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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

IN RE ROBERTS LITIGATION	**CV 13-26-BLG-SEH** **DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** (This document relates to all actions)

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Come now the defendants, United States of America, and the individual defendants, Randy Elliot, Jim Scott, and Hawk Haakanson, and submit the following brief in support of the defendants' motion for summary judgment.

FACTUAL BACKGROUND

At all times relevant to this action, the plaintiff, Sherri Roberts (Roberts), was a resident of Rosebud County, Montana, and lived on the Northern Cheyenne Indian Reservation. (Statement of Undisputed Facts (SOUF) ¶ 1). In 2009, Roberts became involved in a dispute with the Northern Cheyenne Tribe regarding the occupancy of Tribal lands. (SOUF ¶ 2). She was ultimately charged in Northern Cheyenne Tribal Court with trespass for allegedly failing to vacate the property. (SOUF ¶ 3).

Roberts was served with a copy of the complaint and summons, and was directed to appear before the Tribal court on the charge on April 26, 2009. (SOUF ¶ 4). Roberts appeared for an arraignment with her retained Tribal court advocate, Mark Wondering Medicine. (SOUF ¶ 5).

Tribal Court Judge Roni Rae Brady was made aware at the arraignment that Ms. Roberts was a non-Indian. (SOUF ¶ 8). Judge Brady, therefore, advised Roberts of her right to assert lack of personal jurisdiction of the court. (SOUF ¶ 9). Pursuant to the Northern Cheyenne Code of Criminal Rules, however, Roberts was further advised that she could elect to waive personal jurisdiction, and the action would proceed against her as if she were an Indian person. (SOUF ¶ 10). She was also advised that if she elected not to waive personal jurisdiction, the Tribal prosecutor could decide to convert the case to a civil action to exclude her from the reservation. (SOUF ¶ 11).

Roberts stated that she worked and lived on the reservation, and did not want to be excluded. (SOUF ¶ 12). Roberts, therefore, advised that she would waive personal jurisdiction. (SOUF ¶ 12). After confirming her decision a second time, Judge Brady entered a note on the bottom of the complaint, dated April 26, which states: "Defendant waived personal jurisdiction, works here, did not want to be excluded." (SOUF ¶ 13).

Roberts pled not guilty to the charge, and requested that the matter be set for a jury trial. (SOUF ¶ 7). She was then released on

her own recognizance. (SOUF ¶ 14). A similar notation was made by Judge Brady on the return of the summons, which states: "Defendant waived right to jurisdiction, works here." (SOUF ¶ 14).

Roberts was directed to appear at a pretrial conference on May 4, 2010, and was advised that failure to appear may result in a bench warrant being issued. (SOUF ¶ 15). Roberts acknowledged the notice and signed the notice to appear. (SOUF ¶ 16).

Roberts and her advocate attended the pretrial conference on May 4, and again requested a jury trial. (SOUF ¶ 17). A status conference to schedule the date and time of trial was set for July 20, 2010. (SOUF ¶ 18). Roberts was again advised that "[a] failure of the defendant or defendant's legal advocate to appear at status conference shall result in defendant being declared a fugitive and a bench warrant for the arrest of defendant being set." (SOUF ¶ 19).

Roberts did not appear at the July 20, 2010 status conference. (SOUF ¶ 20). As a result, a bench warrant was issued for her arrest, commanding Tribal law enforcement to arrest Roberts and bring her before the court to answer for failure to appear. (SOUF ¶ 21).

BIA Law Enforcement Officers on the Northern Cheyenne Reservation are charged with executing warrants and other orders from the Tribal court. (SOUF ¶ 22). BIA Law Enforcement Officer Hawk Haakanson, therefore, executed the warrant on July 24, 2010. (SOUF ¶ 23). Officer Haakanson arrested Roberts at approximately 1:03 p.m. in Lame Deer, Montana, and transported her directly to the BIA Detention Center in Lame Deer. (SOUF ¶ 24). Haakanson brought Roberts into the detention center; and after determining that she was eligible for bail, he had no further involvement in her detention. (SOUF ¶ 25). Roberts posted a bond, and was released from custody at 2:30 p.m. (SOUF ¶ 27).

