No. 20-3672
Civil

In the United States Court of Appeals
For the Eighth Circuit

JOHN GREGORY LAMBROS,

APPELLANT,

V.

UNITED STATES OF AMERICA AND
UNITED STATES BUREAU OF PRISONS,

APPELLEES.

Appeal from the
United States District Court for the
District of Minnesota

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

The district court correctly dismissed Lambros's complaint. Lambros was extradited from Brazil to the United States in 1992 to face several serious drug charges. *See generally United States v. Lambros*, 4:89-cr-82 (D. Minn.). Lambros was not extradited pursuant to a parole violation warrant (relating to several convictions in the 1970s). The dismissal of Lambros's common law and constitutional tort claims against the United States and the Bureau of Prisons for alleged prolonged detention pursuant to the parole violation warrant should be affirmed.

The National Appeals Board overseeing the United States Parole Commission found that, under the Rule of Specialty, the parole violation warrant could not be enforced. That decision moots any claim for declaratory relief as to prospective detention. Lambros's claims for monetary relief likewise fail because quasi-judicial immunity from liability in tort shields the Parole Commission, and therefore shields the United States and the Bureau of Prisons as well. This Court should affirm the district court's decision dismissing his complaint. The Appellees do not request oral argument.

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JURISDICTIONAL STATEMENT

Plaintiff John Lambros filed a complaint against the United States and the United States Bureau of Prisons seeking declaratory and monetary relief under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq*., and the Constitution. The district court dismissed the complaint on September 11, 2020. U.S. Add. at 1. Lambros filed a motion to alter and/or amend the judgment, which the district court denied on November 18, 2020. DCD 37. Lambros timely filed this appeal on December 21, 2020. DCD 38; Fed. R. App. P. 4(a)(1)(B); 4(a)(4). The district court had jurisdiction over the action pursuant to 28 U.S.C §§ 1331 and 1346.

This Court has jurisdiction over Lambros's appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court clearly erred in finding Lambros failed to prove he properly served the United States, where he attempted service in violation of the requirement that a non-party serve the complaint, and Lambros otherwise made no attempts at completing service even after an extension was granted.

Federal Rule of Civil Procedure 4(c)(2), (i), (m).

Constien v. United States, 628 F.3d 1207 (10th Cir. 2010)

Hamilton-Warwick v. U.S. Bancorp, No. CV 15-2730 (JRT/HB), 2016 WL 740257 (D. Minn. Feb. 24, 2016)

II. Whether the district court properly dismissed Lambros's constitutional claims where there is no waiver of sovereign immunity that would allow Lambros to sue the United States or the United States Bureau of Prisons for monetary relief stemming from alleged violations of his constitutional rights.

FDIC v. Meyer, 510 U.S. 471 (1994)

Buford v. Runyon, 160 F.3d 1199 (8th Cir.1998)

III. Whether the Bureau of Prisons was properly dismissed as a defendant where the Federal Tort Claims Act provides that the exclusive remedy in tort is a suit against the United States.

28 U.S.C. § 1346(b)

FDIC v. Meyer, 510 U.S. 471 (1994)

IV. Lambros alleged that the Parole Commission issued a warrant for Lambros's arrest and upheld the continued applicability of that warrant under its quasi-judicial authority and that the United States, through the Bureau of Prisons, executed that order to detain Lambros until a final decision was issued releasing the warrant. Was the United States entitled to immunity from suit in tort?

28 U.S.C. § 2674

Mayorga v. Missouri, 442 F.3d 1128 (8th Cir. 2006)

Tinsley v. Widener, 150 F. Supp. 2d 7 (D.D.C. 2001)

V. Whether Lambros's declaratory judgment claim was moot because he was released from incarceration after the National Appeals Board found that the Rule of Specialty applied and that Lambros could not be detained solely on the basis of the parole violation warrant due to the United States' treaty obligations to Brazil.

Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983)

Brazil v. Ark. Dep't of Human Servs., 892 F.3d 957 (8th Cir. 2018).

STATEMENT OF THE CASE

I. Factual Background

A. The underlying criminal cases and the extradition from Brazil.

Lambros was convicted in at least three separate federal cases for crimes he committed in the 1970s. He was sentenced to various terms of imprisonment, including a 22-year sentence. Lambros Br., Ex. A. DCD 1 ¶ 66; DCD 1-1 at 39; *see* DCD 31 at 4.[1] Lambros was released on parole in October 3, 1983 and began distributing cocaine.[2] In May 1989, Lambros was charged federally in Minnesota for drug trafficking offenses. *United States v. Lambros*, No. 4:89-cr-82 (D. Minn.). Lambros stopped reporting to his parole officer and left the country. *See* Lambros Br. at 1; *Id.*, Ex. A.

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[1]As described in one of Lambros's other lawsuits, the convictions were for assault on a federal officer, possession with intent to distribute cocaine, and distribution of heroin. *See Lambros v. United States*, No. 95-3502-JWL, 1997 WL 94235, at *1 (D. Kan. Feb. 13, 1997). The criminal docket numbers from the District of Minnesota are listed on the Parole Commission warrant. Lambros Br., Ex. B (CR3-75-128, 3-76-54, and 3-76-17).

[2]Parole was not abolished in federal cases until the Sentencing Reform Act of 1984 took effect.

