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13
14 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

15
16 JESSE DUPRIS and JEREMY REED,

17 Plaintiffs,

18 v.

19 SELANHONGVA McDONALD, *et al.*,

20 Defendants.

No. CV-08-08132-PCT-PGR

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(Consolidated)

21
22 **BIA INDIVIDUAL DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**
23 **AS TO PLAINTIFFS’ INDIVIDUAL CAPACITY CLAIMS**
24 **WITH INCORPORATED MEMORANDUM IN SUPPORT**
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26
27
28

1 Defendants Hawkins, Hernandez, Lopez and Proctor (“BIA Individual Defend-
2 ants”)¹ respectfully move the Court pursuant to Fed. R. Civ. P. 56 and LRCiv 56.1 for
3 summary judgment as a matter of law on Plaintiffs’ individual capacity constitutional
4 claims (“Bivens claims”). Plaintiffs’ Bivens claims should be dismissed because the BIA
5 Individual Defendants are entitled to qualified immunity as (1) they were not personally
6 involved in the alleged violation of Plaintiffs’ constitutional rights, (2) probable cause
7 existed at the time of the arrests, and (3) their conduct did not violate a clearly established
8 constitutional right. This Motion is supported by the following Memorandum and the
9 Federal Defendants’ Statement of Material Facts (SOF), filed concurrently.

10 INTRODUCTION

11 Plaintiffs sue two tribal police officers of the White Mountain Apache Tribe
12 (WMAT) and four Bureau of Indian Affairs (BIA) agents in their individual capacities for
13 civil rights violations under Bivens v. Six Unknown Named Agents of Federal Bureau of
14 Narcotics, 403 U.S. 388 (1971), and the United States under the Federal Tort Claims Act
15 (FTCA), 28 U.S.C. §§ 1346(b)(1) and 2671, *et seq.*² Plaintiffs contend their Fourth and
16 Fifth Amendment rights were violated when they were wrongfully arrested and then
17 maliciously prosecuted in connection with a series of sexual assaults which occurred on
18 the White Mountain Apache Indian Reservation (“Reservation”) and that the actions of
19 Hawkins, Hernandez, Lopez and Proctor constituted those violations. Fourth Am. Compl.
20 (FAC) ¶¶ 25, 144, 157.

21 STANDARD OF REVIEW

22 Summary judgment is appropriate when the pleadings and supporting documents,
23 viewed in the light most favorable to the nonmoving party, show that there is no genuine
24

25 ¹ The Bivens claims against McDonald were dismissed January 26, 2011 (Doc.
26 121), and against McCoy and Youngman June 27, 2011 (Doc. 158).

27 ² The FTCA claims contend the United States is responsible for the actions of the
28 Individual Defendants and have been addressed in the United States’ Motion for
Summary Judgment, filed concurrently.

1 issue as to any material fact and that the moving party is entitled to judgment as a matter
2 of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger v. Nevada Fed.
3 Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994); Fed. R. Civ. P. 56(a) (“[T]he court
4 shall grant summary judgment if the movant shows that there is no genuine dispute as to
5 any material fact and the movant is entitled to judgment as a matter of law...”). Substantive
6 law determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
7 248 (1986); Jessinger, 24 F.3d at 1130. Under Rule 56(c), “the mere existence of some
8 alleged factual dispute between the parties will not defeat an otherwise properly support-
9 ed motion for summary judgment.” Anderson, 477 U.S. at 247-48. Rather, “[o]nly
10 disputes over facts that might affect the outcome of the suit under governing law will
11 properly preclude the entry of summary judgment.” Id. at 248.

12 The movant bears the initial burden of showing that there is an absence of evidence
13 to support the nonmoving party’s case. Celotex, 477 U.S. at 323. If the movant meets this
14 burden, Rule 56(e) requires the nonmoving party to designate specific facts showing that
15 there is a genuine issue for trial as to elements essential to the nonmoving party’s case.
16 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986);
17 Brinson v. Lind Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). The nonmoving
18 party cannot rest on the mere allegations in the pleadings to meet this burden. Fed. R. Civ.
19 P. 56(e); Celotex, 477 U.S. at 324. “Where the record taken as a whole could not lead a
20 rational trier of fact to find for the nonmoving party,” no genuine issue for trial exists.
21 Matsushita, 475 U.S. at 587 (1986).

22 As demonstrated herein, there are no genuine issues of material fact regarding either
23 the personal participation of the BIA Individual Defendants or the facts necessary to
24 determine probable cause. Accordingly, based on the record and merits of this case, this
25 Motion should be granted as a matter of law.

26 ARGUMENT

27 **I. THE BIA INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY 28 BECAUSE THEIR CONDUCT DID NOT VIOLATE A CONSTITUTIONAL RIGHT.**

1 In its January 13, 2010 Order granting the BIA Individual Defendants’ Motion to
2 Dismiss Plaintiffs’ constitutional claims—with leave to amend, the Court held that the
3 Individual Defendants were entitled to qualified immunity because the Plaintiffs “did not
4 set forth specific allegations of individual misconduct[,]” which are required to maintain a
5 Bivens action. Doc. 48, pp. 9, 11 n.8. Now, despite three additional modifications to those
6 allegations resulting in a Fourth Amended Complaint, and extensive discovery including
7 eighteen depositions and the production of over eight thousand pages of documents,
8 Plaintiffs fare no better. Plaintiffs have failed to demonstrate any conduct by Hawkins,
9 Hernandez, Lopez or Proctor which violated Plaintiffs’ constitutional rights. Therefore,
10 Plaintiffs’ Bivens claims are barred by qualified immunity.

