

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DEBRA FAYE LEWIS, Petitioner v. UNITED STATES
CASE NO: 96-7151
PLACE: Washington, D.C.
DATE: Wednesday, November 12, 1997
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IN THE SUPREME COURT OF THE UNITED STATES

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DEBRA FAYE LEWIS, :
Petitioner :
v. : No. 96-7151
UNITED STATES :
- - - - -X

Washington, D.C.

Wednesday, November 12, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

FRANK GRANGER, ESQ., Lake Charles, Louisiana; on behalf of
the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-7151, Debra Faye Lewis v. United States.

5 Mr. Granger.

6 ORAL ARGUMENT OF FRANK GRANGER

7 ON BEHALF OF THE PETITIONER

8 MR. GRANGER: Mr. Chief Justice, and may it
9 please the Court:

10 Debra Lewis was charged, tried, and convicted
11 under an assimilated Louisiana murder statute for a crime
12 which was committed on a military reservation in Vernon
13 Parish, Louisiana. She was not charged nor tried under
14 the appropriate Federal murder statute.

15 On appeal, the Fifth Circuit agreed and reversed
16 the conviction based upon the assimilated Louisiana
17 statute, finding that it did not apply, and that the
18 Assimilative Crimes Act did not allow the prosecutor to
19 assimilate the State statute when, in fact, a Federal
20 murder statute prohibited the conduct for which she was
21 charged.

22 However, the Fifth Circuit then affirmed the
23 life imprisonment sentence based upon her conviction of
24 second degree Federal murder. We also contend that the
25 affirmance of the sentence is harmful and prejudicial to

1 Debra Lewis because under the sentencing guidelines
2 applicable to Federal second degree murder, such a
3 sentence could not be imposed.

4 For purposes of this argument, the Assimilative
5 Crimes Act is a longstanding Federal statute which merely
6 is a gap-filling and a loophole-closing statute. The
7 purpose of the statute was to prevent and allow the
8 Federal Government to prosecute criminal actions on
9 military reservations on territory under exclusive Federal
10 jurisdiction when, by assimilating a State criminal
11 statute if, and only if, there was no Federal statute
12 which made the conduct sort to be prosecuted --

13 QUESTION: Well, I'm not sure that's the
14 backdrop against which that was adopted. I think there
15 was considerable sentiment at the time that basically
16 State law ought to apply to crimes committed in areas that
17 the Federal Government was administering, and what do you
18 think our policy should be in general, to find that State
19 law should apply where possible, because that is the
20 backdrop under which this statute was passed in the first
21 place.

22 MR. GRANGER: Yes, Justice O'Connor, I under --
23 I agree with you, but once the Assimilative Crimes Act was
24 adopted initially in approximately 1825, it was because
25 Congress at that particular point in time had not taken a

1 very proactive role in adopting criminal statutes, so what
2 happened was, you'd have a person commit an act or a
3 criminal -- or a crime on a military reservation or in the
4 territories and then be able to flaunt and get away with
5 it.

6 So as Justice Story has been noted to say, that
7 necessity -- in fact, he was one of the authors of part of
8 the Assimilative Crimes Act, along with Daniel Webster, in
9 saying that we have to allow these crimes to be punished
10 and close -- my words, close the loopholes or fill the
11 gap.

12 There is great sentiment to apply State law on
13 these reservations. However, Congress has spoken. In 18
14 U.S.C. section 13, which I have at page 5 of my brief, the
15 original brief, it says, whoever is guilty of any act or
16 omission which, although not made punishable by any
17 enactment of Congress.

18 So in times past, and in this particular case
19 before 1909, when there was no Federal murder statute,
20 clearly the Government would have been faced with a
21 proposition that it couldn't prosecute for murder, so
22 obviously they had to assimilate the State crime and say
23 we can't allow you to get away with this, and so we'll
24 take the State crime, and by section 13, it becomes a
25 Federal crime and we prosecute it.

1 I think in this particular case we get to the
2 point of whether the particular act is made punishable by
3 an enactment of Congress, and I think that the statutes
4 are clear again. Congress has adopted the Federal murder
5 statute at 18 U.S.C. section 1111, which you'll find at
6 page 5 and 6 of my brief.

7 This statute clearly sets forth a comprehensive
8 scheme of murder. As in most States, there's a difference
9 between first degree and second degree murder. Congress
10 has done the same thing.

11 Congress has found that there would be first
12 degree murders, which are generally murders, or killing of
13 human beings with malice aforethought, but also
14 premeditated murders such as poison, lying-in-wait, or
15 again they have another group of murders that are
16 specifically listed as first degree murders, which is
17 arson, escape, murder, kidnapping, treason, espionage,
18 sabotage, aggravated sexual abuse, or sexual abuse,
19 burglary, or robbery.

20 QUESTION: Was that true in 1993? I don't know
21 the answer to this question. Did that, the specific
22 breakdown come in the 1994 amendments?

23 MR. GRANGER: There may have been an amendment,
24 Your Honor, Justice Souter, as to the aggravated sexual
25 abuse or sexual abuse, but the other provisions were

1 specifically --

2 QUESTION: They were there.

3 MR. GRANGER: However, the statute is also
4 clear, it says any other murder, and that is explicit,
5 that are not listed as first degree murder is murder in
6 the second degree.

7 I think the Federal murder statute is very
8 clear --

9 QUESTION: Well, a little bit depends on how you
10 come at it, doesn't it, Mr. Granger?

11 I mean, I think you're analyzing it and very
12 likely quite proper in saying, here's how Congress treated
13 murder, but if you say, how did Congress treat offenses
14 against juveniles, then you would come at it in a somewhat
15 different way.

16 MR. GRANGER: I don't entirely agree with that,
17 Mr. Chief Justice. I think the way that Congress has
18 specified this statute is merely to set forth the crimes
19 in two broad categories that are fairly com -- that are
20 comprehensive.

21 However, Congress also has another way of doing
22 this, because I know the issue here is murder of a child.

23 However, if we looked at the sentencing
24 guidelines -- I believe it's section 381.2 -- which
25 provides for an enhancement under the murder statute for a

1 vulnerable victim, clearly, Congress then decided that
2 when you have younger persons we have to make an allowance
3 and enhance the penalty.

4 QUESTION: But that wasn't just under the
5 Federal murder statute, was it? That's for all sentencing
6 for all Federal crimes.

7 MR. GRANGER: Correct, Your Honor, and that is
8 merely to take into account the fact that some people are
9 more vulnerable to crimes, such as older people, pigeon
10 drops, or things of that nature, or in our particular
11 situation here, where you have a younger person, a child
12 who is being abused, who is actually being killed by a
13 step-parent, a parent and a step-parent.

14 However, the theory of the statute is
15 comprehensive, and it takes into consideration this
16 particular act, whereas --

17 QUESTION: I'm not sure what your test is. Your
18 brief at some point talks about conduct. At other points
19 it talks about the nature of the offense.

20 It seems to me what you're saying now that
21 Congress has addressed the general subject area, and that
22 that should suffice. I take it that's the standard you're
23 asking us to apply.

24 MR. GRANGER: Yes, Justice Kennedy. What I'm
25 saying is --

1 QUESTION: Maybe you're not, but I'm just --
2 I --

3 MR. GRANGER: Well, my brief, I would admit, is
4 not as articulate as I would like it to have been, but I
5 think the general thought that I was trying to present to
6 the Court is that we have certain conduct, and in this
7 particular case the Federal -- the Congress has enacted a
8 murder statute that takes into account conduct which is
9 normally classified as murder, and that is specifically
10 the killing of a human being.

