12-15788
Op. filed Dec. 8, 2014 (Kozinski (dissenting), O'Scannlain, N.R. Smith, CJJ)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORTINO ALVAREZ,

***Petitioner-Appellant*,**

v.

RANDY TRACY, Acting Chief Administrator for the Gila River Indian Department of Rehabilitation and Supervision,

***Respondent-Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (CV-08-02226-DGC)

PETITIONER-APPELLANT'S SUPPLEMENTAL BRIEF

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Introduction

On April 6, 2015, the panel entered an order directing the parties to submit supplemental briefs addressing: "(1) whether this court can, sua sponte, address Alvarez's failure to exhaust his tribal remedy of direct appeal of his conviction to the Gila River Indian Community appellate court, and (2) assuming this court can address the issue, whether Alvarez's failure to appeal his conviction to the Gila River Indian Community appellate court prevents this court from considering his federal habeas petition."[1] For the reasons set forth below, the answer to both questions is "no."

Argument

I. This Court cannot, sua sponte, address Mr. Alvarez's failure to exhaust his tribal remedy of direct appeal of his conviction to the Gila River Indian Community appellate court.

A. The Community deliberately waived this defense.

"[A] federal court has the authority to resurrect only forfeited defenses." *Wood v. Milyard*, 132 S. Ct. 1826, 1833 n.5 (2012). Forfeiture is "the failure to make the timely assertion of a right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Waiver, on the other hand, is "the intentional relinquishment or abandonment of a known right." *Id.* (internal quotation marks omitted). Where a party's

[1] DktEntry: 48 at 1.

relinquishment of a defense derives not from an "inadvertent error," but rather from a knowing choice to refrain from asserting the defense, the party has not forfeited but has waived that defense. *Wood*, 132 S. Ct. at 1834 (internal quotation marks omitted). The principle that a Court has no "authority" to "resurrect" a waived defense applies here, because the Gila River Indian Community (the "Community") deliberately waived the appellate non-exhaustion defense in this case.

In its response to Mr. Alvarez's habeas petition, under the heading "Affirmative Defenses," the Community alleged that Mr. Alvarez had failed to exhaust the remedies of: "(a) a motion to correct his sentences; or (b) [] a motion for commutation based upon the grounds raised in his Petition."[2] The Community's response did not assert that Mr. Alvarez had failed to exhaust any direct appeal remedy.

Mr. Alvarez subsequently filed a Motion for Leave to Conduct Discovery. (Because they were filed under seal in the district court, the motion, along with the Community's response and Mr. Alvarez's reply, are being filed herewith under seal.) Among other things, he sought authorization to subpoena records regarding the processing of appeals by the Community Courts from October of 2003, and to

[2] D. Ct. Doc. 6 at 7.

depose the Community's Solicitor regarding "whether pursuing relief through the Community's court of appeals would have been futile." Mr. Alvarez explained that this discovery was "necessary to [his] ability to address the defense of non-exhaustion raised in the Community's Response." In support of this request, Mr. Alvarez noted that in *Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999), this Court had expressed doubt as to whether the Community had a "functioning appellate court." *Id.* at 1036.[3] The lack of a functioning appellate court, *Johnson* explained, would render an appeal futile, negating the appellate non-exhaustion defense. *Id.*

After Mr. Alvarez filed his discovery motion, the Community filed a Motion to Dismiss for Failure to Exhaust Tribal Court Remedies that discussed only the remedies of a motion to correct sentence, motion for commutation, and Community Court habeas petition.[4] The next day the Community filed a response opposing Mr. Alvarez's discovery motion that made the following representation regarding Mr. Alvarez's request for appeal-related discovery:

> Mr. Alvarez seeks all documents in the possession of the Community's judicial department relating to the processing of appeals from October 28, 2003, to the present. This request, which should be rejected by the court, is premised on a misunderstanding of Respondent's affirmative defense that Petitioner has failed to exhaust

[3] D. Ct. Doc. 16 at 3-4, 12.
[4] D. Ct. Doc. 20.