11 The qualified immunity doctrine enunciated in Harlow v. Fitzgerald, 457 U.S. 800
12 (1982), was created to shield government officials sued in their individual capacities from
13 civil liability where “their conduct does not violate clearly established statutory or con-
14 stitutional rights of which a reasonable person would have known.” Id. at 818; Morgan v.
15 Morgensen, 465 F.3d 1041, 1044 (9th Cir.), amended, 2006 WL 3437344 (9th Cir. Nov.
16 30, 2006). A claim of qualified immunity is examined by first addressing whether the
17 facts alleged show that the official’s conduct violated a constitutional right. Brosseau v.
18 Haugen, 543 U.S. 194, 197 (2004) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). If
19 Plaintiffs’ fail to establish a violation of the Constitution, the claims must be dismissed.
20 Saucier, 533 U.S. at 201. If the allegations support a claim that federal officials violated a
21 constitutional right, the next step is to determine whether that right was “clearly establish-
22 ed” as measured by the “specific context of the case, not as a broad, general proposition.”
23 Id.; see also Skoog v. County of Clackamas, 469 F.3d 1221, 1229-30 (9th Cir. 2006). The
24 dispositive inquiry in considering the second prong is whether it would be clear to a
25 reasonable official that the conduct was unlawful in the specific situation. Saucier, 533
26 U.S. at 202 (citations omitted). Qualified immunity “‘gives ample room for mistaken
27 judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate
28 the law.’” Hunter v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (quoting Malley v.

1 Briggs, 475 U.S. 335, 343 (1986)). The Court has the discretion to address either step
2 first. Pearson v. Callahan, 129 S. Ct. 808 (2009) (adding flexibility to Saucier two-step,
3 qualified-immunity analysis).

4 **A. The BIA Individual Defendants were not personally involved in the
5 alleged violation of Plaintiffs' constitutional rights.**

6 It is axiomatic that each BIA agent here "his or her title notwithstanding, is only
7 liable for his or her own misconduct...purpose rather than knowledge is required to
8 impose Bivens liability." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Individual
9 liability "require[s] individual participation, not simply being present or being a member
10 of a team." Jones v. Williams, 297 F.3d 930, 937 (9th Cir. 2002); Bibeau v. Pac. North-
11 west Research Found., 188 F.3d 1105, 1114 (9th Cir. 1999) (claim that defendants were
12 "ultimately responsible" failed because plaintiff failed to show their personal involve-
13 ment), amended on other grounds, 208 F.3d 831 (9th Cir. 2000). In order to subject
14 Hawkins, Hernandez, Lopez or Proctor to liability, there must be evidence establishing
15 their personal involvement in the violation of Plaintiffs' clearly established constitutional
16 rights. Jones, 297 F.3d at 937 (citation omitted); see also Saucier, 533 U.S. at 201
17 (plaintiffs' claims may proceed only if "the facts alleged show the officer's conduct
18 violated a constitutional right").

19 There is, however, *no* evidence in the record that shows Hawkins, Hernandez, Lopez
20 and Proctor are personally responsible for the alleged constitutional violations. Likewise,
21 there is no evidence that they were even "integral participants" in any constitutional vio-
22 lation. Blankenhorn v. City of Orange, 485 F.3d 463, 481 n.12 (9th Cir. 2007) (even
23 though "integral participation 'does not require that each officer's actions themselves rise
24 to the level of a constitutional violation,'...it does require some fundamental involvement
25 in the conduct that allegedly caused the violation") (quoting Boyd v. Benton County, 374
26 F.3d 773, 780 (9th Cir. 2004)). Despite the facts revealed during extensive discovery
27 viewed in the light most favorable to Plaintiffs, no such "fundamental involvement"
28 related to a constitutional violation attributable to Hawkins, Hernandez, Lopez or Proctor

1 exists. The record confirms that their participation in the investigation concerning
2 Plaintiffs consisted of and was limited to the following actions:

3 Hawkins was not a member of the Task Force and did not attend the meetings. SOF
4 ¶¶ 5-6, 12. He did not arrest or question Plaintiffs, nor was he present when they were
5 arrested. Id. ¶¶ 80-83, 72. He neither made the probable cause determinations to arrest
6 Plaintiffs, nor was he present for those. Id. ¶ 84. He played no part in the decision to
7 arrest Plaintiffs and did not order the arrests. Id. ¶¶ 80, 85. He did not draft or assist in
8 drafting the tribal charges. Id. ¶ 86. He did not prosecute Plaintiffs or have any discuss-
9 ions with tribal prosecutor King about the prosecutions until the cases were dismissed. Id.
10 ¶¶ 89, 102. Neither did he pressure King or induce the prosecutions. Id. ¶¶ 95-96, 102.
11 Aside from a few preliminary interviews and other minor tasks, Hawkins did not
12 participate in the investigation. Id. ¶¶ 13-14, 87, 92.

