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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** **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** (This document relates to all actions)

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

The defendants will primarily rely upon their opening brief to respond to the arguments set forth in the plaintiff, Sheri Roberts' (Roberts) response brief.

Nevertheless, certain assertions made by Roberts warrant a reply.

I. INDIVIDUAL CAPACITY CLAIMS

A. Roberts' claims against the BIA Law Enforcement Officers are barred by absolute immunity.

In their opening brief, the defendants cite a solid line of authority which establishes that law enforcement officers executing facially valid warrants and other court orders are absolutely immune from liability for damages and civil rights actions. (Defendants' opening brief (Dkt. #33) at 8-13). The defendants also pointed out that the warrants executed in this case were facially valid. Both 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.

The defendants also discussed that it is not within the officers' discretion to determine which warrants they choose to honor. Nor is it within their province to question the authority and jurisdiction of the court to issue a warrant or order, any more than it is within a federal law enforcement officer's authority to question or challenge the warrants and orders issued from this Court. As recognized by the authorities cited by the defendants, "[t]he fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised." Cloverdell v. Department of Social and Health Services, State of Washington, 834 F.2d 758, 765 (9th Cir. 1987).

Roberts maintains, however, that the warrants in this case were void, and issued in the complete absence of any jurisdiction. (Plaintiff's response brief (Dkt. #44) at 7-8). In support of that contention, Roberts argues that a non-Indian cannot waive objection to jurisdiction before a Tribal court.

To begin with, this is not the issue before the Court in this case. The issue is not whether the Tribal court, in fact, had jurisdiction of Roberts, or whether the law permits Roberts to consent to the jurisdiction of the Tribal court. Those are complex jurisdictional issues to be decided by the courts, not by law enforcement. Law enforcement officers "must not be required to act as pseudo appellate courts scrutinizing the orders of judges." Valdez v. City and County of Denver, 878 F.2d 1285, 1289 (10th Cir. 1989).

Moreover, there are a number of instances where the defendant officers may serve warrants from the Tribal court on an individual who is, or appears to be, non-Indian. For example, this may occur where the individual, while appearing to be non-Indian, qualifies as an Indian person under the ever-evolving interpretation of an Indian person under the Major Crimes Act. (See Dkt. #33 at 13-16).

More importantly for this case, it may also occur where a non-Indian has consented to the jurisdiction of the Tribal court under the provisions Northern Cheyenne Code. (See Dkt. #33 at 16-17). As discussed in the defendants' opening brief, the Northern Cheyenne Tribal Code provides a procedure for waiver

of jurisdiction for non-Indians in lieu of exclusion from the reservation. Roberts maintains in her response that such a waiver is not valid, but that is certainly not the obligation of law enforcement officers to make that determination.

Furthermore, Roberts' position on this issue appears to be legally incorrect. A defendant can waive the right to object to the jurisdiction of a Tribal court on the basis that she is non-Indian. In Eagle v. Yerington Paiute Tribe, 603 F.3d 1161 (9th Cir. 2010), for example, a petitioner sought a writ of habeas corpus in Federal District Court following her conviction in Tribal court of criminal child abuse. The petitioner claimed that she was denied due process because the Tribe failed to allege and prove that she was an Indian person.

The district court denied her petition, and the Ninth Circuit affirmed. The Ninth Circuit found that the Tribal code provided that the "burden of raising the issue of non-jurisdiction (status as a Non-Indian) shall be upon the person claiming the exception from jurisdiction. . . ." Id. at 1162. The court further found that petitioner "never raised the issue of her Indian status or the tribal court's jurisdiction before trial or at any point prior to the close of evidence." Id. The Ninth Circuit held that her failure to raise the issue in Tribal court constituted a waiver, stating:

> In the present case, the Tribe exercised its inherent power of self-government to define its child abuse offense without an Indian status element and to create a procedural rule requiring defendants to raise the jurisdictional issue of Indian status before the Tribe must prove it at trial. While the Tribe only has jurisdiction over Indians, the Tribe has not made status as an Indian an

> essential element of the crime, and Congress has not required it to do so. Thus, the Tribe was not required to plead and prove Dawn Eagle's Indian status beyond a reasonable doubt when Dawn Eagle did not raise the issue.

Eagle, 603 F.3d at 1164.

