No. 08-17790

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIO DINERO SESSOMS,
Petitioner and Appellant,

v.

D. L. RUNNELS, *et al.*,
Respondents and Appellees.

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR REHEARING EN BANC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
The Honorable John A. Mendez, United States District Judge
Docket No. CIV S-05-1221 JAM GGH P

Before the Honorable Betty B. Fletcher, Richard C. Tallman
and Johnnie B. Rawlinson, CJJ
Panel Opinion filed June 3, 2011 by Judge Tallman; dissent by Judge Fletcher

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel states:

1. The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional bar association for the criminal defense bar, with over ten thousand members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

2. The NACDL is not a publicly held company; does not have any parent corporation; does not issue or have any stock; and does not have any financial interest in the outcome of this litigation.

Dated: July 28, 2011

Respectfully submitted,

s/ Peter C. Pfaffenroth
Peter C. Pfaffenroth

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with members nationwide, including private criminal defense lawyers, public defenders, and law professors. Among its objectives is ensuring that citizens' invocations of the privilege against self-incrimination are honored.

SUMMARY OF ARGUMENT

A majority of the panel concluded that the deference to state court decisions required by AEDPA, 28 U.S.C. § 2254(d)(1), bars habeas relief in this case. Yet the Supreme Court has squarely held that AEDPA deference does not apply, and *de novo* review governs, where the state court applies the wrong legal standard.

Here, the state court plainly applied the wrong standard. It analyzed Tio Sessoms' statements as if they arose *after* he had already waived his *Miranda* rights. In such a circumstance, when police are tasked with deciphering whether a suspect has changed his mind, a witness must "unambiguous[ly] request" counsel. *Davis v. United States*, 512 U.S. 452, 459 (1994); *see People v. Sessoms*, No. C041139, 2004 WL 49720, at *3 (Cal. Ct. App. Jan. 12, 2004). But Sessoms had never waived his rights; indeed, he had already invoked them when taken into custody by Oklahoma police five days earlier. The invocation at issue occurred *before* the California detectives read him his rights, and before any waiver of them occurred. In such circumstances, the law is clear that if a witness "indicates in any

manner" that "can reasonably be construed to be an expression of a desire for the assistance of an attorney," questioning must stop. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

The panel's erroneous application of AEDPA is of profound importance to the rule of law, and fully warrants rehearing en banc. It is obvious that Sessoms' declaration "… uh, give me a lawyer" (E.R. 96) indicates "a desire for the assistance of an attorney." In parsing his statements word by word, like a statute drafted by lawyers, rather than as a complete thought expressed by a witness under great stress, the courts erred. A writ of habeas corpus should have been granted.

Granting of the writ is all the more important here because Sessoms is among those whom the Supreme Court has recognized are most vulnerable to the loss of their constitutional rights. *See Miranda*, 384 U.S at 471-73; *Davis*, 512 U.S. at 460; *cf. J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2398-99 (2011). The older, hardened, repeat offender will know, from experience, that he can resist the repeated efforts of law enforcement personnel to talk him out of the invocation of his right to counsel. But those like Sessoms–the young, the uneducated, those with limited language skills or other impediments–are least likely to stand by their initial invocation of rights. The Sacramento detectives who questioned Sessoms did so in accord with training given to California police about techniques for circumventing *Miranda*'s protections. This Court, en banc, should rehear this case

to ensure that those misguided efforts are not validated and reinforced through the insulation from justice that this misapplication of AEDPA provides.

ARGUMENT

When a witness has not yet waived his *Miranda* rights, the standard for invoking the right to counsel is "not a rigorous one." Op. at 7371 (Fletcher, J., dissenting). Here the questioning detectives, who had just flown in to Oklahoma from Sacramento, fully realized that Sessoms had expressed a desire for counsel. Yet, rather than respect his stated desire, as *Miranda* requires, they proceeded to advise him *against* bringing in a lawyer because then Sessoms would not get to tell his "version of it." E.R. 100. They then continued, later securing a full confession.

This interview is not a one-time event. Rather, it is a textbook example of the questioning tactics that police have been trained to use in the hope that, even if a confession is excluded, it can still be used for impeachment. To let the state court's and the panel's decisions stand is to validate these sharp practices. If the *Miranda* right to counsel is to survive in state proceedings, the Court should rehear this case en banc.

