Supreme Court, U.S.
FILED
JUN - 9 2014
OFFICE OF THE CLERK

13-1465
No. _____

In The

# Supreme Court of the United States

JESSE DUPRIS and JEREMY REED,
*Petitioners,*

v.

PERRY PROCTOR; TINO LOPEZ; MOLLY HERNANDEZ; DANIEL HAWKINS; PERPHELIA MASSEY; JOSHUA ANDERSON; MICHAEL McCOY; WARREN YOUNGMAN, and UNITED STATES OF AMERICA
*Respondents.*

**On Petition for Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

JOEL B. ROBBINS
*Counsel of Record*
301 East Bethany Home Road, Suite B-100
Phoenix, AZ 85012
Phone: (602) 285-0100
Email: joel@robbinsandcurtin.com

## QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should resolve a split among the circuit courts of appeal, created by the Ninth Circuit panel decision in this matter, as to whether federal agents have "discretion" to arrest an individual without probable cause, for purposes of sovereign immunity under the "discretionary function" doctrine of the Federal Tort Claims Act?

2. Whether this Court should resolve a split among the circuit courts of appeal as to whether a law enforcement officer's pre-arrest consultation with a prosecutor, standing alone, entitles the officer to qualified immunity?

3. Given the federal agents' testimony that there were not any "positive identifications" of Petitioners, contradictory to what the agents told the tribal prosecutor, whether this Court should remand pursuant to this Court's recent holding in *Tolan v. Cotton*, -- U.S. --, 134 S.Ct. 1861 (2014), to ensure that the Court of Appeals properly viewed all evidence in the light most favorable to the Petitioners?

## PARTIES TO THE PROCEEDINGS

Petitioners Jesse Dupris and Jeremy Reed, Plaintiffs in the District Court and Appellee in the Court of Appeals.

Respondents are (1) the United States of America, named as defendant pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*; (2) Perry Proctor, in his individual capacity as an officer with the United States Department of the Interior, Bureau of Indian Affairs; (3) Tino Lopez, in his individual capacity as an officer with the United States Department of the Interior, Bureau of Indian Affairs; (4) Molly Hernandez, in her individual capacity as an officer with the United States Department of the Interior, Bureau of Indian Affairs; (5) Daniel Hawkins, in his individual capacity as an officer with the United States Department of the Interior, Bureau of Indian Affairs; (6) Perphelia Massey, in her individual capacity as an officer with the White Mountain Apache Tribal Police Department; (7) Joshua Anderson, in his individual capacity as an officer with the White Mountain Apache Tribal Police Department; (8) Michael McCoy, in his individual capacity as an officer and agent in charge with the United States Department of the Interior, Bureau of Indian Affairs; and (9) Warren Youngman, in his individual capacity as an officer and agent in charge with the United States Department of the Interior, Bureau of Indian Affairs.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

INTRODUCTION . . . . . . . . . . . . . . . . . . . . . . . . . . 1

DECISIONS BELOW 4

JURISDICTION 5

STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 7

I. Factual Background . . . . . . . . . . . . . . . 7

II. Procedural Background . . . . . . . . . . . 15

REASONS FOR GRANTING THE WRIT

1. This Court Should Consider This Case To Clarify The Conflicting Law Regarding the Relationship Between Law Enforcement Liability For False Arrest and the "Discretionary Function" Exception To the Federal Tort Claims Act. . . . . . . . . . . . . . . . . . 16

**Table of Contents, continued**

2. This Court Should Consider This Case To Resolve The Tension Among the Circuits Regarding When A Prosecutor's "Decision" Breaks The Causal Chain For False Arrest . . . . . . . . . . . . . . . . . . . . . . . . .21

3. The Ninth Circuit Failed To View The Relevant Facts In A Light Most Favorable To Petitioners And, As Such, This Court Should Remand To The Ninth Circuit To Reconsider In Light of This Court's Recent Decision in Tolan v. Cotton, -- U.S. --, 134 S.Ct. 1861 (2014). . . . . . . . . . . . . 26

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . 28

## APPENDIX

Memorandum Decision of United States Court Of Appeals for the Ninth Circuit, January 30, 2014 . . . . . . . . . . . . . . . . . . . . App-1

United States District Court, District of Arizona, Order Granting Summary Judgment, January 9, 2012 . . . . . . . . . . . . . . . . . . . . . App-9

Order Denying Reheating, United States Court of Appeals for the Ninth Circuit, March 11, 2014 . . . . . . . . . . . . . . . . . . . . App-43

United States District Court, District of Arizona, Plaintiff's Responsive Statement of Facts, October 11, 2011 . . . . . . . . . . . . . . . . . . . App-45

## TABLE OF AUTHORITIES

### CASES:

*Berkovitz by Berkovitz v. United States*,
486 U.S. 531, 108 S.Ct. 1954 (1988) . . . . . . . . . . . . . 17

*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388,
91 S.Ct. 1999 (1971) . . . . . . . . . . . . . . . . . . . . . . . . 2, 3

*Brinegar v. United States*, 338 U.S. 160,
69 S.Ct. 1302 (1949) . . . . . . . . . . . . . . . . . . . . . . . . 20

