THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VALERIE BEIDLER, Petitioner-Appellant, vs. GWENDOLYN MITCHELL, Warden; et al., Respondent-Appellees.	)	C.A. NO. 08-56467 D.C. No. 3:05-cv-01384-DMS-CAB Southern District of California, San Diego

PETITIONER-APPELLANT'S REPLY BRIEF.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO

The Honorable Dana M. Sabraw
United States District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES & RULES

INTRODUCTION [1]

This appeal concerns the prosecutor's use of peremptory challenges to exclude all African-American prospective jurors from serving in the jury at the trial in this case, which took place in 2000 in a San Diego County court. Eventually, the seated jury of eleven Caucasians and one Hispanic returned a guilty verdict, convicting the Petitioner-Appellant Valerie Beidler (Petitioner) of first-degree murder special circumstances, among other charges.

In the opening brief, Petitioner argues two issues:

- that the United States district court improperly denied as waived her claim under Batson v. Kentucky , 476 U.S. 79 (1986), concerning African-American Juror No. 12 and African-American Juror No. 69;
- and that defense counsels' failure to object to the prosecution's use of peremptory challenges to strike Jurors 12 and 69 constituted ineffective assistance of counsel.

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[1] As used here in this reply brief: "OB" refers to Appellant's opening brief filed with this Court on April 26, 2010; "ER I", "ER II", "ER III" and "ER IV" refer to Volumes I, II, III and IV, respectively, of Appellant's Excerpts of Record, submitted in four volumes and filed with this Court on April 27, 2010; "AB" refers to Appellees' answering brief filed on May 18, 2010; "SER" refers to Appellees' Supplemental Excerpts of Record, filed on May 20, 2010.

The first of these two arguments represents the certified issue set forth in the Certificate of Appealability (COA). The latter represents a related, but uncertified issue.

The Respondent-Appellees, Gwendolyn Mitchell, et al., (Respondents) have filed an answering brief arguing that the California Court of Appeal's determination that Petitioner forfeited her Batson claim as to Jurors 12 and 69 was not contrary to, or an unreasonable application of, established and controlling United States Supreme Court precedent; and that the state court's factual determination is presumed to be correct and was not an unreasonable determination of the facts in light of the state court record. With respect to the uncertified issue, Respondents argue that the COA should not be expanded to include the ineffective assistance of counsel claim.

In this reply brief Petitioner adopts, as if set forth fully herein, the opening brief's Statement of the Case and Statement of Relevant Facts.

ARGUMENTS

A. Petitioner Made a Batson Claim as to Jurors 12 and 69, and it Was Timely.

Respondents argue that Petitioner, "ignores the question of whether a

Batson objection to Jurors 12 and 69 was made at all, instead focusing on the timeliness issue..." [AB 26]. This is incorrect.

Petitioner argues in the opening brief that the United States Supreme Court in Batson and in Ford v. Georgia directed trial courts to follow local practice as to the form and timing of Batson claims. *See* Batson, 476 U.S. at 99; Ford v. Georgia, 498 U.S. 411, 423 (1991); OB 22-25. As to local practice, the California Supreme Court has stated that a Batson objection made during selection of the jury alternates relates back to, and encompasses, jurors dismissed during the selection of the seated 12 jurors. People v. McDermott, 28 Cal.4th 946, 969 (2002); OB 26.

Respondents argue that McDermott addressed the timeliness of a Batson objection, "not whether an objection was in fact made." [AB 27]. This Court must not follow Respondents' limited and erroneous interpretation of McDermott. The thrust of the McDermott decision was to recognize that discriminatory motives in the use of peremptory challenges may not be sufficiently apparent until the selection of alternate jurors; therefore, a Batson/Wheeler[2] motion made before the

[2] In People v. Wheeler the California Supreme Court ruled that peremptory challenges may not be used to exclude from a jury, solely because of a presumed "group bias," all or most members of an identifiable group of citizens distinguished on racial, religious, ethnic, or similar grounds. 22 Cal.3d 258, 276-77 (1978). The Ninth Circuit has "held that a Wheeler motion is the

alternates are sworn and before the remaining unselected prospective jurors are dismissed acts as a timely challenge – not only to the prospective jurors challenged during the selection of the alternates, but is well to those dismissed during the selection of the 12 jurors already sworn. McDermott, 28 Cal.4th at 969; OB 25-26. For example, in one of the cases McDermott relied upon the California Court of Appeal found that the trial court erred during jury selection, and should have extended a Wheeler motion made during the selection of alternate jurors to four Hispanic jurors previously excluded during the selection of the initial panel of 12. *See* People v. Gore, 18 Cal.App.4th 692, 701-704-705 (1993); OB 26-27. Were this Court to give McDermott the limited interpretation that Respondents advocate, it would eviscerate the significance of that decision.

