ORIGINAL

In the

Supreme Court of the United States

United States Of America,	)	
	)	
Petitioner.	)	
	)	
v.	)	
	)	No. 75-661
Gabriel Francis Antelope Et Al	)	
	)	

Washington, D. C.
January 18, 1977

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UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 75-661
GABRIEL FRANCIS ANTELOPE ET AL	:	

Washington, D. C.

Tuesday, January 18, 1977

The above-entitled matter came on for argument at 10:06 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, Deputy Solicitor General, Department of Justice, Washington, D. C. 20530
For Petitioner

JOHN W. WALKER, ESQ., 114 East Third Street, Moscow, Idaho 83843
Court-appointed Attorney for Respondents William Andrew Davison and Leonard Francis Davison

ALLEN V. BOWLES, ESQ., 204 East 1st Street, Moscow, Idaho 83843
Attorney for Respondent Gabriel Francis Antelope

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 54 Original, the United States against Florida and Texas.

ORAL ARGUMENT OF LEE. C. CLYBURN, ESQ.,

ON BEHALF OF DEFENDANTS

MR. CLYBURN:

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 75-661, United States against Antelope.

Mr. Frey, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here under certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, reversing Respondents' conviction for first degree murder on Equal Protection grounds.

This case began when Respondents broke into the home of Emma Johnson, an 84-year-old non-Indian woman who lived on the Coeur d'Alene Indian Reservation in Idaho.

They robbed her and then they kicked and beat her to death.

Because Respondents are Indians and the crime occurred in Indian country and because the offenses were among those enumerated in the so-called "Major Crimes Act," the crimes came within the jurisdiction of the Federal District Court.

Respondents were indicted, tried and convicted of burglary, robbery and felony murder. And I talk here about Respondents Antelope and Leonard Davison.

Actually, Respondent William Davison was convicted only of second degree murder and the reversal of his conviction appears to be inadvertent and not based on any of the reasons given by the Court of Appeals.

Respondents appealed their first degree felony murder convictions to the Ninth Circuit.

QUESTION: All three of the Defendants were Indians?

MR. FREY: All three, yes. There were actually four participants in the crime. One testified on behalf of the prosecution and was not involved in this appeal.

The Ninth Circuit reversed on the grounds that the conviction violated Equal Protection concepts embodied in the Fifth Amendment by allowing Respondents to be convicted of felony murder -- that is, without the proper proof of premeditation or deliberation -- when a hypothetical non-Indian committing the same crime would have been tried under Idaho law which has no felony murder provisions.

Parenthetically, I note that Idaho used to have a felony murder provision identical to the federal provision and that provision was dropped about four years ago when Idaho adopted a mandatory death penalty for first degree murder.

QUESTION: What about an act committed by a non-Indian in the same circumstances on the same reservation?

MR. FREY: Well, the jurisdiction would depend upon

the identity of the victim and I will outline the jurisdiction possibilities as I proceed with the argument.

The Court of Appeals perceived in the situation that I have described a racial discrimination against Indians which it found not supported by any compelling governmental interest.

I think it is best to begin the discussion of the legal issues in this case by outlining the current status of jurisdiction with respect to crimes committed in Indian country.

If an Indian commits a crime against a person or property of another Indian, jurisdiction over the offense is within the tribal courts unless the offense is one of the major crimes enumerated in 18 U.S.C. 1153 in which case jurisdiction is in federal court under federal law.

If an Indian commits a crime against a non-Indian, essentially the same status applies except that if it is not a major crime and he has been punished by the Tribe, there would be no Federal Court jurisdiction. If he has not been punished by the Tribe, there would be Federal Court jurisdiction under Section 1152.

Now, if a non-Indian commits a crime against a non-Indian, Section 1152 appears on its face to grant federal jurisdiction over that offense.

However, in a long line of decisions beginning with United States against McBratney in 1881 and going through the

Draper case and New York ex rel. Ray in 1945, this Court has held that the states have exclusive jurisdiction over this category of offenses.

QUESTION: Even if it is a so-called "major crime" and even if it is committed on an Indian Reservation?

MR. FREY: It is treated as though it were committed elsewhere in the state and not within Indian country for purposes of jurisdiction. So the situation is, if an Indian is involved, either as perpetrator or victim, there is either federal or tribal jurisdiction. If only non-Indians are involved in the transaction, there is state jurisdiction.

What thus emerges is a coherent overall structure under which full recognition is given to the paramount federal and tribal responsibility for regulation when Indians or Indian interests are involved, while the jurisdiction of the state may be recognized over events occurring within the borders of the states not implicating Indian interests, even though the events may take place in Indian country.

What has become clear as this Court's Indian jurisprudence has evolved, therefore, is the central notion that the allocation of jurisdiction between the Federal Government and the states is strongly rooted in the presence or absence of impact on the interests of tribal Indians.

Now, along comes the Ninth Circuit and holds that the guide and principle developed by this Court is unconstitutional

in its application to a large category of cases. That is, all cases involving crimes against a person or property of non-Indians.

Now, let's consider carefully, then, what this discrimination, as the Ninth Circuit found, is and perhaps more importantly, what it is not.