13 Hernandez did not question Plaintiffs, arrest Dupris or was present for Dupris'
14 arrest. SOF ¶¶ 79, 81-82. She neither made the probable cause determinations to arrest
15 Plaintiffs, nor was she present for those. Id. ¶ 84. She played no part in the decision to
16 arrest Plaintiffs and did not order the arrests. Id. ¶¶ 74, 80, 85. She did not draft or assist
17 in drafting the tribal charges. Id. ¶ 86. She did not prosecute Plaintiffs or have any
18 discussions with King about them. Id. ¶¶ 88, 102. Neither did she pressure King or induce
19 the prosecutions. Id. ¶¶ 95-96, 102. Although present for Reed's arrest, she did not
20 effectuate it and merely provided back-up and transportation. Id. ¶¶ 72, 76-79. Her role
21 was limited to investigative tasks only. Id. ¶¶ 16-17, 46-49, 56, 92.

22 Lopez did not arrest or question Plaintiffs, nor was he present when they were
23 arrested. SOF ¶¶ 72, 80-83. He neither made the probable cause determinations to arrest
24 Plaintiffs, nor was he present for those. Id. ¶ 84. He played no part in the decision to
25 arrest Plaintiffs and did not order the arrests. Id. ¶¶ 80, 85. He did not draft or assist in
26 drafting the tribal charges. Id. ¶ 86. He did not prosecute Plaintiffs or have any discuss-
27 ions with King about them. Id. ¶¶ 88, 102. Neither did he pressure King or induce the
28

1 prosecutions. Id. ¶¶ 95-96, 102. His role was limited to investigative tasks only. Id. ¶¶ 16-
2 17, 31-36, 47-48, 50, 53-55, 92.

3 Proctor did not arrest or question Plaintiffs, nor was he present when they were
4 arrested. SOF ¶¶ 72, 80-83. He neither made the probable cause determinations to arrest
5 Plaintiffs, nor was he present for those. Id. ¶ 84. He played no part in the decision to
6 arrest Plaintiffs and did not order the arrests. Id. ¶¶ 80, 85. He did not draft or assist in
7 drafting the tribal charges. Id. ¶ 86. He did not prosecute Plaintiffs or have any discuss-
8 ions with King about them. Id. ¶¶ 88, 102. Neither did he pressure King or induce the
9 prosecutions. Id. ¶¶ 95-96, 102. His role was limited to investigative tasks only. Id. ¶¶ 23-
10 24, 30, 34-45, 50-51, 63, 92.

11 This evidence demonstrates these Defendants' limited personal involvement
12 surrounding Plaintiffs was entirely consistent with what is normally expected of rea-
13 sonable police officers involved in investigating sexual assaults of minors and passing on
14 that information to the Task Force decision-makers. SOF ¶¶ 15, 68-69, 92. Such
15 conduct—primarily victim and witness interviews and presenting photo line-ups—fails to
16 rise to a violation of Plaintiffs' rights, let alone a constitutional violation. In fact, this
17 Court found that “[a] routine police interview does not amount to a constitutional
18 violation.” Doc. 48, p. 8. Plaintiffs have even relied on that holding in a prior brief,
19 expounding further that “*mere ‘involvement’ with an investigation is a far cry from*
20 *participating in a constitutional violation against the Plaintiffs.*” Doc. 153, p. 10
21 (emphasis added). The BIA Individual Defendants wholeheartedly agree. Arguably, even
22 if a constitutional violation occurred, the undisputed facts demonstrate Hawkins,
23 Hernandez, Lopez and Proctor were not the cause. Without question Plaintiffs cannot
24 prove under any circumstances that Hawkins, Hernandez, Lopez or Proctor personally or
25 intentionally participated in any such constitutional violation. Furthermore, the same facts
26 show they were not “integral participants” in a “concerted” and “collaborative effort” to
27 arrest and prosecute Plaintiffs as alleged. FAC ¶¶ 34, 80, 145, 147, 158, 187. As the
28 Court has correctly discerned—and as Plaintiffs conceded—merely being a member of the

1 Task Force or involved in the investigation is not enough to impose personal liability.
2 Jones, 297 F.3d at 937. For the above-reasons alone Hawkins, Hernandez, Lopez and
3 Proctor are entitled to qualified immunity as to all Plaintiffs' Bivens claims.

4 **B. Even if the BIA Individual Defendants were personally involved the**
5 **Bivens claims fail because no constitutional violation occurred.**

6 Even if Plaintiffs could somehow show that Hawkins, Hernandez, Lopez and
7 Proctor were personally involved in the conduct challenged, summary judgment is still
8 appropriate. As previously noted, a claim of qualified immunity is examined by first ad-
9 dressing whether the facts show that the official's conduct violated a constitutional right.
10 Brosseau, 543 U.S. at 197 (citation omitted). If the facts fail to establish a violation of the
11 Constitution, the claims must be dismissed. Saucier, 533 U.S. at 201. Here the Bivens
12 claims fail because the facts demonstrate there was no constitutional violation since
13 probable cause supported the arrests and the malicious prosecution elements are not met.

