No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

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

PETITION FOR WRIT OF CERTIORARI

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LESLIE DAWN EAGLE

Petitioner

v.

YERINGTON PAIUTE TRIBE
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Leslie Dawn Eagle, respectfully asks leave to file the attached Petition for Writ of Certiorari, without prepayment of cost and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed in the District Court and in the United States Court of Appeals. No affidavit is attached, inasmuch as the District Court appointed counsel for petitioner under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Respectfully submitted,

_____
MICHAEL K. POWELL
Assistant Federal Public Defender
Counsel for Petitioner

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I.

ISSUES PRESENTED

Does the Due Process Guarantee made applicable to Indian Tribes under 25 U.S.C. §1302(8)(the Indian Civil Rights Act) or the Fifth Amendment Protections applicable to all citizens – require – before an individual may be deprived of her liberty that the prosecuting Tribe allege and prove beyond a reasonable doubt that the charged defendant comes within the limited class of individuals who have the political status of an Indian as defined in 25 U.S.C. § 1301(4) and are thus within the limited subject matter jurisdiction of the Tribe?

II.

PARTIES TO THE PROCEEDINGS

There are no parties to this proceeding other than those listed in the caption. Leslie Dawn Eagle, appellant below, is petitioner before this Court. The Yerington Paiute Tribe, appellee below, is respondent before this Court.

III.

OPINION BELOW

The Petitioner seeks review of the Ninth Circuit Court of Appeals decision in *Leslie Dawn Eagle v. Yerington Paiute Tribe*, 603 F.3d 1161, 2010 WL 1816756 (9th Cir. May 7, 2010)(No. 08-16786). *See* Appendix A (*App A*). Ms. Eagle was tried and convicted in the Yerington Paiute Tribal Court located in the Federal District for Nevada and was sentenced to

the maximum punishment allowed by the governing statutes (25 U.S.C. § 1302) – one year incarceration for violating the tribal code pertaining to child abuse. She was represented by a non-lawyer advocate as the Respondent is not required to, nor did it provide an appointed attorney to individuals charged in its tribal court. At the conclusion of the tribal prosecution case, she raised the issue that the tribe had not pled nor proved her political status as an Indian and moved for acquittal based on a failure of proof of a necessary jurisdictional element.

Ms. Eagle, prior to her appeal to the United States Court of Appeals for the Ninth Circuit, had unsuccessfully sought relief in the Intertribal Court of Appeals (Nevada), and the Federal District Court in the District of Nevada under 25 U.S.C. § 1303 which accords the privilege of federal habeas corpus to individuals being held in custody as a result of a tribal court order. The Federal District Court for the District of Nevada appointed counsel but ultimately denied relief.

Ms. Eagle appealed to the Ninth Circuit Court of Appeals. The Court of Appeals in a published opinion found no due process violation and held that the political status of Indian is not a necessary fact of a tribal prosecution and the Tribe need not plead in the charging document nor prove the individual's Indian political status in order to incarcerate. Instead the lower court found that the primary jurisdictional fact of Indian political status is in the nature of an affirmative defense which was waived as Ms. Eagle did not timely raise the issue pre-trial. *App A* at 7 - 8.

IV.

BASIS FOR JURISDICTION

The decision below was filed on May 7, 2010. *App. A* at 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The District Court had jurisdiction pursuant to 25 U.S.C. § 1303 and the Court of Appeals had jurisdiction pursuant 28 U.S.C. §1291.

V.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an individual's right when charged in an Indian Tribal Court to Due Process under the Fifth Amendment of the United States Constitution and/or the Due Process protection imposed by the Indian Civil Rights Act codified in 25 U.S.C. §§ 1302(6) & (8). Further the Indian Tribal Courts are courts of limited criminal jurisdiction which Congress has defined as restricted to the prosecution of individuals who are shown to have the political status of Indian as defined in 25 U.S.C. §§ 1301(2), (3), (4) & 18 U.S.C. § 1153. These provisions in pertinent part provide:

United States Constitution, Amendment V

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

25 U.S.C. § 1302 (Indian Civil Rights Act)

No Indian Tribe in exercising powers of self-government shall –

* * *

(6) deny to any person in a criminal proceeding the right * * * to be informed of the

nature and cause of the accusation * * *;

(8) * * * deprive any person of liberty or property without due process of law;

25 U.S.C. § 1301 (Tribal Powers of Self-government and Jurisdiction)

* * *

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial * * * including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

VI.

STATEMENT OF THE CASE

A. Procedural History.

1. The record below discloses Ms. Eagle is not a member of the Respondent tribe. The record fails to demonstrate that she is a member or holds any political status of any federally recognized Indian Tribe. Yet she was charged, tried, convicted and deprived of her liberty for the maximum allowable punishment of one year by the Respondent Tribal Court.

The only evidence in the record regarding the petitioner's (Ms. Eagle, *infra*) political status as an Indian is that she is **not** a member of the Respondent Tribe. Appellant's Excerpts of Record in the Ninth Circuit Court of Appeals (EOR) at 100 (attached as Appendix B, *App B*

infra).[1] The tribal prosecutor apparently did not know the actual political status of the defendants[2] it had charged in tribal court. At the conclusion of the tribal court proceedings resulting in conviction and a sentence of the maximum of one year incarceration, the tribal prosecutor represented to the tribal judge that "I believe their [sic] both [defendants] from different tribes, in my opinion that does create a flight risk especially with a year sentence.". *Id.* [3] (brackets added).