Otherwise, the facts from the jury selection proceedings indicate that a Batson claim as to Jurors 12 and 69 was made. During selection of the 12 seated jurors the prosecutor struck without cause the only two African-American jurors questioned, Jurors 12 and 69. The possibility of a discriminatory motive appears to have only become apparent during the selection of the alternates, when the prosecutor once again struck without cause the only African-American alternate

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procedural equivalent of a Batson challenge in California." Paulino v. Castro, 371 F.3d 1083, 1088 n. 4 (9th Cir. 2004).

Juror 7. This time, defense counsel objected under Batson.

> "Your Honor, I object to the prosecution's exclusion of Juror No. 7 under Batson versus Kentucky and People versus Wheeler. But relying on the federal right Batson. Juror No. 7 is African-American. ***The – there were two other African-American jurors who survived cause challenges were subject to peremptories in the initial jury. The prosecution used peremptory challenges to excuse both of those jurors, Juror No. 9 [sic] and Juror No. 12. Perhaps there should have been a Batson objection made then. I didn't make it and that is my problem.*** As to Juror No. 7, she is the sole African-American juror that is a potential alternate. I asked her specifically if she could be fair to Mr. Grossman. That was one of my questions on voir dire in light of her personal situation where she had been accused of a crime and she looked – when I asked, she look squarely at Mr. Grossman and said she could be fair to him. I submit under Batson."

[ER II 329-330; emphasis added].

Petitioner acknowledges defense counsels' failure to clearly and expressly articulate Batson claims as to Jurors 12 and 69. Notwithstanding, the Batson claim concerning alternate Juror 7 clearly referenced the peremptory challenges used to strike Jurors 12 and 69. Further, the Batson claim concerning Juror 7 was driven by the prior two peremptory challenges to strike Jurors 12 and 69. Moreover, the Batson claim concerning Juror 7 had the effect of pointing to the prosecutor's systemic exclusion of African-American jurors in the selection process.

We see the trial court's concern over the appearance of the systemic exclusion of African-Americans. In finding a prima facie Batson claim, the court stated: "based on the numbers, sheer numbers involved and the fact that there –

she is the last remaining African-American, that a prima facie case has been shown." [ER II 330]. The court's reference to the "sheer numbers", its acknowledgment that Juror 7 was the "last remaining African-American", and the fact that it did not specifically limit the prima facie finding to only Juror 7, reasonably indicates that the prima facie finding extended to the peremptory challenges of Jurors 12 and 69 – in addition to Juror 7.

Respondents' argument that Petitioner ignores the issue of whether Batson objections as to Jurors 12 and 69 were made at all is incorrect. Under McDermott, and the jury selection facts of this case, Petitioner's Batson objection concerning African-American alternate Juror 7 extended back to the prosecution's peremptory challenges of African-American Jurors 12 and 69.

B. Petitioner's Prima Facie Argument as to Jurors 12 and 69 Is Not Precluded under the COA.

1. The Prima Facie Demonstration Is an Appropriate Discussion under the Certified Question.

The Court granted the COA with respect to the following question: "whether the district court properly denied appellant's *Batson* claim, as to juror numbers 12 and 69, as waived." [ER I 1]. To answer this question, Petitioner argues in the opening brief that under Batson, its progeny and related California

practice, defense counsel made a Batson claim as to the prosecution's peremptory challenges against Jurors 12 and 69 and, therefore, did not waive the issue. OB 22-35.

The next logical step in answering the certified question, is to show not only lack of waiver, but that denial of the § 2254 Petition would be prejudicial because the record shows that the prosecution's peremptory challenges to strike African-American Jurors 12 and 69 was likely the result of discriminatory motive. Hence, Petitioner sets forth a compelling prima facie demonstration in the opening brief by comparing information supplied by dismissed African-American Jurors 12 and 69, with information supplied by four seated Caucasian jurors, Jurors 8, 26, 49 and 51. [OB 36-44]. Respondents deem this an unauthorized expansion of the COA that exceeds the scope of the certified question [AB 30 n.11], in the hope that this Court will not review the same.

Respondents are wrong, and this Court should review the prima facie demonstration. First, having shown that Petitioner did not waive the Batson claim as to Jurors 12 and 69, it is reasonable to show this Court that denial of the § 2254 Petition was prejudicial because the Batson claim as to Jurors 12 and 69 is supported by a prima facie showing of racial discrimination.

