Winner, Best Appellate Brief in the 2003 Native American Law Student Association Moot Court Competition

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WINNER, BEST APPELLATE BRIEF IN THE 2003 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

Matthew Baumgartner** & Elizabeth Ann Kronk***

Questions Presented

1. Is the federal criminal indictment and prosecution of Petitioner, an enrolled member of the Rosebud Sioux Tribe, for his role in burglarizing a private residence on the Cheyenne Sioux Reservation barred by the Fifth Amendment's guarantee against double jeopardy following his conviction for the same crime in tribal court?

2. Does Petitioner's federal prosecution violate the Fifth Amendment's due process clause as a violation of his equal protection rights in light of the fact that Mr. Smith, Petitioner's non-Indian alleged co-perpetrator in the burglary, was not charged in either tribal, state, or federal court?

Statement of the Case

Statement of Facts

In July 2002, Mr. John Iron Hawk, Petitioner, was arrested by Tribal police and charged with burglary in the Cheyenne River Sioux tribal court for allegedly breaking and entering the home of Mr. James Johnson, a non-Indian resident of the Cheyenne River Sioux Tribe in South Dakota, and removing about $500 in personal goods consisting of a stereo, fishing gear and several Pendleton blankets. Petitioner was convicted in tribal court and did not appeal. In September 2002, Petitioner was indicted by a federal grand jury sitting in Pierre, South Dakota and was charged with violating the Major Crimes Act, 18 U.S.C. § 1153 (1948), which lists burglary as one of fourteen enumerated crimes. Mr. Robert Smith, whom Petitioner alleges is his co-perpetrator, was not charged in tribal court pursuant to the holding in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), that tribal courts do not have inherent

* This brief cites to a Fourteenth Circuit case named Ironhorse. This is a fictitious case used only for the Native American Law Student Association Moot Court Competition.
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jurisdiction to try and punish non-Indians and must be specifically authorized
to do so by an act of Congress. Mr. Smith was also not charged in federal
court pursuant to the common law rule that excludes federal criminal
jurisdiction in favor of state jurisdiction over non-Indians who commit crimes
against non-Indians on an Indian reservation. United States v. McBratney, 104
The Dewey County (South Dakota) Prosecutor, however, never prosecuted
Mr. Smith in state court either, believing that there was only federal
jurisdiction over Indian lands in South Dakota pursuant to South Dakota’s
Enabling Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676, 676-77. Hence,
Petitioner was prosecuted twice — once in tribal court, and once in federal
court — for his role in the burglary of Mr. Johnson’s house, and Mr. Smith
was never charged.

Statement of the Proceedings Below

At his federal bench trial, Petitioner raised two substantive defenses. First,
he raised the issue of double jeopardy pursuant to the view that the 1990
Amendments to the Indian Civil Rights Act, 25 U.S.C. § 1301(2), effected a
federal delegation of authority to tribal courts and therefore any subsequent
prosecution in federal court violated the Fifth Amendment constitutional
guarantee against double jeopardy. Second, Petitioner claimed a violation of
his equal protection rights under the Fifth Amendment for the decision to
indict and prosecute him because of his racial identity as an Indian and the
failure to indict and prosecute Mr. Smith because of his racial identity as a
non-Indian.

The District Judge, Honorable Lawrence Hutton, dismissed the indictment
as violative of the constitutional guarantee against double jeopardy. He also
ruled that the decision to indict and to prosecute Petitioner (and not indict and
prosecute Mr. Smith) did not constitute invidious racial discrimination under
the U.S. Constitution.

On appeal to the Fourteenth Circuit Court of Appeals, the panel reversed
the district court decision concerning its double jeopardy ruling as contrary to
the plain meaning of the statute, the clear legislative intent of Congress, and
Congress’ plenary authority in Indian affairs. The panel nevertheless affirmed
the dismissal of the indictment on the alternative reasoning that the
prosecution of Petitioner was racially biased and in violation of the Fifth
Amendment guarantee of equal protection.

Both parties filed petitions (and cross petitions) for certiorari to the United
States Supreme Court. The Supreme Court has granted the petitions on both

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issues. Specifically, the Supreme Court granted certiorari on the questions of whether the federal prosecution of Petitioner is barred by the Fifth Amendment guarantee against double jeopardy and/or whether the federal prosecution of Petitioner is barred by the Fifth Amendment's guarantee of due process and equal protection.

