SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Appeal from the District Court, Arapahoe County, Colorado Judge Elizabeth Volz Trial Judge: Judge Dana Murray Case No. 09CV2334	
WALTER JAMES TATE, Petitioner v. THE PEOPLE OF THE STATE OF COLORADO Respondent	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender Nicholas J. Sarwark, # 40608 Jennifer E. Longtin, # 43509 Deputy State Public Defenders Arapahoe County Public Defenders 12350 E. Arapahoe Road, Centennial, CO 80112 Phone (303) 799-9001 Fax (303) 792-0822 E-mail: nicholas.sarwark@coloradodefenders.us Jennifer.longtin@coloradodefenders.us	Case Number: **2011SC382**

PETITIONER'S OPENING BRIEF

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Petitioner Walter James Tate, through counsel, Nicholas J. Sarwark and Jennifer E. Longtin, submits the following Opening Brief in the above-captioned case.

ISSUES PRESENTED

I. Whether the District Court erred in finding that a person must be conscious and awake to be seized under the Fourth Amendment?

II. Whether the District Court erred in finding that there was reasonable suspicion for an officer to contact the petitioner based on observing a parked vehicle, with the engine running and a man apparently asleep at the wheel?

STATEMENT OF THE CASE AND THE FACTS

On February 8, 2009, at approximately 4:30 a.m., Officer Benda of the Aurora Police department drove through a private, apartment-complex parking lot. (10/5/2009 p. 11 lines 3-6). While driving through the parking lot, he observed a green Ford Explorer that appeared to have its engine running. (10/5/2009 p. 11 lines 13-15). He observed a black male, in the vehicle, who appeared to be sleeping in the driver's seat. (10/5/2009 p. 11 lines 19-20). The officer pulled directly behind the green Ford Explorer and parked perpendicular to the vehicle and the occupant. (10/5/2009 p. 19 lines 23-25, p 20 lines 1-4). There were unoccupied,

parked vehicles directly in front of, to the left, and to the right of the Explorer. (10/5/2009 p. 30 lines 22-25, p. 31 lines 1-2). The green Ford Explorer was completely blocked in by the four vehicles; it would not have been able to leave the parking space without hitting Officer Benda's car. (10/5/2009 p. 31 lines 3-7, p. 31 lines 18-20).

Officer Benda asserted that there had been reports of vehicle break-ins; however, he stated that there was no report on the specific day in question, nor was he dispatched to the area on a report. (10/15/09 p. 19 lines 14-22). While still inside his car, Officer Benda used his spotlight to illuminate the interior of the Ford Explorer. (10/5/2009 p. 11 lines 23-24). Officer Benda exited his car, approached the driver's side of the Explorer, and allegedly observed, "several open or empty Miller Genuine Draft beer cans in the passenger side of the vehicle." (10/5/2009 p. 12 lines 5-9, 12-13).

Officer Benda knocked on the window; he then asked the occupant to wake up and roll the window down. (10/5/2009 p. 12 lines 15-16, p. 13 line 1). The officer asked Mr. Tate to turn off the vehicle and he complied. (10/5/2009 p.13 lines 2-3). Mr. Tate shut off the engine of the vehicle, and then opened the door of the vehicle. (10/5/2009 p. 13 lines 21-22). The officer then observed—for the first time—an odor of alcohol coming from the interior of the vehicle, as well as from Mr. Tate. (10/5/2009 p. 13 lines 21-24). Officer Benda claims that Mr. Tate

appeared confused, tired, and had difficulty balancing upon exiting the vehicle. (10/5/2009 p. 13 lines 21-24, p. 14 lines 6-8).

A motions hearing was held on October 5, 2009. The trial court found that Officer Benda fully blocked Mr. Tate and his vehicle into the parking space; thus, he could not leave the scene, nor avoid the encounter with Officer Benda. (10/5/2009 p. 42 lines 10-12). The trial court found that, because Mr. Tate was completely barred from leaving the scene, Officer Benda did not engage Mr. Tate in a consensual encounter. (10/5/2009 p. 43 lines 1-3). The trial court held that an objective standard is one of a reasonable person, which takes into consideration the facts and circumstances surrounding the encounter. This standard does not necessitate a subjective inquiry into whether or not Mr. Tate, under those circumstances, was aware that his car had been blocked in by Officer Benda. (10/5/2009 p. 42 18-23, p. 38 lines 12-16). The trial court further ruled that, even though there were reports of vehicle break-ins, the facts and circumstances known by Officer Benda at the time were insufficient to lead the officer to believe that Mr. Tate may be engaging in vehicle break-ins. (10/5/2009 p. 43 lines 7-12). The trial court held that Officer Benda did not have a specific articulable basis to believe that a crime had been, or was about to be, committed when he blocked in Mr. Tate's vehicle and restrained his freedom of movement. (10/5/2009 p. 43 lines 16-18). The trial court found this to be a non-consensual encounter in violation of the

