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

KIMBERLIE GILLILAND, **Petitioner,** **vs.** **(1) T. LUKE BARTEAUX,** **Judge for the District Court of the Cherokee Nation, a federally recognized Indian Nation,** **(2) SARA E. HILL,** **Cherokee Nation Attorney General,** **(3) RALPH KEEN II,** **Cherokee Nation Special Prosecutor,** **Respondents.**	**Case No. 22-cv-257-JFH-JHJ**

OBJECTION TO RESPONDENTS' MOTION TO DISMISS

Respectfully submitted,

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OBJECTION TO RESPONDENTS' MOTION TO DISMISS

In this case, Kimberlie Gilliland, a Cherokee Nation citizen seeks Habeas review of the Cherokee Nation courts' unconstitutional detention orders resulting from imposing a $10,000 cash bond after she challenged six constitutional violations of the criminal complaint against her. The Cherokee Nation courts denied relief from any of the six constitutional violations. Gilliland is charged with embezzlement for expending funds of the Cherokee Nation Education Corporation, which changed its name to the Cherokee Nation Foundation ("CNF"). However, Gilliland expended CNF Funds with the consent, knowledge, and authority of the CNF Board of the Directors and within her delegated authority as Executive Director for normal business travel, severance pay, advanced education, and award of scholarships to Cherokee students. Gilliland did not take any money or property from the Foundation other than normal expenses of doing business authorized by the Board.

In *Piasecki v. Court of Common Pleas, Bucks County, PA*, 917 F.3d 161, 166 (3rd Cir. 2019), the Court summarized the principle of law that for purposes of habeas corpus that a party

does not have to be in physical custody:

> Over the past half-century, courts have addressed the issue of habeas custody in an effort to determine when various state-imposed restrictions were sufficiently onerous to constitute "custody" for purposes of habeas jurisdiction. It is now beyond dispute that custody is not limited to "actual physical custody." Rather, for the purposes of habeas jurisdiction, a petitioner is "in custody" if he or she files while subject to significant restraints on liberty that are not otherwise experienced by the general public.

Gilliland is detained by Respondents because the Cherokee Nation District Court (the "District Court") increased her appearance bond from zero to $10,000 and issued an arrest warrant when it found out she lived in Poland, ***which she had the right to do under her initial personal recognizance bond***.

This Court should deny Respondents' motion to dismiss because: 1) Gilliland is not a fugitive and is entitled to seek habeas relief, 2) this Court has subject matter jurisdiction to order the Respondents to release Gilliland from the District Court's orders of detention[1] because she is detained by Respondents and has exhausted tribal court remedies to challenge due process violations, and 3) this Court has subject matter jurisdiction pursuant to the Indian Civil Rights Act of 1968, 25 § 1301, *et seq.,* ("ICRA") because Gilliland is being detained by Respondents in violation of federal due process.

Sadly, after running the tribal court gauntlet challenging Respondents' violations of Gilliland's fundamental constitutional rights of due process, she must seek protection from her own tribal government in this Court because Respondents have violated her basic rights and seek

[1] Exh. A-23, 2019-08-01 Court Minute Bench Warrant Issued; Exh. A-24, 2019-08-12 Bench Warrant; Exh. A-25, 2019-08-16 Court Minute Order issuing bench warrant; Exh. A-31, 2019-10-22 Order Denying Motion to Reinstate Personal Recognizance Bond; and Exh. A-41, 2021-03-26 Warrant of Arrest. Exh. A- 46, 2022-05-17 Order Striking the Case from the Jury Docket.

to imprison her for fifteen years and impose a seven-five thousand dollar fine. In *Valenzuela v. Silversmith*, 699 F.3d 1199, 1203 (10th Cir. 2012), the Court found:

> Because the individual rights provided in the Constitution do not protect Indians against their tribes, Congress passed statutes that limit tribes' authority over their members. In 1968, Congress passed the Indian Civil Rights Act ("ICRA") to provide enrolled tribal members with basic rights.

In *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 713 (2nd Cir. 1998), the Court found:

> Rather, "Title I of the ICRA identifies explicitly only one federal court procedure for enforcement of the substantive guarantees of § 1302: § 1303 makes available to any person '[t]he privilege of the writ of habeas corpus ..., in a court of the United States, to test the legality of his detention by order of an Indian tribe.' "

To test the legality of Gilliland's detention by Respondents' orders, she challenges six violations of due process identified in her Petition for Writ of Habeas Corpus filed herein. Gilliland filed several Demurrers and Motions to Dismiss the Complaint and Amended Complaint in the District Court, all of which were denied.[2] Gilliland then sought a Writ of Habeas Corpus in the Cherokee Nation Supreme Court (the "Supreme Court") challenging the same issues that the District Court denied.[3] The Supreme Court dismissed the Writ of Habeas Corpus.

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[2] Petition Footnote 10, Exh. A-6, 2019-02-14 Defendant's Demurrer to Complaint; Exh. A-12, 2019-04-03 Defendant's Motion to Strike Amended Complaint; Exh. A-8, 2019-02-15 Motion to Disqualify Keen; Exh. A-11 2019-03-25 Defendant's Supplemental Motion to Disqualify Keen; Exh. A-13, 2019-04-03 Defendant's Second Demurrer and Motion to Dismiss Amended Complaint; Exh. A-13, 2019-04-03, Defendant's Motion to Strike Amended Complaint; Exh. A-14, 2019-04-26 Defendant's Reply Brief to Disqualify Keen; Exh. A-16, 2019-05-03 Supplement to Demurrer; Exh. A-17, 2019-05-14 Additional Briefing on Void by Vagueness; Exh. A-18, 2019-05-24 Defendant's Response to Nation Additional Briefing;
Petition Footnote 11, Exh. A-19, 2019-07-02 Order on Demurrer to Complaint.