The Federal Murder Statute under which Respondents were convicted is plainly not racially discriminatory on its face and for purposes of this argument I assume that the term "Indian" in the jurisdictional statutes is a racial term, although we actually dispute that proposition.

Any person committing felony murder within an area of federal jurisdiction, Indian or not, is guilty of first degree murder. This applies to a non-Indian who murders an Indian in Indian country. This applies to a non-Indian who commits felony murder in a federal enclave such as a military reservation or who commits felony murder in a vessel on the high seas.

Indeed, the application of the Felony Murder Statute to Indians by virtue of Section 1153 reflects, not a discrimination with regard to Indians, but an affirmative determination by Congress to treat Indians the same way as all other persons within federal criminal jurisdiction are treated.

The discrimination comes about, then, not because Congress has decreed that Indians and non-Indians who commit

felony murder shall be treated differently in any respect but simply because it has allowed the state to assert jurisdiction when no Indian is involved in a crime, either as victim or perpetrator.

Now, inevitably, when some cases are allocated to the jurisdiction of one Sovereign and others to a different Sovereign, there will be differences in the definition of offense, differences in the procedural and evidentiary rules governing the trial of the case and differences in the punishment provided.

It is these differences that are the product of this jurisdictional allocation that the Court of Appeals found invidiously discriminatory.

This case is thus entirely different from the Cleveland line of cases relied upon by the Court of Appeals and heavily relied upon by Respondents here. Cleveland involved the situation in which an Indian is the victim of an assault and in thinking about this case it can be very confusing and I think one point to keep in mind is what we might call the "Antelope" category of cases all involve non-Indian victims. What we might call the "Cleveland" category of cases all involve Indian victims.

Now, under the provisions of Section 1153 as they were in effect at the time of the Cleveland decision, if an Indian assaulted an Indian, state law was referred to to provide

substantive law and punishment.

However, if a non-Indian assaulted an Indian, 1152 applied and federal law governed and there were differences which resulted in -- for instance, in the Cleveland case, a larger punishment being inflicted on an Indian defendant than could have been on a non-Indian defendant but the key factor in the Cleveland cases is that both groups of defendants were tried in federal court and that Congress had established the standards by which both groups should be judged and the status of the defendant as Indian or non-Indian was the critical factor that activated either state law or federal law applying as a matter of affirmative Congressional enactment.

Now, this kind of direct discrimination would pose a difficult case and it would be legitimately subject to some of the objections wrongly made to the procedures in the present case.

In the present case, the discrimination derives, as I have said, solely from the division of jurisdiction between the states and the Federal Government.

In order for this Court to sustain the result reached by the Court of Appeals, it must conclude that this eminently sensible division of responsibility which has so often been endorsed by this Court, which allows the states to apply their law in their courts when no federal interest is importantly implicated but retains the Federal Government for situations

where trust responsibilities for the Indian tribes are involved, that this sensible allocation of jurisdiction is impermissible because state law is different from federal law.

We submit, of course, that this wholly non-invidious allocation of jurisdiction by Congress and by this Court is fully consistent with the Equal Protection obligations imposed upon Congress.

Now, I think it is plain that we need not carry the burden that Respondents would thrust upon us of showing a compelling governmental interest to sustain the allocation of jurisdiction that exists in this case but I would like to outline for the Court the choices that would be available to Congress if the Court of Appeals rejection of the present system for administering criminal justice in Indian country is upheld by this Court.

First of all, Congress could do nothing. In such a case, each prosecution for a crime against a non-Indian in Indian country would be governed by a patchwork assortment of the most lenient features of state and federal law.

For example, if a peace officer is murdered in the course of a felony in the State of Idaho in Indian country, the defendant could not be convicted of first degree felony murder because Idaho has no such provision, only the federal law does.

Presumably, however, the defendant, if an Indian,

could not be convicted of murder of a peace officer, which is first degree murder under Idaho law, because federal law has no such provision. Now --

QUESTION: Mr. Frey, what is the rule if a Reservation Indian is killed off the Reservation?

MR. FREY: Well, the federal laws state --

QUESTION: Doesn't the state law say that --

MR. FREY: -- that would be within the state jurisdiction.

QUESTION: There is no federal dimension to that at all.

MR. FREY: Well, there is none under present statute. Possibly Congress could adopt a statute.

QUESTION: And how about an Indian committing a crime off the Reservation? The same?

MR. FREY: The same thing goes.

QUESTION: Thank you.

MR. FREY: And, of course, the only Indians in our view who are subject to jurisdiction on the Reservation under the definition of "Indian" in 1152 and 1153 are Tribal Indians, not Canadian Indians, not Indians from terminated tribes, only -- so we suggest that it is not really basically a racial but more a political definition, although we recognize there is a racial component to this.

QUESTION: So that if a non-Tribal Indian commits a

crime or has a crime committed against him on a Reservation --?

MR. FREY: He would be treated as a non-Indian for purposes of the statute.

QUESTION: Thank you.