Summary of Argument

I. Double Jeopardy

A. The Duro override legislation does not imply that 18 U.S.C. § 1153 (1948) excludes federal jurisdiction over non-member Indians such as Petitioner.

Petitioner argues that the Duro override legislation, 25 U.S.C. § 1301(2) (1990), should be read to grant sole jurisdiction over crimes committed by non-member Indians on reservations to tribal courts. This reading, however, contravenes the congressional intent behind the adoption of the Duro override legislation and the Major Crimes Act, 18 U.S.C. § 1153. In passing the Duro override legislation, Congress intended to correct the Supreme Court's erroneous finding that tribal court jurisdiction did not extend to non-member Indians in Duro v. Reina. 495 U.S. 676, 688 (1990). Textually, there is no indication in 25 U.S.C. § 1301(2) that Congress intended to remove jurisdiction over such matters from the federal courts. It is also clear that Congress intended to grant federal jurisdiction over the fourteen enumerated crimes in the Major Crimes Act in addition to the pre-existing tribal court jurisdiction over such matters. As a result, this Court should reject the narrow interpretation of 18 U.S.C. § 1153 advocated by Petitioner in favor of a broader interpretation which recognizes the congressional purpose established in 25 U.S.C. § 1301(2) and 18 U.S.C. § 1153.

B. United States v. Wheeler: The dual sovereignty exception negates Petitioner's double jeopardy claim.

In United States v. Wheeler, 435 U.S. 313 (1978), the Supreme Court held that no double jeopardy problem arises when both tribal courts and federal courts prosecute for the same criminal act. Id. at 329. The Wheeler Court reasoned that the Fifth Amendment guarantee against double jeopardy is not violated by prosecution in both the tribal courts and federal courts for the same act because both tribal governments and the federal government are sovereign nations. As both are sovereign nations, the dual sovereignty exception applies and the Fifth Amendment guarantee against double jeopardy
This holding is further supported by 25 U.S.C. § 1301(2), which specifies that the power to prosecute all Indians, including non-member Indians, is an inherent power of the tribal governments. Therefore, Petitioner’s claim that his Fifth Amendment guarantee against double jeopardy is violated by federal prosecution is directly negated by the holding in Wheeler.

C. Wheeler’s Progeny: The dual sovereignty exception is applicable to non-member Indians such as Petitioner.

Petitioner argues that the holding in Wheeler is not applicable in this case because Petitioner is a non-member Indian, whereas the defendant in Wheeler was a member Indian. This narrow interpretation of Wheeler has been directly refuted by the Ninth Circuit Court of Appeals in United States v. Enas, 255 F.3d 662 (9th Cir. 2001); United States v. Male Juvenile, 280 F.3d 1008 (9th Cir. 2002). Specifically, in Enas, the Ninth Circuit Court of Appeals held that the Wheeler holding, and therefore the dual sovereignty exception, is applicable in cases involving non-member Indians because the power to prosecute non-member Indians is an inherent power of tribal governments. Enas, 255 F.3d at 664. Additionally, the court in Male Juvenile agreed with this finding, holding that the dual sovereignty exception to double jeopardy applies in instances involving non-member Indians as tribal governments are sovereign nations. Male Juvenile, 280 F.3d at 1021. As a result, Petitioner’s claim that the Wheeler holding is not applicable in this case fails because both the Enas court and Male Juvenile court have held that the dual sovereignty exception is applicable in cases involving non-member Indians tried by tribal courts and federal courts.

II. Equal Protection

A. Congress retains the plenary power, not subject to strict scrutiny by the courts, to regulate Indians as a separate people with their own political institutions.

