No. 12-15243

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE DUPRIS and JEREMY REED,

Plaintiffs-Appellants,

v.

SELANHONGVA McDONALD, *et al.,*

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Nos. 3:08-cv-8132 (PGR) and 3:08-cv-8133 (PGR)
(Consolidated)

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

Invoking Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b)(1) and 2671, *et seq*., Plaintiffs-Appellants, Jesse Dupris and Jeremy Reed, sued Bureau of Indian Affairs (BIA) Agents Daniel Hawkins, Molly Hernandez, Tino Lopez, Mike McCoy, Perry Proctor and Warren Youngman, and the United States along with two tribal police officers, Joshua Anderson and Perphelia Massey.[1] On June 27, 2011, the district court dismissed the claims against McCoy and Youngman as time-barred. Plts'-Apps' Excerpts of Rec. (P.E.R.) 1-8. On January 9, 2012,[2] the district court granted summary judgment in favor of the United States and the remaining individual capacity federal defendants (Hawkins,[3] Hernandez, Lopez and Proctor) and denied Plaintiffs' Partial Summary Judgment motion regarding the federal employee status of Anderson and Massey. P.E.R. 9-31.

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[1] Anderson and Massey are not represented by the Department of Justice.

[2] On January 24, 2012, the district court amended that order to correct a few typographical errors. P.E.R. 55-77.

[3] Plaintiffs concede Hawkins was not involved in the alleged violation of their constitutional rights. P.E.R. 12, n.2.; Plts' Br., p. 35. Plaintiffs do not appeal the grant of summary judgment as to Hawkins.

Plaintiffs' noticed their appeal on February 6, 2012. P.E.R. 532-541. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Did the district court correctly dismiss Plaintiffs' FTCA claims against the United States for false arrest and malicious prosecution because: (a) the arrests and prosecutions were supported by probable cause and were therefore not tortious; (b) the claims challenge conduct that falls within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (FTCA); (c) a private individual would not be liable for the conduct alleged under state law, because pursuant to Arizona Revised Statute (A.R.S.) § 13-3620(J), a private person is immune from civil liability where, as here, he or she acts without malice in a criminal investigation into sexual offenses involving minors; (d) the claims pertaining to the conduct of Anderson and Massey are barred by the "intentional tort" exception to the FTCA, 28 U.S.C. § 2680(h); and (e) Anderson and Massey were not federal law enforcement officers for purposes of FTCA liability?

2. Did the district court correctly hold that Plaintiff's claims against McCoy and Youngman are barred by the statute of limitations?

3. Did the district court correctly grant summary judgment on Plaintiff's Bivens claims against the Federal Defendants because: (a) defendants Hernandez,

Lopez, and Proctor were not personally involved in the alleged constitutional violation; and (b) the existence of probable cause forecloses the finding that the arrests and prosecutions constituted a constitutional violation?

4. Even assuming that the Defendants were personally involved in the alleged violations and that the evidence could support a finding that probable cause did not exist, were the claims against the Federal Defendants properly dismissed on qualified immunity grounds because: (a) there was a reasonable basis for the defendants to believe that probable cause existed at the time of the conduct alleged; (b) with respect to the malicious prosecution claim, there is no evidence that the individual Federal Defendants acted with malice; and (c) the tribal prosecutor's independent decision to initiate Plaintiffs' prosecution broke the chain of causation, thus insulating the investigating officers from liability?

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

Plaintiffs sued two tribal police officers of the White Mountain Apache Tribe (WMAT) and six BIA Agents in their individual capacities for civil rights violations under Bivens, as well as the United States under the FTCA. Plaintiffs contend their Fourth and Fifth Amendment rights were violated and that they were falsely arrested and maliciously prosecuted in connection with a series of sexual

assaults at the White Mountain Apache Indian Reservation ("Reservation") in Whiteriver, Arizona. P.E.R. 101-187. The tribal charges and prosecutions against Plaintiffs were later dismissed. P.E.R. 11.

II. PROCEDURAL HISTORY.

Plaintiffs separately commenced their actions on October 20, 2008. P.E.R. 545, Doc. 1; P.E.R. 569, Doc. 1. The complaints asserted only Bivens claims against individuals. Id. Prior to service, Plaintiffs amended to add FTCA claims against the United States. P.E.R. 546, Doc. 11; P.E.R. 570, Doc. 8. In April 2009, after the actions were consolidated for pre-trial purposes, P.E.R. 546, Doc. 15, the Federal Defendants filed separate motions to dismiss. P.E.R. 546-547, Docs. 18 & 19.

On January 13, 2010, the district court granted the BIA Agents' Motion to Dismiss but afforded Plaintiffs leave to amend. P.E.R. 549, Doc. 48. In that order the district court rejected Plaintiffs' claimed "informational disadvantage." Id., p. 2. The United States' motion was denied without prejudice. Id.

Plaintiffs filed a consolidated Second Amended Complaint on February 19, 2010. P.E.R. 549, Doc. 49. On March 8, 2010, the Defendants again moved to dismiss. P.E.R. 550, Docs. 50 & 51. Before replies were due, Plaintiffs sought to amend a third time. P.E.R. 551, Doc. 62. The district court allowed amendment but

warned, "**this will be the last opportunity to amend** ... The Court will not grant any further motions to amend the complaint." Id., Doc. 66, p. 1 (original emphasis). The pending motions to dismiss were denied without prejudice. Id., p. 2. Plaintiffs filed the Third Amended Complaint on May 6, 2010, id., Doc. 67, which Defendants answered. P.E.R. 552, Docs. 73-78.

On October 15, 2010, Plaintiffs sought leave to amend a fourth time to add McCoy and Youngman as individual defendants. P.E.R. 554, Doc. 96. The Defendants opposed, arguing that the factors under Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004) (bad faith, undue delay, prejudice, futility, previous amendments) barred further amendments. P.E.R. 555, Doc. 103. Part of the argument supporting futility was that the statute of limitations for the Bivens claims against McCoy and Youngman had expired and that those claims did not "relate back" under Rule 15(c). Id., pp. 10-13.

On January 26, 2011, the district court, applying "the rule of liberal amendments," granted Plaintiffs' Motion to Amend but dismissed all individual capacity claims against Selanhongva McDonald.[4] P.E.R. 556, Doc. 121. The District Court then stated the Defendants "are entitled to test the sufficiency of any amended complaint." Id.

[4] Plaintiffs do not appeal dismissal of the claims against McDonald.

III. DISPOSITION BELOW AT ISSUE.

The Fourth Amended Complaint was filed on February 11, 2011. P.E.R. 101. The Defendants separately answered, P.E.R. 557, Docs. 130-134, except McCoy and Youngman, who moved to dismiss, arguing that the claims against them were time-barred because Arizona's two-year statute of limitations for Bivens claims expired before the Fourth Amended Complaint was filed. P.E.R. 558, Doc. 145. The district court agreed and dismissed all claims against McCoy and Youngman with prejudice. P.E.R. 1-8.

Before holding the statute of limitations barred those Bivens claims, the district court ascertained the dates Plaintiffs' causes of action accrued and identified the dates Plaintiffs knew of McCoy and Youngman's participation in the investigation, rejecting Plaintiffs' assertion their claims accrued only upon the discovery of the *extent* of the involvement of McCoy and Youngman. P.E.R. 6-8. Applying Ninth Circuit law, the district court held:

> The law of the case doctrine does not foreclose Defendants' statute of limitations argument. Plaintiffs' false arrest and malicious prosecution claims accrued when Plaintiffs became aware of their injuries; that is, on the date of their arrest (October 20, 2006) and on the date the charges were dismissed (February 20, 2007, for Dupris, and April 27, 2007, for Reed). The applicable statue of limitations is two years. Plaintiffs' Fourth Amended Complaint, naming McCoy and Youngman, was filed on February 11, 2011, more than two years after the dates the claims accrued. Based on these facts, the running of the statute is apparent from the face of the complaint and dismissal is appropriate under Rule 12(b)(6).

P.E.R. 8.[5]

After discovery closed, the remaining Federal Defendants filed their respective summary judgment motions along with a Joint Statement of Material Facts. P.E.R. 560-561, Docs. 167, 168 & 169. The common ground for summary judgment on Plaintiffs' Bivens and FTCA claims was that Plaintiffs' arrests were supported by probable cause. Additionally, the United States argued the FTCA claims were barred by the discretionary function exception and the immunity found under A.R.S. §13-3620(J), and Hernandez, Lopez and Proctor asserted that they were entitled to qualified immunity and that, in any event, the tribal prosecutor's independent judgment barred the Fifth Amendment malicious prosecution claims.

On January 9, 2012, the district court granted both motions, dismissed the Fourth Amended Complaint, and entered judgment in favor of all Defendants. P.E.R. 31. After reviewing the facts gleaned during extensive discovery and Plaintiffs' numerous exhibits, the district court held the undisputed material facts

[5] Even if their motion to dismiss had been denied, the claims against McCoy and Youngman would ultimately have been dismissed due to the district court's summary judgment ruling that the arrests were based on probable cause. P.E.R. 16-20.

established that probable cause existed for Plaintiffs' arrests and prosecution. Id., 16-20.[6]

In addition, the undisputed material facts showed that Hernandez, Lopez and Proctor had no personal involvement in the decision to arrest Plaintiffs, thus entitling them to qualified immunity. P.E.R. 14-16, and due to his lack of involvement, Plaintiffs conceded the claims against Hawkins should be dismissed. P.E.R. 12, n.2. The undisputed material facts also showed that the FTCA claims were barred by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), and under A.R.S. § 13-3620(J), which provides that a person who investigates sexual assaults involving minors, "is immune from any civil or criminal liability...unless the person acted with malice." P.E.R. 23-27.

