Case No. 01-15007

Case Decided January 4, 2002. Panel Members: Pregerson, C.J., Rawlinson, C.J., and Weiner, District Judge sitting by designation.

In The

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; BISHOP PAIUTE GAMING CORPORATION, d.b.a. the PAIUTE PALACE CASINO,

Plaintiffs-Appellants,

vs.

COUNTY OF INYO; PHILLIP McDOWELL, individually and in his official capacity as District Attorney of the County of Inyo; DANIEL LUCAS, individually and in his official capacity as Sheriff of the County of Inyo,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, CASE NO. CV-F 00-6153 REC/LJO

APPELLEES' PETITION FOR REHEARING EN BANC

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I

INTRODUCTION AND STATEMENT OF COUNSEL

The COUNTY OF INYO, Inyo County District Attorney PHILLIP MCDOWELL, and Inyo County Sheriff DAN LUCAS, appellees in this case, seek rehearing en banc of the January 4, 2002, panel decision (Pregerson, C.J., Rawlinson, C.J., and Weiner, District Judge sitting by designation) on three issues. In the first of these issues, the **panel's decision conflicts with the 2001 decision of the United States Supreme Court** in ***NEVADA VS. HICKS***, 533 U.S. 353, 121 S.Ct. 2304 (U.S., June 25, 2001). This issue also involves a question of **exceptional** and **national importance,** specifically, whether the ever-increasing numbers of Indian gaming casinos in the United States are to be awarded or vested with the status of **enclaves,** or **sanctuaries,** that are **immune from search, pursuant to a search warrant,** for evidence of off-reservation violations of state criminal law -- that is **crimes, including felonies, that have been committed off the reservation,** and whether the evidence of these **off-reservation crimes** may be housed by Indian tribes in their gambling casinos, and rest with impunity, concealed from law enforcement officers who are investigating these crimes, even in those circumstances where a search warrant has been issued upon probable cause for the search of the criminal evidence.

The Supreme Court held in ***NEVADA VS. HICKS***, supra, that States have the **inherent jurisdiction to enter a reservation**, for criminal law enforcement purposes, regarding **crimes committed off the reservation**, and serve process (specifically **search warrants**) in connection therewith. The Supreme Court held:

> "[T]he principal that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.' *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156, 100 S.Ct. 2069 . . . .
>
> "We conclude today, in accordance with these prior statements, that **tribal authority to regulate state officers in executing process [search warrants]** related to the violation, off reservation, of state laws is **not essential to tribal self-government or internal relations** – to 'the right to make laws and be ruled by them.' The **State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government**." *Nevada vs. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 2311-2313. (emphasis added)

The panel's decision, however, is contrary to and in conflict with this analysis and holding of the Supreme Court. Instead, the panel's decision holds that the execution of such a search warrant by state officers ***does*** impair the tribe's right to self-government, and it is therefore barred by the tribe's assertion of sovereign immunity.

Accordingly, under the panel's view, Indian tribes **may indeed** house the **criminal evidence pertaining to off-reservation crimes in their gambling casinos,** with impunity, may conceal the same from law enforcement officers, and may regulate the performance of law enforcement duties by these officers on the reservation by either totally prohibiting the search, or conditioning the search as they wish, and that the evidence of the commission of these crimes is immune from search by search warrant.[1]

The second issue being submitted also involves an issue of exceptional importance affecting several States, and concerns whether the statutory enactment commonly known as **Public Law 280** (18 U.S.C. 1162) enables State law enforcement officers to search Indian gaming casinos, pursuant to a **search warrant** issued upon probable cause, for evidence of violations of State criminal law, regardless of whether those crimes are committed **on the reservation** or **off the reservation**, or whether the evidence of those crimes may be withheld by the Indian tribes, and subjected to "negotiation" between the tribe (or their gaming corporations that operate

[1] The Supreme Court's decision in **Nevada vs. Hicks**, supra, was issued after appellees' brief was submitted for filing. It was, however, thereafter several times submitted to the panel and brought to its attention, first in the Amicus Curie brief submitted by the California District Attorneys' Association in this case, next by appellants' own Reply Brief, and further, it was extensively presented and argued by the parties, to the panel, at the oral hearing in this matter.

the gambling casinos) and State law enforcement officers. The panel has held the latter.

