

SUPREME COURT, STATE OF COLORADO

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Certiorari to the Arapahoe County District Court
Case No. 14CV31572

Respondent
THE PEOPLE OF THE
STATE OF COLORADO

v.

Petitioner
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Case Number: 16SC267

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 5,215 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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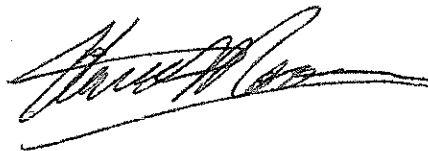
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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| STATEMENT OF THE ISSUES PRESENTED | 1 |
| STATEMENT OF THE CASE | 1 |
| STATEMENT OF THE FACTS | 1 |
| SUMMARY OF THE ARGUMENT | 5 |
| ARGUMENT | 6 |
| The Trial Court Abused Its Discretion When It Allowed the Officer to Provide Testimony Regarding the Administration, Result, and Interpretation of the HGN Without First Qualifying Him as an Expert | 6 |
| A. The District Court’s Opinion | 6 |
| B. Standard of Review | 6 |
| C. Legal Argument | 7 |
| D. Mr. Campbell’s Case Should Be Reversed for a New Trial Because the Officer’s Testimony Regarding the HGN was not Harmless Error.... | 19 |
| CONCLUSION | 22 |
| CERTIFICATE OF SERVICE..... | 24 |

TABLE OF CASES

| | |
|---|----|
| <i>Ballard v. State</i> , 955 P.2d 931 (Alaska 1998)..... | 18 |
| <i>City of Wichita v. Molitor</i> , 341 P.3d 1275 (Kan. 2015)..... | 17 |
| <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993)..... | 18 |
| <i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923) | 18 |
| <i>Hulse v. State Dep’t. of Justice, Motor Vehicle Div.</i> , 961 P.2d 75 (Mont. 1998) | 18 |
| <i>James River Ins. Co. v. Rapid Funding, LCC</i> , 658 F.3d 1027 (10 th Cir. 2011) | 8 |
| <i>Marsh v. People</i> , 389 P.3d 100 (Colo. 2017)..... | 9 |
| <i>People v. Campbell</i> , 14CV31572 (Dis. Ct. Arapahoe County) | 6 |

| | |
|---|---|
| <i>People v. Froehler</i> , 373 P.3d 672 (Colo. 2015) | 7 |
| <i>People v. Ramos</i> , 388 P.3d 888 (Colo. 2017) | 9, 10, 11, 12, 15, 16, 21 |
| <i>People v. Rincon</i> , 140 P.3d 976 (Colo. App. 2005) | 8 |
| <i>People v. Romero</i> , 393 P.3d 973 (Colo. 2017) | 7, 9, 10, 12, 15, 19, 21 |
| <i>People v. Roybal</i> , 655 P.2d 410 (Colo. 1982) | 22 |
| <i>People v. Shreck</i> , 22 P.3d 68 (Colo. 2001) | 22 |
| <i>People v. Stewart</i> , 55 P.3d 107 (Colo. 2002) | 6, 7, 13, 20 |
| <i>People v. Veren</i> , 140 P.3d 131 (Colo. App. 2005) | 13, 20, 21 |
| <i>Robinson v. State</i> , 982 So.2d 1260 (Fla. Dist. Ct. App. 2008) | 18 |
| <i>State v. Blackwell</i> , 971 A.2d 296 (Md. 2009) | 19 |
| <i>State v. Helms</i> , 504 S.E.2d 293 (N.C. 1998) | 17 |
| <i>State v. Ito</i> , 978 P.2d 191 (Haw. Ct. App. 1999) | 18 |
| <i>State v. Merritt</i> , 647 A.2d 1021 (Conn. 1994) | 18 |
| <i>State v. Murphy</i> , 953 S.W.2d 200 (Tenn. 1997) | 19 |
| <i>State v. Russo</i> , 733 A.2d 965 (Conn. App. Ct. 2001) | 18 |
| <i>State v. Ruthardt</i> , 680 A.2d 349 (Del. 1996) | 17 |
| <i>State v. Torrence</i> , 786 S.E.2d 40 (N.C. 2016) | 19 |
| <i>State v. Torres</i> , 976 P.2d 20 (N.M. 1999) | 17 |
| <i>State v. Witte</i> , 836 P.2d 1110 (Kan. 1992) | 17 |
| <i>United States v. McDonald</i> , 933 F.2d 1519 (10 th Cir. 1991) | 8 |
| <i>Venalonzo v. People</i> , 388 P.3d 868 (Colo. 2017) | 1, 6, 8, 9, 10, 11, 12, 15, 16, 19, 20 |
| <i>Zimmerman v. State</i> , 693 A.2d 311 (Del. 1997) | 17 |