*Caban v. United States*, 671 F.2d 1230
(2d Cir. 1982) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

*Cline v. Union County, Iowa*, 182 F.Supp.2d 791
(S.D.Iowa 2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

*Cox v. Hainey*, 391 F.3d 25, 35
(1st Cir. 2004) . . . . . . . . . . . . . . . . . . . . . . . . . 3, 23-24

*Dixon v. Wallowa County*, 336 F.3d 1013
(9th Cir. 2003) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23

*E–Z Mart Stores, Inc. v. Kirksey*, 885 F.2d 476
(8th Cir.1989) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23

*Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012), *cert. denied*, -- U.S. --, 134 S.Ct. 98
(2013) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 25

*Galvin v. Hay*, 374 F.3d 739 (9th Cir. 2004) . . . . . . 20

**Table of Authorities, continued**

*Gen. Dynamics Corp. v. United States*,
139 F.3d 1280, 1283 (9th Cir.1998) . . . . . . . . . . . . . 18

*Gray v. Bell*, 712 F.2d 490 (D.C.Cir.1983) . . . . . . . . 18

*Hollingsworth v. Hill*, 110 F.3d 733
(10th Cir.1997) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23

*Kijonka v. Seitzinger*, 363 F.3d 645
(7th Cir. 2004) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 22

*Mann v. Darden*, 630 F.Supp.2d 1305
(M.D.Ala. 2009) . . . . . . . . . . . . . . . . . . . . . . . . . 19-20

*Maryland v. Pringle*, 540 U.S. 366,
124 S.Ct. 795 (2003) . . . . . . . . . . . . . . . . . . . . . . . . 20

*Medina v. United States*, 259 F.3d 220
(4th Cir.2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . 2, 18

*Nguyen v. United States*, 556 F.3d 1244
(11th Cir. 2009) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 19

*Nurse v. United States*, 226 F.3d 996
(9th Cir. 2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

*Paret-Ruiz v. United States*, 943 F.Supp.2d 285
(D.Puerto Rico 2013) . . . . . . . . . . . . . . . . . . . . . . . . 18

*Pooler v. United States*, 787 F.2d 868
(3d Cir.), *cert. denied*, 479 U.S. 849 (1986) . . . . . . . 17

**Table of Authorities, continued**

*Raz v. United States*, 343 F.3d 945
(8th Cir.2003) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2, 19

*Rhodes v. Smithers*, 939 F.Supp. 1256
(S.D.W.Va. 1995) , , , , , , , , , , , , , , , , , , , , , , , , , ,25

*Stearns v. Clarkson*, 615 F.3d 1278
(10th Cir. 2010) . . . . . . . . . . . . . . . . . . . . . . . . . . 3, 22

*Sutton v. United States*, 819 F.2d 1289
(5th Cir. 1987) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 18

*Thames Shipyard & Repair Co. v. United States,*
350 F.3d 247 (1st Cir. 2003), *cert. denied,*
542 U.S. 905 (2004) . . . . . . . . . . . . . . . . . . . . . . . 2, 19

*Tolan v. Cotton*, -- U.S. --, 134 S.Ct. 1861
(2014) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 26-28

*Wadkins v. Arnold*, 214 F.3d 535 (4th Cir.),
*cert. denied*, 531 U.S. 993 (2000) . . . . . . . . . . . . . . . 23

**CONSTITUTIONAL AND STATUTORY PROVISIONS:**

United States Constitution, Amendment IV . . . . . . 20

28 U.S.C. § 1254(1) . . . . . . . . . . . . . . . . . . . . . . . . . . 5

28 U.S.C. § 1346(b)(1) . . . . . . . . . . . . . . . . . . . . . . . . 5

28 U.S.C. § 2680(a) . . . . . . . . . . . . . . . . .5-6, 17, 18, 19

**Table of Authorities, continued**

28 U.S.C. § 2680(h) . . . . . . . . . . . . . . . . . . . 2, 6, 16, 18

Federal Rule of Appellate Procedure 32.1 . . . . . . . . . . 4

**SECONDARY SOURCES:**

S.Rep.No. 93-588, 93d Cong., 2d Sess.
(1974), reprinted in 1974 U.S.Code Cong. &
Ad.News 2789, 2792) . . . . . . . . . . . . . . . . . . . . . . 16-17

## INTRODUCTION

On October 13, 2006, Jimmie Aday confessed to raping several under-aged girls on the Fort Apache Indian Reservation in Arizona. *Appendix 77.* In a community which had been plagued by a serial rapist for months, the import was significant. A person was admitting to being the assailant of many of the victims.

