

Supreme Court No. 86610-4
Court of Appeals No. 29164-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

vs.

GILBERTO CHACON ARREOLA,
Respondent.

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APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John M. Antosz, Suppression Hearing

SUPPLEMENTAL BRIEF OF RESPONDENT
GILBERTO CHACON ARREOLA

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ORIGINAL

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A. SUPPLEMENTAL ISSUE PRESENTED

Whether a patrol officer, while responding to a report and observing no corroborating evidence of a possible intoxicated driver, improperly stopped the driver on a pretext when he pulled the driver over for having an unlawfully modified muffler when primarily motivated by the intent to further investigate the report.

B. STATEMENT OF THE CASE

City of Mattawa Police Officer Anthony Valdivia responded to a report of a possible DUI in progress, in Grant County, Washington. RP¹ 17, 19; 4/14/10 RP 41. The officer followed and eventually stopped a car matching the report description, which was being driven by the defendant, Gilberto Chacon Arreola.² RP 17–26.

Prior to trial, defense counsel filed a CrR 3.6 motion to suppress, contending that the stop was pretextual and therefore illegal. CP 17–25. In part, the officer testified at the suppression hearing as follows.

Officer Valdivia was dispatched during daylight hours of an early October evening to a “possible DUI in progress”, and given a vehicle

¹ The pre-trial and post-trial proceedings, including the suppression hearing, are contained in one volume and will be referred to as “RP ____”. The two days of trial are reported in two separate volumes and will be referred to by date, e.g. “4/14/10 RP ____”.

description. RP 18–20. He responded to an area several miles out into the county from the Mattawa city limits. RP 19, 42; 4/15/10 RP 30–31.

Officer Valdivia encountered the car southbound on Road R, about halfway between Roads 25 and 26, which run east and west. RP 20–21. As the officer came up behind, he immediately heard a loud noise from the car’s after-market exhaust, which is a traffic infraction.³ RP 34–35.

Officer Valdivia didn’t pull the car over for the muffler violation at that time because he “was intent on looking for visual cues with the report of the possible DUI.” RP 35–36.

The officer followed the car south for about 45 seconds, travelling a distance of approximately ½ mile, and saw no evidence of DUI driving. RP 21, 35.

The driver, Mr. Chacon, then made a legal left turn onto Road 26, heading eastbound. RP 21. As the car accelerated, the muffler noise increased. RP 41–42, 45. The officer followed the car onto Road 26 and

² The documents in the superior court file use the name “Gilberto Chacon Arreola” in the pleading captions. Because the defendant refers to himself as “Gilberto Chacon”, only the surname “Chacon” will be used throughout this brief. 4/14/10 RP 6.

³ “(3) No person shall modify the exhaust system of a motor vehicle in a manner which will amplify or increase the noise emitted by the engine of such vehicle above that emitted by the muffler originally installed on the vehicle, and it shall be unlawful for any person to operate a motor vehicle not equipped as required by this subsection, or which has been amplified as prohibited by this subsection. A court may dismiss an infraction notice for a violation of this subsection if there is reasonable grounds to believe that the vehicle was not operated in violation of this subsection.” RCW 46.37.390(3).

at some point activated his overhead lights and then his siren and “intersection clearing horn” to get the car to pull over. RP 22–23, 35.

Approximately three quarters of a mile after the left turn, Mr. Chacon parked in the yard of a residence on Road 26. RP 23. Officer Valdivia did not tell Mr. Chacon he was being stopped for having committed a traffic infraction, although the officer later issued a citation for the exhaust violation. RP 24–26.

The trial court denied the motion to suppress, and entered written findings of fact and conclusions of law. RP 62–69; CP 46–49. Following a jury trial, Mr. Chacon was found guilty of felony driving while under the influence as charged.⁴ CP 1, 74. The judge imposed a standard range sentence. RP 87.

