ORIGINAL

No. 03-107

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

There is one correction to the government's Statement of the Case. On page 6, the government claims that a conditional guilty plea was taken preserving only the double jeopardy claim. The conditional plea preserved the Motion to Dismiss Indictment for Violation of Double Jeopardy as well as the Motion to Dismiss Indictment for Selective Prosecution or to Allow Additional Discovery Regarding Selective Prosecution. The denials of each of these motions were appealed and both were presented in the Petition for rehearing en banc. The decision of the district court was affirmed as to both motions by the panel in the Eighth Circuit. When the Eighth Circuit announced its decision en banc, it presumably did not reach the second motion because it was moot after the dismissal of the indictment on double jeopardy grounds.

Mr. Lara still believes the second motion should have been granted and would ask that if the Court finds the Indictment should not be dismissed, then the Court should reverse the district court ruling on that motion or remand it to the Eighth Circuit for consideration.

ARGUMENT

A. Congress Cannot Remove Impediments to the Exercise of Tribal Sovereign Powers; Therefore the ICRA Amendments Delegated Federal Authority to the Tribe and the Double Jeopardy Clause Prevents a Subsequent Federal Prosecution for the Same Offense.

Mr. Lara's prosecution by the federal government was a violation of the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The dual sovereignty doctrine limits the Double Jeopardy Clause from acting as a bar to successive prosecutions that are initiated by separate sovereigns. Mr. Lara pled guilty in tribal court and was indicted in federal court for offenses involving the exact same conduct. The question presented is whether these two courts derive their power from the same source or independent sources. The lower court ruled that both of these prosecutions were an exercise of federal power and thus violated the Double Jeopardy Clause. *See United States v. Lara*, 324 F.3d 635 (8th Cir. 2003)(en banc).

A crime is an offense against the sovereignty of a government. Under the dual sovereign doctrine, when a single act violates the sovereignty of two governments, the offender has actually committed two separate offenses. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985). The dual sovereign doctrine only applies when two prosecuting entities derive their prosecutorial powers from independent sources. *See id.* at 90. In situations where a single act violates the

laws of two separate sovereigns, two offenses are committed which permits prosecution by both sovereigns without a violation of the Double Jeopardy Clause. *See id.*

In *Duro v. Reina*, 495 U.S. 676, 685 (1990), this Court ruled that tribes do not have inherent sovereign authority to prosecute non-member Indians. The Court reasoned when a criminal prosecution reflects a "manifestation of external relations between the Tribe and outsiders," including nonmember Indians, "such power would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress." *Id.* at 686. The fundamental status of an Indian who is not a member of the Tribe seeking to prosecute him is identical to that of a non-Indian. *See id.* at 693. Tribes do not have a sovereign power to prosecute non Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Therefore, tribes do not have an inherent sovereign power to prosecute nonmember Indians. Mr. Lara was not a member of the tribe which prosecuted him. As such, he was prosecuted by the Tribe pursuant to delegated federal authority and his subsequent federal prosecution violates the Double Jeopardy Clause.

Another pre-*Duro* case examined retained sovereign powers of tribes and echoed the important distinction between members and non-members. In *Montana v. United States*, 450 U.S. 544, 564 (1981) the Court reiterated that, "[t]he areas in

which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

In response to the holding in *Duro*, Congress amended the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C § 1301 *et seq.*, by defining "powers of self government" to mean "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C § 1301(2). The government claims this amendment is the reason that the holding in *Duro* no longer stands for the proposition that tribes do not have inherent power to prosecute non-member Indians. The Court has not interpreted the ICRA amendments to have changed the holding in *Duro*. In *Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001) the Court cited *Montana* and *Oliphant* favorably for the proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" in criminal matters.

The government claims that this attempt by Congress to overrule *Duro* is permissible because *Duro* was not a Constitutional case. This Court has seen otherwise. While the Court has not construed the post-*Duro* ICRA amendments, it has reaffirmed its limitation on tribal sovereign authority to tribe members.[1] *See*

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[1] Chief Judge Hanson's dissent in the *Lara* panel decision, which was later vacated en banc, does a very nice job of explaining why the *Duro* decision is grounded in the Constitution. 294 F.3d 1004, 1008-09 (8th Cir. 2002).

United States v. Lara, 324 F.3d 635, 638 (8th Cir. 2003) (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) and *Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001)). This Court reaffirmed the fact that tribal jurisdiction over non-members of the tribe is not inherent because it cannot survive without an express congressional delegation. *See South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993).

Contrary to the government's assertion otherwise, *Duro* is a constitutional case. The decision was based on the powers and limitations found in the Constitution. For example, as the Court stated:

> Whatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States .... That Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits. In the absence of such legislation, however, Indians like other citizens are embraced within our Nation's great solicitude that its citizens be protected ... from unwarranted intrusions on their personal liberty.