In August 1989, the U.S. Parole Commission issued a parole violation warrant for Lambros's arrest. Lambros Br., Ex. A ("parole violation warrant"); U.S. Add. at 3. A warrant for his arrest on the pending District of Minnesota charges was also issued. Complaint, Ex. F, DCD 1-1 at 27.

On April 30, 1992, the Supreme Court of Brazil ordered the extradition of Lambros to the United States in the case to face charges of conspiracy to possess and distribute more than five kilograms of cocaine and three counts of possession with intent to distribute cocaine and aiding and abetting in such possession. Lambros Br., Ex. C. In 1993, a jury convicted Lambros of four cocaine-related offenses, including the conspiracy count. *See United States v. Lambros*, 404 F.3d 1034, 1035 (8th Cir. 2005). On appeal, the Eighth Circuit vacated the sentence on the conspiracy count, remanded for resentencing, and affirmed the conviction in all other respects. *See United States v. Lambros*, 65 F.3d 698, 702 (8th Cir. 1995). Lambros was sentenced to a 360-month prison term. *See Lambros*, 404 F.3d at 1035.

B. Lambros's post-extradition challenges to his extradition and to the Parole Commission warrant.

Lambros challenged his extradition in his criminal case in the District of Minnesota. His motion to dismiss the criminal case based on alleged violations of the extradition treaty was denied. *See* Lambros Br., Ex. B (Report and Recommendation, *United States v. Lambros*, 4:89-cr-82 (D. Minn. Dec. 21, 1992) [DCD 39]); Order, *id.* (Jan. 5, 1983) [Dkt. 45] (adopting R&R).

Lambros also challenged the parole violation warrant with the U.S. Parole Commission. Lambros was represented by counsel in an application for dispositional review of the warrant, which had been lodged as a detainer with the BOP. Complaint, DCD 1 ¶ 38; Order, 3:95-cv-3119-RDR, Slip Op. at 2 (D. Kan. Feb. 5, 1998) (Dkt. 14). In 1994, the Parole Commission ordered that the parole violation warrant remain in place. *See Lambros v. United States*, No. 95-3502-JWL, 1997 WL 94235, at *2 (D. Kan. Feb. 13, 1997).

Lambros also filed a number of successive habeas petitions in the District of Kansas and the District of Minnesota relating to his extradition and the circumstances of his confinement. For example, Lambros filed a petition in the District of Kansas alleging a due

process violation by the Parole Commission when it upheld his parole violation warrant without providing an administrative appeal. *Lambros v. U.S. Parole Comm'n*, No. 3:95-cv-3119-RDR (D. Kan. Feb. 5, 1998). The district court denied habeas relief finding that there was no right to appeal the Parole Commission's determination that the parole violation warrant should continue as a detainer. *Id.*, Slip Op. at 3.

In June 2017, Lambros filed a mandamus action in the District of Kansas, which he alleges challenged the parole violation warrant's validity. Lambros Br. at 10, ¶ 6. The district court, however, interpreted the action to be a challenge to the healthcare Lambros was receiving within the Bureau of Prisons. The court dismissed the action. Order, *Lambros v. English*, No. 17-3105-SAC-DJW (D. Kan. Sept. 27, 2017).[3]

[3]None of these decisions in these habeas cases directly addressed the question of whether the Rule of Specialty allowed the parole violation warrant's continued application to Mr. Lambros.

C. Lambros's claims made after completing his Minnesota prison sentence.

In July 2017, Lambros completed his prison sentence in the 1992 Minnesota criminal case. He was not released from custody, however, because of the detainer based on the parole violation warrant. Complaint, DCD 1, ¶ 39.

In October 2017, the Parole Commission held a parole revocation hearing for Lambros regarding the violations underlying the parole violation warrant. Complaint, Ex. A, DCD 1-1 at 1. The Parole Commission determined that Mr. Lambros's parole should be revoked, and he was to reside in and participate in a program of the Residential Re-Entry Center for 6 months. *Id.*

Lambros again challenged his detention in district court. In 2018, Lambros filed a habeas petition in the District of Minnesota challenging, among other things, his detention under the parole violation warrant due to the Rule of Specialty[4] and complaining that

[4]The Rule of Specialty was adopted by the Supreme Court in *United States v. Rauscher*, 119 U.S. 407, 422–23 (1886). It provides, "a defendant may only be tried in the requesting country for the offense for which extradition was granted." *Graham v. Young*, 886 F.3d 700, 702 (8th Cir. 2018).

the warrant prevented him from participating in Residential Drug Abuse Treatment. Petition, *Lambros v. U.S. Parole Commission, et al.,* Case No. 18-cv-571 (SRN/TNL) (D. Minn. Mar. 3, 2018). The district court, reviewing all of Lambros's pleadings, and reviewing his prolific prior challenges to his underlying conviction, found it was not clear what relief Lambros was seeking or the basis for it, and the district court found his claim was largely an unauthorized, serial 2255 petition. Order, *Lambros v. U.S. Parole Commission, et al.,* Case No. 18-cv-571 (SRN/TNL) (D. Minn. June 29, 2018). The district court gave Lambros the opportunity to refile his claim as a civil complaint, but Lambros did not do that. *Id.* Nor did he appeal the decision.

