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| SUPREME COURT, STATE OF COLORADO<br>101 West Colfax Avenue, Suite 800<br>Denver, Colorado 80202 | FILED IN THE<br>SUPREME COURT<br>MAY 18 2012<br>OF THE STATE OF COLORADO<br>Christopher T. Ryan, Clerk |
| Appeal from the District Court, Arapahoe County, Colorado<br>Judge Elizabeth Volz<br>Trial Judge: Judge Dana Murray<br>Case No. 09CV2334 | |
| WALTER JAMES TATE,<br><br>Petitioner<br><br>v.<br><br>THE PEOPLE OF THE STATE OF COLORADO<br><br>Respondent | σ COURT USE ONLY σ |
| Douglas K. Wilson, Colorado State Public Defender<br>Nicholas J. Sarwark, # 40608<br>Jennifer E. Longtin, # 43509<br>Deputy State Public Defenders<br>Arapahoe County Public Defenders<br>12350 E. Arapahoe Road, Centennial, CO 80112<br>Phone (303) 799-9001 Fax (303) 792-0822<br>E-mail: nicholas.sarwark@coloradodefenders.us<br>Jennifer.longtin@coloradodefenders.us | Case Number:<br>**2011SC382** |
| **APPELLANT'S REPLY BRIEF** | |

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# TABLE OF AUTHORITIES

**Cases**

In response to matters raised in the People's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief. The People's Answer Brief will be referred to as People's Answer Brief, P. ___.

## ARGUMENT

### I. In order to prevent manifest injustice and the abrogation of the people's constitutional rights, this Honorable Court must decline to rule that consciousness is a prerequisite to a Fourth Amendment seizure.

In this case, Officer Benda admitted that the placement of his patrol vehicle completely blocked Mr. Tate's vehicle into its parking space; it would have been impossible for Mr. Tate to leave without hitting the patrol vehicle. (10/5/09 p.31 lines 3-7). Officer Benda never claimed that he suspected Mr. Tate of any illegal conduct when he initiated an investigatory detention by blocking in Mr. Tate's vehicle and restricting his liberty of movement. Officer Benda was not responding to any reports of illegal activity. (10/15/09 p. 19 lines 14-22). The trial court found that the officer chose to block in Mr. Tate's vehicle; assuming this was a welfare check, blocking in Mr. Tate's vehicle in order to do so was completely unnecessary. To uphold the District Court's ruling would effectively reward bad police behavior, which is what the People seem to be putting forth as justification for that Court's decision. People's Answer Brief, P. 19.

The People cite three cases they feel support the District Court's ruling; *Huston v. Florida, G.M. v. Florida,,* and *Mackey v. Idaho.* These cases are not binding on this Court, nor do they stand for the proposition that a majority of other jurisdictions support the People's contentions. Furthermore, these cases are factually distinguishable from the case presented; however, that is not necessary here. The holdings in these cases are contrary to United States Supreme Court law, which was discussed extensively in the Appellant's Opening Brief. These two States have read a subjective standard into what is supposed to be an objective test; this Honorable Court should not agree to follow the People down this dangerous road. An individual's constitutional rights should not depend on their current state of awareness. A person is still a person while sleeping or unconscious, and that person is protected under the Constitution in either case; any rule to the contrary dangerously weakens Fourth Amendment protections for all.

The People state that, in the three cases cited above, "[t]he police in those cases had no reason to think that the suspects would be unaware of the unjustified police conduct... if a police show of authority does not constitute a seizure because the defendant is unaware of the police presence, it does not matter whether the show of authority was unjustified..." People's Answer Brief, P. 19. This reasoning is very dangerous for any society that prides itself in, and is built upon, a framework of individual rights in the face of State power. To propose that illegal

and unconstitutional showings of force on the part of the police are acceptable, just because the individual being seized was unaware of the seizure, condones excessive police intrusiveness into people's private lives. What prevents police from stating that someone was unaware of their actions if, at some point in an investigation, they realize their early activities were unconstitutional? Furthermore, in those situations, what defense does an individual have in a system that largely credits the words of its trained police officers over individual defendants? This situation can be avoided entirely, so long as this Honorable Court crafts a pervasive rule on Fourth Amendment Seizures. As long as one rule is in place, for every stop, for every circumstance, the balance of power necessary for the effective functioning of our State to citizen relationship will endure.