Fourth Amendment and granted Mr. Tate's motion to suppress. (10/5/2009 p. 43 lines 18-19).

The government filed a Notice of Interlocutory Appeal and Designation of Record on October 20, 2009. (v. 2, p. 13). The District Court issued an Opinion and Order reversing the trial court on March 10, 2011. Petitioner's petition for rehearing was denied on May 2, 2011.

Petitioner filed a Petition for Writ of Certiorari on June 1, 2011. On June 6, 2011, Petitioner filed a Motion to Accept Petition for Writ of Certiorari and Record Out of Time, which was granted by this Honorable Court on July 26, 2011. Petitioner's petition for Writ of Certiorari was granted on December 12, 2011.

SUMMARY OF THE ARGUMENT

The District Court incorrectly applied the reasonable person standard as it relates to seizures under the Fourth Amendment. The court utilized a subjective reasonable person standard, relying on persuasive authority from earlier case law, and not the objective standard used by the United States Supreme Court in subsequent cases. The use of a subjective, rather than objective, reasonable person standard is in direct contradiction to the current bright line rule in this area of law, causing confusion for both the courts and the police.

Although there are some cases that use the consciousness of an individual in the analysis of a seizure, those cases are specific to emergency first responders. First responders are not trained in police procedure, not interested in investigating a possible crime, and not concerned with issues other than the immediate health and safety of an individual. Police have different duties and requirements in their position as law enforcement officers. Therefore, cases involving first responders should be distinguished from Fourth Amendment seizures performed by law enforcement officers.

Finally, there is nothing in the record which would have given Officer Benda reasonable suspicion to contact Mr. Tate. Reasonable suspicion must be based on specific articulable facts indicating a crime is being, or about to be, committed; these facts must be known to the officer prior to contact. There is no record of any such facts in the present case.

ARGUMENT

I. Mr. Tate was seized when Officer Benda parked behind his vehicle, preventing Mr. Tate from leaving his parking space and terminating the police encounter.

The United States Supreme Court has held that, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed

that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). So long as a person remains free to disregard police questions, "and walk away," there is no intrusion upon that person's liberty. *Id.* In *Mendenhall*, the defendant was approached in a public concourse, by agents wearing plain clothes, and displaying no weapons; these agents requested to see the defendant's identification and ticket. *Id.* at 555. The court held that the defendant had not been seized when she was approached in this manner. *Id.*

Here, 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 him to leave without hitting the patrol vehicle. (10/5/09 p.31 lines 3-7). Applying the reasoning in *Mendenhall,* Mr. Tate was seized when Officer Benda parked his police cruiser behind Mr. Tate's vehicle, which was surrounded on all sides by other parked cars, preventing him from leaving.

While there is not a Colorado Supreme Court case directly on point, other courts have come to similar conclusions. In *United States v. See*, the Sixth Circuit held that evidence from a stop should be suppressed because the officer's action of blocking the defendant's vehicle into a parking space amounted to a *Terry* stop, and the stop was not supported by reasonable suspicion. *U.S. v. See*, 574 F. 3d 309, 315 (6th Cir. 2009). In *See*, an officer was patrolling a public-housing development when he saw a parked vehicle with three people in it; the vehicle was

unlit and had been backed into a parking space. *Id.* at 311. The officer pulled his patrol car in front of the vehicle, preventing the vehicle from leaving the parking space. *Id.* at 312. The court concluded that, because the officer was not responding to a complaint, did not suspect the occupants of the vehicle of a specific crime, and had not seen any of the occupants do anything suspicious, that, under a totality of the circumstances analysis, there was no reasonable suspicion that criminal activity was occurring; therefore, the officer's stop was improper. *Id.* at 314. The concurrence in *See* stated that it was the act of parking the officer's patrol vehicle, so as to block the defendant from leaving, which transformed the officer's conduct into a *Terry* stop that was not supported by reasonable suspicion. *Id.* at 315 (Gilman, J, concurring).