The plaintiff in this case similarly did not raise the jurisdictional issue with the Tribal court. While Roberts maintains that a letter was sent by private counsel to the Tribal prosecutor threatening legal action, she acknowledges that neither she nor her Tribal court advocate raised the jurisdictional issue at any time in Tribal court.

Q. . . . Was there anything in the [court] file, upon your review, that indicated at any time you asserted lack of personal jurisdiction?

A. Not that I recall.

Q. And in all of your appearances before the court, you don't recall any time you or your advocate or anybody else asserting that the court lacked jurisdiction over you?

A. Not that I recall.

Roberts Dep. at 161:12-20.

Nevertheless, even if they had raised the issue, it is not the obligation of law enforcement to independently comb through a court file and make a determination of whether a court has jurisdiction to issue the order.

The plaintiff also argues that the BIA officers not only served the plaintiff with the warrants, "but also detained, handcuffed, transported, and delivered Roberts to the Tribal jail for incarceration." (Dkt. #44 at 6). But that is exactly

what a law enforcement officer is charged with doing when executing an arrest warrant. They are commanded to arrest the subject, which obviously requires that they detain, handcuff and transport the individual to a detention facility, as ordered by the court.

B. Roberts' claims are barred by qualified immunity.

For many of the same reasons discussed above, Roberts' claims are barred by qualified immunity. As discussed in the defendants' opening brief, qualified immunity protects law enforcement officers from liability if established law did not put the officer on notice that his conduct would be clearly unlawful. (Dkt. #33 at 17-21). This "clearly established" inquiry must be conducted "in light of the specific context of the case, not as a broad general proposition. . . ." Saucier v. Katz, 533 U.S. 194, 201 (2001).

In this case, the broad proposition cited by the plaintiff – that Tribal courts do not have criminal jurisdiction over non-Indians – is not easily applied in the field when making arrests. For example, the ethnicity of suspects, and whether they qualify as an Indian person under the Indian Civil Rights Act, is often not a determination that can readily be made in the field. (Dkt. #33 at 13-16).

More importantly, however, the issue discussed above - whether a non-Indian can waive objection to the jurisdiction of the Tribal court - is not clearly established. Roberts argues in her brief that objection to Tribal court jurisdiction by a non-Indian

person cannot be waived, but she offers no legal authority which directly addresses the issue. In fact, in light of the Ninth Circuit's decision in Eagle, 603 F.3d 1161, Roberts' position appears to be incorrect.

Consequently, a law enforcement officer cannot assume that a Tribal court is acting in excess of jurisdiction simply because the subject of the warrant is, or appears to be, non-Indian. Those are issues to be raised and determined by the court in the course of the legal action, not to be decided in the field by law enforcement.

C. Officer Scott did not arrest or detain Roberts.

As discussed in the defendants' opening brief, Bivens liability is personal, based upon each defendant's own constitutional violations or unlawful conduct. (Dkt. #33 at 21-22). Here, defendant Scott did not play any role in either the arrest or detention of Roberts.

Roberts alleges that Scott was present when defendant Haakanson brought Roberts to the detention facility; that he looked at her paperwork; and was allegedly heard to ask a question regarding her bail status. (Dkt. #44 at 12-13). Even if true, however, none of those allegations could be construed as unlawful or unconstitutional conduct. Officer Scott had no personal contact with Roberts relative to her arrest or detention, and there is no allegation that the arrest or detention was conducted at his direction.

D. Roberts' claims are barred by Heck v. Humphrey.

As discussed in the defendants' opening brief, the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994) bars any claim under Section 1983 or Bivens "based on theories that 'necessarily imply the invalidity of [the plaintiff's] convictions or sentences'" where the underlying has not been set aside. Cunningham v. Gates, 312 F.3d 1148, 1153-54 (9th Cir. 2003). (Dkt. #33 at 22-23).

As made clear by virtually every argument advanced in her brief, Roberts' claims in this case are premised on the contention that the Tribal court lacked jurisdiction to prosecute her. Therefore, her claims clearly imply the invalidity of her conviction. That conviction has not been set aside, and her claims under Bivens are barred.