[3] Petition Footnote 12 Exh. A-32, 2019-11-05 SC-19-15 Petition for Writ; Exh. A-35, 2019-11-07 Opening Brief Habeas Corpus; Exh. A-33, 2019-11-07 Exhibits to Habeas Brief; Exh. A-37, 2019-11-19 Defendant's Objection to Nation's Motion to Dismiss Habeas Corpus; Exh. A-39, 2019-12-05 Defendant's Response to Nation's Motion to Dismiss Habeas Corpus.

[3] Petition Footnote 13 Exh. A-40, 2020-11-04 SC-19-15 Opinion.

Contrary to Respondents' unfounded assertion that invoking the protections of the ICRA is an "affront to tribal sovereignty,"[4] Gilliland seeks to test the legality of the District Court's detention orders and to check Respondents' ***abuse*** of tribal sovereignty. That is the purpose of the ICRA.

It should alarm this Court that there was no law enforcement investigation into the alleged embezzlement on which the criminal case is based and that contemporaneously with the criminal case, the Special Prosecutor, as a private attorney retained by the Cherokee Nation to represent CNF in a companion civil case that was filed one day before the criminal case, is seeking to collect $928,000 in civil punitive damages from Gilliland based on the same allegations in the criminal case.[5]

I. INTRODUCTION

"In response to perceived abuses in the administration of criminal justice to tribe members, in 1968, Congress chose to exercise its plenary authority and to partially abrogate Indian tribal immunity through the Indian Civil Rights Act ("ICRA"), 29 U.S.C. §§ 1301–1304. *See Santa Clara Pueblo,* 436 U.S. at 71 ("Congress['s] ... legislative investigation revealed that ... serious abuses of tribal power had occurred in the administration of criminal justice." *Tavares v. Whitehouse,* 2014 WL 1133798 (E.D. 2014)pg. 2. Gilliland suffered serious abuses of tribal power by the Cherokee Nation.

Courts have often found that the same body of law interpreting 28 U.S.C. § 2254 was applicable to the ICRA. However, it appears that Congress intended the federal courts to provide

[4] Petitioner's Motion to Dismiss "Mtn." at pg.3.
[5] *Cherokee Nation Education Corporation v. Gilliland,* Cherokee Nation District Court CV 2016-397.

greater access of habeas corpus relief to those detained by Indian tribes by its amendment to the ICRA in 2013:

> 25 U.S.C. § 1304 (e)(B)(3). Notice. —An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 203 [25 USC § 1303].

The legislative history of the ICRA shows Congress wanted to stem abuses by tribal government. 28 U.S.C. § 2254 does not require a state to notify those detained of the right to seek federal habeas relief. Conversely, a tribe who detains someone has a federal statutory duty to advise them of their right to seek federal habeas relief. Respondents did not advise Gilliland of this right. This Court should therefore view Gilliland's Habeas Petition in a light favorable to granting her access for review.

Respondents make two major erroneous statements of fact in their Motion. First, Respondents claim "Petitioner admits she is not in tribal custody.[6] ***That is not true***. Gilliland advised this Court she is not in ***physical*** custody. *See* Pet. ¶ 25. In *Hensley v. Municipal Court, San Jose Milpitas Judicial Dis., Santa Clara County, California*, 411 U.S. 345, 351 (1973), the United States Supreme Court held a person is not required to be in physical custody and may seek habeas relief even when released on his own recognizance.

Gilliland consistently argues that she is being detained by Respondents' detention orders. From August 12, 2016, to October 21, 2019, she was detained by a personal recognizance bond. Since October 21, 2019, Gilliland has been detained by bench and arrest warrants, the last of which was issued after the District and Supreme Courts denied her challenges to the Respondents' unconstitutional violations.

[6] Mtn. at pg. 1.

Second, Respondents say, "Despite the District Court's orders to appear, she has refused to abide by the Court's orders and remains in Poland as a fugitive." [7] ***That is also not true***.

When Gilliland received notice of her arraignment on the Amended Complaint on October 18, 2019, she appeared by phone as ordered by the District Court with consent of the Special Prosecutor. On October 21, 2019, on motion of the Special Prosecutor, the District Court ordered Gilliland deposit a cash bond of $10,000 with the Cherokee Nation by November 20, 2019, or a bench warrant would be issued. The District Court did not order her to appear at any time.[8]

On March 26, 2021, the District Court issued an Arrest Warrant on the ground Gilliland was "charged with the offense of: failure to timely pay bond after order of reinstatement" and which provided that "You may release the accused person without taking the accused person before a judge. . . if the accused person posts a CASH bond in the amount of $10,000 on his or her personal recognizance."[9] This Arrest Warrant did not order her to appear before the District Court. At a number of hearings after the issuance of the detention orders, the District Court ***NEVER*** ordered Gilliland to appear including:

- April 5, 2021 Status Hearing
- April 26, 2021 Jury Trial Docket
- September 8, 2021 Pre-trial conference
- October 25, 2021- Trial date, continued on motion of Cherokee Nation
- April 5, 2022 Pre-trial Hearing
- May 19, 2022 Sounding docket
-

Gilliland appeared in the District Court whenever she received notice. Gilliland did not deposit the $10,000 Cash bond simply because she did not have $10,000. After Gilliland's

[7] Mtn. at pg. 2.
[8] EX A- 31 - 2019-10-22 Order Denying Motion to Reinstating Personal Recognizance Bond.
[9] EX A - 41 - 2021-03-26 Warrant of Arrest.

arraignment on October 18, 2019, the District Court never ordered her to appear again. The District Court issued arrest warrants because she did not post $10,000 cash with the District Court.