Second, in denying the § 2254 petition, the U.S. district court relied upon

the California Court of Appeal decision filed on February 18, 2003, which was the last reasoned state court decision in this case. [ER I 37-38]. The California Court of Appeal found that Petitioner had waived the right to make a Batson claim as to Jurors 12 and 69. [ER I 183]. In coming to that decision, the court discussed in detail Juror 12, whom the court identified as "Kim L.", and Juror 69, whom the court identified as "Andrew S.". [*See* ER I 179 fn.6]. The court concluded that the record could not support a prima facie finding of racial discrimination under Batson concerning the dismissals of Jurors 12 and 69. "[W]e observe based on the questionnaires submitted by jurors nos. 12 and 69 [that] the prosecutor had ample non-discriminatory reasons for their excuse." [ER I 183 fn.7].

Given the California Court of Appeal's finding of "ample non-discriminatory reasons", it is reasonable and appropriate that Petitioner set forth a prima facie demonstration as to why the Court of Appeal was wrong.

2. The Court Should Not Permit Respondents to File Supplemental Briefing on the Prima Facie Issue.

Petitioner's prima facie discussion in the opening brief was not an illicit attempt to expand the COA, hence Respondents should have addressed the prima facie argument in their answering brief. They chose not to. This Court should not allow Respondents to submit supplemental briefing in this regard. Granting their

request for the same will result in piecemeal briefing in this appeal, which runs contrary to judicial economy. Further, since Petitioner would need to be given an opportunity to respond, granting further briefing of the prima facie issue would be a waste of Criminal Justice Act resources, through which the undersigned has been appointed to represent Petitioner.

3. Should the Court Deem the Prima Facie Issue Beyond the Scope of the Certified Question, Then the Court Should Expand the Question to Encompass the Same.

Assuming for the sake of argument that this Court deems the prima facie discussion of Jurors 12 and 69 beyond the scope of the COA, then Petitioner requests that the Court expand the COA to include the same. To expand the COA, a habeas petitioner must demonstrate that, on the basis of the record and the parties' arguments, "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The U.S. district court relied upon the last reasoned state court decision, the California Court of Appeal decision filed February 18, 2003. That court wrote that: "we observe based on the questionnaires submitted by juror nos. 12 and 69 the prosecutor had ample non-discriminatory reasons for their excuse". [ER I 183 fn.7].

As set forth in the opening brief, a comparative analysis between the information provided by African-American Jurors 12 and 69 in their questionnaires, and information provided by four Caucasian jurors selected for the seated jury, indicates that discriminatory motive was operating in the prosecutor's use of peremptory challenges to strike the only two African-American jurors summoned to the jury box, in violation of Batson. *See* OB 41. Reasonable jurists would find that the California Court of Appeal's assessment of this important constitutional claim is debatable, or wrong. Slack, 529 U.S. at 484.

Moreover, the reporter's transcript included in Respondents' Supplemental Excerpts of Record strengthens Petitioner's prima facie claim. With respect to Juror 12, after discussing the random shooting of her son and his survival, and the photographic evidence of the homicide in this case, the following relevant colloquy occurred between defense counsel Mr. Sheela and Juror 12:

> "A [T]he person who shot my son shot him randomly. That doesn't mean everyone is like that or all people want to go out and shoot someone. It could have been, I don't know who it was, but I can't look at this family or his family or whoever and say all of you are bad because this one person did it. Because you have to look at people individually, so.
>
> Q I guess, when we ask these questions we are really asking for jurors to look inside themselves and judge themselves. The feeling I'm getting back from you is that you are the kind of person that can compartmentalize what happened to your son?

A Right.

Q And keep that out of your judgment in this case?

A Yes.

Q Great. Thank you very much. And the photos, you'll look at them, you'll look at them and use them as best you can?

A Right.

Q Even though you'd prefer a case that didn't have photos like that?

A Yes."

[SER 1, 7-8].

Then the prosecutor questioned Juror 12, which included the following:

"Q ... You understand that this case and the circumstances of why and how Steve Sandoz, the alleged victim in this case, why he got shot have nothing to do with what happened to your son?

A Definitely.

Q Okay, and that as a juror, when you take the oath, if you are sworn in, that you honor that judge's instructions that you have to just consider the facts of this case independently of your background?

A Yes.

Q Okay, what I'm gathering from you is that, and it's perfectly understandable given what's happened, is that just to hear the topic of any type of gunshot or violence is hard for you?

A Yes, exactly.

Q But do you understand that as a juror you cannot let that affect in any way your decision in this case?