One week later, Federal Bureau of Indian Affairs agents arrested and accused both Petitioners Jesse Dupris and Jeremy Reed of also being serial rapists in the small Apache town of Whiteriver. *Appendix 46, 48.* Prior to the arrests, the federal prosecutor assigned to the task force refused to charge these young men. *Appendix 52.* Undeterred, the federal agents turned to the tribal prosecutor – on her first day on the job – to bless their warrantless arrest of Petitioners. *Id.* The federal agents mischaracterized key facts and spent only 30 minutes influencing the prosecutor to condone their arrests. *Appendix 108.*

Several months later, the tribal prosecutor realized that she had been duped and in February and April of 2007, she dismissed all charges against the two, with prejud7ice. *Appendix 48, 52.* Her words: "I've had a chance to look at the other rapist case, Jesse DuPris, and it looks like this case has holes as well [as in the case against Jeremy Reed]. . . . [¶] There might be a charge here somewhere, but this investigation is just as shabby as the other one." *Appendix 52.* Indeed, Mr. Reed presented considerable evidence, including an airtight alibi,

demonstrating his complete innocence. *Appendix 122, 154.*

In Petitioners subsequent claim for relief under both *Bivens* and the Federal Tort Claims Act, the United States Court of Appeals for the Ninth Circuit held that Dupris and Reed did not have valid false arrest claims against the United States or the agents as a matter of law. The Court of Appeals acknowledged that "Plaintiffs advance non-frivolous arguments that the information supporting their arrests was not trustworthy," but that "the Task Force's determinations of whom to arrest and when to arrest them came within the discretionary function exception" of the FTCA. *Appendix 4, 7.*

Put simply, the Ninth Circuit held that an arrest without probable cause may still fall within the discretionary function of the FTCA. This ruling squarely conflicts with numerous decisions of the other courts of appeal. *See, e.g, Thames Shipyard & Repair Co. v. United States,* 350 F.3d 247, 254-55 (1st Cir. 2003) ("[C]ourts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, proscribed by statute, or exceed the scope of an official's authority"), *cert. denied,* 542 U.S. 905 (2004); *Raz v. United States,* 343 F.3d 945, 948 (8th Cir.2003) (discretionary function exception does not apply because plaintiff alleged that conduct violated his constitutional rights); *Medina v. United States,* 259 F.3d 220, 225 (4th Cir.2001) (In "determin[ing] the bounds of the discretionary function exception found in § 2680(a) ... we begin with the principle that federal officials do not possess

discretion to violate constitutional rights or federal statutes") (citation omitted). The Ninth Circuit's decision in this matter contradicts these decisions, and creates a split in authority worthy of this Court's intervention.

The panel decision also created a split with respect to the individual liability of federal agents under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999 (1971). The panel concluded that a tribal prosecutor's verbal approval for the arrests provided the agents with qualified immunity for their false arrests of Petitioners. *Appendix 4-6.* The Ninth Circuit's holding in this regard, however, stands in sharp contrast to the other circuits that have carefully considered the import of an officer's pre-arrest consultation with a prosecutor. "[T]he mere fact that an officer secures a favorable pre-arrest opinion from a friendly prosecutor," the First Circuit recently noted, "does not automatically guarantee that qualified immunity will follow." *Cox v. Hainey*, 391 F.3d 25, 35 (1st Cir. 2004); *see also Stearns v. Clarkson*, 615 F.3d 1278, 1284 (10th Cir. 2010) ("We have never held . . . that an officer's receipt of a favorable probable cause determination from a prosecutor prior to making an arrest necessarily entitles the officer to qualified immunity"). And, in fact, if the officer "knowingly withholds material facts from the prosecutor, his reliance on the latter's opinion would not be reasonable." *Cox*, 391 F.3d at 36.

In contrast to these well-reasoned opinions, the Ninth Circuit did not consider the circumstances of

the informal consultation, most specifically, that the agents inaccurately portrayed the victim identifications as "positive" when, in fact, the identifications were both unreliable and equivocal.

The panel's decision, fully citable as persuasive precedent throughout the country pursuant to Federal Rule of Appellate Procedure 32.1, enters into uncharted and dangerous waters by holding that (1) federal officers have "discretion" to arrest persons without probable cause, and (2) that an authorization from a prosecutor to arrest, following an informal meeting lacking any review of the evidence and in which the agents provided inaccurate information, gives rise to qualified immunity for the unconstitutional arrest. Petitioners respectfully request that this Court grant certiorari to consider the legal tension among the circuits created by the Ninth Circuit's decision.

## DECISIONS BELOW

The district court's ruling on summary judgment in this matter is attached as Appendix 9-42 and is reported at *Dupris v. McDonald*, 2012 WL 210722 (D.Ariz. January 24, 2012). The memorandum decision of the United States Court of Appeals for the Ninth Circuit is attached as Appendix 1-8 and is reported at *Dupris v. McDonald*, No. 12-15243, 2014 WL 323268 (9th Cir. Jan. 30, 2014).

## JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on January

30, 2012. *Appendix 1-8.* On February 14, 2014, Petitioner filed a timely request for panel rehearing and suggestion for rehearing en banc. This request for rehearing was denied by order dated March 11, 2014. *Appendix 43-44.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1346(b)(1) provides that:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. § 2680 provides in pertinent part that:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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.

