No. 07-15931

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRENCE HARRY BRESSI,
Plaintiff/Appellant,

v.

MICHAEL FORD; ERIC O'DELL; GEORGE TRAVIOLIA; RICHARD SAUNDERS; AND THE UNITED STATES OF AMERICA,
Defendants/Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CV-04-00264-TUC-JMR
Honorable John M. Roll, United States District Court Judge

ANSWERING BRIEF OF APPELLEES FORD, O'DELL, TRAVIOLIA, AND SAUNDERS

Roger W. Frazier, State Bar No. 012146
GUST ROSENFELD P.L.C.
One South Church Avenue, Suite 1900
Tucson, AZ 85701-1627
(520) 628-7070
Attorneys for Defendants/Appellees Ford, O'Dell, Traviolia and Saunders

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STATEMENT REGARDING ORAL ARGUMENT

These Appellees, Michael Ford, Eric O'Dell, George Traviolia and Richard Saunders, individual Defendants below, agree with Appellant's statement regarding oral argument.

JURISDICTIONAL STATEMENT

These Appellees agree with Appellant's jurisdictional statement, except that Fed.R.App.P. 4(a) governs the timeliness of the notices of appeal.

ISSUES PRESENTED

1. Where tribal police, with full authority of tribal law and using only outward indicia as tribal officers, conducted a sobriety, license and registration checkpoint on a state highway within reservation boundaries, and the roadblock, stop, questioning and detention of Appellant were done pursuant to tribal authority, does tribal sovereign immunity bar 42 U.S.C. § 1983 and *Bivens* for alleged constitutional violations against the officers for the roadblock, stop, questioning and detention of Appellant?

2. Was there state action supporting 42 U.S.C. § 1983 claims and eliminating tribal sovereign immunity for the roadblock, stop, questioning and detention of Appellant by virtue of the State of Arizona's certification of the tribal officers to enforce state law, where state law was neither needed nor invoked for

those actions, and was only invoked when Appellant violated state laws after he was stopped at the checkpoint?

3. Was there action under federal law supporting *Bivens* claims and eliminating tribal sovereign immunity for the roadblock, stop, questioning and detention of Appellant by virtue of the presence of customs and border patrol agents at the scene who were not responsible for planning or conducting the checkpoint, but were called and would be called to handle drug or immigration issues that arose during the checkpoint, and who in some cases voluntarily assisted the tribal police absent any request from the tribal police for such assistance?

4. Did the officers' subsequent citation and arrest of Appellant for state law violations occurring after he was stopped at the checkpoint convert their prior actions under tribal law to state action for purposes of 42 U.S.C. § 1983?

5. Whether summary judgment was proper for the Appellees on grounds of qualified immunity for the citation and arrest of Appellant under state law where probable cause existed, and even if the actions were deemed unconstitutional, where there was no clearly established legal authority to the contrary.

6. Whether the propriety of the checkpoint, which was conducted under tribal law, is irrelevant to and cannot taint the subsequent citation and arrest of Appellant for state law violations, but that in any event, the checkpoint, which was subject to the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq., was legal, and Appellant's remedy was limited to habeas corpus.

7. Whether objective reasonableness of the police officers' actions supported summary judgment on Appellant's claim of a breach of right to privacy under Art. 2, § 8 of the Arizona Constitution.

8. Whether dismissal of Appellant's claim for injunctive relief was proper because Appellant could not win on the merits.

STATEMENT OF THE CASE

While Appellees' motion for reconsideration of motion to dismiss on grounds of lack of subject matter jurisdiction because of tribal sovereign immunity for 42 U.S.C. § 1983 claims was pending, the court determined the matter should be treated as one under Fed.R.Civ.P. 56, allowed depositions to be taken, and that it would consider only the evidence submitted by May 27, 2005. (Supp-E.R. 60.) Meanwhile, on March 28, 2005, Appellant filed his Second Amended Complaint, adding a claim against these Appellees pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971). (Doc. 40.) On April 11, 2005, these Appellees filed a separate motion to dismiss the *Bivens* claims (doc. 44), to which a response, reply, and additional response and reply (docs. 49, 52, 54 and 57, respectively) were filed. The court did consider Appellant's subsequently submitted documents from Homeland Security. (Doc. 57, and see E.R. 153, 156.) The court dealt with the *Bivens* issues together with the state law issues (the "sovereign immunity motions") and ruled on them together in the Order of September 26, 2005. (E.R. 152.)

By its Order of September 26, 2005, the district court ruled that the checkpoint, stop, questioning and detention of Bressi were conducted pursuant to tribal law, clothing the Appellees with tribal sovereign immunity for those actions. E.R. 157, 162-65. The court also ruled that Bressi could continue to pursue his § 1983 claims for the citation of state law violations and resulting arrest, injunctive relief for future roadblocks to the extent that Arizona law was involved, and to pursue his Arizona constitutional claim for privacy. E.R. 165.

Bressi's motion for reconsideration of November 7, 2005 was designated in the alternative to be a motion to alter or amend order. Appellees responded to the

latter on November 22, 2005 (Doc. 69), and Bressi's motion was denied by order of May 23, 2006 (Supp-E.R. 176).

Appellant elected to not depose Appellees or a customs agent in responding to the sovereign immunity motions despite the court's allowing such discovery. Supp-E.R. 60. Appellant subsequently took those depositions and submitted them on November 24, 2006 in response to Appellees' summary judgment motion on the remaining claims. Doc. 110. No attempt to reopen or change the dismissed claims based on those depositions was or could have been made. Supp-E.R. 178.

The summary judgment for these Appellees on the remaining claims was entered as a final judgment in favor of these Appellees on April 4, 2007 pursuant to Fed.R.Civ.P. 54(b). (E.R. 182). Bressi filed a timely notice of appeal of that judgment on May 2, 2007 (E.R. 190-91).

STATEMENT OF FACTS

At the times relevant to this action, the four individual Appellees were officers of the Tohono O'odham Police Department ("TOPD") of the Tohono O'odham Nation (the "Nation"), a federally recognized Indian Tribe. E.R. 61 ¶3; Supp-E.R. 2 ¶5, 32. The TOPD was operating under a contract with the Bureau of Indian Affairs ("BIA") pursuant to the Indian Self Determination Act, Public Laws 93-638 and 100-472. E.R. 61 ¶4; Supp-E.R. 3-13.

Appellee Richard Saunders, acting Chief of Police of the TOPD, directed his officers to conduct a sobriety checkpoint on December 20, 2002 at State Route 86 (SR-86) at or near milepost 143 within the boundaries of the Nation (hereinafter "the 12/20/02 checkpoint"). The purpose of this and similar checkpoints was to reduce the incidents of impaired driving on the reservation, as previous checkpoints had effectively done. E.R. 61 ¶¶ 1-2, 6.

SR-86 traverses approximately ninety miles of the Nation on a right-of-way provided by the Nation to the State of Arizona for that highway. E.R. 62 ¶ 9; Supp-E.R. 14-20. The Nation's Constitution and Ordinance 97-02 provide for the removal or exclusion from the Nation of non-members for traffic violations if the safety of other persons is at risk. Supp-E.R. 24-25 Art VI, § 1(c)6-7, 34-42. The Nation's Traffic Code ("Arizona's Title 66, 1954) requires obedience to traffic laws and police officers (§§ 66-152 et seq.), licenses to be exhibited on demand (§ 66-272), provides fines for lack of or improper registration (Ordinance 52), and forbids drunk driving (Ordinance 51). Supp-E.R. 21, 43-52. The Nation's Judicial Court's decision in *Tohono O'odham Nation v. Ahill, et al.* (T.O. 1989), recognized the prevalence of drunken driving and authorized tribal police to conduct sobriety checkpoints on the reservation in the manner approved therein. E.R. 142-151. These authorities, along with Supreme Court precedent applied through the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. ("ICRA"), all operated to provide the Appellee officers authority to conduct the checkpoint in this case.[1] E.R. 59 ¶ 7; Supp-E.R. 83-86 no. 3.

Appellees were certified by the Arizona Peace Officers Standards and Training Board (AZ-POST), which provides them with the law enforcement powers of Arizona peace officers, pursuant to § 13-3874. E.R. 61 ¶ 4. This certification provides basic law enforcement training meeting BIA standards and enables TOPD officers to protect tribal lands and tribal members from non-tribal violators who commit crimes, including alcohol-related offenses, within the

[1] The Indian Civil Rights statutes and Arizona constitution and statutes cited in this brief are in the Addendum hereto.

Nation's boundaries. E.R. 61 ¶ 5. TOPD officers are not cross-deputized as county sheriffs. *Id.*

The Appellees had tribal authority to patrol and make any lawful stops on SR-86 within the boundaries of the Nation. If a driver violated state law, Appellees were authorized by virtue of their AZ-POST certification to enforce Arizona law, but until an issue of state law became known, tribal law provided the sole authority needed for stopping such drivers. E.R. 59 ¶ 7, 62 ¶ 7. At the 12/20/02 checkpoint, if the drivers were tribal members, they would be cited into tribal court for violations of any traffic or DUI laws. If they were non-members (or non-Indian as discussed below), and violated Arizona State law, they would be cited into a state court. E.R. 62 ¶ 7; Supp.E-R 76 lines 13-16.

The TOPD conducts checkpoints within the Nation without any participation by the Arizona Department of Public Safety or county sheriffs. They are planned and operated by TOPD officers wearing TOPD uniforms using TOPD equipment and marked TOPD police vehicles. U.S. Border Patrol and U.S. Customs were only called to assist when federal immigration or narcotics violations within their jurisdiction arose. E.R. 62 ¶ 8, 66-67 ¶¶ 17-18. Agencies were routinely notified beforehand that checkpoints would take place and they may be called if a violation under their jurisdiction arose, but they were not involved in planning or conducting the checkpoints. E.R. 72 ¶ 10.

Acting assistant chief of police Joseph Delgado ordered Appellee Lt. Ford to plan and conduct the 12/20/02 checkpoint. E.R. 70-71 ¶ 3. Appellees Traviolia and O'Dell were among officers who worked the checkpoint. Supp-E.R. 54 ¶ 4, 57-58 ¶ 4. O'Dell was off duty when he was called to work the checkpoint, and reported to the scene with his dog that was with him at all times. Supp-E.R. 58 ¶ 5. O'Dell's dog was a bomb and person-finding dog, not a drug dog. Supp-E.R.

200-01 at 17/11-19/21. Chief Saunders was never at that checkpoint.[2] E.R. 60 ¶ 8.

Ford prepared assignment and briefing sheets serving as the operational plan memoranda for two different checkpoints of December 20, 2002. E.R. 64 ¶¶ 4-5. Ford's briefing sheet described overall objectives, which were to check for sobriety, driver's licenses and registrations. It also indicated what equipment should be brought to the checkpoints. E.R. 66 ¶ 17, 134. All of the officers listed on that assignment list were employees of the Nation or rangers of the Nation, and not border patrol or customs. *Id.* While the testimony varied slightly about the exact milepost of the checkpoint, being at or near milepost 143 (not 145) there was no dispute that it occurred within the Nation's boundaries. E.R. 88 at 23/11-19, 99 at 27/12-23, Supp-E.R. 123, 161 ¶ 4.

