NO. 21-35490

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELILE ADAMS,

Petitioner-Appellant,

v.

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

Respondents-Appellees,

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
No. 2:19-cv-01263-JCC

PETITIONER-APPELLANT'S REPLY BRIEF

Gabriel S. Galanda
Ryan D. Dreveskracht
GALANDA BROADMAN PLLC
P.O. Box 15146
8606 35th Avenue NE, Ste. L1
Seattle, WA 98115
206-557-7509

Attorneys for Petitioner-Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. Ms. Adams Successfully Pleaded Bad Faith 1

II. Nooksack Plainly Lacks Jurisdiction Over Ms. Adams 5

III. Judicial Immunity Does Not Apply 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Boozer v. Wilder,
381 F.3d 931 (9th Cir. 2004)……5

In re Junious M.,
193 Cal. Rptr. 40 (Cal. App. 1983)……..….9

John v. Baker,
982 P.2d 738 (Alaska 1999) 9

Juidice v. Vail,
430 U.S. 327 (1977) 1

Lundy v. Balaam,
2021 WL 2904917 (D. Nev. July 9, 2021) 4

Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians,
471 U.S. 845 (1985)……...13

Native Village of Venetie v. Alaska,
944 F.2d 548 (9th Cir. 1991)……8

Nevada v. Hicks,
533 U.S. 353 (2001)……...13

Poodry v. Tonawanda Band of Seneca Indians,
85 F.3d 874 (2d Cir. 1996)……...…..12

Reimnitz v. State's Attorney of Cook County,
761 F.2d 405 (7th Cir. 1985)……..12

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978)……13

State v. Cooper,
130 Wash. 2d 770 (Wash. 1996)……9

State v. Eriksen,
172 Wash. 2d. 506 (Wash. 2011)……..……..……10

State v. Moses,
145 Wash. 2d 370 (Wash. 2002) 7

State v. Schmuck,
121 Wash. 2d 373 (Wash. 1993) 7

State v. Shale,
182 Wash. 2d 882 (Wash. 2015) 7

Stump v. Sparkman,
435 U.S. 349, (1978) 10

Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida,
898 F. Supp.1549 (S.D. Fla. 1994). 1

United States v. Bryant,
579 U.S. 140 (2016) ……...5

STATUTES

AGO 63-64 No. 68……9

Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303..... 5,12

Public Law 280 6,8,9

Public Law 83-280..... 9

RCW 10.92.020……...10

RCW 37.12.010 ..... *passim*

RCW 37.12.160……...10

18 U.S.C. § 1162(c)……..……6

25 U.S.C. § 336……9

67 Stat. 590 (1953)……6,8

INTRODUCTION

Elile Adams hereby replies to both answering briefs: the one filed by the Nooksack Indian Tribe, the Nooksack Tribal Court, and Nooksack Tribal Court Clerks Betty Leathers and Deanna Francis (the "Nooksack Brief"), and the other filed by Raymond G. Dodge and Rajeev Majumdar (the "Dodge Brief").

ARGUMENT

I. MS. ADAMS SUCCESSFULLY PLEADED BAD FAITH

At the motion-to-dismiss stage, under an exception to the general exhaustion requirement, a court must take allegations of bad faith as true and allow the action to proceed.[1] Neither group of Appellees address *Juidice v. Vail*,[2] the origin case for the bad-faith exception that strongly suggests that Ms. Adams properly invoked the exception. Nor does either group contest that *Tamiami Partners* sets forth the pleading standard applicable to assertions of bad faith.[3] Instead, they argue that the bad-faith exception to the exhaustion requirement should not apply because Ms.

[1] *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 898 F. Supp. 1549, 1562 (S.D. Fla. 1994).
[2] 430 U.S. 327 (1977); *see also* Opening Br. at 19–20.
[3] Nooksack Br. at 17 n.52 (noting that "the Court accepts the facts alleged in the complaint as true").

Adams' allegations "are nothing more than a formulaic recitation of the elements of the claim."[4] The Second Amended Petition ("Petition") is hardly that. Ms. Adams specifically alleges that Dodge initiated a *sua sponte* parenting action against Ms. Adams despite knowing that he lacked authority to act as Tribal Court Chief Judge according to the federal government as well as jurisdiction due to a pre-existing Washington State Superior Court action. Moreover, she alleges Dodge abused the judicial process by requiring Ms. Adams to appear before him at least twenty times in two years.[5] While Appellees' bad faith grew much worse as her Petition was pending (as outlined immediately below), what she alleged at the pleading stage of her case should survive dismissal.

