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2 DISTRICT COURT  
3 JEFFERSON COUNTY  
4 STATE OF COLORADO  
5 100 Jefferson County Parkway  
6 Golden, Colorado 80401

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8 PEOPLE OF THE STATE OF  
9 COLORADO,  
10 Plaintiff,

11 v.

12 ^FOR COURT USE ONLY^

13 JAMES JOSEPH JOHNSON,  
14 Defendant.

15 Case No. 18 T 8014  
16 Division F

17 \_\_\_\_\_  
18

19 For the Plaintiff:  
20 Killean, Esq.  
21 Office of the District Attorney  
22 100 Jefferson County Parkway  
23 Golden, Colorado 80401

24 For the Defendant:  
25 Ryan Coward, Esq.

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29 The matter came on for hearing on held on December 2,  
30 2019, before the HONORABLE K. J. MOORE, Judge of the County  
31 Court, and the following proceedings were had.

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34 (Recorded and Transcribed)

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EXHIBITS

IDENTIFIED

ADMITTED

(No exhibits were marked.)

1 PROCEEDINGS

2 MR. COWARD: And, Your Honor, for the defense our next  
3 witness is Mr. Matthew, and I am going to mispronounce his last  
4 name, Malhiot.

5 THE COURT: Thank you. Sir, if you can come forward  
6 and raise your right hand.

7 MATTHEW MALHIOT

8 was called as a witness on behalf of the defendant and having  
9 been sworn, was examined and testified as follows:

10 THE COURT: Thank you. Have a seat.

11 THE WITNESS: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. COWARD:

14 Q Good afternoon, Mr. Malhiot.

15 A Good afternoon, counsel.

16 Q What do you do for work?

17 A I am the proprietor of Forensic Alcohol Consulting and  
18 Training.

19 Q Where do you live?

20 A In Canton, Georgia, which is near Atlanta.

21 Q Okay. Forensic Alcohol Consulting and Training, what  
22 does that mean and what do you do?

23 A Certainly. We provide expert consulting services,  
24 expert witness services and training services to the legal  
25 practitioners in any area where alcohol may be involved, whether

1 it's criminal, civil, mediation, disputes where alcohol may be an  
2 element and be part of the legal action.

3 Q Okay. And it sounded like the last part of that is  
4 training.

5 A Correct.

6 Q What kind of people do you provide training to?

7 A Generally we provide what's known as CLE training,  
8 which is continuing legal education, to members of the bar here  
9 in Colorado and Georgia, Texas, New York, Florida, throughout the  
10 nation, in areas of alcohol toxicology, alcohol pharmacology,  
11 standardized field sobriety testing and breath and blood alcohol  
12 testing.

13 Q Okay. And is your training specifically limited to  
14 just defense lawyers or just kind of all lawyers out there?

15 A No, any attorney who is a member of the bar. In fact,  
16 I've been invited to teach at judge's conferences. Prior to my  
17 employment, I worked for the state and taught lawyers,  
18 prosecutor's attorneys associations. So it's not limited to one  
19 side or the other.

20 Q Okay. How did you end up in this field of forensic  
21 follow consulting?

22 A I started my professional career in 1979 as the police  
23 officer in the United States Air Force for 20 years. I retired  
24 in 1999. During that time, I went through basic police academy,  
25 DUI enforcement.

1           In the mid 80s I was stationed in Germany and was  
2 assigned to the base commanders installation DUI task force and  
3 was required to attend advanced training in DUI.

4           After my time in Germany, I went back to the United  
5 States and was stationed in Malmstrom Air Force Base in Montana  
6 and I received training specifically in alcohol toxicology and  
7 alcohol pharmacology and forensic breath alcohol testing from the  
8 Montana Division of Forensic Science.

9           I continued my education in Montana with the National  
10 Highway Traffic Safety Administration in the standardized field  
11 sobriety testing and the standardized field sobriety instructor  
12 level course. I also completed the AROD course, which was  
13 incorporated, and also completed the US Department of  
14 Transportation instructor facilitator course, so I taught at law  
15 enforcement academies in the Air Force, Montana, Florida and  
16 continued to teach in Florida when I left Montana.

17           After my time in the Air Force, I was with the Cascade  
18 County Sheriff's Office in Montana and also continued to be  
19 certified by the Montana Division of Forensic Science. My  
20 responsibilities with the sheriff's office was mostly in breath  
21 testing, I was responsible for calibration of breath test  
22 instruments. I was part of the Cascade County DUI task force and  
23 the governor's task force in DUI, impaired and under age  
24 drinking.

25           In 2001, I took a job with the Florida Department of

1 Law Enforcement's alcohol testing program. It was basically the  
2 state crime lab, the alcohol division. While there, I received  
3 extensive training in alcohol toxicology, alcohol pharmacology,  
4 standardized field sobriety refresher courses, instructor  
5 refresher and I served on the committee that wrote the curricula  
6 for the Florida law enforcement academies to teach police  
7 officers DUI, DWI detection and standardized field sobriety.

8 I continued to teach at law enforcement academies down  
9 there and conduct research and development in impaired driving,  
10 to include probably hundreds of dosing studies. I also went to  
11 Indiana University to a course entitled the Borkenstein Course  
12 and that course was a specific course on highway traffic safety  
13 research and litigation in alcohol and drug impaired driving.

14 After completion of that, I was sent to a course at  
15 Lafayette, Louisiana entitled Ethanol Measurement and Its  
16 Interpretation. Ethanol, as we've heard earlier, is the alcohol  
17 we find in human consumables.

