Docket No. 21-35490

In the

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 and NOOKSACK INDIAN TRIBE, a federally recognized tribal government,

Defendants-Appellees,

and

BILL ELFO, Whatcom County Sheriff and WENDY JONES, Whatcom County Chief of Corrections,

Respondents.

Appeal from a Decision of the United States District Court for the Western District of Washington, No. 2:19-cv-01263-JCC · Honorable John C. Coughenour

DEFENDANTS-APPELLEES CHIEF JUDGE RAYMOND G. DODGE JR. AND JUDGE RAJEEV MAJUMDAR'S ANSWERING BRIEF

ROB ROY SMITH, ESQ.
RACHEL B. SAIMONS, ESQ.
KILPATRICK TOWNSEND & STOCKTON, LLP
1420 Fifth Avenue, Suite 3700
Seattle, Washington 98101
(206) 467-9600 Telephone
RRSmith@kilpatricktownsend.com
RSaimons@kilpatricktownsend.com

Attorneys for Appellees Chief Judge Raymond G. Dodge, Jr. and Judge Rajeev Majumdar

CP COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

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INTRODUCTION

For over two years, Petitioner-Appellant Elile Adams ("Adams") has sought to get even with Nooksack Tribal Court Chief Judge Raymond G. Dodge, Jr. ("Judge Dodge") by improperly naming him and Nooksack Tribal Court Pro Tem Judge Rajeev Majumdar ("Judge Majumdar") in her Petition for Writ of *Habeas Corpus* after she was arrested for failing to appear at a Nooksack Tribal Court criminal proceeding and then detained in the Whatcom County Jail for fewer than eight hours. However, Adams's wrongful blame of and desire to punish Judge Dodge cannot overcome her procedural failure to exhaust her tribal court remedies before filing her petition in federal court. Nor can it make up for the fact that both Judge Dodge and Judge Majumdar were improperly named respondents who are judicially immune from suit.

Each of the issues presented in Adams's Appeal were previously briefed at length and carefully considered by both the Magistrate Judge and the District Court Judge in several different opinions before both Judges properly concluded that the habeas action should be dismissed. This Court should affirm the District Court's Order.

JURISDICTIONAL STATEMENT

This is an appeal of the September 23, 2020 ruling by the U.S. District Court for the Western District of Washington (Coughenour, J.) adopting the Magistrate's

Second Report and Recommendations and dismissing Adams's Second Amended Petition for a Writ of *Habeas Corpus*. ER-4–7. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

This appeal presents the following issues for review:

(1) Whether the District Court properly dismissed Adams's Petition for a Writ of *Habeas Corpus* for lack of jurisdiction, based on her failure to exhaust tribal court remedies and the absence of any applicable exception to the exhaustion requirement; and

(2) Whether, in the alternative, the claims against Judges Dodge and Majumdar were properly dismissed because the Judges are immune from suit and improper respondents to the action.

STATEMENT OF THE CASE

On August 9, 2019, Adams filed a Petition for Writ of *Habeas Corpus* in the U.S. District Court for the Western District of Washington, naming two respondents: Whatcom County Sheriff Bill Elfo, and Whatcom County Chief of Corrections, Wendy Jones. ER-68. Adams then filed an amended habeas petition on August 13, 2019. ER-68. After Elfo and Jones moved to dismiss the petition, and while that motion was pending, Adams, Elfo, and Jones stipulated to dismiss the petition so that Adams could file an amended petition naming Nooksack Tribal

officials. ER-69. Adams subsequently filed a Second Amended Petition for Writ of *Habeas Corpus* on October 18, 2019, naming Judge Dodge, Judge Majumdar, Nooksack Tribal Court Clerks Betty Leathers and Deanna Francis, the Nooksack Tribal Court, and the Nooksack Indian Tribe as Respondents. Dodge-SER77–96.

The Second Amended Petition alleges that Adams was detained without due process, legal authority, or jurisdiction after she was arrested pursuant to a warrant for failing to appear at a criminal case proceeding in Nooksack Tribal Court.[1] Dodge-SER94. Although she was released from custody the same day she was arrested, Adams nonetheless sought a writ of habeas corpus to "have Petitioner brought before the Court to the end that she may be discharged from her unlawful detention and restraint." Dodge-SER95.