TABLE OF STATUTES AND RULES

| | |
|----------------------------|------------------------|
| Colorado Revised Statutes | |
| Section 42-4-1301 | 1 |
| Colorado Appellate Rules | |
| Rule 28 | i |
| Rule 32 | i |
| Colorado Rules of Evidence | |
| Rule 701 | 7, 8 |
| Rule 702 | 1, 6, 7, 8, 12, 13, 16 |

CONSTITUTIONAL AUTHORITIES

United States Constitution

| | |
|------------------------------|---|
| Amendment V | 6 |
| Amendment VI..... | 6 |
| Amendment XIV..... | 6 |
| Colorado Constitution | |
| Article II, Section 16..... | 6 |
| Article II, Section 25 | 6 |

ISSUE ANNOUNCED BY THE COURT

Whether the trial court abused its discretion in permitting a police officer to testify regarding the results of a Horizontal Gaze Nystagmus test, without first qualifying that officer as an expert under CRE 702 and this Court's decision in *Venalonzo v. People*, 2017 CO 9, 388 P.3d 868.

STATEMENT OF THE CASE

This is an appeal of Mr. Campbell's conviction, following a jury trial, of Driving While Ability Impaired (DWAI), a misdemeanor in violation of § 42-4-1301, as well as two traffic offenses. The Court imposed a sentence of one year in the county jail followed by two years of supervised probation.

STATEMENT OF THE FACTS

On May 1, 2013, an Officer with the Englewood Police Department (EPD) stopped Mr. Campbell on the 1600 block of W. Dartmouth Ave. because the driver's side headlight of his truck was not working. TR 4/30/14, p. 125:4-16. The Officer testified that this was the only traffic infraction that he noticed. TR 4/30/14, p. 148:16-18. The Officer testified that during his initial encounter with Mr. Campbell he detected a moderate odor of an alcoholic beverage on his breath, that his eyes were bloodshot, that his speech was slightly slurred, and that he dropped his wallet while attempting to remove his identification. TR 4/30/14, p.

126:8-16. The Officer suspected Mr. Campbell of driving under the influence of alcohol, and conducted a DUI investigation. TR 4/30/14, p. 126-136. The Officer subsequently arrested Mr. Campbell. TR 4/30/14, p. 136:17-20.

The Officer was disclosed to defense counsel as a lay witness. At a motions hearing conducted on November 4, 2013, the Court addressed Mr. Campbell's Motion for Expert Endorsements and Disclosures. CF, p. 71; TR 11/4/13, p. 4:2-4. The Prosecution indicated that they did not intend to call any experts at trial. TR 11/4/13, p. 4:5.

The Trial Court conducted the jury trial on April 30, 2014. During motions in limine, defense counsel objected to the Prosecution's eliciting expert testimony from the Officer with regard to the standardized field sobriety tests (SFSTs), particularly the horizontal gaze nystagmus (HGN) test. TR 4/30/14, pp. 10:1-12:16. The court denied defense counsel's motion. TR 4/30/14, pp. 12:17-13:4.

During direct examination, the Officer testified that he had been a police officer with the EPD since 1998. TR 4/30/14, p. 123:10-12. At the time of this testimony, that would have been approximately fifteen years.

