IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0741

THE WEST VIRGINIA STATE POLICE, DEPARTMENT OF MILITARY AFFAIRS and PUBLIC SAFETY,

Defendant Below, Petitioner,

v.

J.H., a minor, by and through his partner and next friend, L.D.,

Plaintiff Below, Respondent.

Appeal from an order of the Circuit Court of Berkeley County (CC-02-2019-C-161)

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

Respondent J.H.'s brief misses the mark and demonstrates a lack of understanding of the doctrine of qualified immunity. J.H. spends scant time in his response brief discussing the dispositive issue in this appeal: whether the facts alleged in the complaint, if true, establish a violation of clearly established law by Petitioner West Virginia State Police (the "State Police"). Instead, J.H. mostly discusses whether he pled sufficient facts to otherwise state a claim, all the while ignoring the State Police's entitlement to qualified immunity.

II. ARGUMENT

A. The State Police Has Standing to Bring This Appeal.

Before discussing J.H.'s argument on the merits, the State Police must first dispense with jurisdictional arguments by J.H. As an initial matter, J.H. incorrectly argues that the State Police does not have standing to argue that Defendants Michael Kennedy and Derek Walker (collectively, the "Trooper Defendants") are entitled to qualified immunity because they did not choose to appeal the orders denying their own motions to dismiss. (Resp. Br. 6-8). J.H. is wrong on both counts. First, the State Police is not appealing the denial of the Trooper Defendants' motions to dismiss on qualified immunity grounds but is appealing the denial of its own motion to dismiss. Second, the fact that the Trooper Defendants chose not to appeal the orders denying their motions does not preclude the State Police from appealing its own denial of qualified immunity.

The State Police has standing to assert this appeal because it is not appealing the denial of the Trooper Defendants' motions to dismiss on qualified immunity grounds. J.H. incorrectly argues that the State Police "has no standing to pursue claims of entities not parties to this appeal." *Id.* at 7. The State Police, however, is not pursuing the claims of the Trooper Defendants; it is

appealing the order denying its own motion to dismiss the vicarious liability count against it, which motion was based, in part, on the Trooper Defendants' entitlement to qualified immunity.[1]

J.H. correctly identifies the three elements of first-party standing: (1) "injury-in-fact," which is an invasion of a legally protected interest that is both (a) concrete and particularized, and (b) actual or imminent, as opposed to conjectural or hypothetical; (2) a causal connection between the injury and the conduct forming the basis of the action; and (3) a likelihood that the injury will be redressed through a favorable decision of the court. Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 84, 576 S.E.2d 807, 811 (2002); *see also*, *State v. Brandon B.*, 218 W. Va. 324, 328-29, 624 S.E.2d 761, 765-66 (2005) (applying *Findley* factors to determine party's standing to assert appeal). This Court recognizes that " 'when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue.' " *Findley*, 213 W. Va. at 95, 576 S.E.2d at 822 (quoting *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968)).

Here, the State Police—the party whose standing is placed in issue—is a proper party to request adjudication of the issue of whether the Trooper Defendants and, by extension, the State Police, are entitled to qualified immunity from J.H.'s claims. First, as set forth in the State Police's opening brief, it has suffered injury-in-fact. Because of the Circuit Court's order denying the State Police's motion to dismiss the vicarious liability count on the grounds of qualified immunity, the State Police has been, and undoubtedly will continue to be, required to participate in litigation and be subject to discovery as a party-litigant, the very demands the doctrine of qualified immunity is

[1] Another problem with J.H.'s standing argument is that it disregards that the State Police also moved to dismiss the negligent training and supervision count against it on the grounds of qualified immunity. Even if the State Police did not have standing to appeal the denial of qualified immunity as to the vicarious liability count, it clearly has standing to appeal the denial of qualified immunity as to the negligent training and supervision count, as that count was brought *only* against the State Police.