The 12/20/02 checkpoint was conducted by the TOPD. E.R. 72 ¶ 10. No customs or border patrol officers were involved in setting up the 12/20/02 checkpoint, nor were they required to conduct it. E.R. 66-67 ¶ 17. Any assistance they gave was strictly voluntary on their part. *Id.* The federal agencies were called in for matters within their jurisdiction, and before Bressi arrived, border patrol agents had responded to a matter involving undocumented aliens. E.R. 68 ¶ 6; Supp-E.R. 64-65. Customs agent William Dreeland testified that he simply chose to be at the scene because he was the duty officer who would have to respond to discoveries of drugs if that occurred, yet he lived far away, so he just wanted to remain in the vicinity. E.R. 116-17 at 28/24-30/8. Dreeland testified that his actions at the time of Bressi's arrival and in speaking to Bressi were voluntary, and were not at the request of the TOPD. E.R. 117at 30/17-22.

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[2] Summary judgment was awarded Appellee Saunders on *respondeat superior* claims, E.R. 177-78, and Appellant did not raise that ruling in this appeal.

There was no way to be certain that any particular driver was or was not a tribal member before they provided relevant identification. E.R. 65-66 ¶ 14. Tribal criminal law applied at this checkpoint to any tribally affiliated Indian, regardless whether he or she was a member of this Nation or affiliated or enrolled in another tribe or enjoys the benefits of tribal affiliation. See 25 U.S.C. § 1301, and Public Law, No. 102-137. Such criminal jurisdiction of the Nation extends to and includes the area of the right-of-way on SR-86 within the Nation's boundaries pursuant to 18 U.S.C. § 1151. Legal cited at doc. 51, pp. 5-6, ¶ 16.

Tribal members have Arizona driver's licenses and vehicle registrations. Persons with driver's licenses and plates from other states or countries also drive through the reservation on SR-86 routinely. The requirement for all drivers is that they have a valid driver's license and a proper registration. E.R. 66 ¶ 15.

Checkpoint plans are approved by the chief or assistant chief, and Ford's in this case was approved by Assistant Chief Delgado. E.R. 64 ¶ 8, 71 ¶ 4. Chief Saunders said he would normally be briefed, and that commanders "would be given that ultimate responsibility and duty to provide for scheduling, to provide for making sure that equipment is provided in the location there." E.R. 76 at 22/2-22.

Lt. Ford testified there was portable lighting equipment and a generator used at the scene, all which were transported in a trailer, and the trailer may have had lights illuminating the statements such as "prepare to swerve, checkpoint ahead," or something along those lines. E.R. 89 at 28/10-29/14. The officers intended to obtain computer wants and warrant checks on 100% of the cars stopped at the checkpoint, taking one to three minutes at most, and also a non-computerized check on tribal members. E.R. 48; Supp-E.R. 99-102.

Officer Traviolia worked partly stopping vehicles and partly as a safety officer, assuring no one sped through, because historically people have tried to

actually run over officers. E.R. 99 at 26/1-8; Supp-E.R. 79, at 6-7. Traviolia saw the memorandum and confirmed that it was to check for sobriety, drivers licenses and registrations, and not for drugs or undocumented aliens. Supp-E.R. 54 ¶¶ 4-5, 195 at 19/6-21/7. Officer O'Dell was notified by telephone, but he was not there to stop cars or question drivers. His only role was to provide backup assistance for unusual occurrences such as people becoming violent or refusing to cooperate. The checkpoint was already ongoing when O'Dell arrived, and officers were already speaking to Bressi. Supp-E.R. 57-58 ¶¶ 4-6.

Bressi reached the checkpoint shortly before 5:00 p.m. Supp-E.R. 105 at 98/11-99/10, 129 at 26/8-11. He called his co-worker Andrew Tubbiolo on his cell phone, and Tubbiolo wrote down everything he could hear, which was about forty percent of what was said. Supp-E.R. 105-06 at 101/16-102/21, 125-26 at 10/25-11/15, 13/16-14/2, 15/7-16/4, and 128 at 24/19-24. Tubbiolo testified he would not trust his memory to anything not written in his notes. Supp-E.R. 127 at 21/5-15; notes are at 133.

Bressi testified he did not see any cars being waved through before he was questioned. Supp-E.R. 106-07 at 104/6-106/17. Lt. Ford was the first person he spoke to at the scene. He asked the purpose of the roadblock, and Ford told him that it was a sobriety, driver's license and registration checkpoint (per Ford), that it was a sobriety and document checkpoint (per Bressi), and driver's license and sobriety (per Tubbiolo); seatbelts were not mentioned, and there is no evidence the conversation ever reached insurance. Supp-E.R. 76 lines 8-12, 76 line 25 to 77 line 3, 107 at 109/2-4, 109 at 116/22-117/23, 126 at 15/23-16/11, 133.

Bressi asked Lt. Ford who was in charge of the roadblock, and Ford indicated he was the on-scene commander, gave his name and that he was with the

TOPD, and then requested Bressi's driver's license. Supp-E.R. 109-110 at 117/25-118/9.

Bressi asked if they had any reason to believe that he had done anything wrong, and Ford said no, but again asked for Bressi's drivers license, and said that everyone was being asked the same questions. Supp-E.R. 77 lines 1-8, 110 at 118/11-22.

Bressi's response was that he felt he did not need to comply with the officers in any way and did not even need to show his driver's license. Ford and Bressi continued to discuss whether Bressi had to present his driver's license, but Bressi refused to identify himself, and refused to cooperate or comply with any of Ford's instructions. Ford told Bressi that if he presented his drivers license, which was not his own personal property but the property of the state (which would be true of any tribal member's license, too), it would not diminish his appeal as to the validity of the checkpoint. Ford said that Bressi said flat out that he was refusing. Bressi testified he did "not remember actually specifically refusing," but instead, that he "was waiting for a response to questions that I asked later on that never – never came forward. " Ford said Bressi asked if he was being detained or if he could leave, and Ford responded that he could not leave until he provided the information requested. This entire conversation probably lasted less than a minute per Ford, a little longer per Bressi, but traffic was beginning to back up behind Bressi's vehicle. Supp-E.R. 77 lines 6-15, 110 at 118/23-121/15.

Ford requested Traviolia's assistance, because traffic was backing up and Bressi was engaged in a lengthy conversation and Ford had to deal with other issues ongoing, including a minor accident which occurred. Supp-E.R. 77 lines 15-18, 110-11 at 121/16-122/13. Bressi refused Traviolia's request to show his license. Supp-E.R. 54 ¶ 7. Bressi did not appear intoxicated, but Traviolia

explained to him that this was also a license and registration checkpoint and that they needed to see those, and thereafter he could be on his way. Supp-E.R. 55 ¶ 8. Bressi had become argumentative about not showing his license, and Traviolia asked him to step out of the vehicle, and he refused that order also. Supp-E.R. 55 ¶ 9.

Bressi testified that Customs Agent Dreeland pushed past the TOPD officers and approached Bressi and told him that the law required him to identify himself and that he could be arrested or charges brought against him if he refused to do so. Supp-E.R. 112 at 128/2-129/17. As stated above, Dreeland's actions were voluntary and not at the request of the TOPD, and Bressi did not see any TOPD officer ask Dreeland to talk to him. Supp-E.R. 112 at 129/18-24. Bressi testified that he questioned Agent Dreeland's jurisdiction, and that then Ford told him this was a multi-jurisdictional or joint task force operation (which Ford adamantly denies saying). Supp-E.R. 113-14 at 131/15-132/11 and 133/21-134/16, 155. Bressi acknowledged that Ford did not specify that any particular agency was part of the alleged joint task force, and that Bressi could have just presumed it based on the presence of various federal agents in the area. Supp-E.R. 114 at 134/21-135/2. Moreover, Dreeland testified that he, Dreeland, may have mentioned the words "task force" himself. E.R. 117 at 32/15-22.

O'Dell arrived and Bressi was told to pull to the side of the road and exit the vehicle. Supp-E.R. 58 ¶¶ 6-7, 113 at 132/17-133/17. In response, Bressi asked if he was being detained, the reason being, he testified, was that in his subjective (but unspoken) view, if he was not being detained, then this was converted into a consensual stop, meaning one with which he did not have to comply, though he admits he knew all this time he was not free to go until he showed his license as requested. Supp-E.R. 114-15 at 136/16-141/23. Bressi testified that O'Dell said

"I've had enough of your crap" (or "bullshit"), and Tubbiolo said he heard complaining about traffic holdups, and wrote that he heard (which Bressi does not recall anyone saying): "Don't give me that fourth amendment crap." Supp-E.R. 116 at 143/1-144/3, 127-28 at 21/22-22/19, and 133. O'Dell denied using profanity, E.R. 112 at 43/25-44/4, and although there is some similarity in sound between the phrases "enough of your crap" and "fourth amendment crap," there is no similarity of the sound of those words and "bullshit".

Bressi sat in his truck quietly, not even responding verbally any further. Traviolia told him that he was under arrest for failure to show his i.d. and obeying the police officer while directing traffic. Supp-E.R. 55 ¶ 9. Bressi testified that Traviolia may have said he was operating under tribal authority, but Bressi does not specifically recall that. Tubbiolo, however, still listening by phone, wrote down : "claimed tribal police authority." Supp-E.R. 112 at 126/20-127/12, 127 at 18/6-22, 133. Bressi claimed that (unidentified) officers had put their hands on the top of their holsters, and then, though he was not told to do so, he turned off his engine, put his keys on the dash and his hands on the wheel, and said nothing. Supp-E.R. 116 at 144/5-145/25, 121 at 168/6-11. Traviolia and O'Dell removed him from the vehicle and handcuffed him. He acted as a passive resister, not doing anything to impede or actively resist them in removing him, but basically just went limp. Supp-E.R. 58 ¶¶ 6-8. He refused to walk, and had to be carried to the side of the road where he was seated on the ground, where thereafter the officers obtained his wallet. Supp-E.R. 55 ¶¶ 10-11. His truck was removed from its position blocking traffic. Supp-E.R. 58 ¶ 8. No one asked to search Bressi's vehicle, except when he was going to be removed from the vehicle they asked what was in his glove compartment. Supp-E.R. 113 at 131/5-10, and 117 at 148/20-149/2.

After determining his identity, Traviolia cited Bressi for two state misdemeanor laws, A.R.S. § 28-1595(B) for refusing to provide identity or a drivers license and A.R.S. § 28-622(A) for purposefully refusing to cooperate with officers with authority to direct, control or regulate traffic. Supp-E.R. 55-56 ¶¶ 11-12. He gave Bressi the option to sign the citation, which was not an admission of the charges, but only an agreement to appear in state court at a later date, and that he could then be on his way, but Bressi refused to sign the ticket, so they placed him in the back of a patrol car. *Id.* at ¶ 13.

Bressi offered no evidence that O'Dell "belligerently berated" him for being uncooperative other than allegedly calling him a "green freak", which O'Dell denied. E.R. 112 at 45/1-8. Dreeland said he recalls explaining to another officer that Bressi's behavior upon being arrested was "as a peace demonstrator tactic or something to that effect." E.R. 117 at 33/9-21.

At some undesignated time, Bressi gave an officer his first name and his supervisor's name and telephone number, but acknowledged that the officers told him that that was insufficient and that they were still demanding his driver's license. Supp-E.R. 115 at 140/18-141/17. The supervisor was told he could come get the vehicle, or it would be towed. Supp-E.R. 81 lines 5-7. When Tubbiolo and Bressi's supervisor arrived around 8:00 p.m., Bressi signed the citation and was free to leave and did leave. E.R. 8 ¶ 8; Supp-E.R. 56 ¶¶ 15-16, 123.