During all the proceedings from tribal court to the United States Court of Appeals, the Tribe was represented by a licensed attorney. Ms. Eagle was represented in the tribal courts by a non-lawyer tribal advocate as the Tribe is not required by the Indian Civil Rights Act (*see* 25 U.S.C. § 1302(6)) to, nor, did it in this case provide Ms. Eagle with the services of a licenced attorney.

At the conclusion of the tribal proceedings, the lay advocate made a motion of acquittal based on the premise the Tribe had failed to prove that Ms. Eagle had the political status of Indian and also objected to other procedural pleading issues regarding the filing of additional charges. *App B* at EOR 91. The tribal prosecutor's response was that these arguments were

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[1] The excerpts of record below are in two volumes which are sequentially paginated and include the District Court Clerk's Docket Entries (CDE).

[2] Ms. Eagle was charged along with a co-defendant (Diane Tom). Both were convicted, both appealed to the Intertribal Court of Appeals and both filed federal habeas petitions. Ms. Tom subsequently dismissed her federal petition in exchange for early release from incarceration. *See Tom v. Yerington Paiute Tribe*, District of Nevada No. 3:06-CV-0564 Clerk's Docket Entry 30 & 34.

[3] Obviously, the tribal prosecutor would have access to the Yerington Paiute Tribe's membership rolls as its prosecuting authority and would have known if Ms. Eagle was an enrolled member. Since the prosecutor did not identify the 'different tribe' or Ms. Eagle's membership status in or federal recognition of the unnamed tribe or her political affiliation as an Indian can not be established on the record.

waived for failure to present them in pre-trial motions. *App B* at EOR 93. The tribal judge's response was to dismiss the additional allegations which it deemed an acquittal. *App B* at EOR 93. The lack of proof on the Indian status issue was ignored by the tribal court judge and he found Ms. Eagle guilty on the original child abuse allegation. *App B* at EOR 98. He sentenced Ms. Eagle to the maximum sentence of one year incarceration. *App B* at EOR 99. The charging document upon which the conviction was based did not contain an allegation that Ms. Eagle was an Indian. *See infra*.

2. Ms. Eagle appealed to the Inter-Tribal Court of Appeals for Nevada.

Ms. Eagle timely filed a notice of appeal to the only court of tribal appeals that exists for the tribal courts of Nevada – the Inter-Tribal Court of Nevada (ITCA, *infra*). *App B* at EOR 27; Federal District Court Clerk's Docket Entry (CDE 12. Ex. 2); *see also App B at* EOR 126. The issue raised at trial concerning the failure of the Tribe to allege or prove she was an Indian within the meaning of 25 U.S.C.§ 1301 and 18 U.S.C. § 1153 was deemed by the ITCA to have been preserved. *App B* at EOR 35 (CDE 12,Ex. 4 at 4).

Ms. Eagle was again represented by a non-lawyer advocate and filed a brief in support of her appeal. The Tribe did not file any appellate brief in answer that has been brought to the attention of counsel or the courts below.

The ITCA ruled that whether or not Ms. Eagle was an Indian within the meaning of 18 U.S.C. § 1153 as required by 25 U.S.C. § 1301(4) was not an element of the tribal offense but

instead was in the nature of an affirmative defense. *App B* at EOR 34 - 35(CDE 12, Ex. 4 at 3-4 (citing *United Sates v. Bruce*, 394 F.3d 1215 (9th Cir. 2005)).[4]

The ITCA also held that although the original criminal complaint under which Ms. Eagle was convicted did not allege she was an Indian, Ms. Eagle was on sufficient notice to require her to shoulder the burden of proof and affirmatively defend because a probable cause statement attached to a subsequently dismissed criminal complaint contained an allegation she was an Indian. *App B* at EOR 35 (CDE 12, Ex. 4 at 4). The ITCA made this finding despite the fact – as it noted – that the tribal trial judge dismissed (or acquitted) on all counts under that subsequent complaint because of procedural irregularities. *App B* at EOR 33 (CDE 12, Ex. 4 at 1).[5]

Additionally, the ITCA found that there was some evidence in the record that the alleged **victims** had utilized Indian medical and social services and were therefore Indian and the petitioner was somehow related to the mother of the victims, thus, there was sufficient evidence of Ms. Eagle's status as an Indian of some unknown tribe. *App B* at EOR 36.[6]

The ITCA affirmed the conviction and remanded to the tribal trial court for execution of sentence. *App B* at EOR 37 (CDE 12, Ex. 4 at 6). Ms. Eagle was remanded to a Bureau of

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[4]*Bruce* was a federal prosecution under 18 U.S.C. § 1152 (Federal Enclave Law) which concerns offenses by **non-Indians** against Indians in Indian Country. That statute contains an **exception** to the exclusive federal jurisdiction that if the defendant is an Indian they are entitled to be tried in tribal court not federal court. 18 U.S.C. § 1152.

[5]The ITCA opinion also relied on the fact that the tribal judge did not question whether or not Ms. Eagle qualified as an Indian which would indicate that the tribal judge was also of the opinion that the burden of proof on this issue fell to Ms. Eagle and not the Tribe.