designed to prevent. (Pet'r's Br. 10). Second, the State Police has been forced to participate in this litigation as a direct result of the Circuit Court's order deferring the issue of qualified immunity and permitting discovery to proceed, despite its findings that the factual allegations in the complaint did not state a violation of clearly established law; thus, there is a direct causal connection between the State Police's injury and the order being appealed. *Id.* at 11-12. J.H. concedes as much. (Resp. Br. 8).[2] Finally, it is likely that the State Police's injury could be redressed by an order from this Court, reversing the Circuit Court's order.[3]

While the State Police bases its appeal of the vicarious liability count on language used in the orders denying the Trooper Defendants' motions to dismiss, as J.H. points out, the Circuit Court's earlier rulings—that there was an absence of well-pleaded facts in the complaint to determine whether the force applied was excessive and that a mere allegation of injury during the course of an arrest is not sufficient to particularly plead facts to overcome qualified immunity—were the law of the case at the time the Circuit Court denied the State Police's motion to dismiss. (Resp. Br. 7). *See State ex rel. Termnet Mech. Servs., Inc. v. Jordan*, 217 W. Va. 696, 702, 619 S.E.2d 209, 215 n.14 (2005) ("The law of the case doctrine provides that a prior decision in a case is binding upon subsequent stages of litigation between the parties in order to promote finality.");

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[2] J.H. questions whether the State Police's burden of litigation "as a custodian of records" is truly an injury. (Resp. Br. 8). The injury, however, is whether the State Police will suffer the burdens of litigation—and potential liability—as a party, not as a custodian of records. *See* Mot. to Stay Circuit Ct. Proceedings 7-8.

[3] In his response brief, J.H. incorrectly applies the adjective, "likely," of the *Findley* analysis to mean a likelihood of ultimate success on the merits, which he argues the State Police cannot show in the absence of discovery. (Resp. Br. 8). The actual language of *Findley* requires that it be "likely that the injury will be redressed through a favorable decision of the court," not that it be likely that the party actually will receive a favorable decision. Syl. Pt. 5, *Findley*. Applied to an appeal, then, the likelihood that matters is not the likelihood of an eventual success on the merits, but the likelihood that the injury that is the subject of the appeal—here, being forced to participate in litigation despite qualified immunity—will be redressed *if* there is a favorable decision of the court; that is: Is it likely that a favorable decision of the court before whom the appeal is taken will redress the injury that is being appealed? Here, there can be no doubt that this Court has the ability to redress the injury forming the basis of the State Police's appeal.

Noland v. Va. Ins. Reciprocal, 224 W. Va. 372, 378, 686 S.E.2d 23, 29 (2009) ("Although our doctrine of law of the case generally refers to issues that have previously been reviewed at the appellate level, the doctrine is equally applicable to issues that have been fully litigated in the [trial] court and as to which no timely appeal has been made.") (internal quotation and citation omitted). Given that the law of the case was that J.H. did not allege sufficient facts in the complaint to state a violation of clearly established law by the Trooper Defendants, the trial court was obligated to grant the State Police's motion to dismiss the vicarious liability count on qualified immunity grounds.

In addition, this Court has previously held that a party may appeal a court's ruling, even though the individuals who were directly affected by the ruling did not. In *Brandon B.*, the West Virginia Department of Health and Human Resources ("WVDHHR") appealed the dispositions of two juvenile cases, even though it was not a party to either. 218 W. Va. at 327, 624 S.E.2d at 764. Neither of the juveniles appealed his disposition. *Id.* at 328, 624 S.E.2d at 765. On appeal, the State of West Virginia and the two juveniles all argued that the WVDHHR did not have standing to bring the appeals on the grounds that the WVDHHR was a nonparty, and the two juveniles agreed with the dispositions so, therefore, the WVDHHR had no right to appeal. *Id.* The Court noted that the WVDHHR sought to litigate its own rights and was not seeking to enforce the rights of the juveniles. *Id.* Applying the three *Findley* factors, the Court concluded that the WVDHHR did have standing to pursue the appeal. *Id.* at 329, 624 S.E.2d at 766. *See also*, *Huddleston v. Maurry*, 841 S.W.2d 24, 30 (Tex. App. 1992) (noting in the context of qualified immunity in a vicarious liability claim, "Regardless of whether the individual appeals, the governmental agency should also have the right to an interlocutory appeal because *its* liability is based on the actions of its employees.") (emphasis in original).