Appellees fail to contest almost all of the facts and evidence upon which Ms. Adams' bad faith claim rests. Most notably, they do not dispute that Dodge himself asked the Nooksack Tribal Police to investigate Ms. Adams, or that he required her to attend over twenty hearings in two years, or that he issued a warrant leading to her arrest despite her appearance through counsel at a hearing that fell during an annual Indigenous ritual, or that he denied Ms. Adams' due process right to habeas counsel, or that the Court rejected both habeas and mandamus papers filed by her

[4] *Id.* at 17.
[5] ER-61–62.

counsel, or that Appellees refused to consider her *pro se* habeas petition upon the *ex parte* advice of Appellees' defense counsel.

Instead, citing no evidence, Appellees merely dispute that Dodge initiated a parenting action against Ms. Adams on his own accord.[6] The evidence submitted by Ms. Adams, however, demonstrates the parenting action was initiated by Dodge himself, not by either the "Mother" or the "Father."[7] Nor does the evidence support Appellees' claim that Ms. Adams "forum shopped."[8] Ms. Adams sought custody of her child in state court in 2015, and domestic violence protection in tribal court in 2017.[9] That a judge would convert an Indigenous woman's plea for protection into a challenge to her custody over her young daughter should be unimaginable.

Appellees next ask this Court to excuse Dodge's bad faith because he recused himself after she filed her original habeas corpus petition in federal district court.[10] Dodge's recusal does not avoid the application of the bad-faith exception to exhaustion. The Tribal Court's bad faith persists as it has rejected habeas corpus and mandamus filings filed by Ms. Adams' lawyer, and failed to act on Ms. Adams'

---

[6] Nooksack Br. at 18.
[7] ER-47. Nor do Appellees contest that during the entire time Ms. Adams has faced criminal custodial interference charges and was arrested and imprisoned by Dodge, her daughter's father has not even sought visitation. ER-35. There is not even an alleged victim of the crimes he has leveled against her since February of 2019. *Id.*
[8] Nooksack Br. at 1.
[9] ER-34.
[10] Nooksack Br. at 19 n.58.

pro se habeas corpus petition upon the *ex parte* advice of Appellees' counsel.[11] Even if all bad faith had ceased upon Dodge's recusal in October of 2019, it is undisputed that Ms. Adams remains in custody for purposes of habeas corpus—and she remains in custody precisely because of Appellees' earlier and continued bad faith.

The Tribal Court's bad faith is particularly evident in the inappropriate email from Appellee Clerk Deanna Francis intended for Charles Hurt, Appellees' counsel in this matter. After having rejected Ms. Adams' lawyer's habeas and mandamus filings, Francis sought Hurt's input on how the Tribal Court could also stonewall Ms. Adams' *pro se* habeas corpus petition.[12] The Tribal Court followed Hurt's advice and has continued to stonewall her since.[13] This case is distinguishable from *Lundy v. Balaam*,[14] upon which Appellees rely. In *Lundy*, a court employee forwarded an email chain containing intra-judiciary communication to the tribal prosecutor.[15] The district court found no bad faith because the forwarded emails did not demonstrate the tribal court was "working hand in glove" with the respondent.[16]

Here, unlike *Lundy*, the email by Francis intended for Hurt shows that the court is "working hand in glove" with Appellees' counsel, the very lawyer who is

---

[11] ER-14, 16.
[12] ER-16.
[13] ER-14.
[14] 2021 WL 2904917 (D. Nev. July 9, 2021).
[15] *Id.* at *12.
[16] *Id.* at *12–13.

defending against Ms. Adams' federal habeas petition. Francis reached out to Hurt for advice on how to avoid adjudicating Ms. Adams' *pro se* habeas corpus petition.[17] The habeas corpus remedy afforded by the federal Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, is ineffective when litigants face such obvious obstruction. Though tribal court habeas proceedings must comport with "fundamental fairness" vis-à-vis ICRA's habeas provision, Nooksack effectively slammed shut its courthouse doors to Ms. Adams.[18] The federal court's doors to habeas corpus must remain open as a result of Appellee's manifest bad faith.