In a subsequent case, *United States v. Gross*, the Sixth Circuit stated that an officer's conduct in blocking a vehicle into a parking space, while the defendant was seated in the vehicle, was a warrantless seizure of that defendant. *U.S. v. Gross*, 624 F.3d 309 (6th Cir. 2010). In *Gross*, a housing authority police officer on general patrol encountered a legally parked vehicle with the engine running. *Id.* at 312. There was no visible driver; however, the officer noticed a, "barely-visible passenger who was slumped down in the front-passenger seat," of the vehicle. *Id.* The officer parked his car directly behind the vehicle in question and turned on his police cruiser's spotlights. *Id.* at 313. The court determined that the officer did not

have a particularized and objective basis for the stop at the time he parked his police cruiser behind the defendant's vehicle stating; "any purported community-caretaking function in this instance could have been accomplished through a consensual encounter rather than an investigative stop." *Id.* at 316-17. Therefore, the court held that the officer's actions constituted an unlawful seizure of the defendant.

The Court of Appeals of Minnesota has also addressed the issue of whether an officer effected a seizure when he parked behind a defendant, preventing the defendant from leaving. In *Klotz v. Commissioner of Public Safety,* an officer was responding to a radio report of a drunk driver when he found an unoccupied vehicle, matching the broadcasted description, at a rest area. *Klotz v. Commissioner of Public Safety,* 437 N.W.2d 663, 664 (Minn. Ct. App. 1989). The officer pulled forward and parked behind the vehicle, partially blocking it. *Id.* The defendant exited the vehicle and the officer told him to stop. *Id.* The court stated that, when police engage in actions that would not be expected between two private citizens, such as boxing a vehicle in and preventing it from leaving, it is likely that a Fourth Amendment seizure has occurred. *Id.* at 665. The court held that the, "officer's show of authority compels the conclusion that a seizure then occurred." *Id.*

These cases further the conclusion that Mr. Tate was seized at the moment his vehicle was blocked into its parking space by Officer Benda. As in *See* and *Gross*, Officer Benda could have performed any necessary inquiry without blocking Mr. Tate's vehicle into its parking space.

II. The District Court determined that, in order to be seized, the subject of the seizure must be conscious of the police action; however, *United States v. Mendenhall* and its progeny held that the proper reasonable person standard is objective and does not take into account the mental state of the person being seized.

The District Court utilized a subjective, reasonable person standard in deciding that Mr. Tate had to be conscious of the police's action in order to be seized. The court stated that the earliest moment at which Mr. Tate could have been seized was when he woke up, holding that consciousness is a necessary condition in interpreting police conduct. Because this conclusion is based on a subjective, rather than objective, standard, it is not supported by the controlling case law. The proper analysis under current United States Supreme Court precedent looks to the reasonable person's interpretation of police conduct alone, not the subjective individual's perception of police action.

Under Justice Stewart's test in *Mendenhall*; "an arrest requires *either* physical force ... *or*, where that is absent, *submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 612, 626 (1991) (emphasis original). The

existence of either element is sufficient to find a seizure; both do not have to be present. *California v. Hodari D.* involved a juvenile who was tackled by the police, freed himself, and then discarded cocaine while fleeing. The court determined that the defendant had not been seized for the purposes of the Fourth Amendment because he did not submit to the police assertion of authority. *Hodari* goes on to explain that *Mendenhall's* test is objective; "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Id.* at 628.

In *Michigan v. Chesternut,* the Supreme Court stated that, "[w]hile the test is flexible enough...it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). In *Chesternut,* the defendant ran upon seeing a police cruiser; officers accelerated to catch up to the defendant, who then discarded a package of pills. *Id.* at 569. This case further clarified the test in *Mendenhall,* stating that *Mendenhall's* reasonable person standard ensures that an individual's protection under the Fourth Amendment, "does not vary with the state of mind of the particular individual being approached." *Id.* When the test in *Mendenhall* is explained in this manner, it is clear that its 'reasonable person'

standard is objective, and does not take into account the mental state of the individual being seized.