Judges Dodge and Majumdar filed their Return to Adams's Second Amended Petition on November 27, 2019, asking the Court to dismiss the Petition on the grounds that (1) judges are generally not proper respondents in a habeas corpus action; (2) Chief Judge Dodge had recused himself and therefore was not a proper respondent; and (3) the Judges were entitled to judicial immunity. ER-70. After those issues were fully briefed, the Magistrate Judge issued her first Report

[1] The facts as alleged in this case also form the basis for Adams's claims in two other cases: *Adams v. Dodge et al.,* Case No. 19-2-01552-37 (Whatcom Sup. Ct.), and *Adams v. Whatcom County, et al*., Case No. 2:19-cv-01768-JRC (W.D. Wash). Both cases are stayed pending disposition of the present appeal.

and Recommendation ("R&R"), concluding that Adams's habeas petition should be dismissed without prejudice. Dodge-SER62. Specifically, the Magistrate found that the petition was "premature, as [Adams] has not exhausted tribal court remedies regarding the pending underlying criminal matter, and therefore should be dismissed." Dodge-SER67. Although Adams had argued that she was not required to exhaust her tribal remedies because all three exceptions to the exhaustion requirement applied, the Magistrate found that this was not the case, as she "ha[d] multiple opportunities in the tribal courts to challenge her detention." Dodge-SER74.

On March 12, 2020, Adams filed a motion for reconsideration of the R&R. ER-71. Adams argued that the tribal exhaustion doctrine did not apply; that she had exhausted all available tribal court remedies; that the Nooksack Tribal Court plainly lacked jurisdiction, and that the Judges other Tribal Respondents to the habeas petition had acted in bad faith toward Adams. *Id.* Judges Dodge and Majumdar opposed that motion, as did the Tribal Respondents. ER-71. The Court then adopted in part and rejected in part the R&R, finding Adams had "not demonstrate[d] that she has actually exhausted her tribal court remedies such that she may now seek federal habeas relief on this ground." ER-24. The Court then remanded the R&R to the Magistrate to determine whether Adams had established a plausible claim that her arrest had occurred on allotted land outside of the

Reservation and that therefore the Nooksack Tribal Court lacked jurisdiction over Adams at the time of her arrest. ER-25. On remand, the Magistrate again recommended that Adams's habeas petition be dismissed for failure to exhaust tribal court remedies. Dodge-SER41. Additionally, the Magistrate found that regardless of the Tribal Court's jurisdiction, judicial immunity would apply and the Judges should be dismissed from the action. Dodge-SER56. Adams objected to the Second R&R, arguing that an exception to the tribal court exhaustion rule applied because Tribal jurisdiction was "plainly lacking," and contending that the Magistrate had "misapprehended the judicial immunity doctrine as applied to Respondent Judges." Dodge-SER33–34.

On September 23, 2020, the Court, after "[h]aving thoroughly considered the parties' briefing and the relevant record," adopted the second R&R. ER-8. The Court found that Adams's argument that jurisdiction was "plainly lacking" under Washington law failed because, even if Washington law controlled, the authority on the jurisdiction was mixed and that in light of the "seemingly unclear and conflicting authority, the Court is left with no choice but to conclude that the issue of jurisdiction is far from *plain*, even under Washington law." ER-11 (emphasis original). Accordingly, the Court overruled Adams's first objection, concluding that she was not excused from exhausting her remedies with the Nooksack Tribal Court before bringing her action before the District Court, and dismissed the matter

without prejudice. *Id.* The Court did not reach Adams's second objection, as the failure to exhaust was found to be fatal to her habeas petition. *Id.*

On October 5, 2020, Adams filed another motion for reconsideration. Dodge-SER29–32. This time, she argued that the Court had erred by concluding that the Tribe's "jurisdictional rights to trust lands before Public Law 280 would, indeed, survive Public Law 280" and by overlooking her objection on the basis of the bad faith exception to the tribal court exhaustion doctrine. Dodge-SER29. On October 21, 2020, the Court issued a minute order directing the Tribal Respondents (excluding Judges Dodge and Majumdar) to respond to Adams's motion. ER-73. The Tribal Respondents filed a response on October 30, 2020. ER-73. In response, the Court concluded that it had not overlooked Adams's objection on the application of the bad faith exception, but that it had previously overruled her objections on that basis and she had failed to seek timely reconsideration. Dodge-SER27. As a result, it found that no further consideration of that objection was warranted. *Id.*