The third issue is an issue of **exceptional importance**, and concerns whether, **if it is held** that Indian tribes, through their Indian gaming casinos, **may indeed withhold evidence of off-reservation (as well as on-reservation) crime from State law enforcement officers**, then (1) did the execution of the search warrant in this case constitute a violation of a right of the Indian tribe (constitutional or statutory) that enables the tribe to state a claim upon which relief may be granted for a civil rights violation under 42 U.S.C. 1983, and (2) if so, was the law permitting the Indian tribes and casinos to withhold or suppress the criminal evidence, under the facts of this case and conditions facing the officer, so **clearly established** that no reasonable officer would have known that obtaining and/or executing a search warrant for the criminal evidence held upon the gambling casino was unlawful. If either of these factors does **not** exist, then the officers executing the search warrant are entitled to qualified immunity. *Anderson v. Creighton* (1987) 483 U.S. 635, 640; *Harlow v. Fitzgerald* (1982) 457, U.S. 800, 818; *Saucier v. Katz, et al.*, 533 U.S. 194 (2001).

Contrary to the State of the law in this Circuit and the United States, however, the panel has erroneously held that under the facts alleged, both of

these conditions **did** exist, and that the officers are therefore not entitled to qualified immunity.

II

FACT BACKGROUND

The panel's decision in this case arises from the District Court's granting of appellees' FRCP 12(b)(6) motion to dismiss appellant Tribe's lawsuit for declaratory and injunctive relief, and damages under 42 U.S.C. 1983.

In or about March 1999, the State of California Department of Social Services sent to the County of Inyo a document known as the "IEVS/Integrated Fraud Detection System Report." This report is generated by the State, from payroll information submitted by employers throughout the State, and the Department of Social Services then "matches" the employer-reported income with the income being reported by persons receiving State public assistance. When a "mismatch" is discovered, that is, when the amount of wages being reported by employers is in excess of that being reported by the public assistance recipients, the "Integrated Fraud Detection System Report" is sent to the County handling the public assistance.

In this case, the Bishop Paiute Palace Casino, operated by the plaintiff tribe, had reported to the State of California the wages for three tribal

members who were employees. The wages reported by the tribe were in excess of the wages being reported by the employees. After attempts to reconcile the difference, the County of Inyo referred the matter to the Inyo County District Attorney's Office, and after making requests for a reconciliation to the three employees, and being ignored, the District Attorney Investigator requested the employee records directly from the casino. For whatever reason (this would likely be a disputed factor at trial), the District Attorney Investigator made application for a search warrant for the employee payroll records. The search warrant was served upon the casino, and the records were obtained.

The application for the search warrant stated that the failure to report the subject income may have resulted in an overpayment to the extent of an amount constituting a felony (more than $400.00). This is a violation of California Penal Code § 487 (Grand Theft).

III

PETITION FOR REHEARING EN BANC

A. The Panel's Opinion is in Conflict with the 2001 Decision of the United States Supreme Court in *Nevada Vs. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (U.S., June 25, 2001).