14 The uncontested material facts demonstrate probable cause existed at the time of the
15 arrest. Plaintiffs' only maneuver has been to attempt to undermine the *reasonableness* of
16 that probable cause based on nothing more than *a perception of others assuming what the*
17 *BIA agents should have believed at the time of the arrest* long after the charges were dis-
18 missed and directly contrary to the record evidence and testimony of those very same BIA
19 agents. They cannot, however, challenge the applicable law that probable cause is deter-
20 mined "at the moment of arrest" based on the facts and circumstances *known to the*
21 *arresting officers at that time*. Blankenhorn, 485 F.3d at 471 (citation omitted) (emphasis
22 added). Contrary to Plaintiffs' claims, probable cause for an arrest is neither based on
23 evidence discovered after the fact, nor on *what the suspect believes* the arresting officer
24 *ideally should have known*. Slade v. Phoenix, 541 P.2d 550, 553 (1975) ("Additional
25 investigation might have avoided the mistake in this case, but this position confuses the
26 ideal with the minimum."). Rather, an arrest is lawful if there is probable cause based on
27 a reasonable conclusion "*drawn from the facts known to the arresting officer at the time*
28 *of the arrest*." Devenpeck v. Alford, 543 U.S. 146, 152 (2004) (emphasis added).

1 Plaintiffs' attempt to hold the agents to a higher standard of proof necessary for an arrest
2 must fail because probable cause "as the very name implies...deal[s] with probabilities"
3 that "are the factual and practical considerations of everyday life on which reasonable and
4 prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175
5 (1949); United States v. Diaz, 491 F.3d 1074, 1078 (9th Cir. 2007).

6 First and foremost, the evidence has already shown that Hawkins, Hernandez, Lopez
7 and Proctor neither made the probable cause determination which supported the arrests,
8 nor were they privy to that decision until afterward. SOF ¶¶ 68, 84-85. As the Task Force
9 Incident Commanders McCoy and Youngman made the probable cause determination to
10 arrest Plaintiffs based on the evidence provided to them by Case Agent Whiting. Id.
11 ¶¶ 68-69, 92. The simple fact Hawkins, Hernandez, Lopez and Proctor had no part in the
12 probable cause determination exonerates them from personal liability. Second, the prob-
13 able cause determination to arrest was not made in a vacuum or based on one single piece
14 of evidence. Id. ¶¶ 69-71. It was rather based on the totality of the evidence obtained
15 during the investigation in conjunction with the extensive law enforcement experience
16 and expertise of McCoy and Youngman. Id. ¶¶ 5, 69-71.

17 At the moment McCoy and Youngman made the probable cause determination to
18 arrest Dupris they *knew*: (a) he was positively identified by victims L.T. and L.B., and
19 witness M.M.; (b) he matched the height and weight descriptions provided by at least
20 seven victims and eyewitnesses; (c) he matched the descriptions that the suspect had
21 "crooked teeth," "acne" and very short hair, "almost bald;" (d) he lived in the "Ben Gay"
22 housing area near the trail where some of the assaults occurred; (e) he was seen by former
23 police officer Young in August 2006, at night, running down from one of the trails to his
24 vehicle, wearing dark clothing with a shirt that said "security" on it, not his White
25 Mountain Apache Housing Authority (WMAHA) security shirt, and that he changed back
26 into his WMAHA shirt; (f) he lied about his current address and was not acting like
27 someone who was just charged with multiple sexual assaults; (g) he was deemed
28 "deceptive" by the FBI polygrapher; (h) he was recently a security guard for the

1 WMAHA during the dates of some of the assaults and was now a security guard for the
2 casino; (i) he had knowledge of the trail where the sexual assaults occurred due to
3 patrolling that area and his residence's proximity to that trail; (j) he had unique
4 knowledge and training as a security guard and access to law enforcement equipment
5 used during the sexual assaults, such as handcuffs; (k) he is Irish and Sioux, not Apache,
6 lived off of the Reservation for some years, and C.D. stated her attacker did not have the
7 voice or the accent of an Apache man, was "built or muscular," had a "light complexion"
8 and was not Apache; (l) his supervisor thought he had gotten into trouble when he worked
9 for housing security for "having a young woman in his work vehicle;" (m) the U.S.
10 District Court had authorized a search of his vehicle and residence based on the inform-
11 ation provided; and (n) King had given them permission to have Dupris arrested on tribal
12 charges. SOF ¶ 70. These facts demonstrate that a reasonable officer could believe
13 probable cause existed.

