CA No. 08-16786

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

LESLIE DAWN EAGLE,

Petitioner-Appellant,

v.

YERINGTON PAIUTE TRIBE,

Respondent-Appellee.
_____/

DC No. 3:06-cv-563-LRH-RAM

District of Nevada (Reno)

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

APPELLANT'S REPLY BRIEF

FRANNY FORSMAN
Federal Public Defender
Michael K. Powell
Assistant Federal Public Defender
201 West Liberty Street, Suite 102
Reno, Nevada 89501
Telephone: 775-321-8451
Facsimile: 775-784-5369

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

I.

ARGUMENT IN REPLY

Introduction – The Respondent's position is based on the theory its courts are courts of general jurisdiction.

The Respondent (Tribe) contends that the *Duro* fix embodied in 25 U.S.C. § 1301(4) recognizing its 'inherent sovereignty' renders the Tribal Court – a court of general jurisdiction and all the Tribe's contentions flow from this proposition.[1] This is the only theory that would allow the Tribe to argue that its prosecuting authority is not required to either allege or prove (as was the case here) that any defendant it decides to prosecute has the political status of Indian in order to invoke the tribal court's limited jurisdiction. Appellee's Response [Red] Brief at 11 - 12 (citing Tribal Code). This position is contrary to both Ninth Circuit and Supreme Court decisions that hold tribal courts are courts of limited jurisdiction and the party – in the case the Tribe – that is attempting to avail itself of the powers of a such a court must establish by pleading and proof that court's jurisdiction before the court may validly act.

---

[1] Appellant's Opening [Blue] Brief argued that the tribal courts are courts of limited jurisdiction and thus bear the burden of pleading and proving Indian political affiliation. Blue Brief at 19.

Additionally, the Tribe's position that a defendant must challenge a court's jurisdiction prior to trial or waive any challenge – is incorrect based on its cited authority.

Finally, the Tribe's position that the Court should not interfere with the Tribal Court system is belied by the cases cited. In both of the cases cited the Court has intervened in the administration of the tribal criminal justice system when due process violations occurred. *See* Red Brief at 20 (citing *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988) (tribal conviction reversed and held "we need not engage in a balancing test to determine whether under the Indian Civil Rights Act Randall's rights to be protected from a deprivation of her liberty without due process of law by the Yakima Nation were violated by dismissal of the appeal by the Yakima Court of Appeals." 841 F.2d at 902) and *Smith v. Confederated Tribes of Warm Springs*, 783 F.2d 1409 (9th Cir. 1986) (noting that court had previously affirmed district court's reversal of tribal conviction based on finding that "the Tribal theft statute required proof of an intent to steal (an element that the Tribal Courts had not addressed in convicting Smith" but reversing a later finding that the tribe had not acted expeditiously in retrying the case, 941 F.2d at 1410-11).

A. Challenges to the Subject Matter Jurisdiction of a Court May Be Asserted at Any Time During the Course of the Proceedings.

The Tribe – citing to the Federal Rules of Criminal Procedure (FRCrP) Rule 12 – claims that failure to contest the tribal court's subject matter jurisdiction prior to trial waived the issue. This is not the case.

This Court faced the same issue in an Indian Country case brought under 18 U.S.C. § 1153. *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974). There the defendant was in fact an ethnic Indian and so stipulated. *Id.* at 19. But although an ethnic Indian, she was a member of a then terminated tribe and thus no longer had the political affiliation required for federal jurisdiction under § 1153. On appeal she challenged the federal court's subject matter jurisdiction based on the fact she was not an Indian based on political status. *Id.* The government claimed she could not raise the issue. *Id*.

The Court held that the issue of whether or not a defendant was an individual that had a sufficient political affiliation to be classed as an Indian for purposes of a prosecution under § 1153 was an issue of the court's subject matter jurisdiction. *Id.* This Court found that under a previous version of Rule 12 the defense of lack of subject matter jurisdiction was not waived and could be raised for the first time on appeal. *Id.* The language of the current statute cited by the

Tribe excepts motions challenging lack of jurisdiction or failure to state an offense from the pre-trial requirement and such a motion may be heard at anytime. *See* FRCrP 12(b)(3)(B) ("but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction"); *see also* FRCrP 34(2) – Arresting Judgment (court must arrest judgment if court does not have jurisdiction over charged offense).