On May 17, 2022, the District Court entered an Order Striking the Case from the Jury Docket stating that Gilliland's case was "stricken from the jury docket until such time she settles the warrant issued against her."[10] Contrary to the Respondents' allegations, Gilliland appeared whenever she received notice to appear.

II. ARGUMENT

A. THE FUGITIVE DISENTITLEMENT POLICY DOES NOT APPLY TO GILLILAND.

1. Gilliland is not a fugitive.

With a James Bond flair, Respondents erroneously argue that "Ms. Gilliland flouted a tribal district court's order for a recognizance bond, which lead to the district judge issuing a bench warrant and arrest warrant. Ms. Gilliland is now an international fugitive, living in Poland."[11] Respondents agree that the averments of Gilliland's Petition are deemed true for purposes of Respondents' Motion to Dismiss[12] and are undisputed.

Respondents argue that the fugitive disentitlement concept which was pronounced in *Molinaro v. New Jersey*, 396 U.S. 365 (1970), should deprive Gilliland of habeas review. It does not apply in this case. In *United States v. Bescond*, 24 F.4th 759, 772 (2nd Cir. 2021), the court found:

[10] EX A– 46 - 2022-5-17- Order Striking the Case from the Jury Docket. Attached hereto.

[11] Mtn. at pg. 6.
[12] Mtn. at pg. 3.

> The doctrine "applies only to fugitives from justice." Finkelstein, 111 F.3d at 281. So in order to disentitle a litigant, a court must first determine that the litigant is a fugitive. The court may then exercise discretion to disentitle the fugitive—but only if doing so would serve the doctrine's objectives.
>
> Fugitivity implies some action by Bescond to distance herself from the United States or frustrate arrest. Bescond took no such action.
>
> . . .
>
> The ordinary meaning of the term "fugitive" does not describe Bescond. A fugitive is "[s]omeone who flees or escapes; a refugee," or "[a] criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony, esp[ecially] by fleeing the jurisdiction or by hiding." BLACK ' S LAW DICTIONARY (11th ed. 2019).

Gilliland is not a fugitive. On August 12, 2016, at which time she resided in Tulsa, Oklahoma, outside boundaries of the Cherokee Nation, the District Court released Gilliland on her own recognizance ***with no restrictions on her residency or conditions for reporting change of address to the court***. While living in Poland, with the District's Court's permission, she appeared before it by phone for arraignment on the Second Amended Complaint. Afterward, the District Court increased her bond from zero to $10,000 cash. Gilliland did not flee, evade, or escape arrest, prosecution, or imprisonment. She did not hide.

In summary, as Gilliland's Petition avers and without dispute by Respondents, she was initially arraigned on the Complaint and released on a personal recognizance bond without any conditions while living outside the borders of the Cherokee Nation. Several years later, she moved to Poland to secure work and to obtain cancer treatment for her husband, a Polish citizen. Eight months later, the Special Prosecutor filed an Amended Complaint. Gilliland did not flee from the Cherokee Nation to avoid prosecution; she was already in Poland. According to Gilliland's personal recognizance bond executed on August 12, 2016, there were no restrictions on her residency or conditions to notify the District Court of her moving required, so she moved to

Poland.[13] After receiving notice to appear for a second arraignment, Gilliland subsequently appeared for arraignment by phone without objection by the Special Prosecutor. At the second arraignment, Gilliland did not evade the court and disclosed she was in Poland and why.

Specifically, on August 12, 2016, Gilliland surrendered herself to the District Court, was arraigned on the Complaint, and was released on a personal recognizance bond without any conditions, and without objection by the then Special Prosecutor, Diane Hammons. The Special Prosecutor knew Gilliland lived outside of boundaries of the Cherokee Nation in Tulsa, Oklahoma. Pet. ¶ 7. In August 2018, Gilliland moved to Poland with her husband, a Polish citizen, and their two children because of the stigma of the Nation's criminal charges she was terminated from her job in Oklahoma as the Bacone College Foundation Director in 2016 and could not obtain meaningful employment afterward, and for her husband's health care because he suffered from blood cancer and could get affordable health care in Poland as a Polish native. Pet. ¶ 8. On March 20, 2019, thirty-two months after the Complaint was filed and eight months after she moved to Poland, the Special Prosecutor amended the Complaint, adding six counts which alleged Gilliland provided scholarships to Cherokee students and paid for travel of volunteer instructors who had expertise in Native American high school graduates applying for college scholarships.[14] The Amended Complaint did not allege Gilliland got even a penny from these scholarships. Pet. ¶ 8.

On July 2, 2019, the District Court denied Gilliland's Motions to Strike and Demurrer to the Amended Complaint and ordered that she present herself for arraignment on the Amended Complaint. The District Court Clerk certified she ***emailed*** the Order Re-Setting Arraignment to

[13] EX A-02 - 2016-08-12 Personal Recognizance Bond.
[14] Exh. A-10 - 2019-03-20 Amended Complaint.

Gilliland's attorney, Chad Smith which he did not receive (it was lost in spam). Although the Supreme Court Rule 20 (B) (2014)[15] authorizes email service of Supreme Court orders, there is no similar rule for the District Court. The District Court did not mail the District Court's Order Re-Setting hearing for July 19, 2019. Docket sheets and court filings were not obtainable online at the time.

