No. CA 08-15618

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTHA MURGIA, Personal Representative of the Estate of Arlen Manuel Murgia, on behalf of all statutory beneficiaries,

Plaintiff – Appellee,

v.

OFFICER REED, OFFICER PARSON, each in their individual capacities,

Defendants – Appellants.

On Appeal from the
United States District Court
For the District of Arizona
(Honorable H. Russel Holland)

APPELLEE'S RESPONSE BRIEF

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I. STATEMENT OF JURISDICTION

Pursuant to Ninth Circuit Rule 28-2.2, Appellee states:

(A) **Statutory basis of subject matter jurisdiction of the district court.** Appellee contends that the district court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 1343(1) and (3).

(B) **Basis for finality of order appealed from the statutory basis of appellate court jurisdiction.** Appellee agrees that the interlocutory order is appealable and that jurisdiction and venue in the Ninth Circuit Court of Appeals is proper.

(C) **Statement of timeliness of appeal.** Appellee agrees that the appeal is timely.

II. ISSUES PRESENTED FOR REVIEW

1. Did the district court properly determine that it had jurisdiction to hear a *Bivens* claim brought against a federal employee who was not a federal law enforcement officer?

2. Did the district court properly determine that sovereign immunity from *Bivens* liability does not extend to police officers sued in their individual capacity?

III. STATEMENT OF THE CASE

As noted by the officers, the district court considered their Fed.R.Civ.P. 12(b)(1) motion to dismiss and the same motion filed by the United States in plaintiff's claims against them pursuant to *Bivens* and the Federal Tort Claims Act ("FTCA"), respectively. Facts cited by the defendants on the motions were used interchangeably by the parties as reflected in the officers' current challenge to the ruling on their "factual attack," citing to the Statement of Facts in Support of Defendant United States of America's Motion to Dismiss and Motion for Summary Judgment Docket No. 35-1, p.1, ¶ 2; p. 2, ¶ 3.[1]

The district court granted dismissal in favor of the United States finding some of the same facts proffered in support of the officers' motion, but distinguishing between jurisdiction in a Bivens claim (federal officers) and in an FTCA claim (federal law enforcement officers), "the fact that Reed and Parson are deemed federal employees for purposes of the FTCA does not mean that they are automatically 'federal law enforcement officers.' ..."[2]

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[1] Appellants' Opening Brief, p.4, n. 11.

[2] Order granting motion of United States to dismiss and for summary judgment (Docket No. 60, p. 14).

IV. STATEMENT OF FACTS

In 1998, the Bureau of Indian Affairs ("BIA"), pursuant to the Indian Self Determination Act and Education Assessment Act ("ISDEAA"), P.L. 93-638, entered into a compact and annual funding agreement with the Gila River Indian Community ("GRIC") for the provision of law enforcement services.[3]

In 2001, GRIC reached "mature contractor" status and became eligible to operate the 638 contract for law enforcement for an indefinite time under annual funding agreements.[4] In 2003, the United States and GRIC entered into a Self-Governance Compact, which placed GRIC's existing ISDEAA programs under the Compact.[5]

When Officers Reed and Parson shot and killed plaintiff's son, they were tribal officers acting under the 638 contract. The district court's Order denying their motion to dismiss also opens the way for their depositions. It is undisputed that they shot and killed the decedent in responding to a call of a domestic quarrel.

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[3]Statement of Facts in Support of Defendant U.S.A.'s Motion to Dismiss and Motion for Summary Judgment, Docket No. 35-2, ¶ 6.

[4] Id., Document No. 35-2, ¶ 7.

[5] Id., Document No. 35-2, ¶ 8.

It is assumed that they will testify that he put them in fear of eminent danger of loss of life or serious bodily injury immediately before they shot and killed him.[6]

[6] "a firearm may be discharged only when in the considered judgment of the officer there is imminent danger of loss of life or serious bodily injury to the officer or to another person. The weapon may be fired only for the purpose of rendering the person at whom it is fired incapable of continuing to do the activity prompting the officer to shoot. The firing of a warning shot is prohibited." Gila River Police Department General Orders #13, policy on the use of force, § VIII and #14, firearms proficiency, Doc. 35-4, pg. 25 of 93.

V. SUMMARY OF ARGUMENT

The district court properly determined that deemed federal officers Reed and Parson were not entitled to a sovereign immunity defense in a *Bivens* suit against them in their individual capacities because that defense is available only to the entity that employed them.