As anticipated by defense counsel, the Prosecution also elicited testimony from the Officer regarding his training and experience in conducting the SFSTs. TR 4/30/14, pp. 129:22-131:6. Starting with whether he had training in the

investigation of driving under the influence. TR 4/30/14, p. 123:19-20. The Officer testified that he was certified in the administration of the standard field sobriety roadside maneuvers and DUI detection. TR 4/30/14, p. 123:24-25. The Prosecution then asked the Officer how he became certified in the roadside maneuvers. TR 4/30/14, p. 124:1. The Officer answered that he initially attended a forty hour class at the academy, followed by a recertification at the EPD, and, finally, that he was recertified every other year through a sixteen hour course. TR 4/30/14, p. 124:2-6. Finally, the Prosecution asked the Officer to testify as to the number of DUI investigations he had conducted and whether or not every DUI investigation lead to an arrest. TR 4/30/14, p. 124:19-22. The Officer estimated that he had conducted around seven hundred DUI investigations. TR 4/30/14, p. 124:21. He testified that not all of those resulted in an arrest when “based on the totality of the circumstances the performance of the roadsides” he did not believe that they were under the influence of alcohol. TR 4/30/14, p. 125:1-3.

After the Officer testified about his training and experience, the Prosecution asked the Officer to explain the roadside maneuvers to the jury. TR 4/30/14, p. 128:16-17. The Officer described each of the maneuvers and why he conducts them. TR 4/30/14, p. 128:21-25. He referred to a training that he attended, called a wet lab, where he administered the standardized maneuvers to see if people could

perform them as a sober person. TR 4/30/14, p. 128:22-25. He testified that on May 1, 2013, he was certified to administer the maneuvers and had conducted them on both sober and drunk people prior to that day to determine whether they were safe to drive. TR 4/30/14, p. 129:1-9. He also testified that he was able to differentiate between the results of the roadside maneuvers of a sober person and a drunk person. TR 4/30/14, p. 129:10-11.

The Officer next testified about his administration of the HGN on Mr. Campbell. TR 4/30/14, p. 129:19-21. First, the Officer explained to the jury what he was looking for in the administration of the HGN and how he conducted each part the maneuver. TR 4/30/14, p. 129:24-131:6. The Officer defined terms, or clues, for the jury, including “equal tracking,” “lack of smooth pursuit,” “distinct and sustained nystagmus at maximum deviation,” and “onset of nystagmus prior to forty five degrees”. *Id.* The Officer testified that there were six possible clues on the HGN, provided the name of each clue, described for the jury how each clue is administered, and what he was looking for on each clue. *Id.* The Officer testified that he administered the HGN on Mr. Campbell, and that he observed all six clues. TR 4/30/14, p. 131:5-14.

Finally, the Officer rendered an opinion that Mr. Campbell's performance on the HGN was not consistent with that of a sober person. TR 4/30/14, p. 131:15-18. Defense counsel's objection was overruled. TR 4/30/14, p. 131:19-21.

The Officer testified that he also administered the walk and turn and the one leg stand on Mr. Campbell. TR 4/30/14, pp. 131:22-135:7. He told the jury that he observed six out of eight possible clues on the walk and turn and two out of a possible four clues on the one leg stand. TR 4/30/14, p. 132:21-23; TR 4/30/14, p. 135:5-7.

The Prosecution also elicited testimony from the Officer as to the administration and results of the breath test. TR 4/30/14, p. 144:5-22. The Officer testified that he performed a breath test on Mr. Campbell, the result of which indicated a breath alcohol content (BAC) of 0.07. TR 4/30/14, p. 144:9-10.

During closing arguments, the Prosecution argued that the roadside maneuvers were evidence that Mr. Campbell was driving under the influence. TR 4/30/14, p. 253:15-254:1. She maintained that Mr. Campbell's performance, specifically, that the Officer observed six out of six clues on the HGN, was evidence that he was driving under the influence. TR 4/30/14, p. 253:16-20.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion requiring reversal when it allowed the Officer to provide testimony regarding the administration, result, and interpretation of the HGN on Mr. Campbell without first qualifying him as an expert under CRE 702 and this Court's decision in *Venalonzo v. People*, 2017 CO 9, 388 P.3d 868.

ARGUMENT

I. **The Trial Court Abused its Discretion When it Allowed the Officer to Provide Testimony Regarding the Administration, Result and Interpretation of the HGN Without First Qualifying him as an Expert.**

Mr. Campbell brings these challenges pursuant to U.S. Const. Amend. V, VI, XIV; Colo. Const. Art. II §§ 16, 25.