Although it is alleged that Mr. Tate was asleep at the time he was seized, it is not his mental state that should concern the Court. Under an objective analysis, the Court must look to the circumstances surrounding the seizure from the perspective of a reasonable person. These circumstances included a uniformed and armed officer, who parked behind the defendant's vehicle, preventing it from leaving, and shined a spotlight into the vehicle before approaching. These circumstances would likely convince a reasonable person that they were not free to walk away from the police encounter. Because Mr. Tate's mental state is not relevant to this analysis, the District Court erred by taking it into account when determining whether Officer Benda effectively seized the Mr. Tate under the Fourth Amendment.

Under the ruling of the District Court, the police would be required to determine whether a person is subjectively aware of police actions before deciding how to proceed in a constitutional manner. This places the police in a position where there can be no consistency in their interactions with the public, a possibility soundly rejected by the Supreme Court because it would not, "allow the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Chesternut*, 486 U.S. at 574.

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 Fourth Amendment in either case. A rule to the contrary weakens Fourth Amendment protections for all persons and prevents police officers from knowing, with greater certainty, how to proceed in a constitutional manner.

III. The proposition from *Yam Sang Kwai,* that there is no seizure if the subject is unaware of the seizure, is not controlling and was decided prior to *Mendenhall.*

The District Court relied on *Yam Sang Kwai v. INS* for the proposition that, "[t]here can be no seizure where the subject is unaware that he is seized." *Yam Sang Kwai v. INS,* 411 F.2d 683, 686 (D.C. Cir. 1969). In *Yam Sang Kwai*, INS Agents surrounded the defendant's place of business; they were stationed at both the entrance and the exit of the building. However, "[t]he fact that [persons inside the building] might have been stopped had they attempted to leave," was not before the court. *Id.* This opinion included a strongly worded dissent;

> [n]or is it true that Fourth Amendment protection extend only to persons who know they have been seized by the authorities. An unconscious or feeble-minded person may in fact be arrested without knowing it; that does not mean that evidence obtained in such an arrest is not subject to exclusion where the arrest is made without probable cause.

Id. at 692 (Wright, J, dissenting). Furthermore, *Yam Sang Kwai* was decided eleven years before the *Mendenhall* test was developed by the Supreme Court; the *Mendenhall* test is binding precedent in this jurisdiction, *Yam Sang Kwai* is not.

IV. *Peete v. Metropolitan Government of Nashville* does not apply to the facts at bar because *Peete* involved paramedics acting as first-responders, not police officers; the actions of police officers are held to a higher constitutional standard than those of paramedic first responders acting in emergency situations.

In its opinion, the District Court cited *Peete v. Metropolitan Government of Nashville* for the proposition that a Fourth Amendment seizure requires conscious awareness of the police's conduct. *Peete* involved a federal civil rights suit brought against the Nashville fire department and paramedics after a patient died from being physically restrained by first-responders. *Peete v. Metropolitan Government of Nashville and Davidson County,* 486 F. 3d 217, 220 (6th Cir. 2007). In *Peete,* the victim was unconscious, due to a seizure, while the paramedic first-responders restrained him. The court held that, because the victim was unconscious at the time, he, "could not perceive any restraint on his liberty or otherwise feel compelled to submit to a governmental show of force." *Id.* at 221. However, *Peete* did not involve the police; it centered on paramedic first-responders. This distinction is an important one; medical personnel are concerned with saving the life of an individual, not enforcing the law. The case before this

Court involves a seizure by a police officer and should not be determined by the results of a case which involved only paramedic first-responders.

In a case subsequent to *Peete*, *McKenna v. Edgell*, the Sixth Circuit clarified the distinction between paramedics as first-responders and police as first-responders. *McKenna v. Edgell*, 617 F.3d 432 (6th Cir. 2010). In *McKenna*, two police officers responded to a report of a man having a seizure; the officers forcibly restrained the man and searched his home after he was removed from the scene by paramedics. The court held that the officers were not immune from a civil rights suit under *Peete* because they acted in a law-enforcement capacity and not in an emergency-medical-response capacity. *Id.* at 443. The court stated that, "the fact that a government agent is a police officer clearly matters in some cases-for example, when it bears on the question of whether a person is 'seized' under the Fourth Amendment." *Id.* at 439. Although the victim in *McKenna* was conscious, therefore the court did not apply *Peete's* proposition that consciousness is required for a seizure, *McKenna* clearly distinguishes *Peete* from the case at bar. Here, the contact with the defendant was made by a police officer; *Peete* involved paramedic first-responders, not police officers.