> his tribal court remedies. The remedies available to Petitioner, and [*sic*] more fully outlined in Respondent's *Motion to Dismiss for Failure to Exhaust Tribal Court Remedies*, are (1) a motion for commutation of his sentence(s) or to correct his sentences(s) [*sic*], or (2) filing a petition for writ of habeas corpus in the Community Court.[5]

Mr. Alvarez filed a reply in which he withdrew his request for appeal-related discovery in reliance on the Community's statement:

> In light of Respondent's clear indication that he is not arguing that Mr. Alvarez failed to exhaust his claims by raising them in an appeal to the Community court of appeals, Mr. Alvarez hereby withdraws this request [for appeal-related discovery]. Mr. Alvarez reserves the right to reinstitute this request if the Community raises the argument of failure to exhaust Community Court appellate remedies at any point in the future.[6]

At no point did the Community contradict this statement or suggest that Mr. Alvarez had misunderstood its position.

The Community adhered to its waiver of the appellate non-exhaustion defense throughout this appeal. In its answering brief, the Community defended the district court's ruling on the merits, and did not raise non-exhaustion. At the oral argument (a transcript of which is attached hereto as Appendix A), the Community's counsel raised non-exhaustion, but focused on the *non*-appellate remedies he had argued below: "commutation for [*sic*] filing a habeas proceeding in

[5] D. Ct. Doc. 21 at 3.
[6] D. Ct. Doc. 23 at 4, 10.

the tribal court."[7] When a panel member noted that Mr. Alvarez "apparently said that he didn't know he had the right to appeal," the Community's counsel again referred to non-appellate remedies:

> I believe that the appeal rights are, are specified in the Community's code, but I think the mechanisms that were identified in the motion to dismiss for failure to exhaust uh, were the commutation mechanism that is available in the Community's code, as well as a habeas proceeding in the tribal court[.][8]

Asked whether Mr. Alvarez was advised of his right to appeal, the Community's counsel responded: "I think the fact of the matter is he did not directly appeal his conviction,"[9] but did not argue that this should be the basis for affirming the district court. After further questioning, the Community's counsel asserted that Mr. Alvarez had "these remedies" available to him when he filed his federal habeas petition. Asked whether it was "too late by then," the Community's counsel responded: "I, I don't think there's any time limit on the use of the commutation mechanism in the Community court, Your Honor."[10] No further discussion or briefing on the appellate non-exhaustion issue occurred, although the

[7] App. A at 7:31-34.
[8] *Id.* at 8:6-16.
[9] *Id.* at 10:1-14.
[10] *Id.* at 12:12-22.

Community subsequently mailed the Court a copy of the Community's 2003 Code and a FRAP 28(j) letter that cited the appellate portion of the Code.[11]

The record thus confirms that the Community did not merely forfeit but *waived* the appellate-exhaustion defense. That this was no mere inadvertent omission is demonstrated most plainly by the briefing on Mr. Alvarez's discovery motion, in which the Community expressly disclaimed any such defense. The waiver was further confirmed by the Community's (1) failure to contradict Mr. Alvarez's reply withdrawing the discovery request in reliance on its waiver, (2) failure to raise exhaustion in its appeal brief, and (3) repeated instances of "deliberately steer[ing]" (*Wood*, 132 S. Ct. at 1835) the Court away from the appellate non-exhaustion issue during the oral argument.

In short, in light of the Community's deliberate waiver of the appellate non-exhaustion defense, the answer to the Court's first question is "no." Because this fact deprives the Court of authority to "resurrect" the defense (*id.* at 1833 n.5), this Court need go no further to determine that it may not do so.

[11] DktEntry: 29.

B. Even if the Community had merely forfeited the appellate non-exhaustion defense, this Court could not address it sua sponte.

(1) Mr. Alvarez still has had no fair opportunity to address the appellate non-exhaustion defense, because such an opportunity would require discovery on the question of futility.