D. Lambros's successful challenge to his parole revocation.

In February 2018, the National Appeals Board of the Department of Justice issued an order finding that the Rule of Specialty applied and that Lambros's sentence on his offenses from the 1970s had expired. Lambros Br., Ex. D. Lambros was released.

II. Procedural History

In May 2018, after the National Appeals Board ruled the sentences underlying the parole violation warrant had expired,

Lambros filed the complaint in this case in the District Court for the District of Columbia. Complaint, DCD 1.[5] He alleged he should have been released from custody in July 2017 when he completed his prison sentence in the 1992 Minnesota case. *Id.* ¶¶ 6, 40.

Lambros sought declaratory relief that "Defendants . . . violated the Treaty of Extradition by falsely arresting and imprisoning him based on the parole violation warrant. *Id.* ¶ 69. He also sought compensatory damages of $20,000,000.00 against the Defendants for "false arrest, false imprisonment and emotional injuries sustained as a result of the above actions." *Id.* ¶ 71.

In September 2018, the District Court for the District of Columbia ordered Lambros to serve the complaint and file returns of service on the docket. DCD 3. Lambros requested and received an extension of the service deadline. On November 5, 2018, he filed an

[5]Prior to filing, Lambros exhausted his administrative remedies through the Bureau of Prisons, Complaint, DCD 1 ¶ 53, and filed an administrative tort claim that was denied on April 4, 2018, *id.* ¶ 52, Ex. L. Lambros timely filed his complaint within six months of that denial. 28 U.S.C. § 2401(b).

affidavit indicating that he had personally served the United States and the Bureau of Prisons via certified mail. DCD 6.

The United States moved to dismiss Lambros's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), (2), (3), (5), and (6). DCD 10. In October 2019, the District Court for the District of Columbia granted the motion to dismiss, in part, finding that the District of Columbia was not a proper venue under Federal Rule of Civil Procedure 12(b)(3), and it transferred the case to the District Court for the District of Minnesota. DCD 17. The District Court for the District of Columbia held the remainder of the motion to dismiss in abeyance to allow the Minnesota District Court to address upon the transfer. *Id.*

In February 2020, the United States renewed its motion to dismiss the complaint in the District of Minnesota on the same grounds it raised in its initial D.C. motion. DCD 22. In July 2020, Magistrate Judge Wright recommended dismissal of Lambros's complaint in its entirety, without prejudice, on July 20, 2020. U.S. Add. at 3. Magistrate Judge Wright determined the entire complaint should be dismissed Lambros failed to properly serve the United

States with his complaint under Rule 4(i). U.S. Add. at 12-15. The Court assumed the truth of Lambros's affidavit of service, but held that Lambros's attempt failed because Lambros, a party to the lawsuit, was prohibited from serving the complaint. Fed. R. Civ. P. 4(c)(2). The court found this rule applied even though Federal Rule of Civil Procedure 4(i) allows service on the United States and its agencies via certified mail. U.S. Add. at 14-15.

Magistrate Judge Wright also recommended, on a variety of grounds, that each claim Lambros made in the complaint be dismissed. First, Lambros's claims for money damages against the United States and the Bureau of Prisons for alleged violations of his constitutional rights. U.S. Add. at 15-17. The court found that there was no waiver of sovereign immunity for these claims. U.S. Add. at 16. Lambros could not bring an action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), because that such an action can only be made against individual federal employees, and the Federal Tort Claims Act did not waive sovereign immunity for constitutional claims against the United States. *Id.*

Second, Magistrate Judge Wright recommended dismissing Lambros's request for declaratory relief. U.S. Add. at 17-18. The Magistrate Judge found that Lambros's request was moot following the Parole Commission's decision that the Rule of Specialty applied and the parole violation warrant could not be used to detain Lambros. U.S. Add. at 18.

Third, the Magistrate Judge recommended that Lambros's common law tort claims under the Federal Tort Claims Act ("FTCA") be dismissed against the Bureau of Prisons, because the United States was the only proper defendant for such a claim. U.S. Add. at 18. Finally, as to the United States, the Magistrate Judge found that the Parole Commission, which had issued the parole violation warrant and lodged it as a detainer, had quasi-judicial immunity for those actions. U.S. Add. at 20. The Magistrate Judge further determined the United States was entitled to rely on that immunity as a defense to Lambros's claim that he was wrongfully detained. *Id.* The Magistrate Judge expressly found that any BOP official would have been acting pursuant to the USPC's quasi-judicial actions in enforcing the parole violation warrant. *Id.* at 22. The Magistrate Judge

therefore recommended dismissing the FTCA claims against the United States. *Id.*

Lambros objected to the Magistrate Judge's Report and Recommendation. DCD 32. The District Court, the Honorable Michael J. Davis, reviewed the record de novo. In September 2020, Judge Davis adopted the Report and Recommendation "in its entirety" and dismissed the complaint, without prejudice. U.S. Add. at 1. Lambros filed a timely motion to alter or amend the judgment. DCD 35. That motion was denied. DCD 37.

Lambros filed a timely notice of appeal. DCD 38; Fed. R. App. P. 4(a)(1)(B), a(4).