11 Whereas, when we look at the Louisiana first
12 degree murder statute, it, in much the same way, has
13 broken down murder into first degree and second degree to
14 take into consideration various persons, statuses, or
15 crimes committed within the perpetration or attempt to
16 perpetrate another crime, just like the first degree
17 murder statute in -- that Congress adopted.

18 However, what Louisiana has done is sought to
19 enforce punishment through the differentiation of the
20 types of murder. Whereas in first degree murder you have
21 either a death penalty or life imprisonment without
22 parole, and in second degree murder you have life in
23 prison without parole.

24 However, the conduct, or the act, is the
25 killing. I think it's a fairly specific thing that we can

1 all realize and agree upon that is what murder is, is the
2 killing of a human being.

3 QUESTION: Do you take the position essentially
4 that the Government does on the criterion -- and, by the
5 way, I'm not suggesting that you give your case away if
6 you do this, but I think you and the Government are
7 getting close, because toward the end of the Government's
8 brief the Government says, if I remember rightly, that the
9 question we should ask is whether Congress has made a
10 considered judgment that the particular peculiarity of
11 State law which might be argued to override the Federal --
12 the general Federal statute should have no bearing, and
13 it's kind of a field preemption sort of concept, and I
14 think that's essentially what you're arguing. Am I right?

15 MR. GRANGER: Justice Souter, yes, I believe
16 that's what I'm getting at, but I think I'm trying to make
17 it in a different way.

18 What I'm trying to propose is simply a clear
19 reading of the statutes, because it appears to me that
20 it's fairly clear that Congress has taken over the field
21 of murder, especially after 1909, as it applies to any act
22 which has occurred upon a military reservation, or any act
23 under the exclusive jurisdiction of the Federal court.

24 QUESTION: But I mean you're saying -- as I
25 understand it, you're saying that on the basis of reading

1 the congressional statute and saying, in effect, this
2 looks like a statute which is meant to cover the whole
3 waterfront of murder.

4 MR. GRANGER: Yes, sir.

5 QUESTION: Yes.

6 MR. GRANGER: I do agree with that.

7 QUESTION: Suppose Louisiana had a statute that
8 said, abuse of a child is an offense, juvenile cruelty is
9 an offense. Then in your view would it be perfectly
10 proper for the U.S. prosecutor to say, I have one charge
11 under the U.S. Code for murder, and a second charge under
12 Louisiana law for cruelty to a juvenile. Would that be
13 compatible?

14 MR. GRANGER: Justice Ginsburg, I would think
15 that that's more closely compatible to my analysis of the
16 statutes, and I would -- if I had to concede a point, I
17 would concede that that is more likely to be an
18 appropriate acceptance of the way the statute should work,
19 because under the Louisiana cruelty to a juvenile statute
20 it covers not only cruelty but also it covers neglect, so
21 then you have a different area than, say, the Federal
22 assault statute, where we deal with the actual striking of
23 someone under the age of 16 or something of that nature.

24 But there again, we see the difference. The
25 chord, or the common chord that goes through these cases,

1 at least in my way of thinking, is the fact we have a
2 killing, and Congress has said, as far as it goes to
3 killing, we've decided what is first degree murder, we
4 have decided what is second degree murder.

5 Now, Louisiana, you can decide whatever you want
6 is murder under your State statutes, and you can apply
7 that to whomever you want, as long as they are your
8 citizens or persons in your State, but when it comes to
9 prosecuting this crime on Federal property, in Federal
10 courts, for an offense against the United States, then
11 we're going to look at what we decide murder is and so as
12 not to get too far afield --

13 QUESTION: So is your test, then, just that if
14 the congressional statute covers the crime, murder,
15 homicide, then you don't look any further, that's it?

16 MR. GRANGER: You would not have to look further
17 for the definition of murder. You would look only to the
18 Federal murder statute, not to any Louisiana statutes
19 dealing with murder, yes.

20 QUESTION: So it's -- you're advocating a simple
21 test that the Federal statute covers it, that's it. You
22 don't augment it in any way.

23 MR. GRANGER: Yes, Justice Ginsburg, because
24 when we -- when I looked at this Court's previous ruling
25 in Williams back in 1946, the issue there really, the way

1 I sum it up, is that you have a competing State and
2 Federal statute.

3 The Federal statute chose in that case to draw
4 the elements of the crime more narrowly, the age of
5 consent being 16, whereas the Arizona statute chose to
6 make the age of consent 18, and this Court held --

7 QUESTION: Well --

8 MR. GRANGER: -- that we cannot allow a State
9 statute to somehow enlarge, broaden, or redefine --

10 QUESTION: Well, most Federal courts have
11 interpreted Williams as adopting some kind of a precise
12 acts test.

13 I don't think the courts generally have applied
14 the assimilative crimes statute very literally. It reads
15 broadly, certainly, but they've instead said it's some
16 kind of a precise acts test. Do you agree with that
17 approach in most cases?

18 MR. GRANGER: Justice O'Connor, I agree with
19 that approach, except that I think in a -- the case of a
20 murder versus the case of carnal knowledge versus
21 statutory rape the precise act can only be one act, and
22 that --

23 QUESTION: Well, how about abuse of a child
24 carried out by beating, and the Federal law just has an
25 assault and battery statute, but the State law has a

1 specific child abuse statute that would govern, what -- is
2 it assimilated, or not?

3 MR. GRANGER: If I had to choose I would say
4 it's more like --

5 QUESTION: I mean, it's so curious, because it
6 all depends on how you frame the generality of the act.
7 The act is the beating of a child. Well, then the Federal
8 law covers it. No, it's abusing a child. Well, then the
9 State law covers it. How do we know?

10 MR. GRANGER: I think we have to look at what
11 conduct is being proscribed and whether the statute,
12 whether it be the Federal assault statutes or whether it
13 be a Louisiana cruelty to a juvenile statute, or any State
14 statute that deals with batteries or cruelty to a
15 juvenile, addressed the actual conduct which is being
16 prohibited.

17 There is that gray --

18 QUESTION: Well, how do you answer that
19 question? Which one applies in the case of beating a
20 child?

21 MR. GRANGER: I would think that if it's
22 specifically beating of a child, that more than likely it
23 would be assimilated, and it has been assimilated under
24 other circuit courts.

25 However, I think we also have to understand that

1 assault statutes as written are generally very, very
2 broad, and they're -- and they cover a wide range of acts,
3 and in fact they could also, as far as the cruelty to a
4 juvenile statute in Louisiana --

5 QUESTION: That's pretty close to saying well,
6 murder of a child will apply the State law.

7 MR. GRANGER: But in the Louisiana scheme work I
8 believe, Justice O'Connor, that what we're talking about
9 is, there is a killing of a child, and what we're looking
10 now at is the way that Louisiana defines murder from first
11 degree to second degree.

12 That is not really the issue, I think, before
13 this Court. The issue before this Court, has Congress,
14 through the Federal murder statute, defined this crime
15 and, if so, we don't go to a State statute in order to
16 give us a different burden of proof, to give us different
17 elements of the crime, or to give us different sentences.
18 We look only to the Federal statute.