On August 1, 2019, the District Court revoked Gilliland's personal recognizance bond because she did not appear on July 19, 2021 for arraignment on the Amended Complaint although she had no notice of the arraignment. On August 16, 2019, the District Court ordered Gilliland to deposit $10,000 cash with the District Court by November 20, 2019, ***or she would be arrested and jailed until her trial***. The Special Prosecutor did not give notice to Gilliland's attorney of his Motion for Bench Warrant. Gilliland's attorney did not receive the August 1, 2019, or August 16, 2019 Court Minute Orders issuing the bench warrant signed by the Court. There is no certificate of service by the District Court Clerk for either order.[16]

On September 25, 2019, in anticipation of pre-trial conferences, Gilliland's attorney requested, and the District Court Clerk emailed him copies of the docket sheet in each of his cases pending in the District Court, including Gilliland's. Upon review of the Gilliland docket sheet, Gilliland's attorney discovered, for the first time, that on July 2, 2019, the District Court had entered orders on several motions, set an arraignment date, and subsequently issued a bench warrant for Gilliland on motion of the Special Prosecutor when Gilliland and her attorney, Smith,

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15 https://www.cherokeecourts.org/Portals/cherokeecourts/Documents/Word%20Searchable%20Full%20Code.pdf?ver=2018-09-28-153638-000, page 448

16 EX A-23 - 2019-08-01 Court Minute Bench Warrant Issued and EX A-24 - 2019-08-12 Bench Warrant.

and did not appear on July 19, 2019 Arraignment.[17] It appears several emails from the District Court where not transferred from Gilliland's attorney's email server to his primary account because of spam detection and the orders were not mailed as required under Cherokee law.

On October 18, 2019, without objection by the Special Prosecutor, and with permission of the District Court, Gilliland appeared telephonically for her arraignment on the Amended Complaint, where she disclosed her location in Poland, apologized for not appearing on July 19, 2019, and explained she did not know about the hearing. Although Gilliland appeared, entered a not guilty plea, and was arraigned, the Special Prosecutor moved the District Court to deny her personal recognizance bond which it granted on October 22, 2019, and required her to post a $10,000 Cash bond. The District Court set a trial date for April 26, 2021. The requirement for a $10,000 cash bond restricted her freedom to come and go about, unlike other citizens of the Cherokee Nation and the United States. On March 26, 2021, the District Court issued another Arrest Warrant for Gilliland.[18]

Gilliland thus appeared in the District Court every time she received notice. She did not flout the orders of the District Court; she obeyed the orders to appear when she was given notice of them. The fugitive disentitlement doctrine does not apply to this case and this Court should hear Gilliland's Petition.

2. The Special Prosecutor's Motion for a Bench Warrant and Objection to Reinstate Gilliland's Personal Recognition Bond shows his Conflict of Interest.

On August 1, 2019, the Special Prosecutor requested Gilliland's personal recognizance bond be forfeited and a bench warrant issue without notice to Gilliland.[19] On October 16, 2019,

[17] EX A- 26 - 2019-09-30, Motion to Withdraw Bench Warrant.
[18] EX A-41 - 2021-03-26 Warrant of Arrest.
[19] EX A-23 - 2019-08-01 Court Minute Bench Warrant Issued.

the Special Prosecutor objected to Gilliland's Motion to Reinstate Personal Recognizance Bond.[20] The Special Prosecutor argued that Gilliland absconded from the Cherokee Nation's jurisdiction.

To abscond, one must go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process; to hide, conceal, or absent oneself clandestinely, with the intent to avoid legal process.[21] Gilliland did not abscond; she did not reside in the Cherokee Nation when her Personal Recognizance bond was issued or when the Amended Complaint was filed. She was never required by the District Court to reside in the Cherokee Nation's jurisdiction. Gilliland never left the Cherokee Nation's jurisdiction because at time the Complaint or Amended Complaint was filed, she did not live in the Cherokee Nation. How could she abscond from the Cherokee Nation's territorial jurisdiction if she did not live there when the Complaint and Amended Complaint were filed and was never required to be there?

Although on October 9, 2019, the Special Prosecutor agreed to allow Gilliland to be appear by phone to be arraigned on the Amended Complaint, a week later he insisted on a $10,000 cash appearance bond. These actions highlight the Special Prosecutor's conflict of interest in criminally prosecuting Gilliland while at the same time seeking money damages from her in a companion civil case where he represents an entity of the Cherokee Nation on the same underlying facts and charges. He was in the position to weaponize bond setting for an advantage in the civil case and to punish her by requiring the posting of a $10,000 cash bond. The Special Prosecutor punished Gilliland for moving to and living in Poland which she had a right to according to her August 12, 2016 Personal Recognizance bond. The Special Prosecutor's motion for Gilliland to post a $10,000 cash bond is nothing less than improper leverage.

[20] EX A-29 - 2091-10-16 Objection to Defendant's Motion to Reinstate PR Bond.
[21] https://legal-dictionary.thefreedictionary.com/abscond.

B. THIS COURT HAS JURISDICTION TO HEAR THE PETITION FOR HABEAS CORPUS BECAUSE GILLILAND IS (1) IN CUSTODY AND (2) HAS EXHAUSTED ALL TRIBAL REMEDIES.

1. Gilliland is detained by the Cherokee Nation.

In *Jones v. Cunningham*, 371 U.S. 236, 239 (1963), the Court stated, "Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody."

Gilliland's detention is not economic like a money fine. The Cherokee Nation's awesome power as a domestic dependent nation to detain and put its citizens in prison is real and imminent in this case. *Talton v. Mayes*, 163 U.S. 376 (1896).

In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874,895 (2nd Cir. 1996), the Court stated,

> As *Jones* and its progeny make clear, while the requirement of physical custody historically served to restrict access to habeas relief to those most in need of judicial attention, physical custody is no longer an adequate proxy for identifying all circumstances in which federal adjudication is necessary to guard against governmental abuse in the imposition of "severe restraints on individual liberty." *c.f. Hensley*, 411 U.S. at 351, 93 S.Ct. at 1574... .