Tubbiolo did not indicate he heard any conversation between the TOPD and a border patrol officer who he saw look into cars when he arrived. He also assumed the dog he saw was a drug dog, but did not see it react to any vehicle. Supp-E.R. 132 at 54/1-16. Bressi himself never saw a dog that night. Supp-E.R. 121 at 167/16-168/5. Tubbiolo acknowledged in his deposition that many of his affidavit statements regarding the presence of Arizona vehicles or persons were

just assumptions, not based on seeing specific insignia or other features. Supp-E.R. 130-31 at 49/16-50/9 and 51/7-52/16. Tubbiolo's affidavit merely says Ford told him that the checkpoint served to stem illegal trafficking. E.R. 9 ¶ 13.

Not only did Traviolia deny telling Bressi that the reason he needed to show his license was "because this area was known for smuggling drugs or illegal immigrants," but Bressi's own testimony shows that he was merely drawing his own subjective conclusions, and not that drug smuggling and illegal immigrants were the reasons his driver's license had to be produced. In response to direct questions about whether people had to identify themselves because of drugs and immigration issues, Bressi testified:

> In my recollection, it was related to – he already knew what the issue was, that Lieutenant Ford had been trying to procure my driver's license and that it hadn't been forthcoming. So he came upon the scene to basically indicate, Well, look, you know, there's not an issue with sobriety related to you, but we have these other concerns, and this is why we want people to identify themselves. That was my – that's my interpretation.
>
> ***
>
> [H]e indicated that he didn't have any reason to believe that I had been drinking. And then after that he indicated that the area was known for, you know, illegal narcotics or drug smuggling, something along that line.

Supp-E.R 111-12 at 124/19-126/15, 207-08.

Other than the voluntary actions by Agent Dreeland already discussed, the customs' report shows repeatedly that the TOPD "was conducting a sobriety checkpoint," and that matters involving federal jurisdiction for drugs or immigation arose after the normal stop and involvement of a TOPD officer. For example, customs agents responded after TOPD officers found an illegal alien and 176 pounds of marijuana. E.R. 19. Another example shows that when that

particular vehicle approached, a TOPD officer on primary inspection questioned the driver and made determinations all before the federal agent got involved. E.R. 21. Another entry indicates that the agents were "there to represent the RAIC Sells Office if a matter of interest to the U.S. Customs Service was encountered at the checkpoint." E.R. 26. Bressi's subjective suspicion of why federal officers were present is beside the point; he could not hear any conversations between them and the Appellees.

The plan of operation was to stop every car in each direction on the highway. The only deviations from this were if traffic got backed up to create an unsafe situation in the line of cars on the highway, or if tribal members were returning after already having recently gone through and been checked. Supp-E.R. 76 lines 17-24, 79 lines 3-7.

Chief Saunders testified that at the time of the 12/20/02 checkpoint, the published guidelines for checkpoints were the *Ahill* opinion, and "some direction to put in writing operational plans, as well as de-briefs following deployments there." E.R. 77 at 34/16-21. Also, copies would be available to the public unless officer safety beforehand was a concern. E.R. 78 at 38/1-17. Bressi attacks the legality of the checkpoint based on a memorandum prepared by TOPD officer Lt. Kevin Shonk dated May 4, 2000 ("Shonk Memorandum"), and by testimony of a former TOPD police officer Joseph Patterson and also a narrative by a detective Romero who was at the 12/20/02 checkpoint. E.R. 132-33. The Shonk Memorandum, which lists a purpose of finding illegal drugs, was dated more than two and a half years before the 12/20/02 checkpoint at issue in this case, and before the Supreme Court issued its opinion on November 28, 2000 in *City of Indianapolis v. Edmond,* 531 U.S. 32, 121 S.Ct. 447 (2000). *Id.* That memorandum pertained to a particular roadblock that was to occur the very next

day only. *Id.* It also contained a number of valuable procedures, such as to stop all cars, not to deviate from the same questions of all drivers, and similar procedures.

In deposition testimony applicable only to the summary judgment on remaining claims after the dismissals of claims barred by sovereign immunity, Chief Saunders testified (over objection to form and foundation) that the Shonk Memorandum "would still be the practice to follow," E.R. 79 at 43/7-13. But he clarified that this did not mean that at the time of the 12/20/02 checkpoint the policy was to have a checkpoint with the primary purpose of searching for drugs, illegal aliens, or stolen vehicles. Supp-E.R. 183 at 70/4-71/22, 187 at 99/14-100/25, 189 at 107/15-108/4. He specifically testified that as a result of *Edmond*, the policy had changed to the extent that "the initial meaning for the sobriety checkpoints being alcohol, and none of those other questionings should occur." Supp-E.R. 189 at 108/14-23. Further, Lt. Ford, who planned and was in charge of the 12/20/02 checkpoint, did not think Shonk's Memorandum was policy, and had never even seen it. Supp-E.R. 192 at 16/9-17/23.

Bressi's statement on p. 14 of his brief that Chief Saunders allows individual officers to decide their own policies as to how to treat motorists is misleading and based on a lack of foundation. Again, this is not applicable to the sovereign immunity motions. And the testimony Bressi cites is part of a larger discussion in Saunders' deposition regarding his own experiences in the field, and things he would look for on the license to assure that it is correct, and that officers should run wants and warrants checks as long as time permits, meaning that there is an effort to also keep traffic moving. E.R. 80 at 47/17-49/13.

Former TOPD Officer Joseph Patterson lacks foundation with regard to anything pertaining to the 12/20/02 checkpoint. He ceased working for the TOPD

about eighteen months before that checkpoint. Supp-E.R. 206 at 88/6-25. He was not involved in making any policy, was not in charge of checkpoints, and had not seen any operational plan although he knew they existed because officers used them at briefing sessions. Supp-E.R. 138 at 1-13, 144-45 at 155/8-156/21. While he said officers may look at many things that can be acted on if seen, he never worked a checkpoint where the purpose was to ask if the driver had drugs. Supp-E.R. 148-49, at 167/1-168/18, 152 at 180/1-12. Patterson's testimony cannot be used to support any claim that for the 12/20/02 checkpoint, officers were told nothing more than to show up and where to stand, nor does Patterson's testimony even say that. E.R. 129-130. Patterson's testimony about officers chasing down drivers attempting to avoid the roadblock is likewise without foundation for this checkpoint eighteen months after he was terminated.

The statements attributed to officer Romero that the checkpoint was to locate intoxicated drivers, stolen vehicles, undocumented aliens, smuggling and drug contraband, are hearsay. Objection preserved, Doc. 111 at p. 20-21 ¶ 34. There is no evidence that officer Romero had anything to do with planning or supervising the 12/20/02 checkpoint, or that his statements were made in any official operational plan or programmatic directive or as a statement of what any of these Appellees stated. Romero's personal account or opinions are not determinative of the propriety or purpose of the roadblock. *Edmond,* 531 U.S. at 45-46.

The memorandum for a checkpoint occurring elsewhere nearly a year after the 12/20/02 checkpoint indicates only that other agencies were advised in advance, but not that they were asked to plan or conduct the operation. E.R. 136.

There is no evidence of any non-consensual trunk search or of a search absent probable cause for any particular driver.

Bressi misstates the evidence regarding the loss of the operational plan and statistics. Ford turned in his paperwork related to the checkpoint to Assistant Chief Delgado within a few days of the checkpoint; a year later, he was asked to locate them for Bressi's criminal case, and believed the TOPD had given them to the Nation's Attorney General, and that the Attorney General would decide what to provide. E.R. 64-65 ¶¶ 9-10; Supp-E.R. 95-96 and 98. Delgado briefed the Attorney General's office with Ford a short time after the checkpoint, and thought Ford gave the paperwork to the Attorney General at that time, but the Attorney General claimed to have no record of receiving it; Delgado ultimately believed it got lost in the process of trying to set it aside to be saved. E.R. 71-72, ¶¶ 6-9. Traviolia was not required to keep a copy of those documents. Supp-E.R. 54 ¶ 4. The TOPD, not a party to this case, maintained and routinely destroyed any documents or tapes as a matter of due course and they were not relevant to this case. There is no evidence that the Appellees were custodians or lost any of the records requested, or that Lt. Ford should have done anything else with the paperwork than he has explained. E.R. 64-65 ¶¶ 4-6 and 8-12, 70-72 ¶¶ 1-9. There is no evidence that any of the Appellees had personal control over records retention and handling at any time they were lost or misplaced.

The county attorney's statements in the justice court transcript regarding Ford (E.R. 34-42) are hearsay not subject to an exception. Objection preserved, Doc. 111 at p. 4 ¶ 2. Ford was not speaking in court, was not on the record or under oath, or making an admission as a party, and the case was dismissed before he could even be called as a witness. The transcript does not say that these Appellees would not comply with the subpoena. Ford never made any decision or determination whether documentation from the checkpoint was to be used in that case. Even the county attorney's statements do not suggest that Ford was

personally making a decision that the documents should not be turned over. Finally, although statistics kept in this case are lost, other evidence shows at least six violations for drivers on suspended driver's licenses. Supp-E.R. 63-71.

After the charges were dismissed due to the TOPD's paperwork foul-up, Traviolia re-filed them only after checking with the county attorney, who told him he still had a viable case. Supp-E.R. 196-97 at 69/2-70/8.

SUMMARY OF ARGUMENTS

The Appellees had independent authority under tribal law, and did not use or need to invoke state or federal authority, for the roadblock, stop, questioning and detention of Appellant. For those actions, the Appellees were clothed with tribal sovereign immunity. Those actions were not transformed into state or federal action for purposes of 42. U.S.C. § 1983 or *Bivens* claims by virtue of AZ-POST certifications, or by the presence and activity of federal agents who were on the scene to respond to events within their own jurisdiction, or by the subsequent citation and arrest of Appellant for state law violations that occurred after he was stopped at the checkpoint.

The Appellees were qualifiedly immune from the constitutional claims based on the citation and arrest for state law violations because there was probable cause for those actions. For purposes of a § 1983 claim, the subsequent citation and arrest cannot be deemed tainted by improprieties, if any, in the checkpoint itself. Moreover, the propriety of the roadblock, stop, questioning and detention of Appellant, being done under tribal law, are not issues to be examined in federal court in the first instance. Even if they were, they met Fourth Amendment standards, and state law does not affect the constitutionality of the checkpoint for § 1983 purposes. And even if a constitutional right was violated, qualified immunity

is still applicable because of an absence of a clearly established right under the circumstances of this case. Based on a similar objective analysis, there was no violation of the privacy right in the Arizona Constitution. Finally, because Appellant cannot prove a wrong on the merits, his claim for injunctive relief was properly dismissed.

STANDARD OF REVIEW

Appellant's statement of the Standard of Review on pp. 17-18 of his brief is an accurate statement, basically tracking that set forth by the district court at E.R. 158-159. Because facts outside the pleadings were considered, the motion to dismiss based on subject matter jurisdiction was treated like a motion for summary judgment under Fed.R.Civ.P. 56.

Additionally, factual disputes not changing the outcome of the legal question that will determine whether the Appellees were entitled to judgment as a matter of law are not material for purposes of these motions. *See, e.g., Billington v. Smith,* 292 F.3d 1177, 1185 (9th Cir.2002) (noting that genuine factual disputes are immaterial if they do not change the outcome); Fed.R.Civ.P. 56(c).

In reviewing a dismissal for lack of subject matter jurisdiction, the Court reviews for clear error the district court's findings of fact relevant to that determination. *Crum v. Circus Enterprises*, 231 F.3d 1129, 1130 (9th Cir.2000). The party asserting jurisdiction has the burden of proving all jurisdictional facts. *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1163-64 (9th Cir.2002).