Appellees lean heavily on the District Court orders from which Ms. Adams appeals.[19] But the standard of review in this Court is *de novo*.[20] Because the facts demonstrating bad faith are not disputed, and because Ms. Adams met the pleading standard to survive dismissal of a bad-faith claim,[21] this Court should reverse.

II. NOOKSACK PLAINLY LACKS JURISDICTION OVER MS. ADAMS

As an alternative basis for why Ms. Adams need not have exhausted her tribal court remedies, Nooksack plainly lacks jurisdiction over her. The Tribe, Tribal Court, Francis, and Leathers agree with Ms. Adams that the scope of a state's

[17] ER-16.
[18] *United States v. Bryant*, 579 U.S. 140, 136 S. Ct. 1954, 1966 (2016).
[19] Nooksack Br. at 17; Dodge Br. at 6.
[20] *Boozer v. Wilder*, 381 F.3d 931, 934 (9th Cir. 2004).
[21] *Tamiami Partners*, 898 F. Supp. at 1562.

voluntary assumption pursuant to Public Law 280 is a question of state law.[22] Thus, the relevant inquiry is whether the Nooksack Tribe plainly lacks jurisdiction to arrest Ms. Adams off its reservation under Washington State law. It does, and therefore exhaustion is not required.[23]

Appellees argue that the "overwhelming view . . . is that Public Law 280 was not intended to, and in fact, did not affect civil or criminal tribal court jurisdiction."[24] Ms. Adams does not argue otherwise. Her position instead is that, rather than *itself* altering tribal jurisdiction, Public Law 280 invited states such as Washington "to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."[25] Washington accepted Congress' invitation, passing RCW 37.12.010, which assumed jurisdiction and excepted only "tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to

[22] Nooksack Br. at 23 n.68.
[23] The Tribe, Tribal Court, Francis and Leathers accuse Ms. Adams of citing to a statute—18 U.S.C. § 1162(c)—that does not appear in her opening brief. *See* Nooksack Br. at 22 n.67.
[24] Nooksack Br. at 22.
[25] Opening Br. at 23 (quoting 67 Stat. 590 (1953)); *see also id.* at 23–24 ("The question, then, is not whether *Congress* divested tribes of jurisdiction through Public Law 280, but rather whether *Washington* assumed jurisdiction over off-reservation allotted lands through RCW § 37.12.010.") (emphasis in original); *State v. Schmuck*, 121 Wash. 2d 373, 394 (1993) (noting RCW 37.12.010 was "enacted under congressional authority").

a restriction against alienation imposed by the United States[.]"[26] Because the lands at issue here are off-reservation allotted lands, the exception to State jurisdiction found in RCW 37.12.010 does not apply.

State v. Shale, upon which Appellees rely, is distinguishable because that case, unlike this one, involved the interplay of state and tribal jurisdiction on an established reservation.[27] In *Shale*, the Supreme Court of Washington noted that RCW 37.12.010 "limits state jurisdiction over crimes committed on trust or allotment land *within reservation borders*."[28] *Shale*, then, does not contradict the State's exclusive jurisdiction over allotted lands beyond reservation borders such as the Suchanon Allotment. Appellees' reliance on *State v. Moses* is misplaced for the same reason; that case, too, deals with jurisdiction over reservations.[29]

While the Supreme Court of Washington did state in *State v. Schmuck* that "tribal sovereignty can be divested only by affirmative action of Congress," *Schmuck* recognized that "RCW 37.12.010 was enacted pursuant to congressional authority[.]"[30] Though the "scope [of a state's assumption of jurisdiction] cannot

---

[26] RCW 37.12.010.
[27] 182 Wash. 2d 882, 884 (2015).
[28] *Id.* at 891 (emphasis added).
[29] 145 Wash. 2d 370, 378 (2002) ("Once Congress made it possible to do so, Washington assumed partial, nonconsensual, concurrent jurisdiction over tribal reservations in 1963.").
[30] Schmuck, 121 Wash. 2d at 394.