[6] The relationship of the petitioner to the mother of the alleged victims is not specified as by familial or marriage and thus it is impossible to determine if the petitioner is even ethnically Indian.

Indian Affairs (BIA) custodial facility in Owyhee, Nevada to serve her one year sentence.

3. Federal Proceeding.

Ms. Eagle filed a pro se petition in federal court pursuant to 28 U.S.C. § 2241 seeking a writ of habeas corpus along with a motion to proceed in forma pauperis and motion for appointment of counsel. CDE 1 & 6. Initially, the district court denied the in forma pauperis motion and required Ms. Eagle to pay a $5.00 filing fee. CDE 3. The district court ultimately appointed counsel under the Criminal Justice Act and directed counsel to file an amended petition. CDE 7 & 9. An amended petition was filed seeking a Writ of Habeas Corpus under 25 U.S.C. § 1303 for a person in Tribal Custody along with supporting exhibits. CDE 12; *App B* at EOR 11 - 50.

The petition stated as grounds for relief that Ms. Eagle had been denied her right to due process guaranteed by the Indian Civil Rights Act codified as 25 U.S.C. § 1302(8). *App B* at EOR 16 - 17. The premise of the argument in the petition and augmented by the reply was that the so-called *Duro* fix by Congress codified at 25 U.S.C. § 1301(2) & (4) defined the "inherent" jurisdiction of the Tribe's to be "all Indians" and specifically incorporated the provisions of 18 U.S.C. § 1153 concerning the definition of Indians relying on the case of *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 381 (2006) ("Indian tribal identity is political rather than racial, and the **only** Indians subjected to tribal court jurisdiction are enrolled or *de facto* members of tribes, **not all ethnic Indians**."). *App B* at EOR 16; *see also* 119. The legal argument pointed out that § 1153 had been interpreted by the Ninth Circuit (and all other federal jurisdictions) before the enactment of the *Duro* fix as requiring proof beyond a reasonable doubt of the Indian political status of the defendant relying on *United States v. Indian*

Boy X, 565 F.2d 585, 594 (9th Cir. 1977). *App B* at EOR 14 - 17; *see also* id. at 119 - 120. Further, since Congress chose 18 U.S.C. § 1153 as the definition of the limited scope of defendants that a tribal authority could prosecute, then the prior interpretation of statute requiring jurisdictional pleading and proof were applicable to the tribal courts. *App B* at EOR 16; *see also id.* at 119 - 120.

The district court ordered the Respondent Tribe be served and answer the petition which it did. CDE 29; *App B* at EOR 51 - 116. Ms. Eagle filed a reply to the Tribe's answer expanding her legal arguments. CDE 31; *App B* at EOR 117 - 120. The Tribe was required to file supplemental exhibits to set forth the tribal code provision under which Ms. Eagle was convicted. CDE 33. Eventually, the Tribe complied. *See* CDE 36, 37.

The federal District Court held that the political status of Indian is not an element of a tribal offense and thus need not be alleged or proven beyond a reasonable doubt in any tribal prosecution under 25 U.S.C. § 1301. *App B* at EOR 9. The district court did not analyze the unique body of existing Indian law but resorted to state law which concerns courts of general jurisdiction. The district court also drew upon an analogy to cases under the federal Maritime Drug Law Enforcement Act. The lower court found that Indian status was not an element of any tribal offense citing the nexus test discussed in *United States v. Zakharov*, 468 F.3d 1171 (9th Cir. 2006) as requiring only 'minimum contacts' as distinguished from the statutory jurisdiction test which does require the prosecution to plead and prove the jurisdiction facts. *App B* at EOR 5 - 7.

4. Court of Appeals.

Ms. Eagle timely appealed the Federal District Court's decision to the Ninth Circuit Court of Appeals and was again granted in forma pauperis status under the Criminal Justice Act. CDE

48. She presented the same claims as encompassed in her original habeas petition in her Opening Brief before the Court of Appeals. *See* Appellant's Opening Brief 2008 WL 4973959 (Oct. 7, 2008). Ms. Eagle argued that the Congressional action in response to this Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990), recognized or relaxed the restrictions that constrained the criminal jurisdiction of tribal courts to a limited extent. She argued that the Congressional action popularly known as the *Duro* fix provided that tribal courts had jurisdiction only of all Indians (not non-Indians) and defined all Indians as only those defendants that were shown to have the political status of Indian such that they would be within the jurisdiction of the federal courts as set forth in 18 U.S.C. § 1153. *Id.*

As a matter of due process, Ms. Eagle argued that her political status as an Indian was a necessary fact that must be pled and proven beyond a reasonable doubt before the tribe – a court of limited subject matter jurisdiction – had the authority to deprive her of her liberty under either the Indian Civil Rights act or the Fifth Amendment of the United States Constitution – citing *In re Winship*, 397 U.S. 358 (1970). *See* 2008 WL 2008 WL 4973959 at p. 19 - 22. She argued that as a matter of statutory construction once Congress incorporated the prior federal statute defining 'all Indians', the accumulated meaning of that term and the cluster of ideas drawn from the prior interpretation attached.. *Id.* at 11- 19 (citing *Molzof v. United States*, 502 U.S. 301, 307 (1992)). Ms. Eagle pointed out that tribal courts were courts of limited subject matter

jurisdiction relying on *Plains Commerce Bank v. Long Family Land and Cattle Co.*, ___ U.S. ___, 128 S.Ct. 2709, 2718 (2008) and the burden to establish a tribal court's authority to adjudicate any matter before it falls to the party who is invoking the court's jurisdiction – in this case the tribe. *Id*. at 19. (citing to *DaimlerChrysler v. Cuno*, 547 U.S. 332, 342 (2006) and *United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008)).