Affidavits must be made on personal knowledge setting forth such facts as would be admissible in evidence. Fed.R.Civ.P. 56(e); *Block v. City of Los Angeles*, 253 F.3d 410, 419 (9th Cir.2001). Likewise, deposition testimony not based on personal knowledge cannot raise a genuine issue of material fact

sufficient to withstand summary judgment. *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1091 (9th Cir.1990). Summary judgment is appropriate where there is no genuine issue as to any material fact, after taking the non-moving party's evidence as true, and drawing all justifiable inferences in his favor, and the moving party is entitled to prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-253, 106 S.Ct. 2505 (1986).

ARGUMENTS

A. THE DISTRICT COURT PROPERLY FOUND THAT THE EVIDENCE DID NOT PRESENT GENUINE ISSUES OF MATERIAL FACT BASED ON THE SUBSTANTIVE LAW CONTROLLING THE QUESTIONS AT ISSUE. *(Response to Argument A in Opening Brief, at pp. 18-22.)*

Appellant correctly notes that only disputes over facts that might affect the outcome of the suit under the governing law would preclude the entry of summary judgment. *Anderson,* 477 U.S. at 248. To determine which factual disputes are material or immaterial, it is important to frame the appropriate summary judgment question. *Suzuki Motor Corporation v. Consumer's Union of United States, Inc.*, 330 F.3d 1110, 1131-32 (9th Cir.2003). Here, the district court did construe the evidence in Bressi's favor, but even so, still found that they did not create genuine issues of material fact under the substantive law controlling the summary judgment issues. *Id.; Billington, supra.*

The substantive law controlling the summary judgment questions is discussed in each the arguments following this one, but Appellees point out here that the court gave Bressi his version of the facts, which is all it was required to do. The court was not required to find the legal effect of those facts in his favor, as he seems to argue here.

The court expressly acknowledged that the Appellees had authority to enforce Arizona law by virtue of their AZ-POST certification. E.R. 154. The court squarely addressed the law that actions taken under a mixture of tribal and state law are not subject to tribal sovereign immunity, but that there was no mixed authority for the roadblock, stop, questioning and detention of Appellant, despite the AZ-POST certifications. E.R. 157-59. How the AZ-POST certification affected the prior actions was a matter of law, not of fact.

The court also explicitly recognized evidence that border patrol agents were on the scene and responded to an undocumented alien issue before Bressi's arrival. E.R. 155; Supp-E.R. 64-65. It further noted that federal officers did not have to evacuate the scene if they knew they were likely to be called back minutes later. E.R. 164. And there was no evidence to dispute that customs agents acted voluntarily on the scene prior to matters within their jurisdiction arising. The court was not required for summary judgment purposes to give Bressi the legal conclusion of an interdependence between the federal officers and Appellees that would transform Appellees' actions into federal action for *Bivens* purposes.

The same is true regarding border patrol officers who Tubbiolo claimed looked inside vehicles at the checkpoint three hours after Bressi was cited and arrested. E.R. 8,¶ 8; 9, ¶ 11. The district court properly credited Bressi with the fact that Tubbiolo saw border patrol agents looking in vehicles, but also correctly noted that Tubbiolo had no knowledge of the particular circumstances in which this was taking place. E.R. 162-163.

The court also considered Bressi's allegation that Lt. Ford said a multi-jurisdictional task force was involved. E.R. 162. The Court stated: "Lt. Ford's comment to Plaintiff during his argument with Dreland [sic] is insufficient to overcome the overwhelming evidence of tribal purposes behind the roadblock.

When federal offenses were uncovered, the federal officials did have jurisdiction, so in that sense there were "multi-jurisdictional" exercises of authority at the scene". E.R. 163. There was no failure to construe the facts in Bressi's favor. Instead, the only failure was of Bressi's evidence to change the legal outcome.

The negative inference that Appellant seeks from a lost memorandum of operation or statistics pertains to the propriety of the checkpoint, which the district court did not decide because of sovereign immunity and § 1983 principles concerning tribal law. See also argument atpp. 30-31 of this brief.

Whether a driver was wearing seatbelts could be checked visually, and a citation decided on when the driver's identity was known. Insurance, though not required by tribal law at the time, was still a requirement for registration, and tribal members had state registrations. Supp-E.R. 159.

B. THE ROADBLOCK, STOP, QUESTIONING AND DETENTION OF BRESSI WERE DONE UNDER TRIBAL LAW, AND TRIBAL SOVEREIGN IMMUNITY FOR THOSE ACTIONS WAS NOT LOST BY CERTIFICATIONS TO ENFORCE ARIZONA LAW, NOR BY THE PRESENCE OR ACTIONS OF FEDERAL AGENTS ON THE SCENE. *(Response to Argument B in Opening Brief, pp. 22-27.)*

The common thread running through all of the case law finding state action is that the actor's ability to exercise the purported power at issue was made possible only because he is clothed with authority of state law. *National Collegiate Athletic Association v. Tarkanian,* 488 U.S. 179, 191, 109 S.Ct. 454 (1988); *McDade v. West,* 223 F.3d 1135, 1140-41 (9th Cir.2000). Defendants needed no such state authority here, because the authority for the roadblock, stop, questioning and detention derived from the separate, non-state, sovereign tribal authority, and that is what distinguishes this case and gives Appellees the same sovereign immunity as the tribe for their roles in those acts.

It has long been established that a state highway right-of-way through an

Indian reservation remains part of the reservation and within the territorial jurisdiction of the tribal police, and that tribal police may patrol for tribal, state and federal violations, and detain persons to hand over to the appropriate authority. *Strate v. A-1 Contractors,* 520 U.S. 438, 456, n. 11, 117 S.Ct. 1404 (1997); *Ortiz-Barraza v. U.S.,* 512 F.2d 1176 (9th Cir.1975); *State v. Schmuck,* 121 Wash.2d 373, 850 P.2d 1332 (1993), *cert. den.*, 510 U.S. 931, 114 S.Ct. 343.

In every case discussed herein in which courts found state action, whether through joint action or symbiotic relationship or otherwise, no separate authority of a non-state sovereign was involved. Whether a relationship falls within § 1983 state action "can be determined only in the framework of the peculiar facts or circumstances present." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725-26, 81 S.Ct. 856 (1961). For all of the acts done prior to the citation and arrest, the Appellees, as tribal officers only, would have been able to engage in these acts without AZ-POST certification, wholly under tribal authority. They were neither employed by the State nor under its control or supervision. Conducting a checkpoint, according to the tribal court in *Ahill*, was done under the sovereignty of the tribe to protect the welfare and safety of persons on the reservation.

1. The specific facts of this case fall outside of *Evans v. McKay.*

Bressi misplaces reliance on *Evans v. McKay*, 869 F.2d 1341 (9th Cir.1989) in arguing that the initial roadblock, stop, questioning and detention were illegal state action supporting § 1983 claims. Those actions were all done under tribal authority and tribal authority only, and the Appellees, as tribal officers carrying out their duties under tribal authority, were clothed with tribal sovereign immunity for those actions. *See, e.g., Linneen v. Gila River Indian Community*, 276 F.3d 489,

492 (9th Cir.2002). *Evans* is an important case here because of certain similarities, but there are also very important differences that distinguish *Evans* from this case. Three subject matters are relevant to the analysis of *Evans*. These are the laws in play, the actors who carried them out, and the location where they were carried out.

There were tribal orders for the seizure of goods, and a warrant and arrest pursuant to a city ordinance. Questions about the propriety of the tribal orders in *Evans* were barred as against the tribe. 869 F.2d at 1347. The court held that § 1983 claims for the actions taken under the city ordinance were viable because the authority for those was clearly state action (like the citation and arrest of Bressi, here). *Id.* at 1347-48, and n. 8. What is important is that the *Evans* court did not hold that there was § 1983 liability arising out of the tribal order itself.

The *Evans* plaintiffs had also alleged joint liability for instigating the seizures and arrests, and because that issue had not been litigated before the case was on appeal, the *Evans* court held that on remand the issue of acting in concert could be litigated. 869 F.2d at 1348. In our case, the parties have already presented evidence and fully litigated the issue of joint action or symbiotic relationship for the roadblock, stop, questioning and detention, all which were actions otherwise authorized by tribal law alone, and as discussed in the next three arguments, there was no requisite concert of action.

The "peculiar" law enforcement situation in *Evans* involved the other two subject matters in play: the people who carried out the actions and the location of doing so, both of which are distinguishable from this case. The orders in *Evans* were executed by what the court clearly indicated to be City officers as well as BIA officers. The court states that the tribal court directed the police officers of the City of Browning to execute its order to seize goods, which apparently were within the City of Browning, and that it was the police officers of the City of

Browning who executed it. 869 F.2d at 1343-44, and 1347-48, n. 8. Although Browning was entirely within the exterior boundaries of the reservation, the municipality obviously did not share the tribe's immunity. *See id.*, at 1349. Thus, the *Evans* police officers were not merely empowered to enforce city law, they were actual agents of the municipality from the start. The case does not indicate what authority they displayed when they went to make their seizures. Being BIA officers charged with enforcing tribal law could not eliminate the *Evans* officers' City of Browning agency. In the instant case, the Appellees were not cross-deputized as county sheriffs, and were not agents of any state entity like the police officers in the City of Browning were. The Appellees' empowerment under AZ-POST to enforce state law did not mean that all of their actions were under the color of state law. The Appellees had separate tribal authority to do everything they did up until the point of actual citation and arrest, and were not using powers of state law and made possible only by being clothed with the authority of state law. The *Evans* analysis should only be applied to the actions taken under the Browning ordinance by Browning officers, and should not be extended and broadened to hold that tribal officers certified under AZ-POST replaced existing tribal authority with state law.

To construe *Evans* to apply to the facts of this case would be to say that because of the AZ-POST certification, either everything the TOPD officers do is state action, or everything they do that might end up involving a non-tribal member will end up being state action from the start, even if tribal law fully authorized their conduct absent any state law. This would be more than is intended by the AZ-POST certification. *See Nelson v. State,* 208 Ariz. 5, 9, 90 P.3d 206, 210 (App.2004) which in ¶ 14, clearly indicates that the AZ-POST statute is not intended to interfere with tribal sovereignty. To hold that the A.R.S. § 13-3874

certification means that state action exists for all acts with non-members by tribal officers on the reservation before they determine that the violator is a non-member, and before taking any action under state law, would be a direct deprivation of the Indian self-determination exception stated in *Montana v. United States,* 450 U.S. 544, 566, 101 S.Ct. 1245 (1981). For the state to give its certification to tribal officers only by virtue of their being tribal officers, then to translate action on the reservation under existing tribal authority into state action merely because of the certification would violate the above principles. The district court correctly separated those matters that were strictly under tribal authority from state action.

2. There is no state action under the symbiotic relationship test for the roadblock, stop, detention and questioning of Appellant.

To find state action under the symbiotic relationship test, the government must so far insinuate itself into a position of interdependence with a private entity that it must be recognized as a joint participant in the challenged activity. *Brunette v. Humane Society of Ventura County,* 294 F.3d 1205, 1213 (9th Cir.2002), *cert. den.,* 537 U.S. 1112, 123 S.Ct. 902, *citing Burton, supra.* The cases finding a symbiotic relationship do not involve authority that the actor could exercise under a separate, non-state sovereign, as the Appellees could here. There was no interdependence. The AZ-POST certification and statute permitting it did not intend in any way for the state to control the tribal officers or change tribal authority that the tribal officers otherwise would have absent the certification.