14 At the moment McCoy and Youngman made the probable cause determination to
15 arrest Reed, they *knew*: (a) he was positively identified by victim B.L.; (b) he matched the
16 height and weight descriptions provided by at least seven victims and eyewitnesses; (c) he
17 matched the descriptions that the suspect had "hairy" or "bushy" eyebrows, and that he
18 was "chubby;" (d) he lived in the "Ben Gay" housing area near the trail where some of
19 the assaults occurred; (e) he was being evasive and refused to speak with the Task Force
20 or come in for an interview; (f) Dupris identified him as someone that looks "a lot" like
21 Dupris when asked who could be a suspect, and when asked why he thought Reed might
22 be a suspect, Dupris said Reed is "about the same height," "like the same build as me,"
23 and Reed "probably got bushy eyebrows;" (g) Dupris identified Reed as a possible
24 suspect to the FBI polygrapher because he is a former co-worker at WMAHA who "looks
25 a lot like" Dupris and "perhaps the victims might have mistaken" Reed with Dupris;
26 (h) he was a security guard for the WMAHA during some of the assaults and was former-
27 ly a security guard for the casino; (i) he had knowledge of the trail where the sexual
28 assaults occurred due to patrolling that area and his residence's proximity to that trail;

1 (j) he had unique knowledge and training as a security guard and access to law enforce-
2 ment equipment used during the sexual assaults, such as handcuffs; (k) he is Apache, has
3 lived on the Reservation his entire life, and victim B.L. who identified him said her
4 attacker had a “rez boy” voice indicating he was an Apache man from the Reservation;
5 (l) his supervisor said he was the only security guard who has a flashlight with a blue light
6 which matched the type of flashlight used by a suspect; (m) he admitted he was accused
7 “of picking up girls in different areas, and having two way radios;”(n) even though C.C.,
8 S.R., and B.L., were not definitive in their identification, all three of them kept focusing on him;
9 and (o) King had given them permission to have Reed arrested on tribal charges. SOF ¶ 71.

10 These facts demonstrate that a reasonable officer could believe probable cause existed.

11 The Fourth Amendment is not offended by an arrest supported by probable cause
12 because the seizure of the person is reasonable. Gasho v. United States, 39 F.3d 1420,
13 1427 (9th Cir. 1994) (probable cause is an absolute defense to false arrest). Nor does a
14 subsequent dismissal of the charges make an arrest made with probable cause unlawful.
15 Freeman v. City of Santa Ana, 68 F.3d 1180, 1189 (9th Cir. 1995). It is immaterial that
16 the person may turn out to be innocent. Boudette v. Singer, 8 F.3d 25, n.8 (9th Cir. 1993)
17 (citation omitted). In the Ninth Circuit, the test for probable cause is whether “at the
18 moment of arrest” the facts and circumstances known to the arresting officers and “of
19 which they had reasonably trustworthy information were sufficient to warrant a prudent
20 man” in believing that Plaintiffs had committed an offense. Blankenhorn, 485 F.3d at 471
21 (citation omitted). See also Devenpeck, 543 U.S. at 152. When there is no factual
22 dispute—as in this case—probable cause is a question of law for the Court. Winfrey v. City
23 of Gilbert, Slip Copy, 2006 WL 997185, at *2 (D. Ariz. Apr. 17, 2006) (citations
24 omitted). See also Gasho, 39 F.3d at 1428.

25 It must not be overlooked that the positive identifications of Plaintiffs was sufficient
26 for a finding of probable cause. Peng v. Mei Chin Penghu, 335 F.3d 970, 976-78 (9th Cir.
27 2003); Cullison v. City of Peoria, 584 P.2d 1156, 1159 (1978) (eyewitness identification
28 provided police with sufficient probable cause upon which to make arrest); Slade, 541

1 P.2d at 553 (reasonable police officer could believe the accused committed an assault
2 based on information solely from the victim without conducting an independent invest-
3 igation). See also Malley, 475 U.S. at 341 (police officer may be liable for civil damages
4 only if “no reasonable competent officer” would conclude probable cause exists); Neil v.
5 Biggers, 409 U.S. 188, 199-201 (1972) (reliability of identification determined on
6 “totality of circumstances” including whether witness viewed criminal at time of crime);
7 Torchinsky v. Siwinski, 942 F.2d 257, 262 (4th Cir. 1991) (reasonable police officer
8 could base his belief in probable cause on victim’s reliable identification). Plaintiffs
9 freely admit they were identified in the photo line-ups; they merely claim those identifica-
10 tions were flawed. Arguably, even if the eyewitness identifications were *later* discovered
11 to be flawed, such a fact is irrelevant to what McCoy and Youngman *knew at the time the*
12 *probable cause decision* to arrest Plaintiffs was made. Slade, 541 P.2d at 553. Because
13 probable cause existed for the arrest, it is also irrelevant is that the charges were
14 dismissed. Boudette, 8 F.3d at n.8.

15 Of course, the probable cause determinations to arrest Plaintiffs were *not* made
16 solely on the eyewitness identifications but rather on the *totality of the evidence* collected
17 by Whiting and relied on by McCoy, Youngman and Whiting at the time. That is the basis
18 of probable cause in this case. It is well-settled that “[l]aw enforcement officials who
19 ‘reasonably but mistakenly conclude that probable cause is present are entitled to
20 immunity.’” Villescaz v. City of Eloy, Slip Copy, 2008 WL 4277943, at *4 (D. Ariz. Sep.
21 18, 2008) (quoting Hunter, 502 U.S. at 227). Moreover, “an officer need not have
22 probable cause for every element of the offense.” Gasho, 39 F.3d at 1428 (citation
23 omitted).