Assuming that the Community only forfeited the appellate non-exhaustion defense, it would still be improper for this Court to address it unless Mr. Alvarez had a "fair opportunity to present his position." *Id.* at 1834. Notwithstanding this opportunity to file a supplemental brief, Mr. Alvarez has not had such a "fair opportunity." If an appeal to the Community's court of appeals would have been futile, Mr. Alvarez's failure to exhaust that 'remedy' would not bar this Court's consideration of the merits of his claims. *Johnson*, 174 F.3d at 1036. To show that this was the case, Mr. Alvarez would need to conduct discovery into the functioning – or non-functioning – of the Community's appellate court in 2003, when he was convicted and sentenced. As noted above, Mr. Alvarez initially requested leave to conduct such discovery, then withdrew the request when it became clear that the Community was not raising the defense of appellate non-exhaustion. Without the discovery, Mr. Alvarez cannot show that any attempt to exhaust the appellate remedy would have been futile.

Mr. Alvarez's discovery request was no fishing expedition. There were substantial reasons to question whether the Community courts offered a meaningful appellate remedy at the time of his trial. Just a few years before then, this Court had expressed doubt as to whether the Community had a "functioning appellate court." *Id.* And Mr. Alvarez showed in his discovery motion that this situation did not appear to have improved up to a year before Mr. Alvarez's trial: Mr. Alvarez attached Community court documents to his motion showing that an appeal filed in 2002 had not been decided by the time of the motion, seven years later.[12] An appellate process that could not be relied upon to yield a decision within seven years would not provide an adequate remedy for Mr. Alvarez's unlawful conviction and five-year sentence.

Nor is it any answer that the Court could resolve the matter of futility without any need for discovery, by examining the Community's Code provisions and rules in effect at the pertinent time. Doing so could lead to fundamentally flawed conclusions about the reality of Community court practice. This is so because in this context, there is no systematic correlation between on-the-books codes and on-the-ground practice.

[12] D. Ct. Doc. 16 at 4; *id.* Ex. A.

It has been observed that in tribal court systems generally, published codes may not reflect actual practice. *See* Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 Am. J. Comp. L. 29, 61 (Winter 2008) ("the typical order of authority for tribal judges is custom first, code second, and federal law third"). The Community is no exception. This Court's *Johnson* decision illustrates how, a few years before Mr. Alvarez's trial, the Community's "appellate court" appeared to be more theoretical than real. *Johnson*, 174 F.3d at 1036. And these practices have persisted: In 2009 the Community adopted a new Appeals Code, but for years the Community ignored it and continued following the old Code. *See* Ordinance GR-15-09 Ch. 4.505.A.1 (setting 30-day deadline for filing notice of appeal); *Community v. Sherwin Darrell Johnson*, GRIC Ct. App. No. AC-2010-016 (Mar. 21, 2011) (finding appeal untimely because not filed by superseded five-day deadline); Appeal Hearing in *Community v. Jackson*, GRIC Ct. App. No. AC-2012-006 (Mar. 27, 2013) (Code-mandated judges not available to sit on appellate panel). (The former two documents are attached hereto as Appendices B and C, and Mr. Alvarez is filing herewith a motion for leave to file the third item in electronic form.)

It follows that Mr. Alvarez could not have a "fair opportunity to present his position" with respect to the appellate non-exhaustion defense without conducting

discovery. *Wood*, 132 S. Ct. at 1834. Because he has had no such fair opportunity, this Court may not address that defense sua sponte. *Id.*

(2) This case does not qualify as "exceptional."

In *Wood*, the Supreme Court stated that while courts have discretion to address forfeited habeas defenses, they should "reserve that authority for use in exceptional cases." *Id.* There is nothing "exceptional" about this case that could justify resurrecting a forfeited exhaustion defense. The Community has been represented from the beginning of the case by multiple able attorneys. Its response to Mr. Alvarez's habeas corpus petition bore the names of three members of the State Bar of Arizona, listed as the Community's General Counsel, Senior Counsel, and Assistant General Counsel.[13] These attorneys filed numerous thorough and detailed pleadings and other filings over the course of this litigation. These experienced attorneys were fully capable of preserving an appellate non-exhaustion defense, if they had deemed it to be in the Community's best interest to do so.