18 The first year I was employed with the Florida  
19 Department of Law Enforcement was a training year where I was  
20 assigned a toxicologist and training officer and had numerous  
21 areas of alcohol training, breath test training, standardized  
22 field sobriety and had testing points and was ultimately  
23 certified as a department inspector with the Florida Department  
24 of Law Enforcement.

25 In 2010 I was eligible for retirement, and the governor

1 was threatening to cut our pay because of the recession, so I  
2 retired and started this business, that's how I got here.

3 Q All right.

4 MS. KILLEAN: Your Honor, may we approach briefly?

5 THE COURT: You may. You guys can talk amongst  
6 yourselves for just a second.

7 (Bench conference held at this time. Not audible.)

8 THE COURT: Thank you all. I appreciate it. Go ahead,  
9 Mr. Coward.

10 MR. COWARD: Thank you, Your Honor.

11 Q (By Mr. Coward) All right. It sounds like you've been  
12 in this for a while, so I'm going to skip ahead a little bit, all  
13 right. And we've heard a little bit about National Highway  
14 Transportation Safety Administration certification levels.

15 A Yes.

16 Q What levels do you have for that?

17 A The National Highway Traffic Safety Administration, I  
18 hold certification in standardized field sobriety testing, ARIDE,  
19 which is the Advanced Road Impaired Driver Identification, and  
20 instructor level at both of those, so I hold one level below DR  
21 E.

22 Q Okay. So is it fair to say that this National Highway  
23 Traffic Safety Administration thing, you're a teacher with them  
24 or have been in the past.

25 A I still am, yes.



1 Q Okay. Now have you, how many times have you testified  
2 as an expert?

3 A Hundreds.

4 Q Okay. Have you testified in Colorado courts as an  
5 expert?

6 A I have.

7 Q And been recognized as an expert in Colorado courts?

8 A I have.

9 Q And been recognized as an expert in other courts?

10 A Many state courts, federal courts, military courts.

11 Q Okay. And have you testified for both sides,  
12 prosecution and defense?

13 A I have.

14 Q All right.

15 MR. COWARD: You know, Your Honor, with that, so that  
16 we can move along, why don't I offer Mr. Malhiot as an expert in  
17 the field of DUI detection and standard field sobriety testing.

18 THE COURT: Any objection or voir dire?

19 MS. KILLEAN: No objection, Your Honor.

20 THE COURT: All right. He will be admitted as an  
21 expert in standard field sobriety testing and DUI detection.

22 MR. COWARD: Thank you, Your Honor.

23 Q (By Mr. Coward) Mr. Malhiot, you were hired as a  
24 consultant on this case, correct?

25 A I was.

1 Q All right. And what kind of things did you review in  
2 your consultation?

3 A I reviewed the police report, the notes, both narrative  
4 reports, the alcohol influence report. I've reviewed the  
5 standardized field sobriety curricula. There was photographs,  
6 booking documents, driving history, a good stack of information.

7 Q Okay. And what do you do when you're reviewing a case?  
8 Just briefly walk us through that process.

9 A What I normally do is I take the case chronologically  
10 from the time of traffic stop through time of booking and I will  
11 review the officer's actions and if there's a video, I'll review  
12 the video, and then I will compare those actions and findings to  
13 the national standards, do they meet the standards, exceed the  
14 standards, not meet the standards, and develop a totality of the  
15 circumstances from an audit review standpoint.

16 Q Okay. And as you're applying those standards, does it  
17 make any difference whether or not you've been hired or not to, I  
18 guess, reach a particular conclusion?

19 A I don't get hired to reach a conclusion. I come to  
20 court maybe on 10 percent of the cases I review. Most of them  
21 either I don't agree with the defense strategy or it's not  
22 supported by science or something happens that I don't know, they  
23 work out a deal or it's dropped or they plead, I don't know, but  
24 I only appear in court probably on about 10 percent of the cases  
25 I'm retained.

1 Q Okay. Now in this case, excuse me, did you look at the  
2 HGN test?

3 A I did.

4 Q Okay. You heard Officer Campbell, you were sitting in  
5 the courtroom when he explained that test.

6 A I did.

7 Q Okay. Without going through the whole spiel again,  
8 what's the gist of the HGN eye test?

9 A Horizontal gaze nystagmus is a fancy word for  
10 involuntary jerking of the eye, just as the other officers have  
11 testified. There is a specific protocol in conducting the test,  
12 specific timing of moving and specific objective clues that are  
13 being looked for, three clues, two eyes, a total of six. There  
14 is lack of smooth pursuit, the marble across the glass or a  
15 windshield wiper on a dry windshield. Distinct and sustained  
16 nystagmus is when they are looking out the corner of their eye at  
17 the stimulus, does their eye ping or try to go back to natural.  
18 And the fourth is does that pinging start before the 45 degrees.

19 The best way to explain it is alcohol is a central  
20 nervous system depressant, so it depresses the muscles and nerve  
21 reactions of the eyes. If you go to the gym and you lift weights  
22 and you lift weights and you do a lot of reps, actually you're  
23 going to get to the point where you're lifting the weights in a  
24 very jerking motion, well, that's caused by alcohol in the eyes,  
25 so that's the kind of jerking that's being looked for.

1           Specifically, when the stimulus is moved, you're  
2 looking for lack of smooth pursuit, it must take two seconds to  
3 move the stimulus, one thousand one, one thousand two, one  
4 thousand one, one thousand two. If the stimulus is moved too  
5 fast, the eye can appear to be jerking trying to catch up to the  
6 stimulus.