In the *Heath* case, the error was deemed harmless since the indictment had pled the § 1152 requirement that the victim was an enrolled member of a recognized tribe and thus the federal court had jurisdiction under § 1152 as it applies to non-Indian defendants. *Id*. at 20. Here there was no stipulation and no allegation that Ms. Eagle was an Indian within the meaning of § 1153 and 25 U.S.C. § 1301(4) in the charging document upon which she was convicted and imprisoned. Ms. Eagle challenged the Tribal Court's subject matter jurisdiction at the trial level. Tribal Courts have no jurisdiction over non-Indians which would be all individuals who are not shown to have the requisite political affiliation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978). A conviction from a court that lacks subject matter jurisdiction is void. *See Orff v. United States*, 358 F.3d 1137, 1149 (9th Cir. 2004).

B. The Tribe's Purported Jurisdictional and Burden Shifting Legislation Exceeds its Authority Recognized by the *Duro* Fix in § 1301(2) and (4) and the Primary Jurisdictional Fact of Political Affiliation Is a Necessary Element of All Offenses and the Burden Is on the Tribe to Establish this Fact in Order to Invoke the Power of a Court of Limited Jurisdiction to Imprison.

Just as federal courts are courts of limited jurisdiction, so are tribal courts. *See Nevada v. Hicks*, 533 U.S. 353, 367 (2001) ("Tribal courts, it should be clear, cannot be courts of general jurisdiction . . ."). [2] Courts of limited jurisdiction may neither disregard nor evade constitutional or congressional limitations. *Jones v. Giles,* 741 F.2d 245, 248 (9th Cir.1984). Tribes retain authority to govern subject to the recognition of that authority by Congress. *See United States v. Mazurie*, 419 U.S. 544, 557 (1975).

One of the purposes Congress stated when passing the amendments to the Indian Civil Rights Act embodied in 25 U.S.C. § 1301 was to close a jurisdictional gap that Congress believed existed after the *Duro* decision. *See United States v. Lara*, 541 U.S. 193, 231 (2004) (Stevens J., dissenting quoting H.R. Rep. No. 102 261 p. 6 (1991)). In closing this jurisdiction gap, Congress relaxed or removed a restriction on the bounds of the inherent authority of the Tribes that the United States recognizes. *See Lara*, 541 U.S. at 207. But it did so to a limited extent with

[2] This point was argued in Appellant's Opening [Blue] Brief but not responded to by the Tribe. *See* Blue Brief at 19.

reference to a particular federal statute which operates in the sphere of courts of limited jurisdiction and establishes a necessary jurisdiction element common to all such courts. In determining Tribal jurisdiction in the civil context it is the membership status of the non-consenting party that is the "primary jurisdictional fact" *Hicks*, 533 U.S. at 382 (Souter, J., concurring). The criminal jurisdiction of tribal courts is limited to and dependent on the political affiliation of the defendant. Thus, in the criminal context the political affiliation of the individual is the primary jurisdictional fact.

This Court has found – as has the Supreme Court – that the party seeking to invoke the power of a limited jurisdiction court bears the burden of establishing that jurisdiction. *United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008) (citing *DaimlerChrysler v. Cuno*, 547 U.S. 332, 342 (2006)). As it is the Tribe – that is attempting to invoke the power to imprison of a court whose jurisdiction to do so is limited to a particular class of politically affiliated individuals – it is the Tribe that must bear the burden of establishing by pleading and proof that the person comes within that limited class.