The only thing that sets this case apart from the mine-run of habeas corpus appeals is that it involves an Indian tribe, which raises the prospect that federal-tribal comity concerns could be implicated. *Selam v. Warm Springs Tribal Corr.*

[13] D. Ct. Doc. 6 at 1, 8.

Facility, 134 F.3d 948, 953 (9th Cir. 1998). But that fact cannot render this case "exceptional" within the meaning of *Wood*, for three reasons.

First, addressing Mr. Alvarez's claims would not threaten the Community's sovereignty or integrity. The gravamen of Mr. Alvarez's claims is that the Community breached the (since amended) Indian Civil Rights Act, 25 U.S.C. § 1302 (Westlaw, USCA03 database) ("ICRA"), by failing to inform him that he had to request a jury trial in order to be provided with one, and convicting him using the out-of-court statements of the alleged victim without making a good-faith effort to obtain her presence at trial. Requiring the Community to tell people it prosecutes what they must do to exercise their jury-trial right, and to make good-faith efforts to procure the attendance of key witnesses before introducing their out-of-court statements at trial, would not threaten the Community's sovereignty or integrity.

To the contrary: Addressing Mr. Alvarez's claims on the merits would merely effectuate the rights that Congress clearly extended to tribal-court defendants in ICRA. As the Supreme Court observed in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Congress that enacted ICRA determined the proper balance to strike between the dual objectives of "strengthening the position of individual tribal members vis-à-vis the tribe" and "furthering Indian self-

government" when it authorized Indians to vindicate ICRA rights through federal habeas corpus petitions. *Id.* at 62-67 (internal quotation marks omitted). Refusing to address the merits of a duly-filed ICRA petition on federal-state comity grounds would upset, rather than respecting, the balance carefully set by Congress.

Second, the principle of federal-tribal comity actually weighs *against*, rather than in favor of, addressing the appellate-exhaustion defense sua sponte. A federal court's practice of addressing allegedly unexhausted tribal court remedies tends to generate federal holdings regarding tribal procedures that lack meaningful input from the tribe, and that may conflict with the tribe's own understanding of its procedures. What is a tribe to do, for example, if this Court examines a tribe's Code sua sponte and holds that defendants in the tribe's courts have a particular postconviction remedy, while the tribe itself believes and intends that they have no such remedy? Must the tribe respect this federal-court-created procedural right? Even if such deference is not strictly required, this may not be clear to tribal judges – particularly in light of the fact that "few contemporary tribal judges attended law school." Cooter & Fikentscher, *supra*, at 55. The problem is exacerbated by the facts that obtaining accurate copies of a tribe's code and rules may be difficult, and that even when these documents are available, they may not reflect the actual practice in the tribe's courts. *Id.* at 31 ("tribal officials seldom

circulate their laws outside the reservation and tribal judges seldom document their decisions in writings that outsiders can access"); *see also id.* at 61; Apps. B, C.

Finally, treating this case as "exceptional" on federal-tribal comity grounds would conflict with *El Paso Natural Gas Co. v. Neztsosie*, as explained below in the next section.

(3) Addressing the appellate non-exhaustion defense sua sponte would conflict with *El Paso Natural Gas Co. v. Neztsosie*.

If the Court's justification for addressing the appellate non-exhaustion defense sua sponte were federal-tribal comity, this justification would conflict with the Supreme Court's decision in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999).