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection,

> "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

## STATEMENT OF THE CASE

### I. Factual Background

Beginning in approximately January of 2005, a serial rapist preyed upon the youth of Whiteriver, Arizona, a town of approximately 5,000 individuals. *Appendix 54, 56.* The sexual assaults generally occurred at night, and upon youths between approximately 13 and 18 years of age. *Appendix 56-69.* The victims – many of whom were inebriated at the time of the attacks – noted that the assailant wore a mask. *Id.* They also generally reported that he impersonated a police officer, often using a show of authority to separate his intended victim from others. *Id.*

In August of 2006, 20 months after the serial rapes began in Whiteriver, the Bureau of Indian Affairs established a task force to investigate the crimes, consisting of BIA law enforcement officers and two Fort Apache Tribal Police officers. *Appendix 69-70.* On October 13, 2006, the Task Force arrested Jimi Aday, a local resident, for several of the rapes. *Appendix 75-76.* Aday was not a police officer or employee of any security agency but, in the search of his home and vehicle, the investigators found police paraphernalia – flashing red and blue lights,

handcuffs, police radios, etc. – purchased from online stores. *Appendix 76-77.* Aday was prosecuted in federal court and ultimately plead guilty, now serving time in a federal penitentiary. *Appendix 53.*

Presumably, the arrest and confession of a suspect would have ended the investigation or at least would have prompted a reassessment of charges against Reed and Dupris. However, the Task Force continued without reflection to arrest Reed and Dupris seven days after Aday had confessed to raping 3 to 4 of the victims. *Appendix 46, 52, 77.* The Task Force prepared photo lineups, utilizing photographs of employees from the White Mountain Apache Housing Authority. *Appendix 79.*[1] The Task Force included photographs of Plaintiffs Jeremy Reed and Jesse Dupris, both of whom had previously worked for the Housing Authority, in the lineups. *Id.*

The use of photo lineups was an unreliable investigative tool from the outset. The assaults had occurred at night; the assailant wore a mask; and the assailant targeted adolescent females who appeared to have been drinking. Moreover, almost without exception, the assaults had occurred **<u>many months</u>** before the victims were presented with the photo lineups. *Appendix 52-69, 85-86.* Nonetheless, these

---

[1] This decision appears to have been motivated solely by the fact that the Housing Authority maintained photographs of its employees. There were numerous other police and security agencies operating on the Reservation, but only Housing Authority employees were utilized for the lineups. *Appendix 79, 148.*

lineups were shown to many of the victims and other witnesses, most of whom were unable to identify anyone in the lineups. Witness S.P. identified Housing Authority employee Shane Cosay. *Appendix 47.* Victim C.C. thought that the photograph of Anthony Thompson was similar to the person who attacked her. *Appendix 93.*[2]

Victim B.L. was shown the photo lineups more than six months after her attack. After examining the photo lineups, she first pointed to a photograph of Shane Cosay. She then pointed to a photograph of Jeremy Reed, indicating that "she could not say if it was him or not." *Appendix 47.*

Thirteen-year old L.T. was assaulted in November of 2005. *Appendix 51.* At the time, she was walking home late at night, having shared a case of beer with two other friends. *Appendix 59.* A masked man in a "police car" took her to an abandoned house and raped her. In September of 2006 – **ten full months after her attack** – the Task Force showed her the photo lineups. *Id.* After looking at the lineups for **thirteen minutes**, she pointed to a photograph of Jesse Dupris. *Appendix 92.*

---

[2] With only two exceptions, the victims and witnesses who were shown photo lineups containing the Plaintiffs were **not** shown lineups that included Jimi Aday. *Appendix 53.* There has never been an explanation why, given the use of the photo lineups, the photograph of a man who had been arrested for and confessed to one of the rapes was not shown to the other victims or witnesses.

The Task Force decided to arrest both Jeremy Reed and Jesse Dupris as additional serial rapists, in addition to Jimi Aday. *Appendix 46, 52.* The Task Force presented its case to an assistant United States Attorney, who declined to present the case to a grand jury, citing the absence of adequate evidence. *Appendix 52, 107-08.*

On October 16, 2006, Paula King began her first day on the job as the prosecutor for the White Mountain Apache Indian Tribe. *Appendix 108.* On her first or second day on the job, Task Force members Michael McCoy and Warren Youngman traveled to her office to ask her to authorize the arrests of Dupris and Reed. The two federal agents did not bring a shred of documentation with them. *Id.* In short, Ms. King reviewed no evidence, but solely relied upon the agents' own case description. The meeting lasted approximately 30 minutes. *Id.*[3]

Ms. King does not recall the meeting. *Appendix 109.* However, Mr. McCoy confirmed that he told Ms. King that a victim had made a positive identification of Jeremy Reed: relying on B.L.'s identification, he stated that "we would have certainly let her know that we had people that had identified him through photo lineups and so forth." *Id.*

---

[3] Following this meeting, the Task Force arrested Dupris and Reed. Notably, however, the charging document was ***not*** brought by Ms. King, but one of the tribal police officer members of the Task Force. *Appendix 118.*

Agent McCoy has subsequently acknowledged that calling B.L.'s identification a "positive identification" was not accurate. When asked about B.L.'s "identification" – in which she pointed to both the photographs of Shane Cosay and Jeremy Reed – he stated that it was not "positive":

> Q. Is that a positive identification?
>
> Q. (By Mr. Robbins) "Looked more like this guy"?
>
> A. I wouldn't say it was a positive identification.