Other state courts have found a very limited exception to the Fourth Amendment for unconscious people experiencing an urgent medical emergency. In *State v. Auman*, the Minnesota Court of Appeals held that the warrantless search

of an unconscious individual is constitutional only when conducted as a response to emergency conditions. *State v. Auman*, 386 N.W.2d 818, 820-21 (Minn. Ct. App. 1986). In that case, the defendant was suspected of overdosing on an unidentified drug, acting irrationally, and needing restraint. *Id.* at 819. The defendant consented to an officer's search of his wallet; however, the officer exceeded the scope of the search and found drugs and drug paraphernalia in an eye glass case. *Id.* The court held that the emergency exception applied and found the officer's search to be constitutional. However, the court stated that the emergency exception only applied in certain cases, for example where a defendant was acting "wild" from an unknown drug, or where there was a person unconscious in the middle of a public street. *Id.* at 821.

In the case at bar, Officer Benda stated that she was checking on Mr. Tate's welfare because he was asleep in his vehicle and it was cold outside. (10/5/09 p.20 lines 7-14). These circumstances do not rise to the level of the emergency exception stated in *Auman*. Although *Auman* is not binding on this Court, this case provides valuable insight regarding the proposition that merely being asleep or unconscious does not suspend an individual's rights under the Fourth Amendment.

V. An officer does not have reasonable suspicion to justify an investigatory detention, even momentarily, when all they observe is a running, parked vehicle with a sleeping occupant.

Individuals have a right to be free from unreasonable searches and seizures. U.S. Const. Amend. IV; Colo. Const. Art. II §7. Arrests and investigatory stops or detentions constitute seizures implicating Fourth Amendment protections. *People v. Valencia-Alvarez*, 101 P.3d 1112, 1115 (Colo. App. 2004). An investigatory stop or detention is an encounter in which an officer contacts an individual to question him or her or to conduct a pat-down search for weapons. C.R.S. §16-3-103; *People v. King*, 16 P.3d 807, 814 (Colo. 2001).

A valid investigatory seizure must meet three critical requirements. First, the law enforcement officer may only stop a person when that officer has a reasonable suspicion the individual is committing, has committed, or is about to commit a crime. *See* C.R.S. § 16-3-103(1); *Terry v. Ohio*, 392 U.S. 1 (1968); *People v. Rahming*, 795 P.2d 1338 (Colo. 1983); *People v. Tate*, 657 P.2d 995 (Colo. 1983); *Stone v. People*, 485 P.2d 495 (Colo. 1971). Second, the purpose of the intrusion must be reasonable. *Id.* Third, the scope and character of the intrusion must be reasonably related to the purpose of the stop. *Id.*; *see also People v. Wells*, 676 P.2d 698 (Colo. 1984).

The reasonable suspicion for a stop must be based on specific and articulable facts known to the police officer prior to the intrusion, and any rationale inferences from those facts. *See People v. Garcia*, 789 P.2d 190 (Colo. 1990); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983). The facts articulated by the officer are

judged by an objective standard: would the facts available to the officer at the moment of the encounter cause a reasonable man to believe the stop and seizure was necessary? *People v. Mascarenas*, 726 P.2d 644 (Colo. 1986). A subjective and unarticulated hunch of criminal activity will not support the requirement that reasonable suspicion exist before the investigatory stop is made. *People v. Trujillo*, 773 P.2d 1086, 1090 (Colo. 1989). A mere hunch or guess that criminal activity is taking place is never enough to justify even an investigatory stop of a citizen. *Rahming*, 795 P.2d at 1341; *Trujillo*, 773 P.2d at 1090.

The District Court relies primarily on *People v. Brown* as supporting a finding of reasonable suspicion in this case. *People v. Brown*, 217 P.3d 1252, (Colo. 2009). 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 that was blocking a public sidewalk where the police were responding to a "shot-fired person down" call. *Id.* When the officers arrived on scene, they found a car resting against a fence and idling in reverse gear, partially blocking a public sidewalk, with loud music coming from the stereo, and three unconscious men slumped over in the car. *Id.* at 1254. *Brown* is markedly different than the present case. Officer Benda was not responding to an emergency call; he was driving through a parking lot. Unlike in *Brown,* where the officers' observations of the scene—three men slumped

over—could reasonably lead them to believe they were faced with the victims of a shooting, there was nothing alarming about Officer Benda's observations.

