No. 10-5764

IN THE

Supreme Court of the United States

LESLIE DAWN EAGLE,

Petitioner,

v.

YERINGTON PAIUTE TRIBE,

Respondent.

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

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner was convicted after trial of one count of child abuse in violation of the Law and Order Code of the Yerington Paiute Tribe. Although she failed to raise her challenge in a timely fashion and has never contended she is not an Indian, Petitioner argues the tribal court lacked jurisdiction to convict her because the prosecutor did not adequately plead and prove she is an Indian. She contends the federal courts should set aside her conviction on habeas review because Section 1301(4) of the Indian Civil Rights Act (ICRA) makes Indian status a necessary element of every tribal crime. The Ninth Circuit held that Section 1301(4), which Congress enacted to enlarge tribal sovereignty, does not restrict tribal sovereignty by requiring tribes to plead and prove Indian status when the defendant did not raise the issue. The question presented is:

Whether Section 1301(4) of ICRA makes Indian status an element of every tribal crime that prosecutors must plead and prove regardless whether the defendant timely raises the issue.

PARTIES TO THE PROCEEDING

The parties to this proceeding are petitioner Leslie Dawn Eagle and Respondent Yerington Paiute Tribe.

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COUNTER-STATEMENT OF THE CASE

This case began in July 2004 when Yerington Tribal Police Officer Kirk Stewart, responding to allegations that Leslie Dawn Eagle and her sister, Diane Tom, had abused their nieces, took the children to a medical center for a well child check. When they arrived, Autumn and Shawnee Wood had multiple bruises and contusions. [EOR[1] 52-53, 89-90] Shawnee's nose was covered in scabs. [EOR 90] Autumn and Shawnee would later testify that Petitioner and her sister had repeatedly abused them.

1. a. In August 2004 the Yerington Paiute Tribe filed a criminal complaint against Petitioner and Tom, alleging that they violated Section 5-50-020 of the Tribal Law and Order Code by repeatedly abusing their nieces. Under tribal law, the Tribe has criminal jurisdiction over "offenses enumerated" in the Code "when committed within the jurisdiction of the court by any Indian." Law and Order Code § 1-20-030.

Section 5-50-020 requires the prosecution to prove that the defendant caused "non-accidental physical or mental injury to a person under eighteen" in her care. It contains no reference to the Indian status of a defendant and does not make Indian status an element of the crime. Instead, a separate provision of the tribal code requires the defendant to raise the issue of Indian status, while also providing that the prosecution bears the burden of proof on the is-

[1] All references to the excerpts of record in petitioner's Appendix B are labeled "EOR."

sue if it is timely raised. See Law and Order Code § 1-21-030 (providing that 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 jurisdiction (status as an Indian) remains with the prosecution").

Consistent with tribal law, the complaint did not allege that petitioner and her sister were members of a federal Indian tribe. Nonetheless, petitioner had notice of the Tribe's position on that issue: In January 2005 the Tribe filed a second criminal complaint, along with a probable cause statement alleging that Petitioner and her co-defendant were Indians and adding criminal counts stemming from the defendants' repeated abuse of their nieces. [Cir. Ct. Op. 6800, Pet. App. A][2]

b. At trial, Autumn and Shawnee testified to the abuse to which petitioner had subjected them. They recounted that petitioner and Tom repeatedly slapped, kicked, and beat them. Petitioner whipped Autumn with a willow stick. Petitioner twisted Autumn's nipples. On many occasions Petitioner hit Autumn with a pool cue. [EOR 96]

Petitioner waited until after Autumn and Shawnee's testimony and until after the close of evidence to object that the prosecution did not adequately plead and prove she is an Indian. Petitioner merely stated in passing that the "prosecution failed to prove [she is an] Indian," and did not press the point fur-

[2] All references to the opinion under review, contained in petitioner's Appendix A, are labeled as "Cir. Ct. Op."

ther. [EOR 91] Moreover, petitioner did not assert--and has never asserted--that she is not a member of a federal Indian tribe.