3. No state action derives from the "joint action test" for the roadblock, stop, questioning and detention of Appellant.

The joint action test requires that a private party be a "willful participant" with the state or its agents in an activity that deprives others of constitutional rights. The private party is liable under this theory, however, only if its particular

actions are "inextricably intertwined" with those of the government. A conspiracy between a state and a private party to violate another's constitutional rights may also satisfy the joint action test. *Brunette*, 294 F.2d at 1211. The question here of course is whether the TOPD officers' acts can fall within the joint action test only by analogy to private acts under the test, because here they already had sovereign, tribal governmental authority to do those acts.

In the media cases discussed in *Brunette*, CNN's agreement and actions with the government to enter a private ranch and home with the government on the government's search warrant and film the event was joint action, to be distinguished from no joint action where the media enters at the invitation of the police, but without use of state authority to enter. The distinguishing factor is whether state action is needed or exhibited to take the action. State authority was neither needed nor exhibited by the TOPD officers for the acts in question.

Where an employer not only cooperated with police, but actively encouraged police to arrest strikers and keep them off the streets and to violate their rights, there was joint action. *United States Workers of America v. Phelps Dodge Corporation,* 865 F.2d 1539 (9th Cir.1989). Phelps Dodge (the employer) had to seek state help, because it did not have separate sovereign authority to do those things. This is in contrast to the separate, tribal, sovereign, non-state authority in this case to order and conduct the checkpoint.

Bressi cannot show that the Appellees were not acting with tribal authority and therefore acting with state authority before they saw his identification and cited him for state law violations. Only when it can be shown the officers were acting with state authority does it become relevant to this inquiry. *Collins v. Womancare*, 878 F.2d 1145, 1153 (9th Cir.1989). In this case, the Appellees did not need the state relationship to make their decisions or act under them in

conducting the roadblock and other actions before learning or confirming that Bressi was a non-Indian. Having state authority to act further if a state violation was found to have occurred cannot be deemed to be the deciding factor on whether to conduct the initial activities in question that were authorized under tribal law.

The specific facts and circumstances in this case warrant their own analysis and result. *See Burton*, 365 U.S. at 725-26 (noting that each case "can be determined only in the framework of the peculiar facts or circumstances present."). Only in this case do we have the specific facts that the officers have authority from a separate sovereign and therefore, the officers did not need to invoke state authority for their acts.

4. There is no joint action supporting *Bivens* claims.

Because *Bivens* is the federal state-action equivalent of § 1983, the same basic legal principles are applied. *See, e.g., Ward v. Caulk*, 650 F.2d 1144, 1148 (9th Cir.1981). E.R. 160. Thus, cases dealing with state action are instructive.

In *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 932, 102 S.Ct. 2744 (1982), which was limited to state attachment procedures, 457 U.S. at 939 n. 21, the Supreme Court held that when one invokes the aid of state officials to take advantage of state-created attachment procedures, joint participation with state officials has occurred for purposes of state action. *Lugar* indicates that some significant action between a private party and the particular government agent is required. *Id. at* 937.

In *Cabrera v. Martin*, 973 F.2d 735, 744 (9th Cir. 1992), the Ninth Circuit recognized that the touchstone is whether there is a sufficiently close nexus between the challenged action of a state actor and non-state actor so that the latter may be fairly treated as that of the State itself. In *Askew v. Bloemker*, 548 F.2d

673, 677-78 (7th Cir.1976), cited in *Cabrera*, federal officers were held not to be acting under color of state law where a few state officers provided some backup to a much larger federal force. The participation of the state officers, one who accompanied federal officers into the premises, and others who stood off to the side, was de minimis.

These cases show that for joint action for *Bivens* purposes, the non-federal parties must act in concert with or use federal officials to help them carry out the challenged federal action for purposes of violating a plaintiff's federal rights. In this case, as in *Askew*, if federal agents played any role at all, it was like the state officers in *Askew*, and was de minimis, and definitely was not a significant role. The TOPD was never under the control or direction of federal agents in conducting the roadblock, or the stop, questioning and detention of Bressi. Any assistance or actions by federal officers were voluntary, and de minimis. As to Bressi and the checkpoint itself, the Appellees possessed their tribal power and acted solely by virtue of tribal authority. Neither federal officers nor federal law were significant participants or chief actors so as to transform the TOPD officers into federal actors, and the district court correctly dismissed the *Bivens* claims.

5. The lost paperwork does not require an adverse inference.

Plaintiff provides no authority that lost evidence should be held to contain something supporting state action. The loss of the briefing memorandum by the TOPD was not even known until a year later, when attempting to obtain it for Bressi's court hearing. Ford did not refuse to give it to the prosecutor, but at most said it wasn't his to give; he especially did not refuse to give it in this case. It was not Ford's responsibility to maintain it and he had turned it in shortly after the incident; somewhere in the process between the TOPD and the Nation's Attorney

General's office, it was lost. Neither Ford nor the other Appellees caused the loss, and this case is against them, personally, not the Nation or TOPD. And because of tribal sovereignty, the propriety of the checkpoint is not an issue for this case.

Appellees likewise should not be held responsible for the routine destruction of tapes or any records by the TOPD relating to calls to federal agencies, which had nothing to do with proving state action. Moreover, that destruction was before any discovery requests in this case, and the tapes were unrelated to Bressi. E.R. 45, ¶ 2(b). Spoliation instructions have been held to be improper when a police department destroyed a taped conversation pursuant to a retention policy. *Iowa v. Langlet*, 283 N.W.2d 330 (Iowa 1979).

6. Bressi's other evidence is likewise ineffective to create subject matter jurisdiction.

Notice to the community or a place to turn around do not create an issue of fact of state action. These arguments are related to the propriety of the checkpoint, not state action. Bressi's subjective suspicions on seeing federal officers creates no issue of state action. Tubbiolo's thinking he heard an unpleasant remark about invoking of the Fourth Amendment also does not support state action. An individual officer's narrative report stating the checkpoint was for drugs or other matters is without foundation, and is also not determinative of the purpose of such a checkpoint. *Edmond*, 531 U.S. at 45-46. Shonk's operation plan of two and a half years earlier does not create an issue of state action either, even though it says to look for state, federal and tribal violations. AZ-POST Authority is not needed to look for such things, those were not the primary purpose of the checkpoint, and that was not the memorandum used in this case.

The district court correctly held that the roadblock, stop, detention and questioning were done pursuant to tribal law only, and correctly dismissed claims

arising out of those actions based on tribal sovereign immunity.

7. The *Tuscarora* rule does not affect this case.

Bressi's reliance on *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 80 S.Ct. 543 (1960), and its progeny is unavailing. *Tuscarora* stands for the rule that federal statutes are applied to tribes and tribal members absent the three exceptions stated in the Ninth Circuit's case of *Donovan v. Coeur d'Alene Travel Farm,* 751 F.2d 1113 (9th Cir.1985).

Bressi did not make this argument below, and therefore it is waived (see argument next section on waiver), and Appellees move to strike that argument. The case of *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C.Cir.2007) adds nothing to the 1985 *Coeur d'Alene* case that Bressi could have argued at the time that the subject matter jurisdiction motion was pending.

Without waiving the foregoing objections, it is clear that the rule in *Tuscarora,* which was dictum, applies to congressional acts as opposed to federal constitutional provisions. See *Coeur d'Alene,* 751 F.2d 1113, at 1115-16. Further, it is well established that there is no § 1983 claim for constitutional violations taken under tribal law. *R.J. Williams Company v. Fort Belknap Housing Authority,* 719 F.2d 979, 982 (9th Cir.1983). The *Tuscarora* cases are irrelevant.

C. NO "FREEDOM TO TRAVEL" ARGUMENT WAS RAISED BELOW, AND THE RIGHT WAS NOT VIOLATED. *(Response to Argument C in Opening Brief at pp. 27-32.)*

Bressi never argued or raised a "freedom to travel" issue below, and Appellees move to strike his Argument C. This case does not fall within one of the "narrow and discretionary exceptions to the general rule against considering issues for the first time on appeal." *Jovanovich v. United States,* 813 F.2d 1035,

1037 (9th Cir.1987). Those exceptions allow review of new issues only if they are (1) necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a change in law raised new issue while the appeal is pending, and (3) when the issue is purely one of law. *Id.* This case involves questions of qualified immunity, and evidence was introduced in the district court to provide the full background for the court to make its conclusion as a matter of law on qualified immunity based on the evidence submitted. The "freedom to travel" is not one of the issues on which any evidence was submitted. Indeed, Bressi argues that the Appellees are required to meet strict scrutiny and supply proof of effectiveness, and that the "government has not met its burden of proof that identification at roadblocks meets either of these tests." (Opening Brief, p. 32.) This requires evidence to be introduced which was not, and issues which were not raised in or passed upon below which require evidence to be introduced should not be considered by an appellate court. *See Singleton v. Wulff,* 428 U.S. 106, 120, 96 S.Ct. 2868 (1976).

Without waiving these objections, Appellees assert that no "freedom to travel" right was violated. First, had Appellant shown his license, he would have been on his way. Even after being cited, he simply had to sign the citation and he would have been on his way. The extended delays in this case were his choice. Second, the federal constitution, including the First Amendment or any other clause, is inapplicable to matters taken under tribal law for § 1983 purposes. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 & n. 7, 98 S.Ct. 1670 (1978); *R.J. Williams,* 719 F.2d at 981. Even if the rights are considered to exist under the ICRA, at 25 U.S.C. § 1302(1), habeas corpus would be the sole remedy here.[3]

[3] Appellees are not aware of any attempt Bressi has made to plead any of his arguments in an obviously fit forum, the Nation's courts.

Santa Clara Pueblo, 436 U.S. at 69-70; 13 U.S.C. § 1303. Wants and warrants checks take only 1-3 minutes. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074 (1976) (three to five minutes deemed not too long). Finally, this issue also raises questions about the Nation's right to exclude non-members, which here may involve the University of Arizona's contract regarding Kitt Peak (where Bressi works) and questions of process regarding temporary versus permanent exclusion. See Supp.E-R 33-38; *Dodge v. Nakai,* 298 F.Supp. 26 (D.Ariz.1969). While this includes legal issues about the Nation's right to territorial integrity of and sovereign control over its reservation, there are far too many factual issues to deal with for which evidence was not submitted below for Appellant's argument to fit within the *Jovanovich* exceptions.

D. SUMMARY JUDGMENT ON QUALIFIED IMMUNITY, STATE CONSTITUTION CLAIM AND INJUNCTIVE RELIEF WAS PROPER. *(Response to Argument D in Opening Brief, pp. 32-44.)*

1. Qualified Immunity for § 1983 claims pursuant to *Saucier v. Katz.*

The district court found that the Appellees were qualifiedly immune for Bressi's § 1983 claims as a matter of law pursuant to *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001). E.R. 167-177, 180. To recover § 1983 damages, Bressi had to prove by a preponderance of the evidence that Appellees deprived him of his constitutional rights while acting under color of state law. *Tatum v. City and County of San Francisco,* 441 F.3d 1090, 1094 (9th Cir.2006).

The Supreme Court requires that the requisites of a qualified immunity defense be considered in proper sequence. *Saucier, supra,* 533 U.S. at 200. The first question is, in the light taken most favorably to the party asserting the injury, did the facts alleged show the officer's conduct violated a constitutional right? *Id.* at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified

immunity." *Id.; Johnson v. County of Los Angeles,* 340 F.3d 787, 793-94 (9th Cir.2003). If a violation could be made out on a favorable view on the parties' submissions, the next sequential step is to ask whether the right was clearly established. *Saucier, supra,* 533 U.S. at 201-02. Furthermore, the right that the officers are alleged to have violated must not just be a generally stated one, but rather, "must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 202, *citing Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034 (1987).