The Tribe took the position that it has legislative authority to dispense with the necessity of pleading or proving its limited jurisdiction. *See* Respondent's Answering Brief 2009 WL 3639452 at 11 - 12. The Tribe argued that its courts were courts of general jurisdiction. *Id.* at 18. The Tribe contended that its ability to restrict an individual's liberty by imprisonment was not limited by reference to "**any process followed by any federal law."**. *Id*. It also claimed that whatever due process constraints the Indian Civil Rights Act may have imposed, the concept was "not synonymous with the due process in federal courts" and in any case was too much of a burden on the tribes to properly prove the facts of its jurisdiction and the political status of those it chooses to prosecute. *Id.* at 20.

The Court of Appeals affirmed the lower court finding that there was no due process violation. The lower court found principally that Congress, in relaxing the criminal jurisdictional restrictions on the tribes, did not **expressly** incorporate the jurisdictional requirement of Indian political status inherent in the referenced federal Indian Country statute [18 U.S.C. § 1153]. This holding in essence treats the tribal courts as courts of general jurisdiction. *App A* at 5 - 7. This determination was buttressed by selective quotes from the legislative history. *Id.*

The Court of Appeals also found that Ms. Eagle was on notice – adopting the tribal

appeals court position that the tribe claimed she held the necessary political status of Indian. *App A* at 7. This holding was not based on any allegation contained in the complaint upon which she was tried and convicted, but on a probable cause statement attached to a different complaint which was ultimately dismissed. *Id.* The Court of Appeals found that Ms. Eagle's objection that the tribe had failed to prove her Indian status and therefore its very jurisdiction to adjudicate the matter came too late and was waived notwithstanding the lack of attorney representation. *App A.* at 8.

VII.

REASONS WHY THE PETITION SHOULD BE GRANTED

"[F]reedom from Physical Restraint 'Has Always Been at the Core of the Liberty Protected by the Due Process Clause from Arbitrary Governmental Action'" *Kansas v. Hendricks* 521 U.S. 346, 356, 117 S.Ct. 2072, 2079 (1997).

This is a significant Constitutional issue that effects the rights of the many United States citizens – non-Indian, enrolled members, and others who are of some degree of American Indian ethnicity but who may or may not have a demonstrated political affiliation with a federally recognized tribe – that live or travel upon tribal land. There are currently 564 federally recognized tribes at last count. 74 Fed. Reg. 40218 (Aug. 10, 2009). All are entitled to establish tribal courts pursuant to 25 U.S.C. § 1301. One estimate is that there are 511 operating tribal courts. *See* Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordam L. R. 479, 507 (2000). The largest of these tribal courts (Navajo Tribal Courts) handled more than 40,000 cases in 1983. *Id*. at n. 100 (citing United States Commission on Civil Rights, The Indian Civil Rights Act at 32-22 (1991)).

"Tribal courts are the adjudicatory bodies that are created either by tribal constitutions or the tribal legislative bodies. Most tribal constitutions do not directly create judiciaries or require a separation of powers, and therefore, virtually all tribal courts are the creation of tribal councils." *Id*. Tribal non-members do not generally have access to the political process that elects the tribal councils that create the tribal courts systems at issue here. *Duro*, 495 U.S. at 694. The only fact that is clear from the tribal court record regarding the petitioner's Indian political status in this case is that she – is not a member of the respondent tribe. *See App B* at EOR 100. It is not clear from the record that Ms. Eagle is ethnically an Indian.

There are approximately 200 tribal courts that exercise primary misdemeanor criminal jurisdiction pursuant their limited tribal sovereignty and are allowed to incarcerate a particular class of defendants for a period of up to one year.[7] 25 U.S.C. § 1302(7).[8] Congress on July 21, 2010 passed the Tribal Law and Order Act of 2009 (S. 797 & H. R. 1924) which would allow the

[7] Not all tribal courts have exclusive criminal jurisdiction. Congress in 1953 mandated that five states assume criminal jurisdiction over federal Indian Country and made state law applicable. 18 U.S.C. § 1162. Eliminating the federally recognized tribes in these five states from the list leaves approximately 200 tribal courts that enforce offenses committed by Indians as defined by federal law on a given reservation.