Finally, the district court held Anderson and Massey were not federal law enforcement officers for the purposes of the law enforcement exception to the FTCA because they were neither empowered to enforce federal law, nor acting under the color of federal law when they arrested Plaintiffs on tribal charges. P.E.R. 29-30

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[6] As permitted by Circuit Rule 30-1.7, Defendants have filed, as Defs-Apps' Excerpts of Rec. (D.E.R.) 179-180, their papers considered by the district court in ruling on their dispositive motions which were not included in Plts' Excerpts of Record as required by Circuit Rule 30-1.4(c)(ii).

FACTUAL STATEMENT

In early September 2006, the BIA created the "Operation Mountain Line" Task Force to investigate a series of sexual assaults occurring on the Reservation. The crimes were committed by a man or men who posed as police or security officers. The majority of the fifteen victims were minor females assaulted at night on a trail near an abandoned house. P.E.R. 10.

Hernandez, Lopez, Proctor, McCoy, Youngman and Duston Whiting were assigned to the Task Force. McCoy was the Incident Commander, Youngman the Assistant Incident Commander, and Whiting the case agent. Anderson and Massey were also assigned to the Task Force, id., although they "were not given Special Law Enforcement Commissions ("SLEC") from the BIA, deputized by the BIA, or otherwise authorized to make arrests under federal law." Id., 29.

On October 20, 2006, McCoy and Youngman met with tribal prosecutor Paula King to see whether she wanted to pursue tribal charges against Plaintiffs. King agreed to charge and prosecute Plaintiffs and gave permission to McCoy and Youngman to have Plaintiffs arrested on tribal charges. P.E.R. 10.

As Incident Commanders, McCoy and Youngman made the probable cause determination and did so based on the totality of the evidence obtained. D.E.R. 2-13 (¶¶ 2-5, 16-52, 54-55, 57-63, 67-71). Hernandez, Lopez and Proctor played no

"role in the decisions to arrest and prosecute," nor were they privy to those decisions until afterward. D.E.R. 10, 15-16 (¶¶ 68, 84-89).

At the moment the probable cause determination was made, McCoy and Youngman were aware of information suggesting Plaintiffs' involvement in the attacks. P.E.R. 17-18. They knew, among other factors, that:

> Dupris had recently been a security guard for the White Mountain Apache Housing Authority ("WMAHA"), and in that capacity he had access to the locations and equipment used by the attacker, including handcuffs. (Id.) Dupris lived in the "Ben Gay" housing area, near the trail where the assaults occurred. (Doc. 167, Exs. 4, 7, 10.) Michelle Young, a former tribal police officer, had observed Dupris on patrol one night around the time of one of the attacks. (Doc. 167, Exs. 6, 7, 10.) Wearing a shirt with the word "security" on it, he was running from a trail to his vehicle. (Id.) Young then saw Dupris change back into his WMAHA shirt. (Id.) Two victims, L.T. and LB., identified Dupris from a photo lineup (id., Exs. 6, 7, 8, 10), as did M.M., an eyewitness to another assault. (Id., Exs. 7, 10.) Other victims provided physical details of their attacker that matched those of Dupris. (Id., Exs. 3, 4, 6, 7, 8, 10.) Dupris had lied about his residence, and his polygraph answers were deemed "deceptive" by an FBI examiner. (Id., Exs. 7, 10.) Victim C.D. stated that her attacker did not have the accent of an Apache man, had a "light complexion," and was not Apache. (Id.) Dupris is Irish and Sioux, not Apache, and had lived off of the Reservation for several years. (Id.) Dupris' supervisor believed that he had once gotten into trouble when he worked for WMAHA for "having a young woman in his work vehicle." (Id.)

P.E.R. 17-18. With regard to Reed, they knew:

> When shown a photo lineup, victim B.L. identified Reed as her attacker. (Doc. 167, Exs. 6, 7, 10.) Reed matched the height and weight descriptions provided by several victims and witnesses, and matched descriptions that the suspect had "hairy" or "bushy" eyebrows. (Id., Exs. 4, 6, 7, 10.) Like Dupris, he lived in the "Ben Gay" housing area and had worked as a WMAHA

> security guard. (Id., Exs. 7, 10.) He was evasive and refused to speak with the Task Force or come in for an interview. (Id.) Dupris identified Reed as a possible suspect based on the similarity of their appearance. (Id.) Reed's supervisor said he was the only security guard who had a flashlight with a blue light, which matched the type of flashlight used by the suspect. (Id.) Reed admitted he had been accused "of picking up girls in different areas, and having two way radios." (Id.) Reed is an Apache who has lived on the Reservation his entire life, and victim B.L., who identified Reed from the photo lineup, stated that her attacker had a "red boy" voice. (Id.)

P.E.R. 18.

McCoy and Youngman also believed that additional inculpating evidence against Plaintiffs would be forthcoming, such as DNA results for the rape of C.D. who was pregnant and which could not be obtained until after delivery. D.E.R. 8 (¶ 58), 151-152, 176. Finally, prior to the arrests, a federal district court authorized a search of Dupris' vehicle and residence. D.E.R. 9 (¶ 57).

On October 20, 2006, after King authorized the arrest of Dupris and Reed on tribal charges, D.E.R. 10 (¶ 67), McCoy asked Massey if she would draft tribal charges against Plaintiffs. D.E.R. 13 (¶ 73). Massey agreed and the same day Massey arrested Dupris and Anderson arrested Reed. P.E.R. 56. Hernandez, Lopez and Proctor had nothing to do with drafting the charges or advancing the prosecutions. D.E.R. 15-18 (¶¶ 84-89, 95-96, 99, 102, 106, 108). Hernandez, Lopez and Proctor were not present for Dupris' arrest and only Hernandez was present as back-up at Reed's arrest. D.E.R. 14-15 (¶¶ 75-83).

Afterward, King modified Reed's tribal charges and signed the complaint. P.E.R. 11. She attempted to modify Dupris' tribal charges at arraignment but the tribal court denied her request and determined Plaintiffs should continue to be held in tribal jail. Id. King carried out the prosecutions in tribal court without contact with or pressure from BIA. D.E.R. 10, 15-17 (¶¶ 65-67, 88-89, 94-98, 102), 136. She was not pressured, coerced or induced to arrest, charge or prosecute either Plaintiff. Id. Plaintiffs' prosecutions were solely under King's control. D.E.R. 16-18 (¶¶ 95-98, 105-109). Reed and Dupris were released on bond, respectively, on November 1 and 12, 2006. P.E.R. 11.

Later, on her own accord after she came to believe the evidence would not support a conviction, King dismissed the charges. D.E.R. 17-18 (¶¶ 105-109), 137.

STANDARD OF REVIEW

This Court reviews both a district court's grant of summary judgment and dismissal for failure to state a claim *de novo.* Johnson, 356 F.3d at 1071; Lee v. City of Los Angeles, 250 F.3d 668, 679 (9th Cir. 2001). A grant of qualified immunity is also reviewed by this Court *de novo*. Act Up!/Portland v. Bailey, 988 F.2d 868, 871 (9th Cir. 1993). This Court may affirm "on any basis supported by the record[,] even if the district court did not rely on that basis." Shaw v. Cal. Depot of Alcoholic Beverage Control, 788 F.2d 600, 603 (9th Cir. 1986).

SUMMARY OF ARGUMENT

The district court properly dismissed all of plaintiffs' claims against the federal defendants, and its judgment should be affirmed. Plaintiffs' arrests were supported by probable cause, and they have established no basis for liability either against the United States under the Federal Tort Claims Act, or against the individual federal defendants under Bivens.

1. Plaintiffs' FTCA claims for false arrest and malicious prosecution are foreclosed because the alleged actions were supported by probable cause and therefore cannot support a claim for either false arrest or malicious prosecution. See Conrad v. United States, 447 F.3d 760, 764 (9th Cir. 2006); Gasho v. United States, 39 F.3d 1420, 1427 (9th Cir. 1994). The district court carefully evaluated the extensive evidence of record, and found that the arrests were supported by eyewitness identifications of the plaintiffs as well as corroborating circumstantial evidence. The fact that the charges against the plaintiffs were later dismissed does not render their arrest unlawful or negate the existence of probable cause. See Freeman v. City of Santa Ana, 68 F.3d 1180, 1189 (9th Cir. 1995).

Plaintiffs' ultimate argument is that the district court mistakenly interpreted the facts to conclude that probable cause supported their arrests. Plts' Br., pp. 2-4, 21. Plaintiffs focus almost entirely on narrow inconsistencies in the victim and

witness accounts and/or the reliability of their identifications. Id., pp. 2, 9-10, 21, 31, or upon immaterial facts. See P.E.R. 14, 16, 19, 24-27; D.E.R. 179-199. These arguments fail, because the Task Force was not required to delay the arrests "until after they ha[d] resolved each and every inconsistency or contradiction in a victim's account." Spiegel v. Cortege, 196 F.3d 717, 725 (7th Cir. 1999). The existence of probable cause for plaintiffs' arrests defeats all of Plaintiffs' claims and the district court's judgment can be affirmed on that basis alone.

