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

(1) KIMBERLIE GILLILAND, an individual, Petitioner, v. (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-JFJ

RESPONDENTS' MOTION TO DISMISS

Judge Barteaux, Attorney General Hill, and Special Prosecutor Keen move to dismiss this Petition for Writ of Habeas Corpus. Petitioner seeks habeas relief despite being a fugitive from justice living in Poland. Petitioner admits she is not in tribal custody. As such, her requested relief is not to be released from custody, but instead to have this Court collaterally dismiss the ongoing Cherokee Nation criminal case and "order the Cherokee Nation District Court to dismiss [its claims of embezzlement] with prejudice." Pet. ¶27; *see also id.* ¶157.

This Court should dismiss Petitioner's motion for any of three independent reasons. First, a fugitive is not entitled to seek habeas relief. Second, this Court does not have subject matter jurisdiction to order the Cherokee Nation to dismiss an ongoing tribal criminal case.

Third, this Court does have not subject matter jurisdiction because the Petitioner is not in "detention" or "custody" as required by habeas statutes. Fed. R. Civ. 12(b)(1).

I. Factual Background and Tribal Court Proceedings

On July 28, 2016, the Cherokee Nation Attorney General charged Kimberlie Gilliland in a criminal complaint, alleging multiple counts of embezzlement from Cherokee Nation entities. After missing her July 2019 arraignment, the Cherokee Nation District Court required a routine personal recognizance bond to ensure future appearances. Ms. Gilliland failed to post the bond and the District Court subsequently issued a bench warrant and, later, an arrest warrant.

Since August 2018, Ms. Gilliland has lived in Poland. Pet. ¶¶8, 38. 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. Ms. Gilliland appealed the trial court's bond order and warrants. All appeals were heard and denied. Ms. Gilliland sought habeas relief from tribal courts despite not being in custody. Each court, including the Cherokee Supreme Court, denied habeas relief because Ms. Gilliland is not currently detained:

> The fact of the matter is that Gilliland is neither incarcerated nor detained by the Cherokee Nation. *Habeas Corpus* relief would be entirely improper under the circumstances where a party has disregarded the district court's orders.

Opinion, Cherokee Nation Supreme Court (Nov. 4, 2020) (Pet. at Ex. 40).

Notably, Ms. Gilliland has not been convicted of a crime. She is not on parole. She is not on probation or supervised release. She has not been released post-conviction and is

not awaiting sentencing. She has not been banished from the Tribe nor the Cherokee Nation Reservation.

Ms. Gilliland disagrees with the tribal court rulings and now asks this Court to reverse the Cherokee Nation courts' denials of her motions to dismiss and the Cherokee Nation district court's decision to require a bond to ensure appearance. This Court does not have jurisdiction to review, much less reverse, those decisions. Ms. Gilliland's request to this Court is an improper use and application of the Indian Civil Rights Act's habeas provisions and an affront to tribal sovereignty.

II. Standard of Review

Respondents move to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. 12(b)(1). Ms. Gilliland bears the "burden to establish subject matter jurisdiction." *Oviatt v. Reynolds*, 733 Fed. Appx. 929, 931 (10th Cir. 2018).

Ms. Gilliland relies on the Indian Civil Rights Act's habeas relief, 25 U.S.C. § 1301 *et seq*. Pet. ¶1. A Rule 12(b)(1) motion to dismiss may be facial or factual:

> First, a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint. In addressing a facial attack, the district court must accept the allegations in the complaint as true.
>
> Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. In addressing a factual attack, the court does not presume the truthfulness of the complaint's factual allegations, but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).

United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 547 (10th Cir. 2001) (internal citations and quotations omitted). Here, Respondents *facially* challenge the Court's jurisdiction. Notwithstanding this facial challenge, the Court may take judicial notice of the voluminous Cherokee Nation court docket and filings. *See, e.g.*, *United Keetoowah Band of Cherokee Indians in Oklahoma v. Barteaux*, 527 F. Supp. 3d 1309, 1321 (N.D. Okla. 2020) (evaluating federal court jurisdiction and tribal exhaustion of remedies in ICRA habeas case, "the court considers only the facts as alleged in the Amended Complaint . . .and the tribal court filings and orders . . . of which the court takes judicial notice.").