19 And I think that's what makes those type of
20 cases much different than assault cases, or burglary
21 cases, or cases where you have a long range or a wide
22 range of different actions that can be specifically
23 narrowed down.

24 QUESTION: Mr. Granger, you're not really
25 arguing that we should stick to the words of the statute,

1 are you?

2 I mean, the words of the statute say, if the
3 act, any act or omission not made punishable by any
4 enactment of Congress. That's the condition. It has to
5 be an act or omission which is not made punishable by any
6 enactment of Congress.

7 Now, I assume, if you follow the language of the
8 statute and you beat somebody to death and Congress had an
9 assault statute but not a murder statute, that would be
10 covered by that language, wouldn't it?

11 MR. GRANGER: I think that --

12 QUESTION: You could not prosecute under State
13 law for the murder, because the act or omission was
14 punishable.

15 What he did, the beating of this person which
16 resulted in death, but that was the act or omission, it is
17 punishable, so you would only be able to prosecute under
18 Federal law for assault and no murder prosecution, right?

19 MR. GRANGER: No, Justice Scalia, I disagree
20 with that, because I think that we have two different
21 things. One is an assault, which does not mean there is a
22 killing. You can have an assault and there be no death.

23 QUESTION: That's what I thought you meant.

24 MR. GRANGER: And clearly --

25 QUESTION: In other words, you're urging us to

1 ignore the words, act or omission.

2 I mean, the statute doesn't deal with type of
3 offense. It says, act or omission, and we're all agreed
4 that we should forget about that because it doesn't work.

5 MR. GRANGER: No, Justice Scalia. I think that
6 we need to look at those words because --

7 QUESTION: Well, I thought you had just said we
8 didn't and, indeed, is there a single Federal court that
9 has given it a literal interpretation? If so, what one
10 and what case?

11 MR. GRANGER: The -- I know of none, Justice
12 O'Connor, that has given it that interpretation.

13 But I think the issue here is that when we talk
14 about something such as an assault, which is a very
15 different statute, differently written than a murder, and
16 especially the way that the Federal Congress has defined
17 murder in this case, that it's kind of like mixing apples
18 and oranges together, because assaults do not entail
19 murder, or necessarily.

20 You could have an assault in which someone dies,
21 and then you may be charged with both crimes, but, of
22 course, the murder would be more inclusive of the actual
23 assault on the person.

24 QUESTION: So you want us to define a general
25 subject in a, sort of a preemption context.

1 MR. GRANGER: Justice Kennedy, I believe that is
2 the appropriate way to look at this case, because when
3 Williams grappled with this issue a long time ago we were
4 dealing with situations in which you had, I guess, less
5 Federal criminal legislation than you have now.

6 But even back then we had the murder statute,
7 and more importantly, the case was directed at the conduct
8 that was being prosecuted, and the prosecution of a
9 murder, whether it be a person under the age of 12, as in
10 Louisiana first degree murder, or a person over the age of
11 12, it is the murder, that is the act and the conduct that
12 we have to look at.

13 And the issue then becomes, if Congress has
14 chosen to prosecute that particular type of conduct in a
15 certain way, then it would be impermissible to allow the
16 assimilation of a State statute which may define it
17 differently, or may prosecute it differently, or may have
18 different elements of the crime to merely come in to
19 change this Federal statute.

20 Congress, if it so chooses, can change the
21 statute. It can change it --

22 QUESTION: But why is it the murder that's --
23 what if they had a homicide statute and say, a third -- or
24 a manslaughter provision with negligent driving of a
25 vehicle, or a few other examples, but none that omitted

1 what is the counterpart to first degree murder, would you
2 say that had dealt with the subject of killing the victim?

3 MR. GRANGER: Yes, Justice Stevens, because
4 clearly if you look at the murder statutes any other
5 murder than those which are enumerated is going to be
6 murder in the second degree.

7 Now, of course, in Federal court, or in the
8 Federal Criminal Code we do have voluntary and involuntary
9 manslaughter statutes, but I think that's what Congress is
10 saying, is that we're specific --

11 QUESTION: But I want to be sure -- I'm not sure
12 I understand.

13 MR. GRANGER: Yes.

14 QUESTION: Supposing the Federal statute merely
15 went so far as most, say, second degree manslaughter, the
16 very least severe penalty, that's all it covered, would
17 the deliberate killing be covered by the Federal statute
18 or by the State statute?

19 MR. GRANGER: If I understand your hypothetical
20 correctly, Justice Stevens, if there were no premeditate
21 or malice aforethought element --

22 QUESTION: In the Federal statute, yes.

23 MR. GRANGER: -- then certainly that would be a
24 different type of crime.

25 QUESTION: So there you would then look to the

1 State law.

2 MR. GRANGER: I think you would have to in that
3 particular instance, because what we're discussing is --

4 QUESTION: But then why don't you look to State
5 law if it's not more serious because of deliberateness
6 versus negligence, but rather because the State has chosen
7 to give special protection to youthful victims?

8 MR. GRANGER: I think that --

9 QUESTION: I don't quite understand the logic of
10 your position.

11 MR. GRANGER: And maybe I understand the error
12 of my ways.

13 QUESTION: Yes.

14 MR. GRANGER: I think, Justice Stevens, what I
15 would look at is that, depending, I guess, if we do have
16 crimes that may be crimes under Federal law that are not
17 crimes under State law, and clearly we have crimes under
18 State law which are not crimes under Federal law, whether
19 these apply or don't apply is based on whether they occur
20 on Federal property or not, so if Congress said that we're
21 not going to have any of these murders and we're not going
22 to allow these murders to be prosecuted, then I guess you
23 could not prosecute that person for that type of murder.

24 But if --

25 QUESTION: Well, they just -- they haven't said

1 it can't be. I mean, they just have omitted a particular
2 category.

3 MR. GRANGER: They've just omitted it, but then,
4 I guess, then the prosecution would be for the lowest
5 element of murder under Federal law, which would be
6 included within, say, the higher type of murder that
7 you're describing, which is with premeditation, or --

8 QUESTION: Mr. Granger, now, you say -- one of
9 the questions you present is not just whether your client
10 was prosecuted under the proper statute, but if the
11 petitioner was not properly prosecuted under the
12 Assimilative Crimes Act, whether or not the sentence was
13 proper.

14 Now, supposing that we should agree with you on
15 your argument under the Assimilated Crimes Act, as the
16 Fifth Circuit did, the Fifth Circuit said nonetheless your
17 client should -- the conviction would be upheld because it
18 was equally a violation of the Federal act.

19 Now, what's your position on that before this
20 Court?

21 MR. GRANGER: Well, Mr. Chief Justice, I'd
22 raised another issue in cert which was, of course, denied,
23 so in that particular respect the second degree murder
24 conviction found by the Fifth Circuit would also be
25 affirmed.

1 However, the sentence that was imposed, or at
2 least allowed to stand by the Fifth Circuit, would need to
3 be vacated and the matter remanded.

4 QUESTION: So you're not asking for a new trial,
5 then. At one point in your brief you say something about
6 a new trial, but you're saying now that all you're asking
7 for is a resentencing under the appropriate statute.

8 MR. GRANGER: Your Honor, Mr. Chief Justice,
9 yes, because that issue was not -- cert was not granted on
10 that issue and it's not properly before the Court.

11 However, I would assume that if this Court
12 thought that that issue needed to be raised it could on
13 its own do so.