B. Plaintiffs' FTCA claims were properly dismissed for the additional reason that, as the district court held, they are barred by the discretionary function exception, 28 U.S.C. § 2680(a). The discretionary function exception retains the United States' sovereign immunity with respect to the exercise of discretion in decisions susceptible to policy analysis. The investigative actions at issue here are quintessential examples of conduct protected under that exception. The officers' conduct here was discretionary: plaintiffs' have cited no mandatory law, regulation, or policy that required them to take any specific actions here. And it is well-established that the use of discretion in the law enforcement context is plainly susceptible to policy judgment. Law enforcement personnel must necessarily use judgment as to the best course to follow in compelling compliance with criminal statutes and uncovering and deterring unlawful conduct. See Sabow v. United

States, 93 F.3d 1445, 1452-53 (9th Cir. 1996) ("Investigations by federal law enforcement officials. . . clearly require investigative officers to consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation.").

C. As the district court properly held, Plaintiffs' FTCA claims fail for the additional reason that a private person in like circumstances would not be liable for the conduct alleged under the relevant state's law. See 28 U.S.C. §§ 1346(b)(1), 2674; United States v. Olson, 546 U.S. 43, 45-46 (2005). Arizona law governs here, and under A.R.S. § 13-3620(J), any person is immune from civil liability for actions taken in the course of a criminal investigation into sexual assaults involving minors unless they act with malice. The presence of probable cause negates any finding of malice and, in any event, the record is bare of any facts even remotely suggesting it.

D. Plaintiffs' FTCA claims arising out of the conduct of tribal police officers Anderson and Massey are also expressly barred by the "intentional torts" exception to the statute, which provides that the statute inapplicable to claims arising out of "false imprisonment, false arrest, malicious prosecution, abuse of process." 28 U.S.C. § 2680(h). Although the intentional torts exception is itself subject to an exception, or "proviso," that permits a claim for the torts specified

above if involving "acts or omissions of investigative or law enforcement officers of the United States Government," Ibid, the district court correctly held that the tribal officers who conducted the arrest at issue here were not federal law enforcement officers for purposes of the §2680(h) proviso, because the undisputed evidence established Anderson and Massey were not deputized by the BIA or otherwise "authorized to make arrests under federal law." P.E.R. 29. As a result, claims arising from Anderson and Massey's alleged conduct are barred by the FTCA's intentional torts exception, because they do not fall within the scope of that exception's proviso.

2. The district court correctly held that the claims against individual defendants McCoy and Youngman are time-barred. Plaintiffs' claims accrued when they became aware of the fact of McCoy's and Youngman's participation in the investigation, not when they claim they understood the full extent of that participation. As the district court observed:

> Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action. Cabrera v. City of Huntington Park, 159 F.3d 374, 379 (9th Cir. 1998); see TwoRivers, 174 F.3d at 992. As already discussed, Plaintiffs knew of their injuries, and thus the claims accrued, at the time Plaintiffs were arrested and when the charges were dismissed with prejudice. These dates precede the filing of the Fourth Amended Complaint by more than two years.

P.E.R. 6.

3. The district court also properly granted summary judgment as to Plaintiffs' Bivens claims against the individual Federal Defendants because they are entitled to qualified immunity. The summary judgment for Defendants Hernandez, Lopez, and Proctor on the Bivens was proper because Plaintiffs have not established their personal participation in the allegedly unconstitutional conduct. See Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). Hernandez, Lopez and Proctor had only minimal involvement in the Task Force investigation and that limited involvement was entirely consistent with what is normally expected of reasonable police officers participating in a sexual assault investigation. They had no involvement in the probable cause determination that led to Plaintiffs' arrests. In addition, as explained above, the record demonstrates that probable cause supported Plaintiffs' arrest. The district court's probable cause analysis was correct and the dismissal of the Bivens claims should be affirmed on that basis.

4. Even if there were room for doubt as to the existence of probable cause (and there is not), summary judgment on the Bivens claims against the individual federal defendants was proper.

A. Even if actual probable cause did not exist, qualified immunity would be appropriate because the facts developed during the investigation were sufficient to

support a reasonable, even if mistaken, belief that probable cause was present. See Anderson v. Creighton, 483 U.S. 635, 641 (1987).

B. Even absent probable cause, Plaintiffs have failed to establish a basis for a malicious prosecution claim. They have not shown that the individual defendants' actions were motivated by malice, an essential element of their constitutional malicious prosecution claim. Awadby v. City of Adelanto, 368 F.3d 1061, 1066 (9th Cir. 2004).

C. The BIA agents are further shielded from liability because the tribal prosecutor exercised independent judgment in determining that there was probable cause for Plaintiffs' arrests. Newman v. County of Orange, 457 F 3d. 991, 993 (9th Cir. 2006). That exercise of independent judgment broke the chain of causation and insulates the individual federal defendants from liability.

Ultimately, Plaintiffs do not seriously dispute that the district court applied the appropriate law in this matter, and the undisputed material facts demonstrate that the district court properly granted summary judgment in favor of Defendants and correctly denied Plaintiffs' cross-motion for partial summary judgment. The district court's orders should be affirmed.[7]

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[7] This case is suitable for decision without oral argument because "the dispositive issues have been authoritatively decided" and "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(B) & (C).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' FTCA CLAIMS.

A. PROBABLE CAUSE EXISTED TO ARREST PLAINTIFFS.

The district court properly held that there was probable cause to arrest and prosecute Plaintiffs. The existence of probable cause defeats Plaintiffs' FTCA false arrest and malicious prosecution claims, Conrad v. United States, 447 F.3d 760, 764 (9th Cir. 2006); Gasho, 39 F.3d at 1427. It is an absolute defense to false arrest. Gasho, 39 F.3d at 1427, and a complete defense to malicious prosecution "without regard to the existence of malice." Cullison v. City of Peoria, 584 P.2d 1156, 1160 (1978).

Probable cause "'is a practical, nontechnical conception,'" Beck v. State of Ohio, 379 U.S. 89, 91 (1964) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949), that asks

> whether at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Beck, 379 U.S. at 91. See also Devenpeck v. Alford, 543 U.S. 146, 152 (2004) (Probable cause for an arrest must be found where the officer made a reasonable conclusion "drawn from the facts known to the arresting officer at the time of the

arrest."); Blankenhorn v. City of Orange, 485 F.3d 463, 471 (9th Cir. 2007) (same). Accordingly, a subsequent dismissal of the charges does not render an arrest that was supported by probable cause unlawful. Freeman v. City of Santa Ana, 68 F.3d 1180, 1189 (9th Cir. 1995). Finally, "an officer need not have probable cause for every element of the offense." Gasho, 39 F.3d at 1428 (citation omitted). When there is no factual dispute – as in this case – the existence of probable cause is a question of law for the Court. Id.

Plaintiffs do not challenge either the decision to investigate them, or the use of photo lineups to identify suspects. Plts' Br., p. 37. Instead, their argument against probable cause centers around the eyewitness identifications derived from the photo lineups. Plts' Br., pp. 25-28. This argument fails to acknowledge the probable cause determination was not based solely on the victims' identifications of Plaintiffs as their assailants. Rather, probable cause was based on the *totality of the evidence* collected and relied on by McCoy and Youngman. D.E.R. 2-14 (¶¶ 2-5, 16-52, 54-55, 57-63, 67-71). At the time of Plaintiffs' arrests, the investigators had information separately implicating each Plaintiff in the attacks, including factors in addition to the eyewitness identifications.

Dupris lived in the housing area near the trail where the assaults occured. At the time of the attacks, Dupris, a security guard for WMAHA, had access to the

locations and equipment, including handcuffs, and had been observed on patrol on the night of one of the attacks wearing a shirt with the word "security" on it, running from a trail to his vehicle and then changing back into a WMAHA shirt. Two victims and an eyewitness all identified Dupris from a photo lineup, and other victims gave descriptions of their attacker that matched Dupris. Dupris lied about where he lived and gave deceptive polygraph answers. A victim described her attacker as light-complected and not Apache. Dupris is Irish and Sioux and lived off the reservation for several years. His supervisor reported that Dupris had been reprimanded for having a young woman in his work vehicle. P.E.R. 17-18.

As for Reed, a victim identified him in a photo lineup and Reed matched the height, weight and "bushy" eyebrows descriptions provided by victims and witnesses. Like Dupris, Reed lived in a housing area close to the trail where the attacks occurred and had worked as a WMAHA security guard. He was evasive and refused to speak with the Task Force or come in for an interview. Prior to the arrests, a federal district court authorized a search of Dupris' vehicle and residence. Moreover, Dupris himself pointed to Reed as a possible suspect, based on the similarity of their appearances. Reed's supervisor reported that Reed alone had a flashlight with a blue light, which matched that used by the assailant. Reed had been accused of picking up girls and having two-way radios. One victim, who

identified Reed from a photo lineup, described her attacker as having a "rez boy" accent, meaning he was from the Reservation. Reed is Apache and has lived on the Reservation his entire life. P.E.R. 18. These facts demonstrate that a reasonable officer could believe probable cause existed. Spiegel, 196 F.3d at 725; Torchinsky v. Siwinski, 942 F.2d 257, 262 (4th Cir. 1991).

