

<p><b>SUPREME COURT, STATE OF COLORADO</b></p> <p>Ralph L. Carr Judicial Center  2 East 14<sup>th</sup> Avenue  Denver, Colorado 80203</p> <p>Certiorari to the Arapahoe county District Court  Case No. 14CV31572</p>	<p>DATE FILED: August 21, 2018 12:06 PM  FILING ID: 9AFA31A47A419  CASE NUMBER: 2016SC267</p> <p><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Respondent</b>  <b>THE PEOPLE OF THE STATE OF COLORADO,</b></p> <p>v.</p> <p><b>Petitioner</b>  <b>RANDY CAMPBELL,</b></p>	<p>Case Number: 16SC267</p>
<p>Prosecuting Attorney(s), 18<sup>th</sup> Judicial District:  SUSAN J. TROUT, Senior Deputy, for  GEORGE H. BRAUCHLER, District Attorney  6450 S. Revere Parkway  Centennial, Colorado 80111</p> <p>Phone: (720) 874-8500  Fax: (720) 874-8501  Atty. Reg. #(s): Brauchler 25910, Trout 8504</p>	
<p style="text-align: center;"><b>ANSWER BRIEF</b></p>	

## 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:

**The brief complies with C.A.R. 28(g).**

It contains 8,067 words.

**The brief complies with C.A.R. 28(b).**

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

*s/ Susan J. Trout*  
\_\_\_\_\_  
SUSAN J. TROUT, #8504  
Senior Deputy District Attorney

## TABLE OF CONTENTS

Table of Authorities .....	iv
Issue Presented for Review .....	1
Statement of Case and Facts .....	1
Summary of Argument .....	2
Argument.....	2
I. Most of the Officer’s HGN testimony was not opinion testimony, either lay or expert.....	2
A. Standard of Review and Preservation of Issue.....	2
B. Additional Facts .....	3
C. A police officer may give lay testimony concerning his administration of the HGN maneuver, his observations of the defendant’s performance, and other facts of his investigation. ....	5
D. A police officer may give a lay opinion that a defendant is under the influence of alcohol and that he or she has not performed as a sober person would.....	9
II. The Officer’s HGN testimony was proper, but in the event this Court decides otherwise, any error was harmless. ....	15
A. Standard of Review .....	16
B. Additional Facts .....	17
C. Error, if any, is harmless. ....	23
III. Most states admit police officer HGN testimony based on officer experience and proper administration of the maneuver. ....	25
Conclusion .....	33

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. State</i> , 252 P.3d 211 (Okla. Crim. App. 2010) .....	28
<i>Ballard v. State</i> , 955 P.2d 931 (Alaska 1998) .....	25, 33
<i>Brown v. Hollywood Bar and Café</i> , 942 P.2d 1363 (Colo. 1997) .....	11
<i>Cain v. Back</i> , 889 N.E.2d 1253 (Ind. Ct. App. 2008) .....	32
<i>Carter v. State</i> , 235 P.3d 221 (Alaska Ct. App. 2010) .....	32
<i>Cooper v. State</i> , 761 N.E.2d 900 (Ind. Ct. App. 2002).....	29, 33
<i>Hagos v. People</i> , 288 P.3d 116 (Colo. 2012) .....	16
<i>Morris-Schindler, LLC v. City and County of Denver</i> , 251 P.3d 1076 (Colo. App. 2010).....	10
<i>People v. Berger</i> , 551 N.W.2d 421 (Mich. Ct. App. 1996).....	26
<i>People v. Gallegos</i> , 644 P.2d 920 (Colo. 1982) .....	6
<i>People v. Garrison</i> , 411 P.3d 270 (Colo. App. 2017) .....	7
<i>People v. Hammond</i> , 827 N.Y.S.2d 298 (N.Y. App. Div. 2006) .....	29
<i>People v. Leahy</i> , 882 P.2d 321 (Cal. 1994) .....	26
<i>People v. Norman</i> , 572 P.2d 819 (Colo. 1977).....	10, 12
<i>People v. Ramos</i> , 388 P.3d 888 (Colo. 2017) .....	9
<i>People v. Russell</i> , 396 P.3d 71 (Colo. App. 2014) .....	11
<i>People v. Souva</i> , 141 P.3d 845 (Colo. App. 2005) .....	10, 14
<i>People v. Stewart</i> , 55 P.3d 107 (Colo. 2002).....	passim
<i>People v. Veren</i> , 140 P.3d 131 (Colo. 2005) .....	14, 15
<i>Romero v. People</i> , 393 P.3d 973 (Colo. 2017) .....	7, 16
<i>Schultz v. State</i> , 664 A.2d 60, 74 (Md. App. 1995) .....	26
<i>State v. Armstrong</i> , 561 So.2d 883 (La. App. 1990) .....	27
<i>State v. Baue</i> , 607 N.W.2d 191 (Neb. 2000) .....	25, 27, 30
<i>State v. Boczar</i> , 863 N.E.2d 155 (Ohio 2007) .....	28, 33
<i>State v. Cochrane</i> , 897 A.2d 952 (N.H. 2006).....	28, 31
<i>State v. Engelhorn</i> , 883 N.W.2d 852 (N.D. 2016).....	27, 28, 33
<i>State v. Helms</i> , 348 N.C. 578, 504 S.E.2d 293 (1998) .....	30
<i>State v. Hill</i> , 865 S.W.2d 702 (Mo. Ct. App.1993) .....	27
<i>State v. Hullinger</i> , 649 N.W.2d 253 (S.D. 2002).....	25, 29
<i>State v. McKee</i> , 744 N.E.2d 737 (Ohio 2001) .....	32
<i>State v. Murphy</i> , 953 S.W.2d 200 (Tenn.1997) .....	30
<i>State v. Ruthardt</i> , 680 A.2d 349 (Del.Super.1996).....	30
<i>State v. Saulter</i> , 764 N.W.2d 430 (N.D. 2009) .....	32
<i>State v. Sullivan</i> , 426 S.E.2d 766 (S.C. 1993) .....	30
<i>State v. Superior Court</i> , 718 P.2d 171 (Ariz. 1986) .....	30
<i>State v. Taylor</i> , 694 A.2d 907 (Me. 1997) .....	26