SUMMARY OF THE ARGUMENT

The district court properly dismissed Lambros's claims, and its judgment should be affirmed. The district court did not have subject matter jurisdiction over Lambros's claims. The Federal Tort Claims Act is a limited waiver of sovereign immunity that allows for a suit exclusively against the United States for certain common law torts committed by federal employees within the scope of their employment. No matter what he calls his claim, there is no waiver of sovereign immunity to sue the United States in tort for Lambros's detention while he challenged his parole violation warrant, even if the Parole Commission's judgment that it was valid was later overturned by the National Appeals Board.

Lambros's claims fail for several reasons. As a procedural matter, Lambros failed to serve the complaint on the government properly. By his own admission, Lambros's only attempt to serve the United States was made by Lambros via certified mail. The district court properly applied the long-standing federal rule that a party may not personally serve the complaint on the defendant. Lambros initially did not make any attempt to serve the defendants, and only

mailed the complaint to the government after he was prompted by the district court to serve the complain. His late attempt to serve the complaint himself was invalid.

Each of Lambros's claims also failed for a variety of reasons on jurisdictional grounds. First, Lambros couched some of his claims in constitutional terms, which the district court recognized were improper because the United States did not waive its sovereign immunity. Second, the district court declined his request for prospective, declaratory relief because the National Appeals Board decision applying the Rule of Specialty and Lambros's release, mooted that claim. Third, Lambros's FTCA claims against the Bureau of Prisons are invalid as the United States is the only proper defendant.

Most fundamentally, Lambros's claims are not cognizable as a matter of law. Lambros's clai.ms all stem from his disagreement with the Parole Commission's decision to lodge the parole violation warrant as a detainer and enforce it when he completed his criminal sentence in the 1992 cocaine conspiracy case. Lambros's claims of fraud, misrepresentation, and false imprisonment surrounding his detention

on the parole violation warrant are excepted from the FTCA's waiver of sovereign immunity.

The decisions of the Parole Commission were made in an exercise of quasi-judicial authority over parole matters. The Parole Commission is immune from suit whin that when acting in that capacity, however, and so are the federal officers at the Bureau of Prisons who executed it. The United States is not liable under the FTCA for actions of its employees unless they are tortious; not where, as here, they are expressly within the employees' authority and obligation. The district court properly dismissed Mr. Lambros's common law tort claims for all these reasons, and this Court should affirm.

ARGUMENT

I. The District Court Correctly Held the Government Was Not Properly Served With the Complaint.

The district court's discretionary decision to dismiss this case because Lambros did not properly serve the United States or the Bureau of Prisons should be upheld. This Court reviews the district court's decision granting the Defendants' motion to dismiss for failure of service under Federal Rule of Civil Procedure 12(b)(5) under a mixed standard. The legal question of whether service was insufficient is reviewed *de* novo, while the decision to dismiss the complaint on that basis (rather than to grant more time to complete service) is reviewed under an abuse of discretion standard. *Marshall v. Warwick*, 155 F.3d 1027, 1030 (8th Cir. 1998).

Under Federal Rule of Civil Procedure 12(b)(5), Lambros bears the burden (by a preponderance of the evidence) to establish that he has effectuated service properly and that the Court thereby has personal jurisdiction over the defendants. *Creative Calling Sols., Inc. v. LF Beauty Ltd.*, 799 F.3d 975, 979 (8th Cir. 2015). Lambros cannot do that.

Lambros's attempt at service was unavailing because he may not

effect service himself. Fed. R. Civ. P. 4(c)(2); *Smith v. United States*, 475 F. Supp. 2d 1, 9 (D.D.C. 2006) ("Given the fact that Plaintiff. . . effected service himself in this case by certified mail . . . it is clear that Plaintiff did not comply with the basic requirements of Federal Rule of Civil Procedure 4(c)(2). As such the apparent service upon Defendant was defective."). Lambros argues that he properly served the United States because he sent the summons and complaint by certified mail to the Attorney General, United States Attorney's Office, and Bureau of Prisons. Lambros admitted, however, that he attempted to effect service by mail without enlisting the assistance of a third party. *See* DCD 6, ¶ 4 and Attachments; U.S. Add. at 13.

The district court held that Rule 4(c)(2)'s requirement that a non-party must effectuate service applied even when service is allowed to be completed by certified mail, as it is for the United States under Rule 4(i). U.S. Add. at 14-15. This holding is consistent with the text of Rule 4, which states, generally in section (c)(2) that "any person who is at least 18 years old *and not a party* may serve a summons and complaint." (emphasis added). Rule 4(i) thereafter sets out the requirements to serve the United States. Rule 4(i) describes how (via

certified mail) the United States may be served but does not expressly override who (only non-parties) may serve, as set forward in section (c)(2). *See Hamilton-Warwick v. U.S. Bancorp, et al.*, No. CV 15-2730 (JRT/HB), 2016 WL 740257, at *2 (D. Minn. Feb. 24, 2016) (dismissing complaint served via mail on a private defendant).[6]

The Tenth Circuit considered this precise question and held that service on the United States by certified mail may not be effected by a *pro se* party. *Constien v. United States*, 628 F.3d 1207, 1213 (10th Cir. 2010). In *Constien*, the court looked first to the text of Rule 4, which "contains no mailing exception to the nonparty requirement for service." 628 F.3d at 1213-14. The court then examined the history of the rule for service on the United States, which is now codified in Rule 4(i). The court traced the history of the service requirement from