Gilliland is one of "those most in need of judicial attention" of access to habeas corpus.

The District Court's detention orders severely limited Gilliland's ability to come and go as she pleases. For example, those orders prevented Gilliland from leaving Poland to travel to the United States in June of this year (2022) to watch her first and only son graduate from Dartmouth College with honors. *See* Affidavit of Kimberlie Gilliland, EX A-47. Gilliland was afraid she would be detained upon arrival in the United States if a NCIC check showed the Respondents' detention orders at customs. Her son, Tojuwa Skiora, was also one of the first to graduate from the Cherokee Nation's Language Emmerson school; he was fluent and literate in Cherokee language; his accomplishments are a source of great pride to the Cherokee people. Because of the

District Court's detentions orders, Gilliland, unlike other mothers, was justifiably afraid to travel to attend her son's college graduation. It was heartbreaking for Gilliland.

Considering past actions of the Special Prosecutor in this case, it was reasonable for Gilliland to anticipate him to alert the Dartmouth College Security or Hanover, New Hampshire Police to the District Court's arrest warrant and insist she be arrested at her son's Dartmouth graduation. Further, Gilliland was afraid to return to the United States to see her family and elderly parents. Poland is a bordering country to the Ukraine with her home being just 2 kilometers from the Ukrainian border; there were safer places in the world for her and her family to be in 2022 if she wanted to "hide" from the Cherokee Nation. Gilliland again discloses her location with her address in her attached Affidavit.

Gilliland's detention is further demonstrated by the Cherokee Nation restricting Gilliland's ability to earn a livelihood by contacting organizations and advising them of the pending charges long before the District Court issued a bench or arrest warrant Gilliland to prevent her from earning a living.

Respondents claim they want to "discourage this Court from finding a conventional recognizance bond is a severe restraint on individual liberty that satisfies the habeas standard."[22] The District Court's detention orders are not a conventional recognizance bond. The detention orders are based on an unconstitutional Amended Complaint whose due process violations have been litigated in and blessed by the Cherokee Nation's District and Supreme Courts. It should be noted that District Court denied Gilliland's motions to dismiss and demurrer, and refused to certify its rulings for appeal while she was free on personal recognizance - all before it issued the arrest warrant with $10,000 cash bond.

[22] Mtn. at pg. 11.

In *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 301 (1984), the Court found Defendant's first conviction had been vacated when he applied for a trial de novo, although he had been released on personal recognizance, he was in "custody" for purposed of federal habeas corpus. The Court found the defendant was "under an obligation to appear for trial in the jury session on the scheduled day" and also "at any subsequent time to which the case may be continued . . . and so from time to time until the final sentence." So was Gilliland by the District Court's detention orders.

For purpose of seeking a Writ of Habeas pursuant to the ICRA, Gilliland, much like the defendant in *Lydon*, was and is detained pre-conviction by the Respondents because the Respondents' detention orders, including the March 26, 2021 Arrest Warrant with requirements to post a $10,000 cash bond, subject her to restraints not shared by the public generally.

Gilliland's liberty is further threatened by the Special Prosecutor's ability to file an additional charge of bail jumping pursuant to 22 CNCA 1110.[23]

[23] 22 U.S.C. § 1110. Jumping bail—Penalties
Whoever, having been admitted to bail or released on recognizance, bond, or undertaking for appearance before any Magistrate or Court of the State of Oklahoma, incurs a forfeiture of the bail or violates such undertaking or recognizance and willfully fails to surrender himself within five (5)days following the date of such forfeiture shall, if the bail was given or undertaking or recognizance extended in connection with a charge of a crime or pending appeal or certiorari after conviction of any such offense, be guilty of a crime. Nothing in this section shall be construed to interfere with or prevent the exercise by any Court of its power to punish for contempt.

2. Gilliland has exhausted tribal court remedies.

Respondents claim "[Gilliland's] arguments about the embezzlement statute and other underlying concerns have not been finally and fully resolved because trial and post-trial proceedings have not occurred."[24] ***That dog won't hunt***.

The ICRA, unlike 22 U.S.C. § 2254 (b)(1)(A), has no statutory requirement to exhaust tribal/state court remedies.

In *Valenzuela v. Silversmith*, 699 F.3d 1199, 1206 (10th Cir. 2012), the Court provided reasons for the exhaustion rule:

> The tribal exhaustion rule is based on "principles of comity" and is not a jurisdictional prerequisite to review. See Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir.2006). It applies "[r]egardless of the basis for [federal] jurisdiction," Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), and serves several purposes. First, it reinforces Congress's strong interest in promoting tribal sovereignty, including the development of tribal courts. Nat'l Farmers, 471 U.S. at 856, 105 S.Ct. 2447. Second, it assists "the orderly administration of justice in ... federal court[s] ... by allowing a full record to be developed in the [t]ribal [c]ourt before either the merits or any question concerning appropriate relief is addressed [in federal court]." Id. Third, the rule gives a tribal court "a full opportunity ... to rectify any errors it may have made." Id. All of these purposes support application of the tribal exhaustion rule to § 1303 petitions.

There can be little question that the tribal court record was fully developed before the merits were brought to this Court and that the tribal courts had a full opportunity to rectify any errors. The tribal court record of Motions to Dismiss, Demurrers, Motion to Disqualify, and briefing on questions of law before both the District Court and Supreme Courts is composed of ***46 exhibits constituting over 400 pages.*** It is exhaustive.