Upon her release, Roberts was directed to appear before the Tribal Court on July 26, 2010. (SOUF ¶ 30). Roberts appeared, and asked that all notices and other pleadings be sent to her as well as to her legal advocate. (SOUF ¶ 31). Nevertheless, Roberts was again charged with failure to appear for a status conference on October 19, 2010, and a second bench warrant was issued for her arrest. (SOUF ¶ 32). The warrant again commanded Tribal law enforcement to arrest Roberts and bring her before the Tribal court for failure to appear. (SOUF ¶ 33).

Roberts was arrested on the warrant by BIA Law Enforcement Officer Randy Elliot on February 19, 2011 at approximately 10:34 a.m. (SOUF ¶ 34). Elliot transported Roberts to the Northern Cheyenne Detention Center, and then had no further involvement in her detention. Roberts was released approximately one-half hour later at 11:10 a.m. (SOUF ¶ 37).

A judgment and sentencing order was ultimately entered against Roberts when she allegedly failed to appear at a subsequent status conference on April 19, 2011. (SOUF ¶ 38). Roberts' bond was forfeited, and she was order to pay $25.00 in court fees. (SOUF ¶ 39). That judgment has not been set aside. (SOUF ¶ 40). At no time prior to final judgment did Roberts or her legal advocate object to the jurisdiction of the Tribal court. (SOUF ¶ 41).

Roberts brought this action against BIA Law Enforcement Officers Haakanson, Elliot, and Scott in their individual capacities. She alleges that the defendants violated her constitutional rights under the Fourth and Fifth Amendment to the United States Constitution. (CV 13-26-BLG-SEH).

She has also asserted a claim against the United States under the Federal Tort Claims Act (FTCA). She asserts claims against the United States for false arrest, false imprisonment, and negligent infliction of emotional distress. (CV 14-16-BLG-SEH).

The two actions have been consolidated. (CV 13-26-BLG-SEH, Dkt. 31)

ARGUMENT

I. INDIVIDUAL CAPACITY CLAIMS

A. The plaintiff's claims against the BIA Law Enforcement Officers in their individual capacities are barred by absolute immunity.

Roberts purportedly brings her claims against BIA Officers Haakanson, Elliot and Scott under the authority of Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation, 493 U.S. 388 (1971). In Bivens, the Supreme Court created a private right of action for persons deprived of their constitutional rights by federal employees. Roberts alleges that her arrest by BIA officers pursuant to the Tribal warrants was unconstitutional, because the Tribal court lacked jurisdiction to prosecute her.

A Bivens remedy is clearly not available in this case. Elliot and Haakanson arrested Roberts pursuant to facially valid warrants from the Tribal court. As such, they were merely executing the orders of the Tribal court. It is well established that officers executing facially valid warrants and other court orders are absolutely immune from liability for damages and civil rights actions.

This principle has been firmly established in the Ninth Circuit since the court's decision in Coverdell v. Department of Social and Health Services, State of Washington, 834 F.2d 758 (9th Cir. 1987). In that case, a Child Protective Services (CPS) worker obtained and executed an ex parte court order directing that the plaintiff's newborn daughter be seized and placed in protective care. The plaintiff subsequently filed an action against the CPS worker and others, alleging various violations of her constitutional rights.

As to the CPS worker's execution of the court order, the Ninth Circuit observed that it had "never fully addressed the question of immunity for persons executing court orders." Id. at 764. It recognized, however, that other circuits had uniformly held that "persons who faithfully execute valid court orders are absolutely

immune from liability . . . ." Id. at 764 (collecting cases). The court joined that line of authority in granting absolute immunity in that case.