However, even accepting Plaintiffs' argument that the only relevant evidence was the victims' identifications of Plaintiffs as the serial rapists, those identifications alone were sufficient for a finding of probable cause. D.E.R. 7-8 (¶¶ 36, 38, 44, 48, 50, 52); Peng v. Mei Chin Penghu, 335 F.3d 970, 976-78 (9th Cir. 2003); Cullison, 584 P.2d at 1159 (eyewitness identification provided police with sufficient probable cause upon which to make arrest); Slade v. Phoenix, 541 P.2d 550, 553 (1975) (reasonable police officer could believe the accused committed an assault based on information solely from the victim without conducting an independent investigation); Neil v. Biggers, 409 U.S. 188, 199-201 (1972) (reliability of identification determined on "totality of circumstances" including whether witness viewed criminal at time of crime); Torchinsky, 942 F.2d at 262 (reasonable police officer could base his belief in probable cause on victim's reliable identification).

Plaintiffs freely admit they were identified in the photo lineups; they merely claim those identifications were flawed. Plts' Br., pp. 17-20, 31. Even if the eyewitness identifications were *later* discovered to be flawed, that is irrelevant to what McCoy and Youngman *knew at the time the probable cause decision* to arrest was made. Beck, 379 U.S. at 91. Because probable cause existed for the arrest, it does not matter that the charges were later dismissed. Boudette v. Singer, 8 F.3d 25, n.8 (9th Cir. 1993) (citation omitted).

Moreover, the case law relied upon by Plaintiffs to show probable cause did not exist is unavailing. Plts' Br., pp. 22-25. In Grant v. City of Long Beach, 315 F.3d 1081 (9th Cir. 2002), the probable cause determination was found flawed for reasons that have no application here. There, the determination was based on two impermissibly suggestive identifications, contradictory descriptions, and a faulty canine identification. Id. at 1081. The record here is devoid of evidence that the identifications were impermissibly suggestive, and the majority of eyewitness descriptions were consistent and matched Plaintiffs' height and weight and other important distinguishing physical features. D.E.R. 3-10 (¶¶ 3-4, 16-21, 33-34, 36, 38-40, 43-52, 57-63). More important, the record contains the additional factors enumerated above which resulted in a finding of probable cause. D.E.R. 3-14, 17 (¶¶ 22-30, 32, 54-58, 61, 63, 67-71, 101, 105). These additional factors – neither

present, nor addressed in Grant – demonstrate far more than an unsupported suspicion. Peng, 335 F.3d at 976-78.

Also unavailing is Plaintiffs' dependence on Jenkins v. City of New York, 478 F.3d 76 (2d Cir. 2007). Plts' Br., pp. 23-24. Jenkins not only post-dates the Plaintiffs' arrests, it addressed a factual scenario in which only general identifying traits offered by one witness were used, and other material disputed facts (such as whether Jenkins was fleeing arrest) precluded summary judgment. 478 F.3d at 89-90. Here, probable cause was based on far more than a single, vague description, and no factual disputes remain. D.E.R. 4-14 (¶¶ 16-34, 36, 38-40, 43-52, 58-63, 67-71).

Finally, Plaintiffs' assertion that the investigation against them should have immediately concluded or "refocused" once Jimi Aday was arrested for a sexual assault, Plts' Br., pp. 11-14, is hindsight speculation and fails to take into account the totality of evidence implicating Plaintiffs. D.E.R. 2-13 (¶¶ 2-5, 16-52, 54-55, 57-63, 67-71). Notably, it ignores that Aday could not be connected with the vast majority of the sexual assaults and rapes being investigated, D.E.R. 9 (¶ 56); a fact admitted by Plaintiffs.[8] Furthermore, contrary to Plaintiffs' claim, Plts' Br., pp. 13,

[8] "...the Task Force had located and arrested one solid suspect, Jimi Aday. However, they could not link him to any of the assaults at the vacant house or other 'non-vehicular' rapes. As such, a majority of the assaults were technically unsolved." P.E.R. 563, Doc. 192 (Plts' Opp.), p. 12.

17, Aday never admitted raping any of the victims, nor was he charged with rape. United States v. Jimi Aday, 3:06-CR-991-MHM (D. Ariz.), filed Nov. 8, 2006.

Plaintiffs were arrested based on ample evidence amounting to probable cause. As a result, the district court properly granted summary judgment in favor of the Defendants on the FTCA claims.

B. THE FTCA'S LIMITED WAIVER OF SOVEREIGN IMMUNITY DOES NOT EXTEND TO PLAINTIFFS' INTENTIONAL TORT CLAIMS AGAINST THE UNITED STATES.

Even assuming Plaintiffs could show absence of probable cause, their FTCA claims still fail because the decisions to investigate and arrest them were discretionary and lacked malicious intent, allowing summary judgment for the United States under, respectively, the discretionary function exception, 28 U.S.C. § 2680(a), and Arizona's immunity for those investigating sexual offenses involving minors under A.R.S. § 13-3620(J). See 28 U.S.C. § 1346(b)(1); §§ 2671-2680. Additionally, because Anderson and Massey were neither empowered to, nor enforcing, federal law when they arrested Plaintiffs, 28 U.S.C. § 2680(h), the intentional tort exception acts as a bar to Plaintiffs' FTCA claims based on Anderson's and Massey's actions.

1. The Discretionary Function Exception Bars Plaintiffs' FTCA Claims.

The United States "'is immune from suit save as it consents to be sued...and the terms of its consent to be sued in any court define that court's jurisdiction.'" Lehman v. Nakshian, 453 U.S. 156, 160 (1981) (citation omitted). While the FTCA provides a limited waiver of sovereign immunity for ordinary common law torts, 28 U.S.C. § 1346(b), Congress expressly retained immunity for claims

> based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). See United States v. Varig Airlines, 467 U.S. 797, 808 (1984). The discretionary function exception applies to conduct that "involves the permissible exercise of policy judgment[,]" Berkovitz v. United States, 486 U.S. 531, 537 (1988), and the party bringing suit bears the burden of showing that the waiver of sovereign immunity applies. Gasho, 39 F.3d at 1433 ("to maintain an FTCA claim for an intentional tort, a plaintiff must first clear the 'discretionary function' hurdle") (citing Pooler v. United States, 787 F.2d 868, 872-73 (3d Cir.), cert. denied, 479 U.S. 849 (1986)).

The Supreme Court has articulated a two-part test to determine whether the discretionary function exception applies to a particular government action.

Berkovitz, 486 U.S. at 531, 536. The first part of the test requires a determination of whether the challenged conduct involved an element of choice or judgment or whether it instead violated a mandatory regulation or policy. The Court stated that:

> The exception covers only acts that are discretionary in nature, acts that "involv[e] an element of judgment or choice,"...and "it is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies.... The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive."

United States v. Gaubert, 499 U.S. 315, 322 (1991) (citations omitted). See Conrad, 447 F.3d at 764.

The second element requires a court to determine whether the government conduct at issue is based on policy considerations; that is, whether the judgment or choice is the kind that the discretionary function exception was designed to shield. Berkovitz, 486 U.S. at 536; Conrad, 447 F.3d at 765. This element is "grounded in the notion that the discretionary function exception is designed to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy.'" Kelly v. United States, 241 F.3d 755, 760 (9th Cir. 2001) (citing Gaubert, 499 U.S. at 323). The focus of the inquiry is not on the agent's subjective intent in exercising the discretion, and the decision itself need not actually be grounded in policy considerations so long as it is the type of

decision that, by its nature, is susceptible to policy analysis. Gaubert, 499 U.S. at 325. Finally, the discretionary function exception applies whether or not negligence in the investigation is alleged or proved. See 28 U.S.C. § 2680(a) (exception applies "whether or not the discretion involved be abused."); Mitchell v. United States, 787 F.2d 466, 468 (9th Cir. 1986) ("Negligence, however, is irrelevant to the discretionary function issue."). Even decisions that "represent alarming instances of poor judgment and a general disregard for sound investigative procedures" are barred from judicial review by § 2680(a). Alfrey v. United States, 276 F.3d 557, 565 (9th Cir. 2002) (citing Sabow, 93 F.3d at 1454).

The conduct of a criminal investigation and the determination to arrest particular suspects involves the exercise of considerable discretion by government officers. Plaintiffs have identified no mandatory statutes or regulations that required the Task Force to conduct its investigation in a particular manner. Moreover, it is well-established that the decisions made by an investigator conducting a criminal investigation are precisely the sort of policy-susceptible decisions the discretionary function exception is designed to protect. See, e.g., Alfrey v. United States, 276 F.3d at 566 ("investigations by federal officers clearly involve the type of policy judgment protected by the discretionary-function exception'); Sabow, 93 F.3d at 1453 ("Investigations by federal law enforcement

officials. . . clearly require investigative officers to consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation" and are the types of "social and political judgments that Congress meant to shield from FTCA challenges.").

Plaintiffs argue the Task Force made mistaken judgments when investigating them. But whether or not Plaintiffs are correct with regard to the those judgment calls, the very nature of their argument establishes that the discretionary function exception bars their claims. As stated, McCoy and Youngman's investigative decisions, as well as those of the other members of the Task Force, are precisely the sort of decisions the discretionary function exception was carved out to protect, as law enforcement personnel must necessarily use judgment as to the best course to follow in compelling compliance with criminal statutes and uncovering and deterring unlawful conduct. Sabow, 93 F.3d at 1452; see also Pooler, 787 F.2d at 871.[9] Thus, the challenged conduct by Task Force members was quintessentially discretionary, and satisfies the second prong of the discretionary function analysis, because it is "susceptible to policy analysis." Gaubert, 499 U.S. at 325.

[9] Plaintiffs' subsidiary argument – that the Task Force made the arrests to cover up a negligent investigation or for monetary gain, Plts' Br., pp. 41-43 – was flatly rejected by the district court as unsupported by the record, P.E.R. 24, and likewise should be rejected here.

