UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ELILE ADAMS,

Petitioner,

v.

RAYMOND DODGE, Nooksack Tribal Court Chief Judge; RAJEEV MAJUMDAR, Nooksack tribal Court Pro Tem; BETTY LEATHERS, Nooksack Tribal Court Clerk; DEANNA FRANCIS, Nooksack Tribal Court Clerk; NOOKSACK TRIBAL COURT, an instrumentality of the Nooksack Indian tribal; and NOOKSACK INDIAN TRIBE, a federally recognized tribal government;

Respondents.

Case No. 2:19-cv-01263 JCC

RESPONDENTS' RETURN TO SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS UNDER 25 U.S.C. § 1303 AND MOTION TO DISMISS UNDER FRCP 12(B)(1) AND FRCP 12(B)(6)

NOTED FOR HEARING ON FRIDAY, DECEMBER 20, 2019

WITHOUT ORAL ARGUMENT

Pursuant to FRCP 12(b)(1) and FRCP 12(b)(6), Respondents Raymond Dodge, Rajeev Mujamdar, Betty Leathers, Deanna Francis, the Nooksack Tribal Court, and the Nooksack Indian Tribe hereby move this Court to dismiss Petitioner's Second Amended Petition for Writ of

Habeas Corpus under 15 U.S.C. § 1303. As grounds for this Motion, Respondents state that Petitioner fails to state a claim upon relief may be granted by failing to exhaust tribal court remedies and by naming improper respondents. In addition, this Court lacks subject matter over any claims against the Nooksack Tribal Court and the Nooksack Indian Tribe, which possess tribal sovereign immunity. Respondents do not request an oral argument and do not believe that an evidentiary hearing is necessary.

WHEREFORE, pursuant to FRCP 12(b)(1) and 12(b)(6), Respondents hereby move this Court to dismiss Petitioner's Second Amended Petition for Writ of Habeas Corpus with prejudice.

Dated this ____ day of November, 2019.

s/ Charles N. Hurt, Jr.
Charles N. Hurt, Jr., WSBA #46217
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Nooksack Indian Tribe
Attorney for Respondents
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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION.

On July 19, 2019, the Nooksack Tribal Court issued a 7-day bench warrant for Petitioner for her failure to appear for a pre-trial hearing in a criminal case.[1] The warrant did not issue until

[1] *Nooksack Indian Tribe v. Elile Adams,* No. 2019-CR-A-004 (2019). At all times up to and including the time of her arrest, Petitioner was a Nooksack tribal member. Even though Petitioner apparently attempted to enroll in the Lummi Nation in April 2019, her relinquishment of Nooksack tribal membership was not effective until September 10, 2019. *See* Nooksack Tribal Council Resolution #ER 19-2, dated September 10, 2019, attached as Exhibit A to Declaration of Charity Allen. In any event, it is undisputed that Petitioner and her minor daughter were enrolled Nooksack tribal members at the time she filed the custody action in the Nooksack Tribal Court and at the time the Nooksack Tribal Prosecutor filed the criminal action against her in the Nooksack Tribal Court.

seven days after the issuance and notice to her criminal defense counsel. During the interim, Petitioner had again failed to appear or to sign a promise to appear. The warrant was served on July 30, 2019 at Petitioner's residence in Nooksack tribal housing, located on Nooksack tribal land held in trust by the United States for the Nooksack Indian Tribe. [reference]. In other words, Petitioner had eighteen days in which to avoid service of the warrant but failed to act or even to communicate with the tribal court. It is important to note that during this entire time, Petitioner had criminal defense counsel assigned to her at the Tribe's expense. [reference]. Nonetheless, she allowed the situation to deteriorate to the point that the court had no other option to compel her appearance.