A. **The District Court's Opinion**

The District Court held that the Officer's testimony regarding the administration, result, and interpretation of the HGN on Mr. Campbell was proper lay opinion testimony as to a permissible topic. *People v. Campbell*, (Dis. Ct. Arapahoe County 14CV31572).

B. **Standard of Review**

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002); *Venalonzo v. People*, 388 P.3d 868, 873 (Colo. 2017). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *Id.* This Court reviews a trial

court's abuse of discretion on a preserved, nonconstitutional issue for harmless error. *People v. Froehler*, 373 P.3d 672, 674 (Colo. 2015); *People v. Romero*, 393 P.3d 973, 978 (Colo. 2017). A ruling admitting or excluding evidence is reversible if the ruling affects a substantial right of the party against whom the ruling is made. *People v. Stewart*, 55 P.3d at 124; *People v. Romero*, 393 P.3d at 978.

Mr. Campbell preserved this issue for review. Mr. Campbell argued that the substance of the Officer's testimony regarding the HGN was improperly admitted as lay opinion. Further, Mr. Campbell asked that the Court limit the Officer's testimony to his observations of the SFSTs, particularly as to the HGN, and to preclude him from testifying about an opinion based therefrom. TR 4/30/17, p. 12:10-16.

C. Legal Argument

Pursuant to Colorado Rules of Evidence 701, if the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and, (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Pursuant to Colorado Rules of Evidence 702, if scientific, technical, or other specialized

knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Venalonzo*, this Court reasoned that the proper inquiry in distinguishing between lay and expert testimony is not whether a witness draws on his personal experiences to inform his testimony since all witnesses rely on their personal experiences when testifying. *Id.*, at 875. Rather, this Court reasoned, it is the nature of the experiences that could form the opinion's basis that determines whether the testimony is lay or expert opinion. *Id.*

To determine whether the testimony in question is testimony that an ordinary person could give courts should consider whether ordinary citizens can be expected to know certain information or to have had certain experiences. *Id.* (citing, *People v. Rincon*, 140 P. 3d 976, 982 (Colo. App. 2005); *United States v. McDonald*, 933 F. 2d 1519, 1522 (10th Cir. 1991)). By contrast, expert testimony is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that an ordinary person would not have. *Id.* (See, *James River Ins. Co. v. Rapid Funding, LCC*, 658 F. 3d 1207, 1214 (10th Cir. 2011)).

Ultimately, to determine whether a witness's testimony is lay or expert, this Court, in *Venalonzo*, established the following test:

[I]n determining whether testimony is lay testimony under CRE 701 or expert testimony under CRE 702, the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony.

Id., at 875; *People v. Ramos*, 388 P.3d 888,890-891 (Colo. 2017); *People v. Romero*, 393 P.3d at 977 (Colo. 2017).

The testimony at issue in *Venalonzo* was that of a forensic interviewer who conducted such an interview of a child victim in a sex assault case. *Id.* This Court held that the forensic interviewer's testimony describing her training and interviewing techniques did not constitute expert testimony because in that portion of her testimony she offered only a general overview of interview protocol that relied on ordinary, not specialized, knowledge and did not make any inferences about the case at hand. *Id.*; *Marsh v. People*, 389 P.3d 100, 109 (Colo. 2017). However, this Court also held in *Venalonzo* that the same forensic interviewer's testimony about the significance of certain inconsistencies in the child victim's interviews was impermissible expert testimony because the interviewer drew inferences that the ordinary person would not have drawn without the benefit of her testimony. *Marsh v. People*, 389 P.3d at 109. In so deciding, the *Venalonzo* Court considered that the interviewer relied upon her specialized knowledge to

come to draw these inferences and to answer questions posed by the prosecutor's questions about the meaning of certain terms of art, such as "reproduction". *Id.*, at 876.

This Court applied the *Venalonzo* test in *People v. Ramos*, 388 P.3d 888 (Colo. 2017) and *People v. Romero*, 393 P.3d 973 (Colo. 2017).

