ABDULLAH AL-KIDD, Plaintiff-Appellee, v. JOHN ASHCROFT, Defendant-Appellant, and ALBERTO GONZALES, ET AL, Defendants.

No. 06-36059

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2006 U.S. 9th Cir. Briefs 36059; 2009 U.S. 9th Cir. Briefs LEXIS 906

October 19, 2009

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO.

Petition

COUNSEL: [*1] ANNE RAVEL, Deputy Assistant Attorney General, ROBERT M. LOEB, MATTHEW M. COLLETTE, SARANG V. DAMLE, Attorneys, Appellate Staff, Civil Division, Department of Justice, Washington, D.C.

TITLE: Petition For Rehearing En Banc

TEXT: INTRODUCTION AND STATEMENT REQUIRED BY FED. R. APP. P. 35(b)

Pursuant to Fed. R. App. P. 40 and 35, defendants-appellant John Ashcroft respectfully petitions this Court for rehearing en banc. A divided panel of this Court held that former Attorney General John Ashcroft is not entitled to absolute or qualified immunity on plaintiff's claim that former Attorney General Ashcroft adopted and implemented a policy of using material witness warrants to detain terrorist suspects who the government wished to investigate but did not have probable cause to arrest. The panel majority decision (authored by Judge Milan Smith) reflects significant legal errors that conflict with established Supreme Court precedent.

First, in denying former Attorney General Ashcroft absolute immunity for an act that is undeniably prosecutorial, the panel majority held that courts may inquire into a prosecutor's "immediate purpose," and thereby convert a prosecutorial function into [*2] an investigative function. That holding is inconsistent with longstanding and uniform case law precluding examination of a prosecutor's motives in determining whether absolute immunity applies. *See Buckley v. Fitzsimmons, 509 U.S. 259, 271-73 (1993); Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986).* This newly-created "immediate purpose" exception to absolute immunity substantially undermines the purpose of the doctrine, allowing a party to subject a prosecutor to burdensome litigation and discovery simply by alleging an

"immediate" investigatory purpose.

Second, the majority held that the use of material witness warrants for an allegedly investigatory purpose is a *per se* constitutional violation. That holding is inconsistent with Supreme Court precedent recognizing that purpose is irrelevant to the Fourth Amendment inquiry. *See Devenpeck v. Alford, 543 U.S. 146, 153 (2004); Whren v. United States, 517 U.S. 806, 808-10 (1996).* The panel, after attempting to distinguish these cases in favor of inapposite cases involving the constitutionality of motor vehicle checkpoints, compounded its error by holding that [*3] its unprecedented decision (supported only by *dicta* in a footnote of a district court decision), was sufficiently "clearly established" to impose personal monetary liability upon former Attorney General Ashcroft. The majority's holding - allowing wide-ranging discovery into a prosecutor's alleged investigatory motive even when the requirements of the material witness statute have been met - will significantly impede prosecutors' ability to obtain necessary material witness warrants and effectively preclude investigation of anyone detained as a material witness.

Third, the majority ruled that former Attorney General Ashcroft may be held responsible for alleged misstatements or omissions in the affidavit of an FBI agent filed in conjunction with the material witness warrant. This holding rests upon a theory of supervisory liability that is directly contrary to the Supreme Court's decision in *Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).*

STATEMENT

1. This case stems from the designation of plaintiff Abdullah Al-Kidd as a material witness in a criminal proceeding against Sami Omar Al-Hussayen for visa fraud and making false statements. Plaintiff was arrested on [*4] a material witness warrant as he was preparing to board a plane for Saudi Arabia, and was released about two weeks later after agreeing to surrender his passport and limit his travel. Plaintiff ultimately was not called as a witness in the trial of Al-Hussayen, and the conditions of release were removed.

2. Plaintiff thereafter brought this civil action against numerous officials of the FBI and the Department of Justice (including former Attorney General Ashcroft), and against the United States under the Federal Tort Claims Act, alleging that his arrest, detention, and conditions of confinement violated the Fourth and Fifth Amendments, the material witness statute, and the Bail Reform Act.

