

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

BOBBI DARNELL,
Petitioner,

vs.

JOHN MERCHANT, SHERIFF
Brown County, Kansas

And

**KICKAPOO TRIBE IN KANSAS,
KICKAPOO RESERVATION,
HORTON, KANSAS**
Respondents

**PETITION FOR WRIT OF HABEAS CORPUS
FOR RELIEF FROM A TRIBAL COURT DETENTION AND CONVICTION
PURSUANT TO 25 U.S.C. SECTION 1303
(URGENT)**

Petitioner Bobbi Darnell, by her attorney Napoleon S. Crews of the Crews Law Firm, petitions this court for a Writ of Habeas Corpus pursuant to 25 U.S.C. Sections 1302 and 1303.

The writ should be based on the following events:

FACTUAL AND PROCEDURAL BACKGROUND

1. Petitioner Bobbi Darnell (Ms. Darnell) is an enrolled member of the Kickapoo Tribe in Kansas, a federally recognized Indian tribe in the State of Kansas.
2. At all times relevant, Ms. Darnell, a lifelong resident of the Kickapoo Reservation in Kansas, resided with her husband and two children in a home they own within the boundaries of the Kickapoo Tribe Reservation located in Brown County, near Horton, Kansas.

3. On Friday, March 31, 2017, Ms. Darnell was arrested by the Chief of the Kickapoo Police under the direction of the Judge of the Kickapoo District Court and taken to the Brown County Jail.

4. Ms. Darnell's arrest was based upon the following chronology of events, which will be detailed later in this petition:

a. Ms. Darnell was a trusted Kickapoo Tribal Council member of more than 20 years of service, and on March 9, 2017 she was convicted by a jury, not of her peers, of Fraudulent Handling of Recordable Instruments, Tampering with Records, and Misusing Public Money, arising out of two separate criminal cases filed against her by the Kickapoo Special Prosecutor.

b. In brief summary, each criminal case was based on a drawdown of money from the tribe's burial fund that went into the tribal checking account to pay tribal bills. None of this money inured to the benefit of any private person, but went into the checking account to pay the Tribe's obligations, including payroll.

c. After the jury was discharged, the Kickapoo District Court Judge set a cash bond in the amount of \$2,500, which Ms. Darnell was required to pay or in the alternative, go to jail until sentencing on April 24, 2017.

d. Ms. Darnell did not have the bond amount to pay, but a family member was willing to pay it on her behalf.

e. When the family member arrived with the bond money and handed it to the district court clerk, Ms. Darnell was told by the tribal police, at the direction of the Kickapoo District Court Judge, that she was free to leave.

f. Ms. Darnell promptly left the building, accompanied by this writer and her husband.

g. No order was ever issued by the judge or provided to Ms. Darnell, containing a statement of the bond conditions of release, nor was she informed of the penalties applicable to violations of any conditions of release. (*Please see Exhibit A – Sworn Affidavit.*)

5. At the time of her arrest, Ms. Darnell was told by the Kickapoo Chief of Police that the Kickapoo judge had signed a warrant for her arrest, yet no warrant was ever produced and shown to her.

6. The judge's warrant for her arrest was based on the Special Prosecutor's Motion to Revoke and Forfeit Bond and an attached affidavit of a witness who testified at Ms. Darnell's trial. This witness, Carla Cavin (Cavin), is also a member of the Kickapoo Tribal Council.

7. The Cavin affidavit set forth that on March 30, 2017, Ms. Darnell drove her automobile on Kansas Highway 20 at 75 miles-per-hour, preventing Cavin from passing Ms. Darnell's automobile, and then Ms. Darnell tailgated the Cavin automobile to the Kickapoo Reservation boundary. (*Please see Exhibit B – Affidavit of Carla Cavin.*)

8. Ms. Darnell states that she was driving on Kansas Highway 20 on March 30, 2017 but did not see Cavin driving on that road. She did not drive 75 miles per hour in order to keep anyone from passing her automobile, nor did she tailgate anyone's automobile to the boundary of the Kickapoo Reservation. (*Please see Exhibit C - See Sworn Affidavit 2.*) The stretch of highway in question is about 4 miles long and hilly.