In *Ramos*, this Court applied the *Venalonzo* test to the testimony of a detective who offered lay opinion testimony at trial as to the difference between blood cast-off and blood transfer. *People v. Ramos*, 388 P.3d at 889. There, Mr. Ramos was charged with third degree assault as a bias motivated crime. *Id.*, at 890. Prior to the alleged incident, Mr. Ramos's hand was bandaged and bleeding from an unrelated incident. *Id.* Blood from his bandaged hand ended up on the alleged victim's jacket and hat. *Id.* The defense's theory at trial was that Mr. Ramos did not strike the alleged victim, but rather that the blood on the alleged victim's clothing was from Mr. Ramos waving his hands around. *Id.* At trial, the detective testified that he viewed photographic evidence of the blood on the alleged victim and opined that it was from blood transfer, i.e., physical contact with the alleged victim, and not the product of cast-off, i.e. the defendant waving his hand around. *Id.* The issue before this Court was whether an ordinary person

would be able to differentiate reliably between blood cast-off and blood transfer. *Id.*, at 889.

Applying the *Venalonzo* test, this Court held that an ordinary person would not be expected to have the experience, skills, and knowledge to differentiate reliably between blood cast-off and blood transfer, and, therefore, the trial court abused its discretion by not qualifying the detective as an expert when he testified on the subject of blood transfer. *Id.*, at 891. In reaching that determination, this Court considered: 1. the detective's testimony that in making his determination that the blood on the alleged victim's clothing was the result of blood transfer, he relied on his nineteen years of experience as a police officer, nine years of experience as a detective, and his work on thousands of cases involving blood; 2. that the prosecution capitalized on the detective's specialized experience and knowledge by asking at least six questions invoking his training and experience; and, 3. that the detective's testimony used technical terms, such as "spatter" versus "cast-off" and the use of "buccal swabs" for DNA testing. *Id.* The Court reasoned that the prosecution used this testimony and specialized knowledge to assist the trier of fact to understand the evidence or determine a fact in issue because if ordinary people had a well-developed understanding of blood transfer, then his testimony would

have been unnecessary as the jury could have correctly interpreted the photographic evidence of blood on the alleged victim by itself. *Id*; *See*, CRE 702.

In *Romero*, this Court applied the *Venalonzo* test in holding that the trial court abused its discretion by allowing lay testimony on “grooming”. *People v. Romero*, 393 P.3d at 977. There, the trial court permitted a police officer to testify as a lay witness about the concept of “grooming” in a sex assault on a child trial. *Id*. Applying the *Venalonzo* test, this Court reasoned that an ordinary citizen could not be expected to possess the experience, skills, or knowledge required to understand the concept of “grooming” as it relates to sexual predation. *Id*.

Here, applying the *Venalonzo* test, it is clear that the Officer’s testimony regarding his administration, observations, and interpretation of the HGN was well beyond the ken of an ordinary citizen. Similar to the testimony at issue in *Venalonzo*, *Ramos*, and *Romero*, the Officer in this case began by testifying that he had sixteen years of experience as a police officer, including forty hours of initial training as to the administration of the SFSTs as well as sixteen hours of recertification every other year. He testified that he had conducted approximately seven hundred DUI investigations wherein he felt confident in his ability to discern the results of the SFSTs of a sober person from those of a drunk person. Furthermore, he was asked by the Prosecution to and did explain the administration

of the HGN, the clues that he was watching for, the definitions of those clues, and his ability to interpret them. Because the Officer had training and knowledge that the jury did not have regarding the HGN, his testimony about the administration and results of the test as well as his opinion as to Mr. Campbell's ability to perform the HGN as would a sober person was based on specialized knowledge, requiring the Prosecution to qualify him as an expert pursuant to CRE 702 and to comply with pretrial discovery requirements applicable to experts.