As against former Attorney General Ashcroft, plaintiff principally alleged that after the terrorist attacks on September 11, 2001, Ashcroft, as Attorney General, "developed, implemented and set into motion a policy and/or practice" of using the material witness statute as a pretext "to arrest and detain terrorism suspects about whom [the government] did not have sufficient evidence to arrest on criminal charges but wished to hold preventatively or to investigate further," and that this policy [*5] led to his arrest. ER 29. He also claimed that FBI agents preparing the material witness warrant affidavit included material misrepresentations and omissions, ER 15-16, and that former Attorney General Ashcroft could be held liable for those subordinates' actions, ER 39. Plaintiff also claimed that former Attorney General Ashcroft was liable under the Fifth Amendment for the conditions of confinement under which he was detained. ER 40.

3. The district court denied former Attorney General Ashcroft's motion to dismiss on grounds of lack of personal jurisdiction, absolute prosecutorial immunity, and qualified immunity. A divided panel of this Court affirmed in part and reversed in part.

The panel majority first held that absolute immunity did not shield former Attorney General Ashcroft from liability for the alleged policy of using material witness warrants to detain terrorism suspects for investigative purposes. Although the panel acknowledged that "absolute immunity ordinarily attaches to the decision to seek a material witness warrant," slip op. 12285, it nevertheless held that seeking a material witness warrant is not subject to absolute immunity if its "immediate purpose" is investigatory. [*6] *Id.* at 12990.

The panel majority next held that former Attorney General Ashcroft is not entitled to qualified immunity. The panel

held that, even when the requirements of the material witness statute are met, arresting a witness for the purpose of investigation violates the Fourth Amendment. The majority distinguished longstanding case law foreclosing an inquiry into subjective purpose when determining an arrest's validity, holding instead that material witness arrests are governed by "Fourth Amendment analysis of programs of seizures without probable cause," such as motor vehicle checkpoints set up to interdict drugs. Slip op. 12297-12300. Because analysis of those programs involves an inquiry into their "programmatic purpose," the majority held that absent probable cause to believe that a material witness himself engaged in wrongdoing, resort to the material witness statute as a means of investigating him or placing him in preventative detention violates the Fourth Amendment. *Id.* at 12301.

The majority then concluded that, although no court had squarely addressed the issue, cases involving police checkpoints had "put Ashcroft on notice" that the material witness detentions [*7] would be judged by their "programmatic purpose." Slip op. 12305-06. Appealing to "the history and purposes of the Fourth Amendment," *id.* at 12306, and relying on "dicta in a footnote of a district court opinion," the majority held that the Attorney General should have known of the clear unlawfulness of his actions. *Id.* at 12308.

The majority then held that plaintiff's complaint was sufficient to state a claim against former Attorney General Ashcroft for supervisory liability with respect to the claim that subordinates lied and made material omissions when filing the warrant application in this case. Slip op. 12309-18. The majority held that former Attorney General Ashcroft could be held liable for "setting in motion a series of acts by others * * * which [he] knew or reasonably should have known would cause others to inflict constitutional injury" or for "acquiescence in the constitutional deprivation by subordinates." *Id.* at 12294.

4. Judge Bea dissented in relevant part. He disagreed that the "programmatic purpose" test applied because here the arrest was pursuant to a warrant. Slip op. 12334. As long as the arrest was objectively reasonable, the subjective purposes [*8] of the officials were immaterial. *Id.* at 12331. Nor, in any event, was it clearly established that a valid material witness warrant could not be used if the official had an investigative purpose, since no court had applied the programmatic purpose test to seizures pursuant to warrants. *Id.* at 12343. Former Attorney General Ashcroft was therefore entitled to qualified immunity. On the false affidavit claim, Judge Bea stressed that former Attorney General Ashcroft's alleged role was with respect to the alleged general policy of pretextual use of the material witness statute, not a policy to lie in material witness affidavits. *Id.* at 12345. Judge Bea would also have held that absolute immunity applied. *See id.* at 12358.