In contesting the discretionary function exception's application, Plaintiffs also fail to address the binding Supreme Court and Ninth Circuit authority directly on point.[10] Plts' Br., pp. 35-37, 49. Plaintiffs instead incorrectly rely on Nurse v. United States, 226 F.3d 996 (9th Cir 2000), to overcome discretionary function. Plts' Br., pp. 36-37. Nurse, however, is wholly inapplicable here because its holding, as conceded by Plaintiffs, is limited to the "invocation of the discretionary function on a motion to dismiss." Id., p. 37. Nurse stated:

> Because of the bare allegations of the complaint, we cannot determine at this stage of the proceeding whether the acts of the policy-making defendants violated the Constitution, and, if so, what specific constitutional mandates they violated.

Nurse, 226 F.3d at 1002. Unlike Nurse, here *extensive* discovery has been completed and this Court has before it undisputed evidence, analyzed by the district court, that establishes that the Defendants' conduct was discretionary.

[10] Gaubert, 499 U.S. at 322 (it is the nature of the conduct that is at issue, not whether the conduct may have been negligent); Berkovitz, 486 U.S. at 536 (§ 2680(a) protects a federal employee's conduct whenever employee must "act according to one's judgment of the best course"); Alfrey, 276 F.3d at 565 (even decisions that "represent alarming instances of poor judgment and a general disregard for sound investigative procedures" are barred from judicial review by § 2680(a)); Kelly, 241 F.3d at 760 ("the discretionary function exception is designed to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy.'"); Conrad, 447 F.3d at 764 (the nature of the conduct is the issue, not negligence); Sabow, 93 F.3d at 1452 (decisions concerning who and how to investigate are classic examples of discretionary conduct); Mitchell, 787 F.2d at 468 ("Negligence, however, is irrelevant to the discretionary function issue.").

D.E.R. 2-18, 179-180.[11] Accordingly, applying Berkovitz's two-part test, it is apparent the discretionary function exception bars all of Plaintiffs' FTCA claims.

2. A.R.S. § 13-3620 Bars Plaintiffs' FTCA Claims.

Under 28 U.S.C. § 1346(b), FTCA actions are governed by "the law of the place where the act or omission causing the injury occurred." Mundt v. United States, 611 F.2d 1257, 1259 (9th Cir. 1980). Thus, tort actions under the FTCA are authorized only in circumstances where a private person would be liable for a tort under the applicable state law. 28 U.S.C. § 1346(b)(1); Conrad, 447 F.3d at 767. Because the actions giving rise to this suit took place in Arizona, the law of that state is applied – which includes affording the United States the same immunities Arizona affords a private person. Tekle v. United States, 511 F.3d 839, 852 (9th Cir. 2007) (citing United States v. Olson, 546 U.S. 43, 45-46 (2005)) (citations omitted).

In Arizona, any person – including a police officer investigating allegations of sexual assault of a minor – is immune from civil liability for actions undertaken in the course of the investigation unless they act with malice. A.R.S. § 13-3620(A), (J); Crawford v. City of Phoenix, No. CV 05-2444, 2007 WL 1140396, *2 (D.

[11] Plaintiffs reliance on Galvin v. Hay, 374 F.3d 739 (9th Cir. 2004), Plts' Br., p. 36, is also misplaced. In that case, as here, the conduct alleged "was not a violation of clearly established law," and the officers "had reasonable cause to believe the arrest was lawful." 374 F.3d at 758.

Ariz. Apr. 16, 2007). The statute defines "malice" as "a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established by either proof or a presumption of law." A.R.S. § 1-215(20).

There is no dispute the Task Force was investigating sexual assaults committed on minors, on the Reservation, and therefore, absent a showing of malice, the United States would be entitled to immunity. A.R.S. § 13-3620(A); Crawford, 2007 WL 1140396, *2. Plaintiffs' allegations purporting to show malice, Plts' Br., pp. 38-43, are conclusory, speculative, and unsupported in the record, and thus insufficient to raise a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986); Jeffers v. Gomez, 267 F.3d 895, 908 (9th Cir. 2001).[12] For instance, Plaintiffs ask this Court to infer that the Defendants acted with malice because they presented their case to the tribal prosecutor, because the BIA offered monetary awards for exceptional performance, and because they failed to halt the investigation after the arrest of Jimi Aday. Plts' Br., pp. 41-42. Such an inference strains credulity and is clearly insufficient to strip the United States of immunity.

Finally, Plaintiffs' assertion that § 13-3620 is unconstitutional under Arizona's constitution's anti-abrogation clause is unfounded. Plts' Br., pp. 38-40.

[12] As with all Plaintiffs' claims, the fact that probable cause supported the arrests also negates any possible claim that the Defendants acted with malice.

As the district court explained, "because no court has found § 13-3620 unconstitutional, its immunity provisions applied to the United States under 28 U.S.C. § 2674." P.E.R. 27, n.5. Therefore, § 13-3620 bars all of Plaintiffs' FTCA claims and the district court's holding should be affirmed.

3. The Proviso To The Intentional Tort Exception Does Not Cover Anderson And Massey Because They Were Not Federal Law Enforcement Officers Under The FTCA.

Despite Task Force assignment and federal employment, Anderson and Massey were not federal law enforcement officers and thus cannot be held liable in this matter. 28 U.S.C. § 2680(h); Dry v. United States, 235 F.3d 1249 (10th Cir. 2000). This is because they were not *empowered to enforce federal law*, a requirement of the proviso to the FTCA's intentional tort exception.[13] 28 U.S.C. § 2680(h). Federal employment status for purposes of the FTCA does not mean they are automatically law enforcement officers for purposes of the proviso. Locke v. United States, 215 F. Supp. 2d 1033, 1038 (D. S.D. 2002); see also Billings v. United States, 57 F.3d 797, 800 (9th Cir. 1995).

[13] The Federal Defendants have never taken a position whether Anderson and Massey were federal employees "for Bivens purposes." The U.S. Department of Justice does not represent Anderson and Massey in their individual capacity on the Bivens claims in this matter. However, the test for whether they may be sued in their individual capacity for alleged constitutional violations under Bivens focuses on whether they were acting not only within the scope of their federal employment but pursuant to federal law and under the color of federal law. Pollard\ v. Geo Group, Inc., 607 F.3d 583, 588-90 (9th Cir. 2010).

The proviso to the intentional tort exception waives sovereign immunity for false arrest and malicious prosecution but only if committed by "investigative or law enforcement" officers of the United States, "who [are] *empowered by law*...to make arrests for violations of *Federal* law." 28 U.S.C. § 2680(h) (emphasis added); Arnsberg v. United States, 757 F.2d 971, 977 (9th Cir. 1984), cert. denied, 475 U.S. 1010 (1986) (placing burden on plaintiff to satisfy statutory prerequisite to intentional tort liability). As the court stated in Kerns, "the Arnsberg decision makes clear, the United States may be liable under section 2680(h) only if its investigative or law enforcement officers committed the...false arrest." Kerns v. United States, No. CV-04-01932, 2007 WL 552227, *17 (D.Ariz. Feb. 21, 2007) (emphasis omitted), rev'd and remanded on other grounds by Kerns v. United States, 2009 WL 226207 (9th Cir. Jan. 28, 2009). That is not the case here because Plaintiffs' arrests were neither federal, nor committed by federal law enforcement officers. The undisputed facts support this finding and Plaintiffs provide no evidence in rebuttal. Plts' Br., 47-50. To the contrary, the evidence demonstrates they were enforcing tribal law at the time of the arrests.

Anderson and Massey are tribal police officers who arrested Plaintiffs on the Reservation, on tribal charges, Plaintiffs were held in tribal jail, prosecuted in tribal court by the tribal prosecutor, and no federal charges issued. D.E.R. 202-206 (¶¶ 3,

9, 12, 16-18, 22-34). One of the main reasons they were part of the Task Force was to make an arrest under tribal charges should that need arise because the BIA agents were not authorized to arrest anyone on tribal charges under the Code of Federal Regulations. D.E.R. 203-204 (¶¶ 8-10, 19-21). The fact they were instructed by the BIA to make the arrests does not change that the arrests were based on tribal law for tribal offenses, subject to tribal penalties if convicted. D.E.R. 204-206 (¶¶ 14, 18, 22-38). Anderson and Massey were neither "deputized" by the BIA to enforce federal law, nor granted SLEC's to effectuate federal arrests or enforce federal law. D.E.R. 204 (¶¶ 19-21).

Accordingly, federal law was not being enforced and federal interests were not represented. P.E.R. 30. That conclusion was reached in a similar case. Russell v. United States, No. CV-08-811, 2009 WL 2929426, *1 (D. Ariz. Sep. 10, 2009) (citing Boney v. Valline, 597 F.Supp.2d 1167 (D. Nev. 2009) (stating that tribal law officers enforcing tribal laws against other tribal members were not furthering federal interests)). Russell resolves the issue here: "Absent the power to enforce federal law, tribal officers are not federal investigators or law enforcement officers." 2009 WL 2929426, *1 (quoting Trujillo v. United States, 313 F. Supp. 2d 1146 (D. N.M. 2003) (citing Dry, 235 F.3d at 1249)); see also Hebert v. United States, 438 F.3d 483 (5th Cir. 2006).