7           When you're looking for the distinct and sustained  
8 nystagmus at maximum deviation, it's very, very important that  
9 it's distinct and sustained, so the stimulus is moved one  
10 thousand one, one thousand two and then at maximum deviation it  
11 must be held for a minimum of four seconds because everybody's  
12 going to have a little bit of jerking when you first get out  
13 there, but it must be sustained past that four-second point.

14           And then the third and final clue is when the stimulus  
15 is moved checking onset prior to 45 degrees, that's when it's  
16 moved very, very slowly and it takes four seconds to get to the  
17 corner of the shoulder. If nystagmus is observed, the stimulus  
18 is stopped and verified and then it's moved back and then that  
19 clue can be counted.

20           Q     Okay. So did you review Officer Campbell's findings in  
21 this case?

22           A     I did. And listened to his testimony.

23           Q     Okay. (Not audible) did Mr. Johnson pass that day?  
24 And what was important to note --

25           A     Two things that I noted, one thing is his report, that

1 he only scored a two out of possible six clues. The National  
2 Highway Traffic Safety Administration, like he testified, talk  
3 about four-or-more clues as a failure or indicia to impairment.  
4 They don't research what two clues, unless you get newer research  
5 that talks about two clues and zero tolerance laws for minors in  
6 possession where you're talking an 02 threshold, but there is no  
7 research linking two clues, along with other things, may be  
8 indicative of impairment. It's designed as an arrest, don't  
9 arrest decision guide and anybody who scores less than four clues  
10 is considered not to have failed that test.

11 Q So in Mr. Johnson's case, he didn't fail that test?

12 A He did not fail that test and it was not indicative of  
13 alcohol intoxication or impairment.

14 Q Okay. Now has this test been reviewed by any  
15 professional optometry medical association?

16 A It has.

17 Q Okay. Do you know off the top of your head who?

18 A I do.

19 Q Who?

20 A National Optometrists Association, Optometric  
21 Association, I'm sorry.

22 Q Okay. And what do they say about this test?

23 A They have a point paper and position paper that says  
24 out of all of these standardized field sobriety, the horizontal  
25 gaze nystagmus is the most reliable in indicating impairment in

1 highway traffic safety when performed properly.

2 Q Okay. So when they say the most reliable, does that  
3 mean they're looking at that test compared to the walk and turn  
4 and the one-leg stand?

5 A Yes.

6 Q Okay. And the optometry association says eye test most  
7 reliable.

8 A Yes.

9 Q All right. Can somebody manipulate this test? For  
10 example, if I was taking it, could I consciously not make my eye  
11 bounce back and forth?

12 A No.

13 Q Okay. So not something that you can control. Is that  
14 a little bit, how does that differ a little bit from these other  
15 two tests?

16 A Well, we see a lot of times, especially in college  
17 students we see it, the younger generation, with all of the  
18 police shows on TV nowadays, we all know what standardized field  
19 sobriety and walk the line is, and we have seen it in colleges  
20 and parties people practicing those things and you can physically  
21 practice and get a little bit better, certainly alcohol tolerance  
22 plays a part, but the walk and turn, one-leg stand, you can get  
23 better with practice.

24 Q Okay. Not the case with the HGN.

25 A No. HGN is an involuntary jerking, you have no

1 control. Most persons don't even know they have it. And let me  
2 give an example, there's many, many different types, it's not  
3 just alcohol. For instance, there's one called optokinetic  
4 nystagmus and if you're driving down the road and the railroad  
5 gates come down and you're the first car as the train goes by,  
6 your eye is going to naturally try and track that train and then  
7 ping back to center because you're trying to rest, you will have  
8 optokinetic nystagmus watching that train.

9           We've all seen the funny You Tube videos where somebody  
10 bends over and puts their head on a bat and spins around three  
11 times, stands up and is falling over with dizziness, that's  
12 post-rotational nystagmus, their eye would be pinging like crazy.  
13 So there's lots of different types of nystagmus, not just  
14 alcohol.

15       Q     I think like anybody that's stopped outside the  
16 courtroom now that has a train go by right now --

17       A     You're going to be thinking about it.

18       Q     All right. The next thing that Mr. Johnson was  
19 administered was the walk-and-turn test.

20       A     Yes.

21       Q     And did you hear the evidence that Mr. Johnson  
22 essentially walked backwards?

23       A     Yes.

24       Q     Okay. Does the National Highway Traffic Safety  
25 Administration, have they created any way whatsoever to suggest,

1 to analyze that and determine whether that is an indicia of  
2 intoxication or sobriety or anything like that?

3 A Walking backwards has not been researched. When we say  
4 researched and we talk about all of these percentages, what the  
5 National Highway Traffic Safety Administration did is when these  
6 were first developed, and when all of the states dropped to a  
7 point 08, they contracted with the Southern California Research  
8 Institute to do scientific research on these tests and walking  
9 backwards was never evaluated.

10 Q Okay. Did you hear my conversation with Officer  
11 Campbell regarding all the different other indicia of sobriety?

12 A I did.

13 Q Okay. For example, the pupils in the eyes, did you  
14 hear that?

15 A I did.

16 Q Okay. And the face not being flush.

17 A I heard that, yes.

18 Q And did you review all of those in his report as well?

19 A I did.

20 Q Okay. And are those in fact indicators of sobriety?

21 A Yes. The lack of those can be indicators of sobriety.

22 Q Okay.

23 A And more so.

24 Q Well, what do you mean?

25 A Well, the officer testified and asked for driver's



1 license and registration, alcohol impairment starts in reverse of  
2 what we've learned, so our speech and small muscle groups will  
3 have impairment before our walking, staggering, our large muscle  
4 groups, so the officer said he had no trouble and produced his  
5 driver's license, registration, so those are small, fine motor  
6 skills and being able to produce those without problem is  
7 indicative of sobriety.