<i>State v. Zivcic</i> , 598 N.W.2d 565 (Wis. 1999) .....	25
<i>Tevelin v. People</i> , 715 P.2d 338 (Colo. 1986) .....	17
<i>United States v. Myers</i> , 972 F.2d 1577 (11th Cir.1992) .....	5
<i>United States v. Novaton</i> , 271 F.3d 968 (11th Cir.2001) .....	5
<i>United States v. Smith</i> , 591 F.3d 974 (8th Cir. 2010) .....	7
<i>Venalonzo v. People</i> , 2017 CO 9, 388 P.3d 868 .....	passim
<i>Vigil v. People</i> , 416 P.2d 361 (Colo. 1966) .....	11
<i>Williams v. State</i> , 710 So.2d 24 (Fla. App. 1998) .....	25
<i>Wise v. Hillman</i> , 625 P.2d 364 (Colo. 1981) .....	6

**Rules**

C.A.R. 35(e) .....	16
C.R.E. 103(a) .....	16
C.R.E. 701 .....	5, 8, 9, 10
C.R.E. 702 .....	1, 5, 10, 12
Crim. P. 52 .....	16

## **ISSUE PRESENTED FOR REVIEW**

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

## **STATEMENT OF CASE AND FACTS**

Defendant Randy Campbell ("Campbell") was convicted of Driving While Ability Impaired ("DWAI"), Open Alcohol Container, and Defective Headlamp. CF pp. 121-23.

On May 1, 2013, Police Officer Akins stopped Campbell's vehicle for a defective headlamp. Tr. 4/30/14 p. 125:12-16. Officer Akins determined Campbell was exhibiting signs of intoxication (moderate odor of an unknown alcoholic beverage on his breath, bloodshot eyes, slightly slurred speech, dropping his wallet and fumbling to get out of his vehicle). Tr. 4/30/14 pp. 126:6-20; 127:14-17. With Campbell's consent, the Officer administered three roadside sobriety tests ("horizontal gaze nystagmus,"<sup>1</sup> "walk and turn" and "one leg stand"). Tr. 4/30/14 pp. 127:6-11; 128:18-20. Campbell failed to perform the roadside maneuvers as a sober person would. Tr. 4/30/14 p. 135:11-14.

---

<sup>1</sup> Horizontal gaze nystagmus is referenced as "HGN."

Officer Akins arrested Campbell and advised him under Colorado's Express Consent law. Tr. 4/30/14 p. 137:11-18. Campbell agreed to take a breath test which showed a result of 0.07. Tr. 4/30/14 p. 137:23-24; p. 144:9-10. Additional facts are summarized in the arguments that follow.

### **SUMMARY OF ARGUMENT**

The County Court properly admitted Officer Akins's testimony concerning the facts of his investigation, including his actions in administering the HGN maneuver and his observations of Campbell's performance. The only opinion included within the Officer's HGN testimony was that Campbell did not perform the HGN maneuver as a sober person would. This is proper lay opinion testimony. The County Court did not err.

### **ARGUMENT**

#### **I. Most of the Officer's HGN testimony was not opinion testimony, either lay or expert.**

Campbell argues that Officer Akins's HGN testimony was impermissible expert testimony. On the contrary, the Officer's testimony concerning his actions, observations and the facts of his investigation was proper lay testimony.

#### **A. Standard of Review and Preservation of Issue**

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *Venalonzo*, 388 P.3d at 873, ¶ 15; *People v. Stewart*, 55 P.3d 107, 122 (Colo.

2002). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *Stewart*, 55 P.3d at 122. The People agree the question of the admissibility of Officer Akins' HGN testimony was preserved.

### **B. Additional Facts**

Prior to trial, the defense objected that Officer Akins had not been endorsed as an expert and requested that "the officer only be able to testify about his observations on [HGN] and not be able to testify about any opinions that stem from those observations." Tr. 4/30/14 p. 10:1-13.

The trial court deferred ruling until hearing the testimony and any related objections. Tr. 4/30/14 p. 13:6-7. The lower court further explained that, depending on the nature of the testimony elicited, an officer's HGN testimony may or may not be expert testimony:

THE COURT: All right, certainly I'm working a little bit in a vacuum because I don't know what the officer's going to be asked and I don't know what the testimony sought to be elicited is going to be. There could be testimony on roadsides which would require expert testimony but the general testimony of an officer, I'm trained to do the test in X way, I did the test in X way, usually people who are sober look X and people who are intoxicated look Y and this person looked more like X or more like Y. The Court doesn't find that to be scientific or [sic] necessitating any expert designation and there's no case law in Colorado which requires that [sic] and an expert reconstruction is a very different thing. I don't think we have an expert reconstructionist in this case, is that correct?

DA: No, Your Honor.

Tr. 4/30/14 pp. 12:17-25; 13:1-5.

In accordance with his standing as a lay witness, Officer Akins' trial testimony was confined to a description of his administration of the HGN maneuver, his observations of Campbell's performance and an opinion as to whether Campbell performed as sober person would be expected to perform.<sup>2</sup> Tr. 4/30/14 p. 129:22-25, p. 130; p. 131:1-20.

During Officer Atkins's HGN testimony, the defense objected only one time. Tr. 4/30/14 p. 131:19-20. The defense objection characterized the following statement by Officer Akins as "expert" testimony:

Q Now his performance of the HGN in your opinion based on your training and experience was that consistent with a sober person?

A No, it was not.

Tr. 4/30/14 p. 131:15-18. The objection was overruled. Tr. 4/30/14 p. 131:21.

---

<sup>2</sup> The Officer gave similar testimony concerning the other two roadside maneuvers, the "walk and turn" and "one leg stand" maneuvers. Tr. 4/30/14 pp. 132-34; p. 135:1-10. At trial, the defense raised no objections to the Officer's testimony on the "walk and turn" or "one leg stand" maneuvers.

**C. A police officer may give lay testimony concerning his administration of the HGN maneuver, his observations of the defendant's performance, and other facts of his investigation.**

The issue is whether the trial court abused its discretion under C.R.E. 701 governing the admission of the lay opinion testimony of Officer Akins. C.R.E. 701 states:

If the witness is not testifying as an expert, the witness' 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' 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 .