Instead, Petitioner pressed her argument that the second criminal complaint was deficient and asked the court to apply the original complaint. [EOR 92] Based upon Petitioner's procedural challenge to the second complaint, the trial court applied the first complaint. [EOR 96] The court did not expressly address Petitioner's one-sentence objection to the prosecution's pleading and proof of Indian status. After considering the evidence, the court found beyond a reasonable doubt that Petitioner had repeatedly abused Autumn Wood. [EOR 96-97]

c. Petitioner did not dispute her Indian status during sentencing. The Chief of the Tribal Police informed the court that Petitioner and her co-defendant were "from different tribes" and therefore posed "a flight risk" if allowed to have two weeks to settle their personal affairs before being taken into custody to serve their one-year sentence. [EOR 100] Petitioner did not object, and the Judge ordered the Chief of Police to place her and her co-defendant into custody. [EOR 100]

2. Petitioner appealed to the Intertribal Court of Appeals, but did not challenge the trial court's finding that she abused Autumn. Instead, her "sole argument [was] that the prosecution failed to prove beyond a reasonable doubt that [she is an] Indian[]." [Ct. of App. Op. 2, EOR 33]

The Intertribal Court of Appeals concluded Petitioner forfeited her argument by failing to raise it in a "timely and adequate[]" fashion. [Ct. of App. Op. 6, EOR 107] Given Petitioner's "cursory declaration" in her closing that the prosecution had failed to prove she is an Indian, the "trial court had no duty to address" her challenge. [Ct. of App. Op. 6, EOR 107] Even if Petitioner had preserved her challenge, the Court of Appeals held that given the absence of contrary evidence from Petitioner, the record contained sufficient evidence to prove beyond a reasonable doubt that she is an Indian. [Ct. of App. Op. 4–5, EOR 105–06]

3. a. On habeas review in federal district court, see 25 U.S.C. § 1303, Petitioner raised the new argument that Section 1301 of the Indian Civil Rights Act of 1968 (ICRA) makes Indian status an element of every tribal crime and, therefore, due process required the prosecution to plead and prove she is an Indian notwithstanding her failure to raise the issue.[3]

Applying the well-established rule that the statute under which a defendant is prosecuted establishes the elements of the crime, see infra n.3, the district court found no support for Petitioner's new argument. Section 5-50-020

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[3] The Fifth Amendment "Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." Patterson v. New York, 432 U.S. 197, 210 (1977); see also In re Winship, 397 U.S. 358, 364 (1970). Although the Fifth Amendment does not apply to tribes, see Duro v. Reina, 495 U.S. 676, 693 (1990), ICRA imposes a due process requirement on tribal prosecutions. 25 U.S.C. § 1302.

of the tribal code, the court held, does not make Indian status an element of the crime of child abuse. [D. Ct. Op. 7, EOR 8.]

The district court further held that Section 1301 of ICRA does not require that all tribal crimes include Indian status as an element. Section 1301 was amended in 1990 to "recognize[] and affirm[]" tribal "powers of self government" by defining them to include "criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2) (emphases added). And it incorporates the judge-made definition of "Indian" in the Major Crimes Act, 18 U.S.C. § 1153, under which Indian status turns on affiliation with a tribe rather than ethnicity alone, United States v. Antelope, 430 U.S. 641, 646 (1977).[4] See 25 U.S.C. § 1301(4). Thus, Section 1301 was Congress's response to this Court's decision in Duro v. Reina, 495 U.S. 676 (1990), which held that, under then-existing federal common law, federal Indian tribes possessed criminal jurisdiction over their own members but not over non-member Indians.

At the same time, "Section 1301 is not a criminal statute," but "merely constitutes an express Congressional recognition and affirmation of the inherent criminal jurisdiction of the Indian tribes." [D. Ct. Op. 7-8, EOR 8-9] For that reason, the district court held the statute does not define the elements of tribal criminal law—and does not require Tribes to plead and prove Indian status when the defendant fails timely and adequately to contest it. [Id.]