14 But in this particular circumstance, no. The
15 only issue I have here is if you agree that the
16 Assimilative Crimes Act does not apply, then the only
17 remedy my client has is a remand to the Fifth Circuit to
18 vacate the sentence it imposed, and then remand the matter
19 to the district court for resentencing in accordance with
20 the guidelines, which is basically, as I understand the
21 Government's brief --

22 QUESTION: Yes.

23 MR. GRANGER: -- they conceded --

24 QUESTION: They agree to that, don't they?

25 MR. GRANGER: And I think that that is really

1 the appropriate measure in this case. The --

2 QUESTION: Going back to what's covered or not
3 covered, the point where you are in disagreement with the
4 Government, suppose we have the murder statute that we
5 have on the Federal side, the victim is a pregnant woman,
6 and the State also has a murder statute but then it has a
7 separate crime of feticide.

8 How would that -- would that be something that
9 under your theory you could take the murder from the
10 Federal and the feticide from the State?

11 MR. GRANGER: Justice Ginsburg, I don't think it
12 would apply because the Federal statute would have
13 encompassed both those acts, because feticide is actually
14 another form of killing, and therefore it would be covered
15 by the Federal murder statute, as any other crime which is
16 not first degree murder is second degree murder.

17 So you may have -- you would have the murder,
18 obviously, of the mother, and then as far as whether --
19 and this is the question I don't know the answer to,
20 whether the Federal murder statute would allow such a
21 claim for an unborn child, then I don't have the answer to
22 that.

23 If it does, you would have to say two counts of
24 murder. If not, you'd only have one count.

25 QUESTION: Mr. Granger, I want to get clear on

1 one thing. You referred -- in answering Justice Ginsburg
2 you referred to the fact that the Federal statute covered
3 it. Is your test an analytical test?

4 In other words, you can determine it -- you
5 apply it solely by looking at the terms of State statute,
6 in terms of Federal statute, or is it an analytical test
7 plus an intent test, so that at the end of the day you
8 say, can we infer from everything we know, including
9 what's on the face of the statute, that Congress intended
10 to cover this particular conduct exclusively by the
11 Federal statute? Is it a purely analytical test, or is it
12 ultimately an intent test?

13 MR. GRANGER: Justice Souter, I believe it's
14 clearly an analytical test because the intent issue
15 clearly is covered within the Federal murder statute if
16 you're thinking of criminal intent, whether it be
17 premeditated or with just malice aforethought.

18 However, in that respect it's an analytical test
19 because the murders -- we're not looking to what State law
20 describes as to what intent should apply, whereas in
21 Louisiana in this particular case you only have the issue
22 of, for first degree murder under Louisiana law, a
23 specific intent to kill, or specific intent to inflict
24 great bodily harm, the death of the person, and the person
25 being under the age of 12.

1 So it's strictly analytical, because we don't
2 look to whether another State or a State statute would
3 describe the intent required to meet the definition of the
4 crime. We look at whether Federal law covers the act, and
5 then Federal law itself then describes what intents are
6 requisite for what purposes, whether it be first degree
7 murder, second degree murder, or voluntary or involuntary
8 manslaughter.

9 If there are no other questions, Mr. Chief
10 Justice, I reserve the balance of my time.

11 CHIEF JUSTICE REHNQUIST: Very well,
12 Mr. Granger.

13 Mr. Stewart, we'll hear from you.

14 ORAL ARGUMENT OF MALCOLM L. STEWART

15 ON BEHALF OF THE RESPONDENT

16 MR. STEWART: Mr. Chief Justice, and may it
17 please the Court:

18 The text of the Assimilative Crimes Act is set
19 forth at page 2 of the Government's brief, and I think the
20 proper disposition of this case hinges on analysis of two
21 phrases within that statute. The first is the phrase, act
22 or omission, the second is the phrase, made punishable,
23 and I'd like to address them in that order.

24 QUESTION: It hinges on either observing them or
25 ignoring them, right?

1 MR. STEWART: I -- as to the phrase, act or
2 omission, I think it hinges on interpreting them. The
3 phrase, act or omission, is often used to refer to a
4 particular incident of primary conduct. That is, this
5 Court has frequently stated that a single act may
6 constitute more than one offense, and in that situation
7 it's used in contradistinction to offense.

8 On the other hand, it would not be unnatural to
9 say, for example, that 18 U.S.C. 1111 defines murder as
10 the act of killing a human being with malice aforethought,
11 in which case the word act would be used not to refer to a
12 particular incident at a particular time and place, but to
13 a category of conduct meeting the requisite
14 specifications, and in our view the words act or omission
15 in this statute should be construed to mean, offense. The
16 question is whether the State law offense is made
17 punishable by an enactment of Congress, and I think there
18 are several reasons --

19 QUESTION: Is it your view, just to sum it up,
20 that we apply the Blockburger test unless there's
21 something in the Federal statute that trumps it?

22 MR. STEWART: I think it's not -- that's not
23 quite our view, because I think -- I'll get to made
24 punishable in more detail, but I think the short answer
25 is, one of the features of the Blockburger test is that a

1 greater and a lesser included offense are treated as the
2 same offense for double jeopardy purposes, and that would
3 not be our position with respect to this statute.

4 That is, if State law has defined a greater
5 offense, we would not say that that has been made
6 punishable by an act of Congress simply because Congress
7 has defined a lesser included offense, as in this case.

8 But to return to the phrase --

9 QUESTION: The effect of that kind of
10 interpretation is to say that every poor devil who lives
11 in a Federal enclave is subjected to two total systems of
12 criminal law. You think that's what Congress had in mind?

13 This is a very old statute, and I sort of
14 regarded it as, you know, just to fill in the gaps where
15 there are so many Federal, you know, basic crimes, basic
16 wicked things that were not at that time punished by
17 Federal law.

18 There are very few wicked things that aren't
19 punished by Federal law. Why shouldn't we just call a
20 halt to the expansion of this Assimilative Crimes Act?

21 I don't know why we want to make everybody
22 subject to twice as many different series of statutes just
23 because they're living on a Federal enclave. Why wouldn't
24 it be enough just to say they're subject to Federal law
25 and this thing has either no application any more or it

1 will be a rare, rare case where it has application?

2 MR. STEWART: Well, I think first of all it's
3 obviously not unusual for people living outside Federal
4 enclaves to be subject to both Federal and State criminal
5 laws. Indeed, individuals can often be subjected to
6 successive prosecutions by the two sovereigns for the same
7 criminal act.

8 Now, it's true that individuals residing on
9 Federal enclaves are subject to some Federal criminal
10 provisions that are applicable only to the enclaves, and
11 in that sense they face a distinctive burden.

12 On the other hand, there is no comprehensive
13 Federal Criminal Code applicable to the enclaves.
14 Moreover, an individual on the enclaves has the
15 commensurate advantage that the only prosecution that can
16 be brought will be brought by Federal authorities and,
17 therefore, while individuals residing outside the enclaves
18 may face successive prosecutions for what would be the
19 same offense in Blockburger terms, the individuals on the
20 enclaves will have that added protection.

21 But again, to return to the --

22 QUESTION: That's a good point. You're saying
23 that I'm looking at it precisely wrong, that the question
24 is whether -- isn't whether people on the enclaves shall
25 be subjected to dual criminal laws which other people

1 aren't, but whether they will be treated like everybody
2 else.