Petitioner challenges his indictment in federal court under the Major Crimes Act, 18 U.S.C. § 1153, as violative of his equal protection rights under the Fifth Amendment. Petitioner asserts that he was prosecuted because of his racial identity as an Indian, and that his alleged partner in the burglary, Mr. Robert Smith, was not prosecuted because of his racial identity as a non-Indian. Petitioner’s equal protection claim fails, however, because the Major Crimes Act is constitutional and does not rely on an impermissible racial
classification. While the Major Crimes Act does single out Indians for federal prosecution, the Act provides that Indians, classified by the Supreme Court in Morton v. Mancari, 417 U.S. 535, 553 N.24 (1974), as a separate political group, are subject to the same punishment as any other person committing the same offense. The Major Crimes Act is therefore not subject to strict scrutiny, as the Fourteenth Circuit Court of Appeals incorrectly concluded. Furthermore, the Act is rational as within Congress’ plenary authority over Indian affairs.

B. Selective Enforcement: Whether or not Mr. Smith is subject to federal jurisdiction, Petitioner’s selective enforcement claim fails.

Because the Major Crimes Act is itself constitutional, Petitioner’s equal protection claim must rely on a selective enforcement claim. To make a successful selective enforcement claim, Petitioner must show that he was singled out for prosecution because of his race, and that the selective prosecution was motivated by a discriminatory purpose. Petitioner cannot make either claim effectively since he was selected for prosecution because he is subject to federal criminal jurisdiction, while, under long standing Supreme Court precedent, McBratney, 104 U.S. at 621, Mr. Smith is not. Because there is no federal jurisdiction over Mr. Smith in this case, Petitioner cannot make the claim that his race was even a possible factor in selecting him for prosecution over Mr. Smith. Moreover, even if this Court were to accept the dubious proposition that Mr. Smith is subject to federal jurisdiction, the fact that Respondent believed there to be no jurisdiction negates the discriminatory purpose requirement of a successful selective enforcement claim.

Argument

I. Double Jeopardy

Mr. Iron Hawk, Petitioner, argues that the Duro override legislation, 25 U.S.C. § 1301(2) (1990), effected a federal delegation of authority to tribal courts and therefore any subsequent prosecution in federal court violated the Fifth Amendment constitutional guarantee against double jeopardy. Petitioner’s argument fails for three reasons. First, in passing the Duro override legislation, 25 U.S.C. § 1301(2) (1990), Congress intended to establish that tribal court jurisdiction over non-member Indians is an inherent power of tribal governments. Contrary to Petitioner’s argument, the congressional intent in passing 25 U.S.C. § 1301(2) (1990) was not to remove
jurisdiction over non-member Indians from federal courts. Additionally, the Supreme Court in Wheeler, 435 U.S. at 313, 330, found that the dual sovereignty exception to double jeopardy applies to Indians who commit crimes on tribal reservations. Petitioner asserts that the Wheeler holding is not applicable in this case given that Petitioner is a non-member Indian. Wheeler's progeny, Enas and Male Juvenile, however, indicate the contrary, that Wheeler is applicable to non-member Indians. This is because tribal governments have the inherent power to try non-member Indians and therefore the dual sovereignty exception to double jeopardy applies. As a result, Petitioner's claim that federal prosecution violated his Fifth Amendment constitutional guarantee against double jeopardy fails.

**A. The Duro override legislation does not imply that 18 U.S.C. § 1153 (1948) excludes federal jurisdiction over non-member Indians such as Petitioner.**

Petitioner relies on the legislation, 25 U.S.C. § 1301(2) (1990), to support his argument that through the enactment of the Duro override legislation the federal government delegated its ability to prosecute Indians to the tribal courts. 25 U.S.C. § 1301(2) (1990) was "an amendment to the Indian Civil Rights Act" by Congress in 1990 to include language specifically recognizing tribal court criminal jurisdiction over all Indians. This amendment was made in response to the Supreme Court's ruling in Duro, 495 U.S. 676. Petitioner argues that the 1990 amendment should be interpreted narrowly to exclude federal jurisdiction over Indians. In other words, Petitioner asserts that this Court should narrowly construe 18 U.S.C. § 1153 by reading the grant of tribal court jurisdiction given in 25 U.S.C. § 1301(2) (1990) to preclude federal jurisdiction in 18 U.S.C. § 1153 over non-member Indians who commit crimes on reservations other than their own reservation. A narrow interpretation of 18 U.S.C. § 1153 is not warranted, however, given the clear congressional intent to allow for concurrent jurisdiction of tribal courts and federal courts over actions taken by non-member Indians falling under 18 U.S.C. § 1153 (the Major Crimes Act).