ARGUMENT

I. THE PANEL MAJORITY UNDERMINED THE PROTECTIONS OF ABSOLUTE IMMUNITY BY CRAFTING AN "IMMEDIATE PURPOSE" EXCEPTION.

In denying absolute immunity to former Attorney General Ashcroft, the majority did not question the proposition, supported by ample case law, that seeking a material witness warrant generally falls within the sphere of prosecutorial actions with an intimate connection to the judicial process. *See Imbler v. Pachtman, 424 U.S. 409, 431 (1976);* [*9] *Daniels v. Keiser, 586 F.2d 64, 68-69 (7th Cir. 1978).* Instead, it carved out a novel (and sizeable) exception to the protections afforded by absolute immunity. It held that a prosecutor is *not* entitled to absolute immunity for seeking a material witness warrant when the "immediate purpose" of that warrant was not to secure a person's presence for a criminal proceeding, but "to investigate or preemptively detain a suspect." Slip op. 12290. And since the prosecutor did not have absolute immunity in such circumstances, neither did former Attorney General Ashcroft for setting a policy of using material witness warrants for investigative or detention purposes.

This "immediate purpose" exception is contrary to the Supreme Court's and this Court's precedents. It is well established that the scope of immunity does not turn on the motive or intent of the prosecutor. *Fitzsimmons, 509 U.S. at 271-73; Ashelman, 793 F.2d at 1078.* But the majority's reasoning effectively replaces the simple legal inquiry into the "nature of the function being performed" with a complicated factual inquiry into the subjective "purposes" of the

prosecutor. No [*10] other court has adopted the majority's approach, and several courts of appeals have expressly rejected it. *See, e.g., Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004)* (the "fact that improper motives may influence" a prosecutor's exercise of discretion "cannot deprive him of immunity"); *Austin Mun. Sec. Inc. v. National Ass'n of Securities Dealers, 757 F.2d 676, 685 (5th Cir.1985)* ("the intent with which * * * defendants operate is irrelevant to the absolute immunity issue"). Indeed, it would be particularly anomalous for the application of absolute immunity to turn on an officer's motive, when the Supreme Court has expressly eliminated any inquiry into motive for purposes of *qualified* immunity. *See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Davis v. Scherer, 468 U.S. 183, 191 (1984)* (*Harlow* rejected the "inquiry into state of mind in favor of a wholly objective standard").

Permitting an inquiry into prosecutorial motives - whether to uncover discriminatory animus or a supposedly unlawful "investigatory purpose" - would largely undermine the purposes of the absolute immunity defense. Absolute [*11] prosecutorial immunity "is based upon the same considerations that underlie the common-law immunities of judges and grant jurors acting within the scope of their duties." *Imbler, 424 U.S. at 422-23.* These public policy considerations "include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id. at 423.* But as the dissent recognized, applying the majority's rule - *i.e.,* determining the subjective intent of the prosecutor - would require "precisely the kind of expensive discovery and litigation [that] immunity was designed to avoid." Slip op. 12357-58.

The majority attempted to distinguish this large body of contrary precedent by asserting (op. 12285) that those cases involve "allegations that the otherwise prosecutorial action was secretly motivated by malice, spite, bad faith, or self-interest." Yet the majority offered no reasoned explanation as to why an allegedly racist prosecutor who seeks material witness warrants for discriminatory [*12] reasons would be protected by absolute immunity, but a prosecutor taking the same action for the purpose of investigating a crime would not. There simply is no support for the majority's view that inquiry into the motives of the prosecutor is permissible for some purposes but not others.

At bottom, the majority's ruling creates a huge loophole in the absolute immunity defense. Even the majority recognized that plaintiffs would likely use the "immediate purpose" exception to sue prosecutors for bringing criminal charges with the "real" immediate purpose of pressuring the defendant to provide information on other suspects. The majority, however, saw little danger of such actions succeeding because a "prosecutor who files charges may hope, eventually, that the petty crook will implicate his boss," but that "the *immediate purpose* of filing charges is to *bring a prosecution*-the better to pressure the defendant into providing information." Slip op. 12290 (emphasis in original). But that dictum will come as cold comfort to prosecutors, since the majority offered no principled basis for its asserted distinction. The majority does not explain why a plaintiff cannot simply allege that [*13] the prosecutor's "immediate purpose" for bringing a prosecution is the desire to investigate another defendant that the government lacks probable cause to arrest, thereby overcoming absolute immunity. And, as the dissent pointed out, if the majority's attempted distinction makes sense, "why isn't the prosecutor's 'immediate purpose' in this case to secure a witness's appearance at trial rather than to obtain evidence against al-Kidd?" *Id.* at 12358.