I. The State Court's Decision Is Contrary To And An Unreasonable Application Of Supreme Court Precedent.

The state court's decision is contrary to and an unreasonable application of Supreme Court law. The state court relied on *Davis*, 512 U.S. at 459, to require "an unambiguous request." *Sessoms*, 2004 WL 49720, at *3. Yet the panel

majority and dissent agree *Davis* plays no role here, *see* Op. at 7353; *id.* at 7379 (Fletcher, J., dissenting), for it "applies only *after* the police have already obtained an unambiguous and unequivocal waiver of *Miranda* rights." *United States v. Rodriguez*, 518 F.3d 1072, 1074 (9th Cir. 2008).

That distinction is dispositive here. In the pre-waiver context at issue here, a witness may request counsel "in any manner," *Miranda*, 384 U.S. at 444-45, and once he has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself further initiates communication, exchanges or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

After Sessoms invoked his right to counsel, it was the detectives, and not Sessoms, who continued the interrogation. Detective Woods kept Sessoms talking by warning how a lawyer might hinder Sessoms from telling his "version of [the story]." E.R. 100; *see also Smith v. Illinois*, 469 U.S. 91, 100 (1984) (per curiam) ("an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself"); *Anderson v. Terhune*, 516 F.3d 781, 790 (9th Cir. 2008) (en banc) (post-invocation "follow-up questions allowed the officer to avoid honoring the Fifth Amendment and, as in a right to counsel situation, enabled 'the authorities through "badger[ing]" or

"overreaching"–explicit or subtle, deliberate or unintentional–[t]o wear down the accused and persuade him to incriminate himself'")(quoting *Smith*, 469 U.S. at 98).

The state court erred as a matter of law in treating *Davis*, rather than *Miranda*, as the applicable rule of decision. *See Williams v. Taylor*, 529 U.S. 362, 397 (2000) (an unreasonable application of Supreme Court law includes one that "relied on [an] inapplicable exception"). The state court's decision was therefore entitled to no deference under AEDPA. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1410-11 (2011). Yet the panel still erroneously afforded AEDPA deference to the state court's "harsh" ruling on the "close question" of whether Sessoms invoked, Op. at 7359, without confronting the question directly, as it was required to do.

This case is not like *Harrington v. Richter*, where a federal court is faced with a summary or ambiguous state court opinion to which the federal court must assume that the correct legal test was applied. *See* 131 S. Ct. 770, 784-85 (2011). Here, the presumption that the state court applied the correct legal test is overcome by the state court's expressly erroneous application of *Davis*. *See id.*

It is no answer for the panel majority to contend that because the invocation standard established in *Miranda* and *Edwards* is a "general" one, the state court receives broad "'*leeway*'" in deciding whether to credit Sessoms' invocation. Op. at 7355 (quoting *Richter*, 131 S. Ct. at 786). Under AEDPA, "even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551

U.S. 930, 953 (2007) ("AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied'"). The *Miranda* rule was established to protect suspects, *see* 384 U.S. at 471-73, and it thus imposes on the *government* the "heavy burden" of proving waiver. *Id.* at 475; *accord Arizona v. Roberson*, 486 U.S. 675, 680 (1988); *see also Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (silence right must be "'scrupulously honored'"). In inverting the clear law that pre-waiver invocations must be generously construed in favor of suspects, the state court and panel erred. *Miranda*, 384 U.S. at 444-45.

In sum, the state court's decision was unreasonable because it relied on the wrong legal test, and it is thus subject to *de novo* review. *Panetti*, 551 U.S. at 948.

II. No Magic Words Are Required To Invoke The Right To Counsel.

Under the broad standard for invoking counsel that *Miranda* established and *Edwards* confirmed, Sessoms' invocation was plainly sufficient. The state court and the panel majority concluded otherwise only by misapplying the standard. They treated Sessoms' request for counsel–which the detectives interrupted as it was being made–as two separate statements that could be parsed, like a statute, under a non-existent standard that supposedly required at least one of the pieces standing alone to constitute a clear, unambiguous demand for counsel. This was error. Any statement that "can reasonably be construed to be an expression of a desire for the assistance of an attorney" must be heeded. *McNeil*, 501 U.S. at 178.

Moreover, Sessoms' statements also satisfy the *Davis* standard, even though it should not apply here. 512 U.S. at 459 ("a suspect need not 'speak with the discrimination of an Oxford don'"); *see* Op. at 7372 (Fletcher, J., dissenting). The courts' contortions to avoid evaluating Sessoms' contiguous statements as a complete thought were improper. *See* Pet. for Reh'g at 8-11; *see also Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam) (under *Miranda*, totality of circumstances test is used to evaluate whether suspect was in custody).