The *Neztsosie* case involved tort lawsuits filed in Navajo tribal court by members of the Navajo Nation against companies operating on the reservation. *Id.* at 477-78. The companies sought a federal district court injunction barring the lawsuits. *Id.* at 478. The district court entered only partial injunctions. *Id.* The companies appealed to this Court, which affirmed the portion of the ruling that was adverse to the companies. *Id.* "But [this Court] did not rest there." *Id.* Instead, "[a]lthough [none of the plaintiffs] had appealed the partial injunctions against them, the Ninth Circuit *sua sponte* addressed those District Court rulings, citing

'important comity considerations involved,'" and reversed the partial injunctions. *Id*. at 478-79.

The Supreme Court held that this sua sponte ruling constituted an impermissible violation of the cross-appeal rule, which provides that "[a]bsent a cross-appeal, an appellee . . . may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *Id*. at 479 (internal quotation marks omitted). The Court stressed that this Court's interest in federal-tribal comity is "clearly inadequate to defeat the institutional interests in fair notice and repose that the [cross-appeal] rule advances." *Id*. at 480.

Addressing the appellate non-exhaustion defense sua sponte here would fly directly in the face of *Neztsosie*. Doing so would violate the party presentation principle, which generally "rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). The *Neztsosie* decision specifically involved the cross-appeal rule, but that rule is merely a subpart of the party presentation principle. *Greenlaw*, 554 U.S. at 244. And while the *Neztsosie* decision involved civil litigation, the "institutional interests in fair notice and repose" that underlay its holding should carry even greater weight in the context of habeas corpus litigation, which implicates fundamental rights and individual

liberty. The *Neztsosie* decision thus precludes this Court's use of federal-tribal comity as a justification for its sua sponte consideration of a forfeited appellate non-exhaustion defense.

In short, even if the appellate non-exhaustion defense were merely forfeited, rather than waived, this Court could not "resurrect" that defense. *Wood*, 132 S. Ct. at 1833 n.5. Because the Community waived the defense, and because the defense could not be resurrected even if it had merely been forfeited, the answer to the Court's first question is "no."

II. Assuming this Court can address the issue, Mr. Alvarez's failure to appeal his conviction to the Community's appellate court does not prevent this Court from considering his habeas petition.

If none of the bars to this Court's sua sponte consideration of the appellate non-exhaustion defense discussed above apply, this Court should apply the principles governing tribal exhaustion, and (if necessary) exhaustion in habeas corpus litigation generally. As shown below, these principles do not prevent this Court from reaching the merits of Mr. Alvarez's claims.

A. The balancing called for under the tribal exhaustion doctrine favors addressing the merits of Mr. Alvarez's claims.

The tribal exhaustion doctrine is a "[]flexible" one that balances "the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts[] against the need to immediately adjudicate alleged deprivations of

individual rights." *Selam*, 134 F.3d at 953 (internal quotation marks omitted). This balancing supports reaching the merits of Mr. Alvarez's ICRA claims here. As noted above, doing so would not pose any substantial threat to the sovereignty and integrity of the Community.

On the other side of the scale, the factors demonstrating a "need to immediately adjudicate" Mr. Alvarez's claims are weighty. A system in which a defendant with a seventh-grade education, no attorney, no access to a law library, and no explanation from the judge or anyone else as to how to pursue an appeal is given five days to do so does not provide a "meaningful" remedy for violations of the defendant's civil rights. Moreover, the merits of Mr. Alvarez's claims are strong, and avoiding them on non-exhaustion grounds virtually guarantees that they will never be remedied, because Mr. Alvarez's appeal time ran years ago.

In short, as both the magistrate and district judges found below,[14] the tribal exhaustion doctrine weighs in favor of addressing the merits of Mr. Alvarez's claims. Indeed, their conclusion carries still more force now, as Mr. Alvarez has waited over six years from the filing of his habeas petition to see his ICRA rights vindicated.

[14] D. Ct. Doc. Nos. 67, 73.