Roberts attempts to skirt this plain application by arguing that Heck does not apply in "all" civil rights cases, citing Spencer v. Kemna, 523 U.S. 1 (1998) and Nonnette v. Small, 316 F.3d 872 (9th Cir. 2002). Those cases have absolutely no application here. Spencer involved the issue of whether a petitioner's habeas petition, challenging allegedly unconstitutional parole revocation procedures, was rendered moot by the expiration of his sentence. In discussing that issue, that Court merely pointed out that Heck would not bar a claim under Section 1983 if the claim were based on a "procedural defect that did not 'necessarily imply the invalidity of' the revocation.'" Spencer, 523 U.S. at 17, citing Heck, 512 at 482-483.

In Nonnette, on the other hand, the Ninth Circuit created a narrow exception to the Heck bar in a claim involving revocation of good-time credits in a prison disciplinary hearing. The court held that a parolee could maintain a Section 1983 action, which would have implied the invalidity of his disciplinary proceeding, since a petition for habeas relief would have been dismissed due to mootness. Nonette, 316 F.3d at 876.

Obviously, neither case is in any way similar to this case, and do not control the application of the Heck bar to Roberts' claim.

II. CLAIMS UNDER THE FTCA

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

In her response, Roberts appears to concede that her FTCA claim based on her arrest on July 24, 2010 is barred under the FTCA's statute of limitations. (Dkt. #33 at 26-29). Therefore, any claim under the FTCA must be premised on her arrest on February 19, 2011

B. The plaintiff's claims cannot be sustained under Montana law.

As discussed in the defendants' opening brief, the existence of probable cause is a complete defense to claims of false arrest and imprisonment. (Dkt. # 33 at 27). Therefore, an arrest made pursuant to a court's determination of probable cause is a

complete defense to a false imprisonment claim. Kichnet v. Butte Silverbow County, 274 P.3d 740 (Mont. 2012).

In this case, Roberts' arrest on February 19, 2011 was made pursuant to the Tribal court's determination that there was probable cause for the issuance of a warrant based on the plaintiff's failure to appear as ordered. Since the warrant was valid on its face, a law enforcement officer executing the warrant cannot be held liable under Montana law for false arrest or imprisonment, even if the warrant is subsequently determined to be invalid. Strung v. Anderson, 529 P.2d 1380 (Mont. 1975).

Roberts attempts to distinguish Strung on the basis that the warrant in that case was subsequently found to have been invalid, while the warrant in this case was allegedly void at the outset. However, the allegations in Strung were exactly the same as Roberts' claim here. The plaintiffs in Strung maintained "that from the very face of the warrant, it was obvious the justice of the peace had exceeded his jurisdiction in issuing the warrant and that respondent peace officers were bound to know that such a search warrant was void and that if they executed the same they did so at their peril." Strung, 529 P.2d at 1381. The Montana Supreme Court rejected that argument, holding that the officers should not be held liable where the warrant appeared valid on its face at the time it was executed.

C. Roberts cannot establish a claim for negligent infliction of emotional distress.

As discussed in the defendants' opening brief, a claim for negligent infliction of emotional distress can be maintained only where "the distress inflicted is so severe that no reasonable [person] can be expected to endure it. Sacco v. High Country Independent Press, Inc, 896 P.2d 411, 426 (Mont. 1995). (Dkt. #33 at 29-31).

Here, Roberts has made absolutely no showing that she suffered emotional distress that would even approach that level. Roberts only makes the bald assertion that "being arrested was extremely traumatic," and that she was "scared to death." (Dkt. #44 at 19).

She has not alleged any facts, however, to show the emotional impact the event had on her personally. She has not alleged any physical manifestations of her alleged emotional distress. She has not sought any counseling for her alleged emotional distress, has not taken any medication, and has not alleged or established that her life activities were altered in any way.

As in the many cases cited in the defendants' opening brief, summary judgment is appropriate on Roberts' negligent infliction of emotional distress claim based on her failure to make an adequate showing of severe emotional distress. (See Dkt. #33 at 31).

Wherefore, based on the foregoing points and authorities, as well as those set forth in the defendants' opening brief, the defendants request that their motion for summary judgment be granted, and the plaintiff's claims dismissed with prejudice.

DATED this 3rd day of February, 2015.

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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 2484 words, excluding the caption and certificates of compliance and service.

DATED this 3rd day of February, 2015.

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