VI. ARGUMENT

A. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT JURISDICTION WAS ESTABLISHED BY VIRTUE OF THE OFFICERS' STATUS AS FEDERAL EMPLOYEES

1. The officers were federal employees but not federal law enforcement officers.

Officers Reed and Parson argue on appeal that they were employed as tribal police officers by the Gila River Indian Community ("GRIC"), a federally-recognized Indian tribe, the acts complained of occurred on the reservation and they were engaged in their official duties with the tribe, therefore, the district court erred in concluding that they were "federal employees and federal law enforcement officers," even though (they argue) the court found to the contrary on a virtually identical motion filed by the United States of America ("U.S.A.").

In determining the issues presented by the respective motions, and in granting one and denying the other, the district court noted the distinction between a federal employee (*Bivens*) and a law enforcement officer for purposes of the intentional tort exception to the FTCA, defined as "an officer of the United States who is empowered by law to execute search warrants, to seize evidence, or to make arrests for violation of Federal law," 28 U.S.C. § 2680(h). The district court recognized that not all federal employees are federal law enforcement officers.

2. The officers were federal actors by virtue of the P.L. 93-638 contract.

When Reed and Parson shot and killed Arlen Murgia on January 10, 2005, the U.S.A., Department of the Interior, Bureau of Indian Affairs ("BIA"), pursuant to the Indian Self Determination Act and Education Assistance Act ("ISDEAA"), P.L 93-638, 25 U.S.C. § 450 *et* seq., had entered into compact and annual funding agreements with the GRIC for the provision of law enforcement services.[7] Under this contract, the officers were deemed federal employees for purposes of the FTCA.[8] There was never a contention by any defendant in the district court that the officers were not federal employees but only that they were not federal law enforcement officers. Reed and Parson were referred to as "deemed federal employees Reed and Parson." They are deemed federal employees of the Department of Interior by virtue of 25 U.S.C. § 2504.

3. Statutory basis for secretary's authority.

§ 2802 Indian Law Enforcement responsibilities:

a) the secretary, acting through the Bureau, shall be responsible, for

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[7] Statement of Facts in Support of Defendant United States of America's Motion to Dismiss and Motion for Summary Judgment, (Doc. 35-2).

[8] Id.

providing, or for assisting in the provision of, law enforcement services in Indian Country as provided in this chapter.

b) (deleted).

c) Additional responsibility of Division

Subject to the provisions of this chapter and other applicable federal or tribal laws, the responsibilities of the division of Law enforcement shall include:

1. the enforcement of Federal and, with the consent of the Indian tribe, tribal law.

Further authority to enforce tribal law is granted in 25 U.S.C. § 2803:

> The Secretary may charge employees of the Bureau with law enforcement responsibilities and may authorize those employees to:
>
> 2) execute or serve warrants, summonses, or other orders relating to a crime committed in Indian country and issued under the laws of -
>
> (A) the United States (including those issued by a Court of Indian Offenses under regulations prescribed by the Secretary.

Title 25 U.S.C. § 2804 authorizes the Secretary of Interior to contract for the provision of those services as follows:

a) Agreement for use of personnel or facilities of Federal, tribal, State, or other governmental agency.

The Secretary may enter into an agreement for the use (with or without reimbursement) of the personnel or facilities of a Federal, tribal, state or other governmental agency to aid in the enforcement or carrying out in Indian country of a law of either the United States or Indian tribe that has authorized the Secretary to enforce tribal laws. The Secretary may authorize a law enforcement officer of such an agency to perform any activity the Secretary may authorize under Section 2803 of this title.

e) Authority of Federal agency head to enter into an agreement with Indian Tribe.

The head of a Federal agency with law enforcement personnel or facilities may enter into an agreement (with or without reimbursement) with an Indian tribe relating to–

(1) the enforcement authority of the Indian tribe, or

(2) the carrying out of a law of either the United States or the Indian tribe.

f) Status of persons as Federal employee

While acting under authority granted by the Secretary under subsection (a) of this section, a person who is not otherwise a Federal employee shall be considered to be –

(1) an employee of the Department of the Interior only for the purpose of –

(A) the provisions of law described in § 3374(c)(2) of Title V ....