III. Summary of Tribal Sovereign Immunity and the Indian Civil Rights Act's Habeas Relief

Tribal nations possess the "same immunity from suit" enjoyed by all sovereign powers. *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1277 (10th Cir. 2006). Indian tribes possess "a unique legal status" and are "distinct political entities retaining inherent powers to manage internal tribal matters." *Valenzuela v. Silversmith*, 699 F.3d 1199, 1202 (10th Cir. 2012); *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996). Generally, Constitutional provisions limiting federal or state authority "do not apply to Indian tribes." *Valenzuela*, 699 F.3d at 1202; *see also* Felix S. Cohen, Handbook of Federal Indian Law § 4.01[2][b] (2012 ed.) ("Indian tribes are not constrained by the provisions of the United States Constitution, which are framed specifically as limitations on state or federal authority.").

ICRA provides a narrow exception to tribal sovereign immunity. To protect individual Constitutional rights, Congress passed statutes limiting tribal authority over its members. *Id.* at 1203. Relevant here, in 1968, Congress passed the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*, providing tribal members with certain Constitutional rights. *Id.*

ICRA, however, did not waive sovereign immunity generally and does not provide a civil cause of action in federal court against tribal officials. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1278 (10th Cir. 2006); *Valenzuela*, 699 F.3d at 1203. Rather, tribal members generally use tribal courts to ensure ICRA provisions are followed. Tribal members have "only one avenue to seek relief in federal court" for ICRA violations: filing a petition for writ of habeas corpus under 25 U.S.C. § 1303. *Valenzuela*, 699 F.3d at 1203; *White v. Pueblo of San Juan*, 728 F.2d 1307, 1311 (10th Cir.1984) ("The only remedy in federal courts expressly authorized by Congress in the ICRA is a writ of habeas corpus."). Congress's decision to not provide a federal forum other than habeas relief for people detained by tribal orders was "deliberate." *Santa Clara Pueblo*, 436 U.S. at 61.

ICRA's habeas provision provides it may only be used "to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. The Tenth Circuit has recognized that the "detention" language in ICRA is "analogous" to the "in custody" requirement in other federal habeas statutes. *Valenzuela*, 699 F.3d at 1203; *see also Walton*, 443 F.3d at 1279 n. 1.

IV. Fugitive Habeas Petitions Should Be Dismissed

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. Courts consistently refuse to allow fugitives to seek federal court relief. *See, e.g.*, *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam) (dismissing appeal of fugitive who fled while on bail); *United States v. Birk*, 2020 WL 614739 (10th Cir. Jan. 9, 2020) (dismissing habeas appeal where fugitive failed to report and district court issued arrest warrant). The Supreme Court explained this fugitive disentitlement doctrine:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

Molinaro, 396 U.S. at 366.

Fugitives cannot seek habeas relief either. *Gonzales v. Stover*, 575 F.2d 827, 827 (10th Cir. 1978) ("Here, petitioner was both under sentence and a fugitive. Under these circumstances the district court properly declined to entertain the § 2254 [habeas] petition."). This longstanding doctrine incentivizes "voluntary surrender" and discourages fleeing the court's proceeding. *Id.* at 828. A fugitive cannot "in absentia [] call upon the resources of the Court for determination of [her] claims." *Id.*

Respondents' counsel has not identified any cases applying – or refusing to apply – the fugitive disentitlement doctrine in ICRA habeas cases. Yet the same principles that animate the doctrine in criminal appeals and state court habeas proceedings apply here. Petitioner fled rather than comply with the district court's order to post a recognizance bond. An arrest warrant is outstanding. Consideration of Petitioner's federal habeas petition would encourage lawlessness and discourage orderly legal process. Respondent respectfully requests this court exercise its discretion to invoke the fugitive disentitlement doctrine and dismiss Petitioner's attempt to flout a valid order from another district court.

V. This Court Lacks Subject Matter Jurisdiction

Even if this Court did not invoke the fugitive disentitlement doctrine and did have jurisdiction over the purported custodians, the fact remains that there is "no jurisdiction" for this Court to hear the petition for habeas corpus unless Ms. Gilliland is "(1) in custody and (2) has exhausted all tribal remedies." *E.g. Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation*, 2013 WL 1367045, at *2 (D. Utah Apr. 4, 2013); Felix S. Cohen, Handbook of Federal Indian Law § 9.09 (2012 ed.) ("The petitioner must be in custody, and the petitioner must first exhaust tribal remedies"); *cf. Howard v. Warden*, 776 F.3d 772, 775 (11th Cir. 2015) (noting under § 2254 habeas relief, question of whether Petitioner is "in custody" is one of subject matter jurisdiction). Each alone is sufficient to dismiss this case for lack of subject matter jurisdiction. Here, Ms. Gilliland can show neither.