Here the Tribe claims that it is not required to do so because of tribal legislation that governs the Tribe's jurisdiction. *See* Red Brief at 11-12 (citing Tribal Code). This contention must be viewed in light of Ninth Circuit and

Supreme Court case law that holds – regarding non-members [3] – "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *see also Philip Morris v. King Mountain Tobacco*, ___ F.3d ___, 2009 WL 1622338 (9th Cir. June 11, 2009) at WL *4 (quoting *Strate*). The Tribe in contrast asserts that its inherent criminal jurisdiction recognized under § 1301 allows it to adopt "its own laws addressing the Tribal Court's jurisdiction over Indians and provides a process for a non-Indian to contest the Tribal Court's jurisdiction" and the Tribe's laws need not and "**do not rely upon or adopt any process followed by any federal law**." Red Brief at 17-18 (emphasis added).

The legislation upon which the Tribe relies purports to grant the Tribal Courts subjection matter jurisdiction over "any Indian" and "any other person" allowed by the laws, statutes, regulations or cases of foreign jurisdictions – in this situation specifically federal or state. Red Brief at 11-12 (quoting Tribe's Code: "Tribal Court shall have criminal jurisdiction over all offenses enumerated in this Law and Order Code and any subsequent ordinance adopted by the Tribe when committed within the jurisdiction of the court **by any Indian, any other person** to

[3] The Tribe has never claimed that Ms. Eagle was a member of the tribe, a fact that would be readily ascertainable through its own membership roles.

the fullest extent allowed by the status of the warrant or future federal or state law, statute, regulation or case."(emphasis added)).[4] This statement of jurisdiction obviously exceeds the legislative authority of the Tribe because the Tribe's inherent sovereignty as recognized by Congress does not extend to 'any Indian' or all Indians as stated in 25 U.S.C. § 1301(2) but only to persons that have the requisite political status of Indians in accordance with 25 U.S.C. § 1301(4) which defines "Indian" within the confines of 18 U.S.C. § 1153. *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005).

This Court in *Means* held that "Taken together, the 1990 Amendments, the Major Crimes Act, [18 U.S.C. § 1153] and *Antelope* [430 U.S. 641 (1977)] mean that the criminal jurisdiction of tribes over 'all Indians' recognized by the 1990 Amendments [25 U.S.C. § 1301(2)] means all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians." *Id.*(explanatory brackets added). Any person not proven to be of this limited category is a non-Indian even if racially or ethnically of Native American descent. Clearly, the Tribe has no jurisdiction over such individuals or over "any other person". *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

---

[4] *See* Blue Brief at 16 17 n. 10 pointing out that the tribal jurisdictional legislation exceeds that recognized by Congress.

The Tribe also asserts that unless it defines an offense as having a jurisdictional element – here the political status of Indian – the element does not exist and it need not prove that fact. *See* Red Brief at 15-16. The Tribe also contends that the fact of political affiliation only becomes an element "where the jurisdictional prerequisite is incorporated as an element in the statute defining the offense. Red Brief at 17. This assertion ignores the structure of § 1153 which names offenses committed in Indian Country that are within the jurisdiction of federal courts but defines none of the elements of the offenses named. *See* 18 U.S.C. § 1153. The offenses named are defined elsewhere. Yet this Court and all other circuit courts that have addressed the issue have ruled that § 1153 imposes the fact of political affiliation as an element. *See* Blue Brief at 14 & n. 8 (citing *inter alia United States v. Indian Boy X*, 565 F.2d 585 (9th Cir. 1977) and *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005)).

The Tribe's citation to its Tribal Code jurisdictional authority serves the same purpose and names – but does not define – all of the Tribal criminal code in reference to its jurisdiction. This jurisdictional ordinance which applies to a limited class of individuals (confined by the requirements of § 1301 and § 1153) must be incorporated by allegation into every criminal pleading and proven to

demonstrate the court's limited subject matter jurisdiction. Otherwise any judgment rendered is void for lack of subject matter jurisdiction.