- "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby
recognized and affirmed, to exercise criminal jurisdiction over all Indians; (emphasis added)

Petitioner asserts that because 25 U.S.C. § 1301(2) (1990) specifically recognizes the right of Indian tribes to "exercise criminal jurisdiction over all Indians" the federal government therefore does not have jurisdiction over Indians in criminal matters.

First, Petitioner's interpretation of the Duro override legislation contravenes the clear congressional intent underlying the legislation. Specifically, Congress acted to restore tribal jurisdiction over non-member Indians, after the Supreme Court failed to recognize tribal court jurisdiction over non-member Indians in Duro, 495 U.S. at 676. The purpose of the Duro override legislation was therefore to maintain the concurrent jurisdiction of tribal courts and federal courts over non-member Indians acting within reservation territory. Enas, 255 F.3d at 669.

Additionally, Petitioner's interpretation of 25 U.S.C. § 1301(2) (1990) contravenes the existing law and statements that have been made by the Supreme Court. Initially, it must be pointed out that 25 U.S.C. § 1301(2) does indicate that Indian tribes have criminal jurisdiction over all Indians, yet 25 U.S.C. 1301(2) fails to indicate that the jurisdiction of Indian tribes is exclusive of federal jurisdiction. To the contrary, federal law indicates that both federal courts and tribal courts are to have jurisdiction in situations such as the one presently before the Court. Indian Trade and Intercourse Act, Act of Mar. 3, 1817, ch. 92, 3 Stat. 383; General Crimes Act, Act of Mar. 27, 1854, § 3, 10 Stat. 270; Major Crimes Act, 18 U.S.C. § 1153; Indian Country Crimes Act, 18 U.S.C. § 1152.

According to the Indian Trade and Intercourse Act, Act of Mar. 3, 1817, ch. 92, 3 Stat. 383, federal criminal jurisdiction was extended to crimes committed within Indian Country by any Indian, or other person or persons, but "any offence committed by one Indian against another within any Indian boundary" was excluded. In the present case, while Petitioner is an Indian, the alleged victim, Mr. James Johnson, is a non-Indian resident of the reservation. As a result, under the Indian Trade and Intercourse Act, the federal courts would have jurisdiction in this case. This is an indication of Congress' intent

1. Although Petitioner is not a member of the Cheyenne River Sioux Tribe, this definition would still apply to the case before the Court as Petitioner is an Indian and therefore falls within the category of "all Indians." The definition does not delineate between member and non-member Indians. In other words, Petitioner does not have to be a member of the Cheyenne River Sioux Tribe in order for this tribe to have jurisdiction over his actions while he is on the Cheyenne River Sioux Tribe's reservation. See generally Enas, 255 F.3d at 662.
to maintain concurrent jurisdiction over non-member Indians, such as Petitioner.

Additionally, under the General Crimes Act, Act of Mar. 27, 1854, § 3, 10 Stat. 270, an exception was included to exempt Indians from federal jurisdiction when they had "been punished by the local law of the tribe." This exemption, however, was specifically left out of the Major Crimes Act, 18 U.S.C. § 1153. It is generally agreed upon that Congress acts purposely when including or excluding language. Male Juvenile, 280 F.3d at 1015 (citing Russello v. United States, 464 U.S. 16, 23 (1983)) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). It can therefore be concluded that the exclusion of Indians already punished in tribal court from the Major Crimes Act was the manifestation of the congressional intent to subject Indians to federal jurisdiction.

Similarly, the Indian Country Crimes Act, 18 U.S.C. § 1152 (1948), excludes Indians who had "been punished by the local law of the tribe" from subsequent federal prosecution. The Major Crimes Act, however, contains no such exception. Congress' failure to include an exception for Indians already punished in tribal courts further suggests congressional intent to ensure that Indians are subject to the concurrent jurisdiction of both tribal courts and federal courts. Additionally, at least one federal court has reached a similar conclusion, recognizing that the lack of a similar exception in the Major Crimes Act for Indians who have already been punished in tribal court suggests the existence of concurrent jurisdiction between tribal courts and federal courts. Male Juvenile, 280 F.3d at 1013.