The court explained the rationale for immunizing such persons is that they are an "integral part of the judicial process." Id. at 765 (quoting Briscoe v. Lahue, 460 U.S. 325, 335 (1983)). That is, "[t]he fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised." Id. at 765. Quoting from Kermit Constr. Corp v. Banco Credito y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976), the court said:

> To deny him this [absolute] immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court . . . . It would make the receiver a lightning rod for harassing litigation aimed at judicial orders. In addition to unfairness of sparing the judge who gives an order while punishing the receiver who obeys it, a fear of bringing down litigation on the receiver might color a court's judgment in some cases.

Coverdell, 834 F.2d at 765.

The Tenth Circuit expressed similar sentiments in Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989). There, an individual brought an action against a law enforcement officer who arrested him pursuant to a court's order. The Tenth Circuit found that the officer was entitled to absolute immunity.

In so holding, the court recognized that "[o]ur sister circuits addressing the question likewise agree with virtual unanimity that court officers sworn to execute orders are shielded by absolute immunity in the performance of their duty." Id. at 1288. The court pointed to the inherent inequity in granting judicial officers absolute immunity, while not doing so with officials who merely execute their orders.

> To force officials performing ministerial acts intimately related to the judicial process to answer in court every time a litigant believes the judge acted improperly is unacceptable. Officials must not be called upon to answer for the legality of decisions which they are powerless to control. We explained in Kurtz, 588 F.2d at 802, that it is simply unfair to spare the judges who give orders while punishing the officers who obey them.

Valdez, 878 F.2d at 1289.

The Tenth Circuit further elaborated that law enforcement officers called upon to execute court orders cannot be placed in a position to question the court's jurisdiction and authority to issue the order. Law enforcement officers "must not be required to act as pseudo appellate courts scrutinizing the orders of judges." Id. at 1289. Rather, "[t]he public interest demands strict adherence to judicial decrees." Id.

These same principles hold true with respect to tribal courts, and the officers who are charged with enforcing tribal court orders. In Penn

v. U.S., 335 F.3d 786 (8th Cir. 2003), for example, the plaintiff contended that law enforcement officers violated her constitutional right to due process by executing a tribal court order excluding her from the Standing Rock Sioux Indian Reservation. As in this case, the plaintiff claimed the action was unlawful, because she was not a member of the Tribe, and was not subject to the jurisdiction of the Tribal court.

The Eighth Circuit determined that the officers were entitled to summary judgment based upon absolute immunity. The court recognized that "a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal judges." Id. at 789. The court further recognized that it had "not hesitated to extend absolute immunity to other officials for acts taken pursuant to a facially valid court order." Id.

As to the plaintiff's contention that she was not subject to the jurisdiction of the Tribal court, the Eight Circuit pointed out that judicial immunity is not lost any time a judicial act is taken in excess of jurisdiction. "If that were the case, every appellate invalidation of an order based on lack of jurisdiction would expose the trial judge to a suit for damages." Id. at 789. The court also echoed the Tenth Circuit's

concern that "to subject police officers to suit for servicing or executing a facially valid court order that is later held to be unlawful would require them to 'act as pseudo appellate courts.'" Id. at 789 (quoting Valdez, 878 F.2d at 1289). Therefore, the court determined that "[a] police officer charged with service of a facially valid court order is entitled to carry out that order without exposure to a suit for damages." Id.

Further, in rejecting the argument that the warrant was facially invalid because it was directed to a nonmember, the court said:

> A holding that the exclusion order was facially invalid merely because it was directed toward a nonmember would bring within its reach even those tribal court orders that are lawful under the highly technical analyses governing a tribal court's jurisdiction over nonmembers. Accordingly, we conclude that because the order was facially valid, the defendants were entitled to absolute quasi-judicial immunity for all acts prescribed by the order.

Penn, 335 F.3d at 790.

The warrants in this case were similarly facially valid. Both warrants were signed by a Northern Cheyenne Tribal Judge, and both commanded the officers to arrest the plaintiff and bring her before the Tribal court for failure to appear. BIA law enforcement officers are not afforded the discretion to determine which warrants they choose to honor; they are charged with the duty to carry out the orders of the

court. (SOUF ¶ 44). The officers were simply complying with their legal duty in executing the court's orders in this case, and are entitled to absolute immunity.