Petitioner was booked into Whatcom County Jail, with which the Nooksack Indian Tribe has an interlocal agreement pursuant to RCW Chapter 39.24. *See* Declaration of Whatcom County Deputy Sheriff Wendy Jones, [Dkt. 14 at p.2]. Petitioner posted bail and was released on the same day, July 30, 2019. *See* Declaration of W. Jones [Dkt. 14 at p.2]. Petitioner has remained out of custody while her criminal case is pending in the Nooksack Tribal Court. [reference]. The next scheduled hearing in the case is not until January 9, 2020.

Contrary to Petitioner's allegations, Nooksack tribal law afforded several avenues of relief for a criminal defendant in her situation, both before and even after the service of the warrant. First, Nooksack law provides its own statutory procedure to obtain a writ of habeas corpus. *See* Declaration of George Roche [Dkt. 13 at Exhibit 4]. Second, every criminal defendant in Nooksack Tribal Court has the right to appeal conviction or sentence to the Nooksack Court of Appeals. [Dkt. 13 at Exhibit 4]. Petitioner has not taken any action to avail herself of tribal court remedies since her release from the Whatcom County Jail on July 30, 2019.

FAILURE TO EXHAUST TRIBAL COURT REMEDIES.

Federal courts are courts of limited jurisdiction, and until jurisdiction over a particular case is established, federal courts may not entertain it.[2] The burden of persuasion lies upon the party asserting subject matter jurisdiction.[3] A party can challenge the court's subject matter jurisdiction under FRCP 12(b)(1) either by a facial challenge or by a factual one.[4] A facial challenge questions the pleadings as sufficient to invoke federal subject matter jurisdiction, while a factual challenge questions whether the facts support jurisdiction.[5]

Specifically, United States courts may not exercise jurisdiction over *habeas* petitions under the Indian Civil Rights Act, 25 U.S.C. § 1303, unless the petitioners have exhausted tribal court remedies.[6] While exhaustion is often described as a question of comity, the Ninth Circuit has also described it as a jurisdictional requirement:[7] All formal, available and non-futile tribal remedies are required to be exhausted before a federal court may entertain a *habeas* petition under 25 U.S.C. § 1303.[8] Where there is a direct appellate route available, the petitioner must pursue it or show that it would have been futile to do so. The petitioner must actually attempt to pursue relief and may not merely allege futility.[9] Mere speculation that appellate relief may not be available is insufficient to excuse failure to exhaust.[10] It is the law of the Ninth Circuit that

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[2] *Tavares v. Whitehouse*, 2014 WL 1155798, 1155802 (9th Cir. 2014) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).
[3] *Tavares, supra*, at 1155802 (citing *Kokkonen, 511* U.S. at 377).
[4] *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2004).
[5] *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).
[6] *Iowa Mut. Ins. Co. v. LaPlant*, 480 U.S. 9 (1987); *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010), *cert. den'd* 560 U.S. 925 (2010).
[7] *Jeffredo*, 599 F.3d at 918; *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948 (1998).
[8] *Necklace v. Tribal Ct. of Three Affiliated Tribes of Ft. Berthold Res.*, 544 F.2d 845 (9th Cir. 1977); *McPhee v. Steckel*, 2008 WL 410650 (W.D. Wash. 2008).
[9] *Alvarez v. Lopez*, 835 F.2d 1024, 1027 (9th Cir. 1984); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984); *Aquilar v. Rodriguez*, 2018 WL 4466025 (D.N.M. 2018).
[10] *Aguilar, supra* at 2.

where the tribal court action that led to detention is still pending, that fact alone constitutes failure to exhaust.[11]

While the exhaustion requirement is sometimes described as jurisdictional, there are exceptions in extraordinary cases. The Supreme Court has held that exhaustion is not required if the tribal court action: (1) is motivated by bad faith or an attempt to harass; (2) patently violates jurisdiction; or (3) there is a lack of adequate opportunity to challenge the tribal court's jurisdiction.[12] As Petitioner seems to be raising all three as bases for her Petition, this Memorandum will deal with each exception.

Bad Faith or Attempted Harassment.