2. No constitutional right was violated by the citation and arrest for state law violations.

A police officer has probable cause to arrest a person without a warrant if the available facts suggest a "fair probability" that the person has committed a crime. *Tatum, supra,* 441 F.3d at 1094. This is true even if the person has committed only a very minor criminal offense carrying only a minor penalty: "An officer who observes criminal conduct may arrest the offender without a warrant, even if the pertinent offense carries only a minor penalty." *Id., citing Atwater v. City of Lago Vista,* 532 U.S. 318, 354, 121 S.Ct. 1536 (2001) (upholding a warrantless arrest for a misdemeanor seatbelt violation punishable only by a fine).

Probable cause to cite and arrest Bressi for the state law violations existed for refusing to provide identity or a driver's license to an officer, A.R.S. § 28-1595(B), and, purposeful refusal to cooperate with an officer with authority to direct, control or regulate traffic, § 28-622(A). E.R. 172-73. He could have been cited for similar offenses under tribal law, had he been a tribal member. Upon retrieving his wallet after removing his limp body from the road, it was clear then

that he was subject to state law. If the facts known to an arresting officer are sufficient to objectively create probable cause (regardless of the officer's subjective reasons for it), the arrest is lawful. *Tatum, supra,* 441 F.3d at 1094, *citing Devenpeck v. Alford,* 543 U.S. 146, 153, 125 S.Ct. 588 (2004).

Arizona law also authorizes officers to arrest violators of these statutes. A.R.S. § 13-3883(A)(2), (3). Appellees offered Bressi the right to avoid detention by signing the citation without acknowledging guilt and promising to appear in court at an appointed time, as is permitted by A.R.S. § 13-3903. He declined to do so for three hours, and his arrest during that time was proper.

3. Effect of tribal immunity and alleged improprieties of the checkpoint cannot support Appellant's claim that his subsequent citation and arrest on state law charges violated constitutional rights.

The propriety of the checkpoint should not be an issue. Bressi has never disputed that probable cause existed to cite and arrest him under state law. He argues only that the checkpoint itself was illegal, tainting all acts thereafter for § 1983 purposes. But the checkpoint, stop, questioning and detention of Bressi were conducted pursuant to tribal law, clothing the defendants with tribal immunity for those actions. E.R. 152, 176. The propriety of those actions is governed by 25 U.S.C. § 1302(2), which must be determined by a tribal court. *See, e.g., National Farmers Union Insurance Co. v. Crow Tribe of Indians,* 471 U.S. 845, 105 S.Ct. 2447 (1985); *Santa Clara Pueblo, supra; R.J. Williams, supra.*

Further, section 1983 plaintiffs cannot rely on such a "fruit of the poisonous tree" argument for further acts for which there was probable cause. *Townes v. City of New York,* 176 F.3d 138, 145-149 (2nd Cir.1999), *cert. denied,* 528 U.S. 1964, 120 S.Ct. 398 (1999). Additionally, Bressi cannot establish the deprivation of <u>any</u> constitutional right as a matter of the checkpoint activity itself, which has been

established in this case to have been conducted pursuant to tribal law, clothing the Appellees with sovereign immunity for those actions. E.R. 154, 159, 164-65. The arrest and citation under state law "did not occur until after Plaintiff started arguing with the officers and was taken aside for further questioning." E.R. 159. The court also noted that tribal officers have inherent authority to stop and exclude trespassers on tribal land. E.R. 157.

Plaintiffs may not maintain § 1983 actions in federal court alleging deprivation of constitutional rights under color of tribal law; such actions "may only be examined in federal court under the provisions of the Indian Civil Rights Act" (ICRA). *R.J. Williams,* supra. In the civil context, habeas corpus relief generally is the sole federal remedy for a violation of the ICRA. *Santa Clara Pueblo,* 436 U.S. at 69-70.

Suppression of evidence in a criminal prosecution may be appropriate if conduct violated the ICRA. *United States v. Becerra-Garcia,* 397 F.3d 1167 (9th Cir.2005), *cert. den.,* 547 U.S. 1005, 126 S.Ct. 1463. But the doctrine requiring suppression does not assist a plaintiff with a § 1983 claim. *Townes, supra.* To hold Defendants liable for what occurred after probable cause for state law violations arose would be tantamount to holding them liable for a violation of the ICRA, to which no § 1983 claim may apply. The otherwise proper acts of citing and arresting Bressi after probable cause arose are therefore not foreseeable consequences of an earlier deprivation of a "*constitutional*" right. The district court properly applied the foregoing analysis here. E.R. 173-77. Bressi's attempt to extend an alleged violation of the ICRA to subsequent acts for which there indeed was probable cause, where the alleged wrongful act is one for which there can be no § 1983 damages, and which is under tribal sovereign immunity, was properly rejected by the district court.

4. Even if the propriety of the checkpoint were at issue, it met Fourth Amendment standards; the evidence does not support a checkpoint whose primary purpose was to advance "the general interest in crime control."

The district court did not reach the issue of the propriety of the checkpoint because it did not need to. E.R. 156-59, 173-76. But Appellant raises the propriety issue here as he did below, so these Appellees, without waiving the foregoing arguments that the propriety of the checkpoint is not an issue because of tribal sovereign immunity, respond here. The evidence does not support a primary purpose of general crime control or any other impropriety.

Despite Bressi's arguments otherwise, licenses and registrations (in addition to sobriety) and other driver and road safety issues may be checked at checkpoints, as opposed to roving patrols. *Michigan Department of State Police v.Sitz,* 496 U.S. 444, 110 S.Ct. 2481 (1990); *Edmond,* 531 U.S. at 37-38, *citing Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391 (1979). In *Sitz,* the Court noted that fear and surprise to drivers encountering a checkpoint is resolved by clear indicia of authority and that other cars are also being stopped. 496 U.S. at 452-53. There is no requirement that advance publicity or notice be provided, or warnings for drivers to avoid the checkpoint. The cases do not mandate written guidelines, but only that there be evidence at a programmatic level of a systematic approach to the checkpoint so that individual officer discretion is circumscribed "at least to some extent." *Sitz,* 496 U.S. at 454, *citing Prouse,* 440 U.S. at 661.

Edmond shows that checkpoints with primary purposes of sobriety, licenses and registrations are permitted. *See* 531 U.S. at 37-38 and 47 (stating that the checkpoints suggested in *Prouse,* with the purpose of verifying drivers' licenses and vehicle registrations, are permissible). It is only checkpoints whose primary purpose is to search for narcotics or otherwise to advance "the general interest in

crime control," that violate the Fourth Amendment. 531 U.S. at 48. The key to the case is "primary purpose." As to "secondary purposes," the Court stated:

> Specifically, we express no view on the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car.

531 U.S. at 47, n. 2.

The Ninth Circuit recently applied the principles from *Edmond* in *United States v. Faulkner,* 450 F.3d 466 (9th Cir.2006). In denying a motion to suppress in *Faulkner*, the court held that even though a ranger at an entrance station of a recreation area asked if people were carrying alcohol (in response to numerous complaints of general crime occurring the area), the main purpose of the station was to provide information about rules of the area. The court held that *Edmond* does not apply if a general interest in crime control is a subordinate rather than the primary purpose. 450 F.3d at 471 ("Indeed, the phrase "general interest in crime control" does not refer to every "law enforcement objective.").

The *Faulkner* court also noted that very small percentages of actual violations of the targeted primary purpose are acceptable. 450 F.3d at 472-73 (noting 1.6% of drunk drivers in *Sitz*, 0.12% illegal aliens at a border checkpoint). Such statistical evidence is not even essential. The effectiveness of a checkpoint in fulfilling its primary purpose may be demonstrated in other ways. *United States v. Davis,* 270 F.3d 977, 982 (D.C.Cir.2001). In *Davis*, the court recognized that making the legality of a roadblock seizure wholly dependent on statistics gathered after the roadblock ended would conflict with the time-honored doctrine that a search or seizure is not to be justified based on what it turns up. 270 F.3d at 983. Chief Saunders stated that checkpoints have been effective in reducing the incidence of impaired driving on the reservation. E.R. 61-62 ¶ 6. And although

statistics kept in this case are lost, they are not the only evidence of statistics of that night. Reports show at least six violations for drivers on suspended drivers licenses. Supp-E.R. 63-71. Nor is an operational plan the only evidence of the programmatic and systematic role or primary purpose. Not only did the Appellees testify to the programmatic purpose here, Bressi's own evidence is that they told him it was sobriety, licenses and registrations, and asked for nothing else.

Wants and warrant checks were permissible at the checkpoint and did not turn it into one with a primary purpose of general crime control. Such checks are routinely done of a driver's license and registration before any probable cause for criminal activity exists, and are a de minimus procedure, providing information regarding a legitimate governmental interest in assuring that the driver is properly licensed and a vehicle properly registered and insured. *State v. Rubio,* 139 N.M. 612, 136 P.3d 1022, 1027-28 (N.M.App.2006); *State v. Ellenbecker,* 159 Wis.2d 91, 464 N.W.2d 427, 428 (Wis.App.1990). Checks through the "NCIC computer" provide evidence that a vehicle lacked proper financial responsibility and that the driver was operating a vehicle on a suspended license. *Commonwealth v. Bolton,* 831 A.2d, 734, 736-37 (Pa.Super. 2003). Such checks are not only a reasonable way to obtain information, but outweigh the minimal intrusion on a driver. Plaintiff has provided no case suggesting that checking licenses at the checkpoint through wants or warrants, including NCIC or any other type of computer check, violates the Fourth Amendment or ICRA.

It is undisputed that Bressi was told that the checkpoint was for sobriety, licenses and registrations. It is undisputed that there was signage and other indicia of official authority at the checkpoint itself. It is undisputed that when Bressi arrived, all cars were being stopped, and that Bressi was told that all people are being asked the same questions. There is no evidence of any officer ordering any

driver to answer questions about drugs or aliens absent probable cause. There is no evidence that trunk searches occurred without consent or without probable cause. It is undisputed that Lt. Ford, who neither saw nor considered the Shonk memorandum, planned and conducted this checkpoint. There is no evidence that customs or border partrol officers planned or were asked by TOPD to assist planning or running the checkpoint. It is undisputed that Customs Agent Dreeland, by his own choice, spoke to Bressi. It is undisputed that Bressi was fully aware that he was not free to leave until he provided his driver's license and registration. His claim that officer Traviolia told him he had to "produce identification because this area was known for smuggling drugs and illegal immigrants," is only Bressi's own "interpretation." In any event, an officer's subjective intent in carrying out a search generally plays no role in assessing the constitutionality; the primary purpose is to be determined from all the available evidence. *United States v. Scott,* 450 F.3d 863, 869 (9th Cir.2005, amended 2006).

Although the county attorney advised the court in Bressi's justice court trial that Lt. Ford advised him that the only way documentation could be obtained is if the Attorney General were to approve it (as opposed to the fact it was lost), Ford was not called to testify or clarify, because the court dismissed the case without any witnesses being called. Nevertheless, there is no evidence that any of the Appellees refused to provide copies of documents, but only that they were lost by others.

For all these reasons, even if the propriety of the checkpoint was in play, it did not violate Fourth Amendment principles.

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5. The Appellees did not violate any clearly established law.