3 MR. STEWART: That's exactly right.

4 QUESTION: So it is subject to both State and
5 Federal law for the most part.

6 MR. STEWART: That's exactly right, and I think
7 the resolution of this case ultimately hinges on how the
8 Court views the concept of applying State law norms on
9 Federal enclaves. That is --

10 QUESTION: In fact, the Federal enclave
11 residents may have a better deal, because they are going
12 to get either one or the other, but people off the enclave
13 may get both.

14 MR. STEWART: That's correct. The only
15 sovereign that can prosecute is the Federal Government,
16 although the Federal Government may invoke assimilated
17 State laws.

18 QUESTION: Were you going to focus on the word
19 punishable in this --

20 MR. STEWART: Let me --

21 QUESTION: Was that your second --

22 MR. STEWART: My second -- I do want to focus
23 briefly at least on the words act or omission, because I
24 think the meaning of made punishable is easier to follow
25 if the words act or omission are first made clear.

1 That is, I think for a variety of reasons it is
2 appropriate to interpret the phrase, act or omission, to
3 mean the State law offense that is sought to be
4 assimilated.

5 First of all, as Justice Scalia pointed out in
6 his hypothetical, the contrary reading would create absurd
7 results. That is, in a hypothetical situation in which
8 the Federal Government had an assault statute but no
9 murder statute a State would -- the Federal Government
10 would be precluded from proceeding on an assimilated State
11 murder charge simply because the primary conduct would
12 have constituted assault under Federal law.

13 To focus on the individual incident of primary
14 conduct would have a second practical infirmity as well.
15 That is, from the standpoint of sound judicial
16 administration it's certainly important that the propriety
17 of an Assimilated Crimes Act prosecution can be determined
18 at the outset of the proceeding, but an indictment
19 typically doesn't contain any lengthy recitation of the
20 primary conduct in which the individual is alleged to have
21 engaged.

22 It does contain a summary of the essential
23 nature and elements of the offense with which he is
24 charged.

25 QUESTION: That's the same argument made in

1 favor of Blockburger as the test for double jeopardy.

2 MR. STEWART: That's correct.

3 QUESTION: You have to know it up front.

4 MR. STEWART: That's correct, Your Honor, and if
5 the test ultimately turned on whether act, the conduct
6 proved at trial would have violated some Federal statute,
7 first you wouldn't know up front, and second you could
8 even have the bizarre situation in which the defendant
9 attempted to introduce evidence showing that his conduct
10 did, in fact, violate a Federal statute even though the
11 evidence introduced by the prosecution had not shown that,
12 so I think --

13 QUESTION: But on your theory, I take it we
14 still would not know what offense was the appropriate
15 offense to focus on, and I take it that's the issue that
16 you deal with under the concept of punishables, is that
17 right?

18 MR. STEWART: Well, I think when we ask whether
19 an offense is made punishable the offense should be the
20 State law crime with which the individual is charged, and
21 in this case it's very clear what that was.

22 The jury was instructed at the close of
23 petitioner's trial that in order to find the petitioner
24 guilty it had to find that she killed Jadasha Lowery, that
25 she acted with intent to kill or do great bodily harm, and

1 that the victim was under 12 years old. That --

2 QUESTION: In other words, if the State law
3 offense is more specifically described, if the level of
4 generality is lower, we look to a State law offense.

5 MR. STEWART: If -- in determining whether the
6 offense is made punishable we first look to the State law
7 offense as defined by the -- its essential elements, and
8 then the next question is, what does it mean to say that a
9 State law offense has been made punishable by an enactment
10 of Congress, and in our view a State law offense has been
11 made punishable by an enactment of Congress only if
12 Congress has addressed the class of conduct that
13 constitutes the State offense at the same level of
14 specificity as the State.

15 Now, that will be true most obviously --

16 QUESTION: So yours is a purely analytical test.

17 MR. STEWART: That's correct.

18 QUESTION: It's not a congressional intent test.
19 It's a purely analytical test.

20 MR. STEWART: It is almost exclusively a purely
21 analytical test. That is, in the great majority of cases
22 the question of whether the State law offense has been
23 made punishable by an enactment of Congress can be
24 resolved by asking, is there a Federal statute that
25 contains precisely the same essential elements as the

1 State statute, so we can --

2 QUESTION: On that point, what if Congress had a
3 child murder statute and then repealed it, and then this
4 case arises?

5 MR. STEWART: I think that would be a closer
6 case. I think that probably wouldn't be clear enough, but
7 I would like to --

8 QUESTION: So then it isn't just an analytical
9 test.

10 MR. STEWART: It isn't purely an analytical
11 test, and I think the Court in Williams addressed a
12 situation in which there were Federal laws on the Federal
13 enclaves that prohibited adultery, fornication, and what
14 was called carnal knowledge, what is usually termed
15 statutory rape, and the Federal carnal knowledge law set
16 the age of consent at 16, made it a crime to have sexual
17 intercourse with a person not the wife of the wrongdoer
18 who was under the age of 16.

19 The State statute set the age of consent at 18,
20 and the question was whether the use of the Assimilated --
21 Assimilative Crimes Act was precluded by the Federal
22 statute.

23 Now, it was not the case that there was any
24 Federal statute that had precisely the same elements as
25 the State offense, so part 1 of our test wouldn't be met

1 here, but the Court, surveying all the available evidence,
2 concluded that the reason there was no Federal offense
3 having exactly those same elements was that Congress had
4 considered the matter and had decided that such an offense
5 was not warranted.

6 That is, Congress had considered specifically at
7 what age does an individual become capable of giving
8 meaningful consent to sexual relations.

9 QUESTION: Doesn't that say that you've got to
10 have your analytical criterion plus something more,
11 because in the Williams case the level of specificity was
12 precisely the same, i.e., certain ages are to be
13 considered in deciding what the offense is.

14 And the issue in Williams, I suppose, was, did
15 Congress intend the details of the level of specificity
16 that it chose to prevail over the details of the level of
17 specificity, age of victim, that the State chose?

18 And so ultimately, and I would suppose even on
19 your specificity criterion, you'd have to say, well, we
20 infer that Congress meant its particular choice of ages to
21 prevail over the State's particular choice of ages.

22 MR. STEWART: That was certainly the Court's
23 inference, but --

24 QUESTION: And is -- doesn't that have to be, as
25 it were, an adjunct to your analytical test, because at

1 some times your test is going to produce, as it were, a
2 tie. You're not going to know.

3 MR. STEWART: I think that's correct. That's
4 why I said that assimilation is precluded if either there
5 is a Federal statute with precisely the same elements as
6 the State statute, or -- and I think the second category
7 will be very rare cases -- there is highly persuasive
8 evidence that Congress has considered the matter at the
9 same level of specificity as the State.

10 QUESTION: So if, in fact, you have a Federal
11 statute that forbids bank robbery in general, then the
12 State could punish a person -- it's assimilated because
13 they have a statute that makes it a crime to forbid -- to
14 rob a State bank.

15 That's all. You have -- the Federal law says,
16 punishable to rob any bank, and now Louisiana has a
17 statute that says, it's punishable to rob a State bank.

18 MR. STEWART: I think that's probably correct.
19 At least --

20 QUESTION: Well, I mean, my goodness --

21 MR. STEWART: At least --

22 QUESTION: That sounds like a rather odd
23 result.

24 MR. STEWART: At least if there were any basis
25 for the conclusion that State banks were in some sense --

1 QUESTION: No, no, what -- they are special.
2 They have a special certificate that says the State bank
3 examiner, and they hang that on the wall.