Despite the exhaustive record before them and to rectify errors directly presented to them at both the District and Supreme Court levels, the tribal courts denied each of Gilliland's motions

[24] Mot. at pg. 12.

to dismiss and the demurrers which were before them on the very same grounds of denial of due process presented in this case. Gilliland moved the District Court to certify its orders denying relief on constitutional violation for a direct appeal, but it denied that motion also; therefore, Gilliland presented the issues to the Supreme Court on a Writ of Habeas Corpus which it denied.[25]

3. Any requirement for Gilliland to complete a jury trial is futile and unnecessarily subjects Gilliland to jeopardy.

Respondents erroneously argue that for this Court to assert jurisdiction, Gilliland must go first to jury trial and be convicted. The District Court has decided, and the Supreme Court has reviewed, all the legal issues regarding denial of due process Gilliland presents to this Court. A jury is a finder of fact, not a decider of law. The Cherokee Nation courts have established the law of the case which is now *stare decisis* for Gilliland. Are the District Court's legal rulings going to change at a jury trial? How can Gilliland get a fair jury trial on a constitutionally infirm criminal prosecution that even refuses to advise her why the acts alleged are criminal? How can Gilliland prepare a defense at jury trial without any facts alleged about concealment or conversion? The District Court will instruct the jury with the erroneous law it has adopted after ruling on Gilliland's motions to dismiss and demurrers. So, what is gained?

In *Allen v. Attorney General of State of Me.*, 80 F.3d 569, 573 (1st Cir. 1996), the Court

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[25] On October 10, 2019, Gilliland moved the District Court to certify for appeal its July 2, 2019, Orders to the Strike Amended Complaint and Order of Demur to Complaint EX A -28 2019-10-09 Motion to Certify Orders for Interlocutory Appeal which it denied on October 22, 2019 . EX A 30- 2019 10-22 Order Denying Certification for Interlocutory Appeal.

Then on November 5, 2019 pursuant to 22 CNCA 1079, Gilliland filed a Writ of Habeas Corpus in the Cherokee Nation Supreme Court raising the same due process violations argued herein. EX A-32 - 2019-11-05 SC-19-15 Petition.pdf. On October 19, 2022, the Cherokee Nation Supreme Court denied Gilliland's petition for Writ of Habeas Corpus. EX A-40 - 2020-11-04 SC-19-15 Opinion.

found that exhaustion of state remedies was not required where futile:

> Although the exhaustion rule is important, it is not immutable: exhaustion of remedies is not a jurisdictional prerequisite to a habeas petition, but, rather, a gatekeeping provision rooted in concepts of federalism and comity. *See* *Nadworny*, 872 F.2d at 1096 ("Requiring that remedies be exhausted in state courts is merely comity's juridical tool, embodying the federal sovereign's respect for the state courts' capability to adjudicate federal rights."). Consistent with this rationale, the federal courts have carved a narrow futility exception to the exhaustion principle. If *stare decisis* looms, that is, if a state's highest court has ruled unfavorably on a claim involving facts and issues materially identical to those undergirding a federal habeas petition and there is no plausible reason to believe that a replay will persuade the court to reverse its field, then the state judicial process becomes ineffective as a means of protecting the petitioner's rights. In such circumstances, the federal courts may choose to relieve the petitioner of the obligation to pursue available state appellate remedies as a condition precedent to seeking a federal anodyne. *See* *Piercy v. Black*, 801 F.2d 1075, 1077–78 (8th Cir.1986); *Robinson v. Berman*, 594 F.2d 1, 3 (1st Cir.1979). The law, after all, should not require litigants to engage in empty gestures or to perform obviously futile acts.

In *Lydon*, 466 U.S. at 302, the Court held "That Lydon [defendant] may ultimately be acquitted at the trial de novo [jury trial] does not alter the fact that he has taken his claim that he should not be tried again as far as he can in the state courts." Although *Lydon* involved double jeopardy, the principle that a person is not required to be found guilty by a jury for this Court to review her petition for writ of habeas corpus is more compelling here because the violations of due process have occurred, the Cherokee courts have refused to rectify those errors, a jury cannot change the legal rulings of the Cherokee courts, and she will be tried on a constitutionally infirm Amended Complaint that the Nation has twice refused to amend.

At a future jury trial, there are strictly legal questions of denial of due process that the jury cannot resolve such as the Special Prosecutor filing charges outside the statute of limitation, charges exceeding the punishment provided by the ICRA, and failing to provide a disinterested prosecutor without conflicts of interest. Respondents want Gilliland to go to a jury trial on an Amended Complaint that the Cherokee Nation courts approved even though it is constitutionally

infirm on its face. A person would have more luck at solving Rubik's cube blindfolded on a roller coaster than deciphering what the Cherokee Nation's criminal statute for embezzlement means.

The possibility of prevailing in tribal court upon jury trial is not a requirement for this Court to hear Gilliland's Petition. "We declined to rule that the mere possibility of a successful application to the state courts was sufficient to bar federal relief. Such a rule would severely limit the scope of the federal habeas corpus statute." *Roberts v LaVallee*, 389 U.S. 40, 42-43 (1967).

Futility is a defense to the rule requiring the exhaustion of state remedies. *Piercy v. Black*, 801 F.2d 1075, 1078 (8th Cir.1986); *Hawkins v. Higgins*, 898 F.2d 1365 (8th Cir. 1990); *accord Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991) (exhaustion requirement excused because claims would be deemed procedurally barred if presented in state court); *Fields v. Bagley*, 275 F.3d 478, 482 (6th Cir. 2001) (per curiam) (exhaustion requirement excused because claims reviewed by state supreme court and presenting them again would be futile); *Padavich v. Thalacker*, 162 F.3d 521, 522 (8th Cir. 1998) (exhaustion requirement excused because state court recently decided same legal question adversely to petitioner and comity and federalism better served by addressing merits).

