**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| (1) KIMBERLIE GILLILAND, an individual,<br><br>Petitioner,<br><br>v.<br><br>(1) T. LUKE BARTEAUX,<br>Judge for the District Court of the Cherokee Nation, a federally recognized Indian Nation,<br>(2) SARA E. HILL,<br>Cherokee Nation Attorney General,<br>(3) RALPH KEEN II,<br>Cherokee Nation Special Prosecutor,<br><br>Respondents. | Case No.: 22-cv-257-JFH-JFJ |

**RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

The Court should dismiss this habeas petition for three independently sufficient reasons. First, Ms. Gilliland remains a fugitive who admits to avoiding the United States to avoid arrest and thus should not be allowed to call upon this court's resources until she voluntarily surrenders. Second, this Court lacks subject matter jurisdiction because Ms. Gilliland is in not custody as she lives in Poland avoiding the lawful arrest warrant of the Cherokee Nation. Third, this Court lacks subject matter jurisdiction because Ms. Gilliland has not exhausted her tribal court remedies, including, most glaringly her right to go to trial. For the reasons below, Respondents request this case be dismissed and Ms. Gilliland be encouraged to voluntarily surrender to face trial for embezzlement.

## I. Fugitive Habeas Petitions Should Be Dismissed

The parties agree that the Court may dismiss actions of fugitives. Mot. at 6; Resp. at 7. Ms. Gilliland's only defense to being dismissed is claiming she is not a fugitive, relying primarily on the fact that she left the country before the arrest warrant was issued and on an easily-distinguishable Second Circuit case: *U.S. v. Bescond*, 24 F.4th 759 (2d Cir. 2021).

### A. Ms. Gilliland Is A Fugitive Avoiding Arrest

Ms. Gilliland was allowed to await trial on her own recognizance until she failed to appear for her July 19, 2019 arraignment. *See* Bench Warrant (Aug. 12, 2019) (Pet. Ex. A-24). She was not a fugitive at that time. After her failure to appear, the Court learned she had moved from Oklahoma to Poland, and the Court required her to post a bond to ensure appearance at trial.[1] She appealed the bond and lost. She filed for tribal court habeas relief and lost. Only years later upon her continued refusal to post the bond did the Court issue an arrest warrant. Arrest Warrant (Mar. 26, 2021) (Pet. Ex. A-41).[2]

Today, Ms. Gilliland is a fugitive. Ms. Gilliland would be arrested if she returned to the Cherokee Nation. She is avoiding arrest and legal process by purposefully avoiding places she could be arrested. She explicitly refuses to return to the United States because she fears being arrested.

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[1] Although it addresses the merits, Respondents note the Court was correct to be concerned about Ms. Gilliland's plans to not appear for trial. After her counsel promised she "will return to the Cherokee Nation for trial," Ms. Gilliland moved to be tried *in absentia*. Cherokee Nation's Mot. in Opp. to Trial *In Absentia* ¶3 (Aug. 27, 2021) (Pet. at Ex. A-43).

[2] In her Response, Ms. Gilliland suggests *for the first time* that she cannot afford the recognizance bond. Gilliland Dec. ¶7 (Doc. #10-2). This argument was never raised in the voluminous briefing at the Cherokee Nation District Court and Cherokee Nation Supreme Court. Regardless, her latest argument is irrelevant to the current motion.

*See* Resp. at 13. Providing her foreign address where the Cherokee Nation may not extradite her does not alter her decision to avoid arrest and legal process.

Petitioner confusingly argues she is not a fugitive because the Cherokee Nation District Court "***NEVER*** ordered Gilliland to appear," instead allowing her to participate telephonically at some pretrial hearings. Resp. at 6. First, the Court has ordered her to appear repeatedly.[3] Second, her telephonic appearances do not change the fact that she has not posted the bond, that the District Court issued an arrest warrant for her, and that she avoids the United States to avoid arrest.

B. *Bescond* Is Inapposite

In *Bescond*, Ms. Bescond was a French citizen and resident who had never been to the United States and whose alleged conduct all took place in France. Bescond never consented to the United States federal court's jurisdiction. Bescond had no family, friends, business, or connections to the United States. The court found Bescond was not a fugitive for staying where she had always lived, where her family lived, and where her job existed. In contrast, Ms. Gilliland worked for and committed the alleged crimes while working for a Cherokee Nation entity. She surrendered herself in 2016. She left the country *after* being charged and does not return only to avoid arrest.