However, the Court found that additional consideration of Adams's jurisdictional argument was warranted, and ordered the parties to submit a brief regarding whether the fact that Public Law 280 predated federal recognition of the Nooksack Tribe impacted the determination that the Tribal Court did not plainly lack jurisdiction over the off-reservation allotted lands where Adams was arrested.

Dodge-SER24–25. After Adams, Judges Dodge and Majumdar, and the Tribal Respondents each submitted a brief on this issue, ER-73, the Magistrate issued yet another R&R, again recommending dismissal of Adams's petition on the basis that she had not exhausted her tribal court remedies. In the R&R, the Magistrate analyzed each authority submitted by Adams in support of her claim but nonetheless found that "[w]hile some authority cited by Petitioner may suggest the State has exclusive jurisdiction, the Undersigned cannot find that tribal jurisdiction was plainly lacking as to make exhaustion unnecessary for habeas purposes." Dodge-SER20–21 . After Adams once more objected to this R&R on the basis of jurisdiction, Dodge-SER3–11, the Court overruled that objection, and adopted the R&R recommending dismissal. ER-4–7.

Adams now appeals the Court's Order, seeking reversal of its dismissal.

STATEMENT OF FACTS

Judges Dodge and Majumdar incorporate by reference the Statement of Facts contained within the Nooksack Indian Tribe's Answering Brief and provide additional salient facts below.

A. The Legitimacy of the Nooksack Tribe and by Extension, its Judiciary, Has Been Validated by the United States and Federal Courts

Beginning in approximately 2012, three years before Judge Dodge was employed by the Tribe, the Tribe became embroiled in a dispute over Tribal enrollment. That dispute has been the subject of extensive litigation, including

Rabang v. Kelly, 328 F. Supp. 3d 1164 (W.D. Wash. 2018), *aff'd*, 846 Fed. Appx. 594 (9th Cir. 2021), a federal Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit by Nooksack Tribal members, represented by Adams's counsel, against various Nooksack officials including Judge Dodge. (*See* concurrently filed Exhibits to Request for Judicial Notice "RJN") The plaintiffs in that case similarly alleged that Judge Dodge was a "purported" (i.e., not legitimately appointed) judge. RJN 6. The *Rabang* matter was recently resolved before this Court on appeal, as discussed below.

At one time, in the midst of the enrollment dispute, the United States Department of Interior (DOI) indicated that it would only recognize actions taken by the Tribal Council before March 24, 2016, because of a lack of quorum on Tribal Council. *Rabang,* 328 F.Supp.3d at 1166. However, as deceptively omitted by Adams in her Statement of Facts, DOI subsequently entered into a Memorandum of Agreement (MOA) with the Nooksack Tribal Council Chairman, in which DOI agreed to recognize the Nooksack Tribal Council as the governing body of the Nooksack Tribe if the Tribe conducted a special election within a specified period. *Id*. On December 2, 2017, the Tribe held a special election to fill four seats on the Council, which DOI concluded was validly conducted. *Id.* A second general election to select a Chairman and fill three seats

on the Tribal Council was held on May 5, 2018. DOI also acknowledged this election and pursuant to the MOA, recognized the Tribal Council. *Id.*

On March 15, 2018, following DOI's decision to recognize the validity of the Tribal Council, the Tribal Council passed Resolution #18-15 to ratify the previous appointment of Chief Judge Dodge to the Nooksack Tribal Court. RJN 51-52. The stated purpose of the Resolution was to "eliminate all doubt and resolve the issue of the validity of Resolution #16-92 by adopting Resolution #16-92 as its own through this current ratification of the previous action." *Id.* On May 29, 2018, the Nooksack Tribal Council ratified a number of phone polls which occurred between July 2017 and May 2018. Among the polls was Resolution #18-15, in which the current federally-recognized Tribal Council ratified Chief Judge Dodge's 2016 appointment to the Nooksack Tribal Court. *Id.* Most recently on September 18, 2019, the United States again reiterated that: "[t]he BIA does recognize the Tribe's system of governance"; "The Department of the Interior recognizes the actions and operations of the duly elected Tribal Council"; and "[t]here are no findings by the BIA that the Tribe's system of governance is invalid or unconstitutional in 2019." Dodge-SER146–147.