## II. This Court should address the issue of whether Officer Benda had reasonable suspicion to contact Mr. Tate; this case offers the Supreme Court an opportunity to refine previous rulings on this issue.

The People contend that *People v. Brown* supports a finding of reasonable suspicion in this case. In *Brown*, the court found that police had reasonable suspicion to contact a man who was unconscious in the driver's seat of a car, which was blocking a public sidewalk where the police were responding to a "shot-fired person down" call. *People v. Brown*, 217 P.3d 1252 (Colo. 2009). In this case, Officer Benda testified that he was patrolling a private, residential parking lot and observed a green Ford Explorer parked with the engine running; the Officer

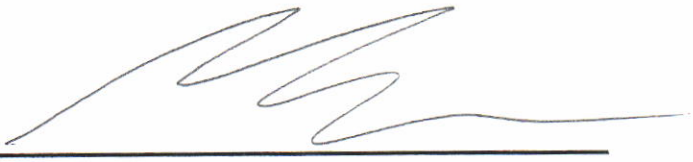
also said that there was a black male sleeping in the driver's seat. (10/15/09 p. 11 lines 3-6, lines 13-15).

The People state that *Brown* stands for the proposition that "reasonable suspicion...may arise...when a police officer sees a person asleep behind the wheel of a car with its engine running." People's Reply, P. 21, citing *Brown*, 217 P. 3d at 1256. Although this is true, this Court made that proposition permissive. *Brown* did not involve a lone man, sleeping in a parked car, in a private parking lot; in that case, the Court took many factors into account, including the position of the vehicle on the sidewalk, blaring music coming from the vehicle, and three apparently unconscious individuals. *Brown*, 217 P. 3d at 1256. Those factors are what lead the Court to find reasonable suspicion in that case; it was not merely that there was an individual asleep in his car. To compare *Brown* to this matter is akin to comparing a mountain to a mole hill. That is why the Court should take this opportunity to clarify that its ruling in *Brown* was not a bright line rule stating that sleeping in your car gives rise to reasonable suspicion of drunk driving in Colorado.

## CONCLUSION

For the reasons and authorities presented here and in the Opening Brief, Mr. Tate, through counsel, respectfully requests this Honorable Court uphold the initial suppression ruling of the County Court.

DOUGLAS K. WILSON
Colorado State Public Defender



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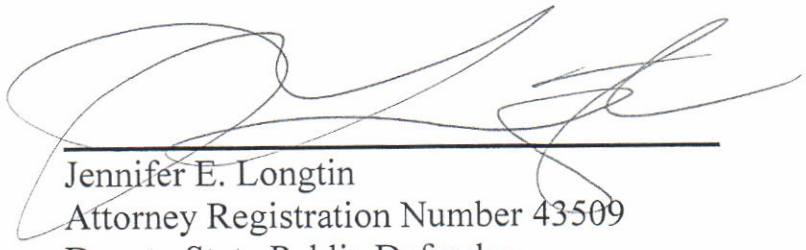

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Dated: May 18, 2012

## CERTIFICATE OF SERVICE

I certify that, on May 18, 2012, a copy of this Petitioner's Opening Brief was mailed to the attention of:

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6450 S Revere Parkway
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Nicholas J. Sarwark, #40608

## CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I, Nicholas J. Sarwark, certify that this document complies with the word limit set forth in C.A.R. 28. This document contains 1,338 words.

Nicholas J. Sarwark, #40608