A. Ms. Gilliland is Not In Custody

This Court lacks subject matter jurisdiction unless Petitioner is detained or "in custody" when she filed the habeas petition. *Oviatt v. Reynolds*, 733 Fed. Appx. 929, 931–32 (10th Cir. 2018) (". . . habeas relief is limited to individuals who are detained when the petition is filed, and the plaintiffs have not alleged they were detained when they filed the habeas petition."); *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010) ("Therefore, an ICRA habeas petition is only proper when the petitioner is in custody.").

1. Ms. Gilliland is Not In Physical Custody

Ms. Gilliland is currently a fugitive living in Poland. Pet. ¶¶8, 38. In her lengthy Petition, she never claims to be in custody; instead acknowledging upfront that she "is not in physical custody." Pet. ¶1.

2. Ms. Gilliland is Not In Non-Physical Custody

Because she is not in physical custody, Ms. Gilliland alleges the pre-trial bond, bench warrant, and arrest warrant constitute "detention" for habeas purposes because they are "sufficiently severe actual restraint[s] on her liberty interests." Pet. ¶155. Respondents recognize certain post-conviction situations short of physical custody can constitute "detention" under current Supreme Court doctrine. But trial court recognizance bonds to ensure appearance at trial and warrants to enforce those bonds are not "severe actual restraint[s] on her liberty interests."

Fines alone are categorically insufficient to constitute detention. *E.g. Spring v. Caldwell*, 692 F.2d 994, 996 (5th Cir. 1982) ("habeas corpus cannot be invoked to challenge

a conviction that resulted in a cash fine only against the defendant."); Wright & Miller § 4262 Requirement of Custody, 17B Fed. Prac. & Proc. Juris. § 4262 (3d ed.) ("habeas corpus cannot be used to challenge a conviction that resulted only in a cash fine against the defendant"). As cash *judgments* are even insufficient to constitute detention, pretrial cash bonds cannot constitute detention.

A bench or arrest warrant to enforce an unpaid fine is similarly insufficient to constitute detention. *See Spring v. Caldwell*, 692 F.2d 994, 999 (5th Cir. 1982) ("We hold that an arrest warrant issued for willful refusal to pay a fine does not amount to custody" in habeas actions). Pretrial bonds and related warrants are not "detention."

In contrast to this pretrial bond case, the "detention' cases involving non-physical custody concern parole, post-conviction release pending sentencing, and complete banishment from tribal reservations. *Jones v. Cunningham*, 371 U.S. 236, 242 (1963) (finding parolee remained "in custody" outside of prison because "Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer."); *Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cnty., California*, 411 U.S. 345, 345 (1973) (post-conviction release pending sentencing); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 901 (2d Cir. 1996) (finding banishment from tribe is "a sufficiently severe restraint on liberty").

Courts have found many economic sanctions, child custody decisions, and even the demolition of tribal members' homes do not rise to the level of "severe restraints on individual liberty":

- "[E]xclusion from the tribal office, court, and family-services building" is insufficient because "exclusion from these facilities does not constitute permanent banishment." *Oviatt v. Reynolds*, 733 Fed. Appx. 929, 932 (10th Cir. 2018);

- "[E]xpulsion of Mr. Walton, a non-Indian, from the Tesuque Pueblo Flea Market does not constitute a 'detention'." *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1279 (10th Cir. 2006);

- "[R]evocation of Mitchell's business license, the placement of his annuity payments into escrow, and the prohibition on his doing business with other tribal-licensed entities are purely economic restrictions that do not provide a basis for habeas review." *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004);

- ". . . the destruction of their homes" is "more aptly as an economic restraint, rather than a restraint on liberty. As a general rule, federal habeas jurisdiction does not operate to remedy economic restraints." *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004);

- Petitioner was never "arrested, imprisoned, or otherwise held by the Tribe" and that a judgment of a fine "does not amount to detention." *Moore v. Nelson*, 270 F.3d 789, 790–91 (9th Cir. 2001);