A Yes.

Q You understand it just has to be on the evidence in this case?

A. Yes. That's why I'm still here."

[SER 1, 9].

Notwithstanding the fact that her son was a victim of a random act of violence, and notwithstanding her concern over the nature of the homicide evidence in the case, these colloquies demonstrate that Juror 12 was ready and willing to serve. While she naturally preferred not to have to view evidence concerning the homicide, she clearly stated that she would look at it and consider it.

As pointed out in the opening brief, Juror 12's reservations concerning the homicide evidence were no more pronounced than those of two seated Caucasian jurors. (*See* OB 37-41). Juror 51, who had been a victim of an armed bank robbery in which she was held at gunpoint, wrote in her questionnaire: "I <u>never</u> watch movies or TV involving graphic details of blood & gore. This also includes avoiding newspaper articles and photographs. I would be very uncomfortable." [ER IV 632, *underline in original*]. As to whether she would be willing to serve

as a juror on this case she answered "yes" but then wrote as a qualification "if I do not have to listen to graphic details of torture". [ER IV 638].

Similarly, Juror 8, who had been a victim of sexual assault, wrote that she was "certain" the language and photographs concerning the alleged murder in this case would "be unpleasant and could be uncomfortable to see or hear but I cannot know for sure unless under those circumstances". [ER III 489, 493, 501, 504].

C. The Antiterrorism and Effective Death Penalty Act of 1996 Does Not Preclude the Application of the Supreme Court's 1991 Ford decision.

Respondents argue that Petitioner's reliance upon Ford v. Georgia in the opening brief (OB 25) is misplaced. They argue that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") precludes application of the Supreme Court's 1991 decision in Ford, which decision confirmed Batson's direction that the making and timing of a race discrimination claim is controlled by local practice. *See* Ford, 498 U.S. at 423. [AB 28-29]. Respondents' argument does not withstand scrutiny.

Concerning when and how a Batson claim is to be made, the Supreme Court in Batson left that decision to local trial courts, stating that "[w]e decline ... to formulate particular procedures to be followed upon the defendant's timely

objection to prosecutor's challenges [ ]", including the procedures governing the timeliness of the motion. Batson, 476 U.S. at 99. The Court confirmed this approach in Ford: "[i]n Batson ... we ... declined ... to decide when an objection must be made to be timely. Instead, we recognize that local practices would indicate the proper deadlines...." Ford, 498 U.S. at 423. [*See* OB, 22-23].

Under local California practice, a Batson objection made during selection of the alternates relates back to, and encompasses, jurors dismissed during the selection of the seated 12 jurors. McDermott, 28 Cal.4th at 969. Therefore, the U.S. district court's finding that it had "not located any clearly established Supreme Court law which delineates when and how a Batson objection must be made" [ER I 41] is wrong and cannot be followed by this Court.

Respondents seek to avoid application of Batson's how and when direction by making a twofold argument. First, following the U.S. district court's decision to deny the § 2254 Petition [ER I 12-13], Respondents argue that the Supreme Court has not yet delineated how a Batson objection must be formulated. [AB 28]. For all the reasons set forth in the opening brief, this argument is incorrect. [OB 22-25]. The Supreme Court has consistently directed that local practices govern the how and when of Batson objections. Batson, 476 U.S. at 99; Ford, 498 U.S. at 423; *see* OB 23-25.

Second, concerning Respondents' argument that the 1991 Ford decision is inapplicable because AEDPA was not enacted at the time of the Ford decision, and therefore "*Ford* cannot stand as authority for applying § 2254 (d)(1)" [AB 29], Petitioner notes the following. First, Respondents provide no authority for this logic, i.e., that AEDPA rendered inapplicable Supreme Court precedent decided prior to the 1996 amendment to § 2254, or that Ford is authority that this Court may choose not to follow.

Moreover, in similar circumstances this Court has not permitted litigants to use AEDPA as a shield against review of meritorious habeas claims, even under AEDPA's demanding standard. In Paulino, this Court determined that it was not bound by AEDPA's deference and reviewed Paulino's Batson claim de novo because "the [California] court of appeal employed the incorrect legal standard." Paulino, 371 F.3d at 1090.

Similarly, in Kesser v. Cambra this Court reversed under Batson and its progeny, noting that "AEDPA is 'demanding but not insatiable.'" Kesser v. Cambra, 465 F.3d 351, 358 (9th Cir. 2006) *quoting* Miller-El v. Dretke, 545 U.S. 231, 240 (2005).[3] "Deference does not by definition preclude relief." Id.