[6]The district court in *Hamilton-Warwick* also held that the FDIC, a federal corporation, had not been properly served because the United States had not been served. 2016 WL 740257, at *2. The court's reasoning regarding the mailing by plaintiff herself, as opposed to a non-party, should apply equally to service on the FDIC, thought the court did not list that failure expressly in the portion of the opinion applicable to the FDIC. In fact, the district court relied on precedent from the District of Columbia that applied this same rule to service on the United States. *Id*. (citing *Otto v. United States*, No. 5-2319, 2006 WL 2270399, at *2 (D.D.C. 2006)).

its initiation in statute, 28 U.S.C. § 763 (1940), which did allow a plaintiff to mail the complaint to the Attorney General. 628 F.3d at 1214. The court noted, however, that the first version of Rule 4 itself required the plaintiff to "furnish the person making service" with copies to effect service – a purposeful deviation from the initial statute. *Id*. at 1214. The Tenth Circuit found further support in the legislative history of Rule 4, which sought to reduce the burden of service on the U.S. Marshals by expanding service to private process servers, but did not go so far as to allow parties to effect service. *Id.*

The court expressly considered whether Rule 4(i)'s language expanded Rule 4(c) as applied to the government and concluded that it did not. *Id.* at 1215 n.7. The court explained that the current language of Rule 4(i) appeared in a 2007 amendment that was intended to by a stylistic change, not a departure from the longstanding requirement of using a process server. *Id.* "Hence, we read the language in present Rule 4(i) that 'a party must send a copy . . . to the Attorney General' as implicitly incorporating the requirement that the party act through a proper process server." *Id.*

This Court should adopt the Tenth Circuit's thorough analysis and affirm the district court's holding. As both *Constien* and the district court noted, there are several other district courts that have explicitly addressed this question and held that a pro se plaintiff cannot effect service simply by mailing copies of the summons and complaint to the United States without enlisting a non-party to do so. *See Constien*, 628 F.3d at 1215 (citing cases); U.S. Add. at 15 (same); *see also Shabazz v. City of Houston*, 515 F. App'x 263, 264 (5th Cir. 2013); *Smith v. All Persons Claiming a Present or Future Int. in Est. 13*, No. 2011-41, 2016 WL 5720541, at *3 (D.V.I. Sept. 29, 2016); *Copeny v. Dep't of the Navy Captain Philip Gubbins*, No. 3:13-CV-275-J-99MMH-JBT, 2013 WL 12388569, at *3 (M.D. Fla. Nov. 1, 2013), *report and recommendation adopted sub nom. Copeny v. Gubbins*, No. 3:13-CV-275-J-99MMH-JBT, 2013 WL 12388561 (M.D. Fla. Dec. 2, 2013). The rationale is consistent with the language and history of the Rule and provides assurance that service is fairly accomplished on the United States as it would be on any other party. Because Lambros did not properly complete service, his complaint was rightly dismissed. Lambros's attempt to serve the United States came

only after he had already missed the 90-day deadline in Federal Rule of Civil Procedure 4(m) and been given an extension by Judge Kelly. DCD 3. Even with that allowance, Lambros did not satisfy the requirement for effecting service on the United States. Lambros's use of the mail was "**how** [he] attempted service; it did not change **who** was making the attempt." *Hamilton-Warwick*, 2016 WL 740257 at *2. The district court was well within its "substantial" discretion to dismiss Lambros's complaint for failure of service, and this Court should affirm that decision. *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 888 (8th Cir. 1996).

II. Lambros's Claims Must be Dismissed Because He Cannot Overcome the United States' Sovereign Immunity for Any of His Claims to Money Damages Against the United States or Its Agencies.

The United States, including its agencies and employees, can be sued only to the extent that sovereign immunity has expressly been waived. *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996). "Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*,

312 U.S. 584, 586 (1941)). Thus, absent a waiver of sovereign immunity, a federal court does not have subject matter jurisdiction over cases against the United State government. *Id.*

The district court properly dismissed Lambros's tort claims under Federal Rule of Civil Procedure 12(b)(1). "The existence of subject-matter jurisdiction is a question of law that this court reviews de novo." *ABF Freight Sys. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011). "A court deciding a motion under Rule 12(b)(1) must distinguish between a 'facial attack' or a 'factual attack'" on jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). This Court has stated that "[t]he method in which the district court resolves a Rule 12(b)(1) motion—that is, whether the district court treats the motion as a facial attack or a factual attack—obliges us to follow the same approach." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016).[7]

[7]Here, the district court considered matters beyond the pleadings, such as other district court opinions and the documents attached to, or referenced in, his complaint. U.S. App'x at 9.

Lambros sought, in part, $20,000,000.00 in damages for the government's decision to detain him on the parole violation warrant even after, he alleges, the Bureau of Prisons should have known the Rule of Specialty prohibited execution of that warrant. Complaint, DCD 1 ¶ 70. Lambros continues to rely on the FTCA for each of his constitutional and common law tort claims,[8] but the FTCA's limited waiver does not apply here. Lambros's claims must be dismissed for lack of subject matter jurisdiction.