QUESTION: That is why you say it is a blend of geographical, political area and the identity of the --

MR. FREY: And, of course, race is relevant. I mean, the existence of Indian blood or non-Indian blood is a relevant factor but it is not necessarily a determining factor in deciding who is an Indian and who is not.

But in our view, it doesn't matter. Even if "Indian" is a racial term, we think it is plain that the arrangement that Congress and this Court have evolved over the years is completely justifiable and does not work any kind of invidious discrimination.

Now, I would like to give another example of what happens under the Court of Appeals decision as we understand it and that is the situation in which an insanity defense is available and let us say that the state definition of insanity is more lenient or liberal than the federal definition of insanity.

Yet, on the other hand, let us say that the state has, as Oregon had, at least at one time, a requirement that the defendant prove sanity rather than the federal requirement that the government -- that the defendant prove insanity, excuse

me, rather than the federal requirement that the government bear the burden of proving sanity beyond a reasonable doubt.

Presumably, again, under the Court of Appeals opinion, you would have to pick the state's definition of insanity and the federal burden of proof.

QUESTION: In this very case, one might be rather hard put to it to decide which was the more lenient rule because, as I think I heard you say earlier in your argument, that while Idaho does not have felony murder, it does have first degree murder punishable by death.

MR. FREY: That is correct.

QUESTION: And the evidence in this case --

MR. FREY: The evidence was cited in this case that possibly --

QUESTION: -- might well have supported a first degree, an ordinary, commonlaw first-degree murder conviction and that would have been --

MR. FREY: Yes, sir. That wouldn't have been more lenient, in our view.

QUESTION: Certainly, the punishment would not have been.

MR. FREY: Certainly the punishment would not have been.

QUESTION: But the proof of conviction would have been more difficult.

MR. FREY: Yes, in order to convict of first-degree murder and prior deliberation --

QUESTION: You'd have to show deliberation and premeditation and wilfulness, that's all.

MR. FREY: That is correct.

QUESTION: I suppose it is even clearer that if the death penalty was available in that state and had been imposed, we would not be here at all.

MR. FREY: If it was imposed.

QUESTION: Yes, imposed. Imposed.

MR. FREY: I doubt that the Idaho statute, in fact, could survive the North Carolina decisions last year but in principle -- I mean, we are talking theoretically now and the fact is that we point out in our brief, for instance, the Manslaughter Statutes, the federal statute has two degrees of manslaughter with certain punishments prescribed. The Idaho statute has four degrees of manslaughter, ranging from punishments considerably less than the federal punishment up to punishments considerably more than the maximum federal punishment.

Now, I don't know how you compare these two systems to determine which is more lenient.

In any event, it seems to me plain that the result of the Ninth Circuit's holding is that no coherent system of legal rules is applied and the potential for spawning litigation

over choice of law is virtually endless.

Now, Congress would have two alternatives to this chaotic system. The first is to abandon federal supremacy in the area and to trust responsibility to the Indian Tribes by either, one, turning all prosecutions over to the state courts under state law, which is what has been done in the so-called "PL 280" states.

Now, there was a time at the time PL 280 was adopted when the sentiment in Congress was very much in favor of assimilation of Indians and PL 280 was a product of that and in five or six states there is, in fact, state jurisdiction.

There since was a reaction to that and in the Indian Civil Rights Act in 1968, Congress drew back from that approach and determined that the tribes should have a say in the turn-over of jurisdiction to the states because many of the tribes were extremely reluctant to see their members subject to state court jurisdiction and state law and preferred to maintain the existing system.

Also, of course, Congress could adopt an assimilative crimes approach under which all Indian defendants -- and now we are talking about the category of cases in which non-Indians are victims -- under which all Indian defendants would be governed by state law.

Now, this involves -- if this is what is required by the so-called "Equal Protection violation" that we have in

this case, it is a strange principle because it basically says that, yes, the Court has recognized over and over again, and the Court of Appeals did not dispute that there exists a wardship or trust responsibility toward the Tribal Indians, but the only way Congress can exercise this responsibility is to abdicate its own law-making functions and simply say, whatever the states do will govern the Indians.

Now, there is a second alternative approach and that is to federalize everything. That is, to bring to -- either for this Court to overrule the McBratney, Draper line of cases or for Congress to overrule it by statute and bring all wholly non-Indian transactions in Indian country within federal court jurisdiction.

QUESTION: The statute looks fairly clear the way it is written, doesn't it?

MR. FREY: That is true, but in McBratney what the Court said was that the statute was implicitly repealed by the Colorado Enabling Act which admitted the state on equal footing and there has been a lot of criticism of this line of cases but it is fairly well-embedded in our jurisprudence now and I think it makes a lot of sense and I would think that this Court should only as a last resort -- only if it finds that it cannot escape the result reached by the Ninth Circuit, should it consider the possibility of overruling the McBratney line of cases.

Now, with regard to the federalizing results, there are some practical problems that I think make it an unsatisfactory course although possibly one that Congress would decide to adopt.

One is that many reservations have a large percentage of non-Indian population. In fact, the Coeur d'Alene Reservation on which this murder occurred has 2,500 non-Indian residents and only 450 Indians so it is over 80 percent non-Indian.

That is true of a number of other Reservations.