4. The law that Reed and Parson were enforcing, whether tribal or federal, has no impact on their status

It is clear from 25 U.S.C. § 2802(a) and 25 U.S.C. § 2802(c)(1) that the Secretary of the Interior acts under his own authority, and not the delegated authority of a tribe, if he authorizes the enforcement of tribal law under a P.L.93-638 contract with an Indian tribe.

Consequently, though Reed and Parson may have been tribal officers enforcing tribal law, they, and all other officers responding to the Murgia home, did so under the P.L. 93-638 contract with the Secretary, acting under the statutory authority of the Secretary of Interior, not the GRIC.

In support of their position, Reed and Parson argue that a *Bivens* action does not lie against a tribal police officer enforcing tribal law, citing *Dry v. United States*, 235 F.3d 1249 (10th Cir. 2000). In *Dry*, however, there was no 638 contract. Moreover, *Dry* did not consider the Secretary's authority in 28 U.S.C. § 2802-2804.

> When a 638 contract meets the definition of a § 2804(a) agreement, and when tribal officers designated under that contract enforce laws that BIA officers would otherwise enforce, § 2804(f) expressly provides that those tribal officers are afforded the same protection under 18 U.S.C. § 111, the Congress has afforded BIA employees. ***This is so regardless of whether the officer is enforcing a tribal, state, or Federal law so long as he is engaged in the performance of his official duties rather than "a personal frolic of his own." (emphasis added; internal citations omitted).***

U.S. v. Schrader, 10 F.3d 1345, 1350 (8th Cir. 1993).

5. Reed and Parson are deemed federal Employees pursuant to 18 U.S.C. § 111 AND § 114.

In *U.S. v. Roy*, 408 F.3d 484 (8th Cir. 2005), defendant appealed his conviction for assaulting a Federal officer in violation of 18 U.S.C. § 111. The officer in question (Van Roekel) was a member of the tribal (and municipal) police department who, in attempting to arrest defendant for a tribal offense, had a physical confrontation with defendant.

Whether Van Roekel was a federal officer protected by the statutes in question was a threshold legal issue for the court which went on to analyze this issue in light of 25 U.S.C. §§ 2802, 2803, and 2804.

> The Secretary of the Interior (Secretary) through the Bureau of Indian Affairs (Bureau) is charged with providing or assisting in the provision of law enforcement services on Indian lands. 25 U.S.C. § 2802(a). In connection with this responsibility, the Secretary "may charge [Bureau] employees with a broad range of law enforcement powers." U.S. v. Schrader, supra.; 25 U.S.C. § 2803. In addition to utilizing Bureau employees, "[T]he Secretary may enter into an agreement for the use ... of the personnel or facilities of a Federal, tribal, State, or other government agency" to assist in the provision of law enforcement services in Indian Country. 25 U.S.C. § 2804(a). The Secretary may authorize an officer of the agency contemplated by such an agreement "to perform any activity the Secretary may authorize under Section 2803." *Id.* "When acting under such authority, a person who is not otherwise a Federal employee shall be considered to be an employee of the Department of the Interior for purposes of 18 U.S.C. §§ 111 and 114." Schrader, 10 F.3d 1350 (quoting 25 U.S.C. § 2804(f).

U.S. v. Roy, 408 F.3d at 489 (emphasis added).

Defendants contend that they were not federal officers because they were not "certified" and had no SLEC card just as Roy contended that Roekel could not qualify as a federal officer because he had not completed the training required of officers who exercise the bureau's law enforcement authority. This was conceded by the state. The court rejected this argument and held that **the regulation does not contain this requirement** and, in addition, such a holding would be

inconsistent with the purpose behind the statute which is to protect both federal officers and federal functions. Id. at 490-491.

B. THE DISTRICT COURT CORRECTLY DETERMINED THAT TRIBAL POLICE OFFICERS SUED IN THEIR INDIVIDUAL CAPACITIES ARE NOT ENTITLED TO SOVEREIGN IMUNITY

1. The distinction between personal- and official- capacity lawsuits is delineated by the U.S. Supreme Court.

The rule which Appellants advocate is simple: police officers should be able to shoot and kill, assault and batter with impunity because they are members of a sovereign. Such is not the law and careful adherence to the distinction between personal- and official-capacity lawsuits is required to prevent this. *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 3104 (1985). There arrestees who were beaten and mistreated during a warrantless search of a house by members of the Kentucky state police brought a § 1983 suit against the Commissioner of the Kentucky State Police, "individually and as Commissioner," and the Commonwealth of Kentucky and individual police officers. The Commonwealth and the Commissioner in his official capacity were dismissed. During trial, the case was settled for $60,000. The settlement agreement barred the arrestees from seeking attorney's fees from the individual defendants but preserved their right to seek them from the Commonwealth. Certiorari was granted to address the issue whether fees could be recovered from a governmental entity when a plaintiff

prevails in a suit against government employees in their personal capacities. The trial court granted the fees and the Sixth Circuit affirmed.