Based on DOI's decision to recognize the newly-elected Tribal Council, the District Court in *Rabang* concluded that it no longer had jurisdiction over the plaintiffs' claims under an exception to the tribal exhaustion rule, and therefore

concluded that "it is for the Nooksack Tribe, not this Court, to resolve Plaintiffs' claims." *Rabang,* 328 F.Supp.3d at 1169. Recently on appeal, this Court affirmed the District Court's dismissal and concluded that "[b]ecause the Nooksack Indian Tribe has a full tribal government that has been recognized by the DOI . . . Rabang's case no longer falls under the futility exception to the tribal exhaustion requirement, which 'applies narrowly to only the most extreme cases.'" *Rabang v. Kelly*, 846 Fed. Appx. 594, 595 (9th Cir. 2021). It is therefore well-established that the Tribe has a functioning, legitimate, and federally-recognized Tribal government and judiciary.

SUMMARY OF ARGUMENT

Adams asks this Court to reverse the District Court's dismissal of her petition for a writ of habeas corpus, arguing that she was not required to exhaust her tribal court remedies because of the existence of bad faith and because tribal court jurisdiction was "plainly lacking." Both of these arguments have been raised, researched, argued, considered, and decided several times over in this case by two different judges in the District Court, and both the Magistrate and the District Court Judge have concluded that neither exception applies. Reversal is not warranted. The allegations do not support a finding of bad faith nor do they establish that jurisdiction was "plainly" lacking. Moreover, irrespective of tribal exhaustion, both Judge Dodge and Judge Majumdar are improper respondents and

are judicially immune from suit. Consequently, this Court should affirm the District Court's dismissal of Adams's petition.

STANDARD OF REVIEW

Questions of subject matter jurisdiction are reviewed de novo. *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1130 (9th Cir. 2000). A federal court is presumed to lack subject matter jurisdiction until the contrary is affirmatively established by the plaintiff. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). The district court's factual findings on jurisdictional issues are reviewed for clear error. *See Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696, 703 n.9 (9th Cir. 2017).

ARGUMENT

A. The District Court Properly Dismissed Adams's Petition for Lack of Jurisdiction Because She Did Not Exhaust Her Tribal Court Remedies and No Exception Applies

1. Adams Is Required to Exhaust Her Tribal Court Remedies

Adams filed her second amended habeas petition in district court pursuant to the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301–1303. Dodge-SER77–96. Under ICRA, federal courts may not exercise jurisdiction over habeas petitions unless the petitioner has exhausted their tribal court remedies. *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). Indeed, courts have explained that this arises from "[t]he Supreme Court's policy of

nurturing tribal self-government [which] strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010) (quoting *Selam*, 134 F.3d at 953). Therefore, all federal courts addressing the issue of habeas corpus mandate that two prerequisites be satisfied before they will hear a habeas petition filed under the ICRA: first, the petitioner must be in custody, and second, the petitioner must first exhaust tribal remedies. *Jeffredo*, 599 F.3d at 918 (citing Cohen, *Handbook of Federal Indian Law* § 9.09 & § 9.09 n. 280). Absent those two conditions, federal courts have no jurisdiction to hear a petitioner's claim for habeas relief. *Id.* at 918.

As the United States Supreme Court acknowledged in *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985):

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

In a footnote to that opinion, the Court clarified that while tribal court exhaustion remained the rule, it would "not suggest" that exhaustion would be required in extreme circumstances, such as where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," where the action is "patently violative of express jurisdictional prohibitions," or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id.* at 856, n. 21 (quoting *Juidice v. Vail*, 430 U.S. 327, 338 (1977)). Thus, while these exceptions remain available in rare occasions, they are limited in application.