Mr. Chacon timely appealed, challenging the denial of the suppression motion. CP 96–97; Brief of Appellant. The Court of Appeals, Division III reversed. State v. Gilberto Chacon Arreola, 163 Wn. App. 787, 798, 260 P.3d 985 (September 15, 2011). Division III upheld the trial court’s findings of fact, but disagreed with its conclusion that the stop was not pretextual under State v. Ladson. Chacon Arreola, 163 Wn. App. 796–97. The Court concluded that although “the trial court’s finding

that the muffler violation was ‘*an actual reason*’ for the stop, it was clearly subordinate to [Officer Valdivia]’s desire to investigate the DUI [driving while under the influence] report. The muffler violation therefore cannot be characterized as *the* actual reason for the stop under Ladson.” Chacon Arreola, 163 Wn. App. at 797 (citation omitted, emphasis in original, bracketed material added). Division III went on to state:

In every case presenting a pretextual stop issue a traffic infraction will be offered as the justification, and thereby an actual reason, for the stop. The reasoning of Ladson compels the result that a traffic stop is without authority of law where it cannot be constitutionally justified for its primary reason (speculative criminal investigation) but only for some other reason (enforcing the traffic code) which is at once lawfully sufficient but only a secondary reason.

Chacon Arreola, 163 Wn. App. at 797.

The State filed a petition, and review was granted, 173 Wn.2d 1013, ___ P.3d ___ (February 7, 2012).

⁴ Prior to trial, the defendant pled guilty to Count 2, first degree driving with license suspended. CP 1, 76.

C. SUPPLEMENTAL ARGUMENT

1. Article 1, section 7's protection against warrantless seizures is violated when a traffic stop is used as a pretext to avoid the warrant requirement.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs ... without authority of law." "Authority of law" requires a valid warrant unless one of a few jealously guarded exceptions to the warrant requirement applies. In re Pers. Restraint of Nichols, 171 Wn.2d 370, 379, 256 P.3d 1131 (2011) (Fairhurst, J., dissenting). Pretextual traffic stops are prohibited by the Washington Constitution. WA Const. art. I, § 7; State v. Ladson, 138 Wash.2d 343, 353, 979 P.2d 833 (1999).

A pretextual traffic stop occurs when police make a stop, not to enforce the traffic code, but to conduct an investigation unrelated to driving. Ladson, 138 Wn.2d at 349. Pretextual stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations—violations for which the officer does not have probable cause." State v. Myers, 117 Wn. App. 93, 94-95, 69 P.3d 367 (2003). The Court in Ladson considered "whether the fact that someone has committed a traffic offense, such as failing to signal or eating while

driving, justifies a warrantless seizure which would not otherwise be permitted absent [the] ‘authority of law’ represented by a warrant,” and concluded it should not. Ladson, 138 Wn.2d at 352 (footnotes omitted). “T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason.” Id. at 351.

Pretextual stops do not violate the Fourth Amendment, so long as the underlying stop is based on an actual traffic violation. Whren v. United States, 517 U.S. 806, 809-13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Under the federal standard, the motivations of the individual officers involved are entirely irrelevant to the determination of the reasonableness of the stop. Id. at 812-13.

However, while pretext stops are permitted under the Fourth Amendment, they are not permitted under article I, section 7 of the Washington Constitution. Ladson, 138 Wn.2d at 352-53. Under the more restrictive state standard, courts are required to “look beyond the formal justification for the stop to the actual one.” Id. at 353. When determining if a stop is pretextual, courts look to the totality of the circumstances. Id.

at 358-59. The court must look both to the objective reasonableness of the officer's behavior and to the subjective intent of the officer. *Id.* at 359.

2. Under *Ladson*, the court must look to the primary motivation to determine whether a given traffic stop is pretextual.