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[4] See also Means v. Navajo Nation, 432 F.3d 924, 930 (9th Cir. 2005) ("[T]he criminal jurisdiction of tribes over 'all Indians' recognized by the 1990 Amendments means all of Indian ancestry who are also Indian by political affiliation, not all who are racially Indians.").

b. The Ninth Circuit affirmed in an unanimous opinion by Judge Thompson, joined by Chief Judge Kozinski and Judge McKeown. [Pet. App. A]

The court began by rejecting petitioner's argument that Indian status must be an element of every tribal crime. Section 1301(4), it explained, is clear: It "simply" defines "Indian" in Section 1301 by referring to the definition of the same term under the Major Crimes Act. [Cir. Ct. App. Op. 6802-03, Pet. App. A] Furthermore, the legislative history left "no doubt" that Congress merely intended to incorporate the "body of case law with regard to who is an Indian" under Section 1153. [Cir. Ct. Op. 6803-04 (quoting H.R. Rep. No. 102-61, at 4 (1991)), Pet. App. A]

The court next noted that it was "satisfied that no due process violation occurred in this case," because petitioner had adequate notice of the Tribe's position that she was an Indian (given the probable cause statement attached to the Tribe's second complaint), as well as an adequate opportunity to respond. [Cir. Ct. Op. 6804, Pet. App. A] Indeed, petitioner "d[id] not claim that she did not have notice of the Tribe's position that she was an Indian." [Id.] Furthermore, petitioner "could have timely disputed the issue of Indian status, but she did not." [Id.] Accordingly, she had an adequate opportunity under Law and Order Code 1-21-030 to challenge that allegation any at time before the prosecution had rested, and instead "waited too long." [Id. at 6805]

4. Petitioner now seeks certiorari, challenging only the Ninth Circuit's rejection of her claim based upon Section 1301(4).

REASONS FOR DENYING THE PETITION

The petition identifies no adequate reason for this Court to grant certiorari, and there are several reasons to deny it. The court of appeals decided a narrow question of statutory interpretation.[7] Its decision implicates no conflict in the lower courts, raises no issues of national importance, and would be a poor vehicle for considering the splitless, narrow question the court resolved. Moreover, the court of appeals' decision is correct.

1. Petitioner argues that Section 1301 of ICRA requires federal Indian tribes to include Indian status as an element of every tribal crime. Accordingly, she contends that respondent's tribal code, which does not make Indian status an element of the crime of child abuse—but which does require prosecutors to bear the burden of proof on that issue if the defendant timely raises it—runs afoul of Section 1301. She adds that this violation of Section 1301 is significant, and worthy of this Court's review, because it violates the due process requirement that a prosecutor plead and prove every element of an offense. This Court's review is unwarranted for several reasons.

a. To start with, petitioner inaccurately frames the issue presented. Although she asserts that the case raises "a significant Constitutional issue that effects [sic] the rights of . . . many United States citizens," Pet. 12, the only issue properly presented is statutory. Petitioner does not allege that Congress

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[7] Petitioner does not seek review of the court of appeals' holding that she received adequate notice and an opportunity to respond, see supra 7, and for good reason. The question is fact-bound and implicates no split of authority in the lower courts.

violated due process (or any other constitutional provision) by enacting Section 1301 of ICRA. Nor does she argue that Congress cannot constitutionally allow tribes to require that criminal defendants timely raise the issue of Indian status. Petitioner's argument is that Section 1301 of ICRA requires tribes to revise all of their criminal codes to make Indian status an element of every tribal crime. The Ninth Circuit properly answered that question, not by consulting the Constitution, but by consulting the text of the statute Congress enacted.

