

**IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,	:	
vs.,	:	Case No. _____
_____	:	
<i>Defendant.</i>	:	

**DEFENDANT’S BRIEF IN OPPOSITION TO THE STATE’S
MOTION FOR RECONSIDERATION AS TO THE EXCLUSION OF
HORIZONTAL GAZE NYSTAGMUS TEST EVIDENCE**

The State has not produced an appellate case in which an objection was made as to the admissibility of the HGN test in relation to its ability to predict impairment by drugs. Instead, the State has produced two cases, *Baker v. State*, 327 Ga. App. 280, and *Jones v. State*, 332 Ga. App. 449 (2015), in which HGN test was merely mentioned in relation to DUI-drugs investigation. In neither *Baker* nor *Jones* were our appellate courts called upon to rule upon the correctness of a trial court’s admission of HGN test evidence for the purpose of determining impairment by drugs.

The State’s reliance upon *Baker* and *Jones* is analogous to the attempt by the State in *Bravo v. State*, 304 Ga. App. 243, 696 S.E.2d 79 (2010), to gain the admission, based upon *Webb v. State*, 277 Ga.App. 355, 626 S.E.2d 545 (2006), of the arresting officer’s testimony of her numeric BAC based on an HGN test. In *Webb*, the defendant’s attorney did not make an objection based upon *Harper* to the admissibility of testimony regarding a numeric BAC based on an HGN test. The defendant’s attorney in *Webb* objected that the evidence was not relevant. The Court in *Bravo* made it clear that we cannot rely upon a case in which a relevancy objection is at issue for the purpose of determining the admissibility of evidence under *Harper*:

Here, the trial court denied Bravo's motion in limine to exclude Nash's opinion regarding his specific BAC after reviewing case law, relying specifically on *Webb v. State*. In *Webb*, the defendant appealed the denial of her motion in limine to exclude the arresting officer's testimony of her numeric BAC, which the officer based on an HGN test, arguing that the evidence was irrelevant because she was charged with DUI less safe, not DUI per se. This Court affirmed, holding that "the evidence of Webb's blood alcohol level was probative of the 'less safe' DUI charge."

The opinion is very clear, however, that Webb's objection to the evidence at issue was based on relevancy, as opposed to the argument in the instant case, which is whether Nash's method of estimating a specific numeric BAC based on an HGN test can "be verified with such certainty that it is competent evidence in a court of law."

Indeed, as the trial court noted, the *Webb* decision specifically stated that

[w]e do not wish to imply that a trial court must always admit numerical evidence of a defendant's blood alcohol content adduced by an HGN test.... The HGN test is a procedure that has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol. *It may be an open question, however, whether the HGN test has reached a state of verifiable certainty in the scientific community as a basis for determining the numerical level of a driver's blood alcohol level.*

Thus, *Webb* does not stand for the proposition that the method of using an HGN test to establish a person's *specific numeric* BAC is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community.

Bravo v. State, 304 Ga. App. 243, 246-47, 696 S.E.2d 79, 82-83 (2010) (citations omitted).

As in *Bravo*, we cannot rely upon *Baker* or *Jones* for the proposition that a HGN test for impairment by drugs satisfies the *Harper* standard when the *Baker* and *Jones* only mentioned HGN testing and no objection or ruling was made on the admissibility of the evidence in those cases.

WHEREFORE, the Defendant respectfully requests that this Honorable Court denies the State's motion for reconsideration and excludes horizontal gaze nystagmus test evidence from the trial of this case.

RESPECTFULLY SUBMITTED, this 22nd day of October, 2015.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the Morgan County District Attorney's Office with a true and accurate copy of the foregoing brief by _____ delivery to Mr. _____ Burks.

This 22nd day of October, 2015.

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