1. The determination of jurisdiction in Indian country is legally and factually complex, and cannot be determined by a law enforcement officer executing a warrant.

In addition, the warrants were not rendered facially invalid because they ordered the arrest of an individual who may not have been an Indian person. As alluded to by the court in Penn, criminal jurisdiction in Indian country is extremely complicated, consisting of a "complex patchwork of federal, state, and tribal law." Duro v. Reina, 495 U.S. 676, 680, n. 1 (1990). Criminal jurisdiction may properly lie with the state, the tribe, or the federal government, depending upon the location of the crime, the race of the offender and the victim (Indian or non-Indian) and the type of crime. Court decisions attempting to define the jurisdictional boundaries of the three sovereigns have resulted in a "bewildering maze of rules." United States v. Bruce, 394 F.3d 1215, 1222 (9th Cir. 2005).

Determining the extent of Tribal court jurisdiction alone is no less complex. Under the Indian Civil Rights Act (ICRA), 25 U.S.C. §§

1301-1303, Indian tribes have the power to exercise criminal jurisdiction over all Indians. 25 U.S.C. § 1301(2). But the task of determining who is an Indian person is itself a factually and legally complex issue.

ICRA incorporates the definition of an Indian person from the Major Crimes Act, 18 U.S.C. § 1153, stating: "'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4).

The difficulty with this definition is that the determination of who is an Indian person under the Major Crimes Act has proved to be "a formidable task." United States v. Zepeda, 738 F.3d 201, 204 (9th Cir. 2013). It "is a mixed question of fact and law that must be determined by the jury." Id. at 206.

After much litigation on the issue, the Ninth Circuit appeared to have settled on the two prong test articulated in United States v. Bruce, 394 F.3d 1215 (9th Cir. 2003) to determine who is an Indian. That test requires consideration of (1) the defendant's degree of Indian blood, and (2) the defendant's tribal or government recognition as an Indian. Id.

at 1223.

As to the first prong, "the general requirement is only 'some' blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong." Id. at 1223. It is also necessary, however, that the individual's "bloodline must be derived from a federal recognized tribe." United States v. Maggi, 598 F.3d 1073, 1080 (9th Cir. 2010).

As to the second prong, courts have considered: "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995).

The determination of this issue may still be unsettled, however, since the Ninth Circuit recently granted *en banc* review of the court's latest attempt to apply the Bruce factors. See U.S. v. Zepeda, 742 F.3d 910 (9th Cir. 2014).

The issue is not only complex legally and factually complex, it is also virtually impossible in many circumstances to determine who may

be an Indian person under ICRA by casual observation. Individuals who appear to be Caucasian may well be an Indian person under ICRA; conversely, persons who appear to be Native American, may not be an Indian person under ICRA. For example, Roberts identifies defendant Randy Elliot as white, but he is actually an enrolled member of the Northern Cheyenne Tribe. (SOUF ¶¶ 46, 47).

The point of this discussion, of course, is to demonstrate that the determination of jurisdiction in Indian country is a complex issue, as is the determination of who may be an Indian person under the ICRA. The Ninth Circuit has had a difficult time defining who is an Indian person after decades of litigation. It would be absolutely impossible to expect a law enforcement officer, performing the ministerial act of executing a bench warrant, to make that determination at the time of arrest.

2. The Northern Cheyenne Tribal Court exercises criminal jurisdiction over non-Indians when they waive objection to personal jurisdiction and consent to the jurisdiction of the Tribal court.