It is long standing in Colorado that when an officer's opinions require the application, or reliance on, specialized training or education, the officer must be properly qualified as an expert before offering such testimony. *People v. Stewart*, 55 P.3d 107, 124 (Colo. 2002); *People v. Veren*, 140 P.3d 131, 136 (Colo. App. 2005). Here, as in *Stewart* and *Veren*, the Officer's opinion as to Mr. Campbell's performance on the HGN required the application and reliance on his specialized training in the administration and interpretation of the HGN. During direct examination, the Prosecution asked the Officer how long he had been a police officer, how many DUI investigations he had conducted, and to describe his training and experience in administering the roadside maneuvers. The Officer testified that he had been a police officer for fifteen years, and, during that time, had conducted approximately seven hundred DUI investigations. He further

testified that he initially received forty hours of training in DUI investigations, including the administration of the HGN, and underwent sixteen hours of recertification training in the administration of the roadside maneuvers every other year. Whereas most people are aware that in investigating a DUI police officers use roadside maneuvers to look for evidence of impairment, it is unreasonable to assume that an ordinary person would know how to administer the HGN and interpret the results in order to opine as to whether a subject performed the HGN like a sober person. Without the specialized training and knowledge that the officer possesses, an ordinary person would not know what “nystagmus” is, let alone recognizing horizontal gaze nystagmus, and know that there is a correlation between HGN and being under the influence of alcohol (emphasis added). Police officers must undergo training in the administration and interpretation of the HGN because it requires specialized knowledge and training.

That the Officer’s testimony surpassed the realm of common experience and required experience, skills, and knowledge that the ordinary person would not have is further evidenced by his testimony defining the clues that he was looking for on the HGN and the administration of the maneuver itself. The Prosecution asked the Officer to explain to the jury how he administers the HGN. The Officer provided the following:

Yeah, the horizontal gaze nystagmus, you're looking for a total of six clues, three separate clues in each eye...what you start into the clues is lack of smooth pursuit. And what you're looking for is as the eyes are following the stimulus whether or not the eye is stopping or if it's following the stimulus smoothly as it passes in front of their face. The second clue that you're looking for is distinct and sustained nystagmus at maximum deviation and what you do there is you hold the stimulus out at maximum deviation which is basically there's no white left in the corner of the eye and what you're looking for is an involuntary jerkiness of the eye, the best to describe it is if you were [to] take a basketball and bounce it against the side of the wall that's the kind of the movement that the eye would make. And the third clue that you're looking for is an onset of nystagmus prior to 45 degrees. To get the prior 45 degrees it's approximately the individual's shoulder and that what you're looking for is just a little bit of white left in the corner of the eye. (TR 4/30/14, p. 129:24-131:5).

Without this detailed explanation of the HGN, how to administer it, and the definitions of what the clues are, an ordinary person could not be expected to understand the significance of the Officer's observations of the HGN.

Furthermore, the Prosecution asked the Officer specific questions as to what he observed while he was administering the HGN on Mr. Campbell. (TR 4/30/14, p. 131:9-10). The Officer testified that he observed the lack of smooth pursuit, a distinct and sustained nystagmus, and the onset of nystagmus prior to 45 degrees in both eyes. (TR 4/30/14, p. 131:11-14). Similar to the challenged testimony in *Venalonzo*, *Ramos*, and *Romero* regarding terminology like "reproduction" in the context of a forensic interview, terms of art associated with blood evidence like

“spatter” and “cast-off,” and “grooming” as it pertains to sexual predation, the Officer in this case provided definitions of scientific terms that are not part of the common lexicon and are unfamiliar to ordinary people. He described what those terms mean and how he interprets those terms, thereby using his specialized knowledge to assist the trier of fact, the jury, to understand the HGN evidence or to determine a fact in issue. CRE 702.

Finally, the Prosecution asked the Officer whether in his opinion based on his training and experience Mr. Campbell’s performance on the HGN was consistent with a sober person. (TR 4/30/14, p. 131:15-17). The Officer opined that it was not. (TR 4/30/14, p. 131:18). Again, this is similar to the testimony in *Ramos*, wherein the detective opined as to how the blood got onto the alleged victim’s hat by blood transfer rather than by the defendant waving his hand around. Employing the same reasoning here that this Court used in *Ramos* in applying the *Venalonzo* standard, it is clear that the trial court abused its discretion by permitting the Officer to offer expert testimony about the HGN as a lay witness:

1. the Officer’s testimony that in deciding to arrest Mr. Campbell for DUI, he relied on his fifteen years of experience as a police officer, seven hundred DUI investigations, and extensive training in administering and interpreting the roadside maneuvers;
2. the prosecution capitalized on the Officer’s specialized experience

and knowledge by asking him to describe the HGN, its administration, what the clues mean, what he observed when he administered the HGN on Mr. Campbell, and how he interpreted those observations; and, 3. the Officer's testimony used technical, scientific terms, such as "lack of smooth pursuit", "distinct and sustained nystagmus", and "onset of nystagmus prior to forty-five degrees".