4 MR. STEWART: It might be the case that if there
5 was nothing different about State banks we could presume
6 that --

7 QUESTION: Well, there is. They have that
8 certificate.

9 But the other -- taking the other part of your
10 argument, I take it that the only -- the only difference
11 here, really, is the death penalty, that if, in fact, we
12 assimilate the State law, the defendant's eligible for the
13 death penalty, and if we don't -- I mean, that's what
14 turns on first degree versus second degree.

15 Second degree in Louisiana has a mandatory life
16 without parole, so the only thing putting it in the first
17 degree is the death penalty, and if that's so, if that's
18 all Louisiana's done between going from Louisiana two to
19 Louisiana one, can we really say that Congress has not
20 made any determination about when they want a Federal
21 death penalty?

22 I mean, my thought is that they've been debating
23 that in Congress for 30 years, and it's normally a very
24 hot issue, and when Congress lists a whole lot of crimes
25 and doesn't put on the death penalty but does on some

1 others, how is that any different from the statutory rape?

2 MR. STEWART: Well, I think the other point that
3 turns -- the other point that depends on choice between
4 the Assimilative Crimes Act and the Federal murder statute
5 is that the Louisiana first degree murder statute provides
6 for a mandatory life sentence even if the death penalty is
7 not sought, whereas the Federal murder statute provides
8 that the defendant may be sentenced to any term of years
9 or for life, so even in this case, where the Government
10 didn't seek the death penalty, it had potential practical
11 significance to the penalty that was imposed.

12 I think -- to return to Williams, I think in a
13 sense we could say that this is the case that Williams
14 would have been had there been no Federal carnal knowledge
15 statute.

16 That is, at the time Williams was decided, there
17 were Federal adultery and fornication statutes that
18 broadly prohibited all acts of sexual intercourse on the
19 Federal enclaves between people who were not married to
20 each other, and I suppose it would have been open to
21 Williams, even in the absence of a carnal knowledge
22 statute, to say Congress has occupied the field. The
23 absence of any statutory rape provision should be taken to
24 reflect an implicit determination that Congress believes
25 the age of the parties to be irrelevant --

1 QUESTION: In other words, to look to intent, it
2 would have been an intent argument, an intent of Congress
3 argument.

4 MR. STEWART: I think it is an intent of --

5 QUESTION: May I go behind that with this
6 question?

7 What gives me pause about the -- let's say the
8 primacy of your analytical test, so that you get to the
9 intent element only if there's -- if you need a tie-
10 breaker, more or less, my concern about giving the primacy
11 to the purely analytical test is that, with respect to
12 every statute, criminal statute that Congress passes, it
13 will have to remain constantly on guard to see whether a
14 State legislature addresses the general criminal conduct
15 in a slightly more specific way, knowing on your test
16 that, if the State legislature does, suddenly the Federal
17 statute has shrunk.

18 And it's very difficult -- I mean, since we're
19 construing an act of Congress here, it's very difficult
20 for me to believe that Congress would have meant us to
21 interpret it in a way that is in effect going to force
22 Congress to keep its eye on what's going on in every
23 single State legislature whenever it's in session, just to
24 see if the legislature addresses a general problem with a
25 statute of greater specificity than Congress does.

1 What's your response?

2 MR. STEWART: I think there are two responses.
3 At the most basic level, the reason that Congress is in
4 that predicament, if you want to call it that, is simply
5 that it's enacted the Assimilative Crimes Act.

6 But the second reason is that up until 1948, the
7 way the Assimilative Crimes Act was worded it said that
8 people can be prosecuted for committing State crimes that
9 were in effect under the law of the State at the time of
10 the last reenactment of the Assimilative Crimes Act.

11 QUESTION: But it doesn't say that any more.

12 MR. STEWART: It doesn't say that any more.

13 And so up until 1948 it was possible at least to
14 indulge the fiction that Congress had chosen to assimilate
15 State law because it had individually examined the laws of
16 the States and found them to be good.

17 What Congress did in 1948 was in essence say, we
18 trust the States enough to provide for the assimilation of
19 State law offenses that have not even been enacted, that
20 we've had no opportunity to scrutinize, because we see an
21 independent value in maintaining consistency between the
22 law within the enclaves and the law of the surrounding
23 areas.

24 QUESTION: But you have to -- I mean, the
25 corollary of that is, every time Congress enacts a general

1 criminal statute, it's doing it at least with the imputed
2 intent that that statute will, in fact, become
3 inapplicable within the enclaves if there is now or
4 hereafter a more specific State statute, and I --

5 MR. STEWART: The Federal statute would not be
6 rendered inapplicable simply because the Assimilative
7 Crimes Act is available.

8 QUESTION: You can have both.

9 MR. STEWART: It's a common rule that this Court
10 has announced most obviously in --

11 QUESTION: It would be subject to choice.

12 MR. STEWART: Right, subject to choice.

13 QUESTION: Subject to choice. You're right.
14 You're right.

15 MR. STEWART: Subject to choice.

16 QUESTION: But isn't --

17 QUESTION: Just as it is in the States, anyway.
18 I mean --

19 MR. STEWART: That's correct.

20 QUESTION: -- they would have to face that
21 question with respect to citizens who are not in enclaves.
22 Do they want to enact a Federal statute that's going to
23 more or less duplicate State statutes that already exist?

24 MR. STEWART: That's correct, and I think if we
25 look at the development of the Federal murder -- if we

1 look at the development of the Federal murder statute,
2 that the statute itself doesn't speak to the age of the
3 victim, and one might ask the question, why has Congress
4 failed to enact a child murder provision, and one possible
5 answer would be that Congress has scrutinized laws like
6 Louisiana and finds them to be unwise.

7 Another answer might be, Congress understands
8 that the Assimilative Crimes Act is out there, and is
9 content for child murder provisions either to be enforced
10 or not be enforced.

11 QUESTION: Well, but Congress has focused a lot
12 on whether it wants a death penalty or not, and in what
13 circumstances. There's been a lot of focus on that.

14 MR. STEWART: There has been, and I think
15 this -- the case would present different questions if we
16 attempted to impose the death penalty under the
17 Assimilative Crimes Act.

18 QUESTION: No, no, it's the same. I mean, the
19 question is whether -- you're arguing that the murder one
20 statute in Louisiana applies. I take it you don't argue
21 the murder two statute applies, do you?

22 MR. STEWART: No. That would essentially
23 duplicate the --

24 QUESTION: Well, if -- so, fine, and the main
25 difference between the murder one and the murder two in

1 Louisiana, in fact I think the only difference, is the
2 death penalty.

3 And if you then compare it with the Federal law,
4 what you discover, as you said, is a big difference, I
5 would think, is the death penalty, and then in addition
6 the term of years is longer, so you have both. That's
7 true. The death penalty seems a big part of it.

8 MR. STEWART: I think so. I --

9 QUESTION: You think so. How do you squeeze
10 that into the word, act or omission? I mean, whatever
11 else the Assimilative Crime Act doesn't cover, it surely
12 bears no reference to what the punishment is.

13 MR. STEWART: Well, but the Assimilative Crime
14 Act does say at the end of the section that a person who
15 is guilty of an act or omission which is, although not
16 made punishable by Federal law, is made punishable by
17 State law, shall be guilty of a like offense and subject
18 to a like punishment.