Notably, petitioner does not suggest that this narrow statutory issue is worthy of this Court's review. See Pet. 12-14 (arguing that certiorari should be granted only because the petition implicates "a significant Constitutional issue"). And if Section 1301 does not require that Indian status be an element of every tribal offense, as the Ninth Circuit held, then petitioner's argument that due process requires elements of a crime to be pleaded and proved by the prosecutor is beside the point. Petitioner does not dispute that tribal law did not make Indian status an element of the offense (although it allowed petitioner to raise the issue and would have placed the burden of proof on the prosecutor if the issue had been timely raised).

Equally misleading is petitioner's assertion that "[t]he Tribe's position in this case—which was affirmed sub silencio [sic] by the Ninth Circuit—is that it is a court of general jurisdiction." Pet. 16. 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. Neither respon-

dent Tribe nor the Ninth Circuit disputed that ICRA limits the jurisdiction of tribal courts to Indians. And apart from statutory or federal common law restrictions on tribal court criminal jurisdiction, the question of how tribal subject matter jurisdiction is established in any particular case turns on tribal law, not, as petitioner would have it, on rules governing the subject matter jurisdiction of Article III courts. Id. at 18–19.

b. The petition should be denied for the further reason that it implicates no conflict in the lower courts. Indeed, in 27 pages of briefing petitioner fails to identify a single lower court opinion adopting her view of Section 1301, and respondent is aware of no other case deciding the issue. The lack of any developed body of lower court opinions on the question presented—much less a circuit split—is itself sufficient reason to deny certiorari.

Petitioner herself highlights why it is unnecessary to review this issue prematurely. She suggests that there are approximately "511 operating tribal courts" in the United States, and that "approximately 200 tribal courts . . . exercise primary misdemeanor criminal jurisdiction." Pet. 12–13. And she asserts that this case will have an impact on "many" non-Indians throughout the United States. Id. at 12. If the question presented is as significant and recurring as petitioner implies, then there is no reason to grant review before other lower courts have had an opportunity to consider the question.

c. Even if this Court were inclined to review the narrow, splitless statutory issue presented, this case would be a poor vehicle for resolving it. As

petitioner acknowledges, see Pet. 2, the tribal courts held that she failed timely to raise the issue of Indian status and thus forfeited the argument. Accordingly, petitioner must argue not only that ICRA makes Indian status an element of the offense, but also that she is entitled to raise that argument at any time. And although she asserts that jurisdictional limits on tribal court jurisdiction may never be waived, see id. at 18, petitioner identifies no support for her view and does not contend that issue independently warrants this Court's review. Petitioner's failure to raise the issue in a timely manner makes this case a poor vehicle for considering it.

2. The petition should also be denied because the court of appeals' decision is correct.

a. Nothing in Section 1301(4) signals an intent to depart from the general rule that, to identify the elements of a crime, a court must look at the statute under which the defendant is being prosecuted. See Dixon v. United States, 548 U.S. 1, 7 (2006); supra n.3. The aim of Section 1301 was not to curtail tribal court jurisdiction or micromanage tribal procedures, but rather to restore tribes' inherent criminal jurisdiction over nonmember Indians after this Court's decision in Duro, 495 U.S. 676; see supra 5-6.

All three branches of the United States Government have long recognized that tribes possess inherent, pre-constitutional sovereign powers limited only by tribes' status as domestic dependent nations. See 25 U.S.C. § 1301(2); Exec. Order No. 13175, Consultation and Coordination with Indian Tribal Govern-

ments, 65 Fed. Reg. 67,249 (Nov. 9, 2000); United States v. Mazurie, 419 U.S. 544, 557 (1975). Among the branches, Congress's authority over tribal affairs is "plenary" and paramount. Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470-71 (1979). This power enables Congress to relax limitations the political branches have placed on tribal sovereignty, and thus to alter "'judicially made' federal Indian law" that was based upon previous actions of those branches. United States v. Lara, 541 U.S. 193, 207 (2004).