*Appendix 109-110.* Ms. King's supposed "independent" decision to authorize the arrests was made:

- On her first or second day on the job;
- Based only on oral report by the federal agents;
- Without a shred of documentation to review; and
- Following only a 30 minute-briefing of the multi-week investigation and, most importantly;
- With critical facts omitted, such as the fact that B.L.'s identification

> was not "positive," but equivocal and that the Federal Prosecutor assigned to the task force had refused to prosecute.

*Appendix 108-110.* Ms. King has subsequently acknowledged that what she was first told was not consistent with the true facts of the case.

> Q. Okay. So let's look back at 4084. There is a significant difference in what is described to you as the prosecutor, what you've been handed in a report that [B.L.] was able to identify Jeremy Reed as the suspect in her case through a photo lineup. Do you see anything on that photo lineup that says he's the one?
>
> A. What I see is she identified two of them. And that's not mentioned in Molly's report.

*Appendix 124.* Ms. King testified, under oath, that had she known the accurate facts about B.L.'s "identification," she would not have authorized the arrest:

> I wouldn't lock him up. I would say you have to investigate it some more. On the other hand, it's a rape, and rape cases are usually this fuzzy. So there's something here, she was raped, she's got something here, but to actually arrest

> him, why don't we arrest Shane Cosay here, because she says he looks like it too.

*Appendix 122.*[4]

Moreover, when Ms. King finally appeared in court, she realized how different Jesse and Jeremy were from the victim descriptions:

> Q. And in terms of one of the things that you had seen, one of the things, do you recall noting how tall Jesse and Jeremy were compared to some of the descriptions of the victims?
>
> A. One of the descriptions said he was short and stocky. And I remember when Jesse came into the courtroom at pretrial and I realized how tall he was and I kind of looked, and plus he's thin, and that bothered me. But how

---

[4] Post-arrest evidence completely exonerated Mr. Reed. *First*, one of the teenagers who was with Victim B.L. at the time the assailant approached the group and isolated B.L. was Reed's next-door neighbor. She was quite clear that if it had been Reed, she most certainly would have recognized him. *Second*, on the date of B.L.'s attack, Reed had a job approximately 40 miles away in Show Low, Arizona, and was not on the reservation at the time of the assault. *Appendix 122, 154.*

> was that description brought out, well, how tall was he, was he five-nine, was he five-ten, was he six-one, and the girl goes along with it that way, that's how they got it, or did she volunteer it, you know. I couldn't guess how tall somebody is. And so it was a description they didn't match. And Jesse is quite tall, and at least one of the rape descriptions was someone who was shorter.

*Appendix 112.*

In memoranda to the tribal attorney, Ms. King made it clear how she had been hoodwinked by the federal investigators: "I've had a chance to look at the other rapist case, Jesse DuPris, and it looks like this case has holes as well [as the case against Jeremy Reed]. . . . [¶] There might be a charge here somewhere, but this investigation is just as shabby as the other one." *Appendix 125-26.*

> Maybe [L.T.] will identify Jesse from the witness stand, and maybe she'll leave out the details of the mask and her drinking a third of a case that night and the change from one-to-two of everything. If so, I might convict him of this charge, but only if I deliberately exclude the photo laydown and its debilities and then sandbag Carol by excluding her alibi witnesses. Even then, my case is still based on a drunken teenager who has

> told two completely different stories about a rapist who was wearing a mask. [¶] . . . Instead, I've got this junk for a case.

*Appendix 126* (underlining in original).

Due to the "shabby" investigation – the "junk for a case" – the tribal prosecutor agreed not only to the dismissal of all charges against Mr. Reed and Mr. Dupris, but dismissal with prejudice.

## II. Procedural Background

Petitioners filed two separate complaints – one for each Petitioner -- in the United States District Court for the District of Arizona on October 20, 2008, District of Arizona Numbers 3:08-cv-08132 and 3:08-cv-08133. The Defendants in these matters were effectively classified into three subsets: (1) law enforcement agents with the Bureau of Indian Affairs; (2) two tribal police officers who joined the BIA Task Force; and (3) the United States of America (for purposes of the FTCA).

On February 10, 2009, both matters were consolidated into the lower-numbered matter for all pretrial purposes. Thereafter, Defendants moved for summary judgment on August 26, 2011. The district court granted the Defendants' summary judgment motions on January 9, 2012.

Plaintiffs/Petitioners timely appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the district court's grant

of summary judgment on January 30, 2014. *Appendix 1-8.* Petitioners requested rehearing and rehearing *en banc*, which the Ninth Circuit denied on March 11, 2014. *Appendix 43-44.*

## REASONS FOR GRANTING THE WRIT

### 1. This Court Should Consider This Case To Clarify The Conflicting Law Regarding the Relationship Between Law Enforcement Liability For False Arrest and the "Discretionary Function" Exception To the Federal Tort Claims Act.