Contrary to J.H.'s argument otherwise, the State Police does not seek to appeal the orders denying the Trooper Defendants' motions to dismiss. The State Police is appealing the denial of its own motion for qualified immunity, based upon the law of the case established in the Circuit Court's orders denying the Trooper Defendants' motions to dismiss. The State Police therefore has standing to bring this appeal.

B. J.H. Continues to Incorrectly Argue That the Circuit Court's Order Is Not Appealable Because It Deferred the Issue of Qualified Immunity Rather Than Expressly Denying the State Police's Motion on That Ground.

In his response brief, J.H. continues to indirectly argue that this Court improvidently granted the State Police's appeal of an interlocutory order because the Circuit Court did not flatly deny the State Police's entitlement to qualified immunity, but instead deferred the decision while permitting discovery to proceed. (Resp. Br. 1, 7, 11). J.H. adds another wrinkle to this argument, conceding that the Circuit Court never specifically addressed the negligent training and supervision count in its order denying the State Police's motion to dismiss, and then questioning how such an interlocutory "non-ruling" is appealable. *Id.* at 11.

The State Police fully addressed this argument in its response to J.H.'s motion to dismiss this appeal, which the State Police incorporates by reference. Suffice it to say for this reply that this Court holds that a trial court order denying a motion to dismiss "that is predicated on qualified immunity"—even if qualified immunity is not expressly addressed in the order—is subject to immediate appeal under the "collateral order" doctrine. Syl. Pt. 1, *W. Va. Bd. of Educ. v. Marple*, 233 W. Va. 654, 783 S.E.2d 75 (2015). Indeed, in *Marple*, the circuit court did not expressly address qualified immunity, but this Court nevertheless found that the lower court's order amounted to a denial of qualified immunity. *Id.* at 660, 783 S.E.2d at 81 n.5.

C. It Is Indisputable That the Circuit Court Improperly Considered Matters Outside the Pleadings When Deciding the State Police's Motion to Dismiss.

Although J.H. correctly points out that the Circuit Court order denying the State Police's motion to dismiss did not specifically refer to the "dashcam" video of the incident, it is nonetheless beyond doubt that the Circuit Court considered the video when deciding the motion. Moreover, the video at issue is not intrinsic to the complaint and, therefore, should not have been considered by the Circuit Court.

J.H. argues that a court speaks through its orders, and there is nothing in the order being appealed mentioning the dashcam video. (Resp. Br. 3-4). Consequently, argues J.H., the State Police cannot show that the Circuit Court committed error. *Id.* at 4.

While the order denying the State Police's motion to dismiss does not mention that the Court considered the dashcam video, it is beyond dispute that the court did. The Circuit Court stated as much on the record. (App. 000197:12-16). Furthermore, the court acknowledged that it "probably should" have included in the order denying the State Police's motion that it considered the video. *Id.*

J.H. goes on to argue that the Circuit Court did not err by considering the video because the video was intrinsic to the complaint. (Resp. Br. 4-6). The video at issue was *not* intrinsic to the complaint, even though it depicted events alleged in the complaint. J.H. would have the Court adopt a rule that any extrinsic material that describes the events alleged in the pleadings can be considered in a motion to dismiss. Under J.H.'s reasoning, a video that effectively *negated* a plaintiff's claim could be attached to a motion to dismiss and considered by a trial court without providing notice to the plaintiff and converting the motion to dismiss into one for summary judgment, as such a video would depict the events alleged in the complaint. This is not the rule in West Virginia.

When considering a motion to dismiss under Rule 12(b)(6), a trial court generally may not consider matters outside the pleadings. *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 536, 236 S.E.2d 207, 211 (1977). There are exceptions to the general rule, such as for materials that are attached to a complaint. Syl. Pt. 1, *Forshey v. Jackson*, 222 W. Va. 743, 744, 671 S.E.2d 748, 749 (2008). In addition, documents that are incorporated into a complaint by reference may be considered at the 12(b)(6) stage. *Id.* at 748, 671 S.E.2d at 753 (citing cases).