Herein, Division III of the Court of Appeals accepted the trial court's findings that "Officer Valdivia's primary motivation in pulling the car over was to investigate the reported DUI"⁵ and that "the muffler violation was 'an actual reason'⁶ for the stop." *Chacon Arreola*, 163 Wn. App. at 796 (emphasis in original). Division III properly determined that whether Officer Valdivia would have pulled over Mr. Chacon for the muffler violation had he not been concerned about drunk driving was irrelevant to the pretextual stop analysis: "[O]ur concern is only with why the stop was made in this particular case. See *Myers*, 117 Wn. App. at 97." *Chacon Arreola*, 163 Wn. App. at 797; *Ladson*, 138 Wn.2d at 353 (a court is required to "look beyond the formal justification for the stop to the actual one" when assessing whether a stop is pretextual).

⁵ The full text is set forth at Finding of Fact 2.5, CP 47: "Officer Valdivia's primary motivation in pulling the car over was to investigate the reported DUI, but he would have stopped the vehicle anyway for the exhaust infraction even without the previous report. These are not inconsistent with one another. The officer's investigation of the DUI was not the sole reason for the stop."

⁶ The full text of the trial court's "finding" is set forth at Conclusion of Law 3.3, CP 48: "The muffler/exhaust violation was an actual reason for the stop because the court concludes the officer would have stopped the vehicle, once following it, even if he wasn't

In considering why the stop was made in this particular case, Division III determined that while the muffler violation was “*an actual reason*” for the stop, the violation was clearly subordinate to the officer’s stated primary motivation in pulling the car over to investigate the reported DUI. Chacon Arreola, 163 Wn. App. at 796–97. The Court concluded “the muffler violation therefore cannot be characterized as *the actual reason* for the stop under Ladson”, and the primary reason for the stop as stated by the officer was to further investigate the DUI report. Chacon Arreola, 163 Wn. App. at 797.

In forming this conclusion, Division III looked in part to Ladson’s observation that “in the analogous context of suppressing evidence obtained in pretextual searches that rely on the emergency exception, Washington courts have held that the search ‘must not be *primarily* motivated by intent to arrest and seize evidence.’” “ Chacon Arreola, 163 Wn. App. at 797 (emphasis by Division III, citations omitted). The Court also considered the obvious fact that “[i]n every case presenting a pretextual stop issue, a traffic infraction will be offered as the justification, and thereby *an actual reason*, for the stop.” Id. (emphasis added).⁴

Division III determined that the reasoning of Ladson “compels the result

suspicious of a DUI, and even though his primary purpose for stopping the vehicle was to further investigate a possible DUI.”

that a traffic stop is without authority of law where it cannot be constitutionally justified for its primary reason (speculative criminal investigation) but only for some other reason (enforcing the traffic code) which is at once lawfully sufficient but only a secondary reason.” Chacon Arreola, 163 Wn. App. at 797 (slight paraphrase of Ladson, 138 Wn.2d at 351). Based upon the facts herein, Division III properly concluded that the traffic stop was primarily motivated by intent to investigate for drunk driving and was therefore pretextual.

a. Petitioner’s position that a traffic stop that is actually motivated in part by a traffic infraction can never be pretextual disregards the *Ladson* standard and is an impermissible reversion to *Whren*.

Petitioner overall argues that where one of the actual reasons for the stop is the traffic violation, a traffic stop should never be considered pretextual. *See generally* Petition for Discretionary Review (“PFR”), pp. 6–12. Where the underlying stop is based on an actual traffic violation, a pretextual stop does not violate the Fourth Amendment. Whren, 517 U.S. at 809-13, 116 S.Ct. 1769, 135 L.Ed.2d 89. However in light of our constitution’s broader privacy guaranty under Article 1, section 7, Ladson holds that in any given case all of the reasons are relevant and must be evaluated to determine whether the “real reason” for the stop “justifies a

warrantless seizure which would not otherwise be permitted absent [the] ‘authority of law’ represented by a warrant.” Ladson, 138 Wn.2d at 351–52. To accept the State’s position would be an impermissible reversion to the lesser protection of the Fourth Amendment under Whren.