With one exception, Officer Akins' testimony does not include opinions that might trigger either Rules 701 or 702. Officer Akins' lay opinion of intoxication was admissible under Rule 701. See subsection D below.

It is axiomatic that lay witnesses may testify to their observations and firsthand knowledge. As any lay witness, police officers may testify to their observations and the facts of their investigation. “[P]olice officers regularly, and appropriately, offer testimony under Rule 701 based on their perceptions and experiences. *People v. Stewart*, 55 P.3d at 123 (citing *United States v. Novaton*, 271 F.3d 968, 1008 (11th Cir.2001) (emphasizing that a witness does not fall outside of Rule 701 simply because his or her “rational[ ] ... perception” is based in part on the witness's past experiences) (quoting *United States v. Myers*, 972 F.2d 1566, 1577 (11th Cir.1992)). “That [a police officer] based his conclusion in part

on his experience . . . does not render his testimony inadmissible.” *People v. Gallegos*, 644 P.2d 920, 928 (Colo. 1982) (citing *Wise v. Hillman*, 625 P.2d 364, 367 (Colo. 1981)).

Officer Akins’ testimony on direct examination spans 22 pages of which only approximately two were devoted to a discussion of the HGN maneuver. Compare Tr. 4/30/14 pp. 123-146 with p. 129:22-25; 130; 131:1-18. As to the two pages in question, Officer Akins described the mechanics of how he administered the maneuver as well as his observations of Campbell’s eyes:

1. First, the Officer put his finger approximately 12 inches from Campbell’s nose, instructing Campbell to follow the finger with his eyes, keeping his head still. Tr. 4/30/14 p. 130:1-5. As Campbell’s eyes followed the Officer’s finger, the Officer was watching to see if both of Campbell’s eyes tracked the finger at the same rate and whether both of Campbell’s eyes followed the finger smoothly as the finger passed in front of his face. Tr. 4/30/14 p. 130:5-18.
2. Second, for each eye, the Officer put his finger to the side so “there’s no white left in the corner of the eye” and watched Campbell’s eye for “involuntary jerkiness.” Tr. 4/30/14 p. 130:18-23.
3. Third, for each eye, the Officer checked for the onset of nystagmus (eye jerkiness) “prior to 45 degrees.” Tr. 4/30/14 p. 131:1-5.

4. Finally, the Officer summarized his observations of Campbell's eye movements: in both eyes, the Officer saw that Campbell's eyes did not smoothly follow his finger, there was distinct and sustained nystagmus (jerkiness) and the Officer also saw nystagmus (jerkiness) prior to 45 degrees in both eyes. Tr. 4/30/14 p. 131:11-14.

“Whether a witness's testimony is lay or expert depends on the facts and surrounding circumstances of the case and ‘requires a case-by-case analysis of both the witness and the witness's opinion.’” *Venalonzo*, 388 P.3d at 874, ¶ 17 (citing *United States v. Smith*, 591 F.3d 974, 982-83 (8th Cir. 2010)); *People v. Garrison*, 411 P.3d 270, 279, ¶ 43 (Colo. App. 2017) (same). Here, Officer Akins did not testify as a physician. He did not attempt to explain HGN as a medical diagnosis. He did not discuss the physiology of the eye, the effects of alcohol consumption on eye movement or any other topic requiring expert testimony.

As noted by the *Venalonzo* Court, “The proper inquiry is not whether a witness draws on her personal experiences to inform her testimony; all witnesses rely on their personal experience when testifying.” *Venalonzo*, 388 P.3d at 875, ¶ 22. “Rather, it is the nature of the experiences that could form the opinion's basis that determines whether the testimony is lay or expert opinion.” *Venalonzo*, 388 P.3d at 875, ¶ 22; *Romero v. People*, 393 P.3d 973, 977 ¶ 13 (Colo. 2017) (same). Here, Officer Akins merely told the jury about some simple finger/eye maneuvers

that he performed as part of his investigation and stated his observations of Campbell's jerky eye movements. Had any of the jurors been present on the scene of the investigation, each could have personally observed the finger/eye maneuvers as well as Campbell's eye movements. Officer Akins's testimony was admissible under C.R.E. 701 as lay witness testimony.

Further, jurors, who presumably possess the "ordinary person's experiences or knowledge," would be expected to understand the Officer's testimony concerning his finger movements as well as the observations of Campbell's eye movements. Any person who has had an eye examination is familiar with technicians who request that patients track the technician's moving finger with their eyes. Any person who has had an eye examination is familiar with technicians who check convergence by requesting that patients focus on the technician's finger as the technician's moves his or her finger toward the patient's nose.

This conclusion is not undercut by the fact that the Officer's HGN testimony used one technical phrase. While an "ordinary person" might not be expected to know the meaning of the term "horizontal gaze nystagmus," the use of a single technical term is not dispositive. *Venalonzo*, 388 P.3d at 876, ¶ 27 ("As for the distinction between leading and non-leading questions, the terms themselves may not be familiar to a lay person, but the concepts certainly are"); *People v. Ramos*,

388 P.3d 888, 893, ¶ 19 (Colo. 2017) (J. Boatright dissenting) (“Jargon aside, the ordinary person could be expected to have experiences or knowledge sufficient to form the basis for the transfer-versus-spatter testimony and the testimony regarding the size of a stain in relation to a dollar bill or a fist”).

Regardless of the phrase “horizontal gaze nystagmus,” it is apparent that an ordinary person who has been seen for an eye appointment or has taken his or her children to such an appointment has sufficient knowledge and experience to understand Officer Akins’ testimony concerning his administration of the HGN maneuver and his observations of Campbell’s performance. Although the HGN maneuver was not scientific or technical, Officer Akins’ observations were helpful to the jury’s determination of the intoxication issue. Officer Akins’s testimony was admissible under C.R.E. 701 as lay witness testimony.

**D. A police officer may give a lay opinion that a defendant is under the influence of alcohol and that he or she has not performed as a sober person would.**

The only *opinion* offered as part of Officer Akins’ HGN testimony was that Campbell did not perform the HGN maneuvers as a sober person:

Q Now his performance of the HGN in your opinion based on your training and experience was that consistent with a sober person?