In reversing, the court stated "This case requires us to unravel once again the distinctions between personal- and official-capacity suits . . ." *Kentucky v. Graham*, at 163, 3104.

Contrary to personal- and official-capacity lawsuits being pleading devices as argued by Reed and Parson, there are particular and doctrinal differences between the two. As explained in *Graham*, "Personal-capacity suits seek to impose personal liability on a governmental official for actions he takes under color of law. Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent'." *Id.* at 165, 3105 (internal citations omitted.)

Moreover,

> On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation, thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. In an official-capacity action, these defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess such as the Eleventh

> Amendment. While not exhaustive, this list illustrates the basic distinction between personal- and official – capacity actions.

Id. at 166-167, 3105-3106 (internal citations omitted).

2. A *Bivens* action seeks redress for individual wrongdoing.

As pointed out by the supreme court, a victory in a personal-capacity action is a victory only against the individual defendant and not the entity that employed him. Thus, in *Graham*, the court held that the arrestees were not entitled to recover fees against the governmental entities following victory in a personal-capacity action against government officials. The instant case against the officers is a *Bivens* action. *Bivens* actions and actions taken under 42 U.S.C. § 1983 are identical save for the replacement of a state actor by a federal actor. *Bieneman v. City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988) *cert. denied.* 490 U.S. 1080, 109 S.Ct. 2099, 104 L.Ed.2d 661 (1989). Individual defendants sued under a *Bivens* claim, like individual defendants sued in their individual capacity under § 1983, can be held liable only for their individual wrongdoing.

> If you believe that a state officer has violated your constitutional rights, you have a choice between suing the officer personally and suing the state. If you go the former route, you don't have to worry about the Eleventh Amendment but do have to worry about various personal defenses, such as good-faith immunity; if you go the later route you don't have to worry about personal defenses but may have to worry about the Eleventh Amendment.

Duckworth v. Franzen, 780 F.2d 645, 649 (7th Cir. 1985), cert. denied 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986), *citing Kentucky v. Graham.*

Plaintiff chose to sue the officers in their individual capacities pursuant to *Bivens*. They did not sue them under a theory which would allow them to raise a defense of sovereign immunity. In *Duckworth*, the court recognized that the plaintiff is the master of his complaint. *Id.* at 650. She is not barred because a theory which she did not pursue is barred by immunity. *Id.*

Being master over her complaint, plaintiff filed a *Bivens* action. This action is not subject to the defense that Reed and Parson, tribal officers, may partake of sovereign immunity. Their claim is that it was incumbent upon plaintiff to dispute their allegations of sovereign immunity. The district court, however, realized that Reed and Parson admitted that they were tribal police officers, considered that this was a *Bivens* action in which sovereign immunity was not an issue, and ruled properly dismissing the officers' argument that a claim which she did not bring is barred by sovereign immunity.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Counsel for Plaintiff-Appellee is not aware of any related cases pending in this Court.

DATED this 27th day of May, 2008.

THE GULINSON LAW OFFICE PLLC

By _____
Gene G. Gulinson

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that *Appellee's Response Brief* is double-spaced in 14-point proportionally-spaced Times New Roman typeface. The word count, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance and statement of related cases is 3,321.

DATED this 27th day of May, 2008.

THE GULINSON LAW OFFICE PLLC

By _____
Gene G. Gulinson

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing *Appellee's Response Brief*, along with two copies of *Appellee's Excerpts of Record* were served via United States Mail on May 27, 2008, addressed to the following:

Thomas L. Murphy
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Counsel for Defendants-Appellants

and the original and fifteen copies of *Appellee's Response Brief* and five copies of *Appellee's Excerpts of Record* were sent overnight delivery on May 27, 2008, addressed to the following:

Office of the Clerk
United States Court of Appeals
95 Seventh Street
San Francisco, California 94103-1526

THE GULINSON LAW OFFICE PLLC

By _____
Gene G. Gulinson