exceed that authorized by Public Law 280,"[31] the version of that law in effect at the time of RCW 37.12.010's passage permitted states "to assume jurisdiction . . . in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."[32] Thus, the State of Washington, not Congress, controlled the extent of its assumption of jurisdiction. Under RCW 37.12.010, that assumption is exclusive over off-reservation allotted lands like the Suchanon Allotment.[33]

In 1953, Congress invited states to assume jurisdiction over Indian country in whatever manner they choose. Washington State accepted the invitation, passing RCW 37.12.010, which contains no exception applicable to off-reservation allotted lands. As recognized by the Supreme Court of Washington, the State's jurisdiction in that scenario is exclusive.[34] Nooksack plainly lacks arrest jurisdiction over Ms.

---

[31] *Id.* at 396.
[32] 67 Stat. 590 (1953).
[33] *See, e.g.*, AGO 63-64 No. 68 (concluding that Washington has exclusive jurisdiction over "all Indians and Indian territory, except Indians on their tribal lands or allotted lands within the reservation and held in trust by the United States" and in other situations not relevant to this appeal). This Court has deferred to opinions of state attorneys general in analyzing jurisdictional scope. *See Native Village of Venetie v. Alaska*, 944 F.2d 548, 561 (9th Cir. 1991).
[34] *State v. Clark*, 178 Wash. 2d 19, 30 (2013) ("[U]nlike crimes committed off-reservation, the State does not have exclusive jurisdiction over crimes by Indians occurring on their reservations."); *see also State v. Cooper*, 130 Wash. 2d 770, 775–76 (1996) (noting that, through RCW 37.12.010, "Washington assumed full nonconsensual civil and criminal jurisdiction over all Indian country outside established Indian reservations.").

Adams on the Suchanon Allotment. Therefore, she need not have exhausted her tribal court remedies.

To the extent that Appellees argue the Nooksack Tribe enjoys concurrent criminal jurisdiction over the Suchanon Allotment,[35] that argument fails to acknowledge that the Nooksack Tribe did not exist in 1963, when Washington assumed jurisdiction over Indians on off-reservation allotted lands.[36] The Nooksack Tribe was not federally recognized until 1973, two decades after Congress passed Public Law 83-280 and a decade after Washington State assumed exclusive criminal jurisdiction over the Suchanon Allotment.[37] Concurrent state-tribal criminal jurisdiction over that allotment was therefore impossible; there was no Nooksack sovereignty to affirm or divest in 1963.[38]

Nor did the Federal Government preempt RCW 37.12.010 or AGO 63-64 No. 68 when recognizing the Nooksack Tribe and forming the Nooksack Reservation in 1973. *Cf. John v. Baker*, 982 P.2d 738, 810 (Alaska 1999) (citing H.R.Rep. No. 91–

---

[35] The Suchanon Allotment was "alienated" to the United States in trust for Nooksack Indian John Suchanon as a public domain allotment in 1931. 25 U.S.C. § 336; *see* Nooksack SER-50. Although the 1855 Point Elliott Treaty bears a Nooksack signature, Nooksack Indians like Mr. Suchanon were considered Canadian Indians by courts in the United States until 1973. *See e.g. In re Junious M.*, 193 Cal. Rptr. 40, 43 (Cal. App. 1983).

[36] *Cooper*, 130 Wash. 2d at 775.

[37] *Id.*

[38] *See id.* ("Because the Nooksack reservation did not exist in 1963, the State's assumption of jurisdiction pursuant to RCW 37.12.010 necessarily included the [off-reservation allotment] property . . .").

1545 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4783) ("This amendment is important because it recognizes that the Metlakatla community lacked concurrent jurisdiction prior to the amendment. This, in turn, represents a recognition of pre-amendment exclusive jurisdiction in the state."). Neither has the Tribe asked the State of Washington to retrocede its exclusive criminal jurisdiction over the Suchanon Allotment to the Tribe, as allowed by existing Washington State law.[39] As of now, Nooksack criminal jurisdiction over Ms. Adams on the Suchanon Allotment is plainly lacking. Exhaustion is, therefore, not required.