A No, it was not.

Tr. 4/30/14 p. 131:15-18. This is the Officer's complete lay *opinion* testimony relating to Campbell's performance on the HGN maneuver.

When applying Rules 701 and 702 to police officers, this Court has held that, where "an officer's testimony is based *not only* on his or her perceptions and observations of the crime scene, but also on specialized training or education, the officer must be qualified as an expert before offering testimony that amounts to expert testimony." *Stewart*, 55 P.3d at 124. But, in Colorado, it is also well established that a lay witness may express an opinion as to whether another person is under the influence of alcohol. *See, e.g., People v. Norman*, 572 P.2d 819, 820 (Colo. 1977) ("[O]nce a proper foundation has been laid, a lay witness may express an opinion as to whether or not a defendant was intoxicated."); *Morris-Schindler, LLC v. City and County of Denver*, 251 P.3d 1076, 1083 (Colo. App. 2010) ("A lay witness who has had sufficient opportunity to observe the demeanor and conduct of another may express an opinion whether the latter was intoxicated" (*citation omitted*)); *People v. Souva*, 141 P.3d 845, 850 (Colo. App. 2005) (a lay person's testimony regarding whether a defendant is under the influence of alcohol is within the "knowledge or common experience of people of ordinary intelligence").

A proper foundation for a lay opinion on another's intoxication or lack thereof (i.e. sobriety) is established where the witness had sufficient opportunity to observe the demeanor and conduct of the person in question. *Brown v. Hollywood*

*Bar and Café*, 942 P.2d 1363, 1366 (Colo. 1997) (proper foundation concerning driver's alcohol intoxication where lay witnesses observed the driver after the accident); *Vigil v. People*, 416 P.2d 361, 362 (Colo. 1966) (proper foundation concerning lay opinion of alcohol intoxication where witnesses talked with the driver and observed his actions and general demeanor). In the case of a police officer, the necessary foundation to express a lay opinion on intoxication or sobriety is as stated above, but may also include the officer's years of experience dealing with persons who are intoxicated by alcohol and compared with those who are not. *People v. Russell*, 396 P.3d 71, 76 (Colo. App. 2014) (police officer permitted to testify as a lay witness that the defendant appeared to be under the influence of drugs given "his observations based on eleven years of experience as a police officer").

Here, in addition to firsthand observations, Officer Akins' lay opinion that Campbell did not perform the HGN maneuver as a sober person required only observation and comparison of the behaviors observed in sober subjects versus the behaviors observed in intoxicated subjects. As a police officer, Akins had experience conducting DUI investigations in which he observed some citizens to be under the influence of alcohol, while others were not. Tr. 4/30/14 p. 124:19-24, p. 125: 1-3. Officer Akins had conducted many roadside maneuvers on sober people and drunk people and was able to tell the difference between the two. Tr.

4/30/14 p. 129:4-11. Of course, given an opportunity for observation, an “ordinary person” would also be able to tell the difference between the two. *Venalonzo*, 388 P.3d at 875, ¶ 23 (the test for lay testimony is whether “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”).

It is immaterial that Officer Akins' lay opinion of Campbell's performance on the HGN maneuver was described as not “consistent with a sober person.” Lay witnesses may describe a person as under the influence of alcohol, drunk, intoxicated, lacking sobriety or words to this effect. *Norman*, 572 P.2d at 820 (“[t]he terms “intoxicated,” “drunk,” and “under the influence of intoxicating liquor” are substantially synonymous. There is no reason to allow testimony phrased in one of these terms and to prohibit it when it is phrased in another of these terms.”)

Under *Venalonzo*, the test for expert opinion testimony is whether “the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony.” 388 P.3d at 875, ¶ 23. The People acknowledge that the prosecutor's single question concerning Officer Akins' HGN opinion inadvertently included language implicating Rule 702 by referencing the fact of “training.” But, the Officer's testimony concerning his training included no explicit reference to training for

HGN maneuvers. Instead, the Officer merely stated he was “certified in the standard field sobriety tests and DUI detection,” with related coursework “initially in the academy” and thereafter “every other year through a [sic] 16 hour.” Tr. 4/30/14 p. 123:24-25, p. 124:1-6, p. 129:4-6. Based on the People’s record review, the only other arguable reference to training is a reference to a “wet lab so we actually administered these maneuvers that are standard, standardized and to see if they could perform the maneuvers as a sober person would essentially.” Tr. 4/30/14 p. 128:22-25.

As emphasized by the *Venalonzo* Court, “the critical factor in distinguishing between lay and expert testimony is the basis for the witness's opinion.” 388 P.3d at 875, ¶ 22. The proper inquiry is “the nature of the experiences that could form the opinion's basis that determines whether the testimony is lay or expert opinion.” *Id.* Here, those experiences include Officer Akins’ administration of HGN maneuvers in hundreds of cases coupled with his observations of performances by both intoxicated and sober subjects. Tr. 4/30/14 p. 124:19-25, p. 125:1-3; p. 1219:7-11.

The fact that Officer Akins may have additional training that might permit him to testify to further information or testify as an expert, if asked, is immaterial as the Officer was not asked for further information that might implicate expert opinions. The situation in this case is unlike that in *Stewart* (police officer, who

was not qualified as an expert, properly testified to his “observations of the crime scene and his investigation,” but improperly testified to expert opinions in the form of deductions about “such matters as the vehicle’s direction, position and speed.”) 55 P.3d at 124. The fact that a witness may possess expert qualifications of some type does not preclude that witness from testifying to lay opinions concerning matters within the knowledge or common experience of people of ordinary intelligence. *Venalonzo*, 388 P.3d at 875, ¶ 22 (citing *Souva*, 141 P.3d at 849 (concluding that an eyewitness who happens to be a certified addictions counselor may offer lay testimony about whether the defendant appeared to be under the influence of drugs at the time she observed him)).