[8] Originally, in 1968 when Congress passed the Indian Civil Rights Acts (ICRA) the period of incarceration was limited to six months. Pub. L. 90-284, Title II, § 202, Apr. 11, 1968. The ICRA was enacted "following several years of hearings by the Senate Subcommittee on Constitutional Rights. The primary sponsor of the ICRA legislation was Senator Sam Ervin of North Carolina, who had concluded that the rights of Indians were 'seriously jeopardized by the tribal government's administration of justice,' which he attributed to 'tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system."'. . McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 469-70 (1998). The permissible deprivation of liberty that a tribal court could impose was increased to one year in 1986. Pub. L. 99-570 Title IV, § 4217, Oct. 27, 1986. The tribal courts are free to stack or make sentences consecutive for multiple counts to an unlimited degree and frequently do resulting in multi-year sentences.

tribes to incarcerate individuals for up to three years and stack sentences which would result in up to nine years incarceration. To avail themselves of this increased punishment the tribes must provide licensed attorneys to defendants and make their law and order codes available. *See* Senate Report 111-93; S. 797, Title III, Sec. 304, *see also* AP News July 21, 2010 "Obama says he'll sign Tribal Law and Order Act" (hosted.ap.org/U/US_INDIAN_CRIME_OBAMA). Those tribes that elect not to meet the requirements for expanding the penalties will continue to be able to deprive individuals of their liberty for the current period of up to one year – with no limitation on the stacking of multiple sentences.

The Bureau of Indian Affairs (BIA) directly funds to some extent 185 of these tribal courts. U.S. Dept. Interior, Budget Justification and Performance Information FY 2011 at p. IA-GPT-6 PPP# 576 [9]. Significantly, the BIA Performance Information states that of the 185 funded tribal courts in 2009 only 21% or 1 in 5 received an acceptable rating under independent tribal judicial reviews. *Id.* The BIA's proposed long term performance goal is to eventually have less than half (44%) of the funded tribal court meet these standards. *Id.*

Thus, the significance of the issue is whether or not citizens – including the petitioner in this case – are protected by the due process guarantee of the United States Constitution and the co-extensive due process guarantee of the Indian Civil Rights Act. May tribal courts which are courts of limited subject matter jurisdiction deprive citizens of their liberty in the absence of any pleading or proof that the court is not arbitrarily acting in excess of its jurisdiction. Any action by a tribal court of limited jurisdiction in excess of its Congressionally recognized jurisdiction is arbitrary and thus void and results in an unconstitutional deprivation of liberty.

[9] Available at www.doi.gov/budget/2011/data/greenbook/FY2011_IA_Greenbook.pdf

VIII.

ARGUMENT IN SUPPORT OF PETITION

Absent Pleading and Proof Beyond a Reasonable Doubt of a Defendant's Political Status of Indian as Defined in 25 U.S.C. §1301(4) and 18 U.S.C. § 1153 a Tribal Court Does Not Have the Jurisdiction nor Is It Authorized to Deprive an Individual of Her Liberty Rendering Any Such Judgment Void and a Violation of Due Process Guaranteed by the Fifth Amendment of the United States Constitution and Indian Civil Rights Act.

A. Tribal Courts Are Not Courts of General Jurisdiction – Civilly or Criminally – and the Class of Individuals That May Be Prosecuted and Deprived of Their Liberty Is an Issue of Tribal Subject Matter Jurisdiction.

The Tribe's position in this case – which was affirmed *sub silencio* by the Ninth Circuit – is that it is a court of general jurisdiction. Respondent's Brief 2009 WL 3639452 at 18; *see also App A.* at 8 (holding the issue of jurisdiction may be waived). This is the same position taken by the largest of the tribal courts – the Navajo Tribal Court. *See Navajo Nation v. Hunter,* Supreme Court of Navajo Nation No SC-CR-07-95 (1996)(available at www.tribal-institute.org/opinions/1996.NANN.0000001) (holding "Navajo Nation courts have jurisdiction over 'any person' who commits an offense 'if the conduct constituting any element of the offense' occurs within the territorial jurisdiction of the Navajo Nation" . . . "There is a false assumption that Indian nations absolutely lack criminal jurisdiction over non-Indians.").

What is clear from this Court's holdings in the area of Indian Law is that tribal courts are not courts of general jurisdiction. *See Plains Commerce Bank v. Long Family Land and Cattle Co.*, ___ U.S. ____, 128 S.Ct. 2709, 2716-2717 (2008) (citation omitted); *Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978) (no jurisdiction over non-Indians); *Duro v. Reina*, 495

U.S. 676, 682 (1990) (no jurisdiction over non-member Indians).[10] As the Court has recently stated, it has "never held that a tribal court had jurisdiction over a nonmember defendant." *Nevada v. Hicks*, 533 U.S. 353, at 358 n. 2, 121 S.Ct. 2304 (2001) ("Respondents' contention that tribal courts are courts of 'general jurisdiction' is also quite wrong."). The Court has found that "[t]he question of tribal court jurisdiction is a question of federal law, which we review de novo." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Additionally, the class of individuals over which tribal courts may exercise jurisdiction has been deemed to be an issue of subject matter jurisdiction. *Hicks*, 533 U.S. at 368, n. 8 ("Strate's limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the action at issue in the litigation are regulable by the tribe.") (referring to *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997). The Court's determination that issue of tribal adjudicative authority over non-members is one of subject matter jurisdiction was made in response to position of Justice Stevens in his concurrence that "[a]bsent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally one of tribal law." *Id.*

As one scholar has stated "[i]n the tribal context, however, the term 'subject matter jurisdiction' has become a term of art describing federal common law doctrines limiting both the