The *Bescond* court provides two definitions of fugitive. Both apply to Ms. Gilliland. First, Ms. Gilliland is a "traditional fugitive:"

> A traditional fugitive is "[a] person who, having committed a crime, flees from [the] jurisdiction of [the] court where [a] crime was committed or departs from his usual

[3] The Court's Bench Warrant requires officers to bring her before the Court of the Cherokee Nation." (Pet. Ex. A-24). The Court's Arrest Warrant also requires officers to "bring that person before a judge of the Cherokee Nation District Court." (Pet. Ex. A-41). Most recently, the Court noted the "Defendant has failed to appear in person before this Court for over a year . . ." May 17, 2022 Order (Pet. Ex. A-46).

> place of abode and conceals himself within the district." *Finkelstein*, 111 F.3d at 281 (alterations in original) (quoting BLACK'S LAW DICTIONARY (5th ed. 1979)).

*Bescond*, 24 F.4th at 771. Ms. Gilliland having committed a crime then fled from the jurisdiction of the court and departed from her usual place of abode. Finally, she concealed herself from the district, putting herself outside the reach of the Nation.

Second, Ms. Gilliland is a "constructive-flight fugitive:"

> a person "who allegedly committed crimes while in the United States but who w[as] outside the country—for whatever reason—when [she] learned that [her] arrest[ ] w[as] sought and who then refused to return to the United States in order to avoid prosecution." *Collazos*, 368 F.3d at 199.

*Bescond*, 24 F.4th at 772. Ms. Gilliland allegedly committed crimes while in the United States (and the Nation) and was outside the country when she learned of the arrest warrant. She has refused to return to the United States (or the Nation) *in order to avoid prosecution*.

C. Petitioner Ignores Controlling Law

The Response briefly notes *Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278 (2d Cir. 1997) (mentioned at Resp. at 8). *Finkelstein* found two defendants who "failed to comply with a court order to appear," leading to "bench warrants for the arrest" of the defendants were subject to the fugitive-disentitlement doctrine. *Id.* at 281-82. That court found the defendants were "not in custody and have not surrendered to the authorities. . . . [they] continued to evade arrest." *Id.* Ms. Gilliland's facts match.

Petitioner never addresses Respondents' caselaw. First, in *U.S. v. Birk*, 2020 WL 614739 (10th Cir. Jan. 9, 2020) (unpublished) (cited at Mot. at 6), the Tenth Circuit found a tax evader who failed to self-surrender leading to an arrest warrant was subject to the fugitive-disentitlement doctrine. *Id.* Second, in *Gonzales v. Stover*, 575 F.2d 827, 827 (10th Cir. 1978) (cited at Mot. at 6), the Tenth Circuit explains that the longstanding doctrine incentivizes "voluntary surrender" and

discourages fleeing the court's proceeding. *Id.* at 828. A fugitive cannot "in absentia [] call upon the resources of the Court for determination of [her] claims." *Id.*

Ms. Gilliland is a fugitive. She should be incentivized to voluntarily surrender before she is entitled to "call upon the resources of the Court for determination of [her] claims." *Id.*

## II. This Court Lacks Subject Matter Jurisdiction Because Ms. Gilliland Is Not In Custody.

The parties agree that Ms. Gilliland must be in custody or detained to be allowed to seek habeas relief. The Motion provided numerous cases showing fines, economic sanctions, and even cash *judgments* do not constitute custody. *See* Mot. at 8-11. Ms. Gilliland does not directly dispute or address these arguments.[4]

Instead, Ms. Gilliland argues her "detention" is not "economic" because she cannot return to the United States without facing arrest. Resp. at 13. Specifically, she is worried she "would be detained" if she returned. *Id.* First, this concern about *future* detention belies the fact that she is not currently in custody. Second, regardless, Ms. Gilliland never contests that "an arrest warrant issued for willful refusal to pay a fine does not amount to custody" in habeas actions. *Spring v. Caldwell*, 692 F.2d 994, 999 (5th Cir. 1982) (quoted at Mot. at 9).

Ms. Gilliland identifies no case supporting a pretrial habeas challenge like her situation. Unlike her situation, both cases cited are post-conviction, post-sentencing habeas challenges. *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 301 (1984) ("We are concerned here with a

[4] However, in her conclusion, she relies on *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969) (Resp. at 24) for the proposition that a party fined by a tribal court could seek federal habeas relief. But Ms. Gilliland fails to note this pre-ICRA case was overruled twenty years ago: "The reasoning of *Settler I*, however, cannot survive two subsequent decisions of the United States Supreme Court." *Moore v. Nelson*, 270 F.3d 789, 792 (9th Cir. 2001) (applying *Santa Clara Pueblo* and *Hensley*). Requiring a bond does not detain Ms. Gilliland.

petitioner who has been convicted in state court . . .");[5] *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 901 (2d Cir. 1996) ("the petitioner were 'convicted of TREASON'"). She also fails to address Respondents' argument that non-physical custody cases concern "parole, post-conviction release pending sentencing, and complete banishment from tribal reservations." Mot. at 9. If Ms. Gilliland is found guilty, she would be closer to these post-conviction cases.