Petitioner appears to argue that the bench warrant was motivated by particular animus against her on the part of the Chief Judge of the Nooksack Tribal Court.[13] The record, however, refutes this claim. Petitioner herself initiated the child custody action in Nooksack Tribal Court that led to the criminal case against her.[14] In the child custody case, Petitioner was represented by counsel, the Nooksack Tribal Court retained a guardian *ad litem* to represent the child and hired a forensic child psychologist to evaluate Petitioner's claims of abuse by the father of her child. When those claims were debunked, the Court ordered visitation, which Petitioner refused. That refusal and resulting multiple violations of the visitation order led to the criminal charges of custodial interference and criminal contempt against Petitioner.[15] The bench warrant was issued

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[11] *Napoles v. Rogers*, 743 Fed. Appx. 136 (9th Cir. 2018)(mem. opinion); *Jeffredo, 599 F.3d at 918. See also McPhee v. Steckel*, 2008 WL 410650 (W.D.Wa. 2008).

[12] *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

[13] Chief judge Raymond Dodge promptly recused himself from the case once Petitioner's criminal defense counsel moved for recusal. *See* pp. 5-9 of Exhibit A to Declaration of D. Francis. Petitioner has nonetheless not availed herself of tribal court remedies since the appointment of *Pro Tempore* Judge Mujamdar, belying the argument that Judge Dodge is somehow to blame for Petitioner's predicament.

[14] *See* ¶ 27 of the Second Amended Petition.

[15] *See* pp. 48-57 of Exhibit A to the Declaration of D. Francis. The contempt charge is based on the fact that at least on one occasion Petitioner admitted to the Nooksack Police that she deliberately violated the Court's visitation order.

only after the Tribal Court gave Petitioner failed on numerous opportunities to appear for court proceedings in the custody action she herself filed. Petitioner was consistently refusing to allow visitation by the non-custodial parent and at the same time refusing to explain to the tribal court her reasons for failing to do so or even to appear when summoned. The tribal court had no other option than to issue the warrant, and even then did so only after allowing Petitioner the opportunity to quash by signing a promise to appear for the next court hearing.

Courts analyzing the bad faith exception typically consider three factors to establish bad faith: (1) if the tribal court action was frivolous or taken with no objective hope of success; (2) if it was motivated by the defendant's suspect class or in retaliation for the exercise of constitutional rights; and (3) if it was conducted in such a way as to demonstrate harassment or abuse of prosecutorial discretion.[16] None of those factors is present here.

Petitioner seems to suggest that the Nooksack Tribal Court filed the custody action on its own motion in order to manufacture a criminal charge against her. This is patently absurd and contradicted by all the evidence in this case. A review of the record indicates that the Tribal Court gave Petitioner multiple opportunities to cure her failures to appear before issuing the warrant, which it did only as a last resort to secure her attendance. There is no evidence of bad faith or harassment, and Petitioner's argument to the contrary is simply an attempt to excuse her failure to exhaust tribal court remedies.

Patent Violation of Jurisdiction.

The second basis for excusing the failure to exhaust tribal court remedies occurs when the tribal court clearly lacks jurisdiction over the action. Petitioner seems to be arguing this exception as well. However, as noted above, Petitioner at all times until September 10, 2019 was

[16] *Phelps v. Hamilton,* 122 F.3d 885, 889 (10th Cir. 1997); *Aguilar, supra, at 5.*

a Nooksack tribal member. Furthermore, Petitioner was and is residing on Nooksack tribal lands in Nooksack tribal housing, owned and operated by the Tribe.[17] The Tribe's *inherent* authority over its own members has been clear under federal law for almost 200 years.[18] Furthermore, the so-called "Duro fix" has made clear that Congress considers a tribe's criminal jurisdiction over non-member Indians to be an inherent right as well.[19]