The panel's decision holds that the execution of the subject search warrant, for evidence of **off-reservation crimes**, interferes with "the right of reservation Indians to make their own laws and be ruled by them." Specifically, the panel held :

> "...at issue is not just the Tribe's right to protect the confidentiality of its employee records, but the more fundamental right of the Tribe not to have its policies undermined by the states and their political subdivisions....
>
> We **conclude** that the **execution of a search warrant** against the Tribe **interferes with 'the right of reservation Indians to make their own laws and be ruled by them**.' *Williams*, 358 U.S. at 220, 79 S.CT. 269." (emphasis added)

In support of this position, the panel cited *United States vs. James*, 980 F.2d 1314 (9th Cir. 1992). The *James* case, was decided nine years **prior** to the controlling case of ***Nevada vs. Hicks***, supra, and obviously does not have the benefit of the Supreme Court's rulings therein. It also can be distinguished in that it involved an Indian defendant being prosecuted by the

federal government, for the **on-reservation** crime of rape against another Indian, pursuant to the Indian **Major Crimes Act**, 18 U.S. 1153, and **did not involve a search warrant for evidence of off-reservation crime,** but rather a subpoena apparently issued by the Clerk of the Court pursuant to FRCRP 17, to the Quinault Tribe for the release of the rape victim's physiological counseling records (drug and alcohol abuse). The subpoena was quashed in *James* on the ground that the tribe had the right to refuse to honor it pursuant to its sovereign immunity.

According to the panel here, the *James* case is authority for holding, in this case, that the execution of a state **search warrant**, for evidence of **off-reservation violations of state criminal laws**, interferes with the "right of reservation Indians to make their own laws and be ruled by them." The panel also balanced, in its view (1) the interests of the Paiute Tribe in refusing to disclose the subject payroll records, and (2) the interests of the State in pursuing the evidence of off-reservation crimes, and stated:

> "[W]e find that the **State's interest** in the present case – **the prevention of welfare fraud** – is **not** as great as the Federal government's interest in the judicious criminal prosecution in James, **and it is certainly not as great as protecting the Tribe's sovereign immunity**." (emphasis added)

In **both of these holdings,** however, as above described, the panel is in **conflict with, and has held contrary to, the analysis and findings of the United States Supreme Court in *Nevada vs. Hicks***, supra.

Nevada vs. Hicks is the 2001 reversal of a previous Ninth Circuit case, wherein the Supreme Court made it clear that, with respect to **off-reservation crime** (which is what we have here -- the crime of grand theft from the State of California and/or County of Inyo), the **states have inherent jurisdiction to execute their process [search warrants] on the reservation, and there is no tribal authority to interfere with, or regulate, the performance of law enforcement duties by state law enforcement officers when coming upon the reservation for the purpose of investigating and prosecuting off-reservation crime.**

The Supreme Court specifically stated, **contrary** to the findings of the panel here, that:

> "Our cases make clear that the Indians' right to make their own laws and be governed by them does **not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.**
>
> . . . .
>
> "[T]he principal that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and **those of the State**, on the other.' *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156, 100 S.Ct. 2069 . . . .
>
> "We conclude today, in accordance with these prior statements, that **tribal authority to regulate state officers in executing process [search warrants]** related to the violation, **off reservation, of state laws** is **not essential to tribal self-government or internal relations** – to 'the right to make laws and be ruled by them.' The **State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government**."
>
> *Nevada vs. Hicks*, supra, 2311-2313. (emphasis added)

In addition, the Supreme Court stated in *Nevada vs. Hicks* (page 2313) that although the states' **inherent jurisdiction** on reservations can be stripped by Congress, that has not happened here (with regard to search warrants for **off-reservation crime)**, and further, that:

> "**Nothing** in the federal statutory scheme **prescribes**, or even **remotely suggests**, that state officers cannot enter a reservation (including Indian-fee land) to **investigate or prosecute violations of state law occurring off the reservation**."
>
> *Nevada vs. Hicks*, supra, page 2313. (emphasis added)

The Supreme Court went on to state that:

> " '[T]he **State's interest** in **execution of process** is **considerable' enough to outweigh the tribal interest in self-government' even when it relates to Indian-fee lands**.' " *Nevada vs. Hicks*, supra, page 2316. (emphasis added)

Even further, the Supreme Court stated in *Nevada vs. Hicks* that:

> "We do not say State officers cannot be regulated; **we say they cannot be regulated in the performance of their law-enforcement duties**. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Nevada vs. Hicks*, supra, page 2317. (emphasis added)

By way of all of the foregoing, and other strong comments by the Supreme Court throughout the *Nevada vs. Hicks* opinion, it is respectfully clear that the **panel was in error when it ruled** that the execution of process, a **search warrant**, by a **state law enforcement officer on a reservation**, for evidence of an **off-reservation crime**, "interferes with the 'right of reservation Indians to make their own laws and be ruled by them.'"