8           Lack of slurred speech, because of the small muscle  
9 groups of the tongue and the jaw, that's indicative of sobriety.

10           Bloodshot eyes can happen for a million reasons and be  
11 at extremely low alcohol concentrations, so that's not, it may be  
12 indicative of some consumption, but not impairment.

13           Same with odor of alcohol, it may be indicative of  
14 consumption, but not impairment. And the analogy I like to give  
15 is if you walk in the house on Thanksgiving, you can smell the  
16 turkey cooking in the oven, but nobody can tell you how many  
17 pound turkey it is. Same thing with the odor of alcohol, you may  
18 be able to smell they have consumed something, but you can't tell  
19 how much they've consumed or generally what it was they consumed.

20           Q     Okay. Are those factors important to consider? All of  
21 those normal observations, is that something important to pay  
22 attention to?

23           A     I think they are.

24           Q     All right. And another thing, speed, that's part of  
25 what we've talked here a little bit, has the National Highway

1 Traffic Safety Administration looked at speeding and whether or  
2 not that's evidence of intoxication?

3 A Yes, they have. They have published researched on 24  
4 driving behaviors, nighttime driving behaviors, that may be  
5 conducive with alcohol impairment, driving without your  
6 headlights, failure to maintain lane, improper signaling, driving  
7 ten-or-more miles per hour below the posted speed limit, those  
8 are all indicative, exceeding the posted speed limit is not  
9 listed in the 24 indicators.

10 Q So is it accurate to say that speeding, even at the  
11 rate that it's alleged that Mr. Johnson was speeding, is not an  
12 indicator of being intoxicated?

13 A Not as a stand-alone indicator, no.

14 Q And why is it that actually going ten miles an hour  
15 below the speed limit is an indicator of intoxication?

16 A Alcohol, as I said earlier, is a central nervous system  
17 depressant, so it's going to slow down your reaction time, slow  
18 down all of those things, ultimately slowing down your driving.

19 Q Okay. In your expert opinion, and having reviewed  
20 Officer Campbell's findings and the other evidence in this case,  
21 do you believe that Mr. Johnson was impaired at the time of the  
22 stop?

23 A After reviewing in the totality, and listening to the  
24 testimony today, I don't believe he was.

25 Q Okay.

1 MR. COWARD: Thank you for your testimony, Mr. Malhiot.  
2 Those are my questions.

3 THE WITNESS: Thank you, counselor.

4 THE COURT: Any cross-examination.

5 MS. KILLEAN: Yes, Your Honor.

6 THE WITNESS: Before she starts, can I get some water?

7 THE COURT: Is that one empty?

8 MR. COWARD: It is, Your Honor.

9 THE COURT: She's going to get some.

10 MS. KILLEAN: I don't mind just going to the water  
11 fountain, if that would be quicker.

12 THE COURT: Why don't you do that and she can run and  
13 get some too, that way we get an immediate and we'll get one  
14 again.

15 THE WITNESS: Thank you.

16 CROSS-EXAMINATION

17 BY MS. KILLEAN:

18 Q Now, sir, can you tell me how to say your last name?

19 A Thank you for --

20 Q I want to make sure I say it correctly.

21 A -- asking. It's pronounced Malhiot, m-y-i-t is the  
22 phonetic pronunciation.

23 Q That is how I'm going to spell it from now on.

24 A It's not how it's spelled, it's spelled M-a-l-h-i-o-t,  
25 but phonetically pronounced m-y-i-t.

1 Q Thank you for clarifying. I'm really glad I asked.  
2 So, Mr. Malhiot, obviously you've had a lot of experience. Now I  
3 just want to clarify some of your experience. You were a police  
4 officer in the Air Force from 1979 to 1999, right?

5 A Yes, ma'am.

6 Q And what did you do at the Cascade County Sheriff's  
7 Office in Montana?

8 A I was a reserve deputy from '97 through 2001.

9 Q And did you ever do in-the-field work?

10 A All of it was in-the-field work.

11 Q Even as a reserve deputy?

12 A Yes. Yes. I was POST certified by the State of  
13 Montana and was a patrol deputy.

14 Q And then from, you said 2001, but I believe on your  
15 resume it says 2002 --

16 A January 2002, yes, ma'am.

17 Q -- so 2002 to 2010 you were at the Florida Department  
18 of Law Enforcement; is that correct?

19 A That's correct.

20 Q And you explained that as a state crime lab; is that  
21 correct?

22 A Yes, ma'am.

23 Q So at that point were you in the field?

24 A Yes.

25 Q Okay.

1           A       I was a field representative responsible for 100 law  
2 enforcement agencies' breath and blood alcohol testing program.

3           Q       And did you personally go out on the field in those  
4 cases?

5           A       I was not a sworn officer in DUI enforcement. I did go  
6 to DUI check points and assist.

7           Q       Okay. But you, yourself, couldn't say charge someone  
8 with --

9           A       I did not make arrests. I did breath testing, field  
10 sobriety testing, but not physical arrests.

11          Q       Okay. I want to talk a little bit about your agreement  
12 that you had counsel sign in this case.

13          A       Certainly.

14          Q       So when you're hired as a consultant, you send a  
15 contract or an agreement for an attorney who has hired you to  
16 sign; is that correct?