To the extent that Petitioner's argument is that the Nooksack Tribal Court lacked subject matter jurisdiction over the original custody action, that argument fails for two reasons. First, the Court clearly had jurisdiction over the child custody action. Both Petitioner and her child were enrolled Nooksack tribal members living on Nooksack tribal land and in Nooksack tribal housing at the time the action was filed.[20] It is well established that Indian tribes have civil jurisdiction over tribal members living on the tribes' land generally, and over domestic cases in particular.[21] Even though Petitioner relinquished her Nooksack tribal membership in an effort to divest the Nooksack Tribal Court of personal jurisdiction over her, the Tribe retains jurisdiction over a custody action involving non-tribal Indians residing within its territory.[22] In fact, all that is necessary for the exhaustion requirement to apply is that the tribal court have *apparent* jurisdiction, i.e., even if there is only a colorable claim of jurisdiction, the petitioner is required to exhaust tribal court remedies before seeking federal *habeas* relief under 25 U.S.C. § 1303.

More importantly, this argument goes to the Court's jurisdiction in the underlying child custody case, which does not involve "detention" within the meaning of ICRA.[23] It is not an

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[17] *See* p. 48 of Exhibit A to the Declaration of D. Francis.
[18] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).
[19] *U.S. v. Enas*, 255 F.3d 662 (9th Cir. 2001), *overrul'g Means v. No. Cheyenne Tr. Ct.*, 154 F.2d 941 (9th Cir. 1998).
[20] *See* p. 48 of Exhibit A to Declaration of D. Francis.
[21] *See, e.g., Fisher v. Dist. Ct.*, 424 U.S. 382, 389 (1976)(tribal court jurisdiction over adoption involving tribal members is exclusive).
[22] *U.S. V. Enas*, 255 F.3d at 669-70.
[23] *Sandman v. Dakota*, 816 F.Supp. 448 (W.D.Mich. 1992)(*habeas corpus* not available to challenge tribal court child custody order). Petitioner also cites a Whatcom County Superior Court Order purportedly divesting the

argument that the Court lacks subject matter jurisdiction in the *criminal* case against Petitioner. The jurisdiction in question in any *habeas* action under 25 U.S.C. § 1303 is the tribal court jurisdiction in which the detention was ordered, not the jurisdiction in a related but separate, civil case. Thus, the argument is at best irrelevant. Of course, it is more than that, the argument that the tribal court lacked jurisdiction is erroneous and made in bad faith.

Respondents anticipate that they will once again hear Petitioner's argument that the Nooksack Tribal Court lacked jurisdiction because it was somehow improperly constituted or not authorized under tribal law. This argument relies exclusively on a series of three letters from the Principal Deputy Assistant Secretary of the Interior issued in 2016.[24] This argument is made in bad faith, as Counsel for Petitioner well knows. This Court has previously rejected this argument in several cases. As this Court is aware, the Nooksack Indian Tribe entered into a Memorandum of Agreement with the United States Department of the Interior, expressly validated by this Court.[25] Furthermore, this Court has reviewed that history and concluded that it is bound to recognize the Nooksack Tribal Council as the governing body of the Tribe.[26] As the Court noted there, "…it is for the Nooksack Tribe, *not this Court,* to resolve Plaintiffs' claims."[27]

Counsel is intimately familiar with these holdings, as he was counsel for the plaintiffs in those actions. Yet, he refuses to disclose them and continues to trot out the same old bad faith

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Nooksack Tribal Court of jurisdiction. Second Amended Petition, ¶ 54. While irrelevant to the issue before this Court, that ruling is also clearly erroneous, as state law cannot circumscribe tribal court jurisdiction unless expressly authorized by Congress. Tribal courts' civil jurisdiction over non-members, the exact situation in the underlying child custody case, is exclusively a federal question. *Nat'l Farmers Un. Ins. Co. v. Crow Tribe,* 471 U.S. 845, 852-53 (1985). *Nat'l Farmers* also examined and reaffirmed the requirement of exhaustion of tribal court remedies, 471 U.S. at 856-57. One of the rationales for the exhaustion requirement that the Court stated was the avoidance of precisely the type of "procedural nightmare" Petitioner is attempting to create here.