Under the Federal Tort Claims Act, federal employees are typically exempt for torts of false arrest, abuse of process, and malicious prosecution. *See* 28 U.S.C. § 2680(h). However, in 1974, Congress modified this subsection to permit such common law claims against "investigative and law enforcement officers." *Id.* Specifically, sovereign immunity was waived false arrest and imprisonment claims with "with regard to acts or omissions of investigative or law enforcement officers of the United States Government." *Id.* The legislative history demonstrates that this Congress intended the amended statute (the law enforcement exception to false arrest immunity) to have a broad scope. "The measure was designed to 'provid(e) a remedy against the Federal Government for innocent victims of Federal law enforcement abuses.'" *Caban v. United States*, 671 F.2d 1230, 1235 (2d Cir. 1982) (quoting S.Rep.No. 93-588, 93d Cong., 2d Sess. (1974),

reprinted in 1974 U.S.Code Cong. & Ad.News 2789, 2792).

The Federal Tort Claims Act includes another exception to liability under the FTCA, typically known as the "discretionary function" exception, which provides that the provisions of the FTCA shall not apply to 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).** This exception to the FTCA applies if, and only if, the allegedly wrongful conduct involved the "exercise" of some form of "policy judgment in performing a given act." *See, e.g., Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 546 547, 108 S.Ct. 1954, 1964 (1988) ("Thus, if the Bureau's policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful").

Petitioners in this matter have never disputed that how the federal agents chose to run their investigation was a discretionary decision. *See Pooler v. United States*, 787 F.2d 868, 871 (3d Cir.) (conduct of individual who "was placed in charge of an investigation, and was required to decide how that investigation would be pursued" was within discretionary function exception); ("Congress did not intend to provide for judicial review of the quality of investigative efforts."), *cert. denied*, 479 U.S. 849 (1986). The "investigation," however, is not at issue

in this matter; rather, the fundamental issue is whether the federal agents could exercise "discretion" to arrest the Petitioners without probable cause.

Courts have recognized the inherent tension between the discretionary function of section 2680(a) and law enforcement liability under section 2680(h). *See Paret-Ruiz v. United States*, 943 F.Supp.2d 285, 289 (D.Puerto Rico 2013) ("The reservation of immunity in Section 2680(a) and the waiver of immunity in Section 2680(h) conflict when law enforcement officers commit intentional torts while performing discretionary functions"). "This issue," the *Paret-Ruiz* Court observed, "divides the circuits." *Id.* at 290.

On the one hand, Courts have held that the 1974 amendments to the FTCA did not intend to limit the discretionary function exception in any manner and, as such, "the discretionary function exception applies to the intentional torts enumerated in Section 2680(h)." *Id.* at 289. This logic has been endorsed by the Fourth and Ninth, and D.C. Circuits. *See Medina v. United States*, 259 F.3d 220, 225 (4th Cir.2001); *Gen. Dynamics Corp. v. United States*, 139 F.3d 1280, 1283 (9th Cir.1998); *Gray v. Bell*, 712 F.2d 490, 508 (D.C.Cir.1983).

In contrast, other circuits have held that "if the law enforcement proviso is to be more than an illusory—now you see it, now you don't—remedy, the discretionary function exception cannot be an absolute bar which one must clear to proceed under § 2680(h)." *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987). In addition to the Fifth Circuit,

this construction of the FTCA has been endorsed by the Eleventh Circuit. *See Nguyen v. United States*, 556 F.3d 1244, 1253 (11th Cir. 2009).

The Ninth Circuit's decision is consistent with the Ninth Circuit's prior decisions applying the discretionary function exception to the intentional torts of federal law enforcement agents. However, the panel decision in this matter went beyond the mere application of the discretionary function exception, but found that the exception applies in circumstances uniformly rejected by the other circuits, even those circuits which apply section 2680(a) to the actions of federal law enforcement agents. Specifically, the federal circuits have held that a federal agent's discretionary authority does not extend to violations of constitutional mandates. For example, in *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247 (1st Cir. 2003), *cert. denied*, 542 U.S. 905 (2004), this First Circuit declared: "[C]ourts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, proscribed by statute, or exceed the scope of an official's authority." *Id.* at 254-55. The Fourth Circuit has similarly noted that, in "determin[ing] the bounds of the discretionary function exception found in § 2680(a) ... we begin with the principle that federal officials do not possess discretion to violate constitutional rights or federal statutes." *Id.* at 225 (citation omitted); *see also Raz v. United States*, 343 F.3d 945, 948 (8th Cir.2003) (discretionary function exception does not apply because plaintiff alleged that conduct violated his constitutional rights); *Mann v. Darden*, 630 F.Supp.2d 1305, 1315 (M.D.Ala. 2009) ("[I]f a reasonable officer

could not have believed that he had probable cause to arrest, then there is no discretionary-function immunity"); *Cline v. Union County, Iowa*, 182 F.Supp.2d 791, 800 (S.D.Iowa 2001) ("To conduct an illegal arrest or prosecution does not represent a choice based on plausible policy considerations").[5]