Duro, 495 U.S. at 692-93. "Unwarranted intrusions" on a person's liberty is a concept taken directly from the Fifth Amendment of the Constitution. As the Court stated in *Duro*: "[a]s full citizens, Indians share in the territorial and political sovereignty of the United States." *Id.* at 709. This reference can not be interpreted to exclude the constitutional guarantees found in the Fifth Amendment.

The Court further recognized the Constitution's limiting authority with respect to Congressional Power over Indian law: "Our cases suggest constitutional

limitations 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." *Id.* at 693. The constitutional consideration which concerned the Court in *Duro* was "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Id.* at 694. Finally, the Court noted: "We cannot, however, accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens." *Id.* at 698. Equal treatment of citizens in the eyes of the law is a basic principle of the United States Constitution. As these references demonstrate, the Court recognized the Constitutional impact of its decision in *Duro*.

The government's contention that *Duro* was not a constitutional holding seems to ignore the constitutional references. The constitutionality of the *Duro* holding is not grounded so much in the treatment of the tribes as it is in the treatment of the individual. *See id.* at 692. It is Mr. Lara's individual rights that are implicated by his prosecution by a sovereign which does not afford him his constitutional rights and to which he has not consented. This is a key distinction between the treatment of a member of a tribe in *Wheeler* and non-members of the tribe in *Oliphant* and *Duro*. The Court in *Duro* emphasized that "petitioner's status as a citizen of the United States" grants protection "from unwarranted

intrusion on [his] personal liberty." *Id.* (citing *Oliphant*, 435 U.S. at 210).

The government's final contention in Section A is that Congress could authorize a power that the tribes would otherwise lack even if *Duro* was based on the Constitution. This is true. Congress can authorize tribes to prosecute non-member Indians and this is the holding of the lower court. *See Lara*, 324 F.3d at 640. By this authorization, Congress has given the tribes federal power to prosecute nonmembers. *See id.* at 640.

Although unclear from its argument, it is assumed that government is of the view that Congress can delegate criminal jurisdiction without running afoul of the Double Jeopardy Clause. This is untrue. The cases cited by the government to support its argument do not stand for this proposition. The government cites two cases wherein Congress allowed States to take action which would otherwise violate the Commerce Clause. See *Hillside Dairy Inc. v. Lyons*, 123 S.Ct. 2142 (2003) and *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). These were civil cases and therefore did not raise the Constitutional question of Double Jeopardy. In these cases, the States were using a federal power and therefore, the delegation in these cases was the power of one sovereign not two. Congress cannot fix the constitutional problem in Mr. Lara's case in the same way it can authorize States to take action which would otherwise violate the Commerce Clause. If the recognition of inherent sovereignty is unconstitutional, then so to is the

authorization of sovereignty. This is a delegation of federal power from Congress and it results in double jeopardy no matter what it is called by Congress.

Congress does have broad powers concerning the treatment of Indians, but it does not have the power to recognize a sovereignty which this Court has already determined does not exist, especially, when the recognition of this sovereignty violates the Constitution of the United States.

B. The Court of Appeals Correctly Interpreted the ICRA Amendment to Delegate Federal Prosecutorial Power to the Tribes.

Congress's intent in amending ICRA was to correct an error which it felt this Court committed. The government argues that the lower court erred by not construing the tribal grant of power in ICRA as a legal nullity. This would have the effect of invalidating Mr. Lara's tribal conviction. Without the valid tribal conviction, the government argues, the second prosecution is really the first and there is no Double Jeopardy.

The government's argument on this issue misses a very important point. The Double Jeopardy Clause protects a person from being twice put in jeopardy for the same crime. If the Eighth Circuit's interpretation of the statue as a delegation of power is incorrect, it does not change the fact that Mr. Lara was put in jeopardy for a crime. In fact, he was more than put in jeopardy, he actually lost his liberty in the tribal court. Mr. Lara's tribal prosecution may be expunged from his record (if a habeas petition is successful), but his loss of liberty cannot be restored. It would

be an odd result for Mr. Lara to have his position affirmed and still be sentenced in a federal court for a crime he was already punished for in tribal court. This was certainly not the result the framers of the Constitution envisioned when drafting the Double Jeopardy Clause.

Congress intended to give tribes misdemeanor jurisdiction over nonmember Indians. The fact that they improperly termed it as a recognition of inherent sovereignty does not change the fact that the law's purpose was one of tribal law enforcement. It is doubtful that Congress did not want tribes to be able to prosecute nonmember Indians. Congress was acting to fill a perceived void in jurisdiction. The fact that Congress erred does not change its intent to delegate jurisdiction to the tribes over non-member Indians in criminal cases. The concurrence by Justice Souter in *Hicks* confirms this contention that "Congress passed a statute expressly granting tribal courts [criminal jurisdiction over nonmember Indians]." 533 U.S. at 377 n.2.