A. The United States has not waived sovereign immunity for claims alleging a violation of the Constitution.

The doctrine of sovereign immunity bars any action for money damages against the United States for claims that are based on an alleged violation of the Constitution. *See Meyer*, 510 U.S. at 486 (declining to extend individual capacity liability under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S.

[8]The district court correctly pointed out that the United States' treaty obligations to Brazil do not create a private right of action that would allow Lambros to sue the United States for a violation of the Rule of Specialty in and of itself. U.S. App'x at 17 n.6. Thus, the United States focuses exclusively on the FTCA as the source of Lambros's claims.

388 (1971) to federal agencies); *Buford v. Runyon*, 160 F.3d 1199, 1203 (8th Cir.1998); *McCourt v. Rios*, No. CIV. 08-6411 PAM/RLE, 2010 WL 3269905, at *7 (D. Minn. July 16, 2010), *R. & R. adopted*, No. CIV. 08-6411 (PAM/RLE), 2010 WL 3269914 (D. Minn. Aug. 16, 2010). Lambros's constitutional claims were properly dismissed for lack of jurisdiction. *See Meyer*, 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature."). The district court lacked jurisdiction to consider Lambros's constitutional torts under the FTCA (U.S. Add. at 16-17), and its dismissal of his complaint should be affirmed.

B. The FTCA is a limited waiver of sovereign immunity and does not waive sovereign immunity for Lambros's common law tort claims.

The FTCA is a limited waiver of sovereign immunitythat makes the federal government liable to the same extent as a private individual for certain torts of federal employees acting within the scope of their employment. 28 U.S.C. §§ 1346, 2674; *United States v. Orleans,* 425 U.S. 807, 813 (1976). The FTCA provides the *exclusive* remedy "[w]here a plaintiff seeks monetary damages against a federal agency fortorts committed by federal employees." *Lempert v. Rice,* 956 F. Supp. 2d 17, 28 (D.D.C. 2013) (alteration in original) (quoting *Jones*

v. United States, 949 F. Supp. 2d 50, 53 (D.D.C. 2013)); *Johnson v. Veterans Affairs Med. Ctr.*, 133 F. Supp. 3d 114-15; *see* 28 U.S.C. § 2679(b)(1) (the FTCA remedy is "exclusive of any other civil action or proceeding for money damages"). The district court correctly held that the FTCA's limited waiver of sovereign immunity did not apply to any of Lambros's claims, and the decision should be affirmed in all respects.

1. All FTCA claims against the BOP were properly dismissed.

The FTCA does not permit claims against an agency of the United States, rather, only against the United States itself. 28 U.S.C. 1346(b).

> To establish the FTCA waiver of sovereign immunity, the plaintiff must show that his claim is [1] against the United States, [2] for money damages, ... [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Meyer, 510 U.S. at 477 (alterations in original) (quoting 28 U.S.C. § 1346(b)). "Because a federal agency cannot be sued under the Federal

Tort Claims Act, the United States is the proper defendant." *Duncan v. Dep't of Labor*, 313 F.3d 445, 447 (8th Cir. 2002). Thus, this Court should affirm the district court's dismissal of the Bureau of Prisons as a defendant in tort. U.S. Add. at 18.

2. The United States is entitled to rely on the quasi-judicial immunity of employees of the Parole Commission.

The claim that Lambros was wrongly detained on the parole violation warrant after July 3, 2017 was also properly dismissed, because any employee of the United States would be entitled to immunity and the United States may rely on that same immunity. 28 U.S.C. § 2674; *Khan v. Holder*, 134 F. Supp. 3d 244, 253-54 (D.D.C. 2015). As the district court explained, "Parole board officials are entitled to quasi-judicial immunity when they make decisions with respect to parole detainer warrants or decide to grant, deny, or revoke parole." U.S. Add. at 20.

The Eighth Circuit, consistent with many other circuits, has held that parole board members are entitled to absolute quasi-judicial immunity from a suit for money damages. *Mayorga v. Missouri*, 442 F.3d 1128, 1131 (8th Cir. 2006) ("Parole board members are entitled

to absolute immunity when considering and deciding parole questions, as this function is comparable to that of judges."); *Nelson v. Balazic,* 802 F.2d 1077 (8th Cir. 1986); *see also Clark v. Georgia Pardons & Paroles Board,* 915 F.2d 636, 640 n.1 (11th Cir. 1990); *Fuller v. Georgia State Board of Pardons & Paroles,* 851 F.2d 1307, 1310 (11th Cir. 1988); *Walrath v. United States,* 35 F.3d 277, 281-83 (7th Cir. 1994); *Wilson v. Rackmill,* 878 F.2d 772, 775-76 (3d Cir. 1989); *Fendler v. United States Parole Comm'n,* 774 F.2d 975, 980 (9th Cir. 1985).

The United States is entitled to judicial immunity under the FTCA because the employees of the Parole Commission, whose alleged acts form the basis of plaintiff's claims, are immune and the United States may rely on that immunity in its defense. *See, e.g. Tinsley v. Widener,* 150 F. Supp. 2d 7, 12 (D.D.C. 2001) (judicial immunity protects United States from FTCA suit); *Buck v. Stewart,* No. 07–cv–774, 2008 WL 901716, at *4 (D. Utah Mar. 31, 2008) (United States possesses judicial immunity as to FTCA claims where individual judicial defendants are immune); *Dockery v. United States,* No. 08-80031-CIV, 2008 WL 345545, at *2 (S.D. Fla. Feb.6, 2008) (same); *Lawrence v. Conlon,* No. 92 C 2922, 1995 WL 153273, at *5 (N.D. Ill.