To the contrary, the United State Supreme Court has found, and held, exactly the **opposite**. **The states have inherent jurisdiction**, as one of the United States, to **serve such search warrants for evidence of off-reservation crime.** *Nevada vs. Hicks*, supra, pages 2313, 2316-2317.

To hold otherwise would be to create **enclaves**, or **sanctuaries**, on Indian reservations, where the evidence of off-reservation criminal activity may reside, with impunity, immune from search by state law enforcement officers, immune from seizure by law enforcement officers, and immune from utilization by prosecutors, all with regard to off-reservation state crime,

whether that crime be grand theft (as in this case), murder, vehicular homicide, rape, armed robbery of a non-federal institution, home intrusion burglaries, rapes, assaults, etc.

The creation of such enclaves or sanctuaries, for the storage of evidence of off-reservation crime, cannot be allowed to stand. For these reasons, the importance of a rehearing of this matter, en banc, is great.

B. The Panel's Opinion that the Sovereign Status of the Tribe Prevents the Execution of the Search Warrant Because "Public Law 280 Did Not Waive the Tribe's Sovereign Immunity," Must be Reassessed in Light of the Supreme Court's Decision in *Nevada Vs. Hicks*.

In its opinion, the panel also sets forth a second (and more briefly stated) reason why the tribe may prevent the execution of the search warrant for criminal evidence. The panel cites *Bryan vs. Atasca County*, 426 U.S. 373, 379 (1976), and *California vs. Quechan Tribe of Indians*, 595 F.2d 113, 1156 (9th Cir. 1979), as support for its holding that Public Law 280 did not "waive the tribe's sovereign immunity" with regard to criminal process.

However, each of these cases dealt **not** with the criminal aspect of Public Law 280 (which is set forth at 18 U.S.C. 1162), but instead addressed the right of a tribe to be immune from a **civil lawsuit**, and otherwise limit the State's **civil jurisdiction**, all as set forth in the **civil aspect** of Public Law 280

(which is 28 U.S.C. 1360, and is entitled "State Civil Jurisdiction in Actions to Which Indians are Parties").

None of the cases cited by the panel, or elsewhere to be found by the undersigned, holds in any way that **the criminal aspect** of Public Law 280, at 18 U.S.C. 1162, has been interpreted to mean that a search warrant, issued by a state court, upon probable cause, for evidence of crime that is located upon a reservation (specifically tribal property), is immune from search pursuant to the search warrant.

As discussed above, the panel in this case has ruled that the state's interest in enforcing its criminal laws must yield to the interest of tribal "self government."

However, as we have also seen in *Nevada vs. Hicks*, supra, the United States Supreme Court has now held **to the contrary,** and has also held that **"the State's interest in execution of process [search warrants] is considerable, and even when it relates to Indian-fee lands, it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government."** *Nevada vs. Hicks*, supra, page 2313.

Accordingly, to the extent that Public Law 280 affects (as appellants have contended) only crimes by or against Indians occurring within Indian country, the execution of search warrants for violations of state law, on the

reservation, pursuant to Public Law 280, can be no less onerous to the tribe than the execution of search warrants for off-reservation crime.