The result is that matters in which there is no serious federal interest would be thrust upon the federal courts system, thrust upon the United States Attorneys and the Marshal Service to deal with.

It would be a substantial added burden that is difficult, in my view as a practical matter, to justify in terms of the kind of federal interest involved.

At the same time, I think it has an unjustified effect on the states, one that Congress would be reluctant as to, having in the Enabling Act admitted the states with jurisdiction over wholly non-Indian transactions, there is something to be said for the proposition that this should not be taken away from the states unless Congress or perhaps this Court finds a compelling federal interest for altering that allocation of responsibilities.

Now, what we come down to, then, is what I think the Court of Appeals has done is, it has picked some concepts which have merit in other context, the notion that there should not be racial discrimination in the administration of criminal law and that where statutes discriminate between individuals on the basis of race, that discrimination could only be justified, if at all, by showing a compelling governmental interest, then it has imported those considerations into an area where they really don't fit, where they really don't belong and where they really have most unfortunate and unnecessary results.

I don't believe that the Indians are treated unfairly under the present allocation of jurisdiction. They are treated the same way in this case that non-Indians any place within federal criminal jurisdiction in the United States are treated and I believe there is no ground for a finding of an Equal Protection violation.

I'd like to reserve the balance of my time, please.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Frey.

Mr. Walker.

ORAL ARGUMENT OF JOHN W. WALKER, ESQ.

ON BEHALF OF RESPONDENTS DAVISONS

MR. WALKER: Mr. Chief Justice and may it please the Court:

It is the Respondents Davisons position that the statutory framework of L8 USC 1151, 1152 and 1153, when read

together, provide an impermissible racial discrimination in that when certain conduct is perpetrated within the exterior boundaries of an Indian Reservation, that prohibited conduct treats the perpetrator differently depending upon the race of the victim and the race of the perpetrator.

In this instance, for example, the victim was non-Indian and the defendant was Indian and as a consequence, under 18 USC 1153, the Major Crimes Act, these Indian defendants were in federal court facing 18 USC 1111, which is the Federal Homicide Statute.

QUESTION: What if the defendant were the white man and he had killed an Indian? And the white man came to you. Would you be here making the same argument?

MR. WALKER: Under 1152, Mr. Justice, that would still be a matter for federal court determination.

QUESTION: I know, but he would not have the advantage of the state law.

MR. WALKER: I believe that is correct.

QUESTION: So would you be making a racial discrimination claim here?

MR. WALKER: I don't believe that I would be able to.

QUESTION: Well, it is because he is white, is it? Or is it or not? Or because he killed an Indian? Or because he committed a crime against an Indian?

MR. WALKER: Well, it is possible that the

hypothetical position that you pose, or situation that you pose might also be subject to the same argument that we are adopting here. I haven't -- and possibly I should have considered that. It seems to me that in reaching the question, this statutory framework differs from any other that I am aware of in the federal system in that, not only are you considering the territory involved, but you are also, in conjunction with that, considering the race of the individuals involved -- more specifically, the race of the defendant.

Actually, in trying to decide which form you are going to be in -- and there are three possibilities, there can be tribal court. There can be state court. And there can be federal district court. It is a matter of original jurisdiction.

And there are four things that need to be considered in order to make the determination. One is the location of the offense, whether it was within the exterior boundaries of an Indian Reservation that is covered; secondly, the race of the victim and race of the defendant. And thirdly, the conduct that is being considered, whether it comes within 1153 or not. Fourthly, you have to determine whether or not the state in which the conduct was perpetrated is a state which is affected by Public Law 280.

Now, this is another matter that further goes to complicate the question and that is, that Public Law 280

allowed six states at the inception to have full jurisdiction over all offenses committed on Indian Reservations.

For example, in California, I don't believe there were any excluded Reservations in California. In Minnesota I believe there was one excluded.

But in California, for example, under these same facts, since California was a Public Law 280 state, this entire trial would have been in California State Court as opposed to Federal Court because it is a Public Law 280 state.

QUESTION: Is that any different than the United States ceding jurisdiction to Puerto Rico to have its own crime system rather than having the federal statute decide what should be crimes in Puerto Rico?

MR. WALKER: Well, the significance of Public Law 280, in our view, is that one of the justifications for this racial consideration that is posed by the government is the fact that the United States Government has a wardship or trust responsibility toward Indians and the contention is that this can only be furthered by having trial in federal district court to protect them from the capriciousness or the discrimination that might exist in the state courts and by Congress then enacting Public Law 280, they have more or less abandoned, in our view, this justification.

QUESTION: But doesn't Public Law 280 require the states that take advantage of it to make certain commitments

to treat the Indians equally or favorably? I mean, it isn't just a cession by its own terms.

MR. WALKER: Well, there is not a different criminal justice standard in the State of California for Indians that differs from that for non-Indians. If there is, I assume that it is subject to some kind of constitutional attack.

QUESTION: But haven't a number of states that could have qualified under Public Law 280 declined to do so because they didn't want to perform the other side of the bargain?

MR. WALKER: Yes, Mr. Justice, that is correct. Now, as Public Law 280 is amended, it requires the legislature and the tribe in the state to both consent to this.