III. JUDICIAL IMMUNITY DOES NOT APPLY

"In *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L.Ed.2d 331 (1978), the Supreme Court established a test for determining when a judge is protected by absolute immunity."[40] "The first part of the test is whether the judge performed a

[39] RCW 37.12.160 (noting "the state may retrocede . . . all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe . . ."); RCW 37.12.160(9)(d)(iii) ("'Indian country' means . . . [a]ll Indian allotments . . ."). The more immediate solution would be for the Tribe to enter into a cross-deputization agreement with Whatcom County, also as a matter of existing Washington State law. *See State v. Eriksen*, 172 Wash. 2d. 506, 514, 259 P.3d 1079, 1083 (Wash. 2011) (encouraging state-tribal "use of political and legislative tools" to address policy concerns created by "the territorial limits on [tribal] sovereignty," including cross-deputization or mutual aid pacts in Whatcom County); RCW 10.92.020.

[40] *Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990).

judicial act."[41] "The second part of the test is whether the judge was acting in the 'clear absence of all jurisdiction.'"[42]

Here, the first part of the *Stump* test is not met because Dodge was not performing judicial acts in March of 2017, when he knowingly masqueraded as a judge and took "so-called" judicial actions, according to a determination by then-Principal Deputy Assistant Secretary of Indian Affairs Lawrence S. Roberts only three months prior.[43] Dodge also exceeded the bounds judicial action when he personally asked the Tribal Police to investigate Ms. Adams.[44]

Dodge also fails the second part of the *Stump* test, having acted in the clear absence jurisdiction. He is therefore not absolutely immune.[45] Dodge knew of Assistant Secretary Roberts' determination that he lacked authority to act.[46] He knew Assistant Secretary Roberts specifically invalidated any of his "so-called tribal actions and orders" after March 24, 2016.[47] These actions include the *sua sponte* parenting action Dodge commenced against Ms. Adams in March of 2017.[48]

---

[41] *Id.*
[42] *Id.* (quoting *Stump*, 435 U.S. at 357).
[43] ER-59–60.
[44] ER-57.
[45] Dodge does not argue for any other form of immunity.
[46] ER-59–60.
[47] ER-27.
[48] ER-47.

Accordingly, Dodge cannot logically be protected by any form of judicial immunity as he acted pursuant to an illegitimate appointment.[49]

Finally, Dodge and Majumdar argue they are not proper respondents to the Petition.[50] But in the ICRA context, an individual is a properly named respondent to a habeas petition if "they have an interest in opposing the petitions, as well as the ability to lift the . . . orders should the petitions be found on remand to have merit."[51] The relevant inquiry is whether the individual has "the power to give the petitioner what he seeks if the petition has merit—namely, his unconditional freedom."[52] Dodge, the judge who issued the warrant for Ms. Adams' arrest and remains intimately involved in the Tribal Court's entire operation,[53] and Majumdar, who substituted for Dodge in October of 2019 upon his recusal, are those individuals.

[49] ER-27.
[50] Dodge Br. at 25.
[51] *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900 (2d Cir. 1996).
[52] *Reimnitz v. State's Attorney of Cook County*, 761 F.2d 405, 408–09 (7th Cir. 1985).
[53] ER-54 (Dodge "directed the clerk of the Nooksack Tribal Court to reject notices of appearances [and] otherwise denied tribal members their due process right to civil counsel of their choosing").

CONCLUSION

Ms. Adams is entitled to her unconditional freedom, as Congress intended.[54] She need not exhaust tribal remedies, as the U.S. Supreme Court intended.[55] The District Court erred by dismissing her Petition. This Court should reverse.

DATED this 18th day of October, 2021.

GALANDA BROADMAN PLLC

/s/ Gabriel S. Galanda
Gabriel S. Galanda, WSBA #30331
Ryan D. Dreveskracht, WSBA #42593
P.O. Box 15416,
8606 35th Avenue NE, Suite L1
Seattle, WA 98115
PH: 206-557-7509
gabe@galandabroadman.com
ryan@galandabroadman.com
Attorneys for Petitioner-Appellant

[54] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).
[55] *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, **REPLY BRIEF OF PETITIONER-APPELLANT,** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 18th, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the all parties of record.

Signed under penalty of perjury and under the laws of the United States this 18th day of October, 2021.

/s/ Gabriel S. Galanda
Gabriel S. Galanda, WSBA #30331
Attorney for Petitioner-Appellant