9. Unfortunately, the Cavin affidavit does not state the time that this event allegedly occurred and makes it clear that the alleged event occurred off of the Kickapoo Reservation on a State of Kansas highway in Brown County.

10. For some reason, the alleged Cavin incident was never reported to the Brown County Sheriff or the Kansas Highway Patrol and neither agency has contacted Ms. Darnell to investigate the truth of the Cavin allegations.

11. Ms. Darnell currently sits in the Brown County Jail based on the mere allegations of the Cavin affidavit.

12. On April 7, 2017, this writer filed an Emergency Request For Release Of Defendant (Ms. Darnell) Or Further Hearing, with the Supreme Court Of The Kickapoo Tribe In Kansas, and that request has been frustrated by official inaction as has been pattern of the Kickapoo Supreme Court. *(Please see Exhibit K)*.

I. THE KICKAPOO TRIBE DISTRICT COURT DEPRIVED MS. DARNELL OF HER LIBERTY WITHOUT DUE PROCESS OF LAW AS REQUIRED UNDER THE INDIAN CIVIL RIGHTS ACT (ICRA) 25 U.S.C. SECTION 1302(8).

Concise Statement of Facts in support of Claim I

There is no question that the Cavin incident as alleged, occurred off of the Kickapoo Tribe's reservation. (Exhibit B). Article I of the Constitution And By-Laws Of The Kickapoo Tribe Of Indians Of The Kickapoo Reservation In Kansas provides that jurisdiction of the Kickapoo Tribe shall extend to the territory within the confines of the Kickapoo Reservation as defined under the Treaty of May 18, 1854, and to such other lands as may be hereafter added thereto under any law of the United States. *(Please see Exhibit D)*.

The Kickapoo District Court judge has no jurisdiction to incarcerate a member of the tribe upon allegations of conduct that occurred off of the Kickapoo reservation. *See Kelsey v. Pope, No. 14-1457 (6th Cir. 2016)*. In the Kelsey case, the district court granted a writ of habeas corpus for the very reason that the conduct occurred off of the reservation. It is also suggestive that the alleged Cavin off-reservation event was never reported to or investigated by the appropriate county or State of Kansas law enforcement authorities. It is also clear that the Kickapoo District Court Judge did not issue an appropriate order upon release of Ms. Darnell, which contained a statement of the conditions imposed on her release on bond, nor did the judge inform her of the penalties applicable to violations of the conditions of her release as required by Title 11, Section 701 of the Kickapoo Nation Tribal Code. *(Please see Exhibit E)*.

As a result of the above violations, Ms. Darnell was deprived of a fair hearing and of her liberty without due process of law. Ms. Darnell is being illegally detained in the Brown County Jail facility, and her stay is being paid for by federal funds provided to the Kickapoo Tribe for operation of its judicial system. Lastly, the Kickapoo Supreme Court has compounded this deprivation by its inaction.

II. HABEAS CORPUS ALLOWS FOR A REVIEW OF THE FACTUAL AND LEGAL SUPPORT FOR DETENTION, AND IN DOING SO, THE JUDGE MAY EXAMINE WHETHER EARLIER PROCEEDINGS COMPORTED WITH DUE PROCESS. See Brandon L. Garrett, Habeas Corpus and Due Process, 98 Cornell L. Rev. 47, 55 (2012).

Concise Statement of Facts in support of Claim II

Ms. Darnell's case was tried to a jury on March 8 and 9, 2017, and the following due process violations occurred:

JURY SELECTION PROCESS

Title VI, Section 612 provides that the prospective jurors for the trial or an action shall be drawn by the court clerk, in open court in the presence of a judge, by lot either by wheel or by numbering the prospective juror cards, and then drawing numbers from a pool containing a numbered marker for each prospective juror available to be called, or by some similar form of random drawing approved by the Court. (*Please see Exhibit F*).

