

No. 10-5764

IN THE SUPREME COURT OF THE UNITED STATES

LESLIE DAWN EAGLE

Petitioner

v.

YERINGTON PAIUTE TRIBE

Respondent

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

REPLY BRIEF FOR PETITIONER

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I.

ARGUMENT IN REPLY TO RESPONDENT'S OPPOSITION

A. **Burden Shifting Presumptions Such as the One Contained in Respondent's Tribal Code on the Issue of Jurisdiction Have Due Process Consequences in Criminal Law.**

The Respondent (Tribe, herein) claims that there is no constitutional question before the court. Respondent's Brief in Opposition (Opp.) at 7. The constitutional issue lies in the Tribe's Code which creates a burden shifting presumption that all individuals that are present within the Tribe's territorial jurisdiction are subject to the Tribe's criminal jurisdiction even though the limited statutory grant (relaxation or recognition) embodied in 25 U.S.C. § 1301 is clearly confined to individuals that have the political status of Indian. See Petition for Writ of Certiorari (Pet.) at 20, n. 12. The presumption is deemed by the Tribe to be an affirmative defense which shifts to the defendant both the burden of production and a burden of persuasion on the essential jurisdictional fact of the defendant's political status as an Indian.

As this Court has stated "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). While "the locus of the burden of persuasion is normally not an issue of federal constitutional moment" it is a due process consideration in criminal law. *Id.* "Generally in a criminal case the prosecution bears both the production burden and the persuasion burden. In some instances, however, it is aided by a presumption, . . . or a permissible inference, . . . These procedural devices require (in the case of a presumption) or permit (in the case of an inference) the trier of fact to conclude that the prosecution has met its burden of proof with respect to the presumed or inferred fact by having

satisfactorily established other facts. Thus, in effect they require the defendant to present some evidence contesting the otherwise presumed or inferred fact. . . . Since they shift the production burden to the defendant, these devices must satisfy certain due process requirements.” *Mullaney v. Wilbur*, 421 U.S. 684, 702, n. 31 (1975)(citations omitted).

Due Process “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364. An essential jurisdictional fact necessary to crimes charged and the ability of any tribal court to deprive an individual of her liberty is the political status of the defendant under 25 U.S.C. § 1301. The pleading and proof of this fact must be assigned to the tribal prosecution and it must assume the risk of error because “[w]here one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.” *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958).

The basic fact inherent in the Tribe’s jurisdictional presumption is that presence on tribal land gives rise to the mandatory³ presumption that the individual holds the political status of

³ The Court defined a mandatory presumption as a far more troublesome evidentiary device that “may affect not only the strength of the “no reasonable doubt” burden but also the placement of that burden: it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.” *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 157 (1979).

Indian. But, after *Oliphant*, mere presence on tribal land is not strongly connected to Indian political status. See www.citizensalliance.org/CERA_News/CERA_News_2003_01_Diverse_Reservations_by_DS.htm#_ednref4, Population Statistics for Indian Reservations by State (based on the 2000 census: 479,390 American Indians were living on Reservations while 441,932 non-Indians or mixed races individuals (or 48%) were living on Reservations). The validity of evidentiary devices or presumptions under the due process clause "vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 156 (1979). In a criminal case, "the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Id.* (citations omitted). Here the Tribe takes the position that by virtue of its presumption it has no burden of production or persuasion (in the absence of the defendant meeting the shifted burden) and the mandatory presumption establishes factual jurisdiction beyond a reasonable doubt. The fact finder must find the defendant possesses the political status of Indian unless the defendant meets a burden of production. Further, the Tribe deems this an affirmative defense which also assigns the defendant a burden of persuasion. This procedural device violates due process by relieving the Tribe of establishing in the first instance its very power to adjudicate and punish.