The issue is further complicated by the fact that the Northern Cheyenne Tribal Court does, in fact, exercise jurisdiction over

non-Indians when the individual consents to jurisdiction. Rule 9(B)(3) of the Northern Cheyenne Code of Criminal Rules provides, in part:

> If the defendant is a non-Indian, the Court shall explain his right to assert lack of personal jurisdiction of the Court over the defendant in a criminal action. If the defendant affirmatively elects to waive personal jurisdiction, the action shall proceed as if the defendant were an Indian. If the non-Indian defendant does not affirmatively waive the lack of personal jurisdiction, the action shall become a civil action to exclude the defendant from the Reservation. . . . The defendant may assert or waive lack of jurisdiction at any time prior to the start of trial.

(SOUF 6).

Consequently, in cases where an officer suspects, or even has actual knowledge, that an individual may be a non-Indian, he/she may nevertheless have waived personal jurisdiction in the Tribal Court. That is what occurred here. Roberts appeared before the court for arraignment, she was advised of her rights under the foregoing Rule, and affirmatively waived her right to object to jurisdiction. (SOUF ¶¶ 9-12).

B. The plaintiff's claims against the BIA Law Enforcement Officers in their individual capacities are barred by qualified immunity.

Plaintiff's claims are also barred by qualified immunity. Since the Supreme Court's decision in Harlow v. Fitzgerald, 457 U.S. 800

(1982), it has been firmly established that qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. The protections afforded by qualified immunity are broad. It may insulate a defendant's conduct even if a plaintiff's rights were violated. McCullough v. Wyandanch Union Free School Dist., 187 F.3d 272, 277 (2d Cir. 1999) ("[T]he whole point of the qualified immunity defense is to allow a defendant to be dismissed out of the case even if a right was actually violated . . . ."). The doctrine precludes an award of damages for that violation so long as the official action did not cross a constitutional or statutory bright line. Davis v. Scherer, 468 U.S. 183, 190 (1984) Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The question is not whether judges or constitutional scholars could divine the outlines of the right plaintiff seeks to redress. Wilson v. Layne, 526 U.S. 603, 615 (1999). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment

based on qualified immunity is appropriate." Saucier v. Katz, 533 U.S. 194 (2001) at 202.

In Saucier, the Supreme Court established a two-part process for analyzing the application of qualified immunity. The "initial inquiry" was to focus on whether the officer's conduct violated a constitutional right. Id. "[I]f a violation could be made out on a favorable view of the parties' submissions," then "the next, sequential step is to ask whether the right was clearly established." Id.

Until recently, the Supreme Court warned against skipping ahead to the second step, and instead insisted that the initial constitutional inquiry be resolved first. In 2009, however, the Supreme Court discarded this rigid approach, and held that the lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs . . . should be addressed first in light of the circumstances in the particular case at hand." Pearson v. Callahan, 555 U.S. 223, 236 (2009).

In addressing the "clearly established" inquiry, the Supreme Court has stressed that it "must be undertaken in light of the specific context of the case, not as a broad general proposition . . . ." Saucier, 533 U.S.

at 201. To overcome qualified immunity, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S., at 640. This rule takes account of one of the fundamental purposes of qualified immunity, which is to bar liability when it would be "difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." Saucier, 553 U.S. at 205.

Applying the foregoing criteria to this case, it is clear that the individual defendants are entitled to qualified immunity. Again, the broad proposition that Tribal courts do not generally have criminal jurisdiction over non-Indians is not easily applied in the field when making an arrest. As discussed above, the ethnicity of the suspect, and whether she would qualify as an Indian person under ICRA, is certainly not a determination which can be made when executing a warrant.

Further, even if the race of the suspect were known with absolute certainty, the Tribal court may still be exercising criminal jurisdiction pursuant to the individual's consent. That is the case here, and there is

no known authority which provides that a non-Indian cannot consent to the jurisdiction of a Tribal court. Therefore, it is virtually impossible for a law enforcement officer executing an arrest to know that he is violating a clearly established right in effecting an arrest pursuant to a Tribal court's order, even if he is certain of the subject's race.

C. The plaintiff's claim against BIA Law Enforcement Officer Jim Scott is barred because of his lack of participation in plaintiff's arrest or detention.