In Ms. Darnell's case, the prospective jurors' names were typed on paper and placed into a glass bowl. To the amazement of the entire courtroom, the Kickapoo District Court Judge then sorted through the papers in the glass bowl and called jurors apparently of his choosing. At least once and maybe twice, the judge pulled a name out of the bowl and set it aside on the bench.

As a result of the judge's non-random selection process, the prospective jury became packed with individuals who were either employed in tribal enterprises or who were non-Indians who did not live on the reservation. In spite of Ms. Darnell's exercise of 3 peremptory challenges, the final jury consisted of 3 tribal members with close ties to the Kickapoo Tribal Council, including one who is the next-door neighbor of Chairman Lester Randall (Chairman Randall), and 3 non-Indians whose only tie to the Kickapoo Reservation consisted of employment at the tribe's Golden Eagle Casino. The prosecutor used only one peremptory challenge after Ms. Darnell had exhausted all of hers, in order to remove the only person with no ties to tribal employment, and in the opinion of this writer, the only person who might have been impartial.

When this writer objected to proceeding with the non-random selected jury and detailed the judge's actions in the tainted selection process, which the entire courtroom observed, the judge simply replied "denied." The judge gave no explanation whatsoever for his actions in selecting the jury. It should also be noted that most of the Kickapoo Tribal Council sat prominently present in the courtroom or stood in the hallway during the entire Voir Dire examination.

PROSPECTIVE JURORS' FEAR EXPRESSED DURING VOIR DIRE

To a person, each prospective juror stated that he or she could not be impartial because of fear for his or her job. However, under direct, spirited, and prolonged questioning by the judge, each prospective juror finally relented and stated that perhaps he or she could be impartial after all.

Prospective jurors were also asked about 2 letters written by Chairman Randall and sent to each tribal member at their home address. The letters detailed the criminal allegations filed against Ms. Darnell, the circumstances of the alleged crimes, inferred that Ms. Darnell was indeed guilty, and invited the tribal members to attend her trial. *(Please see Exhibits G and H).*

TRIBAL COUNCIL PRESENT IN JURY ROOM WITH JURORS

Although the judge advised the jury and those present in courtroom that the jury was not to have any inappropriate contact, the Chairman Randall and Vice Chairman Thomas were both observed coming out of the jury room when jury members were inside.

When this writer made a record of the Chairman and Vice Chairman's inappropriate contact, the judge did not specifically ask the jury members about the presence of the Chairman and Vice Chairman in the jury room with them. The judge proceeded to ask if anyone tried to have an inappropriate conversation with the jury members, to which each dutifully replied "no." The matter was dropped.

Further, during every recess of the trial, tribal council members stood in the hallway within sight of the jurors as they left the courtroom and when they returned.

TRIBAL ATTORNEY MOUTHING ANSWERS TO A PROSECUTION WITNESS

The Kickapoo tribal attorney second-chaired the trial with the Kickapoo Special Prosecutor. When this writer was in the process of cross examining a particular prosecution witness, the tribal attorney was observed by others in the courtroom mouthing to the witness to "just say no" to several of the questions this writer asked.

TRIBAL CHAIRMAN THREAT THAT HE WOULD MAKE MS. DARNELL PAY

In 2013, the Kickapoo tribal accountant reported to Ms. Darnell, tribal treasurer, that there appeared to be inappropriate handling of certain funds in the tribal trading post. Ms. Darnell reported the matter to the then Kickapoo Tribal Council, and the council reported the matter to the FBI and the BIA. An investigation of Lester Randall (He was not the Chairman then.) and another employee. Both were apparently cleared of any wrongdoing and it was suggested that the tribe establish rules for the handling of certain trading post transactions.