17          A       I do.

18          Q       And essentially, you sent that in this case.

19          A       I did.

20          Q       And here it requires certain payments are made, right?

21          A       It does.

22          Q       And there is a payment of case review and audit fee.

23          A       Correct.

24          Q       And there's a payment of court appearance and expert  
25 witness fee.

1           A     Correct.

2           Q     And those payments are due prior to services being  
3 rendered, in any event, payment is due within 30 days of written  
4 notice or invoice demand for same to client from (not audible);  
5 is that correct? I know I read that kind of (not audible).

6           A     It's correct in that it's broken down into separate  
7 fees. Like I testified earlier, I don't testify in all of my  
8 cases, so if after the consultation, written report and  
9 consultation with counsel they decide, at that point they haven't  
10 paid court fees, so after they decide with their client that they  
11 want to bring me in for court, then the court fee would be due.

12          Q     And you were originally retained as a nontestifying  
13 witness in this case; is that correct?

14          A     Correct.

15          Q     And did there come a point where that changed?

16          A     Yes.

17          Q     Was there an updated contract?

18          A     No.

19          Q     And was there an additional fee?

20          A     No, it's listed in the fee schedule, that portion of  
21 the fee would be due once they have decided to retain me for  
22 court.

23          Q     And the fee schedule says that case review or  
24 instrument audit is \$650?

25          A     Correct.

1 Q That the court appearance is \$3,000.

2 A Correct.

3 Q There's also, and I apologize I skipped it, there's an  
4 expedited surcharge or a supplemental report surcharge of either,  
5 I apologize, I'm going to go through that a little bit slower, an  
6 expedited surcharge of \$100 and a supplemental report of \$225.

7 A Correct, but they did not apply in this case.

8 Q Okay. And here there's also a court appearance or  
9 another hearing of \$750.

10 A That's if we have telephone deposition type of thing or  
11 motion hearing by phone.

12 Q And that didn't happen in this case.

13 A It did not happen in this case.

14 Q Okay. And there's also another deposition phone --

15 A Correct.

16 Q -- which didn't apply in this case --

17 A There's no deposition, no.

18 Q -- but that is a potential fee.

19 A Correct.

20 Q And another potential fee could be \$900, but also  
21 didn't apply in this case, for another deposition.

22 A That's correct.

23 Q So we're looking at the case review, which is \$650, and  
24 the court appearance, which is \$3,000; is that correct?

25 A That is correct.

1 Q Are there any additional fees?

2 A I believe there was a \$200 fee for when I came out here  
3 on a previous motion or court and there was a change fee.

4 Q Okay. So some sort of change fee.

5 A Correct.

6 Q Okay. And as we said, you were already or initially  
7 retained as a nontestifying witness.

8 A Correct.

9 Q And --

10 A When the report is issued, that's the way it's written  
11 for two reasons. One, as he discloses it to you, you're not  
12 under the impression that I've been retained to testify, he has  
13 to declare as an expert in the declaration as per Colorado  
14 statute --

15 Q All right. But you are here testifying today.

16 A Yes. Yes.

17 Q Okay. Now you said that you're involved in cases where  
18 there's alcohol and legal action; is that correct?

19 A Yes.

20 Q And that you do a lot of training.

21 A I do.

22 Q And that's for lawyers of all sorts, you said even  
23 judges.

24 A Yes.

25 Q Now I want to talk about some cases that you testified



1 in.

2 A Certainly.

3 Q Could you put a percentage on how many times you  
4 testified for defense versus prosecution.

5 A Vast majority.

6 Q So the vast majority means what?

7 A I don't have it broken down, but I would not dispute an  
8 85 percent defense bar.

9 Q Okay. So that means that in approximately 85 times  
10 that you testified in court, it's for a defense attorney or  
11 defendant?

12 A 85 percent of the time, yes, ma'am.

13 Q Okay. So that would be 15 percent for prosecution or  
14 the people?

15 A Probably less because that includes civil cases. I  
16 don't get hired, the last time I was hired by a prosecutor was  
17 2012 because obviously the prosecutor has state crime lab  
18 services that are at no charge and would take advantage of that  
19 versus hire me.

20 Q Sure. But sometimes you teach prosecutors.

21 A I do.

22 Q Now I want to talk about the National Highway Traffic  
23 Safety Administration, it's not transportation safety  
24 administration; is that correct?