From the jurisdictional legislation that exceeds the limited authority recognized or granted by Congress the Tribe contends that it may by ordinance treat all individuals as subject to Tribal authority unless the individual raises the issue. *See* Red Brief at 12. The quoted ordinance purports to authorize Tribal law enforcement to proceed against "any person" as if jurisdiction exists and places the "burden of raising the issue of non-jurisdiction (status as a non-Indian)" on "the person claiming the exemption from jurisdiction but the burden of proof of jurisdiction (status as an Indian) remains with the prosecution." Red Brief at 12. This legislation again assumes that the Tribe's courts have general jurisdiction and tracks the language of 18 U.S.C. § 1152. But in relaxing the limits of tribal jurisdiction, Congress chose to cite § 1153 and not § 1152. There is no specific procedure identified for raising the issue and a plea of not guilty would then seem to require the tribe to prove the court's jurisdiction.

C. Failure to Allege and Prove Beyond a Reasonable Doubt That the Primary and Necessary Fact a Defendant Holds the Political Affiliation of Indian Violates Due Process Given There Was No Notice in the Allegation Which Resulted in Imprisonment as Required by § 1302(6) and There Is No Right to Appointed Counsel in Tribal Court.

The Tribe relies on *United States v. Lara* to bolster its claim that its limited inherent jurisdiction converts it to a court of general jurisdiction which allows it to adopt its own jurisdictional laws without reference to federal law. *See* Red Brief at 17-18 (citing *United States v. Lara*, *supra*). The Tribe claims that it provided notice that it premised its jurisdiction on Ms. Eagle's political affiliation. Red Brief at 15. The supposed notice was not contained in the allegation upon which Ms. Eagle was tried, convicted and imprisoned but in a probable cause statement attached to a dismissed allegation. EOR 35 ("Although the original complaint did not alleged Defendant-Appellants were Indians, the probable cause statement attached to the amended complaints did allege Defendants-Appellants were Indians. . . .Although the trial court found Defendants-Appellants guilty under the first complaint and not the second one, the probable cause allegations in the second complaint effectively provide Defendants-Appellants with notice triggering their obligation to go forward with proof substantiating their defense.")

The Tribe's (and the Tribal Court of Appeals)[5] notion of sufficient notice for purposes of due process is an allegation of Indian status in any document aside from the one that is actually tried.

This Court has noted that the Supreme Court in the habeas context concerning the sufficiency of notice "has never held that non-charging-document sources can be used to satisfy the Constitution's notice requirement in the present context." *Gautt v. Lewis*, 489 F.3d 993, 1009 (9th Cir. 2007) (review of the sufficiency of notice of charges underlying a state court conviction on federal § 2254 habeas). To determine whether a defendant received adequate notice "the court looks first to the information." *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994); *see also Gautt*, *supra*, 489 F.3d at 1003 ("an information [must] state the elements of an offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend"). The right to such notice is an aspect of the Sixth Amendment and is codified in the Indian Civil Rights Act. *See* 25 U.S.C. §

---

[5] The Tribal appeal court found that there was evidence of political affiliation because the victim was an Indian and the defendants were related to the victim – thus "in turn establishing the status of their relatives as Indians". EOR 36. The relationship of the defendant to the victim does not demonstrate any more than racial or ethnic ancestry – not political affiliation. Tribe did not even claim or present evidence that the alleged victim was a tribal member – information and authority over which the Tribe has exclusive control. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

1302(6) ("No Indian tribe in exercising powers of self-government shall . . .deny to any person in a criminal proceeding the right . . . to be informed of the nature and cause of the accusation . . ."). Failure to provide proper notice violates this aspect of the Sixth Amendment and due process. The Court in *Gautt* indicates the error is structural. *Gautt*, 489 F.3d at 1015.

The lack of notice that the tribe's limited jurisdiction was premised on the primary fact of political affiliation and its shifting of the burden of going forward on the issue is made more egregious by the fact that the right to appointed counsel is not required in tribal courts. *See* 25 U.S.C. § 1302(6) (tribe may not deny an accused "at his own expense to have the assistance of counsel for his defense").[6] This is an aspect of due process the Supreme Court in *Lara* expressly did not decide as the single issue was double jeopardy based on the concept of dual sovereignty. *Lara*, 541 U.S. at 207-208. The high court reserved the issue of whether the "Due Process Clause forbids Congress to permit a tribe to prosecute a nonmember Indian citizen of the United States in a forum that lacks this protection [right of indigent defendant to counsel where imprisonment possible]." *Id.* (citation omitted, brackets added). It did not address the issue because the

[6] Ms. Eagle was represented by a tribal advocate – a lay practitioner – at her own expense.