Thus, by the plain language of Public Law 280[2], at least with regard to on-reservation crime, the state may execute its process (search warrants) for evidence of crimes committed on the reservation, and this would include tribal property, in that a tribe's barring of the service of search warrants has been held as **"not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them.' "** *Nevada vs. Hicks*, supra, page 2313. By so holding, there can be uniform investigation and enforcement of state criminal laws, regardless of whether the crime occurred on the reservation, or off of the reservation.

The issue of whether or not Public Law 280 applies to off-reservation crimes only becomes material if, for some reason, the en banc court were to find that the Supreme Court's holdings of *Nevada vs. Hicks,* supra, regarding a state's inherent jurisdiction on reservations, does not, for some reason, apply in California.

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[2] Public Law 280 (18 U.S.C. 1162) provides: "Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State of Territory, ... and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory: California – All Indian country within the State."

C. **The Panel's Opinion that the District Attorney and Sheriff are Not Entitled to Qualified Immunity is Erroneous for Two Reasons. First, The Rights of the Tribe that were Allegedly Violated are not Statutory or Constitutional Rights, and thus Will Not Support a 42 U.S.C. 1983 Claim; Second, the Law Regarding When a Search Warrant May be Obtained in Indian Country was not so Clearly Established that a Reasonable Officer Facing the Situation at Issue Would Have Known that Obtaining and/or Executing the Search Warrant was Unlawful.**

1. **Both the right to self-governance, and the claimed right to assert sovereign immunity as a bar to the execution of the search warrant, are not statutory or constitutional rights. As such, they cannot support a Section 1983 claim.**

It is well established that in order to prevail in a Section 1983 claim, the government official must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Conn vs. Gabbert*, 526 U.S. 286, 290 (1999); *Harlow vs. Fitzgerald*, 457 U.S. 800, 818 (1982).

The panel has acknowledged this in its Footnote 6, where the panel acknowledges that *Hoopa Valley Tribe vs. Nevins*, 881 F.2d 657 (9th Cir. 1989) holds that interfering with or impairing an Indian tribe's **right to self-governance** is **not** a protected interest under Section 1983, and will not

support a claim for Section 1983 damages. This is because a tribal right to self-governance is not based upon federal statutory or constitutional law, but rather is based upon case law, common law and sometimes treaty.

The panel then goes on, however, in Footnote 6, to assert that the right that supports the Section 1983 claim is the **unlawful search** of the tribal casino, and that the same is a 4th Amendment violation. However, even accepting the panel's view that the search was unlawful, the only thing that **makes** the search unlawful (for it was with search warrant, and there was probable cause for its issuance, etc.) is that the search was made in violation of **the tribal sovereign immunity of plaintiff** to prevent such searches.

Thus, the only tribal right being violated besides the right to self-governance (which is not Section 1983 actionable) is the asserted **tribal right to sovereign immunity from search**, and this also is a right **not** founded in federal statutory or constitutional law, but rather in common law and case decisions. Therefore, a violation of this right, just as a violation of the right to tribal self-governance, **will not support a Section 1983 claim**. Accordingly, the District Attorney and Sheriff are **entitled to qualified immunity**.

One final note on this topic addresses the incorrect assertion by the panel that California law does not allow a state magistrate to issue a search

warrant to the Sheriff of the magistrate's county, regarding a search to be conducted outside of the county, and that because this is said to have occurred here (presumably because the reservation is considered by the panel to be outside the jurisdiction of the magistrate/county) the Sheriff acted outside of his jurisdiction. This is an incorrect recitation of California law, even though the District Court in *Sycuan* recited this. California Penal Code 1528 permits the magistrate to issue search warrants to "a peace officer in his or her county" which includes, of course the County Sheriff or his deputies. Further, the California Supreme Court has held, after a complete examination and analysis of Penal Code 1528, 1529, 830.1, and other applicable statutes, that "a magistrate has jurisdiction to issue an out-of-county search warrant when he has probable cause to believe that the evidence sought relates to a crime committed within his county." *People v. Fleming* (1981) 29 Cal.3d. 698, 703-706).