In order for an individual to be liable under Bivens, there must be a showing of direct personal responsibility. Pellegrino v. U.S., 73 F.3d 934, 936 (9Th Cir. 1996); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).[1]

[1] See also Evancho v. Fisher, 423 F.3d 347, 252 (3d Cir. 2005) (requiring "personal involvement); Alejo v. Heller, 328 F.3d 930, 936 (7th Cir. 2003; Trulock v. Freeh, 275 F.3d 391, 402 (4th Cir. 2001) (holding that Bivens liability "is personal, based upon each defendant's own constitutional violations"); Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 254 (2d Cir. 2001) ("It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages."); Cronn v. Buffington, 150 F.3d 536, 544 (5th Cir. 1998); Simkins v. D.C. Gov't, 108 F.3d 366, 369 (D.C. Cir. 1997) ("The complaint must a least allege that the defendant federal official was personally involved in the illegal conduct."); Tallman v. Reagan, 846 F.2d 494, 495 (8th Cir. 1996) ("Only federal officials who actually participate in alleged violations are subject to a Bivens-type suit.")

In this case, BIA Officer Jim Scott did not have any personal role in the arrest or detention of Roberts on either occasion. He had no participation in Roberts' arrests. (SOUF ¶ 28). Further, while he was present at the detention center when Roberts was brought in by Officer Haakinson, he did not have any involvement or participation in her detention. (SOUF ¶ 29). Therefore, he cannot be exposed to Bivens liability.

D. The plaintiff's claim against the BIA Law Enforcement Officers in their individual capacities is barred because the underlying conviction has not been set aside.

In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the Supreme Court held that "that in order to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been" previously invalidated on direct appeal or by some other means.[2]

The Ninth Circuit has recognized under Heck that "if a criminal conviction arising out of the same facts stands and is fundamentally

[2] Heck applies equally to Bivens actions. Martin v. Sias, 88 F.3d 774, 775 (9th Cir. 1996).

inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." Smithart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996). Stated another way, Heck bars any suit "based on theories that 'necessarily imply the invalidity of [the plaintiff's] convictions or sentences.'" Cunningham v. Gates, 312 F.3d 1148, 1153-54 (9th Cir. 2003)(quoting Heck, 512 U.S. at 487).

In this case, Roberts' claim is based on the theory that her arrests were unlawful because the Tribal court lacked criminal jurisdiction to prosecute her. The assertion that the Tribal court lacked jurisdiction necessarily implies the invalidity of the Tribal court conviction, which has not been set aside. Roberts' claim is, therefore, barred by Heck.

II. CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT

A. The plaintiff's claims under the FTCA based on her arrest on July 24, 2010 are barred under the FTCA's statute of limitations.

As a prerequisite to suit under the FTCA, an administrative tort claim must be presented to the appropriate government agency prior to filing suit. 28 U.S.C. § 2675(a).

The FTCA also contains specific time limitations for presentment of an administrative tort claim, and for initiation of an action in district

court. Pursuant to 28 U.S.C. § 2401(b), an administrative claim must be filed with the appropriate federal agency within two years, and any suit must be commenced within six months after final denial of an administrative claim.

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it is presented.

In this case, Roberts submitted her administrative tort claim to the Bureau of Indian Affairs on February 17, 2013. (SOUF ¶ 50). Consequently, any claim related to Roberts' arrest on July 24, 2010 accrued more than two years prior to the filing of her administrative claim, and is barred under Section 2401(b).

B. The plaintiff's claims against the United States under the FTCA cannot be sustained under Montana law.

The United States, as a sovereign, is absolutely immune from suit unless it has expressly waived its immunity and consented to suit. United States v. Shaw, 309 U.S. 495, 500-501 (1940); F.D.I.C. v. Meyer, 510 U.S. 471 (1994). Therefore, any case against the United States

requires an analysis of whether, and to what extent, the United States has waived its sovereign immunity and permitted the suit.