That the Officer's testimony regarding HGN was expert and not lay testimony is supported by decisions in other jurisdictions. *State v. Witte*, 836 P.2d 1110, 1116 (Kan. 1992) (The HGN test is based upon scientific principles and exceeds common knowledge); *City of Wichita v. Molitor*, 341 P.3d 1275, 1283 (Kan. 2015) (The district court and the Court of Appeals erred in allowing the State to rely on the scientifically unproved HGN test results to establish the requisite reasonable suspicion that permitted the officer to request that the defendant submit to a preliminary breath test); *State v. Helms*, 504 S.E.2d 293, 295 (N.C. 1998) (the HGN does not measure behavior a lay person would commonly associate with intoxication, but rather represents specialized knowledge that must be presented to the jury by a qualified expert); *State v. Ruthardt*, 680 A.2d 349, 362 (Del. 1996); *Zimmerman v. State*, 693 A.2d 311, 312 (Del. 1997) (prior to the admission of HGN evidence the State must provide a proper foundation for the evidence by presenting testimony from an expert with specialized knowledge and training in

HGN testing and its underlying principles); *State v. Torres*, 976 P.2d 20, 32, 34 (N.M. 1999) (the HGN involves scientific knowledge, requiring the State to qualify police officers as experts before they can testify regarding the administration and specific results of a test); *Hulse v. State Dep't. of Justice, Motor Vehicle Div.*, 961 P.2d 75, 94 (Mont. 1998) (the relationship between alcohol consumption and nystagmus is beyond the range of ordinary training and intelligence; therefore, a conventional Rule 702, M.R. Evid. analysis is required to determine the admissibility of HGN test results); *Ballard v. State*, 955 P.2d 931, 941 (Alaska 1998) (overruled on other grounds) (a police officer may testify to the results of HGN, but the government must establish as a foundational matter that the officer has been adequately training in the administration and assessment of the test); *State v. Merritt*, 647 A.2d 1021, 1028 (Conn. 1994) (as a precondition to the admission of testimony concerning HGN testing and results, the party introducing the testimony must establish, pursuant to *Frye*, the general acceptance of the HGN test); *State v. Russo*, 733 A.2d 965, 968 (Conn. App. Ct. 2001) (the court abused its discretion in admitting testimony regarding the defendant's HGN test without requiring that the state satisfy the criteria for the admission of scientific evidence as set forth in *Daubert*); *Robinson v. State*, 982 So.2d 1260, 1261 (Fla. Dist. Ct. App. 2008) (opinion testimony relating to HGN test results requires a qualified

expert witness); *State v. Ito*, 978 P.2d 191, 210 (Haw. Ct. App. 1999) (before HGN test results can be admitted into evidence it must be shown that (1) the officer administering the test was duly qualified to conduct the test and grade the results, and (2) the test was performed properly in the instant case); *State v. Blackwell*, 971 A.2d 296, 307 (Md. 2009) (before HGN testimony can be admitted into evidence the witness must be offered to the court, and accepted by it, as an expert in the field of administering the HGN test); *State v. Torrence*, 786 S.E.2d 40, 42 (N.C. 2016) (if an officer is going to testify on the issue of impairment relating to the results of an HGN test, the officer must be qualified as an expert witness under Rule 702(a) and establish a proper foundation); *State v. Murphy*, 953 S.W.2d 200, 203 (Tenn. 1997) (testimony concerning the HGN constitutes “scientific, technical, or other specialized knowledge.” As such, it must be offered through an expert witness and must meet the requirements).

D. Mr. Campbell’s Case Should be Reversed for a New Trial Because the Officer’s Testimony Regarding the HGN was not Harmless Error.

Reversal is required only if the error affects the substantial rights of the parties. *Venalonzo v. People*, 388 P.3d at 880; *Romero v. People*, 393 P.3d at 978. An error affects a party’s substantial rights if it substantially influenced the verdict

or affected the fairness of the trial proceedings. *Venalonzo v. People*, 388 P.3d at 880.