This error warrants en banc review, because such an exacting *post hoc* approach to parsing witnesses' statements threatens to render *Miranda* rights unattainable for countless suspects who attempt to invoke their rights but who, in the stress of the interrogation room, fail to use the perfect phrasing that, years later, a state court intent on admitting a confession may demand. Lawyers draft statutes, and have the opportunity to edit them before they are passed and enacted. Non-lawyers invoke their *Miranda* rights, and may do so without experience, under duress, and–as here–in the presence of experienced, veteran detectives who may interrupt or otherwise obstruct them in their efforts to do so. Their attempted invocations of their constitutional rights must be construed by considering all the circumstances and favoring the invocation of counsel so long as it is done "in any manner," as *Miranda* requires. This is essential to protect the rights of those who "'most need[] counsel,'" *Miranda*, 384 U.S at 471, such as the less educated, the

young, and the poor. *See id.* at 471-73; *see also, e.g., J.D.B.*, 131 S. Ct. at 2403 (juveniles are "'more vulnerable [to] outside pressures'"). The panel's decision, by contrast, sets such a high bar that only those most experienced in the criminal justice system, like repeat felons, will be able successfully to invoke their rights. *See, e.g.*, Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 286 (1996) ("a suspect with a felony record in my sample was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record and almost three times as likely to invoke as a suspect with a misdemeanor record"); Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 Chap. L. Rev. 551, 558 n.30 (2007) (felons "invoke silence more often because their previous experience with the police taught them the advantages of silence").

As *Davis* recognized, "some suspects . . . because of fear, intimidation, lack of linguistic skills, or a variety of other reasons . . . will not clearly articulate their right to counsel although they actually want to have a lawyer present." 512 U.S. at 460. That is why only police – but not citizens at large – are trained to memorize "magic words" to recite under *Miranda*. Yet, if an individual's initial attempts to invoke are not heeded, as in Sessoms' case, a suspect may not make further efforts, for "he may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Id.* at 472-73 (Souter, J., concurring); *see* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to*

Remain Silent Under Miranda, 17 William & Mary Bill Rts. J. 773, 815 (2009) (if suspect's "initial attempt to invoke his rights [i]s met with disdain," it "reinforc[es] all his fears and concerns," making it doubtful "such a person would then be capable of unequivocally and clearly invoking"). The Court tolerated this possibility in *Davis* because the suspect had already "knowingly and voluntarily waive[d] his right to counsel," 512 U.S. at 460, but no such rationale applies here.

Indeed, within the first two minutes of his encounter with the Sacramento detectives who had just arrived in Oklahoma, Sessoms requested counsel. After a short, nervous, and polite exchange about whether the detectives had had a good flight, Sessoms stated, again politely, "There wouldn't be any possible way that I could have a . . . lawyer present while we do this?" E.R. 96. The court discounted this as a mere question, not an invocation. Yet "people use hedges not only when they are uncertain about something, but also as a means of expressing politeness or being deferential." Strauss, at 790. Sessoms likely thought his desire for counsel would be more probably heeded if he presented himself, and his request, politely. "[I]t is not surprising that studies demonstrate that the people who are most likely to clearly assert their rights are 'hardened' criminals who may be less intimidated and more accustomed to the custodial interrogation setting." *Id.* at 806.

Here, there is little doubt that, no matter how the state court characterized Sessoms' first statement, he requested a lawyer. *Cf. Connecticut v. Barrett*, 479

U.S. 523, 529 (1987) (even after a waiver, "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous"). Indeed, Sessoms had similarly invoked his *Miranda* rights five days earlier when he turned himself in, which invocation the Oklahoma police had heeded, despite their desire to question him. *See* E.R. 76. Moreover, the twenty minute video of Sessoms as he waited in the interrogation room for the Sacramento detectives to enter shows him repeating to himself to ask to "talk with my lawyer" and the like. *See, e.g.*, Nov. 20, 1999 video, at 4:00, 6:50, 12:07 (DVD on file with counsel); E.R. 90B (quoting Sessoms as saying, just before the detectives entered, "They didn't tell me if I have a lawyer. I know I want to talk to my lawyer now.").