Nor does Ms. Gilliland grapple with the Supreme Court's admonishment in *Hensley* (Mot. at 11) that its "decision does not open the doors of the district courts to the habeas corpus petitions of all persons released on bail or on their own recognizance." *Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cnty., California*, 411 U.S. 345, 352 (1973). There, the Court emphasized that "[w]e are concerned here with a petitioner *who has been convicted in state court* and who has apparently exhausted all available state court opportunities to have *that conviction* set aside." *Id.* (emphasis added).

Most importantly, Ms. Gilliland provides no example across the entire nation where a federal court intervened on a habeas review to consider a state or tribal pretrial recognizance bond decision or warrants to enforce those bonds. Yet she asks this Court to be the first and to "open the doors" to an entirely new category of pretrial review. The Court should decline the invitation.

Ms. Gilliland is not in custody, physical or otherwise, because she is purposefully avoiding arrest by staying outside the reach of the Cherokee Nation.

[5] *Lydon* also concerns an inapplicable exception to the exhaustion requirement that protects defendants from double jeopardy.

### III. This Court Lacks Subject Matter Jurisdiction Because Ms. Gilliland Has Not Exhausted Tribal Court Remedies.

The parties agree that exhaustion is required by Tenth Circuit precedent. Mot. at 11-13; Resp. at 16. Contrary to Ms. Gilliland's implication, the issue is not whether a 400-page record is "exhaustive," but rather whether all tribal court remedies have been exhausted. Resp.at 16. Ms. Gilliland hopes to skip trial and instead have the Court review the fairness of a future conviction.

A trial remains an unexhausted tribal court remedy. Absent trial, this Court does not know:

- what evidence of a conflict of interest would be permitted at trial. *See* Resp. at 11-12 (arguing Special Prosecutor has a conflict of interest); Resp. 20-22 (same);
- what evidence about the investigation would be permitted at trial. *See* Resp. 20-22;
- what jury instructions will be used. *See* Resp. at 17 ("The District court will instruct the jury with the erroneous law . . .");
- whether Ms. Gilliland will be found guilty;
- whether Ms. Gilliland will receive a penal sentence or just a fine.

Indeed, Ms. Gilliland admits she has not exhausted her tribal court remedies. Instead, she argues a trial would be unfair or futile. It would be neither.

First, she objects to facing "jeopardy" when it is only double jeopardy that is forbidden. Resp. at 17. Double jeopardy is a narrow exception to the exhaustion requirement. *See* Mot. at 12 n.2. That exception applies because the "unique nature of the double jeopardy right" means going to trial again would "sacrifice . . . the protections" of the right. *Lydon*, 466 U.S. at 302, 303.

Second, every "futility" case cited by Ms. Gilliland is a post-trial, post-conviction situation and/or concerns the Double Jeopardy exception.

- *Allen v. Attorney Gen. of State of Me.*, 80 F.3d 569, 572 (1st Cir. 1996) (Resp. at 17-18): "Ordinarily, a state criminal case is ripe for the ministrations of a federal habeas court only after completion of the state proceedings (that is, after the defendant has been tried, **convicted**, **sentenced**, and has pursued available direct appeals). In this instance, the

petitioner knocked on the federal court's door before his state trial began. But because of [the Double Jeopardy] exception to the ripeness rule, this case evades the bar."

- *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 302 (1984) (Resp. at 18): "We are also convinced that Lydon had exhausted his state remedies with respect to his claim that his **second trial** would violate his right not to be twice placed in jeopardy . . ."

- *Roberts v. LaVallee*, 389 U.S. 40, 41 (1967) (Resp. 19): "Petitioner was **convicted** of the crimes charged and **sentenced** to a term of 15—20 years in prison. His **conviction** was affirmed by the Appellate Division of the New York Supreme Court. The New York Court of Appeals denied leave to appeal."

- *Piercy v. Black*, 801 F.2d 1075, 1077 (8th Cir. 1986) (Resp. at 19): Piercy was **sentenced** to "five years imprisonment for burglary," then "**sentenced** to a consecutive term of one year for the escape," then **sentenced** to three to five years imprisonment for attempted burglary and to twenty months to five years for possession of burglary tools."

- *Hawkins v. Higgins*, 898 F.2d 1365, 1366 (8th Cir. 1990) (Resp. at 19): "Hawkins was **convicted** in Missouri for selling marijuana. On January 18, 1983, he was **sentenced** to a term of five years imprisonment in the Missouri Department of Corrections."