It is important to note that the Indian Country Crimes Act's exemption is specific to Indians who have already been punished, not merely tried. 18 U.S.C. § 1152. This language can therefore be interpreted as further evidence that Congress intended for there to be concurrent jurisdiction between tribal courts and federal courts without barriers arising from double jeopardy claims. This is because by using the term "punished" it can be inferred that Congress intended for federal jurisdiction to remain in cases where an Indian was tried by a tribal court but not punished. As a result, even the Indian Country Crimes Act can be read to favor the Respondent's position that no violation of Petitioner's Fifth Amendment guarantee against double jeopardy has occurred, because under the Indian Country Crimes Act, had Petitioner not been punished by the tribal court there would be clear federal court jurisdiction in this case.
As previously indicated, Petitioner relies on the Duro override legislation to support his assertion that to subject him to prosecution in federal court would be contrary to the Fifth Amendment constitutional guarantee against double jeopardy. Precedent, as well as the legislation cited above, suggests that in this case there is concurrent federal court and tribal court jurisdiction. The Ninth Circuit Court of Appeals has concluded that tribal governments have concurrent jurisdiction to punish conduct that also constitutes an offense under the Major Crimes Act. *Enas*, 255 F.3d at 662; *Male Juvenile*, 280 F.3d at 1008. Additionally, the legislative history of the Major Crimes Act strongly supports the tribal court exercise of concurrent jurisdiction. See Robert Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 559 n.295 (1976). In addition to tribal court jurisdiction, it is clear that the federal courts also have jurisdiction. In fact, the federal courts have already determined this issue with explicit reference to the Cheyenne River Sioux reservation. The Eighth Circuit Court of Appeals determined that the federal government, rather than state government, retained jurisdiction to try offenses committed by Indians on the Cheyenne River Sioux Reservation. *United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988). This remains binding precedent in the circuit. Additionally, denying federal jurisdiction over Petitioner is antithetical to the purpose of the Major Crimes Act. This is, "[b]ecause the Major Crimes Act was enacted in response to purportedly inadequate tribal punishments, it would make little sense to allow a prior tribal punishment to prevent certain crimes from being prosecuted under the MCA [Major Crimes Act]." *Male Juvenile*, 280 F.3d at 1020. As suggested by the court in *Male Juvenile*, this case presently before this Court is an example of an inadequate tribal punishment, as Petitioner will escape with only having paid restitution damages should federal jurisdiction not be extended.

Regardless of whether or not the tribal court had actual subject matter jurisdiction over Petitioner, it appears that Petitioner consented to the jurisdiction of the tribal court. A person can consent to a court’s assertion of jurisdiction over them despite the fact that the court may not have been granted subject matter jurisdiction. Rest. Conf. 2d § 32, Rest. J. 2d § 13. Petitioner’s ultimate consent to the tribal court’s jurisdiction was manifested by his failure to appeal his conviction in tribal court. Albert A. Ehrenzweig, David W. Louisell, and Geoffrey C. Hazard, Jr., *Jurisdiction: State and Federal* 20 (1980). The conclusion that Petitioner conceded to tribal court jurisdiction is further evidenced by the fact that Petitioner accepted and fulfilled the punishment given him by the tribal court. Therefore, because Petitioner conceded to the tribal court’s jurisdiction and the federal court has...
clear jurisdiction in this case, it is apparent that there is concurrent jurisdiction between the two court systems.

B. United States v. Wheeler: The dual sovereignty exception negates Petitioner's double jeopardy claim.

In Wheeler, 435 U.S. at 330 (1978), the Supreme Court held that no double jeopardy problem arises if both the tribal courts and federal courts prosecute a member Indian for the same criminal act. The Wheeler Court reasoned that there was no breach of the Fifth Amendment constitutional guarantee against double jeopardy in such cases because both the federal government and tribal governments are sovereign nations. As a result, because tribal courts, as courts of sovereign nations, do not derive their power to adjudicate from the federal government, the Wheeler Court concluded that both governments can prosecute a member Indian separately for the same offense.