2. The Allegations Do Not Establish Bad Faith

Adams argues that her habeas petition should not have been dismissed because of a limited exception to the tribal court exhaustion requirement that arises where an assertion of tribal court jurisdiction is motivated by a desire or harass or is conducted in bad faith. Opening Br. at 18. Adams asserts that Judge Dodge's "overzealous response to a failure to appear" warrants application of the bad faith exception, and that because Adams merely alleged bad faith, the District Court should not have granted dismissal. *Id.* at 21. This assertion is legally and factually incorrect.

The bad faith exception does not apply here for two reasons. First, there can be no bad faith because it is undisputed that Chief Judge Dodge "recused" himself

in October 2019 from Adams's case after he filed counterclaims against her in the state tort case she initiated against him arising out of this same arrest. Dodge-SER86. He therefore has not had any involvement in Adams's criminal court proceedings since that time. *Id.* Second, the allegations as pleaded simply do not establish the existence of bad faith or a desire to harass which would warrant the application of the exception. The bad faith exception may not be utilized unless it is alleged and proved that a judge is acting in bad faith or is motivated by a desire to harass. *Juidice*, 430 U.S. at 338. As the Magistrate determined in the Report & Recommendation after considering Adams's previous allegations of bad faith:

> Although Petitioner['s] allegations may raise suspicion regarding the tribal criminal and parenting actions, the Court concludes that it does not rise to the level of bad faith or harassment. First, Petitioner's argument that Respondent Judge Dodge is acting in bad faith is unpersuasive as he recused himself from the ongoing criminal matter. Second, appears the criminal charges were brought with a reasonable expectation of obtaining a conviction. Police reports show that from January 12, 2019 to February 20, 2019, Petitioner failed to exchange custody of her child pursuant to the Nooksack Parenting Action, in violation of Nooksack Code of Laws, Sections 20.03.160, 20.11.020. Police reports also show Petitioner knew she was required to exchange custody but failed to do so for ten out of twelve visitations in a one-month period. Regardless of any alleged vendetta of Respondent Judge Dodge or the Nooksack Indian Tribe, tribal police found probably cause to arrest Petitioner for violating NTC 20.03.160. Petitioner has not been harassed with multiple criminal cases, but instead has only been charged in one pending case. Therefore, it appears that this habeas petition would unduly interfere with the tribal

> court criminal proceeding and the Court should abstain from deciding these claims.

Dodge-SER70–71.

After Adams objected to the R&R, arguing that new evidence established the continued bad faith by the Tribe and additional evidence of bad faith, the Court overruled her objection and explained that "[t]hese reasons do not establish that the tribal court has unjustifiably precluded Petitioner from pursuing her tribal court remedies and do not otherwise rise to the level of bad faith or harassment such that Petitioner is excused from exhausting those tribal court remedies." ER-26.

The District Court thoroughly considered—and rejected—the application of the bad faith exception to the tribal court exhaustion requirement in this case. This Court should affirm dismissal of Adams's petition.

3. Tribal Court Jurisdiction Was Not "Plainly Lacking"

Adams also contends that exhaustion was not required because "[w]hen Nooksack law enforcement arrested Ms. Adams at her home on the off-reservation Suchanon Allotment on July 30, 2019, the Tribe plainly lacked criminal jurisdiction." Opening Br. at 22. As with the assertion of bad faith, this argument has been extensively briefed, fully considered, and ultimately properly rejected by the Magistrate and the District Court.

In support of her assertion, Adams cites to Public Law (P.L.) 280, two Washington state cases, and an old Attorney General's Opinion to argue that state

jurisdiction over off-reservation allotted lands is exclusive, not concurrent. Opening Br. at 25. However, none of the authority cited by Adams establishes that the Tribe plainly lacked jurisdiction. First, as previously extensively briefed by the Judges, ER-73, a review of the P.L. 280 statutory language illustrates the absence of any intent to exclude tribes from exercising jurisdiction over off-reservation tribal lands. The absence of any language which would support exclusive state jurisdiction or revoke tribal jurisdiction is telling, as it is presumed that "the purpose and meaning of the legislature are correctly and definitely expressed by the language employed in the [law]." *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 507, 104 P.2d 478, 482 (1940).