[3] In Kesser, this Court reversed the California Court of Appeal on the ground that it had the duty, under Batson's third prong, to determine whether the prosecutor's nonracial motives were pretextual. "The court reviewed the

D. The Court Should Expand the Certificate of Appealability to Include Petitioner's Uncertified Issue.

Petitioner argues in the opening brief that should this Court finds that defense counsel failed to make a Batson objection to the striking of Jurors 12 and 69, then said failure constituted ineffective assistance within the meaning of Strickland. Strickland v. Washington, 466 U.S. 668, 694 (1984).

Respondents object to expanding the COA to this issue pursuant to Circuit Rule 22-1(e)[4] which permits an expansion of the COA only upon a "'substantial showing of the denial of a constitutional right'". Cooper-Smith v. Palmateer, 397 F.3d 1236, 1245 (9th Cir. 2005) *quoting* 28 USC § 2253 (c)(2). [AB 31].

Respondents note that the California Court of Appeal anticipated

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prosecutor's reasons without looking at the voir dire or the jurors' questionnaires, and erroneously found that the race-neutral reasons were not "sham excuse[s]." Kesser, 465 F.3d at 358.

[4] "Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading, 'Certified Issues,' and then, in the same brief, shall discuss any uncertified issues under the heading, 'Uncertified Issues.' Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate. Except, in the extraordinary case, the court will not extend the length of the brief to accommodate uncertified issues." Circuit Rule 22-1 (e).

Petitioner's ineffective assistance of counsel issue concerning lack of an express and specific Batson claim as to African-American Jurors 12 and 69. [AB 31]. That court wrote:

> Anticipating a claim for ineffective assistance of counsel on this ground, we observe based on the questionnaires submitted by a juror nos. 12 and 69 the prosecutor had ample non-discriminatory reasons for their excuse. Thus, were we to address the question we would conclude Gerardo's counsel was not ineffective for failing to make a meritless objection to those challenges."

[ER I 183 fn7].

Petitioner believes the California Court of Appeal was wrong, and sets forth a persuasive prima facie showing of discriminatory motive in the opening brief with respect to the prosecutor's use of peremptory challenges to strike Jurors 12 and 69 in the opening brief. Given this record, there is a reasonable probability that had counsel objected to the striking of Jurors 12 and 69, Petitioner would have succeeded in proving that the prosecutor was engaging in racial discrimination in selecting the jury for this first-degree murder trial. Such practices violate the Equal Protection Clause of the United States Constitution. Batson, 476 U.S. at 89. Petitioner submits that she has shown in the opening brief and here a substantial showing of the denial of a constitutional right sufficient to permit expansion of the COA. Cooper-Smith, 397 F.3d at 1245.

The Supreme Court has instructed that, "the discriminatory use of

peremptory challenges by the prosecution causes a criminal defendant cognizable injury ... [R]acial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." Powers v. Ohio, 499 U.S. 400, 411 (1991) (internal quotation marks and citation omitted). Given the overriding importance of maintaining the integrity of the judicial process, pursuant to Circuit Rule 22-1(e) this Court should expand the COA to encompass Petitioner's uncertified issue.

CONCLUSION

For the reasons set forth in the opening brief and here in the reply brief:

- this Court should reverse the district court's decision denying the § 2254 Petition and request for an evidentiary hearing;

- concerning Petitioner's prima facie showing of discriminatory motive as to the prosecutor's peremptory challenges to Jurors 12 and 69, the Court should deny Respondents' request to deem such argument beyond the scope of the COA, and deny Respondents request to submit more briefing in that regard;

- should, however, the Court find the prima facie argument as to Jurors 12 and 69 beyond the scope of the COA, then Petitioner requests that the Court expand the COA to include that argument;

- finally, this Court should extend the COA to include the uncertified issue concerning ineffective assistance of counsel set forth in the opening brief.

DATED: May 29, 2010, Wailuku Maui, Hawai`i.

s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Petitioner-Appellant Valerie Beidler

C.A. NO. 08-56467

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32 (a) (7) (c) and 9th Cir. R. 32-1, the attached reply brief is:

x Proportionately spaced, has a typeface of 14 points or more and contains 4,181 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7000 words), or is:

Monospaced, has 10.5 or fewer characters per inch and contains_____words or_____lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

DATE: Wailuku Maui, Hawai`i, May 29, 2010.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for the Defendant Appellant

C.A. NO. 08-56467

CERTIFICATE OF SERVICE
When All Case Participants Are Registered for the
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I hereby certify that on (date) May 29, 2010, 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.

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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I hereby certify that on (date) _____, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature: _____