The case presently before the Court is similar to the matter brought before the Wheeler Court because in both cases the Indian Nations, the Navajo Nation in Wheeler and the Cheyenne River Sioux Tribe in the present case, are punishing the accused under their own laws. In Wheeler, this distinction was important because it is consistent with the argument that federal and tribal governments are distinct and separate sovereign nations, which punish the accused under separate laws. Wheeler, 435 U.S. at 326. In the present case, Petitioner was charged with violating the Cheyenne River Law and Order Code § 5-1-3 in the tribal court. In the federal court, however, Petitioner was charged with violating the Major Crimes Act, 18 U.S.C. § 1153. Consistent with the Wheeler Court's reasoning, Petitioner has been charged under two separate laws promulgated by two separate sovereign nations.

Additionally, underlying Petitioner's argument that prosecution in the federal courts is barred by the Fifth Amendment constitutional guarantee against double jeopardy is the assumption that the punishment decided upon

2. The United States has recognized the Cheyenne River Sioux Tribe, and, as such, it is a federally recognized tribe. See 25 U.S.C. § 479a-1 (1994). As a federally recognized tribe, the Cheyenne River Sioux Tribe has the status of being a "domestic dependent nation." See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

3. This distinction between the federal government and Indian governments is consistent with the distinction between state and federal prosecutions. State prosecution does not bar federal prosecution and vice versa, because the prosecutions fall under the law of separate nations. As a result, prosecutions by both state and federal governments do not, in the words of the Fifth Amendment, "subject [the defendant] for the same offence." See, e.g., Moore v. Illinois, 55 U.S. 13 (1852).
by the tribal court should hold in this case. The tribal court in this case found Petitioner guilty and required him to apologize to the victim and compensate the victim for his loses (approximately $500). It is likely that Petitioner would face a far more severe punishment in federal court should he be found guilty in the federal court as well. Therefore, should this Court refuse federal jurisdiction in this matter, the problem illuminated by Justice Stewart in *Wheeler* would come to fruition. Specifically, Justice Stewart stated,

The same sort of "undesirable consequences" identified in *Abbate* could occur if successive tribal and federal prosecutions were barred despite the fact that tribal and federal courts are arms of separate sovereigns. Tribal courts can impose no punishment in excess of six months' imprisonment or a $500 fine. 25 U.S.C. § 1302(7). On the other hand, federal jurisdiction over crimes committed by Indians includes many major offenses. 18 U.S.C. § 1153 (1976) Thus, when both a federal prosecution for a major crime and a tribal prosecution for a lesser included offense are possible, the defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity... the prospect of avoiding more severe federal punishment would surely motivate a member of a tribe charged with the commission of an offense to seek to stand trial first in a tribal court. Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated. (citations omitted)

*Wheeler*, 435 U.S at 330-331. Therefore, in order to avoid the policy problems envisioned by Justice Stewart, it is imperative that this Court reject Petitioner's arguments with regard to his claim that federal jurisdiction is precluded by the Fifth Amendment constitutional guarantee against double jeopardy.

Alternatively, Petitioner may attempt to argue that *Wheeler* does not apply to the case presently before the Court, because in *Wheeler* the defendant was a member of the Navajo Nation and in the present case Petitioner is not a member of the Cheyenne River Sioux Tribe. Despite this difference, the reasoning of the *Wheeler* case should still apply to the present case for several reasons. First, the present case is consistent with *Wheeler*, because, as previously indicated, Petitioner is being punished under different laws from two separate sovereign nations. The Court in *Wheeler* relies heavily on the fact that the federal government and tribal governments are distinct sovereign nations, indicating that the important litmus test is whether the tribal
government is a sovereign nation and not whether the individual is a member of the tribe. This conclusion is supported by the decision in Male Juvenile that recognized that prosecution in tribal court and federal court is allowed under the dual sovereignty exception to the double jeopardy doctrine.

Furthermore, the question of non-member prosecution was recently laid to rest in an en banc decision of this court, United States v. Enas, decided while this appeal was pending. Enas, 255 F.2d 662 (en banc). There, we held that a tribal court exercising its power to prosecute a non-member Indian under the Indian Civil Rights Act acts as a separate sovereign, making a subsequent prosecution by the federal government permissible under the dual sovereignty double jeopardy doctrine.

Male Juvenile, 280 F.3d at 1021.