19 QUESTION: A like punishment, as a State law,
20 but as to the question of whether the State law applies or
21 not, it's a difference in the act or omission which you
22 want to define as offense, and maybe you can, but there's
23 no way to define act or omission as punishment, and if you
24 can't define act or omission as punishment, punishment
25 should have nothing to do with whether the crime is

1 assimilated or not.

2 MR. STEWART: I agree with that. When I --

3 QUESTION: Of course you agree with that.

4 (Laughter.)

5 QUESTION: But Mr. Stewart, could you remind us
6 of, there was -- the act originally used the word offense,
7 and then it changed it to act or omission, and what was
8 the reason for that?

9 MR. STEWART: It first changed it to act or
10 thing, which was subsequently changed to act or omission.

11 The reason that was given in the legislative
12 history was that it seemed incongruous to use the
13 phrase -- the word offense to describe something that was
14 not in fact defined as offense by Federal law, and this
15 Court in Williams stated that the expressed intent of the
16 committee was to continue in force rather than to change
17 the substantive meaning of the statute.

18 And again, it would have been easy in
19 Williams -- if the Court had believed in Williams that the
20 phrase, act or omission should refer to a particular
21 incident of primary conduct, it would have been easy for
22 the court in Williams to say, this person would have been
23 guilty of adultery under Federal law, and stopped there.

24 The Court instead embarked on a lengthy analysis
25 of Congress' development of a Federal statutory rape law

1 and arrived at the conclusion that Congress had implicitly
2 decided that individuals aged 16 or 17 were capable of
3 giving meaningful consent to sexual relations.

4 QUESTION: Well, why couldn't one decide,
5 looking at this whole picture, as was suggested by
6 Mr. Granger, I think, that there's the punishment for
7 murder, and then there's the guidelines that say you take
8 into account the vulnerability of the victim, so looking
9 at it as a whole, Congress has essentially dealt with
10 these elements but in a different way?

11 MR. STEWART: I think it's fair to say that
12 looking at the system as a whole there is some role to
13 play in considering the age of the victim in sentencing a
14 defendant on a charge of Federal second degree murder.
15 That doesn't mean that Congress has addressed the question
16 at the same level of specificity as the States.

17 And the point I wanted to get back to was, we
18 really don't know why Congress has failed to enact a child
19 murder provision, whether it's because they find such a
20 provision to be undesirable, whether it's because they're
21 content to let the States do what they will on the
22 enclaves, or whether they simply hasn't -- haven't thought
23 about it.

24 QUESTION: Well, in 1994 they passed a huge law
25 that has chapters in it like crimes against children,

1 violence against women, amending the assault statute, and
2 so forth. I thought Congress has now specifically focused
3 on this.

4 MR. STEWART: Certainly Congress has addressed
5 some aspects of the problem of violence against children.
6 The point I was making was, Congress has not enacted a
7 provision that speaks directly to the question, when is
8 the age of a murder victim deemed to be a more culpable
9 offense, and I think that what you do with that --

10 QUESTION: No, but isn't -- doesn't that -- I
11 mean, doesn't Justice Breyer's question raise the same
12 problem, in effect, that Williams raises, because it's
13 quite true Congress did not make this precise category of
14 murder a separate offense the way the State did, so you
15 say, aha, the State statute is at a lower level of
16 generality, at a higher level of specificity, and
17 therefore it prevails.

18 And yet what Congress has done, at least in
19 '94 -- I realize this is a '93 crime, but just for
20 analytical purposes here, what Congress has done is to
21 say, aha, there will be this specific murder category,
22 that specific murder category, that specific category of
23 crimes against children, and that sounds a lot like what
24 was going on in Williams.

25 It sounds as though Congress is saying, yeah, we

1 are, in fact, going to legislate at a very high level of
2 specificity, but we're not going to make a specific murder
3 provision for this particular subcategory, and that sounds
4 a lot like Williams.

5 And therefore I would suppose that if you follow
6 the Williams analysis you would say, both State and
7 Federal are legislating at the same level of specificity,
8 and we think the Federal crime ought to -- if you follow
9 the Williams analogy, we think the Federal -- that
10 Congress' intent was not to assimilate, that the Federal
11 crime would be the sole one because it had addressed the
12 issue and probably meant to occupy the field.

13 Why do you come out differently here?

14 MR. STEWART: Well, I think there are two
15 reasons.

16 First, we do see a difference in specificity as
17 between this case and Williams. That is, in Williams,
18 Congress really had focused on the precise question, at
19 what age does an individual become capable of giving
20 legally meaningful consent to sexual relations, and that's
21 on a different level of generality from what Congress has
22 done in the statutes that you refer to, namely, address
23 other parts of the problem of violence against children.

24 QUESTION: Congress has said what particular
25 crimes ought to be defined with reference to children, or

1 reference to age.

2 MR. STEWART: I think --

3 QUESTION: I mean, this is the -- well, go --
4 I'm sorry.

5 MR. STEWART: I think what is really crucial
6 here is the default rule that the Court adopts. That is,
7 if the Court's default rule is that application of State
8 law to Federal enclaves should be treated with suspicion,
9 should be reserved for those situations where we really
10 feel quite sure that Congress hasn't spoken to the
11 question at all, then you're right, we lose.

12 Our default rule is that individuals all over
13 the country are normally subject to concurrent State and
14 Federal jurisdiction, and an individual should be
15 insulated from potential prosecution and punishment for
16 State law crimes only if Congress has made it very, very
17 clear that it has addressed the precise question at issue
18 and has arrived at a different conclusion.

19 QUESTION: You began with a construction of the
20 statute, and I -- as I understand it, all that did for us
21 was to get us out of the conduct test.

22 MR. STEWART: Well --

23 QUESTION: Now we're arguing, or trying to
24 decide whether or not your specificity test or what I
25 would call the preemption test of the petitioner is the

1 better of the two, and I don't think the statute helped us
2 much between those two alternatives, or am I --

3 MR. STEWART: I think you're right. I think we
4 are construing the phrase, made punishable. We are
5 asking, what does it mean to say that a State law offense
6 has been made punishable by an act of Congress, and our
7 view is, it's been made punishable only if Congress has
8 spoken very precisely to the specific class of conduct
9 that constitutes the State offense.

10 But we would readily concede we don't
11 particularly draw that from the literal, necessary
12 significance of the words, made punishable. We draw it
13 instead from what we take to be the underlying premises of
14 the Assimilative Crime Act. That is --

15 QUESTION: Is the result of your submission that
16 in most cases the harsher of the two sanctions will apply,
17 or is that not the way it's going to work most of the
18 time?

19 MR. STEWART: I don't know how that will work.
20 Certainly the result of our solution will be that there
21 will be more cases in which the Federal prosecutor will
22 have a choice between two statutes, and I would suppose at
23 least in some of those cases the prosecutor will choose
24 the one that has the harsher penalty.

25 What the point --

1 QUESTION: Mr. Stewart, your answer to Justice
2 Scalia pointed out quite rightly that concurrent
3 jurisdiction and -- I mean, concurrent -- subjection to
4 concurrent schemes of law is the norm now.