24 Plaintiffs’ reliance on Grant v. City of Long Beach, 315 F.3d 1081 (9th Cir. 2002)
25 throughout this litigation is not persuasive because the probable cause there was based on
26 completely different factors: two impermissibly suggestive identifications, contradictory
27 descriptions, and a faulty canine identification. Id. at 1081. The record here, however, is
28 devoid of evidence that the identifications were impermissibly suggestive. Also, unlike

1 Grant, the facts shows the majority of eyewitness descriptions were consistent and
2 matched Plaintiffs' height and weight. More important, the record contains the additional
3 factors enumerated above which resulted in a finding of probable cause. These additional
4 factors—neither found, nor addressed in Grant, demonstrate more than an unsupported
5 suspicion. Hansen v. Garcia, Fletcher, Lund & McVean, 713 P.2d 1263 (Ariz. Ct. App.
6 1985); see also Peng, 335 F.3d at 976-78. Moreover, Grant does not resolve the qualified
7 immunity question at issue here. Because their conduct was reasonable Hawkins,
8 Hernandez, Lopez and Proctor are entitled to qualified immunity. Anderson v. Creighton,
9 483 U.S. 635, 640 (1987) (qualified immunity provides “ample room for mistaken
10 judgments” and its protection lost only when it is “sufficiently clear that a reasonable
11 official would understand that what he is doing violates that right”).

12 Regardless of the speculative hindsight available years after the arrest, Plaintiffs
13 cannot escape the fact that they were arrested based on probable cause, however mistaken
14 Plaintiffs attempt to paint that assessment now. Key v. State, 2010 WL 5060706, *5
15 (Ariz. Ct. App. Dec. 2, 2010) (“probable cause is judged by information known to the
16 defendants at the initiation of proceedings, not a their conclusion”). The above evidence
17 was the basis for a reasonable probable cause determination at the time of the arrest and
18 as a result, is a complete bar to all of Plaintiffs' claims. Devenpeck, 543 U.S. at 152.

19 Furthermore, Plaintiffs cannot maintain a malicious prosecution claim under the
20 Fifth Amendment's right to substantive due process. Albright v. Oliver, 510 U.S. 266,
21 271, 275 (1994). Although the Ninth Circuit recognizes federal malicious prosecution
22 claims premised upon the *Fourth* Amendment, here those claims must fail because, as
23 demonstrated, probable cause existed. Probable cause is also a complete defense to
24 malicious prosecution. Mosqueda v. County of Los Angeles, 171 Fed. App'x 16, 17 (9th
25 Cir. 2006). It is well-settled in Arizona—where the Ninth Circuit requires Plaintiffs to
26 meet the necessary malicious prosecution elements—that “the existence of probable
27 cause...is a complete defense to malicious prosecution without regard to the existence of
28 malice.” Cullison, 584 P.2d at 1160.

1 Notwithstanding the existence of probable cause, Plaintiffs have also not satisfied
2 the required elements for malicious prosecution in the Bivens context. In order to succeed
3 on a claim for malicious prosecution the Plaintiffs must show: (i) tortious conduct under
4 the elements of state law, and (ii) intent to deprive the plaintiff of a constitutional right.
5 Sundaram v. County of Santa Barbara, 39 Fed. App'x 533, 535 (9th Cir. 2002) (citing
6 Poppell v. City of San Diego, 149 F.3d 951, 961 (9th Cir. 1998)). Plaintiffs ““must show
7 that defendants prosecuted [them] with malice and without probable cause, and that they
8 did so for the purpose of denying [them] equal protection or another specific con-
9 stitutional right.”” Awadby v. City of Adelanto, 368 F.3d 1061, 1066 (9th Cir. 2004)
10 (quoting Freeman, 68 F.3d at 1189). The “intent” requirement, however, does not apply to
11 the underlying Fourth Amendment right that protects against prosecutions without
12 probable cause, but rather it applies to any other constitutional rights that the prosecution
13 was purposely initiated to violate. Id. at 1066, 1069. For a malicious prosecution claim to
14 be actionable against these four agents in their individual capacity, Plaintiffs must not
15 only prove the common-law elements of the tort but must also show an additional
16 deprivation that implicates federally guaranteed rights. Cline v. Brusett, 661 F.2d 108,
17 112 (9th Cir. 1981) (citing Paskaly v. Seale, 506 F.2d 1209 (9th Cir. 1974)); see also
18 Awadby, 368 F.3d at 1066, 1069. In Arizona “the elements of malicious prosecution are:
19 (1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) *with defendants as*
20 *prosecutors*, (4) *actuated by malice*, (5) *without probable cause*, and (6) causing
21 damages.” Slade, 541 P.2d at 552 (emphasis added).

22 First, there is no evidence the prosecutions were initiated to deny Plaintiffs equal
23 protection or to violate a specific constitutional right. Awadby, 368 F.3d at 1066.
24 Plaintiffs similarly failed to prove any intent to deprive them of a constitutional right.
25 Sundaram, 39 Fed. App'x at 535. Second, Plaintiffs failed to prove Hawkins, Hernandez,
26 Lopez and Proctor prosecuted them. They had nothing to do with drafting the charges or
27 advancing the prosecutions. SOF ¶¶ 84-89, 95-96, 99, 102, 106, 108. Therefore, the
28 prosecutions were solely under the control of the prosecutor and “out of [their] hands.”