In this case, the plaintiff relies on the FTCA for the requisite waiver of sovereign immunity and grant of jurisdiction in this Court. The FTCA waives sovereign immunity for certain torts committed by federal employees, and provides "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674.

The FTCA also grants exclusive jurisdiction of such claims in federal district court, providing that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . , for injury . . . caused by the negligent or wrongful act or omission of any employee . . . 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. 28 U.S.C. § 1346(b).

The United States Supreme Court has interpreted the "law of the place," in Section 1346(b), as referring to the law of the state where the act or omission occurred. FDIC v. Meyer, 510 U.S. 471 (1994). The

Court has also made clear that the relevant inquiry under Section 2674 is whether a private person would be liable under state law in like circumstances. U.S. v. Olson, 546 U.S. 43, 45-46 (2005). Thus, the United States' liability under the FTCA in this case must be premised upon whether a private person would be liable under Montana law in like circumstances.

1. Roberts' claims of false arrest and imprisonment are precluded under Montana law, because the BIA officers were acting pursuant to facially valid warrants.

Although Roberts brings separate claims for false arrest and false imprisonment, it does not appear that Montana law provides for separate, independent causes of action for arrest and imprisonment. Rather, imprisonment appears to be the extension or result of an arrest.

"The gravamen of a false imprisonment claim is the deprivation of liberty of movement or freedom to remain in the place of one's lawful choice." Hughes v. Pullman, 36 P.3d 339, 343 (Mont. 2001). The elements of the claim are "[1] the restraint of an individual against his will, and [2] the unlawfulness of the restraint." Kichnet v. Butte Silverbow County, 274 P.3d 740 (Mont. 2012). Roberts cannot establish the second element of the claim.

It is well settled that "the existence of probable cause is a complete defense to claims of false arrest and imprisonment." Groves v. Croft, 2011 WL 5509028 *25 (D. Mont). Therefore, under Montana law, an arrest made under a warrant issued pursuant to a court's determination of probable cause is a complete defense to a false imprisonment claim.

In Kichnet, 274 P.3d 740 (Mont. 2012), for example, the plaintiff brought a false imprisonment claim against law enforcement officers following his arrest pursuant to an arrest warrant. The Montana Supreme Court held that he could not maintain such a claim, because he was arrested on a warrant pursuant to a court's finding of probable cause. Relying on Magistrate Judge Ostby's decision in Groves, 2011 WL 5509028 **24-25, the court stated:

> As the Groves court noted, "the existence of probable cause is a complete defense to claims of false arrest and false imprisonment. Under Montana law, an arrest warrant may issue if 'there is probable cause to believe that the person against whom the complaint was made has committed an offense[.]' MCA § 46–6–201.... *355. Because the existence of probable cause, upon which the valid arrest warrant was based, is a defense to false arrest and imprisonment ... [Groves'] claim fails." Groves, citing Dean v. Sanders Co., 2009 MT 88,¶ 37, 350 Mont. 8, 204 P.3d 722 (internal citations omitted). Because Kichnet was lawfully restrained pursuant to a court determination of probable cause, his false imprisonment claims must likewise fail.

Kichnet, 274 P.3d at 740.

Further, as demonstrated by the Montana Supreme Court's decision in Strung v. Anderson, 529 P.2d 1380 (Mont. 1075), this result is not altered because the warrant is subsequently found to be invalid. In Strung, the plaintiffs were arrested after their home was searched pursuant to a warrant. It was later determined that the search warrant was invalid, because it had erroneously been obtained from the justice of the peace, not from the district court. In subsequently asserting a false arrest and imprisonment claim, the plaintiffs argued that the warrant was facially invalid, because it should have been obvious that the justice of the peace exceeded his jurisdiction in issuing a warrant.

The Montana Supreme Court affirmed summary judgment in favor of the defendants, noting that the search warrant was valid on its face when shown to the officers at the time of the search. The invalidity was not discovered until later, when the Montana Supreme Court determined that the specific type of warrant must be issued by a district court judge. The Montana Court found that "it would put too great a burden on law enforcement officers to make them subject to damages

every time they miscalculated in what a court of last resort would determine constituted an invasion of constitutional rights. Id. at 1381.