25 A The National Highway Traffic Safety Administration.

1 Q Perfect, I just want to clarify that. So with that you  
2 also said AROD; is that correct?

3 A Well, it's incorporated, it's kind of an introduction  
4 to DRE, drugs and impaired driving, that kind of thing.

5 Q And that's training that wasn't necessarily involved in  
6 this case.

7 A Oh, no, no.

8 Q But that's actually ARIDE, which is --

9 A Right.

10 Q -- the Advanced Roadside Impaired Driving Enforcement.

11 A Correct.

12 Q So that's another form of education that officers or  
13 people in the field can take.

14 A Correct.

15 Q And you have that?

16 A I do.

17 Q But it's ARIDE, not AROD.

18 A Right, I misspoke.

19 Q Okay. So in this case, you said that you were hired as  
20 a consultant.

21 A Yes.

22 Q Do you recall when you were hired as a consultant?

23 A If I can review my notes.

24 Q Sure.

25 MS. KILLEAN: Permission for the witness --

1 THE WITNESS: February 28th of this year.

2 Q (By Ms. Killean) Okay.

3 A That's when I was first contacted about this case and  
4 that's the date I was retained.

5 Q Okay. And you said that you reviewed all of the  
6 documents really in this case; is that correct?

7 A I did.

8 Q And so you reviewed the police reports that you  
9 mentioned, the impairment sheet, things like that.

10 A I did.

11 Q Now you weren't at the scene of the crime.

12 A No, ma'am, I was not.

13 Q You weren't there on August 22, 2018, around 9:30.

14 A No, ma'am.

15 Q You weren't in Jefferson County, Colorado.

16 A Not to my knowledge.

17 Q And in your review, as you stated, there wasn't dash  
18 cam.

19 A Correct.

20 Q There wasn't body cam.

21 A Correct.

22 Q So what you had to go with is strictly based on what's  
23 written on pieces of paper.

24 A And listening to testimony today, yes.

25 Q And those reports were written in August.

1 A My report? I'm sorry --

2 Q No, the reports in this case --

3 A Oh, yes, the police officer, I assume --

4 Q -- were generally written in August of 2018.

5 A -- wrote them as quickly thereafter the incident.

6 Q And you, at the earliest, had the chance to review them  
7 on February 28th of 2019.

8 A Correct.

9 Q So you, as we stated, there wasn't dash cam, wasn't  
10 body cam, did you get to review any video in this case?

11 A I did not.

12 Q Because there's no video in this case.

13 A Not to my knowledge.

14 Q Did you ever go to visit the scene on C-470 and West  
15 Morrison Road?

16 A I did not.

17 Q So you never went there.

18 A No, ma'am.

19 Q So you didn't see what the surface was like for  
20 yourself.

21 A No, ma'am.

22 Q So you're basing everything that you learned off the  
23 education and training that you've gotten in the past.

24 A Well, everything, along with the documentation provided  
25 by the police officers and their testimony.

1 Q Okay. And just based on your training alone.

2 A Well, I don't understand what visiting the scene and my  
3 training, maybe I'm not understanding the question.

4 Q That's okay. You haven't been to the scene (not  
5 audible) --

6 A I have not.

7 Q Okay. So I want to talk a little bit about your  
8 observations on the HGN test.

9 A Certainly.

10 Q You said that there were only two-out-of-six clues,  
11 which is what you heard Officer Campbell testify today.

12 A Correct.

13 Q So what he testified was what was in his report.

14 A Correct.

15 Q Now you said that that is not sufficient to show  
16 intoxication.

17 A Correct.

18 Q So that's not talking about impairment.

19 A Well, I interact the terms. It's not impairment or  
20 intoxication, I would not consider it indicative of either.

21 Q But there is a difference between intoxication and  
22 impairment.

23 A There's a statutory difference in Colorado, yes.

24 Q And the statutory difference goes along with that  
25 percentage; is that correct?

1           A       What percentage?

2           Q       I apologize, the number of clues that show impairment  
3 on the HGN test.

4           A       No. National Highway Traffic Safety Administration has  
5 not researched X number of clues and the more clues the higher  
6 the alcohol, that's not, it's designed as an arrest, don't arrest  
7 decision guide at a point 08 threshold.

8           Q       So I want to be, so it's a point 08 threshold, that's  
9 what you're saying.

10          A       Correct. That four-or-more clues is a point 08  
11 threshold.

12          Q       And is it your understanding that point 08 is  
13 indicative of intoxication?

14          A       Statutorily, I don't know if necessarily that's, I'm  
15 assuming that's Colorado's statutory definition.

16          Q       Now you said that HGN is the most reliable test.

17          A       Of the three standardized field sobrieties, yes.

18          Q       And that's for alcohol testing.

19          A       The DRE protocol is different, but in this context,  
20 yes.

21          Q       Is the HGN most reliable when drugs are involved?

22          A       I don't feel comfortable, I'm not a toxicologist or a  
23 DRE, it's part of the DRE protocol, but I don't know if it's  
24 going to be considered the most reliable.

25          Q       So you can't say either way.

1           A     I cannot.

2           Q     Okay.  Now I want to talk to you, and I might butcher  
3 these phrases and I apologize if I do, you talked about  
4 optokinetic nystagmus.

5           A     Yes.

6           Q     Now you explained that that's like, for an example,  
7 when a train goes by.

8           A     That's one of the examples, yes.

9           Q     But there are no train tracks here.

10          A     No, I wasn't implying that he suffered from that that  
11 night, no --

12          Q     Sure.

13          A     -- there's no --

14          Q     So there are no train tracks.

15          A     I didn't visit the scene, I couldn't tell you, but  
16 there's nothing in the report or testimony to indicate there's  
17 train tracks.

18          Q     And you heard testimony today about traffic being light  
19 to moderate.

20          A     I did.

21          Q     And you heard testimony that at the time that  
22 Mr. Johnson was stopped by Officer Campbell, there were no other  
23 cars on the road.

24          A     No.  What he testified to, in my recollection, is that  
25 when he locked the radar in, he confirmed that it was his

1 vehicle, the defendant's vehicle because there was no other cars  
2 on the road. Both officers testified that there was traffic when  
3 they were pulled over to the side at the traffic stop location.

4 Q And you heard light-to-moderate --

5 A I did.

6 Q -- traffic.

7 A Light to moderate, yes.

8 Q Now you also talked about post-rotational nystagmus.

9 A Yes.

10 Q Now you said that was an example of someone putting  
11 their head on a bat and spinning around; is that correct?

12 A Yes.

13 Q But there was no bat involved in this case.

14 A No. No. And I don't want to mislead anybody and  
15 indicate that I think he suffered from post-rotational nystagmus,  
16 I was just giving examples that alcohol is not the only thing  
17 that can cause nystagmus.