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[10] The tribes have not had general jurisdiction in the criminal arena since Congress enacted the Major Crimes Act in the 19th century in response to this Court's decision in *Ex parte Kan-gi-shun-ca (Crow Dog)*, 109 U.S. 556 (1883), now codified with amendments as 18 U.S.C. § 1153. *See United States v. Male Juvenile*, 280 F.3d 1008, 1013 (9th Cir. 2002) (§ 1153 known as the Major Crimes Act created federal jurisdiction over certain crimes by Indians against Indians "in response to 'congressional displeasure over the Supreme Court's decision in Ex parte Crow Dog, holding neither federal or territorial courts had jurisdiction to try an Indian for murder of another Indian on a reservation.'")(citation omitted).

states' powers to adjudicate tribal cases and the power of tribal courts to adjudicate cases involving non-tribe members." Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. R. 285, 321 (1998) (citing *Oliphant*, *supra;* footnotes omitted). There is a perception in the lower courts that this Court's definition of tribal court subject matter jurisdiction is lacking the precision that has been applied to Article III courts thus perhaps leading to the outcome in this case finding that subject matter jurisdiction may be waived. *Smith v. Salish Kootenai College,* 434 F.3d 1127, 1137 (2006). Precision in defining of tribal subject matter jurisdiction and the concepts that attach to such a determination is required by due process – to prevent a tribe from arbitrarily depriving an individual of her liberty when the individual is not proven beyond a reasonable doubt to be within the tribe's authority to do so.

B. A Party May Not Consent to the Adjudication of a Court That Lacks Subject Matter Jurisdiction, Thus Lack of Subject Matter Jurisdiction Can Not Be Waived or Made an Affirmative Defense as the Court of Appeals Found in this Case.

"Subject-matter jurisdiction properly comprehended, we emphasized, refers to a tribunal's "power to hear a case," a matter that "can never be forfeited or waived." *Union Pacific R. Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Cent. Region*, ___ U.S. ___, 130 S.Ct. 584, 596 (2009)(citations omitted). This Court, in precisely defining subject matter jurisdiction with respect to Article III courts, has held:

> The prerequisites to the exercise of jurisdiction are specifically defined . . .They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute

> vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure.

McNutt v. General Motors Acceptance Corp, 298 U.S. 178, 189, 56 S.Ct. 780, 785 (1936). As a consequence, parties to a suit in federal court "may not confer jurisdiction ... by stipulation," *California v. LaRue*, 409 U.S. 109, 113 n. 3, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), abrogated on other grounds by *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), or other " 'prior action or consent of the parties,' " *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 n. 21, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978) (quoting *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17, 71 S.Ct. 534, 95 L.Ed. 702 (1951)).

As the Court has found: "[s]ubject-matter jurisdiction ... functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Ins. Corp. of Ire. Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). The same is true of tribal courts. The tribes lack jurisdiction over all persons who happen to live or travel into the territorial jurisdiction of a tribe. *See Oliphant*, *Duro*, *supra*. The "primary jurisdictional fact" in the civil context of tribal adjudicative authority – where the deprivation of liberty is not at issue – is the membership status of the non-consenting party. *Hicks*, 533 U.S. at 382 (Souter, J., concurring). Clearly a criminal defendant hailed into tribal court registers non-consent by entering a plea of not guilty.

The tribes are no more able to exceed their Congressionally recognized adjudicative authority than are Article III courts. *See United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Tribes retain authority to govern subject to the recognition of that authority by Congress); *Hicks*, 533 U.S. at 366, 121 S.Ct. at 2314 ("Tribal courts, it should be clear, cannot be courts of

general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction."). "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Oliphant*, 435 U.S. 191 at 210 (1978). The same is true for non-members after *Duro*. In fact this Court held in *Duro* that the jurisdictional status of non-Indians is the same as non-members. *Duro*, 495 U.S. at 695-696.

Obviously tribes (although the Respondent and the Navajo Nations claim otherwise) do not have the legislative jurisdiction to prosecute non-Indians in the absence of Congressional legislation or recognition post-*Oliphant*. And there is a constitutional limitation "even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Duro*, 495 U.S. at 693; *see also United States v. Lara*, 541 U.S. 193, 209 (2004) (reserving the due process claims on the limits of tribal prosecutions over non-members).

In this case, the tribal prosecutor represented to the Respondent court that the petitioner was **not** a member of the prosecuting tribe but made a vague reference to other unknown tribes. In the absence of pleading and proof that petitioner is in fact an enrolled member of some federally recognized tribe, or otherwise has a sufficient political connection to some federally recognized tribe: she is – as far as the record is concerned – a non-Indian. This Court has left the question open as to whether or not enrollment (or tribally recognized membership) in a federally recognized tribe is a requirement of sufficient political status to meet the definition of the term "Indian" as used in federal criminal law under 18 U.S.C. § 1153. *See United States v. Antelope*,

430 U.S. 641, 647 n. 7 (1977). But the Court indicated in *Antelope* that tribal court jurisdiction **was** limited to enrolled members. 430 U.S. 643 n. 2. The Court stated "[e]xcept for the offenses enumerated in the Major Crimes Act, **all crimes committed by *enrolled* Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts**." *Id.* (emphasis added).