Even if a constitutional right was violated, summary judgment on qualified immunity is still required if the court finds the right was not clearly established. *Id.* If the propriety of the checkpoint were at issue at all, the question is still whether it would be clear to a reasonable officer that his conduct was unlawful in the specific context of the situation he confronted and under the particular law in question. *Saucier, supra; Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050-51 (9th Cir.2002).

As noted above, there was undisputed probable cause regarding the state law violations. Even if there were deemed to be improprieties of the checkpoint actions, and even if such improprieties could cause the citation and arrest to be tainted, there is not any clearly established law on point regarding the actions taken here. There is no clearly established law that AZ-POST certifications convert tribal officers' actions into state actions for § 1983 claims where no state law authority was needed or invoked, or that the presence of federal officers who have their own, separate jurisdiction turns tribal police officers' actions into federal ones for *Bivens* purposes. Further, court opinions favoring the defendants' actions, such as those on wants and warrants, are additional evidence that reasonable persons would have thought their actions were lawful. *Wilson v. Layne*, 526 U.S. 603, 617-18, 119 S.Ct. 1692 (1999). For all these reasons, there was no violation of a clearly established right.

6. Re-filing the charges was based on probable cause, and was not a constitutional violation.

Appellees believe this argument is related to the malicious prosecution claim, which Appellee U.S.A. is defending rather than these Appellees. However, Appellees set forth that there is no evidence that the notices of claim provided

notice of any clearly established law they violated. The re-filed charges were based on the same probable cause as the first, and Traviolia re-filed them only after checking with the county attorney, who told him he still had a viable case. And no search or seizure was involved in the re-filing of the charges, and thus no constitutional violation resulted from that.

7. State law does not affect the qualified immunity analysis.

Arizona state law regarding checkpoints is irrelevant because a violation of state law does not indicate a violation of settled constitutional law (i.e., the basis for determining the legality under the ICRA). A violation of state law more restrictive than federal Fourth Amendment law is not determinative of whether there is a violation of the Fourth Amendment. *See Bercerra-Garcia, supra*, 397 F.3d at 1174, *citing Cooper v. California*, 386 U.S. 58, 61, 87 S.Ct. 788 (1967); *see also generally, Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012 (1984) (violation of clearly settled state law does not mean there is a violation of constitutional law for a § 1983 claim). Further, the purpose of the checkpoint was tribal, which is a further reason why state law regarding checkpoints is irrelevant.

8. Summary judgment was properly granted on Bressi's state constitutional claim.

Art. 2, § 8 of the Arizona Constitution states that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Arizona applies the very analysis that the Supreme Court applies to the Fourth Amendment of "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *State v. Jeney,* 163 Ariz. 293, 295-297, 787 P.2d 1089, 1091-93 (App.1989). The district court held that under this objective analysis, Appellees acted with the authority of law for the state

citation and arrest because they had probable cause, as described above. Bressi has failed to argue otherwise, and summary judgment on the state constitutional claim should stand.

9. Injunctive relief was unavailable because Bressi's claims failed on the merits.

Bressi sought a permanent injunction based on state and federal law. Supp-E.R. 164, ¶ 22. The district court dismissed the claim for injunctive relief because Bressi could not show a violation of federal or state law on the merits, warranting dismissal under both state and federal law. *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546, n. 12, 107 S.Ct. 1396 (1987); *Smith v. Coronado Foothills Estates Homeowners Association, Inc.*, 117 Ariz. 171, 172, 571 P.2d 668, 669 (1977). He did not seek an injunction regarding tribal law, and the court correctly noted that jurisdiction in the first instance of injunctive relief under tribal law would be in tribal courts. See E.R. 179-80. He did not submit the tribe's new checkpoint policy as evidence in this case, and Appellees have shown above that wants and warrants checks are permissible.

CONCLUSION

Because Appellees had total authority for the roadblock, stop, questioning and detention of Bressi under tribal law, and neither needed to nor actually invoked state or federal authority, tribal sovereign immunity precludes subject matter jurisdiction for § 1983 and *Bivens* claims against Appellees arising from those acts. Those actions were not transformed into state or federal action by virtue of the AZ-POST certifications, by any presence or activity of federal officers, or by the subsequent state action of citing and arresting Appellant under state law. Summary judgment on the latter on grounds of qualified immunity was proper, because there

was probable cause, and because there was no clearly established right that was violated. Summary judgment on the state constitutional claim and injunctive relief were likewise proper. Accordingly, the district court's rulings and judgment in favor of these Appellees should be affirmed in all respects.

Respectfully submitted this 18th day of October, 2007.

GUST ROSENFELD P.L.C.

By: _____
Roger W. Frazier
Attorneys for Defendants Ford, O'Dell, Traviolia and Saunders

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2007 the original and fifteen copies of the Answering Brief of Appellees Ford, O'Dell, Traviolia, and Saunders and five copies of the Supplemental Excerpts of Record of Appellees Ford, O'Dell, Traviolia, and Saunders were mailed via U.S. Postal Service, to: Clerk of the Court of Appeals, United States Court of Appeals for The Ninth Circuit, 95 Seventh Street, San Francisco, CA 94103-1526.

And that two copies of the Answering Brief and one copy of the Supplemental Excerpts of Record on October 18, 2007, to:

David J. Euchner, Esq., 32 N. Stone Avenue, 4th Floor, Tucson, AZ 85701, *Attorney for Plaintiff/Appellant.*

James Palmore Harrison, The First Amendment Project, 1736 Franklin Street, 9th Floor, Oakland, CA 94612, *Co-Counsel for Plaintiff/Appellant.*

and to:

Gerald Frank, Esq., United States Attorney – District of Arizona, 405 W. Congress Street, Tucson, AZ 85701, *Attorneys for Defendant United States of America*

RESPECTFULLY SUBMITTED October 18, 2007.

GUST ROSENFELD P.L.C.

By: _____
Roger W. Frazier
Attorneys for Defendants/Appellees
Ford, O'Dell, Traviolia and
Saunders

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), Counsel for the Appellees Ford, O'Dell, Traviolia and Saunders hereby certifies that this Answering Brief was prepared using a proportionally spaced typeface. It was prepared in Times New Roman, 14-point font (double-spaced except for quotations more than two lines long which were indented and single-spaced, footnotes and headings). According to Word, the total word count is 13,805.

DATED: 18th day of October, 2007.

GUST ROSENFELD P.L.C.

By: _____
Roger W. Frazier
Attorneys for Defendants/Appellees
Ford, O'Dell, Traviolia and
Saunders

STATEMENT REGARDING RELATED CASES

These Appellees do not believe that there are any cases related to this case which are pending in this court.

DATED: 18th day of October, 2007.

GUST ROSENFELD P.L.C.

By: _____
Roger W. Frazier
Attorneys for Defendants/Appellees
Ford, O'Dell, Traviolia and
Saunders

ADDENDUM

TABLE OF CONTENTS

Addendum

25 U.S.C.A. § 1301

United States Code Annotated Currentness
Title 25. Indians
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)
§ 1301. Definitions

For purposes of this subchapter, the term--

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
(3) "Indian court" means any Indian tribal court or court of Indian offense; and
(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

CREDIT(S)

(Pub.L. 90-284, Title II, § 201, Apr. 11, 1968, 82 Stat. 77; Pub.L. 101-511, Title VIII, § 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1968 Acts. Senate Report No. 721, see 1968 U.S. Code Cong. and Adm. News, p. 1837.

Amendments

1990 Amendments. Par. (2). Pub.L. 101-511, § 8077(b), added "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;".

Par. (3). Pub.L. 101-511, § 8077(c), substituted "offense; and" for "offense.".

Par. (4). Pub.L. 101-511, § 8077(c), added par. (4).

Short Title

1968 Acts. Pub.L. 90-284, Title II, Apr. 11, 1968, 82 Stat. 77, which is classified generally to this subchapter, is popularly known as the "Indian Civil Rights Act of 1968" and by the acronym "ICRA".

Time Limitation on Criminal Misdemeanor Jurisdiction of Trial Courts Over Non-Member Indians

Pub.L. 101-511, Title VIII, § 8077(d), Nov. 5, 1990, 104 Stat. 1893, as amended Pub.L. 102-124, § 1, Oct. 9, 1991, 105 Stat. 616; Pub.L. 102-172, Title VIII, § 8112A(b), Nov. 26, 1991, 105 Stat. 1202, which provided that the effects of subsecs. (b) and (c) , which amended pars. (2) and (3) and added par. (4) of this section, as those subsections affect the criminal misdemeanor jurisdiction of tribal courts over non-member Indians have no effect after Oct. 18, 1993, was repealed by Pub.L. 102-137, Oct. 28, 1991, 105 Stat. 646.

25 U.S.C.A. § 1302

United States Code Annotated Currentness
Title 25. Indians
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)
§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [FN1] a fine of $5,000, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

CREDIT(S)

(Pub.L. 90-284, Title II, § 202, Apr. 11, 1968, 82 Stat. 77; Pub.L. 99- 570, Title IV, § 4217, Oct. 27, 1986, 100 Stat. 3207-146.)

[FN1] So in original. Probably should be "or".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1968 Acts. Senate Report No. 721, see 1968 U.S. Code Cong. and Adm. News, p. 1837.

1986 Acts. Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 5393.

Amendments

1986 Amendments. Par. (7). Pub.L. 99-570, § 4217, substituted "for a term of one year and a fine of $5,000" for "for a term of six months or a fine of $500".

Enhancement of Ability of Tribal Governments to Prevent Traffic of Illegal Narcotics

Section 4217 of Pub.L. 99-570 provided in part that amendment of par. (7) of this section was "To

enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics in Indian reservations".

25 U.S.C.A. § 1303

United States Code Annotated Currentness
Title 25. Indians
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)
➡§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

CREDIT(S)

(Pub.L. 90-284, Title II, § 203, Apr. 11, 1968, 82 Stat. 78.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1968 Acts. Senate Report No. 721, see 1968 U.S. Code Cong. and Adm. News, p. 1837.

A.R.S. Const. Art. 2 § 8

Arizona Revised Statutes Annotated Currentness
Constitution of the State of Arizona (Refs & Annos)
Article II. Declaration of Rights
§ 8. Right to privacy

Section 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

A.R.S. § 13-3874

Arizona Revised Statutes Annotated Currentness
Title 13. Criminal Code (Refs & Annos)
Chapter 38. Miscellaneous
Article 6. Authority of Peace Officers Outside Geographical Area of Agency (Refs & Annos)
§ 13-3874. Indian police; powers; qualifications

A. While engaged in the conduct of his employment any Indian police officer who is appointed by the bureau of Indian affairs or the governing body of an Indian tribe as a law enforcement officer and who meets the qualifications and training standards adopted pursuant to § 41-1822 shall possess and exercise all law enforcement powers of peace officers in this state.

B. Each agency appointing any Indian police officer pursuant to this section shall be liable for any and all acts of such officer acting within the scope of his employment or authority. Neither the state nor any political subdivision shall be liable for any acts or failure to act by any such Indian police officer.

CREDIT(S)

Added as § 13-1364 by Laws 1972, Ch. 76, § 1, eff. April 25, 1972. Renumbered as § 13-3874 by Laws 1977, Ch. 142, § 129, eff. Oct. 1, 1978. Amended by Laws 1991, Ch. 143, § 1.

HISTORICAL AND STATUTORY NOTES

The 1991 amendment substituted "who meets the qualifications and training standards adopted pursuant to § 41-1822" for "holding a certificate of qualification and training from the director of the department of public safety" in subsec. A.