Congress exercised its plenary power when it amended Section 1301 to restore tribal criminal jurisdiction over nonmember Indians after this Court's decision in Duro, 495 U.S. 676. All Duro held was that tribes lack inherent criminal jurisdiction over nonmember Indians, and that is all Congress addressed with the 1990 amendments to Section 1301. See Pub. L. No. 101-511, tit. VIII, § 8077(b), (c), 104 Stat. 1856, 1892-93 (Nov. 5, 1990); Lara, 541 U.S. at 197-98 ("soon after this Court decided Duro, Congress enacted new legislation specifically authorizing a tribe to prosecute Indian members of a different tribe"). Congress addressed Duro on the one hand by affirming tribal criminal jurisdiction over anyone who is an "Indian[]." ICRA § 1301(2), and on the other

hand by defining "Indian" with reference to the judge-made definition of that term under Section 1153 of the Major Crimes Act. id. § 1301(4).[1]

The legislative history confirms that Section 1301 solely incorporates the definition of "Indian" as political rather than ethnic. [Cir. Ct. Op. 6803–04, Pet. App. A] The 1990 Congress was aware of the federal pleading and proof requirements of Section 1153 of the Major Crimes Act. [Id. at 6804 (citing S. Rep. No. 102-168, at 5 (1991))] But it referred to Section 1153 "so that there would be a consistent definition of 'Indian' in the exercise of jurisdiction by either the Federal government or a tribal government," not in order to make federal and tribal pleading and proof requirements consistent. [Id. at 6803–4 (quoting S. Rep. No. 102-168, at 6))]

b. Petitioner seeks to cloud the clear statutory text by resort to the Senate Report's statement that if a tribal prosecution "cannot meet its burden of proof" as to Indian status, then the defendant can petition for habeas review under ICRA. Pet. 25–26; see S. Rep. No. 102-168, at 7. That statement is irrelevant. The Tribe does not dispute it bears the ultimate burden of proof on Indian status under tribal law—indeed, Section 1-20-030 of the Law and Order

[1] The judge-made definition of "Indian" for purposes of the Major Crimes Act has a long history that predates the development of contemporary federal criminal procedure. In United States v. Rogers, this Court held that to be considered an "Indian," a person must have Indian ancestors and a present social tie to a tribe. 45 U.S. (4 How.) 567, 573 (1846). This Court reaffirmed that two-part test in Antelope, 430 U.S. at 646, and it provides the basic framework for determining "Indian" status for purposes of federal criminal jurisdiction under the Major Crimes Act and, by operation of Section 1301(4) as amended, tribal criminal jurisdiction under Section 1301(2). Cohen's Handbook of Federal Indian Law §§ 3.03, 9.02, 9.04 (2009); Means, 432 F.3d at 930.

Code affirms that obligation. Thus, tribal law is consistent with Section 1301(4) of ICRA, which limits tribal criminal jurisdiction to Indians, but does not prescribe the procedures for proving or challenging Indian status.

c. The Ninth Circuit's decision is further supported by the canon of construction applicable to federal treaties and statutes concerning Indians. Under that canon, statutes "passed for the benefit of dependent Indian tribes" must be construed in favor of tribal sovereignty, unless they cannot bear the construction. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); see also Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976). Applying that canon, the proper construction of Section 1301 is that it does nothing to abrogate the general rule that due process requires a prosecutor to plead and prove the elements of the crime as defined in the statute of conviction, and nothing more. The prosecution in this case met that rule by proving beyond a reasonable doubt that Petitioner repeatedly beat, slapped, pinched, and kicked her niece, Autumn Wood.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED this 8th day of November, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that she is an employee at the Law Offices of Mitchell C. Wright, and is a person of such age and discretion as to be competent to serve papers.

That on November 8, 2010, she served a true and correct copy of the foregoing Brief in Opposition by personally placing said copy in the United States Mail, postage prepaid to the following:

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Dated this 8th day of November, 2010.

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