- Loss of employment, health care, and annuity payments failed to satisfy ICRA's custody requirement. *Shenandoah v. U.S. Dep't of Interior,* 159 F.3d 708, 713–14 (2d Cir. 1998);

- "The temporary suspension of one's license to practice as a tribal court advocate is simply not the 'custody' required to sustain habeas corpus proceedings." *Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation*, 2013 WL 1367045, at *2 (D. Utah Apr. 4, 2013);

- "[E]xclusion from tribal lands and suspension of gaming benefits are [not] a sufficiently severe restraint on liberty to constitute "detention" and establish jurisdiction in this case." *Tavares v. Whitehouse*, 2014 WL 1155798, at *2–10 (E.D. Cal. Mar. 21, 2014), aff'd in part, appeal dismissed in part, *Tavares v. Whitehouse*, 851 F.3d 863 (9th Cir. 2017).

Here, Ms. Gilliland has not been convicted. She has not been banished. She is not on parole, nor is she awaiting sentencing. The warrants issued by the tribal district court are an effort to enforce the bond being flouted by Ms. Gilliland and secure her appearance for trial. In

short, the pretrial economic restraints do not constitute "custody" or "detention" for habeas purposes.

Indeed, while expanding what constitutes "custody," the Supreme Court warned that its "decision does not open the doors of the district courts to the habeas corpus petitions of all persons released on bail or on their own recognizance." *Hensley*, 411 U.S. at 353. Instead, the Court emphasized that "[w]e are concerned here with a petitioner *who has been convicted in state court* and who has apparently exhausted all available state court opportunities to have *that conviction* set aside." *Id.* (emphasis added). The Court reiterated that habeas is "an extraordinary remedy for severe restraints on individual liberty" and "its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe or immediate." *Id.* at 351.

Respondents discourage this Court from finding a conventional recognizance bond is a severe restraint on individual liberty that satisfies the habeas standard. To do so would "open the doors" of federal courts to second guess state and tribal district court judges managing their dockets, long before any convictions occurred. No cases support such an enlargement of federal intrusion on state and tribal courts. Ms. Gilliland is not in custody, physical or otherwise, and this Court does not have subject matter jurisdiction to review the merits of the tribal court bond.

B. Ms. Gilliland Has Not Exhausted Tribal Court Remedies

Although ICRA does not include a textual requirement that a petitioner exhaust tribal remedies before seeking habeas relief, courts have required exhaustion due to the

"strong federal policy supporting tribal self-government." Felix S. Cohen, Handbook of Federal Indian Law § 9.09 (2012 ed.); *Valenzuela*, 699 F.3d at 1207 ("Under the tribal exhaustion rule, until petitioners have exhausted the remedies available to them in the Tribal Court system, it is premature for a federal court to consider any relief.") (internal quotation omitted).

Here, Ms. Gilliland has a direct tribal court remedy she has not exercised: going to trial.[1] Her 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. Federal courts recognize that state pretrial habeas claims have not exhausted all state court remedies until trial has occurred.[2] *See U. S. ex rel. Scranton v. State of N. Y.*, 532 F.2d 292 (2d Cir. 1976) (noting the unexhausted remedy "was to go to trial" and then raise the legal issue "again on appeal" or to "plead guilty" and raise the legal issue). The Second

[1] The Cherokee Nation District Court regularly and routinely conducts jury trials. Should Ms. Gilliland return from Poland for the purpose of exercising her right to a jury trial, the Cherokee Nation can timely set her case for trial during the next available jury term for 2022-2023. *See* "Cherokee Nation District Court Tahlequah Jury Term Schedule," available at https://www.cherokeecourts.org/Portals/cherokeecourts/Documents/District%20Court/2022-2023%20Jury%20Term%20Schedule.pdf?ver=2022-09-02-114248-560 (last visited Sept. 2, 2022).

[2] An exception may exist for habeas petitions alleging violations of a right to a speedy trial or to guard against double jeopardy. *See Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973) (speedy trial act); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 302 (1984) (double jeopardy). Neither issue was raised here or in the Cherokee Nation courts.

Circuit found "unless we violate our trust," the failure to go to trial meant "there is no denying the fact that she has not exhausted her state remedies." *Scranton*, 532 F.2d at 295.