If either Congress or the state legislature had intended for later-recognized tribes to lose their right to exercise criminal jurisdiction in Indian Country through the passage of P.L. 280, they certainly could have included such a provision within any of the statutes passed. *See Bryan v. Itasca Cty., Minnesota,* 426 U.S. 373, 389 (1976) (noting that "the same Congress that enacted Pub.L. 280 also enacted several termination Acts legislation which is cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation."). As neither Congress nor the State elected to include a provision excluding tribes from concurrent jurisdiction, it is safe to presume that there was no intent to do so, and that tribes

have retained their authority to exercise concurrent jurisdiction over off-reservation tribal lands.

Adams also once again cites a 1963 opinion from the Washington Attorney General, AGO 63-64 No. 68, as dispositive evidence of the State's exclusive jurisdiction. However, the District Court repeatedly found Adams's reliance on that opinion to be "unpersuasive," explaining that while courts sometimes defer to Attorney General opinions, they "are not bound by Attorney General opinions," and "such opinions are not controlling." Dodge-SER50–51, ER-10; Dodge-SER17. Additionally, the AGO was written before P.L. 280 was amended in 1968, a relevant fact for purposes of a jurisdictional analysis.

Adams's reliance on *State v. Cooper*, 928 P.2d 406, 408 (Wash. 1996) is similarly misplaced. The District Court previously explained that in *Cooper*, "the question before the court was not whether the tribe's jurisdiction extended to off-reservation trust lands, but whether the *state's* did." ER-10 (emphasis original). Thus, as found by the Magistrate, "Petitioner directs the Court to authority establishing that the State has jurisdiction on off-reservation allotted lands, however, the authority does not address whether that jurisdiction is exclusive or if tribes have concurrent jurisdiction." Dodge-SER21. Because "[n]othing in the language of P.L. 280, RCW 37.12, or any relevant amendments appears to have divested the Nooksack Indian Tribe of concurrent jurisdiction," Dodge-SER21,

Adams cannot establish that the Tribe "plainly lacked" jurisdiction at the time of Adams's arrest. And, as aptly previously noted by the Magistrate during the earlier consideration of this issue, "[t]hat this jurisdiction issue is still before the Court after several motions for reconsideration and supplemental briefing supports the finding that tribal jurisdiction was not *plainly* lacking." Dodge-SER22 (emphasis original).

Adams has failed to establish here that any exception applies to excuse her from exhausting her tribal court remedies before bringing a habeas petition in federal court. The Court should affirm the dismissal of her petition.

B. Dismissal Should Also Be Affirmed Because Judges Dodge and Majumdar Are Improperly Named Respondents and Are Immune From Suit

Finally, the Court should affirm the dismissal of Adams's habeas petition because Judges Dodge and Majumdar were improperly named respondents and are judicially immune from suit. In adopting the Magistrate's R&R, the District Court dismissed Adams's petition on the basis that she had not exhausted her tribal court remedies and therefore did not address the Magistrate's findings regarding alternative grounds for dismissal. However, the Magistrate properly determined that the Judges were immune from suit. Dodge-SER55–56 (finding that "Respondents Judge Dodge and Pro Tem Judge Majumdar are also entitled to judicial immunity and should therefore be dismissed from this action, as discussed

below); Dodge-SER14, n. 1 (recommending that "Respondents Nooksack Indian Tribe, Nooksack Tribal Court, Leathers, Francis, and Judge Dodge be alternatively dismissed as improperly named respondents and that Respondent Pro Tem Judge Majumdar be dismissed due to judicial immunity.").

Judges have long enjoyed absolute immunity from personal capacity claims and liability in damages for their judicial or adjudicatory acts. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011); *Forrester v. White*, 484 U.S. 219, 219 (1988) (judges have absolute immunity in order to protect judicial independence). Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). Tribal court judges are entitled to the same absolute judicial immunity that shields state and federal court judges. *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003).