[24] *See* ¶¶ 16-20 of the Second Amended Petition.

[25] *Doucette v. Bernhardt*, Case 2:18-cv-00859 TSZ (8/9/19)[Dkt. 14].

[26] *Rabang v. Kelly*, 2:17-cv-00088-JCC (7/31/18)[Dkt. 13 at p. 7].

[27] *Rabang, supra, at 8.*

arguments that superseded Department of Interior letters should control.[28] This Court has repeatedly rejected this argument, and Petitioner should be estopped from making it here.[29]

Lack of Opportunity to Challenge Tribal Court Jurisdiction.

The final ground on which to excuse failure to exhaust tribal court remedies occurs when there is a genuine lack of opportunity to challenge the detention. Courts generally apply a two-part test to determine whether there is a genuine opportunity to challenge the detention.[30] First, courts ask if there is evidence of appellate process or some other formal remedy. Second, courts ask if the petitioner actually sought relief from the tribal court. If the answer to the first question is affirmative, the petition must be denied.[31] If the answer to the second question is negative, the petition must be denied.

Here, the answers to both questions militate for dismissal. Petitioner cannot dispute that the Nooksack Indian Tribe has specific, formal, statutory procedures that may provide relief here; she simply has chosen not to pursue them. Petitioner has multiple procedures under tribal law to challenge her detention and even to challenge the court's jurisdiction over the underlying child custody action, which she herself filed.[32] To idly speculate that those procedures would be unsuccessful because the Tribe has a vendetta against her does not meet her burden to excuse her failure to exhaust and thereby supply this Court with jurisdiction. The Petition should be dismissed for Petitioner's failure to exhaust tribal court remedies.

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[28] The Tribe notes that Interior opinion letters cannot determine the jurisdiction of any tribal court, which is exclusively determined by reference to tribal law.

[29] *See* fn. 25 and 26, *supra.*

[30] *Aguilar, supra,* at 2, (citing *Necklace v. Tribal Court of Three Affiliated Tribes,* 554 F.2d 845, 846 (8th Cir. 1977)).

[31] *Aguilar, supra,* at 5.

[32] Respondents note off hand that Petitioner could move for acquittal of the criminal charges on the grounds that the underlying visitation order is void, could move to strike the warrant and return of bail, or could ask for declaratory relief. All of these remedies and more are available under Nooksack law. *See* NTC §10.07.190 and 10.07.200 [Dkt. 13 at p. 84].

TRIBE AND TRIBAL COURT HAVE SOVEREIGN IMMUNITY.

Petitioner has named the Nooksack Indian Tribe and the Nooksack Tribal Court as additional respondents in this action. However, tribal sovereign immunity remains intact "absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress."[33] Federal law is clear that the tribe ordering the detention is never a proper a respondent under 25 U.S.C. § 1303.[34] This is because the tribe continues to enjoy tribal sovereign immunity.[35] In fact, the U.S. Supreme Court has expressly held that 25 U.S.C. § 1303 does not "constitute a general waiver of sovereign immunity."[36] Accordingly, here the Nooksack Indian Tribe, a federally recognized tribe,[37] and the Nooksack Tribal Court as an instrumentality of the Tribe,[38] possess tribal sovereign immunity and are not proper respondents.[39] They should therefore be dismissed from this action with prejudice.

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[33] *Burlington N. R.R.Co. v. Blackfeet Tribe*, 924 F.2d 899, 901)(9th Cir. 1991), *cert den'd* 505 U.S. 1212 (1992). This Court has recently expressly recognized the Nooksack Indian Tribe's sovereign immunity from suit, *Rabang, supra,* at 8. [Dkt. 13].

[34] *Poodry v. Tonawanda Band*, 85 F.2d 874, 899 (2nd Clr. 1996)("Because a petition for writ of *habeas* corpus is not properly a suit against the sovereign, [the tribe] is simply not a proper respondent.") *See also Coriz v. Rodriguez,* 350 F.Supp.3d 1044, 1051 (D.N.M. 2018).