The Tribe also takes the position that it may — without offending the due process protection imposed on the Tribes by Congress — define the elements of any tribal offense to circumvent its burden of production on the issue of its jurisdiction. This Court has determined

that there is a constitutional limit to such legislative methods of avoiding the holding of *Winship*. In *Mullaney*, the Court held that “if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law.” *Mullaney, supra*, 421 U.S. at 698. The *Mullaney* Court held *Winship* was “concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the ‘operation and effect of the law as applied and enforced by the state.’” *Id.* (citations and footnote omitted). This “operation and effect of the law as applied” holding is directly analogous to this Court’s recent Fifth and Sixth Amendment jurisprudence which holds that any fact that affects punishment must be pled and proven beyond a reasonable doubt. *See Jones v. United States*, 526 U.S. 227, 243, n.6 (1999)(“under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”); *see also Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (applying the rule to the States). If the Tribe does not plead and prove beyond a reasonable doubt the facts of the defendant’s Indian political status it lacks the authority to impose any loss of liberty or mete out any punishment.

Finally, the Tribe's choice of a jurisdictional presumption to lessen its burden of production and persuasion² - despite its denial³ - specifically places the limited nature of Tribal court criminal jurisdiction in issue.

B. The Adoption of a Presumption to Establish the Jurisdiction of a Court of Limited Authority Is Contrary to Common Law.

Aside from this Court's frequent determinations that tribal courts are courts of limited jurisdiction (*see e.g. Nevada v. Hicks*, 533 U.S. 353, 358, n. 2 (2001)), the Court has long ago explained the jurisdictional difference between courts of general jurisdiction and courts of limited jurisdiction in terms of presumptions recognized at common law - not just in Article III courts. The common law rule for courts of general jurisdiction that proceed "within the general scope of its powers, is presumed to act rightly." *Galpin v. Page*, 85 U.S. 350, 365 (1873). A court of general jurisdiction is "presumed to have jurisdiction to give the judgments it renders until the contrary appears." *Id.* This is the tenor of the Tribe's Code provision that presumes it has jurisdiction as if it were a court of general jurisdiction.

Tribal courts are not courts of general jurisdiction and "[t]he rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the

² Among the Tribe's arguments below was the argument that it would be unduly burdened if it was required to bear the burden of production and persuasion on the issue of the defendant's political status and thus its own jurisdiction to act. *See* Appellee's Response Brief in the Ninth Circuit, 2009 WL 3639452 at18; *see also* EOR 61 - 62 (Tribe's response in District Court).

³ *See* Opp at 8 - 9. "The question in this case is not whether tribal courts are of general or specific jurisdiction, but whether ICRA dictates how Indian status is to be determined procedurally." The Tribe in the court below asserted that: "Tribal Courts, though courts of general jurisdiction, are oftentimes courts of limited means." *See* Appellee's Response Brief 2009 WL 3639452 at18

record, or their judgments will be deemed void on their face.” *Id.* at 366. “The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.” *Id.* at 372. These general principles are in accord with this Court’s modern understanding of limited jurisdiction courts. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, n. 3 (2006) (we presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record.) Here there is no affirmative evidence in the record of the Petitioner’s political status as an Indian – the judgment is deemed void on its face. The Tribe has replaced its burden at common law to affirmatively establish the essential facts of its jurisdiction on the record by shifting that burden to the defendant. A deprivation of liberty premised on a legislatively created jurisdictional presumption – that the common law does not recognize – is the embodiment of arbitrary governmental action and violates due process.

C. If the Language of a Statute Is Silent as to the Assignment of a Burden of Production or Persuasion, the Court Looks to Common Law Defaults Which Require the Proponent of an Issue – in this Case the Jurisdiction of Tribal Court – Bear the Burden of Production and Persuasion in the First Instance.

“The question of tribal court jurisdiction is a question of ‘federal law’ which this Court reviews de novo.” *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985). Looking to common law and the canons of statutory construction when correctly applied to the interpretation of the jurisdiction element in 25 U.S.C. §§ 1301(1)& (4) will bring the statute in conformance with the requirements of due process.

The court below and the Tribe have ignored the canon of construction which applies to new legislative enactments that incorporate sections of prior law. Congress in passing the *Duro* fix set forth in 25 U.S.C. § 1301(4) defining Indians specifically incorporated 18 U.S.C. § 1153.

This canon of statutory construction presumes that Congress “had knowledge of the interpretation given the incorporated law, at least insofar as it affects the new statute”. *See* Pet. at 24 (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)). Every circuit court that has addressed the issue of the burden of proof on the essential facts of Indian political status under § 1153 has found that the prosecution bears the burden of production and persuasion on that issue in order to invoke jurisdiction. *See* Pet. at 23.