When Lester Randall became tribal chairman in 2014, he advised Ms. Darnell that "he would make her pay" for her participation in the actions that led to the FBI and

BIA investigations. Ms. Darnell testified at trial regarding the 2014 threat made by Chairman Randall, and although he was listed as a witness for the prosecution in Ms. Darnell's trial, he never took the stand to deny that he had made the threat to Ms. Darnell.

In addition to causing the filing of two criminal actions against Ms. Darnell, Chairman Randall first filed Pro Se, civil action number CIV-15-29 in the name of the Kickapoo Tribe, against Ms. Darnell in her capacity as former tribal treasurer. The suit alleged that "As Treasurer and Chief Financial Officer of the Kickapoo Tribe", "she violated the Budget Ordinance" in that "She failed to exercise reasonable and ordinary care to insure that appropriations were not exceeded." (*Please see Exhibit I*). The gist of the civil lawsuit is that the budget adopted by the Kickapoo Tribal Council for 2014 was exceeded in certain areas and as secretary, she was somehow responsible.

IMPROPER JURY INSTRUCTIONS

This writer objected to certain jury instructions proposed by the Kickapoo Prosecutor. The basis for the objections was that the proposed instructions did not properly and fairly state the law to be applied in Ms. Darnell's case or the facts. (*Please see Exhibit J*). The judge overruled this writer's objections to the elements instructions, and allowed other improper instruction as detailed in Exhibit J.

MS. DARNELL ENTITLED TO SOVEREIGN IMMUNITY

The trial testimony showed that at all times pertinent to the crimes alleged in the Kickapoo criminal complaint, Ms. Darnell was the duly elected treasurer of the Kickapoo Tribal Council and was acting in that capacity. Yet the Kickapoo District Court

Judge would not recognize Ms. Darnell's sovereign immunity and in addition denied the motion for a directed verdict.

It is a settled axiom of federal law that Indian tribes, like state and federal governments, are sovereign entities that cannot be sued absent their consent or an unambiguous abrogation of their immunity. See, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Tamiami Partners v. Miccosuke Tribe*, 63 F.3d 1030 (11th Cir. 1995); *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991). It is equally well settled that tribal officials sued in their official capacities also enjoy the same immunity from suit. *Santa Clara Pueblo* 436 U.S. at 58.

III. A FEDERAL COURT MAY NOT REQUIRE EXHAUSTION OF REMEDIES IN THE TRIBAL COURT UNDER CERTAIN CIRCUMSTANCES. See e.g., *Wounded Knee v. Andrea*, 416 F. Supp. 1236, 1239 (D.S.D. 1976).

Concise Statement of Facts in support of Claim III

The exhaustion rule is not required by the Indian Civil Rights Act, but is based on comity and is generally not a jurisdictional prerequisite to review. See *Burell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006).

Federal courts may not require exhaustion of remedies where an assertion of tribal jurisdiction is motivated by a desire to harass, is conducted in bad faith, is patently violative of express jurisdictional prohibitions, where exhaustion would be futile because of lack of opportunity to challenge the court's jurisdiction, if resort to remedies provided by the tribe would be futile. See *LaVallie v. Turtle Mountain Tribal Court*, No. 4-06-Cv-9, 2006 WL 1069704, at *2 (D.N.D. Apr. 18, 2006) (quoting *Nat'l Farmers Union Ins.*, 471 U.S. at 857 n.21).

a. Desire to Harass and Bad Faith – It seems clear, based on Chairman Randall’s threat to make Ms. Darnell pay, that the Pro Se civil action and two criminal actions filed against her are intended to harass her and were filed in bad faith. Moreover, the actions on their face describe events that allegedly occurred while Ms. Darnell served as the tribal treasurer. To further make the point of harassment and bad faith, after Ms. Darnell’s convictions were announced and while the judge was considering the prosecution’s request to banish Ms. Darnell from the reservation as a sentencing consideration, Chairman Randall was observed standing at the back of the courtroom laughing quietly.