The Fourth Amendment forbids the warrantless arrest of a person in the absence of probable cause. **U.S.Const., Amend. IV**. "Probable cause," in turn, "exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Maryland v. Pringle*, 540 U.S. 366, 372 n.2, 124 S.Ct. 795, 800 n.2 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–176, 69 S.Ct. 1302 (1949)). In this matter, the panel acknowledged that the "trustworthiness" of the information in the possession of the arresting officers was an issue of fact: ""Plaintiffs advance non-frivolous arguments that the information supporting their arrests was not trustworthy." *Appendix 4*.[6]

---

5 Prior to the panel decision in this matter, the Ninth Circuit seemingly followed this same rule. *See Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) ("Federal officials do not possess discretion to violate constitutional rights. . . .") (quotation omitted); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) ("In general, governmental conduct cannot be discretionary if it violates a legal mandate").

6 Petitioners, of course, would characterize their arguments and evidence supporting the lack of

Nonetheless, the Ninth Circuit panel concluded: "We conclude on this record that the Task Force's determinations of whom to arrest and when to arrest them came within the discretionary function exception." *Appendix 7.*

The panel's decision in this matter thus represents a sharp break with the law from other circuits, placing the Ninth Circuit alone among the circuits in holding that, even if factual disputes exist as to the existence of probable cause to arrest, the arrest falls within the discretionary function exception as a matter of law. This legal conclusion runs contrary to the policies underlying the Fourth Amendment to the United States Constitution, as well as the policy considerations underlying Congress' 1974 amendments to the FTCA. Petitioners respectfully request that this Court accept certiorari to clarify the split among the Circuits on this important issue of federal accountability.

**2. This Court Should Consider This Case To Resolve The Tension Among the Circuits Regarding When A Prosecutor's "Decision" Breaks The Causal Chain For False Arrest.**

Agents McCoy and Youngman met with tribal prosecutor Paula King for approximately 30 minutes on either her first or second day on the job. They brought with them none of the evidence in the case.

---

trustworthiness of the evidence in far more compelling terms than "non-frivolous."

They told her that the investigation had produced "positive identifications" of the two Petitioners – even though these same agents now agree that the identifications were not "positive." Nonetheless, the Ninth Circuit concluded that, on these facts, "assuming that there was not probable cause to arrest Plaintiffs, nonetheless the tribal prosecutor's independent authorization of the arrests was sufficient to allow the members of the Task Force to proceed with the arrests in good faith." *Appendix 4.*

Until the Ninth Circuit's decision in this matter, no court had ever held that a law enforcement officer's informal, pre-arrest advice from a prosecutor, standing alone, provided the arresting officer with qualified immunity for an arrest without probable cause.

Most recently, the United States Court of Appeals for the Tenth Circuit reiterated that "[w]e have never held . . . that an officer's receipt of a favorable probable cause determination from a prosecutor prior to making an arrest necessarily entitles the officer to qualified immunity." *Stearns v. Clarkson*, 615 F.3d 1278, 1284 (10th Cir. 2010). At best, "the fact that an officer obtains a prosecutor's determination of probable cause prior to making an arrest is only one factor that is relevant to the qualified immunity analysis." *Id.* Other circuits have agreed. The Seventh Circuit has noted that pre-arrest consultation with a prosecutor may lend reasonableness to an officer's conclusion that probable cause exists and, thus, may help to establish qualified immunity. *Kijonka v. Seitzinger*, 363 F.3d 645, 648 (7th Cir. 2004). Similarly, the Eighth Circuit has held

that such advice can assist in "show[ing] the reasonableness of the action taken" and, thus, assist in determining the existence vel non of qualified immunity. *E–Z Mart Stores, Inc. v. Kirksey*, 885 F.2d 476, 478 (8th Cir.1989). The Ninth and Fourth Circuits also have recognized that a pre-seizure consultation with a prosecutor is a factor to be considered in determining an officer's entitlement to qualified immunity. *See Dixon v. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003); *Wadkins v. Arnold*, 214 F.3d 535, 542 (4th Cir.), *cert. denied*, 531 U.S. 993 (2000).

Thus, such a consultation is, at best, a factor to consider in the qualified immunity calculus. Moreover, the First Circuit, among others, has emphasized that when an officer's reliance on pre-arrest advice from a prosecutor is considered, one of the most critical factors is the accuracy and completeness of the officer's statements to the prosecutor. *Cox v. Hainey*, 391 F.3d 25 (1st Cir. 2004). In *Cox*, the First Circuit stated: "The officer's own role is also pertinent. **If he knowingly withholds material facts from the prosecutor, his reliance on the latter's opinion would not be reasonable.**" *Id.* at 36 (citing *Dixon*, 336 F.3d at 1019; *Hollingsworth v. Hill*, 110 F.3d 733, 741 (10th Cir.1997)) (emphasis added).

> [T]he mere fact that an officer secures a favorable pre-arrest opinion from a friendly prosecutor does not automatically guarantee that qualified immunity will follow. Rather, that consultation comprises only one factor,

> among many, that enters into the totality of the circumstances relevant to the qualified immunity analysis. The primary focus continues to be the evidence about the suspect and the suspected crime that is within the officer's ken.