C. Only Two Circuits are in Conflict on this Issue and More Time is Needed to Determine How Other Circuits Will Resolve This Issue.

While it is true that there is a conflict between the Eighth and Ninth Circuits on the issue presented in this case, this conflict has not been fully examined by the other circuits. Allowing more time for the other circuits to weigh in on this issue will give this Court a more complete picture.

Allowing more time will also allow Congress to close any perceived gap in jurisdiction. Action by Congress may make any decision on this case moot. If Congress amends ICRA to show a clear delegation of its power to the tribe, or if Congress takes some other step to alleviate the problems claimed by the government, then this issue becomes moot.

If the government is truly concerned that this decision will cause problems in tribal law enforcement, they are free to lobby Congress for changes which would correct this problem.

D. The Question Presented in this Case Does Not Have the Significant Ramifications Envisioned by the Government.

The government contends on page 20 of its Petition for a Writ of Certiorari that many problems will arise if the decision of the Eighth Circuit is allowed to stand. These problems are not as severe as the government makes them out to be and they do not justify granting a Writ of Certiorari.

The first contention is that misdemeanors are best prosecuted by the tribes. This is true and the *Lara* decision in the Eighth Circuit does nothing to change this. *See* 324 F.3d 635. Misdemeanors committed by all Indians can still be prosecuted by any tribe even in the Eighth Circuit. The *Lara* decision ruled that the ICRA amendment served to delegate federal authority for prosecution of misdemeanors to the tribes. *Id.* at 640. Therefore, the problem complained of by the government does not exist.

The second contention is essentially that a nonmember Indian may quickly plead guilty to a misdemeanor and foreclose the government from charging a more serious felony. This concern of the government is real, however, its impact is within the control of the government. Every state has a U.S. Attorney's office and they regularly communicate with tribal prosecutors. While the government alleges that U.S. Attorneys are overworked, it can be argued that tribal prosecutors are just as busy if not more busy than their federal counterparts. It would be a rare case where a tribal prosecutor would not defer to his or her colleagues at the U.S. Attorney's office to reduce his caseload and get a more appropriate sentence.

The government's contention assumes that the defendant is the only person involved in the decision to charge an offense or plead guilty. A defendant cannot force a tribal prosecutor to charge him. A defendant cannot plead guilty to an offense without the prosecutor's knowledge. Not only must the prosecutor be involved in this decision, but the Judge is also involved. The Judge must accept the guilty plea and it can be assumed that if the Judge questions the appropriateness of a misdemeanor charge, the prosecutor will be asked if the U.S. Attorney has had appropriate input on the case. The government's concern on this point would require a breakdown of the system involving the prosecutor, the Judge and even the U.S. Attorney.

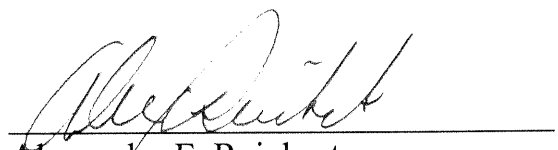
There is no contention that tribal prosecutors care less about law enforcement than U.S. Attorneys. There is no contention that these tribal prosecutors are corrupt or that they are waiting in the wings to allow murderers to plead guilty to assault in tribal court and avoid murder charges in the Federal Courts because of Double Jeopardy.

As a practical matter, this ruling should significantly increase cooperation between Federal and Tribal prosecutors. This cooperation can only enhance the overall administration of justice on the reservations.

CONCLUSION

For the reasons stated above respondent Billy Jo Lara respectfully requests that this Court deny the government's Petition for a Writ of Certiorari should be denied.

Respectfully submitted. this 21st day of August, 2003.



August 21, 2003

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PROOF OF SERVICE

I, Alexander F. Reichert, do swear or declare that on this date, August 21, 2003 as required by Supreme Court Rule 29 I have served the enclosed **Motion for Leave to Proceed In Form Pauperus** and **Respondent's Brief in Opposition** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelop containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

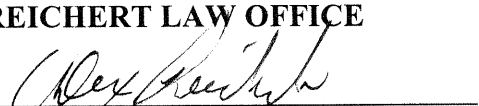
The names and addresses of those served are as follows:

Theodore B. Olson
Solicitor General of the United States
Department of Justice
Room 5614
950 Pennsylvania Avenue NW
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 21, 2003.

REICHERT LAW OFFICE



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