B. Under general procedural default principles, Mr. Alvarez's failure to exhaust the appellate remedy should be excused.

It is reasonable to assume that when Congress gave tribal-court defendants the right to file habeas corpus petitions in federal court (25 U.S.C. § 1303), it understood that such petitions would generally be governed by established principles applicable to habeas corpus litigation. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) ("we presume that Congress is aware of existing law when it passes legislation") (internal quotation marks omitted). Pursuant to these principles, a petitioner's procedural default may be excused where the petitioner can demonstrate cause for the default and actual prejudice from the trial errors addressed in his petition. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Both of these circumstances are present here.

There is cause for a procedural default where "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 753 (internal quotation marks omitted). Here, there were many such objective factors, and they all conspired to impede Mr. Alvarez's filing of a timely appeal. Specifically, despite knowing that Mr. Alvarez was unrepresented, barely out of his teens, and was "having a hard time understanding

the procedures,"[15] the Community: (1) did not remind him at the close of his trial of his appeal right or explain how he could exercise it; (2) detained him in a facility with "no law library or other form of legal assistance"[16]; and (3) gave him only five days to file a notice of appeal.[17] These factors constitute "cause" for Mr. Alvarez's failure to file a timely appeal. *See Johnson v. Champion*, 288 F.3d 1215, 1227-28 (10th Cir. 2002) (finding "cause" for default where, among other factors, state rules required incarcerated petitioner to undertake procedural steps "within a relatively narrow window of time"); *Watson v. New Mexico*, 45 F.3d 385, 387-88 (10th Cir. 1995) (remanding for "cause"-related inquiry into petitioner's assertion that he was ignorant of state's procedures and that prison library was inadequate to enable him to learn them); *cf. Buffalo v. Sunn*, 854 F.2d 1158, 1164-66 (9th Cir. 1988) (remanding for "cause"-related inquiry into petitioner's contention that prison "lockdown" prevented him from filing timely writ of certiorari to state supreme court).

To show "prejudice," a habeas petitioner must show that the errors at trial worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. *Murray v. Carrier*, 477 U.S. 478, 494 (1986).

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[15] ER Vol. II at 156:25-157:1.
[16] D. Ct. Doc. 14 at 2:8-9.
[17] ER Vol. II at 64.

Such prejudice is evident here, with respect to the jury-trial and confrontation claims that Mr. Alvarez raised in his petition and presses in this appeal.

The denial of the right to a jury trial is a structural error requiring automatic reversal of a conviction. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). And the admission of prejudicial testimony in violation of Mr. Alvarez's confrontation right in his bench trial should be deemed harmful, because it is evident that the judge relied upon the improperly-admitted testimony. *Wilson v. Bowie*, 408 F.2d 1105, 1107-08 (9th Cir. 1969); *Wright v. Sw. Bank*, 554 F.2d 661, 664 (5th Cir. 1977). Had E.C.'s out-of-court accusations not been introduced, the only evidence supporting convictions on the four counts alleging offenses against E.C. would have been Officer Benally's and J.C.'s testimony that E.C.'s head looked hurt – and without the context provided by E.C.'s accusations, a "big old bump" on E.C.'s head would not have constituted sufficient evidence to support a finding beyond a reasonable doubt that Mr. Alvarez had assaulted her. Because it is thus evident that the Community court relied upon E.C.'s out-of-court accusations in finding Mr. Alvarez guilty, the violation of his confrontation right was prejudicial. *Cf. Wilson*, 408 F.2d at 1107-08.

In sum, assuming that this Court could address the appellate non-exhaustion defense sua sponte, that defense does not prevent the Court from addressing the merits of his claims.

Conclusion

For the reasons set forth above, the answer to both of the Court's questions is "no."

Respectfully submitted on April 27, 2015.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(B)

I hereby certify that, pursuant to Circuit Rule 40-1(a), the foregoing Petition for Panel and En Banc Rehearing is proportionately spaced, has a typeface of 14 points, and contains 4,175 words.

s/Daniel L. Kaplan
DANIEL L. KAPLAN
Assistant Federal Public Defender
Attorney for Defendant - Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused the foregoing Petition for Panel and En Banc Rehearing to be submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on April 27, 2015, using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/*Daniel L. Kaplan*
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