Other than references to the standard of review or harmless error, Campbell places little reliance on *Stewart* or *People v. Veren*, 140 P.3d 131 (Colo. 2005). Opening Brief p. 13. In *Stewart*, the objectionable police officer testimony concerned expert conclusions that “some skidmarks found at the scene were traceable to Stewart’s vehicle and evidenced acceleration of the vehicle in reverse,” while a “squiggle mark” on the pavement indicated the spot where one of Stewart’s tires “ran over” the victim’s head. 55 P.3d at 122. In *Veren*, the officer, who was not qualified as an expert, testified regarding the manufacturing process for methamphetamines, opined as to the amount of pseudoephedrine required to manufacture the same, and informed the jury that the quantity of the ingredient

chemicals in defendant's possession could raise an inference of the intent to manufacture methamphetamine. 140 P.3d at 139. The *Stewart* and *Veren* officers testified on the basis of detailed and specialized knowledge vastly exceeding that necessary to conduct the HGN maneuver as described by Officer Akins. Here, Officer Akins's testimony stayed within the proper bounds of lay testimony with a single lay opinion concerning the lack of sobriety.

In conclusion, the only portion of Officer Akins' HGN testimony to which the defense objected was the opinion that Campbell did not perform as a sober person would. Tr. 4/30/14 p. 10:1-13 (Defense counsel requested that "the officer only be able to testify about his observations on [HGN] and not be able to testify about any opinions that stem from those observations.") This is a lay opinion based on the Officer's first hand observations, which observations could also be made by an "ordinary person." The trial court did not abuse its discretion in admitting this testimony.

**II. The Officer's HGN testimony was proper, but in the event this Court decides otherwise, any error was harmless.**

Officer Akins' HGN testimony was properly admitted as lay testimony and opinion. But, even if this Court were to find otherwise, any claimed error was harmless given the overwhelming evidence of intoxication.

## A. Standard of Review

Even where a trial court's evidentiary ruling concerning the scope of opinion testimony is found to be an abuse of discretion, "the inquiry is not at an end." *Romero*, 393 P.3d at 978. Trial court rulings concerning the scope of opinion testimony or opinion are reviewed for nonconstitutional harmless error. *Venalonzo*, 388 P.3d at 881 (citing *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012)); *Stewart*, 55 P.3d at 124 (having determined that the trial court abused its discretion in admitting the officer's accident reconstruction as lay opinion, "we consider whether the error was harmless").

"A ruling admitting or excluding evidence is not reversible unless the ruling affects a substantial right of the party against whom the ruling is made." *Stewart*, 55 p.3d at 124 (citing C.R.E. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected")); C.A.R. 35(e) (an appellate court shall disregard any error not affecting a substantial right of party); Crim. P. 52 (any error not affecting substantial rights shall be disregarded). *Accord Venalonzo*, 388 P.3d at 880 ("we reverse only if the error "affects the substantial rights of the parties").

"If a reviewing court can say with fair assurance that, in light of the entire record of the trial, the error did not substantially influence the verdict or impair the fairness of the trial, the error may properly be deemed harmless." *Stewart*, 55 P.3d

at 124. “An error affects a party's substantial rights if it “substantially influenced the verdict or affected the fairness of the trial proceedings.” *Venalonzo*, 388 P.3d at 880, ¶ 48 (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986) (erroneous admission of expert testimony stating victim was telling the truth was harmless error “[i]n light of the overwhelming evidence of guilt”)).

### **B. Additional Facts**

According to the defense, Campbell had a party at his house and everyone except Campbell was drinking. Tr. 4/30/14 p. 129:9-13. Campbell left his party to purchase some more liquor and drive one of his guests (Monica Moore) to her home. Tr. 4/30/14 p. 129:16-21. After purchasing some “shooters,” Campbell was stopped by Officer Akins because one of his headlights was out. Tr. 4/30/14 p. 129:19-21. Defense counsel claimed that Campbell was afraid he would be arrested so “he took a shooter of schnapps to calm his nerves for the interaction with the officer.” Tr. 4/30/14 p. 121:1-2, Defense Opening Statement.

The Officer was observing Campbell’s car when he pulled it over. Tr. 4/30/14 p. 154:6-8. Officer Akins watched Campbell and his passenger prior to approaching his car. Tr. 4/30/14 p. 151:6-18; p. 152:18-22. In response to defense questioning, Officer Akins unequivocally testified that he could see Campbell “the entire time:”

Q So it'd be fair to say during that time your attention's not 100 percent focused on the driver?

A It's focused on the vehicle, it's fair to say.

...

A I mean am I staring at the driver, I mean I'm looking at the driver, it's a car from my position of the vehicle I can see the entire back of the car. So I mean can I see the driver the entire time, yes. I can also see the passenger the entire time.

Tr. 4/30/14 p. 152:11-13, 18-22. Although the Officer was not asked whether he saw Campbell drinking or raising anything to his lips, the inference is clear that, had the Officer seen this, he would have documented it in his report.<sup>3</sup>

Further, the defense called Monica Moore, a guest at Campbell's party and his passenger when stopped by Officer Akins. Tr. 4/30/14 p. 187:12-20; p. 189:10-11. Ms. Moore admitted that she did not see Campbell drink a shooter or anything else:

Q Okay. And were you paying any attention to Mr. Campbell?

A Nope, none. I was more focused on me.

Q Okay. So did you notice whether Mr. Campbell took a shot or not?

A Nope.

---

<sup>3</sup> For example, in response to defense questioning, Officer Akins emphasized that had somebody thrown something out of the car, Officer Akins would have "noted that." Tr. 4/30/14 p. 154:12-15.

Tr. 4/30/14 p. 190:14-19. Campbell did not testify. Tr. 4/30/14 p. 183:20.

When Officer Akins first spoke with Campbell, he noticed a moderate odor of an unknown alcoholic beverage on Campbell's breath, bloodshot eyes, and slightly slurred speech. Tr. 4/30/14 p. 126:6-10. After the Officer asked for Campbell's identification, Campbell dropped his wallet while fumbling to remove the information. Tr. 4/30/14 p. 126:11-20.

Officer Akins asked Campbell whether he had been drinking and Campbell's first response was that "he had not had any alcohol that evening." Tr. 4/30/14 p. 126:17-25. When the Officer replied that he could smell it, Campbell changed his story to "one beer at approximately 2:30 in the afternoon." Tr. 4/30/14 p. 126:22-25.