In *People v. Stewart*, 55 P.3d 107 (Colo.2002), this Court held a police officer's testimony about accident reconstruction had been erroneously admitted under the guise of lay opinion, but concluded the error was harmless because it was corroborated by the testimony of the defendant and other eyewitnesses and related matters that were not in dispute. *Stewart*, 55 P.3d at 124-25.

In *People v. Veren*, 140 P.3d 131, 140 (Colo.App.2005), a division of the Court of Appeals acknowledged that admitting expert testimony under the guise of lay opinion creates a pretrial notice problem that is unfair. The court reversed, finding the error in admitting expert testimony under the guise of lay opinion was not harmless because the expert testimony was important to the prosecution's case and the lack of pretrial disclosures deprived the defendant of the opportunity to evaluate the testimony in advance of trial and hire his own expert. *Id.*

In *Venalonzo*, the Court reversed the defendant's conviction, finding that both improper testimony from the interviewer and the alleged victim's mother was improper testimony that substantially impacted the defendant's right to a fair trial. *Id.*, at 880. As to the prosecution's failure to disclose the interviewer as an expert witness, the Court reasoned that if the defendant had had the benefit of pretrial

disclosure of the interviewer's expert testimony and bases for her opinions, then he would have had the opportunity to evaluate the testimony in advance of trial or to obtain his own expert witness. *Id.*, at 881 (*citing, Veren*, 140 P.3d at 140). The Court found that permitting the interviewer to offer her expert opinion caused the defendant to suffer prejudice that the rules governing expert witnesses seek to prevent. *Id.*

In *Ramos*, the Court reversed the defendant's conviction, finding that the trial court abused its discretion. The Court seems to concluded that because the detective's opinion regarding the blood evidence was one of two main pieces of evidence against the defendant in the trial, the other being the alleged victim's testimony. *Id.*, at 889.

In reaching its conclusion that the error against the defendant in *Romero* was not harmless, the Court reasoned that there was lack of overwhelming evidence against the defendant at trial thereby reversing his convictions. *Id.*, at 978.

Here, the Officer's testimony regarding the results of the HGN were the most difficult to challenge of the other evidence against Mr. Campbell. There was no evidence that Mr. Campbell was driving poorly, the sole reason that the Officer stopped him was because a headlight was out on his vehicle. His performance on the other roadside maneuvers could have easily been attributable to poor balance or

coordination. While the results of the breath test indicated the presence of some alcohol in Mr. Campbell's system, he was not driving in a manner that reflected that it was affecting him even in the slightest degree to operate a vehicle safely. The only other indicia of alcohol were bloodshot eyes, a moderate odor of alcohol, and slightly slurred speech. An odor of an alcoholic beverage is not inconsistent with ability to operate a motor vehicle in compliance with Colorado law. *People v. Roybal*, 655 P.2d 410, 413 (Colo. 1982). The Officer's testimony regarding the HGN and the prosecution's reliance thereon was aimed directly at overcoming the lack of other evidence against Mr. Campbell. Furthermore, because the prosecution failed to disclose the Officer as an expert, Mr. Campbell was denied the opportunity to challenge his qualifications render an expert opinion pursuant to *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001).

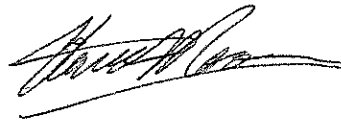
Because this testimony was key to the prosecution's case and influenced the jury's verdict, the error in admitting the Officer's expert testimony under the guise of lay opinion was not harmless and requires reversal for a new trial.

CONCLUSION

For the reasons and authorities presented, this Court should reverse the decision of the District Court and remand Mr. Campbell's case to the trial court for a new trial.

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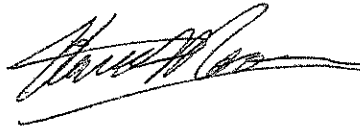
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CERTIFICATE OF SERVICE

I certify that, on December 18, 2017, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on Susan Joyce Trout of the 18th Judicial District Attorneys Office.

A handwritten signature in black ink, appearing to read "Susan Joyce Trout", is written above a horizontal line.