18 Q Sure. And I just want to be very clear and say there's  
19 no indication, in anything that you reviewed in this case or in  
20 your report, that states that Mr. Johnson spun around in any way.

21 A Absolutely not.

22 Q Okay. Now you talked a little bit about the walk and  
23 turn.

24 A I did.

25 Q And you said that walking backwards is not something



1 that's been tested by NHTSA; is that right?

2 A That's correct.

3 Q But isn't following instructions part of --

4 A It is.

5 Q -- the clues in the walk-and-turn test?

6 A It is.

7 Q And is it fair to say that walking backwards is not  
8 properly following the instructions?

9 A That is correct.

10 Q So that itself could be a clue.

11 A Well, the fact that they didn't turn properly.

12 Q And you didn't really talk about the one-leg stand.

13 A I wasn't asked that many questions, he asked me a  
14 couple, but, yes.

15 Q Yeah, so there were clues on the one-leg stand.

16 A There were.

17 Q Two.

18 A That's what he testified to, yes.

19 Q And that's consistent with --

20 A Two-or-more clues, that's the threshold, yes.

21 Q Okay. And just going back, what's the threshold for  
22 walk and turn?

23 A Two.

24 Q And Mr. Johnson had more than that.

25 A He did.

1 Q He had four.

2 A He did.

3 Q He met the threshold on the one-leg stand.

4 A The officer documented that, yes, and testified to it.

5 Q Now would you say that the two other --

6 MS. KILLEAN: Just one moment.

7 Q (By Ms. Killean) There were two other tests  
8 administered in this case.

9 A There were.

10 Q And that's the alphabet and counting.

11 A Yes.

12 Q And you said those aren't NHTSA tests.

13 A They are not --

14 Q And you --

15 A -- standardized tests, no.

16 Q Sure. And you heard Officer Campbell testify that  
17 they're not NHTSA tests, by they're often used.

18 A They are.

19 Q So is it your statement here today that that can't be  
20 used as a building block to show impairment?

21 A Well, they're designed to be used and they're taught as  
22 ultimate sobriety or (not audible) sobriety. For example, if you  
23 stop an individual and you ask them if they would voluntarily  
24 consent to field sobriety and they say yes, they open the door  
25 and they have a cast on their foot, well, obviously they're not

1 going to do one-leg stand, walk and turn, so those are the types  
2 of tests you have in the alternative. Or if you stop somebody  
3 and they're sitting behind the driver's seat, those are the types  
4 of tests you can ask before you even ask them to step out of the  
5 car. When we say they're not standardized, as we've testified  
6 and heard testimony today, there's objective standards for pass,  
7 fail thresholds for the other three, there is no pass, fail  
8 thresholds for numbers, alphabet, those type of tests. They are  
9 used more as an alternative sobriety testing. Boating under the  
10 influence, which it's kind of hard to walk and turn on a boat --

11 Q I'm going to stop you right there because I just think  
12 that's irrelevant. I'm going to ask you another question.

13 A Certainly.

14 Q So is it your testimony today that the results of the  
15 standard field sobriety tests themselves, so just those three  
16 tests, should not be looked at with a totality of the  
17 circumstances spectrum?

18 A No, I didn't say that. And that's not my testimony.

19 Q So is it your testimony that those tests should be  
20 looked at in the totality of the circumstances?

21 A Everything should be looked at in the totality of the  
22 circumstances, yes.

23 Q So passing, quote, unquote passing one test, but  
24 showing two clues, but failing two other tests, you don't think  
25 that should be looked at in the totality of the circumstances?

1 A I think it should be looked at, yes.

2 Q As well as indicia of intoxication, such as odor --

3 A Odor is not an indicator of intoxication --

4 Q -- alcohol on someone's breath.

5 A -- counselor.

6 Q So it's not an indicator of intoxication.

7 A No, ma'am. It may be an indicator of consumption, but  
8 not necessarily intoxication.

9 Q Sure. Indicator of consumption, let's go with that.

10 So with the failure of two standard field sobriety tests, passing  
11 of one standard field sobriety test, you're saying that other  
12 indicators of consumption should not be looked at in the totality  
13 of the circumstances?

14 A No, ma'am, I didn't say it shouldn't be looked at.

15 Q Okay. So explain.

16 A Well you said indicators of intoxication or impairment  
17 or indicative of, I said it may be an intoxicated person will  
18 have an odor, but the odor of alcohol is not an indicator of  
19 intoxication, it may be an indicator of consumption. Not all  
20 persons who consume are intoxicated or impaired.

21 Q Now are you also stating that it is not thorough in an  
22 investigation to do additional testing not recognized by NHTSA?

23 A It's kind of contradictory to the curricula that's  
24 taught to do additional testing after the standardized testing,  
25 that's why I was explaining it's supposed to be pre-exit sobriety

1 testing because after the standardized testing, that's when the  
2 arrest, don't arrest decision, I'm not saying they can't and  
3 there's something that prohibits it.

4 Q And in fact if that wasn't done, you would have less to  
5 testify about today.

6 A If those were not done?

7 Q Um-hmm.

8 A I wouldn't be asked about it I'm sure.

9 Q Sure. So I want to talk a little bit about speeding.  
10 You talked about 24 nighttime driving behaviors that are  
11 indicative of intoxication, I believe that's what you said.