- *Grey v. Hoke*, 933 F.2d 117, 119 (2d Cir. 1991) (Resp. at 19): "Based largely on the trial testimony of Jackson and Campbell, the jury **convicted** petitioner of the weapons charge. They acquitted petitioner of second-degree murder, but **convicted** him of the lesser included charge of first degree manslaughter. Petitioner was **sentenced** on March 4, 1986, to 12½ years to 25 years on the manslaughter count, and to a concurrent term of 5 to 10 years on the weapons count."

- *Fields v. Bagley*, 275 F.3d 478, 480 (6th Cir. 2001) (Resp. at 19): "Ronald Fields filed this habeas corpus petition, pursuant to 28 U.S.C. § 2254, challenging his incarceration after **pleading "no contest"** to two counts of aggravated trafficking, Ohio Rev. Code § 2925.03, and one count of possession of criminal tools, Ohio Rev. Code § 2923.24."

- *Padavich v. Thalacker*, 162 F.3d 521, 522 (8th Cir. 1998) (Resp. at 19) "After Padavich paid the assessed taxes and penalties, an Iowa state court **convicted** Padavich of possession of marijuana with intent to deliver and failure to affix drug tax stamps. *See id.* § 124.401(1)(d); § 453B.12. The Iowa Supreme Court affirmed Padavich's **conviction** and **sentence** on direct appeal."

- *Bear v. Boone*, 173 F.3d 782, 783 (10th Cir. 1999) (Resp. at 20): "The jury acquitted Petitioner on the first-degree rape charge, but found him **guilty** of the second-degree rape charge. The court **sentenced** Defendant to ten-years imprisonment."[6]

(emphasis added). She identifies no case where the petitioner has neither been convicted before seeking relief nor is challenging potential *double* jeopardy. This is not surprising. Ms. Gilliland has an unexhausted remedy "to go to trial" and then raise the legal issue "again on appeal" or to "plead guilty" and raise the legal issue. *U. S. ex rel. Scranton v. State of N. Y.*, 532 F.2d 292 (2d Cir. 1976) (quoted in Mot. at 12-13). Ms. Gilliland never tries to distinguish *Scranton*. Her failure to go to trial means "there is no denying the fact that she has not exhausted her [tribal] remedies." 532 F.2d at 295.

Finally, if she admits the facts about what she is accused of doing, she could plead guilty. At times, Petitioner suggests her only defenses are legal ones. If so, she could plead guilty and make the legal challenges she has preserved on a proper habeas review once she was actually in custody and had actually exhausted her tribal court remedies.

## IV. This Court Cannot Properly Force The Cherokee Nation To Dismiss Charges.

Habeas relief is not used to force state or tribal courts to dismiss pending charges. Ms. Gilliland ignores Respondents' argument (Mot. at 14) that the Court should dismiss "because the remedy sought by [petitioner] in [her] petition, dismissal of state charges, was unavailable." *Tiger v. Whetsel*, 125 Fed. Appx. 971, 972 (10th Cir. 2005) (unpublished). Habeas should be directed to a custodian, requiring the detained person to be released, which is why habeas jurisprudence is almost always in a post-trial, post-conviction posture.

[6] Similarly each case in the page 19 string-cite concerns futility where a convicted individual's appeal is futile because binding appellate caselaw already decided the legal issue. None concern avoiding a first trial.

Ms. Gillibrand responds by citing the Freedman case that did not involve ICRA habeas relief. *See Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012) (applying *Ex Parte Young* to Principal Chief). Nothing in *Vann* empowers this Court to direct the Cherokee Nation to dismiss a pending criminal case midstream.

If this Court finds a new habeas-based power to order state and tribal courts to dismiss pending charges (as requested by Ms. Gilliland), state and tribal pretrial proceedings will be routinely challenged in federal court under habeas review. The Court should avoid such a novel encroachment and the disruption it would cause to the comity valued between sovereigns.

## V. Conclusion

Respondent requests the Court dismiss this matter. First Ms. Gilliland *is* a fugitive who is not entitled to call upon this Court's resources. She refuses to produce herself for arrest or post the recognizance bond.

Second, the Court does not have subject matter jurisdiction because Ms. Gilliland is in Poland, not in custody. The Cherokee Supreme Court found she was not detained in her tribal court habeas review. The United States Supreme Court has emphasized that even its broadest definition of custody still concern a "petitioner who *has been convicted* in state court" and should not be extended to "a state defendant is released on bail or on his own recognizance pending trial or pending appeal." *Hensley*, 411 U.S. at 353.

Third, the Court does not have subject matter jurisdiction because Ms. Gilliland has failed to exhaust tribal court remedies. She has not appeared for trial and has not used any post-trial procedural opportunities, unlike the defendants in the cases she cites.

Respondents ask this Court to dismiss the case under either the discretionary fugitive disentitlement doctrine or due to lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

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## CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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*/s/ R. Trent Shores*
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