Plaintiffs' assertion that it makes no difference that the arrests and prosecution were under tribal law, Plts' Br., p. 47, ignores the facts and disregards tribal sovereignty, which is separate and distinct from the United States' sovereignty. United States v. Male Juvenile, 280 F.3d 1008, 1020-21 (9th Cir. 2002) (an Indian tribe's power to prosecute a member derives from inherent sovereignty making a subsequent prosecution by the federal government permissible under the dual sovereignty double jeopardy doctrine). Sovereignty is not interchangeable. Id., at 1020 ("Indian tribes are not federal agencies, but rather derive their power from their inherent and independent sovereignty."). Additionally, any reliance on the "638 contract" with the Tribe does not change the result. Dry, 235 F.3d at 1249.

Plaintiffs cannot escape that they were arrested, charged and prosecuted under tribal law. Because Anderson and Massey did not enforce federal law and were not empowered by law to enforce federal law, they are not "federal law enforcement officers" for purposes of the proviso to Section 2680(h)'s intentional tort exception. Therefore, the FTCA claims based on their actions are barred. 28 U.S.C. § 2680(h).

II. THE BIVENS CLAIMS AGAINST MCCOY AND YOUNGMAN ARE BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiffs are barred from suing McCoy and Youngman because the complaint naming them personally was filed after the statute of limitations expired. Despite the expiration of the statute of limitations, however, Plaintiffs argue their Bivens claims against McCoy and Youngman should be allowed because the discovery rule applies. Plts' Br., pp. 44-45. Plaintiffs assert that these claims did not accrue until July 16, 2010, when they received documents from Defendants pursuant to a discovery request. Id. Plaintiffs are mistaken because here federal law determines accrual and according to the facts, Plaintiffs' causes of action accrued the moment they occurred.

There is no doubt that in this matter federal law determines when the claims accrued. Wallace v. Kato, 549 U.S. 384 (2007). This is because, "[a]lthough state law determines the length of the limitations period, federal law determines when a civil rights claim accrues." Knox v. Davis, 260 F.3d 1009, 1013 (9th Cir. 2001) (quoting Morales v. City of Los Angeles, 214 F.3d 1151, 1153-54 (9th Cir. 2000)). And under federal law, a cause of action accrues when the plaintiff knows or should have known that he or she has been harmed. United States v. Kubrick, 444 U.S. 111, 122 (1979); TwoRivers v. Lewis, 174 F.3d 987, 992 (9th Cir. 1999) ("A

claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action."); Cabrera, 159 F.3d at 379 (same).

Moreover, the Ninth Circuit has consistently found that a plaintiff need not know the identity of the person who caused his injury to trigger the statute of limitations. Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir. 1984) ("Discovery of the cause of one's injury, however, does not mean knowing who is responsible for it."); see also In re Swine Flu Prod. Liab. Litig., 764 F.2d 637, 640 (9th Cir. 1985) ("The 'cause' is known when the immediate physical cause of the injury is discovered."). A plaintiff's "ignorance of the involvement of United States employees is irrelevant." Dyniewicz, 742 F.2d at 487 (citations omitted). It is well-established "[t]he general rule in tort law is that the claim accrues at the time of the plaintiff's injury." Davis v. United States, 642 F.2d 328, 330 (9th Cir. 1981), cert. denied, 455 U.S. 919 (1982). Finally, Bivens claims in Arizona are covered by A.R.S. § 12-542 and are deemed expired two years after the cause of action accrues. Vaughan v. Grijalva, 927 F.2d. 476, 478 (9th Cir. 1991).

Plaintiffs' reliance on a few, mainly district court rulings outside the Ninth Circuit regarding state law standards purporting to show their claims against McCoy and Youngman should be deemed to have accrued later, is misplaced and not universally accepted as they suggest. Plts' Br., pp. 44-45; P.E.R. 559, Doc.

153, p. 6. Even relying on the Arizona state standard under Doe v. Roe, 955 P.2d 951, 961 (1998), that a plaintiff "need not know all the facts underlying a cause of action to trigger accrual[,]" does not salvage Plaintiffs' argument because by the time the FTCA notices were filed in early 2008, Plaintiffs knew or with reasonable diligence could have known sufficient facts about McCoy and Youngman to trigger accrual. Arce-Mendez v. Eagle Produce P'ship, Inc., No. CV 05-3057, 2008 WL 659812, *8 (D. Ariz. Mar. 6, 2008). "Knowledge 'that a wrong occurred and caused injury' suffices." Id., (quoting Doe, 955 P.2d at 961).

It is uncontested that Plaintiffs were arrested October 20, 2006, D.E.R. 14 (¶¶ 75-76), and commenced their actions on October 20, 2008, but only against individuals under Bivens. P.E.R. 545, Doc. 1; P.E.R. 569, Doc. 1. Seventeen days later Plaintiffs amended to sue the United States. P.E.R. 546, Doc. 11; P.E.R. 569, Doc. 8. Filing their actions exactly two years to the day after their arrests and only against the individual agents for constitutional violations under Bivens, proves Plaintiffs knew their Fourth Amendment false arrest claims accrued the day they were arrested and that those claims would expire on October 20, 2008 under A.R.S. § 12-542. Cabrera, 159 F.3d at 379. Plaintiffs admitted that was the very reason they filed their initial complaints on October 20, 2008, solely against the

individuals, despite not including FTCA claims against the United States. P.E.R. 547, Doc. 28, p. 4.

The tribal charges against Dupris were dismissed February 20, 2007; Reed's were dismissed April 27, 2007. D.E.R. 17-18 (¶¶ 107, 109). The original complaints confirm these as the accrual dates for their Fifth Amendment malicious prosecution claims. P.E.R. 545, Doc. 1; P.E.R. 569, Doc. 1. Therefore, under A.R.S. § 12-542, those claims expired February 20 and April 27, 2009, respectively. There is no dispute that these are the dates when Plaintiffs' claims accrued. D.E.R. 179-180.

Plaintiffs did not file the Fourth Amended Complaint suing McCoy and Youngman personally until February 11, 2011. P.E.R. 101.[14] Thus, the expiration of Plaintiffs' Bivens claims preceded the filing of the Fourth Amended Complaint by over two years with regard to false arrest, and close to two years regarding malicious prosecution.

Moreover, the facts demonstrate Plaintiffs knew McCoy and Youngman were involved in the investigation more than two years before the Fourth Amended Complaint. Contrary to their claimed ignorance about their roles, Plts' Br., p. 45,

[14] While an amendment generally supersedes an original pleading, the filing date of an original complaint "remains operative for relation-back purposes." F.D.I.C. v. Jackson, 133 F.3d 694, 702 (9th Cir. 1998).

Plaintiffs actually alleged Task Force conduct attributed to McCoy and Youngman in the Second and Third Amended Complaints. P.E.R. 549, Doc. 49 (¶ 36), P.E.R. 551, Doc. 67 (¶¶ 48, 86). At that time Plaintiffs knew they were part of the Task Force and understood their importance to the claims. P.E.R. 555, Doc. 103, Ex. 2; Doc. 67 (¶¶ 48, 86). However, Plaintiffs knew of McCoy and Youngman's involvement much earlier. Plaintiffs were aware of Youngman's involvement *at least* as early as June 12, 2009, when they were served with the Federal Defendants' Rule 26(a) Initial Disclosures, which identified Youngman as a Special Agent of the BIA "likely to have discoverable information regarding Plaintiffs' allegations that they were falsely arrested and maliciously prosecuted by the Defendants." P.E.R. 548, Doc. 37. But it was actually fifteen months earlier that Plaintiffs were aware of Youngman's involvement with the Task Force. On March 6, 2008, seven months before *any* complaints were filed, Reed submitted his FTCA Notice of Claim to the BIA, P.E.R. 558, Doc. 145 (Ex. 1), attaching an exhibit which identified Youngman was the Task Force spokesman. Id.

Likewise, Plaintiffs were aware of McCoy's involvement as early as June 18, 2009, when they served their own Rule 26(a) Initial Disclosure which identified McCoy and Youngman as members of the Task Force. P.E.R. 555, Doc. 103 (Ex. 2). At that time, Plaintiffs knew McCoy and Youngman were, in their

own words,"part of the team investigating serial rapes on the White Mountain Apache Tribal reservation." Id. This is the same language Plaintiffs used to describe all the BIA Agents in their Rule 26(a) disclosure. Id.

Actually, Plaintiffs were aware of McCoy's involvement in the Task Force over a year before that date and nearly eight months before the initial complaints were filed when on February 29, 2008, Dupris submitted his FTCA Notice of Claim to the BIA. P.E.R. 558, Doc. 145 (Ex. 2). Dupris' notice shows Plaintiffs knew McCoy interviewed, along with Proctor, victim LB. Id. In February 2008, Plaintiffs also knew McCoy wrote and signed that interview sheet and that LB. later identified Dupris as the man that restrained her. Id. Accordingly, as early as February 2008, Plaintiffs were aware that McCoy and Youngman were not only part of the Task Force but involved with the specific cases.

In fact, in its previous order allowing a fourth amendment to the complaint, even the district court recognized:

> Plaintiffs do not allege that they were unaware of McCoy and Youngman's association with the case. Instead, they contend that until they received the documents in July, they were unaware of the *extent* of the agents' participation, including their decision-making authority in the case.

P.E.R. 556, Doc. 121, n.2 (original emphasis). So Plaintiffs knew of McCoy and Youngman's involvement but intentionally waited before suing them "until they had sufficient evidence of conduct upon which they could base claims of wrongful

conduct." P.E.R. 554, Doc. 96, p. 1; Plts' Br., p. 45. But the record indicates otherwise. Accordingly, their claim they lacked sufficient knowledge to sue McCoy and Youngman lacks merit and refuses to acknowledge not only the existence of their own documents identifying McCoy and Youngman, P.E.R. 558, Doc. 145 (Ex. 1 & 2), but the procedural history which delayed production of Defendants' documents. See, e.g., P.E.R. 548-549, Docs. 40-49.