The court below found the language of the statute silent on the burden of proof regarding the essential jurisdictional facts. *See Eagle v. Yerington Paiute Tribe*, 603 F.3d 1161, 1164 (9th Cir. 2010). The lower court held: “Dawn Eagle contends that because the 1990 Amendments to ICRA defined “Indian” by reference to § 1153, all tribal prosecutions are subject not only to the federal definition of “Indian,” but also to § 1153’s Indian-status pleading requirement. We disagree. . . . We start, as always, with the statutory text. The 1990 Amendments do not expressly impose § 1153’s federal pleading requirement on tribal prosecution or otherwise make Indian status an essential element of every tribal offense. . . . True, the statute defines “Indian” by referencing § 1153. But that reference simply make[s] it plain that the definition of Indian is the same as Indian in [§ 1153], nothing more.” *Id.* (brackets in original, internal quotes and citations omitted).

This Court has held where the plain text of a statute “is silent on the allocation of the burden of persuasion” the Court begins with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” *Schaffer v. Weast* 546 U.S. 49, 56 (2005) (citing McCormick on Evidence § 337, p. 412 (5th ed. 1999)) (“The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present

state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion”); C. Mueller & L. Kirkpatrick, *Evidence* § 3.1, p. 104 (3rd ed. 2003) (“Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.”)). This principle is in accord with the risk allocation derived from the *Winship* and *Mullaney* line of cases identified in *Speiser v. Randall, supra*.

Later, in *Dixon*, the Court in discussing which party bears the burden of duress under a statute that was silent on the allocation of the burdens looked to the common law and held that: “common-law courts generally adhered to the rule that “the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule.” *Dixon v. United States*, 548 U.S. 1, 8 (2006)(citations omitted). The Court also found that the common law was in accord with general evidentiary principles that “the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.” *Id.* (citation omitted). The Court in reaching its interpretation stated “there is no reason to suppose that Congress wanted to depart from the traditional principles for allocating the burden of proof. . .” *Id.* Here the legislative history reference to the underpinnings of the grant of the Writ in § 1303 is a further confirmation of Congressional intent to require the tribe to carry the burden of pleading and proof. *See* Pet. at 24 - 25 (quoting Senate Report 102-168 at 7 (1990)).

There is no reason in this case to suppose that Congress by defining the scope of tribal criminal jurisdiction over Indians with reference to § 1153 and its universally recognized burden allocation “wanted to depart from the traditional principles” for allocating the burden of production and persuasion to the prosecution.

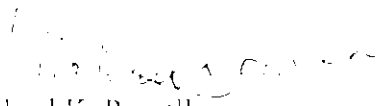
Congress's enactment of the *Duro* fix when viewed against the back drop of common law as it relates to courts of limited jurisdiction and general burden allocation as well as the application of the correct canons of statutory construction demonstrate that the Tribes are required to affirmatively plead and prove Indian political status in order to constitutionally exercise the authority to punish.

II.

CONCLUSION

Petitioner, Leslie Dawn Eagle, respectfully requests this Court grant certiorari and declare her tribal court conviction void and constitutionally infirm. Further, § 1301 should be interpreted to conform with due process requiring the Tribes plead and prove beyond a reasonable doubt the Indian political status of any defendant before a tribal court as an essential jurisdictional fact of any tribal criminal prosecution.

Respectfully Submitted,


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Counsel for Petitioner

CERTIFICATE OF SERVICE

LESLIE DAWN EAGLE
Petitioner

No. 10-5764

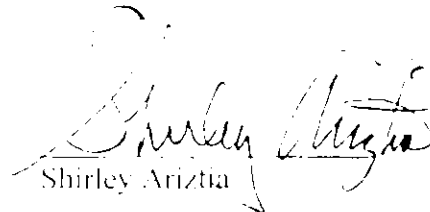
v.

YERINGTON PAIUTE TRIBE
Respondent.

The undersigned hereby certifies that she is an employee in the Office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on November 17, 2010, she served a true and correct copy of the foregoing Reply Brief for Petitioner by personally placing said copy in the United States Mail, postage paid to the addressees named below:

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