In this case, the arrests were made pursuant to the Tribal court's determination that probable cause existed to arrest Roberts for her failure to appear before the court as ordered. The warrants were valid on their face, and the individuals who executed them cannot be held liable under Montana law based on theories of false arrest and imprisonment, even if the warrants are subsequently determined to be invalid. Therefore, since a private individual cannot be held liable in these circumstances under Montana law, the United States is also not liable under the FTCA.

2. Roberts cannot establish a claim of negligent infliction of emotional distress.

The Montana Supreme Court first recognized an independent claim for negligent infliction of emotional in Sacco v. High Country Independent Press, Inc., 896 P.2d 411 (Mont. 1995). The court found that "[a] cause of action for negligent infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the

defendant's negligent act or omission." Id. at 425.

In outlining the requirements for such a claim, however, the court set a very high standard of proof. As to the requirement that the emotional distress be "severe" or "serious," the court made clear "[t]he law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it." Id. at 426.

The court also included a requirement of objective reasonableness, stating: "[t]he distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor had knowledge." Id. at 426.

In addition, the court made clear that it is initially for the trial court to determine whether the plaintiff has made a sufficient showing that severe or emotional distress can be found. "[I]t is for the court to determine whether on the evidence severe or serious emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed. Id. at 429.

Applying this standard, the Montana Supreme Court has affirmed

summary judgment on several occasions where a plaintiff has failed to make an adequate showing of serious or severe emotional distress. See e.g., Renville v. Fredrickson, 101 P.3d 773 (Mont. 2004); Feller v. First Interstate Bancsystem, Inc, 299 P.3d 338 (Mont. 2013); and White v. State, 305 P. 3d 795 (Mont. 2013).

In this case, Roberts' claim of emotional distress is clearly not sufficient to satisfy the Saco standard. During her arrest on July 24, 2010, she described BIA Officer Haakinson's conduct as "polite but firm." (SOUF ¶ 26). He transported her to the detention facility, and after confirming that she was eligible for bail, had no further involvement in her detention. (SOUF ¶ 25). Roberts was released from the detention center within one and one-half hours after she was initially arrested. (SOUF ¶ 27).[3]

As for her arrest on February 19, 2011, BIA Officer Randy Elliot told Roberts that he was going to make her arrest as painless as possible. (SOUF 35). Before transporting her to the detention facility, Elliot and Roberts had a friendly discussion about Elliot previously

3 As discussed above, any claim arising out of this arrest is barred by the FTCA's statute of limitations, in any event.

feeding her dog jerky. (SOUF 35). Then, at Roberts request, Officer Elliot allowed her to be transported to the detention facility without handcuffs. (SOUF ¶ 36). Roberts was then released from the detention facility within one-half hour. (SOUF 37).

Applying Saco's objective reasonableness standard, it is difficult to understand how this gentle, polite treatment by Officer Elliot, and this very brief period at the detention facility, would result in emotional distress "so severe that no reasonable person could be expected to endure it." Saco, 896 P.2d at 426.

In fact, objective evidence of Roberts' emotional distress is all but nonexistent. Aside from discussing her situation with a couple of friends, Roberts did not seek any care or treatment for her alleged emotional distress. (SOUF ¶ 51). She has not taken any medication to relieve the symptoms of her alleged emotional distress. (SOUF ¶ 53). She has also not lost any time from work, suffered any loss of earning, or apparently had her life activities altered in any way because of her alleged emotional distress. (SOUF 52). In short, she simply cannot meet the high standard for an independent action for negligent infliction of emotional distress.

Wherefore, the United States requests that its motion for summary judgment be granted, and the plaintiff's complaints be dismissed with prejudice.

DATED this 19th day of December, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 6,377 words, excluding the caption and certificates of compliance and service.

DATED this 19th day of December, 2014.

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