)he has the right to refuse the test using **exactly** each of these words:
(time mark)

- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.

- The arresting officer has directed that samples be taken for alcohol and/or drug testing.

- The samples will be taken and tested according to Section 56-5-2950 and SLED policies.

3. **SLED Records of the particular DataMaster machine used**
www._____

YES NO Malfunctions? _____

YES NO Repairs? _____

YES NO Complaints? _____

YES NO Other Problems? _____

NOTES:

SECTION 56-5-2953. Incident site and breath test site video recording.

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.