Here, however, J.H. never once referred to the video in the First Amended Complaint. (App. 000073-76). Therefore, it was not intrinsic to the complaint. Compare, *e.g.*, *Zsigray v. Cty. Comm'n of Lewis Cty.*, No. 2:16-CV-64, 2017 WL 462011, at *3 (N.D.W. Va. Feb. 2, 2017), *aff'd sub nom. Zsigray v. Cty. Comm'n of Lewis Cty., W. Virginia*, 709 F. App'x 178 (4th Cir. 2018) (considering video that was expressly mentioned in plaintiff's complaint when deciding motion to dismiss), *with Smith v. Roane Cty. Comm'n*, No. 2:18-CV-00950, 2019 WL 1301979, at *1 n.2 (S.D.W. Va. Mar. 21, 2019) (refusing to consider video at motion to dismiss stage when video was not referred to in plaintiff's complaint).

J.H. implies that the State Police waived any error related to the Circuit Court's consideration of the video at issue, noting that "Petitioner was on notice of the video," and that "Petitioner concedes its failure to object to the video." (Resp. Br. 6). While the State Police was on notice of the video, it was not on notice that the Circuit Court was going to *consider* the video when ruling on the motion to dismiss. J.H. presented the video as evidence in his response to Trooper Walker's motion to dismiss, but the Circuit Court did not indicate in its order denying Trooper Walker's motion that it had considered the video when making its ruling. To the contrary, the court's order stated that its ruling was "[b]ased solely on the amended complaint." (App. 000078). In addition, Rule 12 requires that a circuit court provide notice to the parties before

considering matters outside the pleadings. It is not uncommon for a court to receive, but not consider, matters outside the complaint in a motion to dismiss, as demonstrated by the *Smith* case cited above. Finally, the State Police did not concede that it failed to object to the video, but that it did not have the *opportunity to object* to the court's consideration of the video, as the court ruled before the State Police could file a reply brief. (Pet'r's Br. 7 n.2).

There is no doubt that the Circuit Court improperly considered matters outside the pleadings without providing notice to the State Police and converting the State Police's motion into one for summary judgment under Rule 56. For this reason alone, this Court should reverse the Circuit Court's order denying the State Police's motion to dismiss. In addition, as discussed below, the Circuit Court also erred by denying the State Police qualified immunity, an issue that J.H. hardly addresses in his response brief.

D. J.H. Does Not Address the Key Issue of Qualified Immunity in His Response Brief.

Nowhere in his response brief does J.H. address head-on the dispositive issue that is before the Court: Do the factual allegations in the First Amended Complaint, if true, state a violation of clearly established law—either by the Trooper Defendants as to the vicarious liability count, or by the State Police as to the negligent training and supervision count? Instead, J.H. practically ignores the qualified immunity question that is at issue and argues that he otherwise has provided a short, plain statement of his claim sufficient to survive a Rule 12(b)(6) motion. J.H.'s brief therefore misses the mark. The question is not whether it is "beyond doubt" that he "can prove no set of facts" to entitle him to relief, but whether the facts he has pled can overcome the State Police's entitlement to qualified immunity. *See* Resp. Br. 3. And as the Circuit Court unequivocally found, they cannot.

Citing to Syllabus Point 1 of *Hutchison v. City of Huntington*, J.H. argues that because this Court held that the ultimate determination of whether qualified immunity applies is a question of law "unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination,"[4] the Court necessarily envisaged "appropriate factual development . . . prior to a ruling on the issue[.]" (Resp. Br. 6). This argument is misplaced.

Here, there is no dispute about the facts that underlie the immunity determination. Nor can there be, as the question was posed in a motion under Rule 12(b)(6). It is axiomatic that there *cannot* be a factual dispute at the motion to dismiss stage because, for purposes of deciding a Rule 12(b)(6) motion, the allegations in the complaint "are to be taken as true." *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). Thus, it is impossible for there to be a factual dispute at the motion to dismiss stage.