Those documents demonstrate that, prior to filing their original complaints, Plaintiffs not only possessed the minimum requisite of knowledge to identify the alleged wrongs that were committed, but also the persons they believe were responsible for those wrongs. Plaintiffs conceded this point when they admitted to intentionally waiting before naming McCoy and Youngman, "until they had sufficient evidence of conduct upon which they could base claims of wrongful conduct." P.E.R. 554, Doc. 96, p. 1. Yet, accrual of a claim does not occur when the plaintiff decides he or she has enough evidence, but rather when "plaintiff knows or has reason to know of the injury." TwoRivers, 174 F.3d at 992. Plaintiffs made a conscious decision not to sue McCoy and Youngman before the statute of limitations expired, and now seek to ameliorate the necessary consequences of that maneuver. This is not the situation the discovery rule was intended to protect. Hensley v. United States, 531 F.3d 1052, 1056 (9th Cir. 2008).

Plaintiffs face the same barrier with the excuse they did not feel McCoy and Youngman's involvement was important enough to justify naming them as defendants until they received the investigative file. Plts' Br., pp. 44-45. To now claim, in the face of all the documentary evidence at their disposal at the time, that they did not know of McCoy and Youngman's involvement or the extent of that involvement prior to the expiration of the statute of limitations, would suggest Plaintiffs failed in their requirement to fully investigate their claims prior to filing their complaints. Fed. R. Civ. P. 11(b). As the Ninth Circuit has held:

> There is a twist to the discovery rule: The plaintiff must be diligent in discovering the critical facts. As a result, a plaintiff who did not actually know that his rights were violated will be barred from bringing his claim after the running of the statute of limitations, if he should have known in the exercise of due diligence.

Bibeau v. Pac. Northwest Research Found., 188 F.3d 1105, 1108 (9th Cir. 1999), amended on other grounds, 208 F.3d 831 (9th Cir. 2000) (citation omitted).

Plaintiffs knew as much about McCoy and Youngman as they did about the other BIA Agents who they did sue. Before the Fourth Amended Complaint was filed Plaintiffs identified by name *all* the BIA agents – including McCoy and Youngman – who they reasonably believed were involved in the incidents precipitating their claims. P.E.R. 551, Doc. 67 (¶¶ 3-15, 48, 59, 86). Prior to that, they identified *all* the BIA agents with the same language (*i.e.*, "part of the team

investigating serial rapes on the...reservation."). P.E.R. 555, Doc. 103-2, p. 4. Finally, any excuse they did not want to sue McCoy or Youngman personally until they could verify their participation in the violation of rights, Plts' Br., p. 45; P.E.R. 554, Doc. 96, pp. 12-13; P.E.R. 559, Doc 153, pp. 10-12, is not compelling, as they had no such qualms about suing the other agents for nearly identical conduct.

Accordingly, Plaintiffs "had a reasonable basis for knowing that" McCoy and Youngman may have contributed to their injuries, but did not pursue that further. The reasons why they were not sued originally are immaterial. What is important is that before the original complaints were filed Plaintiffs knew of the Task Force involvement of McCoy and Youngman and, in the very least, the potential that they were liable for the alleged constitutional violations claimed. Thus, the discovery rule does not apply and the district court's order should be affirmed.

III. THE BIA AGENTS ARE ENTITLED TO QUALIFIED IMMUNITY.

The qualified immunity doctrine enunciated in Harlow v. Fitzgerald was created to shield government officials sued in their individual capacities from civil liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S.

800, 818 (1982). See Morgan v. Morgensen, 465 F.3d 1041, 1044 (9th Cir.), amended, No. 04-35608, 2006 WL 3437344 (9th Cir. Nov. 30, 2006).

As a threshold matter, a plaintiff must establish that each individual defendant personally participated in the allegedly unconstitutional conduct. This is because it is axiomatic that each individual defendant, "his or her title notwithstanding, is only liable for his or her own misconduct." Iqbal, 556 U.S. at 677. Individual liability "require[s] individual participation, not simply being present or being a member of a team." Jones v. Williams, 297 F.3d 930, 937 (9th Cir. 2002); Bibeau, 188 F.3d at 1114 (claim that defendants were "ultimately responsible" failed because plaintiff failed to show their personal involvement). Mere knowledge, or holding a supervisory position, is also insufficient, as "purpose rather than knowledge is required to impose Bivens liability." Iqbal, 556 U.S. at 677.

If an individual's personal participation is established, the next question is whether the facts show that the official's conduct violated a constitutional right, Brosseau v. Haugen. 543 U.S. 194, 197 (2004) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). If a plaintiff fails to establish a violation of the Constitution, the claims must be dismissed. Saucier, 533 U.S. at 201. Should the reviewing court determine that the plaintiff has put forward facts that support a claim that federal

officials violated a constitutional right, the next step is to determine whether that right was "clearly established" as measured by the "specific context of the case, not as a broad, general proposition." Id.; see also Skoog v. County of Clackamas, 469 F.3d 1221, 1229-30 (9th Cir. 2006). The dispositive inquiry in considering the second prong is whether it would be clear to a reasonable official that the conduct was unlawful in the specific situation. Saucier, 533 U.S. at 202 (citations omitted). Thus, the defense of qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (quoting Malley v. Briggs, 475 U.S. 335, 343 (1986)). The Court has the discretion to address either step first. Pearson v. Callahan, 555 U.S. 223 (2009) (adding flexibility to Saucier two-step, qualified-immunity analysis).

A. HERNANDEZ, LOPEZ AND PROCTOR WERE NOT PERSONALLY INVOLVED IN ANY VIOLATION OF PLAINTIFFS' CONSTITUTIONAL RIGHTS.

Assuming a constitutional violation occurred, in order to subject Hernandez, Lopez or Proctor to liability, there must first be evidence establishing their personal involvement in that allegedly unconstitutional conduct. Jones, 297 F.3d at 937 (citation omitted); see also Saucier, 533 U.S. at 201 (plaintiffs' claims may

proceed only if "the facts alleged show the officer's conduct violated a constitutional right").

Here, Plaintiffs fail to point to any evidence showing that Hernandez, Lopez and Proctor were personally responsible for the alleged constitutional violations. Likewise, there is no evidence that these defendants were even "integral participants" in any constitutional violation. Blankenhorn, 485 F.3d at 481 n.12 (even though "integral participation 'does not require that each officer's actions themselves rise to the level of a constitutional violation,'...it does require some fundamental involvement in the conduct that allegedly caused the violation") (quoting Boyd v. Benton County, 374 F.3d 773, 780 (9th Cir. 2004)).

Plaintiffs cannot show that Hernandez, Lopez or Proctor had any "fundamental involvement" in any alleged constitutional violation. Rather, the record following extensive discovery confirms that they were only minimally involved with the investigation. D.E.R. 6-9, 14-17 (¶¶ 31, 34, 37, 39, 41, 45-50, 53-54, 56, 77-86, 88, 95, 102). Further, what limited personal involvement these Defendants did have was entirely consistent with what is normally expected of reasonable police officers investigating sexual assaults and passing on that information to the Task Force decision-makers. Id. Their conduct consisted primarily of victim and witness interviews and presenting photo line-ups – and as

the district court previously ruled, "[a] routine police interview does not amount to a constitutional violation." Id.; P.E.R. 549, Doc. 48, p. 8. Hernandez, Lopez and Proctor did not participate in the probable cause determination supporting the arrest and were not privy to that decision until afterward. D.E.R. 10, 15 (¶¶ 68, 84-85). Instead, it was McCoy and Youngman who made the probable cause determination to arrest. D.E.R. 10, 16 (¶¶ 68-69, 92). These facts preclude any finding of personal participation by Hernandez, Lopez or Proctor. Blankenhorn, 485 F.3d at 481 n.12.

Boyd does not help Plaintiffs' argument for "integral participation." Plts' Br., p. 33. Boyd, an excessive use of force case, found the officers present when the decision was made to use the flash-bang and when it was deployed could be held liable. 374 F.3d at 780. Those officers were present for *both* the decision and the use. Id. But an officer's mere presence does not mean liability attaches. Hopkins v. Bonvicino, 573 F.3d 752, 770 (9th Cir. 2009) ("an officer who waits in the front yard interviewing a witness and does not participate in the unconstitutional search in any fashion cannot be held liable").

Boyd is also unhelpful because Plaintiffs here contest the *reasonableness* for the probable cause determination to arrest, not the act of carrying out the arrest. Plts' Br., pp. 23-31. As shown, it is *undisputed* McCoy and Youngman made the

probable cause decision to arrest, Hernandez, Lopez and Proctor were not present when Dupris was arrested, and Hernandez only provided back-up during Reed's arrest. Therefore, the "group decision" argument fails. Even assuming a constitutional violation occurred, the undisputed facts demonstrate Hernandez, Lopez and Proctor were not the cause and merely being a member of the Task Force is not enough to impose personal liability. Jones, 297 F.3d at 937.

Any reliance on Beck v. City of Upland, 527 F.3d 853 (9th Cir. 2008) is equally unpersuasive. In Beck, the police chief was liable because he was the supervisor who knew an arrest would be wrong but refused to "stop the process" and then threatened others when they attempted to do so. 527 F.3d at 872. Hernandez, Lopez and Proctor neither supervised the Task Force, nor is there any evidence of threats or knowledge of wrongdoing. D.E.R. 3, 10, 16 (¶¶ 9, 68, 92).