In *Fields v. Bagley*, 275 F.3d 478, 482-483 (6th Cir. 2001) the Court found:

> The Court agrees with the Magistrate Judge that Fields has exhausted his claims. Fields has taken his claim to the highest court in Ohio, and that court had the ability to review the claim on its merits. This is all that is necessary to exhaust his claim. *See Tuggle v. Seabold*, 806 F.2d 87, 91 (6th Cir.1986) ("Once an issue of asserted constitutional violation has been presented to the State's highest court, the doctrine of exhaustion of remedies does not require future repetitive presentations to such court by additional attempts through a variety of successive motions"); *Coleman v. Maxwell*, 7 Ohio Misc. 11, 351 F.2d 285, 286 (6th Cir.1965)("It is clear to this court that once an issue of asserted federal constitutional violation has been presented to the highest state court in the state concerned, that the doctrine of exhaustion of remedies does not require futile repetitive presentation to such court by repeated attempts through a variety of motions"). "[O]nce [a] federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Castille v. Peoples*, 489 U.S. 346, 350, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989) *quoting*

Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982); *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir.1984).

In *Bear v. Boone*, 173 F.3d 782, 785 (10th Cir. 1999), the Court found, "In order to fully exhaust state court remedies, a state's highest court must have had the opportunity to review the claim raised in the federal habeas petition." The Supreme Court had that opportunity after exhaustive briefing and denied Gilliland relief on November 4, 2020.

Why subject Gilliland to a jury trial when the District Court's detention orders based on Respondents' criminal prosecution of Gilliland are constitutionally infirm? Why must Gilliland face charges that: (1) fail to state an offense, (2) fail to allege specific facts showing criminal intent, (3) fail to clearly state the criminal allegations without vagueness, (4) fail to file charges within the statute of limitations, (5) fail to remain within the punishment parameters provided by the ICRA, and (6) fail to have a prosecutor without a conflict of interest. It is more than unfair to put Gilliland in jeopardy before a jury where the charges are constitutionally infirm.

If Gilliland were to be found guilty by a jury, the Cherokee courts have already affirmed the constitutional violations as acceptable. Why would the District Court, or the Supreme Court change their rulings on a second round? Gilliland would then be back here with the same arguments. That is the definition of futility.

4. The Special Prosecutor's conflicts of interest deny Gilliland due process.

Furthermore, Gilliland will be pressed into a jury trial by a Special Prosecutor that has an irreconcilable conflict of interest and has demonstrated a lack of "dispassionate assessment of the propriety of criminal charges." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 806 (1987).

This case has been brought by a Special Prosecutor whose conflicts of interest deny Gilliland due process because he represents a private client seeking money and punitive damages

in a companion civil case over the same factual allegations in the criminal case, and he uses each for unfair tactical advantage in the other case. The Special Prosecutor abandoned his duties as a dispassionate prosecutor when he filed and prosecuted the criminal charges without an investigation by any law enforcement. The Special Prosecutor acknowledged that there was no law enforcement investigation of this case when he cited as true Gilliland's comment to the press in one of his District Court briefs:[26]

> I (Gilliland) can only assume that because these actions were filed in tribal court that the FBI and federal investigators have rejected these claims for that they are, which is a frivolous attack on a private citizen who has done nothing wrong.

Affirming that the Special Prosecutor filed this cased without any law enforcement investigation is the list of witnesses endorsed with this prosecution, which show no law enforcement officers listed.[27] The Special Prosecutor refused to produce the only investigative report in this case claiming that it was attorney-client privileged.[28]

Having failed to require law enforcement to investigate Gilliland's alleged embezzlement, and filing the criminal Complaint, the Special Prosecutor then conducted discovery in the civil case to be used in the criminal case without notice to Gilliland's attorney in the criminal case. The Special Prosecutor conducted the depositions of Andrew Sikora (9/20/2017), Heather Sourjohn (10/19/2017), Shelly Butler-Allen (10/27/2017), Jay Calhoun (2/1/2018), and Robin Ballenger (2/1/2018) in the civil case before filing an Amended Complaint in the criminal case on March 30, 2019. Indeed, the Special Prosecutor resisted Gilliland's request to stay discovery in the civil case pending disposition of the criminal case.[29]

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[26] EX A-03 - 2016-09-06 CNF Civil Case Resp & Brief In Opp to Motion to Stay, pg. 5.
[27] EX A-01 - 2016-07-28 Complaint and Information.
[28] EX A-04 - 2016-09-08 Motion to Compel Discovery
[29] EX A-03 - 2016-09-06 CNF Civil Case Resp & Brief In Opp. to Motion to Stay.

In yet another conflicted act, the Special Prosecutor thwarted Gilliland's efforts to depose the Cherokee Nation's primary witness by representing the witness in a motion to quash subpoena for deposition on July 26, 2021[30] although he conducted the deposition of witness Cara Cowan Watts on October 27, 2017 in the criminal case without notice to Gilliland's attorney.

Notably, before the District Court, the Special Prosecutor cited the civil petition as authority and precedent for the criminal case as the date of discovery of the alleged embezzlement, and that the statute of limitations adopted by the District Court in the civil case should be applied to the criminal case.[31] It appears the Special Prosecutor bootstraps the criminal case prosecution through civil case proceedings and discovery; his conflict of interest deprives Gilliland of due process.

There is an inherent conflict of interest for the Special Prosecutor to be prosecuting a civil and criminal case against Gilliland on the same set of facts. *See Young* 481 U.S. 787, 805, ("If a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony under § 208(a)..."). In this case, the Special Prosecutor moved to increase Gilliland's bond from zero to $10,000 which gave him the leverage of her freedom as an advantage in the civil case.