In sum, the panel majority's absolute immunity ruling creates a dangerous precedent that undermines the absolute immunity afforded to prosecutors. The ruling cannot be squared with Supreme Court and circuit precedent and should be reheard by this Court sitting *en banc.*

II. THE PANEL MAJORITY ERRED IN DENYING FORMER ATTORNEY GENERAL ASHCROFT QUALIFIED IMMUNITY.

The panel majority's decision denying former Attorney General Ashcroft qualified immunity also warrants en banc review. First, the majority's holding that the use of material witness warrants for an allegedly investigatory purpose amounts to a *per se* constitutional violation is wrong. Second, the majority, after distinguishing a string of Supreme Court precedent, [*14] engrafting a standard gleaned from an entirely different aspect of Fourth Amendment law, and relying on *dicta* in a district court footnote, erred in holding that the law was sufficiently clear to hold a Cabinet-level

officer personally liable for a never-before-recognized constitutional violation.

1. Plaintiff did not challenge the facial constitutionality of the material witness statute. *See* Slip. op. 12296. Rather, as the dissent pointed out, plaintiff's claim is that "*even if* the material witness warrant on which he was detained was objectively valid and supported by probable cause, the prosecutor's subjective intention to use the material witness warrant to accomplish other, law-enforcement objectives renders the government's conduct unconstitutional." *Id.* at 12331 (emphasis in original).

Contrary to the majority's holding, a facially proper material witness warrant obtained for allegedly improper reasons - whether investigative or otherwise - does not violate the Fourth Amendment. A long line of Supreme Court precedent holds that, under the Fourth Amendment, an officer's motives are irrelevant in determining the lawfulness of his or her conduct. For example, [*15] in *Whren v. United States, 517 U.S. 806, 813 (1996),* the Supreme Court expressly rejected the contention that the Constitution prohibits the use of traffic offenses "as pretexts for pursuing other investigatory agendas," *id. at 811,* and held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," *id. at 813.* The Court reemphasized this point again in *Devenpeck v. Alford, 543 U.S. 146, 153 (2004),* holding that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."

The majority held that *Whren* and *Devenpeck* do not apply here, because those cases involved arrests based on "probable cause *to believe that a violation of law has occurred.*" Slip op. 12297 (quoting *Whren, 517 U.S. at 811)* (emphasis by the majority). The majority noted that, by contrast, "[a]n arrest of a material witness is not justified by probable cause because the two requirements of § 3144 (materiality and impracticability) do not constitute the elements of a crime." *Id.* at 12298. The majority [*16] thus concluded that because a material witness arrest is not supported by "probable cause to arrest," it was more appropriate to adopt the "programmatic purpose" standard from cases involving warrantless searches at motor vehicle checkpoints, which appears to allow some examination of subjective motivations of government officials, though only at a "programmatic" level. *See Illinois v. Lidster, 540 U.S. 419 (2004); City of Indianapolis v. Edmond, 531 U.S. 32 (2000).*

The majority's approach is fundamentally flawed. First, the majority's attempted distinction between pretextual arrests for minor traffic violations and material witness arrest warrants is without foundation. An officer who arrests an individual for a minor traffic violation, while secretly wishing to detain the suspect for narcotics trafficking, lacks probable cause to detain the suspect for the latter crime, yet the officer's motive is irrelevant. The majority does not explain why motive suddenly becomes relevant when an otherwise lawful material witness arrest occurs. Both situations involve detentions that are lawful on their face, and both involve allegations that the officer lacked [*17] probable cause to arrest the suspect for the particular crime that allegedly motivated the arrest.