The tribal court neither had nor has any subject matter jurisdiction to adjudicate any case against a non-Indian and deprive her of her liberty. On this record, the tribe exceeded its legislative authority by doing away with the requirement that the tribe plead and prove any defendant coming before the tribe's courts is within the limitation of congressional recognition. It exceeded its legislative authority by relieving itself of the burden of establishing the very fact that gives the tribal court adjudicative authority and shifting the burden to disprove the jurisdictional fact to an un-counseled defendant on pain of waiver.[11] The tribal code establishes a presumption that the tribe has jurisdiction over any person whose non-Indian status is "not immediately clear or resolved". *See* EOR 46.[12] This language appears to have a racial classification overtone based on whether the individual appears to be of Indian ancestry. No such presumption can exist in a court of limited subject matter jurisdiction. The tribe can not

[11] The fact that the petitioner did not have access to an actual attorney is compounded by the difficulty in accessing legal materials in the tribal court area including access to the tribal codes even for scholars. *See* Cooter & Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 American Journal of Comparative Law, 29, 32 - 34 (2008).

[12] The Tribal Code Section states: "Whenever status as a Non-Indian is not immediately clear or resolved, any person, otherwise subject to arrest, detention, investigation or other action under the law of the Yerington Paiute Tribe may be dealt with by law enforcement authorities as if jurisdiction existed. The burden of raising the issue of non-jurisdiction (status as a Non-Indian) shall be upon **the person claiming the exemption from jurisdiction** but the burden of proof of jursidiction (status as an Indian) remains with the prosecution."

create an exemption from its jurisdiction when that jurisdiction has not been granted by Congress and does not exist. A fact essential to the establishment of a court's power to adjudicate a matter and the authority to deprive an individual of her liberty is a fact essential to the crime and Due Process requires the prosecution to pled and prove that fact beyond a reasonable doubt. *See In Re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068 (1970).

C. Congressional Recognition or Relaxation of the Restrictions on the Subject Matter Limitation of the Tribes by Referring to a Long Existing Statute Coupled with the Imposition of Due Process on the Tribes Constitutes the Accepted Manner in Which Tribes May Exercise Their Limited Criminal Jurisdiction.

As previously noted, this Court has never held that tribes could exercise jurisdiction over non-members. *Hicks*, 533 U.S. 353, at 358 n. 2. In fact, the Court ruled in *Duro* that tribes lacked the jurisdiction to criminally prosecute non-members. It was Congress that relaxed the jurisdictional limitations on the tribes' adjudicative authority. But the exercise of that limited jurisdiction must be within "a manner acceptable to Congress." *Oliphant*, 435 U.S. at 210.

As noted earlier, Congress enacted the Indian Civil Right Act (ICRA) due to grave concerns about the rights of citizens of this nation that happen to be ethnically Indian and were subjected to the loss of liberty in tribal courts. *See* McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 469-70 (1998). The ICRA imposed a substantive body of rights patterned on the Bill of Rights. *Johnson v. Lower Elwah Tribal Community*, 484 F.2d 200, 203 (9th Cir. 1973). The ICRA "was concerned primarily with the tribal administration of justice and the imposition of tribal penalties." *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278, 281 (10th Cir. 1971). Given the fact that only one in five tribal courts are functioning at an adequate level after an independent review, the concerns that prompted Congress to impose constitutional restrictions on the tribes' ability to deprive

individuals of their liberty, forty years ago, continue to exist and will continue to exist. *See*, U.S. Dept. Interior, Budget Justification and Performance Information FY 2011 at p. IA-GPT-6 PPP# 576. Thus, the first component that forms an acceptable manner of exercising tribal jurisdiction is that due process and notice be observed. 25 U.S.C. § 1302(6) & (8) (notice and due process). The second component of congressional recognition of tribal jurisdiction is that it is limited to a class of defendants that Congress defined as within the tribal purview.

Congress, in relaxing the jurisdictional limitations this Court found in *Duro* – as a result of the tribes' domestic dependant sovereign status – did not restore jurisdiction over all persons – but only "all Indians." 25 U.S.C. § 1301(4) (the *Duro* fix). In defining the class of individuals restored to tribal criminal jurisdiction, Congress incorporated a specific statute – 18 U.S.C. § 1153 – the Major Crimes Act. *Id*. This statute, as previously noted, gave the federal government jurisdiction over Indians who commit certain crimes against other Indians on tribal lands in response to another decision of this Court. *See* n. 10, *supra*, (citing *United States v. Male Juvenile*, 280 F.3d 1008, 1013 (9th Cir. 2002)).

The Court held – prior to the *Duro* fix – that the jurisdiction conferred by § 1153 is not an ethnic term and does not apply to "many individuals who are racially to be classified as 'Indians'". *Antelope*, 430 U.S. at 647 n. 7 (citing *Morton v. Mancari*, 417 U.S. 535, 553 (1975)).[13] The Court held that jurisdiction under § 1153 is limited to defendants who have the political status of Indian generally by enrollment – although the Court has not yet determined whether or not enrollment is an absolute requirement for federal jurisdiction. *Id.* The tribes have

[13] This holding was in response to an Equal Protection challenge based on a racial classification.

exclusive control over the issue of who is entitled to enrollment (*see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978)), and generally only enrolled members may politically participate in tribal governance. *Duro, supra*. Thus, enrollment (at least in some federally recognized tribe) would seem to be a requirement necessary to demonstrating political status.[14]

More to the point, this Court and every lower court to address the issue prior to the *Duro* fix has found that to invoke the limited jurisdiction under § 1153, or its predecessor statute, requires pleading and proof beyond a reasonable doubt of Indian political status. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir. 1977); *United States v. Torres*, 733 F.2d 449, 454 (7th Cir. 1977), *United States v. Jewett*, 438 F.2d 495, 497 (8th Cir. 1971); *see also* F. Cohen, *Handbook of Federal Indian Law*, 300-04 (1982); *cf Draper v. United States*, 164 U.S. 240, 241, 17 S.Ct. 107 (1896) (held in reversing a murder conviction in the federal circuit court that "the question of jurisdiction arises on the record, since, if, as matter of law, the reservation was not within the sole and exclusive jurisdiction of the United States, as the indictment fails to charge that the crime was committed by an Indian, it necessarily follows that, if the court had jurisdiction only to punish such a crime, the want of jurisdiction appears upon the face of the record.").