Campbell consented to performance of voluntary roadside maneuvers. Tr. 4/30/14 p. 127:6-11. Campbell "reached for the door handle two separate times before actually grabbing the door handle and being able to open the door." Tr. 4/30/14 p. 126:12-17. As Campbell was getting out of his car, the Officer saw an open "schnapps shooter" on the floor board. Tr. 4/30/14 p. 137:1-3, p. 158:23-25, p. 159:1-10. Campbell also "held on to the doorframe in an apparent attempt to gain his balance." Tr. 4/30/14 p. 160:20-21.

In addition to the HGN maneuver summarized elsewhere, the Officer demonstrated the "walk and turn" maneuver for Campbell. Tr. 4/30/14 p. 132:3-

20. In observing how the subject walks an imaginary line, the Officer routinely makes observations including whether the individual stands with his/her “heel to toe on a straight line with their arms down at the side” while instructions are given, whether they keep their balance or start too soon, whether they touch heel to toe on every step, whether they step off the line, whether they raise their hands above six inches for balance, whether they stop during the maneuver, how many steps they take and how the turn is performed. Tr. 4/30/14 pp. 132:3-20; 167:13-15.

On this maneuver, the Officer observed that Campbell started too soon, “was unable to keep his balance,” stepped off the line, missed heel to toe, raised his arms for balance and the turn was not performed correctly. Tr. 4/30/14 p. 133:1-6. Campbell’s performance on the “walk and turn” maneuver was not consistent with that of a sober person.<sup>4</sup> Tr. 4/30/14 p. 134:3-5.

The Officer demonstrated the “one leg stand” maneuver for Campbell. Tr. 4/30/14 p. 165:19-20 (“I also demonstrate for them”). In this maneuver, Campbell had to raise one foot in front of him with the foot parallel to the ground balancing with arms at his side. Tr. 4/30/14 p. 165:7-21. In observing how a subject performs this maneuver, the Officer routinely makes any of the following four

---

<sup>4</sup> In contrast to testimony concerning HGN, when Officer Akins was asked if Campbell completed the “walk and turn” maneuver as a sober person would, the defense did not object to the question or the answer given. Tr. 4/30/14 p. 134:3-7.

observations: whether the subject sways, uses his/her arms for balance, puts his/her foot down or hops during the maneuver. Tr. 4/30/14 p. 134:10-14.

On this maneuver Campbell swayed and used his arms for balance raising them more than six inches. Tr. 4/30/14 p. 166:1-16. Campbell's performance on the "one leg stand" maneuver was not consistent with that of a sober person.<sup>5</sup> Tr. 4/30/14 p. 135:8-10.

During his performance of the roadside maneuvers, Campbell became agitated and told Officer Akins "to hurry up or made some kind of statement like that." Tr. 4/30/14 p. 136:15-16. Officer Akins arrested Campbell and advised him under Colorado's Express Consent law. Tr. 4/30/14 p. 137:11-18. Campbell agreed to take a breath test which showed a result of 0.07. Tr. 4/30/14 p. 137:21-25; p. 144:9-10.

The witnesses called by the defense were not credible. The first defense witness, Monica Moore, was one of Campbell's friends and was a passenger when Campbell's vehicle was stopped by Officer Akins. Tr. 4/30/14 p. 187:12-20; p. 189:10-11. During the entire episode, Ms. Moore was extremely intoxicated by alcohol and drugs. Tr. 4/30/14 p. 188:14-20. Prior to being stopped, Ms. Moore had been up for four days using crack

---

<sup>5</sup> In contrast to testimony concerning HGN, when Officer Akins was asked if Campbell completed the "one leg stand" maneuver as a sober person would, the defense did not object to the question or the answer given. Tr. 4/30/14 p. 135:8-10.

cocaine. Tr. 4/30/14 p. 189:23-25; p. 190:1. When stopped, Ms. Moore “freaked out” because she knew there was an outstanding warrant for her arrest, and she needed to quickly clean out her purse to make sure she had no drugs. Tr. 4/30/14 p. 189:18-20.

The second defense witness was Campbell’s son, who testified that he and his father spent the entire day and evening together until ten or eleven that night, when his father left to “help out one of his friends.” Tr. 4/30/14 p. 197:12-25. In contrast to the other witnesses, Campbell’s son denied that any of Campbell’s friends came over that night and claimed instead that he and his father were working “on one of our friend’s cars.” Tr. 4/30/14 p. 198:3-6. Campbell’s son did not observe the stop and had no information concerning whether his father drank after the stop.

The third defense witness was Deborah Johnson, one of Campbell’s friends, who was also a guest at Campbell’s house party. Tr. 4/30/14 p. 221:9-12; p. 222:11-17.) Ms. Johnson had been drinking and using drugs prior to the party. Tr. 4/30/14 p. 222:4-9. She was drinking at the party. Tr. 4/30/14 p. 228:16-20. Ms. Johnson did not observe the stop and had no information concerning whether Campbell drank after being stopped by Officer Akins.

**C. Error, if any, is harmless.**

An error is harmless unless it substantially influenced the verdict or affected the fundamental fairness of the trial. *Stewart*, 55 P.3d at 124. Here, evidence other than the brief HGN testimony overwhelmingly established the fact of Campbell's intoxication. See Additional Facts, Subsection B above.

In apparent recognition of this fact, the defense did not dispute Campbell's intoxication but argued instead that "the whole theory of Defense is that Mr. Campbell drank alcohol after driving and that's the reason that there was alcohol in the truck." Tr. 4/30/14 p. 266:12-14. This was the theory the defense hammered home in opening statement<sup>6</sup> and closing argument.<sup>7</sup> The defense theory explicitly

---

<sup>6</sup> In opening statement, the defense explained:

...Mr. Campbell drove, we don't deny that. But the key detail here is when Mr. Campbell drank. He drove, then he drank...and fearing that he was going to get arrested because of his passenger's bad decisions he took a shooter of schnapps to calm his nerves for the interaction with the officer. He drove, then he drank. Bad judgment, sure. Not criminal...

Tr. 4/30/14 p. 120:7-8, 24-25, p. 121:1-3.