Moreover, the majority's adoption of the "programmatic purpose" standard from *Lidster* and *Edmond* is incorrect. That standard is a *limited* exception to the general rule that motive is irrelevant. Thus, in *United States v. Knights,* the Court concluded that, "[w]ith the limited exception of some special needs and administrative search cases, [the Court] ha[s] been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *534 U.S. 112, 122 (2001)* (citing *Edmond, 531 U.S. at 45,* and *Whren, 517 U.S. at 813).*

In addition, the "programmatic purpose" standard used in *Lidster* and *Edmond* makes little sense here, where the arrest was made pursuant to a warrant issued by a neutral magistrate. As the dissent explained, "[t]he 'programmatic purpose' inquiry is necessary to test the validity of a special needs search precisely because such searches occur without the procedural protections of the warrant requirement and the magisterial supervision it entails." Slip op. 12335. [*18] Here, by contract, the majority has held that even a perfectly accurate affidavit that complies fully with the statute and that a judge correctly approved as supporting the issuance of a material witness warrant can be challenged as a Fourth Amendment violation if the subjective intent of the prosecutor who sought the warrant was to further some ancillary investigative objective. Because the majority's holding requires courts to look beyond the objective reasonableness of the warrant to the subjective purpose for which it was sought, rehearing en banc is warranted.

2. However, even if one could conclude that the investigatory use of material witness warrants violates the Fourth Amendment, former Attorney General Ashcroft is entitled to qualified immunity because that norm had not been clearly established. At the time of plaintiff's arrest as a material witness, no reasonable official would have been on notice that, where the requirements of the material witness statute are satisfied, using a material witness warrant for the purpose of investigating a suspect violates the Fourth Amendment.

The majority acknowledged that no case had "squarely confronted the question of whether misuse [*19] of the material witness statute to investigate suspects violates the Constitution." Slip op. 12304. The only case the majority identified even remotely addressing the "specific context of [this] case," *Brosseau v. Haugen, 543 U.S. 194, 199 (2004),* was a district court decision that, in dictum in a footnote, warned that the material witness statute "should not be abused as an investigatory anti-terrorism tool." Slip op. 12307-08. Nothing in that footnote established reasonable contours for a prosecutor to conclude that having a subjective alternative motive, whatever that motive might be, for obtaining an otherwise-valid material witness was a Fourth Amendment violation.

In fact, the federal courts have rejected the contention that an intent to investigate an individual as a suspect invalidates a material witness warrant even where the statutory criteria have been met. In *United States ex rel. Glinton v. Denno, 339 F.2d 872, 875 (2d Cir. 1964),* a criminal defendant originally detained as a material witness argued that "it is irrelevant that the police complied with the technicalities of the material witness statute, because as the 'target' of the [*20] grand jury proceeding he could not have been summoned to testify, * * * and therefore could not be held as a witness." But as the court held, "[t]his argument has no merit." *Ibid.* The court found "dispositive" the decision in *People v. Perez, 300 N.Y. 208, 219, 90 N.E. 40, 46 (Ct. App. N.Y. 1949),* in which the court upheld a situation almost identical to the practice alleged here: "While the police may have suspected defendant of the murder, they did not have enough evidence to hold him as a defendant until shortly before he confessed. His detention during that period was lawful because, in light of his admitted knowledge of many of the circumstances surrounding the murder, his commitment as a material witness was valid." *Ibid.*

The majority further erred in concluding that, because the Supreme Court had long established the "programmatic purpose" inquiry for administrative or "special needs" warrantless searches, this "should have been sufficient to put Ashcroft on notice that the material witness detentions * * * would similarly be subject to an inquiry into programmatic purpose." Slip op. 12305-306. As explained above, cases involving warrantless searches [*21] and seizures have no clear relevance to the constitutionality of arrests of material witnesses pursuant to warrants issued by a neutral magistrate.

Indeed, the majority's attempted distinction of cases such as *Whren* and *Devenpeck,* and its unprecedented adoption of a "programmatic purpose" standard in this context, was insufficient even to convince its dissenting colleague. It is patently untenable to render the former Attorney General subject to burdensome litigation and potential liability on the basis of so thin a reed. *See Wilson v. Layne, 526 U.S. 603, 618 (1999)* (when "judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy") .

III. THE PANEL MAJORITY ERRED IN HOLDING THAT FORMER ATTORNEY GENERAL ASHCROFT CAN BE HELD PERSONALLY LIABLE FOR THE ALLEGEDLY DEFICIENT AFFIDAVIT USED TO SEEK A MATERIAL WITNESS WARRANT.