Instead, the dispute here is whether the facts J.H. alleged in his pleading, if true, were sufficient to state a violation of clearly established law so as to overcome the State Police's entitlement to qualified immunity.[5] As to the vicarious liability count, the Circuit Court expressly found that the factual allegations were insufficient to state a violation of clearly established law by the Trooper Defendants, and by extension, the State Police. The Circuit Court made no findings as to the negligent training and supervision count, but nevertheless denied the State Police's motion to dismiss that count.

J.H. goes on to complain that while this Court requires "heightened pleading" by plaintiffs in cases that implicate immunity, the Court has not explained what "heightened pleading" means.

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[4] Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

[5] *See Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659 n.12 ("[W]here a plaintiff's complaint, even when accepted as true[,] does not state a cognizable violation of constitutional or statutory rights, then the plaintiff's complaint fails. If the complaint fails to allege a cognizable violation of constitutional or statutory rights it also has failed to state a claim upon which relief can be granted.")

(Resp. Br. 9, citing *Hutchison*, 198 W. Va. at 150, 479 S.E.2d at 660). This is simply not so. In the *Hutchison* decision itself, the Court stated that public officials and governmental agencies should be entitled to qualified immunity "unless it is shown by specific allegations that the immunity does not apply." *Hutchison*, 198 W. Va. at 147-48, 479 S.E.2d at 657-58. The Court further instructed that the specific allegations must "rest[] on more than conclusion alone." *Id.* at 150, 479 S.E.2d at 660 (internal quotation and citation omitted). Thus, "heightened pleading" means "specific allegations," not mere conclusions, that show qualified immunity does not apply. Furthermore, this Court has not hesitated to dismiss claims when the complaint did not meet the heightened pleading standard to overcome qualified immunity. *See, e.g., Jarvis v. W. Va. State Police*, 227 W. Va. 472, 481, 711 S.E.2d 542, 551 (2010) (reversing circuit court order denying motion to dismiss on qualified immunity grounds, noting that "this Court has applied qualified immunity to individual defendants where no constitutional rights violations were *alleged*") (emphasis added).

Similarly, J.H. impliedly argues that *Hutchison* requires defendants asserting qualified immunity to file a motion for a more definite statement under Rule 12(e) before filing a motion to dismiss under Rule 12(b)(6). (Resp. Br. 9). Neither *Hutchison* nor Rule 12(e) require a motion for a more definite statement, however. In *Hutchison*, this Court suggested that Rule 12(e) motions for a more definite statement—along with court orders under Rule 7(a) directing plaintiffs to file a reply to an answer asserting qualified immunity—"*can* speed the judicial process." 198 W. Va. at 150, 479 S.E.2d at 660 (emphasis added). The Court's direction was permissive, not mandatory. Similarly, Rule 12(e) itself is permissive: "the party *may* move for a more definite statement before interposing a responsive pleading." W. Va. R. Civ. P. 12(e) (emphasis added). Nothing in this Court's precedent or in the Rules of Civil Procedure require a motion for a more definite statement. Indeed, as the *Jarvis* case demonstrates, this Court has not required defendants asserting qualified

immunity to move for a more definite statement before moving to dismiss. *See also*, *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660-61, 783 S.E.2d 75, 81-82 (2015) (reversing denial of motion to dismiss on qualified immunity grounds when plaintiff did not identify clearly established law that was violated by defendant's alleged discretionary acts); *W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 203, 800 S.E.2d 230, 241 (2017) (same); *W. Va. Bd. of Educ. v. Croaff*, No. 16-0532, 2017 WL 2172009, at *6-7 (May 17, 2017) (memorandum decision) (same).[6]