April 6, 1995) (federal officers performing judicial functions are entitled to absolute judicial immunity from claims brought under FTCA); *McGee v. United States*, No. 1:10-CV-521, 2010 WL 3211037, at *3 (S.D. Ohio Aug. 12, 2010) (the United States is entitled to judicial immunity under the FTCA because the clerk of court and staff attorney defendants whose alleged acts form the basis of plaintiff's claims are immune from suit).

The United States agrees with Lambros that *Stump v. Sparkman*, 435 U.S. 349 (1978), generally sets forward the standard for determining judicial immunity from suit. *See* Lambros Br. 22. In that case, the Supreme Court upheld a judge's assertion of immunity from suit, stating that "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978). Lambros does not allege such an error in his complaint, however.

Lambros's claims for monetary relief against the United States under the FTCA are barred by judicial immunity applied here due to

the quasi-judicial nature of the functions of the Parole Commission in issuing its warrants and rulings and the functions of those at the Bureau of Prisons in enforcing those rulings. The District Court properly dismissed those claims.

3. The FTCA does not waive the United States' sovereign immunity for false imprisonment claims under these circumstances.

As a waiver of sovereign immunity, the FTCA "carefully limits the conditions under which the United States subjects itself to liability," and its scope is strictly construed. *LaFromboise v. Leavitt*, 439 F.3d 792, 795 (8th Cir. 2006). When Congress enacted the FTCA, it included certain exceptions, *i.e.*, subject areas in which no tort claims are allowed. 28 U.S.C. § 2680(h). Thus, for example, under § 2680(h), no liability exists for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." There is no dispute that this exception bars any claim for false imprisonment leveled against the United States based on the actions of the Parole Commission. U.S. Add. at 21 n.7.

Lambros mistakenly reads the district court's decision to suggest that he can proceed on a false imprisonment claim against the United States, acting through the Bureau of Prisons. Lambros Br. 13, 15, 20.[9] In support of that argument, Lambros cites *Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990). Lambros Br. at 22.[10] *Alexander* does not apply here, however, because the alleged error here is not in the calculation of Lambros's sentence, as it was in *Alexander*, but rather in whether the Rule of Specialty applied so that his prior sentence was expired. The validity of the parole violation warrant was firmly within

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[9]The district court explained that the FTCA's law enforcement proviso (which is an exception to the exception in 2680(h)) has been interpreted by this Court and others to allow for claims against Bureau of Prisons officials. U.S. App'x at 21 n.7. Therefore, it is possible to state a claim against the United States under the FTCA for false imprisonment arising from the actions of Bureau of Prisons employees. That does not mean, however, that Lambros has asserted such a claim.

[10]Lambros's complaint does not state such a claim. Rather, the injury for which he seeks recompense flows from the Parole Commission's lodging of the parole violation warrant as a detainer and not applying the Rule of Specialty at his parole revocation hearing in 2017. *See, e.g.,* Complaint ¶ ¶ 15-17, 22. As discussed later in this brief, Lambros's claim that the Rule of Specialty applied to him became moot after the National Appeals Board's decision in 2018, resulting in his release from custody. *See*, *infra*, § III, p. 15.

the Parole Commission and the National Appeals Board's authority to decide.

For example, Lambros states that the Bureau of Prisons knew by May 2017 that he had submitted proof to the Parole Commission that his detention under the parole violation warrant was barred by the Rule of Specialty. Complaint, DCD 1 ¶ 33. Even assuming the truth of Lambros's allegation that the Bureau of Prisons knew of his challenge to the parole violation warrant or that the Bureau of Prisons knew or should have known that the Rule of Specialty applied, Lambros nowhere contends that the Bureau of Prisons had independent authority to evaluate the legality of the parole violation warrant or decide to release him contrary to the U.S. Parole Commission's decision.

The authority to issue a warrant for violation of parole and to revoke such a warrant lies exclusively with the Parole Commission. 28 C.F.R. § 2.44(a) ("A summons or warrant may be issued or withdrawn only by the Commission, or a member thereof."); 28 C.F.R. § 2.47(a) ("When a parolee is serving a new sentence in a federal, state or local institution, a parole violation warrant may be placed against him as a

detainer."). Here, the Parole Commission conducted a dispositional review of the warrant/detainer, in which Lambros was represented by counsel. DCD 1 ¶ 38; Order, 3:95-cv-3119-RDR, Slip Op. at 2 (D. Kan. Feb. 5, 1998) (DCD 14). On September 14, 1994, the USPC ordered that the parole violation warrant remain in place. *See Lambros v. United States*, No. 95-3502-JWL, 1997 WL 94235, at *2 (D. Kan. Feb. 13, 1997). Lambros acknowledges the 1994 process and decision upholding the parole violation warrant. Lambros Br. at 9 ¶ 3; Complaint, DCD 1 ¶ 38.