12 A Yes, ma'am.

13 Q And you said speeding isn't one of them.

14 A It's not one of the 24 listed.

15 Q Does that mean speeding is not dangerous?

16 A No, ma'am, I didn't say that.

17 Q So --

18 A It can be very dangerous.

19 Q And speeding 93 miles per hour in a 65-mile-per-hour  
20 zone at night could be dangerous.

21 A Yes, ma'am.

22 Q And is a reason for a stop based on all of your  
23 experience.

24 A Absolutely.

25 Q Now I want to talk a little bit about some things that

1 you mentioned that are, there are, you said, multiple indicators  
2 of sobriety and then some.

3 A Correct.

4 Q The standard field sobriety tests are designed to show  
5 intoxication at the threshold of a point 08; is that correct?

6 A They're designed to assist an officer, yes.

7 Q So assist an officer in showing intoxication.

8 A Determining an arrest, don't arrest decision, yes.

9 Q So they don't necessarily show sobriety, they show  
10 intoxication and they are showing clues of intoxication.

11 A Correct. And the absence of those clues can support  
12 sobriety.

13 Q But that's not what NHTSA says.

14 A Yes, it is, because NHTSA talks about all of the  
15 research evaluations are point 08 or higher and the original  
16 research was point 10 and higher, when you get down below that,  
17 the National Highway Traffic Safety Administration is very  
18 specific that there's not an association between a particular  
19 alcohol concentration --

20 Q So I'm not asking for, I think we're a little bit  
21 confused, where in NHTSA would it say that lack of a clue shows  
22 sobriety.

23 A I didn't say a lack of a clue --

24 Q Okay.

25 A -- I said --

1 Q So this is what I'm trying to clarify.

2 A Okay.

3 Q Does NHTSA say that a lack of a clue means sobriety?

4 A No, not a lack of a clue, just like the officer  
5 documented four out of eight, well, that means there's four clues  
6 that weren't present, no, that doesn't mean those four are going  
7 to show sobriety, the threshold is two, that's what I was talking  
8 about.

9 Q Sure. So on HGN, for example --

10 A Correct.

11 Q -- we've heard a lot of testimony and reviewed a lot of  
12 documents that said Mr. Johnson received two-out-of-six clues.

13 A Correct.

14 Q But those four clues that he passed don't necessarily  
15 show sobriety.

16 A I would disagree with that because an impaired person,  
17 with the statistics you showed show that 88 percent probability  
18 of impairment --

19 Q But is that what NHTSA says.

20 A Yes. You're the one, your witness testified to the 88  
21 percent.

22 Q That's not what I'm asking. I'm asking if NHTSA says  
23 that those four clues that Mr. Johnson did not score are clues of  
24 sobriety?

25 A You can't have one be true and the opposite not be

1 true, but that's --

2 Q I need you to answer my question.

3 A Go ahead and ask again. I'm sorry.

4 MR. COWARD: Your Honor, this is asked and answered.

5 THE COURT: I don't think it has been answered.

6 THE WITNESS: Go ahead.

7 Q (By Ms. Killean) Does NHTSA say that the four clues  
8 that Mr. Johnson did not score on HGN are signs of sobriety?

9 A No. What they say is that the threshold is four or  
10 more is indicative of impairment and intoxication.

11 Q At a point 08.

12 A Correct.

13 Q And that's intoxication under Colorado state law.

14 A Correct.

15 MS. KILLEAN: Nothing further.

16 THE COURT: Thank you. Any redirect?

17 MR. COWARD: Yes.

18 REDIRECT EXAMINATION

19 BY MR. COWARD:

20 Q Let's just close the loop on that and move on, NHTSA  
21 has a threshold of four, right?

22 A Yes.

23 Q Do they tell you what less than four means?

24 A It means that they have not met the impairment  
25 intoxication standard, they haven't met the arrest, don't arrest



1 decision. In fact, they fell below the arrest decision and  
2 should not be arrested based on two clues.

3 Q Thank you. In regards to the administration of the  
4 alphabet and counting tests, any sense, as an expert who has seen  
5 hundreds and thousands of stops, what's going on there with  
6 Officer Campbell and his decision to decide to administer those  
7 two tests at that point?

8 A I don't know what was in his head. His testimony is  
9 that he does it all the time. The objective tests are the three  
10 that are explained, HGN, walk and turn, one-leg stand.  
11 Additional testing may be used to gather additional evidence, but  
12 I don't feel comfortable speculating what his thought process was  
13 when he decided to do additional testing.

14 Q Fair enough. I appreciate that. Last question for  
15 you, you talked about getting paid to come and testify here  
16 today, are you going to reach a particular conclusion or testify  
17 a particular way just because you're getting paid?

18 A Absolutely not.

19 Q Okay. Would that have implications on your ability to  
20 continue in this career field?

21 A Yes. I think it's much more important to create  
22 integrity in both the courts and the legal community for  
23 longevity in this business and not just take money to testify.

24 Q Okay. All right.

25 MR. COWARD: Thank you, sir. I appreciate your

1 testimony.

2 THE WITNESS: Thank you.

3 THE COURT: Any recross?

4 MS. KILLEAN: No, Your Honor.

5 THE COURT: Any questions from the jurors? All right.

6 Sir, you may step down. Thank you.

7 THE WITNESS: Am I excused, Your Honor?

8 THE COURT: Yes, you are.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Thank you.

11 (WHEREUPON, the requested portion of the digitally  
12 recorded proceeding concluded.)

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TRANSCRIPTIONIST'S CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

DATED this 30th day of December, 2019.

/s/ Kristie R. Karol-Chik  
Kristie R. Karol-Chik  
Court Transcriber