[35] *Poodry*, supra, at 899-900 ("§ 1303 does not signal congressional abrogation of tribal sovereign immunity, *even in habeas cases.*")(emphasis in original). *See also James v. U.S., 980 F.2d 1314* (9th Cir. 1992), *cert den'd* 510 U.S. 838 (1993).

[36] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[37] 84 Fed. Reg. 1200 (2/1/19). "The inclusion of a tribe on the Federal Register list of recognized tribes is generally sufficient to establish entitlement to sovereign immunity." *Munoz v. Barona Band of Mission Indians,* 2018 WL 1245257, at 2 (S.D.Cal. 2018)(*citing Larimer v. Konocti Vista Casino,* 814 F. Supp. 2d 952, 955 (N.D.Cal. 2011), *Ingrassia v. Chicken Ranch Bingo*, 676 F.Supp. 2d 953, 957 (E.D.Cal. 2009) and *Cherokee Nation v. Babbit,* 117 F.3d 1489, 1499 (D.C.Cir. 1997)). If there were ever any question of the Nooksack Indian Tribe's status, *Rabang*, fn. 26, *supra,* and *Doucette,* fn. 25, *supra,* and the September 18, 2019 letter from BIA Northwest Regional Director Mercier should make clear that the Tribe is and has continuously been federally recognized and that the federal government maintains government-to-government relations with the Nooksack Tribal Council. [Dkt. 13 at pp. 50-51].

[38] *See Cook v. AVI Casino Enterprises, Inc.,* 548 F.3d 718, 725 (9th Cir. 2008)(governmental as well as commercial instrumentality of tribe entitled to protection of tribe's sovereign immunity)(*citing Kiowa Tribe of Okla v. Manufacturing Technologies, Inc., 523* U.S. 751, 754 (1998)). Petitioner admits as much, *see* ¶ 7 of the Second Amended Petition.

[39] This Court has decided a closely related issue: that the tribe and the general counsel of the tribe are not necessary parties to a *habeas* action under 25 U.S.C. § 1303 in part because the tribe has immunity. *Sweet v. Hinzman*, 634 F.Supp. 2d 1196, 1201 (W.D.Wa. 2008)

THE COURT CLERKS ARE NOT PROPER RESPONDENTS.

Petitioner had also named Court Clerk Betty Leathers and Deputy Court Clerk Deanna Francis of the Nooksack Tribal Court as additional respondents. However, the proper respondent to a *habeas corpus* petition under 25 U.S.C. § 1303 is "the official with authority to modify the tribal conviction or sentence."[40] Generally, there is only one proper respondent to a petition.[41]

This is in accordance with the general rule in *habeas* actions that the custodian of the person being detained is the only proper respondent.[42] That is, the proper respondent is the person with the power to produce the petitioner before the court.[43] In cases where the petitioner is not in physical custody, the proper respondent is the person who exercises legal control over the detention.[44]

Here, it is undisputed that Respondent Leathers and Francis do not exercise legal control over Petitioner's "detention." They are therefore not proper respondents and should be dismissed from this action WITH PREJUDICE.

CONCLUSION.

In this action, Petitioner seeks a writ of *habeas corpus* under 25 U.S.C. § 1303 for relief from a tribal court bench warrant even though the action in which the bench warrant was issued is still pending and even though Petitioner has not sought any of the various tribal court remedies available to her. Almost by definition, this constitutes failure to exhaust tribal court remedies, which exhaustion is a precondition to this Court entertaining this action.

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[40] *Garcia v. Elwell*, 2017 WL 3172826 at 2 (D.N.M. 2017)(citing *Poodry, supra,* at 899-900. *See also Coriz v. Rodriguez, supra,* at 1050 (substituting current governor of pueblo for past governor).
[41] *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004).
[42] *Rumsfeld v. Padilla*, 542 U.S. at 435.
[43] *Coder v. O'Brien*, 719 F. Supp. 2d 655 (W.D.Va. 2010), *aff'd* 405 Fed. Appx. 778 (4th Cir. 2010).
[44] *Rumsfeld*, 542 U.S. at 438.