"argument (if valid) would show that any prosecution of a nonmember Indian under the statute is invalid; so Lara's tribal prosecution would be invalid, too." *Id*. at 208. That argument was not compatible and would defeat his double jeopardy argument since a void judgment is no judgment for purposes of double jeopardy.

The Court may avoid deciding this constitutional issue by determining that the *Duro* fix as a matter of statutory construction imposed a necessary jurisdictional element which a tribe must establish by allegation and proof in order to invoke the limited jurisdiction of tribal courts. *See* Blue Brief at 16.

II.

CONCLUSION

Tribal courts are courts of limited jurisdiction. The jurisdiction recognized by Congress – inherent or otherwise – is specifically limited to individuals who are shown to have Indian status by political affiliation – not merely ethnicity. The district court erred in finding that the factual allegation that the petitioner was an Indian by political affiliation and proof beyond a reasonable doubt of that fact is not a necessary element of the tribal offense (or any tribal offense) of which the petitioner stands convicted is erroneous – because the tribal courts are courts of limited jurisdiction. The Tribe's failure to give notice and establish the primary

jurisdiction fact in its criminal allegation and prove the status of Indian by political affiliation is a violation of due process as guaranteed under the Indian Civil Rights Act and voids her conviction in tribal court. Tribal codes to the contrary exceed the Tribe's authority to legislate beyond Congress's recognition of tribal 'sovereignty.

Ms. Dawn Eagle respectfully requests that the Court reverse the judgment of the district court and remand with instructions to grant the writ of habeas corpus reversing her conviction in the Respondent's court.

Respectfully Submitted,

/s/ Michael K. Powell

Michael K. Powell
Assistant Federal Public Defender
Counsel for Ms. Dawn Eagle

CERTIFICATE OF COMPLIANCE

PURSUANT TO CIRCUIT RULE 32-1

Case No. ***08-1678***

I certify that:

Oversize Briefs:

The court granted permission to exceed the length limitations set forth at Fed. R. App. P. 32(a)(7) by an order dated _____or

An enlargement of brief size is permissible under Ninth Circuit 28-4.

The Reply Brief is

_X_ Proportionately spaced, has a typeface of 14 points or more and contains 3328 words.

or is

___ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ____ lines of text

or is

___ In conformance with the type specifications set forth at Fed. R. App. P. 32a(a)(5) and does not exceed _____ pages

Briefs in Capital Cases: This brief is being filed in a capital case pursuant to the type volume limitations set forth at Circuit Rule 32-4 and is:

___ Proportionately spaced, has a typeface of 14 points or more and contains _____ Words (opening, answering and the second and third

briefs filed in cross-appeals must not exceed 21,000 words, reply briefs must not exceed 9,800 words)

or is

___ Monospaced, has 10.5 or fewer characters per inch and contains _____ Words or _____ lines of text (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words or 1,950 lines of text, reply briefs must not exceed 9,800 words or 910 lines of text)

or is

___ In conformance with the type specifications set forth at Fed. R. App. P. 32(a)(5) and does not exceed _____ pages (opening, answering and the second and third briefs filed in cross-appeals must not exceed 75 pages; reply briefs shall not exceed 35 pages)

/s/ Michael K. Powell
Michael K. Powell
Assistant Federal Public Defender
Counsel for Appellant

CERTIFICATE OF SERVICE

When NOT all Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on July 10, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Mitchell C. Wright, Esq.
Yerington Tribal Court Prosecutor
325 West Liberty Street
Reno, NV 89501
Counsel of Record for the Respondent

/s/ Shirley Ariztia
Signature