The *Fleming* Court further held that pursuant to Penal Code 830.1, the authority of the peace officer "**extends to any place within the state** ... [a]s to any **public offense committed or which there is probable cause to believe has been committed** within the political subdivision which employs him." *People v. Fleming*, supra, page 704.

Thus, there is no extraterritorial jurisdiction being asserted by the Sheriff, or District Attorney Investigator, both of whom are peace officers employed by the County of Inyo, and whose authority extends to "any place within the state" with regard to the grand theft crime committed, or for which there was probable cause to believe had been committed, in Inyo County.

2. The finding by the panel that the state of the law regarding the *James* case, as extrapolated to cover search warrants, as well as subpoenas, was so clearly established that any reasonable officer should have known that the application for and/or service of the search warrant was unlawful, is erroneous.

In *Crow Tribe of Indians, et al. v. Racicot, et al.*, 87 F.3d 1039 (9th Cir. 1996), the service of a search warrant upon the Crow Tribe's casino was challenged and upheld as lawful; in *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), the service of a FRCRP 17 subpoena by a defendant to his alleged sexual abuse/rape victim was quashed as being in violation of the tribe's sovereign immunity; in *United States v. Snowden*, 89 F.Supp. 1054 (D. Oregon 1995), under almost identical circumstances as *James*, the District Court refused to follow *James*, finding that the constitutional rights of the accused were not considered in *James*, and that the constitutional rights of the accused outweighed the tribe's claim of sovereign immunity in the counseling

records, and the subpoena **was not** quashed; and in *United States v. Verlarde* 40 F.Supp.2d 1314 (D. New Mexico 1999), once again under almost identical circumstances as *James,*, the court again went through an extensive analysis of James and Snowden, and found that the constitutional rights of the accused, and the federal government's overriding sovereign authority, "trumped" the tribe's claim of sovereign immunity in the counseling records, and once again the subpoena **was not** quashed.

Further, all of these cases, leading to **inconsistent results**, were similar in that they all involved alleged violations of federal and/or state law occurring **on the reservation**. This would be confusing enough to a peace officer on the street; let alone add the fact that there was no case that, like this one, addressed the issue of **off-reservation state crime**.

Under these varied circumstances, in simply cannot be said that all reasonable officers would have known that obtaining and/or execution of a search warrant, issued by a magistrate on probable cause, was unlawful under the circumstances alleged.

IV

CONCLUSION

The issues which are the subject of this petition involve a conflict of the Ninth Circuit panel's decision in this case, with the 2001 decision of the U.S.

Supreme Court in ***Nevada vs. Hicks***, supra. That conflict has led to inconsistent opinions of the law in this Circuit, and leads to the question of whether the Supreme Court's view on search warrants **not** impairing tribal self-government, or the Ninth Circuit panel's view that search warrants **do** impair tribal self-government, will be followed by the federal courts in the Ninth Circuit.

For this and all of the reasons set forth herein, it is urged that the requested en banc hearing be granted, and these issues of conflict and exceptional importance be addressed by the en banc court.

DATED: January 24, 2002

Respectfully submitted,

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By _____
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CERTIFICATION OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing en banc is: (check applicable option)

X Proportionately spaced, has a typeface of 14 points or more, and contains 4185 words.

or

___ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Dated: January 24, 2002

JOHN D. KIRBY

PROOF OF SERVICE BY MAIL

State of California, County of San Diego

I am employed in the County of San Diego, over the age of 18 years and not a party to the within entitled action. My business address is 9747 Business Park Avenue, San Diego, California 92131.

On January 24, 2002, I served the foregoing document described as: APPELLEES' PETITION FOR REHEARING EN BANC on all parties in said action, by causing a true copy thereof to be transmitted in a sealed envelope, addressed as shown below,

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[X] FEDERAL I declare that I am a member of the Bar of this Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 24, 2002

JOHN D. KIRBY