Judicial immunity extends to habeas corpus proceedings because, as discussed below, judges are generally not proper respondents. In *Cade v. Carpenter*, 367 F.2d 572 (5th Cir. 1966), the court held that, "Construed as liberally as the rules permit and require, Appellant's petition cannot be interpreted as a petition for writ of habeas corpus because it is not directed against the person holding Appellant in custody, but rather against the District Judge. As so construed, appellant fails to state a ground on which relief can be granted, since the

actions of the District Judge are protected by the bar of judicial immunity." *Id*. at 572 (internal citations omitted). "A seemingly impregnable fortress in American Jurisprudence is the absolute immunity of judges from civil liability for acts done by them within their judicial jurisdiction." *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974). Judges Dodge and Majumdar both retain judicial immunity from suit and were properly dismissed from Adams's petition.

Additionally, neither Chief Judge Dodge nor Judge Majumdar were proper respondents to Adams's habeas petition for two reasons. First, because there is generally "only one proper respondent to a given prisoner's habeas petition," *Rumsfeld v. Padilla*, 542 U.S. 426, 438-41 (2004) and that is the custodian of the petitioner, or the person with the "day-to-day" control over the petitioner. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992); *Belgarde v. Montana*, 123 F.3d 1210, 1213 (9th Cir. 1997) (petition must name the officer having custody of the petitioner as the respondent). Importantly, a judge is not a petitioner's custodian for habeas purposes because a judge never has actual physical custody and control of a petitioner, and is not able to produce her in court, even when the petitioner is out on bail. *Hubbs v. Houser*, CV 10-1318-PHX-GMS, 2010 WL 4607399 (D. Ariz. Nov. 4, 2010) (dismissing habeas petition case naming Superior Court Judge as respondent because proper respondent was the State Attorney General); *see also Peyton v. Nord*, 78 N.M. 717, 719, 437 P.2d 716,

718 (1968) (dismissing habeas case under state law against judge because judge is not the petitioner's custodian).

Second, Judge Dodge was also not a proper respondent because he recused himself from the case involving Adams in Tribal Court. A recused judge can, under no set of facts, be considered the current custodian of a habeas petitioner. *E.g., Braden v. 30th Jud. Cir. Ct. of Kentucky,* 410 U.S. 484, 494-95 (1973) (noting "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."). Following his recusal, Judge Dodge no longer could be considered to have any role in Adams's detention, and similarly lacked any power or authority to release her from custody. Similarly, Judge Majumdar never made any rulings on Adams's detention, nor had he even heard the case at the time he was named in the petition.

Thus, the dismissal of Adams's habeas petition should alternatively be affirmed on the basis that Judges Dodge and Majumdar are judicially immune and were improper respondents to this action.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

DATED: September 27, 2021. Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: *s/ Rob Roy Smith*

Rob Roy Smith, WSBA #33798
Email: RRSmith@kilpatricktownsend.com
Rachel B. Saimons, WSBA #46553
Email: RSaimons@kilpatricktownsend.com
1420 Fifth Ave, Suite 3700
Seattle, WA 98101
Tel.: (206) 467-9600; Fax: (206) 623-6793

Attorneys for Respondent-Appellee
Chief Judge Raymond G. Dodge, Jr.

STATEMENT OF RELATED CASES

Appellee knows of no cases pending in this Court that would be deemed related under Circuit Rule 28-2.6.

DATED: September 27, 2021. Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: *s/ Rob Roy Smith*

Rob Roy Smith, WSBA #33798
Email: RRSmith@kilpatricktownsend.com
Rachel B. Saimons, WSBA #46553
Email: RSaimons@kilpatricktownsend.com
1420 Fifth Ave, Suite 3700
Seattle, WA 98101
Tel.: (206) 467-9600; Fax: (206) 623-6793

Attorneys for Defendant-Appellee
Chief Judge Raymond G. Dodge, Jr.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and is 14-point font, Times New Roman.

DATED: September 27, 2021. Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: *s/ Rob Roy Smith*

Rob Roy Smith, WSBA #33798
Email: RRSmith@kilpatricktownsend.com
Rachel B. Saimons, WSBA #46553
Email: RSaimons@kilpatricktownsend.com
1420 Fifth Ave, Suite 3700
Seattle, WA 98101
Tel.: (206) 467-9600; Fax: (206) 623-6793

Attorneys for Respondent-Appellee
Chief Judge Raymond G. Dodge, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

/s/ Kirstin E. Largent