1 Walsh v. Eberlein, 560 P.2d 1249, 1252-53 (Ariz. Ct. App. 1976) (“the instigator of a
2 proceeding loses control over the case once the prosecution has been initiated”). Finally,
3 the evidence fails to prove that the prosecutions were actuated by malice and without
4 probable cause. Because probable cause existed at the time and Plaintiffs have failed to
5 meet the other required elements, their malicious prosecution claims should be dismissed.
6 Freeman, 68 F.3d at 1189. Accordingly, Hawkins, Hernandez, Lopez and Proctor are
7 entitled to qualified immunity and Plaintiffs’ claims against them should be dismissed.

8 **II. THE BIA INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY**
9 **BECAUSE THEIR CONDUCT DID NOT VIOLATE CLEARLY ESTABLISHED LAW.**

10 Hawkins, Hernandez, Lopez and Proctor are entitled to immunity from this suit
11 even if Plaintiffs’ rights were violated so long as those rights were not “clearly
12 established” at the time of the incident or if reasonable officials in their position could
13 disagree as to whether their conduct would violate Plaintiffs’ rights. Mitchell v. Forsyth,
14 472 U.S. 511, 535 & n.12 (1985) (emphasis added). Qualified immunity provides “‘ample
15 room for mistaken judgments.’” Hunter, 502 U.S. at 229 (citation omitted). “This
16 accommodation for reasonable error exists because ‘officials should not err always on the
17 side of caution’ because they fear being sued.” Id. (quoting Davis v. Scherer, 468 U.S.
18 183, 196 (1984)). The protection of qualified immunity is lost only where “[t]he contours
19 of the [right alleged to have been violated are] *sufficiently clear* that a reasonable official
20 would understand that what he is doing violates that right.” Anderson, 483 U.S. at 640
21 (emphasis added).

22 Were it determined that Hawkins, Hernandez, Lopez and Proctor violated a con-
23 stitutional right of the Plaintiffs, the next step would be to determine whether that right
24 was “clearly established,” as measured in the “specific context of the case, not as a broad,
25 general proposition.” Saucier, 533 U.S. at 201; see also Skoog, 469 F.3d at 1229-30. A
26 right is “clearly established” if “it would be clear to a reasonable officer that his conduct
27 was unlawful in the situation he confronted.” Saucier, 533 U.S. at 202. The right alleged-
28 ly violated must be defined at “the appropriate level of specificity” before a court can

1 determine if it was clearly established. Wilson v. Layne, 526 U.S. 603, 615 (1999). In
2 other words, prior to imposing liability upon these agents, Plaintiffs were required to
3 show that the agents had “fair warning” that their actions were unlawful. San Jose Charter
4 of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 975 (9th Cir. 2005)
5 (citing Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

6 The totality of evidence in this case fails to prove how “it would be clear to a reason-
7 able officer” that the conduct of Hawkins, Hernandez, Lopez and Proctor was unlawful in
8 the situation they confronted. Saucier, 533 U.S. at 202. In fact, their actions were reason-
9 able under the circumstances. Graham, 490 U.S. at 387; see also Malley, 475 U.S. at 341.
10 The evidence is clear they did not make the probable cause determinations, they did not
11 make the decision to arrest Plaintiffs, they did not pressure or induce the prosecutions,
12 they did not draft the charges, they did not effectuate the arrests, they did not order the
13 tribal officers to make the arrests, and apart from Hernandez providing back-up for
14 Reed’s arrest, they were not present at the arrests.

15 Furthermore, there are no facts that indicate Hawkins, Hernandez, Lopez or Proctor
16 had “fair warning” their actions were unlawful under the circumstances. Hells Angels
17 Motorcycle Club, 402 F.3d at 975. Qualified immunity applies if a reasonable govern-
18 ment officer could have believed the acts to be lawful in light of clearly established law
19 and the information possessed at the time. Anderson, 483 U.S. at 641; Peng, 335 F.3d at
20 980. Even assuming probable cause did not exist, based on the facts there was at least
21 “arguable probable cause” in the situation these agents faced. Under the theory of
22 arguable probable cause a police officer is immune from liability for an unlawful arrest
23 without probable cause if the circumstances known to the officer at the time support a
24 reasonable belief that probable cause existed. Anderson, 483 U.S. at 641; Burrell v.
25 McIlroy, 464 F.3d 853, 857 (9th Cir. 2006); see also Hunter, 502 U.S. at 227. Plaintiffs’
26 best case scenario fails because of this and there is no evidence to the contrary. Likewise,
27 there is no evidence that it would be sufficiently clear to a reasonable officer that con-
28 ducting victim/witness interviews and showing photo line-ups would violate Plaintiffs’

1 constitutional rights. Anderson, 483 U.S. at 640; Peng, 335 F.3d at 980. Instead, the
2 evidence fully supports the reasonableness of the BIA agents' actions and in the very
3 least, arguable probable cause. For the reasons stated above Hawkins, Hernandez, Lopez
4 or Proctor are entitled to qualified immunity as to all Plaintiffs Bivens claims. Accord-
5 ingly, Plaintiffs' Bivens claims against them should be dismissed as a matter of law.