As a refinement of the preceding argument, Petitioner and Amici Curiae urge there should be special dispensation from the Ladson standard for law enforcement officers who are on routine patrol duty, where they might observe a traffic infraction and be suspicious at the same time that a more serious offense could be taking place. *See* PFR, pp. 1, 4–12; Memorandum of Amici Curiae (“Memo of A.C.”), pp. 2, 4–9.

Petitioner argues that without the exemption, a patrol officer may be discouraged from enforcing the traffic code just *because* he or she also suspects criminal activity; i.e. that the traffic stop will always be considered pretextual. PFR, pp. 11–12. To the contrary, because the Ladson standard focuses entirely on the particular facts of a given case, it may be easily applied to all law enforcement personnel, even those on routine patrol duty. This is evident in State v. Hoang, 101 Wn. App. 732, 6 P.3d 602 (2000), *rev. denied*, 142 Wn.2d 1027 (2001), a case cited as support by Petitioner and Amici Curiae (PFR, pp. 10–11; Memo of A.C., pp. 4–5).

In Hoang, a patrol officer on routine traffic control duties was parked in a neighborhood known for drug activity. He observed a car stop twice, appearing to talk to groups of individuals. Although he saw nothing being exchanged, the officer suspected that a possible drug deal was occurring. The officer watched as the car turned around in a cul de sac and then stop at a stop sign. When the driver, Mr. Hoang, failed to signal his left-hand turn, the officer immediately turned on his overhead lights and front flashers, and pulled the car over within a block. Cocaine was found during a search incident to Hoang's arrest for driving with license suspended. Hoang, 101 Wn. App. at 734–36. After a suppression motion, the trial court made unchallenged findings of fact that the officer was credible, was acting within the scope of his normal traffic control duties when he made the stop, and would have made the same decision to pull Hoang over for failing to signal a left-hand turn even if the officer had not just observed Hoang twice make contact with people on the street. The officer testified also that he would not have made the stop but for the failure to signal the turn. Hoang, 101 Wn. App. at 736–38.

On appeal, the court accepted the findings and, based on the entire record, concluded that the trial court had properly applied the standard required by Ladson in finding that the stop was not pretextual.

It is clear from the record that the trial court did consider the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his behavior ... In summing up its oral ruling, the trial court observed that, upon making the stop, the officer asked only the questions that would be asked on a routine traffic stop: Do you have a driver's license? May I see the vehicle registration? May I see the certificate of insurance? He asked no questions regarding what Hoang was doing in that area at that time of morning. We also observe that, unlike Ladson and DeSantiago⁷, here, the officer did not follow Hoang hoping to find a legal reason to stop him: Hoang made a left-hand turn without signaling right before the officer's eyes, and the officer immediately pulled him over, just as he would have for any other routine stop for a traffic infraction committed in his presence.

Hoang, 101 Wn. App. at 741–42.

Contrary to Petitioner's fears herein, the Hoang Court acknowledged that "even patrol officers whose suspicions have been aroused may still enforce the traffic code" under the Ladson standard.

Hoang's position in this appeal is tantamount to a contention that this court may look behind an unchallenged finding of fact that the traffic stop in question would have been made in any event, and conclude instead as a matter of law that the stop was unconstitutionally pretextual merely because the officer who made the stop first saw the vehicle while observing a narcotics hotspot and saw the driver of the vehicle engage in behavior that could be entirely innocent (such as asking for directions) or not entirely innocent (such as asking if drugs were for sale)--and because the officer, not being entirely naïve, suspected that the behavior was not entirely innocent. But Ladson does not stand for that proposition. Under Ladson, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as

⁷ State v. DeSantiago, 97 Wn. App. 446, 983 P.2d 1173 (1999).

enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation. Ladson, 138 Wn.2d at 357-58, 979 P.2d 833.

Hoang, 101 Wn. App. at 742.

The caveat— “[w]hat they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation”—is fact-specific and can be equally applied on a case-by-case basis to all law enforcement personnel regardless of the nature of the patrol in which he or she is engaged, either by assignment, or because his or her suspicion has been specifically aroused. The Hoang Court found that under its facts, the patrol officer did not use his suspicions of criminal activity in making the traffic stop and that therefore the stop was not pretextual. In the present case, however, the record is clear that the officer’s primary motivation for making the stop was to further investigate the reported DUI and therefore the stop *was* pretextual.