More broadly, "Petitioner may not use a federal habeas petition to derail a pending state court criminal proceeding by attempting 'to litigate constitutional defenses prematurely in federal court.'" *Wilson v. Favro*, 2016 WL 2354271, at *3 (N.D.N.Y. May 4, 2016). This is precisely what Ms. Gilliland seeks here. She wishes to have this Court intervene in the tribal criminal proceedings before they have concluded.

Exhaustion is required also because it is not clear whether Ms. Gilliland will ever be imprisoned. She has not been convicted. She may prevail at trial. Even if found guilty at trial, the district court may exercise its discretion to hand down a non-custodial sentence. Moreover, in the post-trial phase, Cherokee law permits an appeal to the Cherokee Nation Supreme Court. Cherokee Nation Supreme Court Rule 70(B) ("Any party in a criminal case, may appeal a judgment or sentence.").

Put simply, several steps remain before Petitioner has exhausted the tribal court process. Respondents request the Court dismiss the Petition for failure to exhaust those avenues.

VI. This Court Does Not Have Subject Matter Jurisdiction To Grant Injunctive or Declaratory Relief.

While Ms. Gilliland purportedly proceeds under the ICRA habeas provisions, her Petition requests the Court "find the Cherokee Nation criminal charges against her violation due process and order the Cherokee Nation District Court to dismiss them with

prejudice." Pet. ¶27. Much of her Petition asks for a collateral appeal of court orders in an ongoing criminal case. This requested relief belies the inappropriateness of the habeas vehicle as she is not requesting to be released from detention.

ICRA provides no vehicle for injunctive or declaratory relief. *Santa Clara Pueblo*, 436 U.S. at 69-70 (relief under ICRA is limited to a writ of habeas corpus); *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1142 (10th Cir. 2004); *Barteaux*, 527 F. Supp. 3d at 1326. Creating a federal cause of action here "would be at odds with the congressional goal of protecting tribal self-government" because "[t]ribal forums are available to vindicate rights created by the ICRA." *Santa Clara Pueblo*, 436 U.S. at 64-67 (discussing legislative history behind Congressional decision to not provide additional federal jurisdiction over ICRA claims). In the ICRA legislative process, Congress rejected a proposal to grant "*de novo* review in federal court of all convictions obtained in tribal courts." *Id.* at 67.

Indeed, a writ of habeas corpus is not a proper vehicle to ask this Court to intervene and order a state or tribal court to dismiss charges. *Tiger v. Whetsel*, 125 Fed. Appx. 971, 972 (10th Cir. 2005) (unpublished) (noting "the district court denied the [habeas] petition because the remedy sought by [petitioner] in his petition, dismissal of state charges, was unavailable"). If it were otherwise, state and tribal pretrial court proceedings would be routinely challenged in federal court under habeas review. Such an intrusion on other sovereign courts' ability to manage their dockets would be a novel encroachment contrary to the comity so valued between sovereigns. *See, e.g.*, *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) ("As in cases raising comity concerns regarding federal-state jurisdiction,

comity concerns in federal-tribal civil jurisdiction arise out of mutual respect between sovereigns."); *id.* at 444 ("Congress has enunciated a strong interest in promoting tribal sovereignty, including the development of tribal courts.").

VII. Conclusion

Respondents request this Court recognize the importance of not intervening in ongoing state or tribal court proceedings to assist a fugitive attempting to evade basic judicial tools to ensure appearance at hearings and trial. Ms. Gilliland's decision to become a fugitive rather than post a recognizance bond should not be rewarded. The Court may dismiss this Petition solely due to her fugitive status.

Independently, the Court does not have subject matter jurisdiction for two reasons. First, Ms. Gilliland is not in physical – or any other – custody. Ms. Gilliland's displeasure with having to answer for her alleged crimes in tribal court does not give this Court jurisdiction to hear a pretrial appeal from tribal court orders. As the Cherokee Supreme Court already found, this case should be dismissed because ICRA's habeas provision only applies to petitioners in "detention," not those who choose to flee to and live in another country to avoid posting a bond. Habeas proceedings are inappropriate.

Second, Ms. Gilliland has failed to exhaust tribal court remedies. She has not appeared for trial and has not used any post-trial procedural opportunities.

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

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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/s/ R. Trent Shores
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