



MEMORANDUM

TO: The Pennsylvania Senate Judiciary Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: February 1, 2021

RE: OPPOSITION TO SENATE BILL 137 P.N. 110 (HUTCHINSON)

Bill summary: [SB 137](#) (PN 110) would add a five dollar surcharge to DUI fines, collected in a restricted account, to fund the training of Pennsylvania State Police officers as Drug Recognition Experts (DREs).

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 137 for the following reasons:

Drug Recognition Expert HGN tests are inadmissible at DUI trials in Pennsylvania.

Drug Recognition Experts (DREs) are law enforcement officers trained to conduct field sobriety tests using a 12-step protocol developed by the [International Association of Chiefs of Police](#).¹ DREs are called to a scene where a person is suspected of driving under the influence of drugs to determine whether or not the suspect is impaired; and if so, whether the impairment relates to drugs or a medical condition; and if drugs, what category or combination of categories of drugs are the likely cause of the impairment. A critical component of this protocol is a horizontal gaze nystagmus (HGN) test to detect any involuntary jerking of the suspect's eye when moving from side to side. It is this part of the field sobriety test in particular that has been repeatedly challenged in Pennsylvania's (and other states') appellate courts.

In order for expert testimony to be considered in a Pennsylvania court, it must meet the Frye standard. Named after the decision in [Frye v. United States](#),² this standard requires that the techniques used by an expert are generally accepted as reliable within the scientific community in order to be admissible in court. The National Highway Traffic Safety Administration (NHTSA), under strictly controlled conditions, determined that the HGN only yields the correct result approximately 77% of the time,³ with the remainder yielding false results. It has also been proven that certain medications can mimic the signs of intoxication that show during a HGN test.

Due to its unreliability, no Pennsylvania appellate case has upheld the admissibility of HGN testing at trial. In the most recent challenge to HGN's admissibility, the Pennsylvania Supreme Court affirmed the Superior Court's ruling in [Commonwealth v. Weaver](#),⁴ only permitting HGN to be admissible at probable cause hearings, but still not admissible at an actual DUI trial. This decision follows several other Pennsylvania Superior Court decisions declaring HGN to be inadmissible due to the absence of an appropriate scientific foundation:

- In [Commonwealth v. Miller](#),⁵ the Pennsylvania Superior Court held that no expert testimony or evidence was presented showing that HGN was generally accepted in the scientific community and that the arresting officer's training on the administration of the HGN test was insufficient to qualify him to testify about the scientific principles underlying the test.

¹ IACP, International Drug Evaluation & Classification Program, 12 Step DRE Protocol, at <https://web.archive.org/web/20180826162926/http://www.decp.org/drug-recognition-experts-dre/12-step-process/>

² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), at <https://casetext.com/case/frye-v-united-states-7>

³ U.S. Department of Transportation, National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing, Participant Manual* (Session 8, Page 8 of 950), updated February 2018, at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_refresher_full_participant_manual_2018.pdf

⁴ *Commonwealth v. Weaver*, 76 A.3d 562 (Pa. Super. Ct. 2013), at <https://casetext.com/case/commonwealth-v-weaver-27>

⁵ *Commonwealth v. Miller*, 532 A.2d 1186 (Pa. Super. 1987), *Id.* at 1189-90, at <https://www.courtlistener.com/opinion/2377625/com-v-miller/>

- In [Commonwealth v. Apollo](#),⁶ the Pennsylvania Superior Court stated that the Commonwealth's "expert" testimony on HGN was "largely based on [the witness'] own personal views and observations."
- In [Commonwealth v. Moore](#),⁷ the Pennsylvania Superior court reversed a trial court's admission of a detective's testimony stating that, under the present state of the law, the detective "did not provide an adequate basis for finding that HGN testing had gained general acceptance in the scientific community, particularly in the field of medical science represented by ophthalmology."
- In [Commonwealth v. Stringer](#),⁸ the Pennsylvania Superior Court stated: "[U]ntil our Supreme Court addresses this issue, Pennsylvania law requires that an adequate foundation be set forth establishing that HGN testing is generally accepted in the scientific community, including the medical science field of ophthalmology."

And just last June, Judge Geishauser in Berks County refused to admit HGN as evidence, stating, "Specifically, with regard to the HGN test, this court is concerned that the officers, who are not medically trained, may not even be observing nystagmus. Accordingly, we hold that the HGN test is inadmissible. The HGN test is an important component of the DRE protocol ... As the defense noted in its Memorandum, there have been limited attempts to validate the DRE program, and many of those studies were conducted by people who worked in law enforcement or who were integral to the development and expansion of the DRE program. This court is concerned about the lack of doubleblind, peer reviewed studies on the reliability of the DRE protocol and its acceptance in the medical and scientific communities. **The DRE may testify as to his observations of Defendant, but he will not be classified as an expert witness**" (emphasis added).⁹

Without additional clarification, the fee provision in SB 137 is likely unconstitutional.

Under [Nelson v. Colorado](#),¹⁰ it is unconstitutional to impose costs on someone who has not been convicted. SB 137 does not specify that the \$5 DUI fee can only be imposed post-conviction. While the bill may *imply* that the fee only attaches following conviction, most cost statutes make it explicit — and SB 137 should as well.

SB 137 will impose yet another unaffordable financial burden and siphon even more money away from restitution payments to victims.

In our December 2020 report, [Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts](#),¹¹ we found that approximately 2 **billion** dollars of court debt remains unpaid because the legislature continues to impose unaffordable fines and costs on people without considering their ability to pay. SB 137 should be amended to clarify that this cost should only be assessed if the court makes a finding on the record that the defendant has the present ability to pay it.

The AOPC reports that 86% of fines, 45% of costs, and 70% of restitution remain unpaid, that public defender clients walk out of sentencing owing, on average, over \$1,300, and most still owe money even 10 years later.¹² The upshot is that continuing to fund programs on the backs of defendants, especially programs that train officers to develop an "expertise" that isn't even admissible at trial, all but guarantees that little to none of these anticipated revenues will materialize. And because the law is structured to prioritize payment of court costs before restitution, the longer it will take victims to receive any restitution owed to them.¹³

For these reasons, we urge you to oppose Senate Bill 137.

⁶ *Commonwealth v. Apollo*, 603 A.2d 1023 (Pa. Super. 1992), at <https://www.courtlistener.com/opinion/2310251/com-v-apollo/>

⁷ *Commonwealth v. Moore*, 534 Pa. 527 (Pa. Super. 1993) *Id.*, 635 A.2d at 629, at <https://law.justia.com/cases/pennsylvania/supreme-court/1993/534-pa-527-0.html>

⁸ *Commonwealth v. Stringer*, 678 A.2d 1200 (Pa. Super. 1996), *Id.* at 1203, at <https://www.courtlistener.com/opinion/1928015/com-v-stringer/>

⁹ OPINION IN DISPOSITION OF DEFENDANT'S MOTION TO EXCLUDE COMMONWEALTH WITNESS, Eleni Dimitriou Geishauser, J. June 3, 2020. Berks County Law Journal, vol. 112, p. 256.

¹⁰ *Nelson v Colorado*, 137 S. Ct. 1249 (2017) at <https://supreme.justia.com/cases/federal/us/581/15-1256/>

¹¹ <https://www.aclupa.org/en/publications/imposition-and-collection-fines-costs-and-restitution-pennsylvania-criminal-courts>

¹² *Ibid.*, p. 2.

¹³ 204 Pa. Code § 29.35 specifies that 50% of any payment goes to fines and costs; the other half goes to restitution per 42 PaCS 9728(g.1).