The panel majority also held that former Attorney General Ashcroft may be held personally responsible not just for the alleged policy of obtaining material witness warrants for investigatory purposes, but also for specific alleged [*22] misstatements or omissions in the affidavit used to obtain the warrant to arrest plaintiff in this case - even though the complaint is devoid of allegations that former Attorney General Ashcroft had any involvement in, or even knowledge of, the warrant used in this case. That holding is flatly inconsistent with the Supreme Court's decision in *Iqbal.*

Iqbal set forth two principles important to this case. First, the Court explained that the Federal Rules of Civil Procedure require plaintiff to provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is

plausible on its face.'" *129 S.Ct. at 1949* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007))*. Second, the Court held that government officials may not be held liable for the misconduct of their subordinates under broad theories of "supervisory liability." *Iqbal, 129 S.Ct. at 1949.* Instead, a supervisory official may be held liable under *Bivens* only if a plaintiff demonstrates that the supervisor "through [his or her] own individual actions, has violated the Constitution." *Id. at 1948.*

The majority's decision here [*23] is plainly inconsistent with *Iqbal.* First, the majority, without acknowledging *Iqbal's* extensive discussion of the issue, held that former Attorney General Ashcroft could be held liable merely for "setting in motion a series of acts by others * * * which [he] knew or reasonably should have known would cause others to inflict constitutional injury" or for "acquiescence in the constitutional deprivation by subordinates." Slip op. 12294. But *Iqbal* expressly rejected that approach. Just as in this case, the plaintiff in *Iqbal* alleged that the former Attorney General was the "principal architect" of a policy, and that he knew or should have known that constitutional violations were occurring and failed to correct them. The *Iqbal* Court held that the claim of "knowledge and acquiescence" is insufficient to impose supervisory liability. *129 S.Ct. at 1949.*

The majority mistakenly characterized *Iqbal* as requiring only that the supervisor "was *involved* in the constitutional deprivation." Slip op. 12312 n.23 (emphasis added). But the proper inquiry is not whether the supervisor was somehow *involved* in constitutional deprivations, but whether that [*24] supervisor, through his own individual actions, *"violated the Constitution." Iqbal, 129 S.Ct. at 1949* (emphasis added). The majority's supervisory liability holding is therefore incorrect.

CONCLUSION

For the foregoing reasons, this Court should vacate the panel's decision and rehear this case en banc.

Respectfully submitted,

ANNE RAVEL
Deputy Assistant Attorney General n1

n1 Assistant Attorney General Tony West is recused in this matter.

ROBERT M. LOEB
(202) 514-4332
MATTHEW M. COLLETTE
(202) 514-4214
SARANG V. DAMLE
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7212
Department of Justice
Washington, D.C. 20530-0001

OCTOBER 2009

BRIEF FORMAT CERTIFICATION

I hereby certify that the Petition for Rehearing En Banc complies with the Type-Volume requirements of 9th Cir. R.

40-1(a) in the following manner:

The Brief was prepared using Corel Wordperfect 12.0. It is proportionately spaced in 14-point type, and contains [*25] 4,077 words.

MATTHEW M. COLLETTE
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2009, I electronically filed the foregoing Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send Notice of Electronic Filing to the following persons:

Lee Gelernt
American Civil Liberties Union
125 Broad St.
18th Floor
New York, NY 10004

Cynthia Jane Wooley
Law Offices of Cynthia J. Wooley
P.O. Box 6999
Ketchum, ID 83340

Lee-Anne Mulholland
Wilson, Sonsini, Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050

Robin L. Goldfaden
ACLU Immigrants' Rights Project
39 Drumm St.
San Francisco, CA 94111

I hereby certify that on October 19, 2009, I served the following counsel by causing two copies to be mailed to:

R. Keith Roark
Roark Law Firm
409 North Main Street
Haily, ID 83333

Alison M. Tucher
Elizabeth O. Gill
Morrison & Foerster, LLP
425 Market St.
San Francisco, CA 94105

Erin J. Holland
Wilson, Sonsini, Goodrich & Rosati
650 Page Mill Road

Palo Alto, CA 94304-1050

MATTHEW [*26] M. COLLETTE
Counsel for Appellant

[SEE OPINION IN ORIGINAL]