I think the import of Public Law 280, however, is that it rejects, in my mind, the contention that the only way to further the trust responsibility that the Federal Government has or the Wardship Doctrine, is by having a federal district court the court of original jurisdiction.

QUESTION: Mr. Walker, under Idaho state law there is a death penalty possibility, is there not?

MR. WALKER: That is correct.

QUESTION: Do you want to subject your clients to that?

MR. WALKER: The answer to that question, Mr. Justice, is that under the decisions rendered in the Ninth Circuit, the Ninth Circuit has looked at two phases of the substantive

crime. One is the burden of proof that the prosecution must meet and secondly, they look at the severity of the punishment and when they have found a discrimination based upon race, they have opted to give the Indians the benefit of the doubt so in this instance, if the Court were to adopt the Ninth Circuit standard or opinion, in effect, the Respondents in this instance would be given the benefit of the burden of the Idaho Homicide Statute and I would assume, then, the benefit of the punishment provision contained within the Federal Homicide Statute.

I understand the question that you pose and I understand the difficulties that it would present. However --

QUESTION: Then I take it you wouldn't be happy if we were to decide in the interest of equality that all Indians and non-Indians are to be tried in the state courts?

You want the benefit of either one.

MR. WALKER: The -- naturally. The problem is if you assume a conviction, then we would not want the death penalty, naturally, but what the effect of this district court decision was before the Ninth Circuit reversed it, was that it made conviction easier and, in effect, it was easier because of the race of the defendants.

Naturally, if you assume that there could be a conviction had under either one of the statutes, then we wouldn't be happy with the death penalty situation. But here, the

standard that the government had to meet was a lesser standard and as a consequence, they did not have to prove premeditation in order to obtain the convictions.

I don't think there can be any question but that the classification here is racial. There has been, in the brief, a contention made by the government that there is a political-social status or relationship here and they have cited the Mancari case. It seems to me that the Mancari case was very limited in its holding in that, first of all, it applied only to civil Bureau of Indian Affairs hiring preferences. It did not go to the criminal situation and additionally, it conferred a benefit as opposed to a detriment.

It seems to me, then, that if you do agree that the statute on its face --

QUESTION: Well, in Mancari, the statute conferred a benefit on the Indians, but it conferred a detriment on the whites. If you are arguing race or racial, I mean, certainly the thing upheld in Morton against Mancari, in Mr. Justice Blackmun's opinion, was something that favored the Indians and disfavored the whites.

MR. WALKER: Correct.

QUESTION: Are you suggesting that the fact that it benefited Indians makes it easier to defend than if it had benefited whites?

MR. WALKER: No, I am suggesting that the holding of

that case is not -- was narrow and that the Government is trying to take this political-social theory and take it from the civil realm and from the employment-preference realm and apply it to the criminal realm as well.

QUESTION: But I thought one of your arguments was that it conferred a benefit rather than a detriment.

MR. WALKER: That is correct and in instances where a benefit has been conferred, the cases coming from the Ninth Circuit have held that there is no standing for the Indian to complain when there is discrimination when he is benefited by the discrimination.

For example, there was a case where there was a difference between the federal and state definition for the rape statute and the Indian defendant filed an appeal on Equal Protection grounds and the court held, yes, there is a difference but the difference is to your benefit and if it is to your benefit, you have no cause to complain.

QUESTION: Mr. Walker, there in the Ninth Circuit, wouldn't it be possible in the future for a white man to raise the same question and holler for a little bit of equal protection?

MR. WALKER: I would say that it would certainly be possible. It would depend upon what Congress' reply to the decision was.

QUESTION: And if we agreed with that, wouldn't the

whole criminal law be sort of confused?

MR. WALKER: I would say that there would be one way for the Court to rule in which there would be no difference in the substantive definition and that has already been done in part. In 1153, the substantive definition of the crime is relegated to the state definition in certain instances. It is now 13 major crimes in 1153.

Some of those are relegated to the state definition.

QUESTION: Then it would have to be done by Congress. We couldn't do that.

Is that right?

MR. WALKER: The situation that you pose is certainly a possibility, Mr. Justice. If you assume --

QUESTION: Now, going back, if you will, for a moment, Mr. Walker, to your colloquy with my brother Rehnquist about whether or not this is racial, as I understood Mr. Frey, and perhaps I misunderstood him, he said that -- let's assume a Mohican Indian who lives up in New York State and goes on his vacation out here in the Coeur d'Alene Reservation, just as any other tourist, and he committed this offense. He would be treated not as an Indian, wouldn't he?

MR. WALKER: He would be tried in the state court.

QUESTION: So it isn't racial. Indian, as I -- unless I misapprehend it, means a member of the Tribe who operates that Reservation. Doesn't it?

MR. WALKER: Well, the cases have held that you cannot become enrolled unless you are Indian.

QUESTION: Well, I know that. To be eligible to be a member of the Tribe you have to be an "Indian."

MR. WALKER: Right. So maybe it is racial in part.

QUESTION: It is not all Indians, is it?

MR. WALKER: That would be correct.