Moreover, the first statement cannot be considered in isolation. Detective Woods interjected, "Well, uh, what I'll do is, um–," but Sessoms immediately continued, "[t]hat's what my dad asked me to ask you guys . . . uh, give me a lawyer." E.R. 96. (Sessoms, then nineteen, had turned himself in at his father's insistence, *see* E.R. 76, and plainly looked to his father for guidance, even though Sessoms was legally an adult.) Thus, when his first statement had not sufficed to stop the interview, as shown by the detective's tactical interruption, Sessoms tried one more time to finish his thought and get his point across. When that additional statement still was ignored, it is hardly surprising–particularly in light of Woods' attempt immediately thereafter to talk Sessoms out of invoking his rights–that

Sessoms did not try further, since he "may well [have] see[n] further objection as futile." *Davis*, 512 U.S. at 472-73 (Souter, J., concurring). Alternatively, he may have been convinced–as Detective Woods obviously intended–that things would go better if he changed his mind and cooperated rather than insisting on a lawyer. *See Doody v. Ryan*, No. 06-17161, 2011 WL 1663551, at *15-16 (9th Cir. May 4, 2011) (en banc) (police violated *Miranda* by "obfuscat[ing]" warnings).

In short, Sessoms–a nervous, indigent, "unsophisticated teenager" with little experience with law enforcement, *i.e.*, just the type of person least likely to be able to overcome the hurdles that can stand in the way of a successful *Miranda* invocation, *see id.* at *19–clearly sought to invoke his rights, and any reasonable construction shows he requested counsel. Yet the treatment of that invocation by Detective Woods, the state court, and the panel majority is proof positive of the great barriers to the continued practical availability of the *Miranda* right to counsel to anyone but the most experienced criminals. The Court should grant rehearing en banc to reaffirm the right remains available to all.

III. Rehearing En Banc Should Be Granted To Make Clear That The Police Tactic Of Questioning "Outside Miranda" Is Improper.

This case is especially important because, in permitting the admission of Sessoms' confession despite his clear invocation of the right to counsel, the state court and the panel majority countenanced police practices that subvert *Miranda*'s very purpose, and the decisions, if left in place, may further encourage such tactics.

At the time of Sessoms' interrogation in 1999, the California Commission on Peace Officer Standards and Training ("POST"), which oversees police training in California, as well as the state Attorney General's Office, District Attorneys' offices, and police departments used training materials that encouraged officers to continue questioning suspects who invoked their *Miranda* rights. Police learned that it is permissible (and tactically advantageous) to question "outside *Miranda*" by ignoring an invocation to take advantage of the impeachment exception to the exclusionary rule, and to obtain the fruits of an otherwise inadmissible statement.[1]

Indeed, the Supreme Court, too, has noted "a question-first practice of some popularity," *Missouri v. Seibert*, 542 U.S. 600, 611 (2004) (plurality opinion), and has quoted from an advanced training videotape distributed by POST in 1996, around the time of Sessoms' interrogation. *See id.* at 610 n.2. That video explains:

> Today we're going to talk again about one of our favorite controversial topics on this program and that is the issue of continuing to question a suspect after they've invoked their *Miranda* rights. . . .

---

[1] *See, e.g.*, *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1049-50 (9th Cir. 2000) (officers trained to question "'outside *Miranda*'" were not entitled to qualified immunity); *People v. Peevy*, 17 Cal. 4th 1184, 1202-05 (1998) (statement taken in deliberate violation of *Miranda* results from "illegal[]" practice and "police misconduct") (emphasis omitted); *People v. Neal*, 31 Cal. 4th 63, 78-85 (2003) (statement involuntary where an officer deliberately ignored repeated invocations, as he was trained to do); Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 Mich. L. Rev. 1121, 1123-54 (2001); Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 461-63 (1999).

> [Since 1988], we on this program, or some of us in this program, have been encouraging you to continue to question a suspect after they've invoked their *Miranda* rights . . . to lock them into their story now . . . .
>
> Despite the fact that that is the law, despite the fact we've been encouraging you to do this for the last eight years, some judges . . . have taken exception to that and everybody's entitled to their opinion, and certainly judges are entitled to think that "You know, that's just not a good idea." But some judges . . . have gone so far as to . . . prohibit those kinds of statements from coming in even for impeachment purposes. . . .
>
> So what does all this mean? What it means is, our job is getting harder with respect to obtaining information from a suspect after they've invoked their *Miranda* rights. I'm not telling you, "Stop questioning him after that." The law under *Harris v. New York* [401 U.S. 222 (1971)] . . . is what it is . . . and we want to take advantage of that . . . . Somehow, if it can be done, you need to have the suspect acknowledge a willingness to continue to speak even after he's invoked his *Miranda* rights.
>
> So for example, you read him his *Miranda rights*, and he invokes his right to silence. What can you do? You can . . . ask him something like this: "Would it be O.K. if I continue to ask you a few questions about something related or even peripheral to the case?" Get him to acknowledge that it would be O.K. for you to continue to ask him those questions, or if he invokes his right to silence, you could say, "Lookit, would it be O.K. if I turn the tape recorder off?" . . . If after setting the criteria, he acknowledges a willingness to talk . . . , at least that puts something on the record . . . acknowledging that these additional statements . . . are voluntarily made.