Lambros also acknowledges that in 2017, the United State Parole Commission held a hearing on the revocation of Lambros's parole pursuant to the charges set out in the parole violation warrant. Complaint, Ex. A, DCD 1-1 at 1. The Parole Commission determined that Mr. Lambros's parole should be revoked, and he was to reside in and participate in a program of the Residential Re-Entry Center for 6 months. *Id.* Lambros also attempted to challenge the validity of the parole violation warrant via habeas and civil actions in the District of Kansas and District of Minnesota. However, none of these cases found

that Lambros was wrongfully detained, such that the Bureau of Prisons was compelled to release him.

Lambros also acknowledges that in February 2018 the National Appeals Board of the Department of Justice issued an order holding that the Rule of Specialty applied to Lambros and determined that his sentence on his offenses from the 1970s had expired. Lambros Br. Ex. D. At that point, he was released by the Bureau of Prisons – following DOJ's exercise of its quasi-judicial authority.

These quasi-judicial functions of reviewing the parole decision are not within the Bureau of Prison's purview to question or ignore. *Khan*, 134 F. Supp. 3d. at 254 (it is "widely recognized that public officials, actingwithin the scope of their authority, who enforce facially valid court orders are entitled to absolute quasi-judicial immunity."). Rather, ss the district court correctly concluded, the quasi-judicial immunity of the Parole Commission extends to "the law enforcement officers, such as those working under the BOP, who are integral in enforcing quasi-judicial decisions." U.S. Add. at 21.

4. The FTCA did not waive sovereign immunity for fraud or misrepresentation claims.

Plaintiff has raised claims of "fraud and artifice" and asserts that Defendants engaged in a pattern of improper legal practices through misrepresentations, omissions, and false innuendo, *see* Complaint, DCD 1 ¶ 58. There is no waiverof sovereign immunity for fraud, false representation, or misrepresentation, however, and the claims should be dismissed. 28 U.S.C. § 2680(h). The Supreme Court has interpreted § 2680(h) broadly, stating that it "comprehends claims arising out of negligent, as well as willful, misrepresentation." *United States v. Neustadt,* 366 U.S. 696, 702 (1961).

And, as the district court explained, the "law enforcement exception" in 2680(h), on which Lambros relies with regard to his false imprisonment claim, does not apply to claims of fraud and misrepresentation. U.S. Add. at 21 n.7. Therefore, the FTCA does not waive sovereign immunity for these fraud and misrepresentation claims arising out of either the Bureau of Prisons or the Parole Commission's actions, and such claims are "properly dismissed by the district court against . . . government defendants." *Scanwell Labs., Inc. v. Thomas,* 521 F.2d 941, 948 (D.C.Cir.1975); accord *Lewis v. United*

States, 83 F. Supp. 3d 198, 206 (D.D.C. 2015), *aff'd*, No. 15-5100, 2015 WL 9003971 (D.C. Cir. Oct. 30, 2015).

The district court correctly dismissed all of Lambros's tort claims against the United States as barred by the doctrine of sovereign immunity. This Court should affirm.

III. Lambros's Declaratory Judgment Claims Are Moot.

The district court correctly concluded that Lambros's claims for declaratory relief are moot.[11] Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983); *see also Cityof Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) ("[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.").

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[11]Plaintiff sought to have the district court "Issue a declaratory judgment that Defendants United States of America and the U.S. Bureau of Prisons violated the Treaty of Extradition by committing the acts of false arrest and false imprisonment by detaining, arresting, convicting, and incarcerating Plaintiff Lambros on the August 21, 1989, U.S. Parole Commission Warrant. . . ." Complaint, DCD 1 ¶ 69.

Plaintiff sought a ruling from the court regarding the "Specialty Doctrine" and its applicability to Plaintiff's detention under the parole violation warrant. *See* Complaint, DCD 1 ¶¶ 14-19. The claim is now moot, however, as Lambros admits that the Parole Commission has concluded that he is no longer subject to the parole violation warrant. *Id.* ¶¶ 66-67 and Ex. I. Thus, according to allegations in the complaint, there is no longer any controversy as to whether the Rule of Specialty applies. *Id.*

The district court correctly found that "[t]here is no dispute that Lambros has been released from incarceration and there is no allegation that he will be taken into custody again based on the 1989 Warrant." U.S. Add. at 18. "To satisfy the case-or-controversy requirement, a plaintiff seeking injunctive relief to guard against future unlawful conduct must be under a 'real and immediate threat of injury.'" *Brazil v. Ark. Dep't of Human Servs.*, 892 F.3d 957, 960 (8th Cir. 2018). Under these circumstances, there is no longer a case or controversy fit for federal court adjudication, and the district court properly dismissed on that ground.

CONCLUSION

For all the foregoing reasons, the district court's judgment should be affirmed.

Dated: March 29, 2021

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for the United States certifies this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32. The brief has 7,457 words, proportionally spaced using Century Schoolbook, 14-point font. The brief was prepared using Microsoft Word 2016. The undersigned attorney also certifies that the brief has been scanned for viruses and, to the best of our ability and technology, believes it is virus-free.

Dated: March 29, 2021

W. ANDERS FOLK
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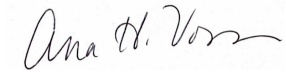

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ADDENDUM OF APPELLEES