In the *Duro* fix, Congress did not broadly recognize tribal jurisdiction over 'all Indians' or leave the parameters of the term to the tribal courts to define. Instead, Congress incorporated a specific section of prior federal law – § 1153. This Court has held that where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to

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[14] Federal courts have held that enrolled members of terminated tribes (tribes no longer federally recognized) are non-Indians. *United States v. Health*, 509 F.2d 16, 19 (9th Cir. 1974); *St. Cloud v. United States*, 702 F. Supp. 1456, 1465 (D. S.D. 1988).

have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 580-581, 98 S.Ct. 869-871 (1978). The presumption here as in *Lorillard* is particularly appropriate as Congress was dealing directly with this Court's decisions in *Oliphant* and *Duro* and had extensive knowledge of prior interpretations of jurisdictional issues in Indian law. Congress selected a specific statute to incorporate that had been enacted more than 100 years before. Based on its presumptive knowledge of the prior interpretations of how the essential jurisdictional facts were to be established, Congress must have intended the incorporated statute to affect tribal prosecutions in the same manner. Otherwise Congress could have left the term 'all Indian' undefined, leaving the determination to the tribes. Any doubt about the congressional intent is resolved by pertinent parts of the Legislative History overlooked by the Court of Appeals.

D. The Legislative History of the *Duro* Fix Indicates That Congress Provided Federal Habeas Corpus Review under 25 U.S.C.§ 1303 Specifically to Test Whether or Not the Tribe Asserting Jurisdiction Had Carried its Burden of Proving the Defendant's Indian Political Status as in § 1153.

The legislative history of the *Duro* fix clearly indicates that Congress understood the implication of specifically incorporating § 1153 and its prior interpretation into its recognition and relaxation of the limits on tribal criminal jurisdiction. The Senate Report unequivocally states:

> Criminal Federal Court Review: Section 3 of the Indian Civil Rights Act (25 U.S.C. 1303) guarantees to any person subject to the jurisdiction of a tribal court the following:
> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.
> Thus, if the prosecution cannot meet its burden of proof that the person over whom it is seeking to exercise criminal jurisdiction is an Indian for purposes of 18 U.S.C. 1153, the person has access to Federal court for a determination of

> whether the tribal government is authorized to exercise criminal jurisdiction over him.

Senate Report 102-168 at 7 (1990). This piece of legislative history apparently went unnoticed by the Court of Appeals.

The great Writ of Habeas Corpus in general is a proper vehicle to seek "vacatur of a judgment that is void for lack of subject-matter jurisdiction-a consideration just as valid in habeas cases as in any other, since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties." *Gonzalez v. Crosby*, 545 U.S. 524, 534, 125 S.Ct. 2641, 2649 (2005). This is so because a party can not consent to an adjudication by a court that lacks subject matter jurisdiction and consequently can not waive the issue of subject matter jurisdiction.

The tribe in this case has never justified the exercise of its criminal jurisdiction over the petitioner by carrying its "burden of proof that the person over whom it is seeking to exercise criminal jurisdiction is an Indian for purposes of 18 U.S.C. § 1153" and accordingly was not authorized to deprive her of her liberty. *Gonzalez, supra*. The tribe instead has claimed throughout the proceeding that it is a court of general jurisdiction and does not have a burden of proof in the first instance to establish its authority to deprive individuals of their liberty. The tribal court order depriving Ms. Eagle of her liberty is in excess of its jurisdiction and is void. The lower federal courts failed to protect her right as a citizen to due process.

IX.

CONCLUSION

Petitioner, Leslie Dawn Eagle, respectfully requests this Court grant certiorari and

declare her tribal court conviction void and constitutionally infirm and determine that due process requires that the Indian political status of a defendant before a tribal court is an element of any tribal criminal offense which the tribe must plead and prove beyond a reasonable doubt before it is authorized to deprive a citizen of her liberty.

Respectfully Submitted,

Michael K. Powell
Assistant Federal Public Defender
Counsel for Petitioner

CERTIFICATE OF SERVICE

LESLIE DAWN EAGLE
Petitioner

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 August 2, 2010, she served a true and correct copy of the foregoing Petition for Writ of Certiorari, Motion to Proceed in Forma Pauperis and Appendix A & B attached thereto by personally placing said copy in the Unites States Mail, postage paid to the addressees named below:

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

_____
Shirley Ariztia

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

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

PETITION FOR WRIT OF CERTIORARI

APPENDIX A
Opinion of the Ninth Circuit Court of Appeals

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APPENDIX B

Excerpts of Record *Eagle v. Yerington Paiute Tribe*
Ninth Circuit Court of Appeals CA No. 08-16786