State v. Weber, 159 Wn. App. 779, 247 P.3d 782 (2011), is offered as further support by Amici Curiae (Memo of A.C., pp. 4–5) for the requested dispensation from the Ladson standard, but provides minimal substantive analysis. Procedurally, Division III sat in discretionary review

of a Superior Court decision made under Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) of a District Court's granting of a motion to suppress on the basis of a pretextual stop. The trial court found or concluded that the officer's motivation for the stop was not the alleged traffic infraction. Weber, 159 Wn. App. at 785.

Division III, on discretionary review of the superior court's ruling on the RALJ appeal that "sufficient evidence was presented to override the trial court's decision", appears simply to hold that where a trial court does not make a finding of an officer's actual motivation, the reviewing court cannot infer the actual motivation and therefore the reviewing court cannot make a finding one way or another on the issue of pretext under Ladson. Weber, 159 Wn. App. at 786–87, 791. Division III's two-person majority acknowledged the record and written findings/rulings in both courts below were incomplete. *See* Weber, 159 Wn. App. at 786–91. The dissent believed the superior court impermissibly substituted its own findings for those of the fact-finding court. Weber (Sweeney, J. dissenting), 159 Wn. App. at 791–95. Although Amici Curiae cites dicta from the case which promotes the traffic enforcement duties of patrol officers⁸, Weber is essentially not helpful to a discussion of the issue before this Court.

⁸ Memo of A.C., p. 5.

Petitioner cites State v. Nichols, 161 Wn.2d 1, 162 P.3d 1122 (2007) as additional authority for allowing an exemption from the Ladson standard for patrol officers performing their routine traffic duties. *See* PFR, pp. 8–11. Again contrary to the State’s argument, Nichols demonstrates that the Ladson standard may be easily applied to all law enforcement personnel, even those on routine patrol duty.

In Nichols, an officer saw a car pull into a parking lot, slowly drive around, and then return to the street. In doing so, the car violated several traffic code requirements by crossing over to the far lane instead of into the closest lane. Suspecting that the driver did not want to drive in front of the patrol car, the officer went in pursuit and activated his lights immediately upon catching up to the car. Nichols, 161 Wn.2d at 4–5.

The court concluded that there was no basis for finding a pretext stop.

The officer never said he began investigating the vehicle or its driver, or even that he thought of doing so, prior to seeing what he believed were several traffic infractions. There is no evidence in the record that [the officer] followed the vehicle because he suspected the driver was trying to avoid him. Although [the officer] noted his observation that it “appeared to [him] that the vehicle (driver) was trying to avoid driving in front of [him],” he did not say that this is why he pursued the vehicle. Rather, [the officer] reported that nearly concurrently with this observation the vehicle crossed the double yellow line and right away moved into the far right lane. [The officer] immediately pursued the vehicle and activated his lights as soon as he caught up with it.

Nichols, 161 Wn.2d at 10–11 (citation to record omitted).

This Court concluded there was no evidence that the officer was reacting due to his suspicions or performing anything other than routine patrol duties when he observed what he thought were traffic infractions. Nichols, 161 Wn.2d at 12. Thus, under the Ladson standard, it was objectively reasonable for the patrol officer to stop to investigate the turning violation. Id. at 12-13. In the present case, however, the record is clear that the officer *was* primarily motivated by his suspicions in making the stop and therefore the stop was pretextual.