5 Is that a legitimate basis for us to consider in
6 construing this statute, because this statute was intended
7 to address the case in which there is a hiatus, shall
8 State law fill it, and now you're saying, well, we'll use
9 this statute to answer a different question. There is, we
10 presume, a concurrence, and when is it illegitimate not to
11 recognize that concurrence, and that's a different kind of
12 question.

13 MR. STEWART: I think it is a different kind of
14 question. When I spoke of the background norm that
15 individuals are typically subject to concurrent State and
16 Federal law, obviously Congress could have adopted a
17 different regime for the enclaves if had chosen.

18 For one thing, Congress might have decided, for
19 instance, that the criminal law applicable to all the
20 Federal enclaves shall be the Criminal Code of the
21 District of Columbia, which in a sense is the
22 quintessential Federal enclave.

23 If Congress had placed preeminent importance on
24 maintaining uniformity among the enclaves, a solution like
25 that might have occurred to it.

1 I think the solution that it chose, assimilating
2 State law, reflects the premise that there was an
3 independent value in maintaining consistency between the
4 enclaves and the surrounding areas of the State, that an
5 enclave is in a meaningful respect part of the State in
6 which it's located.

7 QUESTION: In practical effect, then, it would
8 give the prosecutor on the enclaves the kind of authority
9 that the U.S. Attorney for the District of Columbia has.
10 That is, to pick -- he could -- here, he could pick also
11 courts, but pick whether to indict under the D.C. Code or
12 under the U.S. Code.

13 MR. STEWART: I think that's correct. With --
14 again, with the reminder that because the prosecution
15 would be brought by a single sovereign, the double
16 jeopardy rules applicable to multiple punishments would
17 apply as they would to any claim of multiple punishments
18 by the Federal Government.

19 QUESTION: The trouble with the -- I can see the
20 practical consequence being, well, so what, they just have
21 both jurisdictions.

22 On the other hand, this book of the Federal
23 Criminal Code didn't used to be, but now it's many times
24 bigger than most State codes, and so what I would fear
25 with your approach is, thousands of cases we're parsing

1 the words of -- differently written in State and Federal
2 statutes to try to figure out whether your analytic test
3 or your other test or both are or are not applicable.

4 MR. STEWART: I think our test is actually
5 easier to administer than the competing test.

6 That is, it's certainly not going to be a
7 problem to compare the elements of a State offense to the
8 elements of the Federal offense that's alleged to be
9 preemptive and determine whether they are precisely the
10 same elements.

11 Now, it's true that the second step of our
12 inquiry will involve a certain amount of indeterminacy,
13 but again, our basic point is, the use of the Assimilative
14 Crimes Act should be precluded only when it is quite clear
15 that Congress has spoken to the precise question and that,
16 in the run of cases, is going to be an easier test to
17 administer than simply one that asks, is it close enough.

18 QUESTION: Thank you, Mr. Stewart.

19 Mr. Granger, you have 3 minutes remaining.

20 REBUTTAL ARGUMENT OF FRANK GRANGER

21 ON BEHALF OF THE PETITIONER

22 MR. GRANGER: I think the question really is,
23 the Louisiana statute really is more a death penalty
24 statute than merely an attempt to particularly define
25 child killing, but I think --

1 QUESTION: So you're relying on the death
2 penalty. Did you do that in your brief? I don't recall
3 that.

4 MR. GRANGER: Not -- no, sir, Your Honor.

5 QUESTION: But it seems like a good idea to you
6 now.

7 (Laughter.)

8 MR. GRANGER: No, but I --

9 QUESTION: Can you tell me how you get that into
10 the language of the statute?

11 MR. GRANGER: Because of the fact that you have
12 to bring the punishment along with the crime.

13 QUESTION: Yes, but that isn't the criterion --

14 MR. GRANGER: Correct.

15 QUESTION: -- of whether the statute assimilates
16 the State law or not.

17 MR. GRANGER: I agree with you, Justice --

18 QUESTION: The criterion is act or omission. Is
19 there any way to get punishment within the meaning of act
20 or omission?

21 MR. GRANGER: No, I don't believe so, Justice --

22 QUESTION: I didn't think so.

23 QUESTION: Well, why don't -- isn't there a way
24 to get it in which is, you want to know whether Congress,
25 in passing these other laws, really intended to forego

1 picking up the Louisiana law, and I guess Congress would
2 look at what the difference is, wouldn't it?

3 MR. GRANGER: I would think so, Justice Breyer.

4 Also, I think that if we look at 18 U.S.C. 3551
5 it also allows the bringing in, even though it may be an
6 assimilated State crime, you have to look at the
7 guideline.

8 QUESTION: Which section is it again?

9 MR. GRANGER: 3551, Your Honor.

10 QUESTION: Thank you.

11 QUESTION: What does 3551 say?

12 MR. GRANGER: Because -- what it does, Justice
13 Scalia, is that if you have an assimilated State crime,
14 you then have to look at the guideline that's most
15 analogous to that particular crime.

16 QUESTION: Fine.

17 MR. GRANGER: And I think that --

18 QUESTION: Fine, but how does that relate to
19 Congress' intent that Justice Breyer is talking about?
20 Can you attach that congressional intent to some
21 enactment?

22 MR. GRANGER: I don't think I can.

23 QUESTION: Or is it just sort of a wandering
24 congressional intent unreflected in the United States
25 Code?

1 MR. GRANGER: It may be the latter, Justice
2 Scalia.

3 QUESTION: Okay.

4 QUESTION: Well, it's an act or omission made
5 punishable, and I suppose it's a legitimate question to
6 say, well, made punishable how?

7 MR. GRANGER: Correct.

8 QUESTION: And as Justice Breyer suggested, when
9 you ask, made punishable how, by a lot, by a little, you
10 are, in fact, focusing ultimately on an issue of intent,
11 and I take it -- I mean, that's what you want us to do, I
12 take it.

13 MR. GRANGER: Correct, but Justice Souter, more
14 importantly, I think what gives me pause is that the
15 argument of the Government then states that people are
16 subjected to two different jurisdictions.

17 Well, if you're on a Federal enclave, I don't
18 think you really are subjected to State law. You're
19 subjected to Federal law for a Federal crime on a Federal
20 enclave, so the inquiry is, and what it's always been when
21 we're dealing with these kind of cases is, has Congress
22 enacted a law that prescribes or punishes, makes
23 punishable this conduct? If it has, you don't need to
24 look to State law.

25 Otherwise, what we're going to have is 50 States

1 and numerous military reservations all over, and then the
2 U.S. Attorney is going to be forced to say, well, .
3 Louisiana defines it a little bit differently here, so I'm
4 going to use Louisiana law.

5 What happens to the Federal law? Is it even
6 necessary any more? Why, then, has Congress chosen, even
7 in the 1940's, to reenact the Assimilative Crimes Act to
8 say we don't have to keep reenacting this act.

9 Any time Congress -- and this is what Sharpnack
10 was saying. Any time Congress makes a new enactment it's
11 automatically going to be brought over. It's going to
12 preempt the field. It's going to cover the area. We
13 don't have to get into this argument every single time
14 that Congress chooses to do something.

15 CHIEF JUSTICE REHNQUIST: Thank you,
16 Mr. Granger. The case is submitted.

17 (Whereupon, at 12:03 p.m., the case in the
18 above-entitled matter was submitted.)
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CERTIFICATION

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DEBRA FAYE LEWIS, Petitioner v. UNITED STATES
CASE NO: 96-7151

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BY Don Mari Federico-----

(REPORTER)