<sup>7</sup> In closing, the defense argued:

He wasn't drinking till that point when he was pulled over and got nervous and he made a mistake...What you've heard today is that Mr. Campbell drove and then he drank. That was a highly questionable decision it's not a decision we're advocating. But he was not impaired when he was behind the wheel...

Tr. 4/30/14 p. 261:6-7; p. 262:13-16.

conceded that Campbell, as observed by Officer Akins, was intoxicated. In these circumstances, the HGN testimony had no meaningful impact on the verdict or the fundamental fairness of the trial.

Further, in these circumstances, it is apparent that the defense did not intend to retain an expert to rebut Officer Adkins' HGN testimony. Contrary to argument by the Criminal Defense Bar concerning the possibility of "ambush," Campbell's defense counsel anticipated the nature of HGN expert testimony and could have retained an expert had they cared to do so:

Defense Counsel: ...here the officer's going to want to testify about what the science behind nystagmus, what nystagmus means, what nystagmus looks like, what it indicates, what the officer's able to tell by it. All of those things are something that a layperson just simply cannot know without the specialized training and knowledge of the officer and so for that reason, with particular concern for the HGN test Defense would ask that the officer's testimony about standardized field sobriety tests be limited to his observations and his investigation of the incident and that he not be allowed to testify about his opinion.

Tr. 4/30/14 p. 12:7-16. Given the theory of defense, as a matter of defense strategy, no defense expert testimony was presented. Any error was harmless.

**III. Most states admit police officer HGN testimony based on officer experience and proper administration of the maneuver.**

The defense and amicus briefs rely largely on older cases announced when HGN science was novel and much younger than is the case today. Opening Brief pp. 17-19; Amicus Curiae Brief pp. 8-10. Now, “[m]ost courts permit the admission of HGN test evidence by arresting officers who have been adequately trained in conducting the test and can show that the test in the particular case at bar was conducted in substantial accordance with that training.” *State v. Hullinger*, 649 N.W.2d 253, 258 (S.D. 2002). Earlier cases notwithstanding, this is currently the majority rule. See *State v. Baue*, 607 N.W.2d 191, 205 (Neb. 2000) so holding and citing:

***State v. Zivcic*, 598 N.W.2d 565, 570 (Wis. 1999)** ( “[a]s long as the HGN test results are accompanied by the testimony of a law enforcement officer who is properly trained to administer and evaluate the test,” evidence is admissible);

***Ballard v. State*, 955 P.2d 931, 941 (Alaska 1998)** (holding police officer may testify to results of HGN testing if government establishes officer adequately trained in administration and assessment of test), overruled on other grounds;

***Williams v. State*, 710 So.2d 24, 32 (Fla. App. 1998)** (noting “HGN test results are generally accepted as reliable and thus are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified [person]”);

***State v. Taylor*, 694 A.2d 907, 912 (Me. 1997)** (holding proper foundation for admission of HGN test is evidence that officer or administrator of test is trained in procedure and test properly administered);

***People v. Berger*, 551 N.W.2d 421, 424 (Mich. Ct. App. 1996)** (holding because HGN test satisfied *Frye* standard, only foundation necessary for introduction of evidence regarding HGN test is evidence that test properly performed and officer administering test qualified to perform it);

***Schultz v. State*, 664 A.2d 60, 74, 76-77 (Md. App. 1995)** (holding HGN results admissible in future cases without reference to *Frye* standard if officer properly qualified and test conducted properly);

***People v. Leahy*, 882 P.2d 321, 336 (Cal. 1994)** (holding once *Frye* standard met in published opinion regarding HGN,

prosecution not required to submit expert testimony to jury, and police officers are sufficient to testify to results of HGN tests);

***State v. Hill*, 865 S.W.2d 702, 704 (Mo. Ct. App.1993),**

(holding when properly administered by adequately trained personnel, HGN test admissible as evidence of intoxication),

*overruled on other grounds;*

***State v. Armstrong*, 561 So.2d 883, 887 (La. App. 1990)**

(proper foundation for admitting HGN test is showing officer trained in procedure, certified in its administration, and procedure properly administered).

*Baue*, 607 N.W.2d at 205 (“We conclude that the majority view is sound, and adopt the view that a police officer may testify to the results of HGN testing if it is shown that the officer has been adequately trained in the administration and assessment of the HGN test and has conducted the testing and assessment in accordance with that training.”).

The *Baue* Court’s list of states applying the majority approach is illustrative only. By way of example, *see*:

***State v. Engelhorn*, 883 N.W.2d 852, 853-54 (N.D. 2016)**

(reaffirming previous holdings that expert testimony is not

required for admission of HGN test results, as circumstantial evidence of intoxication).<sup>8</sup>

***Anderson v. State*, 252 P.3d 211, 212–13 (Okla. Crim. App. 2010)** (HGN test results were admissible without expert testimony where admitted for the same purpose as other field sobriety test evidence—“a physical act on the part of Appellant observed by the deputies contributing to the cumulative portrait of Appellant as intoxicated in the deputies' opinion.”).

***State v. Boczar*, 863 N.E.2d 155, 160 (Ohio 2007)** (holding HGN test results are admissible without expert testimony so long as the proper foundation has been shown “both as to the administering officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test.”)

***State v. Cochrane*, 897 A.2d 952, 956 (N.H. 2006)** (so long as a trained police officer's testimony is limited to: (1) his or her

---

<sup>8</sup> Reliance by amicus curiae on *Engelhorn* is misplaced. Amicus Brief p. 9. The amicus brief cites a snippet of language from *Engelhorn* where the North Dakota Supreme Court is reaffirming its prior decision in *McLaughlin* holding that “scientific foundation by expert testimony is *not* required to admit HGN test results.” *Engelhorn*, 883 N.W.2d at 855 (emphasis added). *Engelhorn* does not support the defense position.

training and experience in administering and scoring the HGN test based upon the NHTSA standards and guidelines; (2) the administration of the HGN test in a particular case; and (3) the results of the HGN test as established by the NHTSA standards and guidelines, we hold that it constitutes lay testimony”).

***People v. Hammond*, 827 N.Y.S.2d 298, 299–300 (N.Y. App. Div. 2006)** (proper foundation for admission of HGN test where “the officer testified regarding his qualifications to administer the test and the techniques he employed”).