In summary, Petitioner’s position that patrol officers on routine traffic duty who make traffic stops should somehow be exempted from the Ladson standard is unreasonable. If the circumstances of a traffic stop raise privacy concerns under WA Const. art. 1, sec. 7, Ladson requires that all circumstances be examined and meet constitutional requirements. As demonstrated by Hoang and Nichols, the courts are capable of applying the Ladson standard to a stop made by a patrol officer who both observed a traffic infraction and was at the same time suspicious that a more serious offense could be taking place. To hold that a traffic stop that is actually motivated in part by a traffic infraction can never be pretextual would be

an impermissible reversion to the more restrictive Fourth Amendment privacy analysis of Whren.

b. The position that pretext is never an issue when an officer stops a citizen for a traffic infraction in order to investigate a *driving-related* crime also disregards the *Ladson* standard.

Amici Curiae appear to suggest the pretext analysis of Ladson should never apply to a patrol officer who suspects a violation of the traffic code such as impaired driving⁹ while observing a “blatant” traffic code violation. Amici Curiae posit the officer would somehow face an impasse where he or she “must either make the stop—risking that it may be later held ‘pretextual’, or decline to enforce the traffic code.” Memo of A.C., p. 5. This “would be an untenable situation for lower courts, law enforcement officers, and citizens who travel on Washington’s roadways” and “will chill the enforcement of traffic laws to the detriment of public safety.” Memo of A.C., p. 5, 8.

However, cases such as Nichols, supra, demonstrate that patrol officers may ably enforce Washington’s traffic laws while still observing the constitutional rights of its citizenry. The protection of Ladson is not limited to suspicion of non-traffic code criminal activity. *See Chacon*

⁹ The DUI statutes are found in the traffic code, chapter 46.61 RCW.

Arreola, 163 Wn. App. at 797–98. Rather, Ladson aims to thwart all “search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason.” Ladson, 138 Wn.2d at 351. As Division III observed herein, “the rationale of Ladson cannot be reconciled with the State’s position that an officer lacking probable cause to stop a driver in order to investigate a *driving-related crime* may rely pretextually on a civil traffic infraction for an investigatory stop.” Chacon Arreola, 163 Wn. App. at 798. To accept the State’s position would be an impermissible reversion to the lesser protection of the Fourth Amendment under Whren.

3. Division III properly applied the *Ladson* test.

Officer Valdivia followed Mr. Chacon’s blue Chevy Cavalier for over a half mile because it fit the description of a car reportedly driven by a suspected drunk driver. While watching for signs of impaired driving, the officer notice the car was equipped with a modified muffler in violation of state vehicle equipment requirements. Without having seen any evidence of impaired driving, the officer pulled over Mr. Chacon with the primary motive of investigating whether he was driving under the

influence of alcohol (DUI), in violation of RCW 46.61.502. At a hearing on Mr. Chacon's motion to suppress the State's evidence, the officer testified that the muffler was an additional reason for the stop and, hypothetically, would have caused him to stop and cite Mr. Chacon even absent suspicion of drunk driving. Chacon Arreola, 163 Wn. App. at 789.

Division III properly determined that even accepting the trial court's finding that the muffler violation was "*an actual reason*" for the stop, the reason was clearly subordinate to Officer Vildavia's desire to investigate the DUI report. Because the officer's primary motivation in pulling the car over was to investigate the reported DUI, Division III properly concluded that the traffic stop was pretextual. Chacon Arreola, 163 Wn. App. at 797. "The traffic stop that yielded the evidence on which the State charged Mr. Chacon was without authority of law because the reason for the stop—to investigate for drunk driving—was not exempt from the warrant requirement." Id. at 798.

D. CONCLUSION

For the reasons stated here and in his Brief of Appellant, Mr. Chacon asks this Court to affirm Division III's reversal of the conviction, and remand for dismissal of the charge with prejudice.

Respectfully submitted on March 29, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 29, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of respondent:

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Hi, Mr. Carpenter:

I am attaching Mr. Chacon's Supplemental Brief in this matter for filing. The proof of service is on the last page, showing that I am e-serving the brief on Mr. Hill, Ms. Loginsky and Ms. Williams. My client's copy is being sent through the mail. Oral argument is currently scheduled for Tuesday, May 22, 2012, as the 3rd case.

If you have any questions, please let me know. Thank you for your assistance in this matter.
Susan Gasch