J.H. cites to *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 479 (1998), for the proposition that this Court has "approved the practice of allowing discovery to assist the circuit court in determining whether it has jurisdiction over a matter." (Resp. Br. 10 n.9). As J.H. recognizes, *Bowers* involved a motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, not a motion to dismiss under Rule 12(b)(6) on the grounds of qualified immunity. *Bowers*, 202 W. Va. at 47, 501 S.E.2d at 483. Thus, the concerns of the burdens of litigation on public officials and agencies expressed in the doctrine of qualified immunity were not implicated. Additionally, the Court in *Bowers* did not permit general discovery, as J.H. seeks and as the Circuit Court granted here. Instead, the Court approved of only "limited jurisdictional discovery," and then only after the plaintiff met the "threshold criteria" of alleging the requisite jurisdictional contact in the complaint and by asserting "more than bare allegations of jurisdictional facts" in response to a Rule 12(b)(2) motion. *Id.* at 51, 501 S.E.2d at 487. To the contrary, the State Police is unaware of any instance when this Court approved permitting general discovery when the facts

[6] J.H. also argues on page 10 of his response brief, "In fact, Petitioner can cite to no authority for the immediate dismissal of well pleaded complaints that survive initial Rule 12(b)(6) scrutiny." This statement frankly makes no sense. If a complaint "survive[s] initial Rule 12(b)(6) scrutiny," then by definition, it was not dismissed. On the other hand, if a complaint was "immediate[ly] dismiss[ed]," it did not "survive initial Rule 12(b)(6) scrutiny."

alleged on the face of the complaint did not state a violation of clearly established law sufficient to overcome a defendant's entitlement to qualified immunity.

At no point in the response brief does J.H. identify specific factual allegations in the pleadings that would state a violation of clearly established law that, if true, would overcome the Trooper Defendants' entitlement to qualified immunity or the State Police's entitlement to qualified immunity from the direct claim against it of negligent training and supervision. As he did in the court below, J.H. merely refers to the "immutable, real time video of the facts presented in the complaint[.]" (Resp. Br. 11). Yet, the Circuit Court, despite apparently considering the video at issue, nevertheless found that J.H.'s complaint did not plead sufficient factual allegations to overcome the Trooper Defendants' entitlement to qualified immunity and, by extension, the State Police's entitlement to qualified immunity from the vicarious liability count. Furthermore, the video in no way speaks to any clearly established law purportedly violated by the State Police in its training and supervision of the Trooper Defendants. Indeed, J.H. virtually ignores this count in his response brief, as he did in the Circuit Court.

In his response brief, J.H. glosses over the dispositive issue before the Court—what factual allegations are in the complaint that, if true, state a violation of clearly established law by the Trooper Defendants or the State Police? He does not identify any such allegations in his brief. He does not point to any language in the order at issue that identifies clearly established law that was violated. He does not argue why the Circuit Court was incorrect when it held that there was "an absence of well-pleaded facts to allow the court to determine whether the physical actions visited upon J.H. was [*sic*] objectively reasonable force to effect an arrest or a gratuitous infliction of pain on a recalcitrant prisoner" and that "[a]n allegation of injury during the course of an arrest is not sufficient to particularly plead facts overcoming the immunity asserted" by the Trooper

Defendants, and by extension, the State Police. (App. 000063-64, 000078-79). Consequently, the State Police is entitled to qualified immunity from the claims brought against it by J.H. and should be dismissed from this case.

III. CONCLUSION

Respondent J.H. fails in his response brief to show any alleged violation of clearly established law by the Trooper Defendants or the State Police. Instead, he again argues that the State Police's appeal is premature, that the State Police has no standing to bring the appeal, and that the State Police has not shown that he cannot prove any set of facts that would entitle him to relief. He simply has not shown any reason why this Court should not reverse the Circuit Court's order denying the State Police's motion to dismiss on the grounds of qualified immunity.

WHEREFORE, Petitioner West Virginia State Police respectfully requests entry of an order reversing the order of the Circuit Court of Berkeley County and remanding the case for entry of an order granting the West Virginia State Police's motion to dismiss or, in the alternative, entry of an order reversing the order of the Circuit Court of Berkeley County and remanding for further proceedings.

Respectfully submitted this 29th day of January 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January 2020, I caused the foregoing "Petitioner's Reply Brief" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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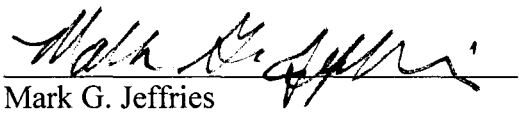

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