b. Violation of Jurisdictional Requirements – Ms. Darnell’s incarceration in the Brown County Jail for alleged off reservation conduct violates the Kickapoo Constitution and the Treaty of 1854.

c. Opportunity to Challenge Jurisdiction and Remedies Provided By the Tribe – This writer is convinced that Ms. Darnell will not be accorded fair treatment in the Kickapoo District Court. For the last three or four years, there has been no Kickapoo Supreme Court of which to speak. Appeals filed by this writer and others were never acknowledged or acted upon by the Supreme Court until recently. The newly gathered Kickapoo Supreme includes one justice who represented Chairman Randall in a civil, domestic matter filed in the Kickapoo District Court before the very judge who presided over Ms. Darnell’s trial. The Kickapoo Supreme Court, with Chairman Randall’s previous attorney on board, denied this writer’s motion to dismiss the civil action that Randall filed Pro Se against Ms. Darnell based on sovereign immunity. This writer filed a motion

to reconsider with the Kickapoo Supreme Court months ago, citing the appearance of impropriety due to the participation of Chairman Randall's previous council in the decision, and the motion has still not been acted upon.

d. The Emergency Request For Release Of Defendant (Ms. Darnell) Or Further Hearing filed with the Supreme Court Of The Kickapoo Tribe In Kansas has apparently suffered the same fate as the other appeals that have been made to the highest court, in that the request has been frustrated by official inaction. In this instance, no more can be demanded, and the exhaustion requirement is satisfied. *See Wounded Knee*, 416 F. Supp. At 1239 (citations omitted); *see also Selam v. Warm Springs Tribal Corr. Facility*, 134 F. 3d 948, 954 (9th Cir. 1998); *St. Marks v. Chippewa-Cree Tribe*, 545 F.2d 1188, 1189-90 (9th Cir. 1976); *Cobell v. Cobell*, 503 F 2d 790, 793-794 (9th Cir. 1974).

IV. MS. DARNELL'S RIGHTS AS A UNITED STATES CITIZEN ARE VIOLATED BY CONTINUED INCARCERATION IN A PUBLIC JAIL FACILITY PURSUANT TO A CONTRACT PAID FOR BY FEDERAL FUNDS WHEN THE DETENTION IS ILLEGAL AND CONTRARY TO THE UNITED STATES CONSTITUTION AND THE INDIAN CIVIL RIGHTS ACT.

Ms. Darnell is a U.S. citizen. She is entitled to constitutional protections afforded to all Americans. Her current incarceration, whether or not in violation of the ICRA violates her right to due process and her right to a fair hearing. Ms. Darnell is being illegally detained by the Kickapoo Tribe and the Brown County, Kansas Sheriff, and since the contract the Indian Tribe has with the Brown County Jail is paid for by the federal government, the detention is required to be lawful and not in violation of the United States Constitution.

CONCLUSION

WHEREFORE, Ms. Darnell respectfully requests that this Court: (1) issue a writ of habeas corpus commanding her immediate release from the Brown County, Kansas jail; (2) overturn her convictions in Kickapoo criminal cases numbered CRM016-11 and CRM016-23; stay all further court action against her in the foregoing criminal and civil cases; and, grant any other, further relief that this Court deems just and proper.

Respectfully submitted,

CREWS LAW FIRM

/s/ Napoleon S. Crews

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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, April 13, 2017, a true and correct copy of the foregoing **DOCUMENT** was electronically sent to the following recipient:

John Merchant
Brown County Sheriff
709 Utah Street
Hiawatha, Kansas 66434
785-742-7125
John.Merchant@brownso.org

I hereby certify that on Friday, April 14, 2017, a true and correct copy of the foregoing **DOCUMENT** was mailed to the following recipient:

Lester Randall, Chairman
Kickapoo Tribal in Kansas
824 111th Drive
Horton, Kansas 66439

CREWS LAW FIRM

/s/ Napoleon S. Crews
Napoleon S. Crews, Esq.