Further, Petitioner has failed to demonstrate any of the bases for excusing her failure to exhaust. The first basis – bad faith – exists only in Petitioner's allegations. She was criminally charged in a tribal court operated by the tribe of which she was a member at the time of the criminal conduct and on whose tribal property and in whose tribal housing she continues to reside and concerning visitation of a minor child who was also an enrolled Nooksack tribal member. The charges arose out of her admitted refusal to obey a child custody order requiring her to allow visitation to her minor child's father for ten required visits over a period of a few weeks, which supervised exchange of visitation was to take place on tribal trust land.

The court action was not frivolous; Petitioner was served with a bench warrant for her multiple failures to appear in court, about which there is no dispute. Likewise, there is clear jurisdiction by the tribal court here. At all relevant times, Petitioner was a Nooksack tribal member residing on Nooksack lands held in trust and in Nooksack tribal housing owned and operated by the Nooksack Indian Housing Authority. The minor child who was the subject of the visitation order was a tribal member. Even after her Nooksack tribal membership relinquishment, and enrollment in another federally recognized tribe, under federal and tribal law Petitioner remains subject to the Nooksack Tribal Court criminal jurisdiction.

The final exception to the exhaustion requirement is also unavailing. Petitioner cannot demonstrate a lack of opportunity to challenge the detention, as she has simply failed to take advantage of any of her possible avenues of relief. Mere speculation is not enough; Petitioner must actually have attempted to secure relief before turning to this Court. She has not done so, and the Petition must be dismissed.

Further, the Tribe and the Tribal Court possess tribal sovereign immunity here and must be dismissed on that basis as well. Finally, the Tribe, the Tribal Court, and Respondents Leather

and Francis are not proper respondents to the Petition, as they lack the legal authority to control Petitioner's detention. Accordingly, they should be dismissed.

WHEREFORE, pursuant to FRCP 12(b)(1) and 12(b)(6), Respondents Raymond Dodge, Nooksack Tribal Court Chief Judge, Rajeev Mujamdar, Nooksack Tribal Court Judge Pro Tem, Betty Leathers, Nooksack Tribal Court Clerk, Deanna Francis, Nooksack Tribal Court Clerk, the Nooksack Indian Tribe, and the Nooksack Tribal Court hereby move that the Petition be dismissed for failure to exhaust tribal court remedies, for tribal sovereign immunity and for naming improper respondents and move for such other relief as the Court may deem just. Additionally, Respondents the Nooksack Indian Tribe, the Nooksack Tribal Court, Betty Leathers and Deanna move to dismiss as they are not proper respondents to a petition for writ of *habeas corpus.*

Finally, the Nooksack Indian Tribe and the Nooksack Tribal Court move to dismiss on the grounds that they enjoy tribal sovereign immunity, and accordingly this Court lacks subject matter jurisdiction over this action. As Petitioner has already been granted leave to amend the Petition for naming improper respondents and for failure to state a claim upon which relief may be granted previously, Respondents move to DISMISS WITH PREJUDICE.

Dated this 22nd day of November, 2019.

s/ Charles N. Hurt, Jr.
Charles N. Hurt, Jr., WSBA #46217
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Nooksack Indian Tribe
Attorney for Respondents
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of NOVEMBER, 2019, I caused to be served via the CM/ECF system, a copy of the foregoing RESPONDENTS' RETURN TO SECOND AMENDED PETITION FOR *HABEAS CORPUS* to all counsel of record at the following addresses:

Attorney Gabriel Galanda gabe@galandabroadman.com

Attorney George Roche groche@co.whatcom.wa.us

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is a true and accurate statement.

Dated this 22nd day of November, 2019, at Deming, Washington.

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