Miranda: *Post-Invocation Questioning* (POST July 1996) (on file with counsel).

Similarly, in 1999 the Sacramento Police Department specifically trained officers that statements taken in violation of *Miranda* can be used for other purposes. Donald J. Currier, *Laws of Arrest* 23 (Aug. 15, 1999 Sacramento Police Academy course outline) (on file with counsel) ("Statements taken in violation of

Miranda can be used to impeach . . . [and] [c]an be used for M.O. and intelligence information."). And an interrogation guide by a Sacramento Sheriff's Department member instructs officers that a statement taken in violation of *Miranda* can be "used for impeachment purposes and usually keeps the defendant from testifying." Carl Stincelli, *Reading Between the Lines: The Investigator's Guide to Successful Interviews and Interrogations*, 68 (Jan. 2000) (on file with counsel).

The continued approval of questioning "outside *Miranda*" at the time of Sessoms' 1999 interrogation was particularly inappropriate given the California Supreme Court's condemnation of the practice as "illegal[]" "police misconduct" in 1998. *Peevy*, 17 Cal. 4th at 1202-05 (emphasis omitted). But in the wake of *Peevy*, "[n]either [POST nor the Attorney General's office] made any effort to halt the practice of questioning 'outside *Miranda*.'" Weisselberg, at 1152.

These tactics were put into action during Sessoms' interrogation. Although Sessoms invoked his rights at the outset of the interview, the detectives–realizing that they had come a long way for nothing–deliberately and skillfully walked him back from his invocation. Even after Sessoms explained he wanted an attorney because he feared that his words would be turned on him, the detective implied that a lawyer wasn't needed because he and his partner would not "play[] [any] switch games or nothing else." E.R. 96. Similarly, just before advising Sessoms of his right to an attorney, the detectives warned that invoking it would be a bad idea,

because it would prevent them from getting Sessoms' "version of it." E.R. 100. A lawyer, they explained, would likely advise him not to make a statement, implying that this would not be in Sessoms' interest. *Id.* These responses show the police understood Sessoms' statements as a request for a lawyer, as any reasonable person would. *See* Op. at 7372 (Fletcher, J., dissenting). Yet, consistent with training to question outside *Miranda*, the detectives proceeded with the interrogation until securing a full confession, thus utterly defeating Sessoms' invocation. This case is exceptionally important because, if left in place, the panel majority decision will establish AEDPA as a green light that will further encourage officers to disregard and overcome *Miranda* invocations just as Detective Woods did.

* * * * *

Miranda announced a vital constitutional rule that "has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Yet as this case and the police practices described above illustrate, it is all too often honored in the breach. Rehearing en banc is necessary to establish that the right to counsel remains real and accessible to ordinary citizens, and that it will be heeded, not only by the police, but also by the courts.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing en banc.

Respectfully submitted,

s/ Peter C. Pfaffenroth

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July 28, 2011

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STATEMENT OF RELATED CASES

To the best of my knowledge, there are no related cases.

Dated: July 28, 2011

s/ Peter C. Pfaffenroth
Peter C. Pfaffenroth

CERTIFICATE OF COMPLIANCE

1. This brief complies with the length requirements of Circuit Rule 29-2(c)(2), in that the body does not exceed fifteen pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14 point font.

3. No party's counsel authored this brief, nor did any party or party's counsel contribute funds towards it, nor did any other person contribute such funds. *See* Fed. R. App. P. 29(c)(5).

Dated: July 28, 2011

s/ Peter C. Pfaffenroth
Peter C. Pfaffenroth

CERTIFICATE OF SERVICE

CASE NAME: **SESSOMS v. RUNNELS**
CASE NO.: **No. 08-17790**
COURT: **NINTH CIRCUIT COURT OF APPEALS**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 28, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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