QUESTION: I mean, my visiting New Yorker wouldn't be an Indian within this definition even though he is, in fact, an Indian.

MR. WALKER: As I understand it, that would be correct. You would have to be an enrolled Indian.

QUESTION: So it is not as though you were talking about all people of a certain race. It is only people who were politically members of this Tribe, isn't it?

MR. WALKER: It might be, if you will excuse the expression, an elite racial classification.

QUESTION: Or at least a segment of the whole group.

MR. WALKER: Right. Right. It would not apply to the entire group.

QUESTION: And if a member of this Tribe were visiting a Reservation in South Carolina, he would not be an Indian if he committed this offense on that Reservation, would he?

MR. WALKER: As I understand the case decisions, that would be correct.

MR. CHIEF JUSTICE BURGER: You are getting into your colleague's time, Counsel.

MR. WALKER: I didn't see it. I'm sorry.

QUESTION: I'm sorry. I'm afraid I did that.

MR. CHIEF JUSTICE BURGER: Mr. Bowles.

ORAL ARGUMENT OF ALLEN V. BOWLES, ESQ.

ON BEHALF OF RESPONDENT ANTELOPE

MR. BOWLES: Mr. Chief Justice and may it please the Court:

The one comment I might make before starting and that, really, is not determinative of this case as far as the Idaho death penalty itself is concerned, that is presently on appeal and expected to be overturned, so --

The question of -- I would like to address just a moment this "Indian" matter. The one essential element that must be present for an individual to come within this federal jurisdiction is the fact that he be an Indian, that in addition to being enrolled.

You could be adopted by the Tribe and still not come within the jurisdiction. And as has been stated by the U.S. Government here, that the Indian who comes within this federal jurisdiction here is treated no differently than anyone else who comes within federal jurisdiction.

But I think the point we have to make is that the reason that that person is within the federal jurisdiction is

because of his Indian blood. Add that to his enrollment in the Tribe and the location, but there is that one essential element that is necessary and which brings him within the federal jurisdictional statute.

QUESTION: There is another factor in it. If he committed murder in the City of Chicago, he would be tried in the state court. The other reason is, he is on a Reservation.

MR. BOWLES: That is correct. There is a situs.

QUESTION: It is not just race.

MR. BOWLES: Yes, but you have to have the race before you get into that --

QUESTION: And the Reservation.

MR. BOWLES: Right.

QUESTION: Well, under the old cliche, having Indian blood is a necessary but not a sufficient condition.

MR. BOWLES: That is correct. Yes. It is absolutely necessary.

Now, the decisions, of course, and as the development of the law down through the time we started dealing with the Indians has assumed this Wardship Doctrine and the purpose of that, of course, was to assist and benefit the Indian.

I think, as the Court stated in the U.S. versus Kagama case in 1886, that from the weakness and helplessness so largely due to the course of dealing of the Federal Government with them and the treaties that have been promised to them,

there arises a duty of protection and I think from that duty of protection -- of course, it says, and with that also is the power for the legislation. But from that duty of protection, under the -- I think it is the Mancari case, wherein they were given the advantage in the employment, their duty of protection to promote the Indian's ability to function on their own is promoted by that and is a legitimate purpose under the duty of protection which came out of the Kagama case and was later, however, in the United States versus the Klamath case in 1938, we find that the Wardship Doctrine and the duty that the Federal Government has to the Indians is, however, subject to constitutional limitations.

So what we are saying in essence is that it is necessary to have this Indian blood which puts you into the federal jurisdiction, applies a standard to you which does not apply to any other defendants in that state, assuming a non-Indian victim, non-Indian defendant.

QUESTION: Mr. Bowles, could I ask you a question about your basic theory? As I understand it, there are three possible jurisdictions that might try the men, the state, the Federal Government or the Tribe.

MR. BOWLES: Or the Tribe. That is correct.

QUESTION: Would you make the same argument if the jurisdiction were committed to the Tribe and the Tribe had a more severe penalty than the state?

MR. BOWLES: I think there we would be going along with the entire policy in dealing with Indians, of trying to recognize what we term their "independent sovereignty." And you would be getting into an area which was not only race but was more emphatically this political subdivision type of situation, where --

QUESTION: So the answer is, you say that would be a different case?

MR. BOWLES: I would view it as a different case, yes.

Now, in a recent case in 1973 of Keeble versus the United States, language within that decision says Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would be civilized a great deal sooner by being under the federal criminal laws and taught to regard the life and personal property of others.

Then a quotation from -- I don't seem to have the Congressman here but this is emphatically not to say, however, that Congress intended to bribe Indian defendants of procedural rights guaranteed to other defendants. Of course, by this comment it doesn't exclude just defendants in federal court or to make it easier to convict an Indian than any other defendant and I think this is a justification for the type of application that we have in the Antelope case. We have to show that this type of treatment is beneficial to the Indian under our duty of

protection to the Indian and by making it easier to convict the Indian than you do any other citizen within the State of Idaho, are we protecting the Indian? Are we benefiting the Indian to make it easier for him to, eventually, we hope, melt into society and take his place there as all other citizens of the State of Idaho or any other state.