6 **III. THE PROSECUTOR'S JUDGMENT BARS PLAINTIFFS' FIFTH AMENDMENT CLAIMS.**

7 Hawkins, Hernandez, Lopez and Proctor are further shielded from any personal
8 liability on the malicious prosecution claims because of the prosecutor's independent
9 judgment to screen the cases and decision to prosecute Plaintiffs. Newman v. County of
10 Orange, 457 F.3d 991, 993 (9th Cir. 2006) (“[f]iling a criminal complaint immunizes
11 investigating officers...from damages suffered thereafter because it is presumed that the
12 prosecutor filing the complaint exercised independent judgment in determining that
13 probable cause for an accused's arrest exists at that time”) (quoting Smiddy v. Varney,
14 665 F.2d 261, 266 (9th Cir. 1981)). See also Hartman v. Moore, 547 U.S. 250, 263 (2006)
15 (recognizing longstanding presumption of regularity accorded prosecutorial decisions that
16 prosecutor had legitimate grounds for action taken is not lightly discarded); Cameron v.
17 Gila County, Slip Copy, 2011 WL 2115657, *5 (D. Ariz. May 26, 2011) (malicious
18 prosecution will not lie where prosecutor left to judge propriety of proceeding with
19 charge and acted on own initiative) (citing Walsh, 560 P.2d at 1252). Plaintiffs never
20 rebutted the prosecutor's independent judgment. Sloman v. Tadlock, 21 F.3d 1462, 1474
21 (9th Cir. 1994).

22 Before arraignment, the prosecutor modified Reed's charges and tried to modify
23 Dupris' charges on her own volition based on her judgment. SOF ¶¶ 97-98. Also, the
24 prosecutor was steadfast that she was not pressured by anyone, let alone the BIA, to
25 prosecute Plaintiffs. Id. ¶¶ 88-89, 95-96, 102. Certainly—even looking at the evidence in
26 the light most favorable to Plaintiffs—there is *not a shred of evidence* that Hawkins,
27 Hernandez, Lopez or Proctor were responsible for her decisions or induced or pressured
28 her to prosecute. Id. The prosecutor never communicated with those four agents prior to

1 or during the prosecutions. Id. Moreover, at the arraignments it was the tribal court that
 2 determined Plaintiffs should continue to be held in jail. Id. ¶¶ 93, 99, 103-104.

3 The prosecutor's exercise of independent judgment is a superseding cause that
 4 breaks the chain of causation. Myers v. City of Hermosa Beach, 299 Fed. App'x 744, 746
 5 (9th Cir. 2008) (citations omitted); Alvarez-Machain v. United States, 331 F.3d 604, 636
 6 (9th Cir. 2003) (police officers "insulated from liability where there are independent,
 7 intervening acts of other decision-makers...such as prosecutors"), rev'd on other grounds
 8 sub nom., Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). Furthermore, the prosecutions
 9 were solely under the prosecutor's control. SOF ¶¶ 95-98, 105-109; Walsh, 560 P.2d at
 10 1252-53. Accordingly, the prosecutor's independent judgment further shields these BIA
 11 agents from liability and the malicious prosecution claims against them should be
 12 dismissed.

13 CONCLUSION

14 As demonstrated, there are no genuine issues of material fact regarding either the
 15 personal participation of Hawkins, Hernandez, Lopez and Proctor or the facts necessary
 16 to determine probable cause. The facts necessary to establish liability for these agents, in
 17 the light most favorable to Plaintiffs, simply do not exist. Their conduct did not violate a
 18 clearly established constitutional right and no reasonable officer would think that it did.
 19 Because there are no genuine material facts which prove misconduct on their part as
 20 required for Bivens liability, Hawkins, Hernandez, Lopez and Proctor are entitled to
 21 qualified immunity. For these and the other foregoing reasons, the BIA Individual
 22 Defendants respectfully request the Court grant summary judgment in their favor and
 23 dismiss Plaintiffs' Bivens claims pursuant to Fed. R. Civ. P. 56.

24 Dated: August 26, 2011

Respectfully submitted,

25 */s/James G. Bartolotto*
 26 JAMES G. BARTOLOTTO
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 Torts Branch, Civil Division
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 27 *Attorneys for the BIA Individual Defendants*
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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2011, a true and correct copy of the foregoing **BIA INDIVIDUAL DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS’ INDIVIDUAL CAPACITY CLAIMS WITH INCORPORATED MEMORANDUM IN SUPPORT** was filed with this Court electronically and served by mail on any party to this action unable to accept electronic filing. Notice of this filing will be sent by electronic mail (e-mail) to Plaintiffs’ counsel and all parties by operation of the Court’s electronic filing system (ECF) or by mail to any party unable to accept electronic filing. Parties may access this filing through the Court’s CM/ECF System. This Motion is filed electronically pursuant to LRCiv 5.5, and comports with LRCiv 7.1, LRCiv 7.2 and LRCiv 56.1.

/s/James G. Bartolotto
JAMES G. BARTOLOTTO
Trial Attorney