***Cooper v. State*, 761 N.E.2d 900, 903 (Ind. Ct. App. 2002)** (the proper foundation for admitting HGN evidence should consist of describing the officer's education and experience in administering the test and showing that the procedure was properly administered.)

***State v. Hullinger*, 649 N.W.2d 253, 255, 260-61 (S.D. 2002)** (reversing trial court’s exclusion of positive HGN results in a DUI case, holding “if it can be shown to be properly administered by a trained officer” the evidence is admissible on whether the subject was under the influence of alcohol).

*State v. Sullivan*, 426 S.E.2d 766, 769 (S.C. 1993) (holding police officers may testify to HGN results as “objective manifestations of soberness or insobriety,” but not to establish a “specific degree of blood alcohol content.”).

*Baue* illustrates the minority rule by citation to *State v. Helms*, 348 N.C. 578, 504 S.E.2d 293 (1998); *State v. Murphy*, 953 S.W.2d 200 (Tenn.1997) and *State v. Ruthardt*, 680 A.2d 349, 361 (Del.Super.1996). 607 N.W.2d at 205. See Opening Brief citing these cases at pp. 17 and 19. Based on its research, the People believe *Baue* accurately summarizes the majority and minority rules for admission of police officer testimony on the HGN maneuver.<sup>9</sup>

Reliance by amicus curiae on *State v. Superior Court*, 718 P.2d 171 (Ariz. 1986) is misplaced. Amicus Brief p. 9. After determining that the HGN test satisfied the *Frye* standard, the Arizona Supreme Court held that “with proper foundation as to the techniques used and the officer's ability to use it [citation omitted], testimony of defendant's nystagmus is admissible on the issue of a defendant's blood alcohol level as would be other field sobriety test results on the question of the accuracy of the chemical analysis.” 718 P.2d at 181. This case does not support the defense position.

---

<sup>9</sup> In the People’s view, this is so despite the existence of a few early cases that initially indicated *three* lines of incipient authority.

The People read the defense and amicus briefs to imply that, where a State has evaluated HGN testing under *Frye*, *Daubert* or the comparable state standard, and found it reliable, any testimony admitted at trial concerning HGN testing must be proffered through expert testimony. If this is the suggestion, it is wrong and contrary to the majority rule. See cases cited at pp. 25-30 above. The issue of whether HGN testing is scientifically reliable is a separate issue from whether the testimony of a police officer introducing HGN results is expert or lay testimony.

A police officer's testimony regarding his training, his administration and observation of nystagmus does not require an understanding of the underlying scientific mechanisms explaining the phenomenon of nystagmus itself. "All that is required is an understanding that alcohol consumption can cause nystagmus, which can be detected by a trained police officer through observing the defendant during the administration of an HGN test." *Cochrane*, 897 A.2d at 955. None of Colorado's DUI officers are physicians, ophthalmologists or forensic toxicologists and this should not be required. The State's DUI officers generally do not read scientific journals and this should not be required.

Finally, amicus curiae asserts that "[o]ther states *with cases like Venalanzo* have recognized that testimony about conducting HGN tests and interpreting their results is based on specialized scientific knowledge requiring the officer to be qualified as an expert before testifying." Amicus Brief p. 8 (emphasis added).

Like *Venalonzo*, there are numerous states with recent judicial decisions that attempt to demarcate lay from expert testimony. By way of example, see *Carter v. State*, 235 P.3d 221, 224–25 (Alaska Ct. App. 2010) (explaining the “distinction between ‘lay’ testimony and ‘expert’ testimony [as] set forth in Alaska Evidence Rules 701 and 702.”); *State v. Saulter*, 764 N.W.2d 430, 434 (N.D. 2009) (discussing Rules 701 and 702, noting “A critical distinction between Rule 701 and Rule 702 testimony is that an expert witness ‘must possess some specialized knowledge or skill or education that is not in the possession of the jurors.’”); *Cain v. Back*, 889 N.E.2d 1253, 1257–58 (Ind. Ct. App. 2008) (explaining the “two principal distinctions between lay opinion testimony under Rule 701 and expert opinion testimony under Rule 702”); *State v. McKee*, 744 N.E.2d 737, 742 (Ohio 2001) (“The distinction between lay and expert witness opinion testimony is that lay testimony “results from a process of reasoning familiar in everyday life,” while expert testimony “results from a process of reasoning which can be mastered only by specialists in the field.”).

While Alaska, North Dakota, Indiana and Ohio all have cases “like *Venalonzo*,” contrary to the suggestion of amicus curiae, these states nevertheless recognize that police officer “testimony about conducting HGN tests and interpreting their results” is admissible where the officer has been adequately trained in the administration of the HGN maneuver and has conducted the

maneuver in accordance with such training. As discussed above, *see State v. Engelhorn*, 883 N.W.2d 852, 853-54 (N.D. 2016); *State v. Boczar*, 863 N.E.2d 155, 160 (Ohio 2007); *Cooper v. State*, 761 N.E.2d 900, 903 (Ind. Ct. App. 2002); *Ballard v. State*, 955 P.2d 931, 941 (Alaska 1998).

### CONCLUSION

The People respectfully request that this Court AFFIRM Campbell's conviction, and DENY his request for a new trial.

Respectfully submitted,

GEORGE H. BRAUCHLER,  
District Attorney

August 21, 2018

Date

BY: s/ Susan J. Trout

SUSAN J. TROUT, #8504

Senior Deputy District Attorney

## CERTIFICATE OF SERVICE

On August 21, 2018, I hereby certify that a true and correct copy of the foregoing ANSWER BRIEF was e-filed via Colorado Courts E-Filing System (CCES) to the following:

M. Shelby Deeney #46441  
Colorado State Public Defender  
13356 E. Briarwood Avenue  
Centennial, CO 80112

Taylor Ivy, #50122  
Matthew Frederickson, #47453  
The Noble Law Firm, LLC  
215 Union Boulevard, Suite 305  
Lakewood, CO 80228

Katherine A. Hansen #25464  
Denver District Attorney's Office  
201 W. Colfax, Dept. 801  
Denver, CO 80202

BY: s/ Terri Combs  
Terri Combs, Paralegal