QUESTION: Mr. Bowles, if political reasons could justify ceding jurisdiction to the Tribe, why can't political reasons justify ceding jurisdiction to the Federal Government as opposed to the state government?

MR. BOWLES: Well, I think it can but it is still subject to our constitutional limitations.

QUESTION: Political considerations must be those which favor the Indians.

MR. BOWLES: I think it has to benefit the Indian if our purpose in having power and authority over the Indian is to protect them and to benefit them.

QUESTION: If the transfer is to the Federal Government but not if it was transferred to a Tribal authority. There, that need not have to be beneficial.

MR. BOWLES: They would be self-governing at that point rather than the Federal Government having the power and the authority over them.

QUESTION: No, but it would all be subject to the ultimate federal statutory scheme that, I suppose, would be

dependent on that in the last analysis.

Even if there were a transfer of jurisdiction to a Tribe, is what I am saying?

MR. BOWLES: Yes, as far as constitutional language.

QUESTION: You seem to find that acceptable, even though it might prejudice a particular Indian defendant --

MR. BOWLES: Well --

QUESTION: -- but you do not find it acceptable if it transfers from the state to the government.

MR. BOWLES: Well, I think it depends on what way we are going to go and there seems to be a lot of fluctuation throughout the years as far as dealing with the Indians is concerned. Are we going to recognize their sovereignty as much as possible? Or are we going to continue the wardship doctrine and, to their benefit, take more rights away from them by furthering legislation such as expanding 18 1153 from the original seven major crimes to a larger number that we now have so we keep eroding their sovereignty by assuming more jurisdiction over them and actually taking away their sovereignty whereby our process and what is recognized in Williams versus Lee, a 1959 case, that Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society and it contemplates criminal and civil jurisdiction over Indians by a state ready to assume those burdens, as soon as the educational and economic status

of Indians permit the change without disadvantage to them. So --

QUESTION: Well, I think the Congress has, over the years, followed a variety of quite different and inconsistent policies in different eras, hasn't it? Sometimes of very sharp changes.

MR. BOWLES: That is correct, Mr. Justice.

QUESTION: Back in the '50's there was a policy of assimilation. By the '60's there was a policy of protecting the identity of and the separateness of the Indians, wasn't there?

MR. BOWLES: Yes. But whether or not it is acceptable, as questioned earlier, for the jurisdiction to be left to the Tribal Council, I think depends on how we are going to go, one way or the other, in recognizing the sovereignty or taking away further jurisdiction from the Indians.

QUESTION: And there certainly is quite an inconsistency in the concepts of treating an Indian Tribe as a quasi-sovereign nation like England or France on the one hand and treating Indians as wards of the state who need protection, on the other. They are quite inconsistent policies and yet each has been reflected in the actions of Congress and the decisions of this Court over the years.

MR. BOWLES: That is correct. I would agree with that.

One other case I would like to mention here is the

U.S. versus Cleveland case, which was a Ninth Circuit case decided in 1974 and in that case, there was a difference in treatment between Indian and non-Indian defendants based on whether he was an Indian or non-Indian and also, both parties, whether Indian or non-Indian defendants, were tried under federal jurisdiction.

And as the Ninth Circuit has held in this case, the government should not be allowed to do through a procedural matter what they are not allowed to do through a substantive matter such as was the case in the United States versus Cleveland case in the Ninth Circuit and it is, of course, again pointed out the one essential element is being of the Indian blood in order to fit into the jurisdictional scheme which applies a different standard to the defendant in this case than it would have been had that defendant been a non-Indian so that if we had asked that the Court in this case affirm the Ninth Circuit's opinion, finding that this is a racial classification and that the guardianship interest that the U.S. Government has in the Indian and the Indian Nation, especially in the State of Idaho and the Coeur d'Alene Tribe and Coeur d'Alene Reservation, is not benefited by the 18 1153 statutory scheme which brings the Indian under federal jurisdiction in the felony murder rule.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Counsel.

Do you have anything further, Mr. Frey?

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.

MR. FREY: A couple of points, Mr. Chief Justice.

I think I should say with respect to the question that Mr. Justice Stewart asked, if I left a misimpression, I apologize but it is our view that the Mohican Indian, if he is a member of the Tribe, if he is a Tribal Indian --

QUESTION: Of the Mohican Tribe in New York.

MR. FREY: Of the Mohican Tribe, would be subject to federal Indian country jurisdiction.

QUESTION: But if he is a non-Tribal Indian living in Chicago --

MR. FREY: If he is not a Tribal Indian --

QUESTION: Then he would not be an Indian within the meaning --

MR. FREY: Wherever he lives, if he is a member of a terminated Tribe -- I think the Klamath Indians, for instance, were terminated by Congress. It doesn't exist as a Tribe any more. He is racially an Indian but he is not an Indian for purposes of this statute but the case is not quite as easy for us as your questions would indicate.

QUESTION: The Mohican Indians in New York building those high skyscrapers, they don't need any help from the Federal Government.

MR. FREY: Well, they are not necessarily Indians.

I mean, the question is not simply whether the Tribe exists but whether these people continue to be members of the Tribe.