In the end, Plaintiffs have shown nothing more than that Hernandez, Lopez and Proctor were members of the Task Force. That is not enough to support a finding of personal liability. Blankenhorn, 485 F.3d at 481 n.12. For that reason, the district court held "Plaintiffs' conclusory assertions of wrongdoing on the part of the Task Force are insufficient to demonstrate that Proctor, Hernandez, and Lopez personally violated any of their constitutional rights." P.E.R. 16. For the same reason, this Court should affirm that holding.

B. THE FACTS AND CIRCUMSTANCES KNOWN TO THE TASK FORCE SUPPORT A REASONABLE BELIEF THAT PROBABLE CAUSE EXISTED.

Plaintiffs cannot recover on their Fourth or Fifth Amendment claims unless they can prove absence of probable cause. Devenpeck, 543 U.S. at 152; Freeman, 68 F.3d at 1189 (Fifth Amendment). As demonstrated supra, at 19-25, there was ample probable cause for Plaintiffs' arrests. Accordingly, on that basis alone, Defendants are entitled to qualified immunity. Saucier, 533 U.S. at 201. Moreover, even if actual probable cause did not exist, a police officer is still entitled to qualified immunity if the circumstances known to the officer at the time support a reasonable, even if mistaken, belief that probable cause existed. Anderson, 483 U.S. at 641; Burrell v. McIlroy, 464 F.3d 853, 857 (9th Cir. 2006); see also Hunter, 502 U.S. at 227.

The Task Force collected abundant evidence implicating Plaintiffs in the crimes being investigated. D.E.R. 10-14. That evidence demonstrates there was at least arguable probable cause in the situation. Malley, 475 U.S. at 341 (police officer may be liable for civil damages only if "no reasonable competent officer" would conclude probable cause exists). As shown supra, at 21-22, at the time of Plaintiffs' arrests, the investigators knew that eyewitnesses had identified Plaintiffs, both of whom also lived in the housing area near where the attacks

occured and, as current or former WMAHA security guards, had access to the locations of the attacks and the equipment used. Both Plaintiffs had dubious interactions with young women. Dupris was observed wearing a shirt with the word "security on it and, on the night of one of the attacks, running from a trail to his vehicle and changing back into a WMAHA shirt." Dupris lied about where he lived and a polygraph examination showed he gave deceptive answers. An eyewitness described the attacker as light-complected and not Apache. Dupris is Irish and Sioux. Finally, a federal district court authorized a search of Dupris' home and vehicle.

Reed fit the height, weight and "bushy eyebrows" description given by several victims and witnesses. Reed also was evasive with investigators and refused to speak with the Task Force or come in for an interview. Dupris himself suggested Reed as a possible suspect, based on the similarity of their appearances. Reed's supervisor reported that Reed alone had a flashlight with a blue light, which matched that used by the assailant. Finally, one victim described an assailant with a "rez boy" accent. Reed is Apache and has lived on the Reservation his entire life.

These facts are more than sufficient to justify a reasonable belief that Plaintiffs' arrests were supported by probable cause. Accordingly, the district court's decision granting defendants qualified immunity should be affirmed.

C. PLAINTIFFS' BIVENS CLAIMS FAIL BECAUSE NO FIFTH AMENDMENT EQUAL PROTECTION VIOLATION OCCURRED.

Plaintiffs claim the Defendants' actions amounted to a malicious prosecution in violation of the Fifth Amendment. First, to succeed on such a claim, Plaintiffs must show that the BIA Agents prosecuted them with malice and without probable cause, and "'that they did so for the purpose of denying [them] equal protection or another specific constitutional right.'" Awadby, 368 F.3d at 1066 (quoting Freeman, 68 F.3d at 1189). Thus, to prove a malicious prosecution claim against the BIA Agents personally, Plaintiffs must prove not only the common-law elements of the tort but also show an additional deprivation that implicates federally guaranteed rights. Cline v. Brusett, 661 F.2d 108, 112 (9th Cir. 1981) (citation omitted); see also Awadby, 368 F.3d at 1066, 1069.

In Arizona "the elements of malicious prosecution are: (1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) with defendants as prosecutors, (4) actuated by malice, (5) without probable cause, and (6) causing damages." Slade, 541 P.2d at 552. First, as we have shown, Plaintiffs' prosecution was supported by probable cause. See supra, at 19-25; D.E.R. 179-198. Second, they cannot overcome that King prosecuted Plaintiffs based on her own judgment, not that of the BIA Agents. D.E.R. 16-18 (¶¶ 94-109). Third, the material evidence fails to prove the prosecutions were actuated by malice or any nefarious motive,

D.E.R. 16-17 (¶¶ 90-91, 101), rather than by Defendants' reasonable belief that probable cause – or arguable probable cause – existed to support the arrests. Anderson, 477 U.S. at 257; Jeffers, 267 F.3d at 908. Finally, Plaintiffs offer absolutely no evidence to show that the prosecutions were initiated to deny Plaintiffs equal protection or to violate any other constitutional right. D.E.R. 179-198; Awadby, 368 F.3d at 1066. Accordingly, all of the BIA Agents are entitled to qualified immunity and the dismissal of the malicious prosecution claims against them should be affirmed.

D. THE PROSECUTOR'S INDEPENDENT JUDGMENT BARS PLAINTIFFS' FIFTH AMENDMENT MALICIOUS PROSECUTION CLAIMS.

The BIA Agents are further shielded from personal liability on the malicious prosecution claims because King, the sole prosecutor, screened the cases and made the decision to prosecute Plaintiffs. Newman, 457 F.3d at 993 ("[f]iling a criminal complaint immunizes investigating officers...from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time") (quoting Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981)). See also Hartman v. Moore, 547 U.S. 250, 263 (2006) (recognizing longstanding presumption of regularity accorded prosecutorial decisions that prosecutor had legitimate grounds for action taken is not lightly discarded). The

prosecutor's exercise of independent judgment is a superseding cause that breaks the chain of causation. Myers v. City of Hermosa Beach, 299 Fed. App'x 744, 746 (9th Cir. 2008) (citations omitted); Alvarez-Machain v. United States, 331 F.3d 604, 636 (9th Cir. 2003) (police officers "insulated from liability where there are independent, intervening acts of other decision-makers...such as prosecutors"), rev'd on other grounds sub nom., Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

Plaintiffs failed to rebut the presumption of the prosecutor's independent judgment because the undisputed material evidence establishes King's independent actions. D.E.R. 16-18 (¶¶ 94-98, 102-109); Sloman v. Tadlock, 21 F.3d 1462, 1474 (9th Cir. 1994). King authorized the arrest of Plaintiffs. D.E.R. 10 (¶¶ 65-67). Of her own volition, King modified and signed Reed's charges before his arraignment, and tried to modify Dupris' charges. D.E.R. 16-17 (¶¶ 97-98). Also, King was steadfast that she was not pressured by anyone, let alone the BIA, to prosecute Plaintiffs. D.E.R. 15-17 (¶¶ 88-89, 95-96, 102). There is not a shred of evidence Hernandez, Lopez or Proctor were responsible for King's decisions or induced or pressured her to prosecute. Id. King never communicated with those agents prior to or during the prosecutions. Id. Likewise, McCoy and Youngman did not pressure King to prosecute. D.E.R. 10, 16-17 (¶¶ 67, 95-96, 101-102). At the arraignments it was the tribal court that determined Plaintiffs should continue to be held in jail.

D.E.R. 16-17 (¶¶ 93, 99, 103-104). Furthermore, the ensuing prosecutions were solely under King's control as evidenced by her decisions how to proceed and ultimately to dismiss the charges. D.E.R. 16-18 (¶¶ 95-98, 105-109).

These undisputed material facts satisfy Defendants' burden of showing the causal chain was broken by King's independent actions. Newman, 457 F.3d at 993. King admits as much in her signed declaration. D.E.R. 136-138 (¶¶ 7-14). This evidence directly contradicts Plaintiffs' assertion that Defendants arrested and charged Plaintiffs and "never provided...King with the opportunity to fairly evaluate the case[.]" Plts' Br., pp. 31-32. As a result, King's independent judgment regarding the prosecution of Plaintiffs is not rebutted and therefore all the BIA Agents are shielded from liability on the malicious prosecution Bivens claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court is correct in all respects and should be affirmed.

Dated: July 13, 2012

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the Federal Defendants-Appellees are not aware of any related cases, other than the two consolidated herein in this appeal, as defined in Circuit Rule 28-2.6, pending in this Court.

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CERTIFICATE OF COMPLIANCE

Counsel for the Federal Defendants-Appellees hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C)(i), that the foregoing **BRIEF FOR FEDERAL DEFENDANTS-APPELLEES** complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 13,062 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Counsel for the Federal Defendants-Appellees further certify that the foregoing **BRIEF FOR FEDERAL DEFENDANTS-APPELLEES** complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type styles requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared using a proportionally spaced typeface using WordPerfect verison X5 in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

We hereby certify that on this **13th day of July, 2012**, we electronically served the foregoing **BRIEF FOR FEDERAL DEFENDANTS-APPELLEES** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Ninth Circuit's appellate CM / ECF system. Participants in the case who are registered CM / ECF users will be served by the appellate CM / ECF system. We further certify that all the parties in this case are registered CM / ECF users.

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