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. (10/15/09 p. 11 lines 3-6, lines 13-15). He asserted that there had been reports of vehicle break-ins in the area, but admitted that there had been no report on that specific day and he had not been dispatched to the area on any reports. (10/15/09 p. 19 lines 14-22).

Officer Benda states that he observed a black male sleeping in the driver's seat of the vehicle, but it is unclear from the record if he made that observation before or after he blocked in the vehicle with his patrol car and illuminated the parked car with his spotlight. Even assuming that it was before, the only information that Officer Benda had when he initiated an investigatory detention was that the car was parked and running, and that the individual in the vehicle appeared to be asleep. Officer Benda asserts that the only reason that he exited his patrol car and approached the vehicle was to check the welfare of the occupant. (10/15/09 p. 12 lines 5-9, p. 20 lines 10-14).

Officer Benda has never stated that he suspected the occupant of the vehicle of any criminal conduct before he used his vehicle to initiate an investigatory detention. The officer has never asserted that he suspected the sleeping occupant

to be intoxicated or driving under the influence until well after he had initiated an investigatory detention. All the reasons listed by the officer as giving rise to probable cause to arrest were observed after the officer initiated an investigatory detention by blocking in the vehicle and questioning Mr. Tate; these reasons cannot be considered in evaluating the officer's reasonable suspicion under *Garcia*, *Thomas*, and *Mascaranas*.

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; the officer solely asserted that he felt it necessary to check on the individual in the vehicle. Officer Benda was not responding to any reports of illegal activity, and Mr. Tate took no action to indicate that he needed or had any desire to be contacted by police. Initiating an investigatory detention without any belief that the person being detained is committing, has committed, or is about to commit a crime violates the first and most critical requirement for a valid *Terry* stop. The trial court found that the officer chose to block in Mr. Tate's vehicle. Even if Officer Benda was in fact only contacting Mr. Tate so as to check on his welfare, blocking in Mr. Tate's vehicle in order to do so was completely unnecessary and violated Mr. Tate's federal and state constitutional rights. Officer Benda's blocking in of Mr. Tate's vehicle also violated the second and third prongs of *Terry* and its progeny.

CONCLUSION

Wherefore, Mr. Tate requests that this Court reverse the ruling of the District Court and remand the case for further proceedings.

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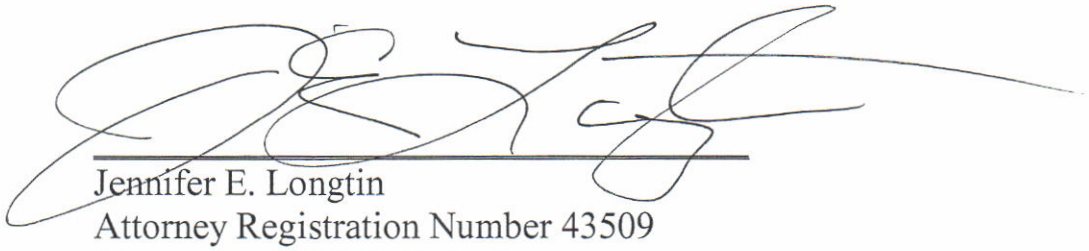

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Dated: January 20, 2012

CERTIFICATE OF SERVICE

I certify that, on January 20, 2012, a copy of this Petitioner's Opening Brief was mailed to the attention of:

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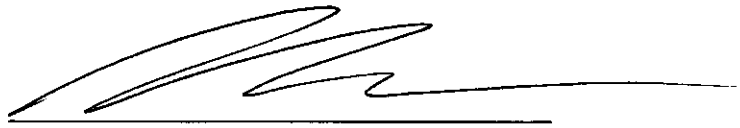

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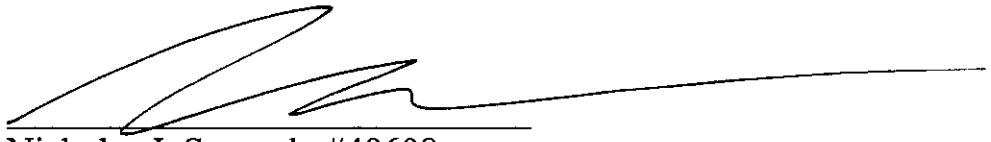

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