*Id.* at 35 (citation omitted).

The Ninth Circuit's decision in this matter is inconsistent with the reasoned opinion of the First Circuit in *Cox*, among other authorities. Although the Ninth Circuit acknowledged the factual dispute regarding the presence of probable cause to arrest Petitioners, the Ninth Circuit found that the officers' consultation with Paula King was, standing alone, sufficient to provide the officers with qualified immunity. The Court of Appeals found none of the circumstances surrounding the consultation to be relevant, including (1) the officers' failure to bring any physical evidence or documentation with them to the meeting; (2) Ms. King was on her first or second day on the job; (3) a federal prosecutor had already indicated that the evidence was insufficient to support probable cause; and (4) the meeting, including introductions and the like, lasted only 30 minutes.

More significantly, the Ninth Circuit failed to consider the "officers' own role" in the consultation. *See Cox, supra.* Most significantly, the evidence shows that that the officers told Ms. King that they had "positive identifications" of Petitioners when, as

even the agents later admitted, the identifications were "positive" but, at best, equivocal.[7]

The ramifications from this decision are significant and troublesome. At least within the expanse of the Ninth Circuit, officers now can shield their questionable or shady arrests from potential civil liability by grabbing a prosecutor in a court hallway, giving a brief, incomplete, and uncorroborated summary of facts, and getting a "green light" to then make an arrest.

The First and Tenth Circuits have carefully explained the significance and weight to be given to an officer's pre-arrest consultation with a prosecutor, as well as the factors to be considered. In this matter,

---

[7] The role of a prosecutor comes up not only in the qualified immunity analysis, but also with respect to causation. Specifically, "where an officer presents all relevant probable cause evidence to an intermediary, such as a prosecutor, a grand jury, or a magistrate, the intermediary's independent decision to seek a warrant, issue a warrant, or return an indictment breaks the causal chain and insulates the officer from a section 1983 claim based on a lack of probable cause for an arrest or prosecution." *See, e.g., Rhodes v. Smithers*, 939 F.Supp. 1256, 1274 (S.D.W.Va. 1995) (collecting cases). Even so, this rule applies only where the prosecutor actually applied her or his independent judgment in a charging decision or the like and, further, "officers may be liable when they have lied to or misled the prosecutor." *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (collecting cases), *cert. denied*, -- U.S. --, 134 S.Ct. 98 (2013).

the Ninth Circuit jettisoned all of this analysis for a blanket rule that a pre-arrest consultation leads to qualified immunity as a matter of law. Accordingly, for the reasons set forth herein, Petitioners urge this Court to grant certiorari to address the conflict among the circuits regarding the relationship between pre-arrest consultations and qualified immunity.

**3. The Ninth Circuit Failed To View The Relevant Facts In A Light Most Favorable To Petitioners And, As Such, This Court Should Remand To The Ninth Circuit To Reconsider In Light of This Court's Recent Decision in *Tolan v. Cotton*, -- U.S. --, 134 S.Ct. 1861 (2014).**

The Ninth Circuit's decision in this matter acknowledges at least twice that Petitioners raised a colorable claim that they had been arrested without probable cause. However, the Ninth Circuit concluded that the federal agents were entitled to qualified immunity because their warrantless arrests had been "approved" by the tribal prosecutor. As noted above, this "approval" occurred during a 30-minute meeting, on Ms. King's first or second day on the job, and in which the agents brought none of the evidence with them. More significantly, the agents told Ms. King that they had "positive identifications" of Petitioners when, in fact, the agents themselves acknowledge that the identifications could not be fairly described as "positive."

In *Tolan v. Cotton*, -- U.S. --, 134 S.Ct. 1861 (2014), this Court reaffirmed the well-established rule that "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Id.* at 1866. This rule, this Court observed, applied equally to cases involving the application of the qualified immunity rule. *Id.* ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard").

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

*Id.* at 1868.

The same is true here. The panel decision acknowledged that Petitioners presented "non-frivolous" evidence that they had been arrested without probable cause. *Appendix 4.* Nonetheless, the panel weighed the evidence, particularly with respect to import and significance of the federal agents' brief meeting with the tribal prosecutor.

Whether this meeting, in which the agents mischaracterized the strength of the witness identifications of the Petitioners, should absolve the agents for their wrongful arrests is a question for the factfinder, not the appellate court.

Accordingly, as alternative relief, Petitioners request that this Court remand this matter to the Court of Appeals for reconsideration in light of this Court's opinion in *Tolan.*

## CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that this Court grant this Petition, and hear this matter on the merits, resolving the conflicts of law described above. Alternately, Petitioners respectfully request that this Court remand the matter to the Ninth Circuit Court of Appeals for reconsideration in light of this Court's ruling in *Tolan v. Cotton.*

RESPECTFULLY SUBMITTED this 9th day of June, 2014.

JOEL B. ROBBINS
*Counsel of Record*
301 East Bethany Home Road
Suite B-100
Phoenix, AZ 85012
Phone: (602) 285-0100
Email: joel@robbinsandcurtin.com