C. INJUNCTIVE AND DECLARATORY RELIEF IS THE PRODUCT OF CHALLENGING THE UNDERLYING CHARGES.

The ICRA, specifically 25 U.S.C. § 1303, provides the jurisdictional basis for Gilliland's Petition; she is not seeking this Court to assert jurisdiction on any other grounds. The purpose of

[30] EX A-42 - 2021-07-21 Nation's Motion to Set Aside & Quash Subpoena & To Strike Attorney.
[31] EX A-15 - 2019-04-30 Nation's Response to Motion to Strike Amended Complaint Stat of Limit, pgs.2 and 4.

habeas corpus is to challenge underlying charges. The judicial mechanism and remedy for this Court is to make a judgement on the constitutionality of the underlying charges and provide injunctive relief which includes an order discharging Gilliland from detention. If the charges are unconstitutional, it follows that they must be dismissed.

Respondents are not immune from the remedy of declaratory judgement and injunction once this Court asserts jurisdiction under 25 U.S.C. § 1303. Contrary to Respondents' claim, an Indian tribe's sovereign immunity does not bar claims for declaratory or prospective injunctive relief against tribal officers. *Vann v. U.S. Dep't of the Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012).

An application for a writ of habeas corpus is never viewed as a suit against the sovereign, simply because the restraint for which review is sought, if indeed illegal, would be outside the power of an official acting in the sovereign's name. *Poodry,* 85 F.3d 874, 900. "The important thing is not the quest for a mythical custodian, but that the petitioner named as respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit--namely, his unconditional freedom. *Reimnitz v. State's Attorney of Cook County*, 761 F.2d 405, 408-09 (7th Cir.1985) (emphasis supplied)." *Poodry, 85* F.3d 874, 899-900 (2d Cir. 1996).

Therefore, this Court has jurisdiction over Gilliland's Petition for Writ of Habeas Corpus and authority to find the Respondents' prosecution against her is constitutionally infirm and to order her released from detention.

III. CONCLUSION

In *Fay v. Noia* , 372 U.S. 391, 401-02, (1963), the United States Supreme Court stated,

> Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today

> habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.

The Writ of Habeas Corpus is known as the "great and efficacious writ in all manner of illegal confinement. *See* Blackstone Commentaries, p. 131 Am. ed 1832. The "Great Writ" is the only writ explicitly protected by the U.S. Constitution, Art. I, § 9, cl. 2. *See Holland v. Florida*, 130 S. Ct. 2549 (2010). The ICRA authorizes the use of the Great Writ to contest tribal court proceedings.

In *Settler v. Yakima Tribal Court*, 419 F.2d 486, 490 (9th Cir., 1969), the Ninth Circuit held that 28 U.S.C. § 2241 habeas corpus relief was available to a party who was fined by a tribal court and posted bond. The Ninth Circuit stated the law:

> We believe, however, that the writ of habeas corpus is available to one who, like appellant, has been fined by an Indian Tribal Court and has posted a bond pending procedural review by an Indian appellate court.
> . . , *Brownell v. We Shung*, 352 U.S. 180, 183, 77 S.Ct. 252, 1 L.Ed.2d 225 (1953) (habeas corpus available to an alien seeking entry into the United States even though he is free to go anywhere else in the world); *Ex parte Fabiani*, 105 F.Supp. 139 (E.D.Pa.1952) (habeas corpus appropriate procedural vehicle for testing legality of induction into the military); *Ford v. Ford*, 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed.2d 240 (1962) (habeas corpus available to parents disputing proper custody of child)."

In *Sheriff, Clark County v. Hatch*, 100 Nev. 664, 691 P.2d 449 (1984), the Nevada Supreme Court stated the law, "Habeas corpus is a form of collateral attack-- an independent proceeding instituted for the purpose of testing the legality of detention." That is the purpose of the ICRA.

After exhausting her remedies in the Cherokee Nation District and Supreme Courts which denied her challenges to the Respondents' violations of due process in the Amended Complaint Gilliland sought relief from this Court under the ICRA.

Due process is fundamental fairness. How is it fair to send Gilliland to a jury trial where the Amended Complaint charges actions which are not a crime under Cherokee law and does not

advise her of how her actions were criminal, the charging criminal statue makes no sense, many of the Amended Complaint counts were filed after the statute of limitations ran, the prosecution demands punishment beyond that allowed by the ICRA, and a Special Prosecutor whose conflict of interests if occurring in federal court would be facing a felony? How is it fair to require Gilliland to complete a jury trial when the District Court has ruled these constitutional violations are okay and will instruct the jury accordingly?

By operation of Respondents' detention orders, Gilliland is restricted from leaving Poland to return to the United States without posting a $10,000 cash bond; her moving to Poland was not prohibited by her August 12, 2016, Personal Recognizance Bond and she had the right to move. As of March 26, 2021, the tribal court issued an Arrest Warrant that can only be set aside by Gilliland posting a $10,000 cash bond.

Gilliland's returning to tribal court for jury trial and a second appeal to the Supreme Court is a futile exercise because the District Court has already ruled negatively on by finding motions to dismiss and demurrers holding that violations of due process protected by the ICRA are acceptable; and the Supreme Court has affirmed those rulings by rejecting her Petition for Writ of Habeas Corpus. If she returns to the tribal court for a jury trial, Gilliland will be tried by a process replete with unconstitutional violations of due process and cannot receive a fair trial.

The Court's holding in *Hensley* 411 U.S. at 352-353 applies to Gilliland's case,

> Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim.

Gilliland's case is precisely the kind of case that compelled Congress to enact the ICRA. This Court should therefore deny Respondents' Motion to Dismiss and hear Gilliland's Petition for Writ of Habeas Corpus.

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 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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