QUESTION: They are living right in New York City.

MR. FREY: Well --

QUESTION: Yes.

MR. FREY: But Congress has made a judgment which involves some, you know, when you draw a line there are going to be some individual instances on one side of the line where you might feel it is unnecessary.

QUESTION: But they are not on the Reservation.

MR. FREY: They don't have to live on the Reservation. I mean, the fact is that they can live off the Reservation but they may still be getting benefits from allotments, trust payments, other kinds of benefits that derive from their status as Tribal Indians.

They may still be Tribal Indians even if they don't live on the Reservation.

QUESTION: The offense has to be in Indian country.

MR. FREY: It has to be in Indian country.

QUESTION: But that is a separate matter.

MR. FREY: That is correct.

QUESTION: Mr. Frey, I have to confess, I don't quite understand the importance of the fact that there are some Indians against whom that -- if you call it a discrimination --

doesn't apply. Would your case really be any different if all Indians were subject to the same definition? You would have the same argument.

MR. FREY: Well, we would still make all but one argument. One argument --

QUESTION: Well, you can't say that discrimination on race, which would normally be bad -- would be saved by the fact that there were some members of the race who were not victimized by the discrimination.

MR. FREY: Well, but it is a question of whether you characterize it as truly being a racial discrimination and the Court has recognized in Mancari, for instance, that it is a political not a racial -- although it overlaps with a racial group and I think it is important because I think what has happened in this case -- the reason we lost in the Ninth Circuit is that the Ninth Circuit was engaging in this kind of characterization by label.

They classified the case as a racial discrimination case.

Now, we say, well, it doesn't matter even if it is but we also say that it is not a racial discrimination case.

QUESTION: Of course, it is true. Someone has to face the fact that if this defendant were of any other race, he would be subject to different jurisdiction.

MR. FREY: If he committed this particular offense.

QUESTION: If you just change one -- change his race and you get a different result.

MR. FREY: Well, change his status. I --

QUESTION: But you change the victim's race and you come back to this result.

MR. FREY: Well, that is true, but --

QUESTION: If you changed -- if you just made one change, namely, the race of the defendant --

MR. FREY: But you don't have to change his race. All you have to do is change his status.

QUESTION: Well, you can make other changes but if you make that change and no other --

MR. FREY: I know, but you could take a person who is still an Indian but who is a Canadian Indian --

QUESTION: I understand that, but as to this defendant, this defendant with a different race, the result would have been different.

And all other facts the same.

MR. FREY: Well, but that doesn't necessarily mean that it is a racial discrimination.

QUESTION: I know that, but you must acknowledge that to be true.

MR. FREY: I agree that if this defendant were a non-Indian -- whether that is racial or political, I don't know but if he were a non-Indian, he would have been tried in the state

court. Now, with respect to a point --

QUESTION: Mr. Frey, you never have disputed that.

MR. FREY: No, no, we don't dispute that. We don't think there is anything wrong with that.

QUESTION: You said awhile ago that there was a racial overtone here but I take it your position is that if there is a racial discrimination, it is benign.

MR. FREY: Well, it certainly is at least neutral. I don't think it has to be benign. It is neutral and it is in furtherance of Congress' responsibility and I find the notion, in referring to the Cleveland case, Mr. Bowles talked about what the Court of Appeals said and I find the language of the Court of Appeals quite extraordinary.

The Court of Appeals said the government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage.

To hold otherwise would allow the government to run roughshod over the Fifth Amendment in the name of jurisdictional sacrosanctity employing jurisdiction as an inviolate tool.

Well, the Ninth Circuit is talking as though Congress set about to decide how it could discriminate against Indians and impose burdens on them that are not imposed on non-Indians and decided to use the mechanism of jurisdiction.

Nothing could be further from the truth in this case

and I think that concept that the Ninth Circuit apparently has just has no place in this area.

Now, Mr. Justice Marshall raised a point when Mr. Walker was arguing about the effect of the decision on state proceedings and I would like to emphasize that in my view, the same rule would apply if you had a non-Indian defendant and he were tried in state court for an offense committed in Indian country against a non-Indian victim. I don't see why he wouldn't have the same argument. Any lenient features of federal law, he would be entitled to so that the decision impacts not only on the administration of federal criminal justice but also on the administration of state criminal justice.

We also don't say, as Mr. Walker suggested, that the only way that the congressional responsibility toward the Tribes can be furthered is by federal jurisdiction.

What we say is what this Court said in the Seber case. It rests with Congress to determine when the guardian-ship relation shall cease.

Here, Congress has determined that on the Coeur d'Alene Reservation it shan't cease and federal jurisdiction shall be maintained.

One other point. We don't believe that the ward-ship or trust doctrine requires leniency. This notion that a benefit to the Indians is to select out the most lenient

features of two legal systems, the notion that you cannot -- that Congress cannot benefit the Indian interest by applying a coherent body of federally-established law seems to be mistaken and there are, after all, Indians living on the Reservation besides these Respondents and their rights and interests are also affected by the disposition that is made of the Respondents criminal activity.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:59 o'clock a.m., the case in the above-entitled matter was submitted.]