A.R.S. § 13-3883

Arizona Revised Statutes Annotated Currentness
Title 13. Criminal Code (Refs & Annos)
Chapter 38. Miscellaneous
Article 7. Arrest (Refs & Annos)
§ 13-3883. Arrest by officer without warrant

A. A peace officer may, without a warrant, arrest a person if he has probable cause to believe:

1. A felony has been committed and probable cause to believe the person to be arrested has committed the felony.

2. A misdemeanor has been committed in his presence and probable cause to believe the person to be arrested has committed the offense.

3. The person to be arrested has been involved in a traffic accident and violated any criminal section of title 28, [FN1] and that such violation occurred prior to or immediately following such traffic accident.

4. A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested under this paragraph is eligible for release under § 13-3903.

B. A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a copy of the traffic complaint for any alleged civil or criminal traffic violation. A peace officer who serves a copy of the traffic complaint shall do so within a reasonable time of the alleged criminal or civil traffic violation.

CREDIT(S)

Formerly § 13-1403. Amended by Laws 1967, Ch. 75, § 1; Laws 1970, Ch. 176, § 1; Laws 1972, Ch. 77, § 1. Renumbered as § 13-3883 and amended by Laws 1977, Ch. 142, § 133, eff. Oct. 1, 1978. Amended by Laws 1982, Ch. 238, § 6; Laws 1982, Ch. 276, § 2; Laws 1983, Ch. 271, § 3, eff. Jan. 1, 1984; Laws 1990, Ch. 338, § 1.

[FN1] Section 28-101 et seq.

HISTORICAL AND STATUTORY NOTES

Source:

Rules Cr.Proc., § 21. [Reference is to a Code of Criminal Procedure based on the Model Code of Criminal Procedure and adopted by the Supreme Court. See Code 1939, § 44-102 et seq.]
Code 1939, § 44-124.
A.R.S. former § 13-1403.

Adopted from Model Code Crim.Proc. § 21.

The 1967 amendment substituted "probable cause" for "reasonable ground" in former pars. 3 and 4;

and added former par. 5, which read:

"When, at the scene of a traffic accident, based upon personal investigation, the officer has probable cause to believe that the person to be arrested has violated any section of title 28. The Arizona traffic ticket and complaint shall be utilized and the person so arrested shall be released as provided in § 28-1054 in all cases not covered in § 28-1053."

The 1970 amendment added a requirement that the investigating officer have probable cause to believe the person to be arrested had been involved in a traffic accident in former par. 5.

The 1972 amendment rewrote par. 1, which had read:

"A peace officer may, without a warrant, arrest a person:

"1. When the person to be arrested has committed a felony or misdemeanor in his presence. If the arrest is for a misdemeanor, the arrest shall be made immediately or on fresh pursuit.";

added pars. 2, 3 and 4; and deleted former pars. 2, 3, 4 and 5, which had read:

"2. When the person to be arrested has committed a felony, although not in the presence of the officer.

"3. When a felony has in fact been committed, and he has probable cause to believe that the person to be arrested has committed it.

"4. When he has probable cause to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it.

"5. When the investigating officer has probable cause to believe that the person to be arrested has been involved in a traffic accident and violated any section of title 28, and that such violation occurred prior to or following such traffic accident. The Arizona traffic ticket and complaint shall be utilized and the person so arrested shall be released as provided in § 28-1054 in all cases not covered in § 28-1053."

The 1977 amendment substituted "13-3903" for "13-1422" in par. 4.

Laws 1982, Ch. 238, § 6, added "If he has probable cause to believe" to the introductory sentence; deleted "When he has probable cause to believe" from the beginning of pars. 1 through 4; and in par. 4, rewrote the last sentence, which formerly read: "The person so arrested shall be released in conformity with the provisions of § 13-3903."

Laws 1982, Ch. 276, § 2, in par. 4, inserted "or a petty offense, as prescribed in § 28-702.01, subsection E," following "misdemeanor" in the first sentence.

The 1983 amendment, in par. 3, inserted "criminal" preceding "section"; and, in par. 4, deleted ", as prescribed in § 28-702.01, subsection E," following "petty offense" in the first sentence.

The 1990 amendment inserted the designation for subsec. A; and added subsec. B.

Reviser's Notes:

1982 Note. Prior to the 1983 amendment, this section contained the amendments made by Laws 1982, Ch. 238, § 6 and Ch. 276, § 2 which were blended together pursuant to authority of § 41-1304.03.

A.R.S. § 13-3903

Arizona Revised Statutes Annotated Currentness
Title 13. Criminal Code (Refs & Annos)
Chapter 38. Miscellaneous
Article 7. Arrest (Refs & Annos)
§ 13-3903. Notice to appear and complaint

A. In any case in which a person is arrested for an offense that is a misdemeanor or a petty offense, the arresting officer may release the arrested person from custody in lieu of taking such person to the police station by use of the procedure prescribed in this section.

B. At any time after taking a person arrested for an offense that is a misdemeanor or a petty offense to the police station, the arresting officer may, instead of taking such person to a magistrate, release such person from further custody by use of the procedure prescribed in this section.

C. In any case in which a person is arrested for an offense that is a misdemeanor or a petty offense, the arresting officer may prepare in quadruplicate a written notice to appear and complaint, containing the name and address of such person, the offense charged, and the time and place where and when such person shall appear in court, provided:

1. The time specified in the notice to appear is at least five days after arrest.

2. The place specified in the notice shall be the court specified in § 13- 3898.

3. The arrested person, in order to secure release as provided in this section, shall give his written promise so to appear in court by signing at least one copy of the written notice and complaint prepared by the arresting officer. The officer shall deliver a copy of the notice and complaint to the person promising to appear. Thereupon, the officer shall forthwith release the person arrested from custody.

4. The officer shall, as soon as practical, deliver the original notice and complaint to the magistrate specified therein. Thereupon, the magistrate shall promptly file the notice and complaint and enter it into the docket of the court.

D. The Arizona traffic ticket and complaint may be utilized not only for the purposes provided in the Arizona supreme court rule, but to satisfy the requirements of this section.

E. When a person has given his written promise to appear in court upon a designated date pursuant to this section, and thereafter fails to appear, personally or by counsel, on or before that date, the magistrate shall file a complaint, in writing, under oath, setting forth the offense of wilfully violating a written promise to appear in court in accordance with § 13-3904, and shall issue a warrant of arrest thereon. Upon such person's appearance in court for arraignment on the charge of violating § 13-3904, such magistrate shall also arraign such person on the charge stated in the notice to appear and complaint for which such person had previously promised to appear.

F. Nothing in this section shall be construed to affect a peace officer's authority to conduct an otherwise lawful search incident to his arrest even though such arrested person is released before

being taken to the police station or before a magistrate pursuant to this section.

CREDIT(S)

Added as § 13-1422 by Laws 1966, Ch. 89, § 1. Amended by Laws 1969, Ch. 129, § 3. Renumbered as § 13-3903 and amended by Laws 1977, Ch. 142, § 140, eff. Oct. 1, 1978. Amended by Laws 1982, Ch. 276, § 3; Laws 1983, Ch. 271, § 4, eff. Jan. 1, 1984.

HISTORICAL AND STATUTORY NOTES

Prior to the 1969 amendment, this section read:

"**A.** Whenever a peace officer is authorized to arrest a person without a warrant he may instead issue to such person a notice to appear.

"**B.** The notice to appear shall:

"1. Be in writing.

"2. State the name of the person and his address.

"3. Set forth the nature of the offense.

"4. Be filed by the officer issuing the notice to appear.

"5. Direct the person to appear before a court as a certain time and place.

"**C.** Upon failure of the person to appear, a summons or warrant of arrest may issue.

"**D.** The Arizona traffic ticket and complaint may be utilized not only for the purposes provided in the Arizona supreme court rule, but to satisfy the requirements of this section."

The 1977 amendment substituted "§ 13-3898" for "§ 13-1418, subsection A" in paragraph 2 of subsection C; and substituted a reference to § 13-3904 for the reference to § 13-1423 in subsection E of this section.

The 1982 amendment inserted "or a petty offense, as prescribed in § 28-702.01, subsection E," following "misdemeanor" in subsecs. A through C.

The 1983 amendment deleted "as prescribed in § 28-702.01, subsection E," following "petty offense" in subsecs. A through C.

A.R.S. § 28-622

Arizona Revised Statutes Annotated Currentness
Title 28. Transportation (Refs & Annos)
Chapter 3. Traffic and Vehicle Regulation (Refs & Annos)
Article 2. Obedience to and Effect of Traffic Laws (Refs & Annos)
§ 28-622. Failure to comply with police officer; classification

A. A person shall not wilfully fail or refuse to comply with any lawful order or direction of a police officer invested by law with authority to direct, control or regulate traffic.

B. A person who violates this section is guilty of a class 2 misdemeanor.

CREDIT(S)

Added by Laws 1996, Ch. 76, § 18, eff. Oct. 1, 1997.

HISTORICAL AND STATUTORY NOTES

Source:
Laws 1950, 1st S.S., Ch. 3, § 24.
Code 1939, Supp.1952, § 66-152v.
A.R.S. former § 28-622.
Laws 1984, Ch. 330, § 6.

A.R.S. § 28-1595

Arizona Revised Statutes Annotated Currentness
Title 28. Transportation (Refs & Annos)
Chapter 5. Penalties and Procedures for Vehicle Violations (Refs & Annos)
Article 4. Procedures for Civil Traffic Violations (Refs & Annos)

§ 28-1595. Failure to stop or provide driver license or evidence of identity; violation; classification

A. The operator of a motor vehicle who knowingly fails or refuses to bring the operator's motor vehicle to a stop after being given a visual or audible signal or instruction by a peace officer or duly authorized agent of a traffic enforcement agency is guilty of a class 2 misdemeanor.

B. After stopping as required by subsection A of this section, the operator of a motor vehicle who fails or refuses to exhibit the operator's driver license as required by § 28-3169 or a driver who is not licensed and who fails or refuses to provide evidence of the driver's identity on request is guilty of a class 2 misdemeanor. The evidence of identity that is presented shall contain all of the following information:

1. The driver's full name.

2. The driver's date of birth.

3. The driver's residence address.

4. A brief physical description of the driver, including the driver's sex, weight, height and eye and hair color.

5. The driver's signature.

C. A person other than the driver of a motor vehicle who fails or refuses to provide evidence of the person's identity to a peace officer or a duly authorized agent of a traffic enforcement agency on request, when such officer or agent has reasonable cause to believe the person has committed a violation of this title, is guilty of a class 2 misdemeanor.

D. A peace officer or duly authorized agent of a traffic enforcement agency may give the signal or instruction required by subsection A of this section by hand, emergency light, voice, whistle or siren.

E. A person shall not be convicted of a violation of subsection B of this section if the person provided evidence of identity required by subsection B, paragraphs 1 through 5 of this section and produces to the court a legible driver license or an authorized duplicate of the license that is issued to the person and that was valid at the time the violation of subsection B of this section occurred.

CREDIT(S)

Added as § 28-3795 by Laws 1995, Ch. 132, § 3, eff. Oct. 1, 1997. Renumbered as § 28-1595 and amended by Laws 1996, Ch. 76, §§ 6, 43, eff. Oct. 1, 1997.

HISTORICAL AND STATUTORY NOTES

Source:

A.R.S. former § 28-1075.
Laws 1983, Ch. 271, § 49.
Laws 1987, Ch. 148, § 58.
Laws 1995, Ch. 286, § 8.