Despite the fact that Petitioner is not a member of the Cheyenne River Sioux Tribe, he has acted in a manner consistent with being a member of the tribe and, as a result, he owes allegiance to the tribe. Petitioner has acted in a manner consistent with being a member of the Cheyenne River Sioux tribe for several reasons. Notably, he has obtained benefits from his association with the tribe, namely his ability to live within tribal housing in the Red Scaffold Community. Additionally, his wife and children are all members of the Cheyenne River Sioux Tribe and his children attend the tribally run school, Cheyenne River Elementary School, suggesting that his ability to sustain his family is substantially enhanced by his connection with the tribe. Petitioner, therefore, receives many of the benefits bestowed upon members of the Cheyenne River Sioux Tribe. In fact, there is nothing to suggest from the facts before the Court that Petitioner receives fewer benefits than an "official" member of the Cheyenne River Sioux Tribe does. While Petitioner may not formally be a member of the Cheyenne River Sioux Tribe, Petitioner functions as a member of the Cheyenne River Sioux Tribe.

The Ninth Circuit Court of Appeals similarly concluded that a person who is treated by the tribe as a member of the tribe could be found to be a de facto member of the tribe. United States v. Keys, 103 F.3d 758 (9th Cir. 1996). In finding that the child in Keys, Jane Doe, was a member Indian of Colorado River Indian Tribe for purposes of tribal court jurisdiction, the Keys court held as dispositive the fact that the Colorado River Indian Tribe treated Jane Doe as a member of their tribe. Keys, 103 F.3d at 761. Similarly, the Cheyenne River Sioux Tribe has consistently treated Petitioner as a member of the tribe, notably by giving him accommodation on the reservation and educating his children. Accordingly, because Petitioner behaves as a member of the tribe,
Cheyenne River Sioux Tribe and the tribe appears to consider Petitioner a de facto member of the tribe, it would not be unjust to treat Petitioner similarly to the defendant in Wheeler.

C. Wheeler’s Progeny: The dual sovereignty exception is applicable to non-member Indians such as Petitioner.

While Petitioner may attempt to argue that Wheeler cannot appropriately be applied to the present case given that Petitioner is a non-member Indian, two cases following Wheeler clearly show that Wheeler can be applied in instances where the defendant is a non-member Indian, such as the present case. Specifically, both Enas and Male Juvenile have addressed the issue of whether the dual sovereignty exception applies in instances where both tribal courts and federal courts have asserted jurisdiction over crimes emanating from the same action of a non-member Indian. In both cases, the Ninth Circuit Court of Appeals — relying on Wheeler — concluded that the dual sovereignty exception did apply.

In Enas, the defendant, a non-member Indian, stabbed an enrolled member of the White Mountain Apache Tribe on the tribe’s reservation. The court considered whether an Indian tribe and the federal government may twice prosecute a non-member Indian for the same conduct without offending the double jeopardy clause. In answering this question, the court looked at the distinction between “inherent” and “delegated” powers of Indian tribes. According to the court,

[i]f the tribe was acting pursuant to its inherent power when it prosecuted Enas, then the dual prosecutions were undertaken by separate sovereigns, and were therefore constitutionally permissible. If, however, the tribe was exercising power delegated by Congress, then it was acting as an ‘arm of the federal government,’ Wheeler, 435 U.S. at 328, rather than employing its own sovereign authority, and the federal prosecution is barred.

Enas, 255 F.3d at 664. Ultimately, the Ninth Circuit Court of Appeals held that prosecution of non-member Indians by tribal courts does not preclude subsequent federal court jurisdiction under the 1990 amendments to the Indian Civil Rights Act. Id. The court in Enas based its conclusion in part on the finding in Wheeler that tribal jurisdiction over non-member Indians was an inherent power of tribal governments which was merely recognized by the 1990 amendments to the Indian Civil Rights Act. Enas, 255 F.3d at 669.

Further support for applying the Wheeler holding to non-member Indians can be found in Male Juvenile. While the Male Juvenile court declined to go
into a discussion of the inherent powers of tribal governments, the court did conclude that the controlling question when deciding whether the dual sovereignty exception applies to non-member Indians is whether the tribal governments have the inherent power to put non-members on trial. Male Juvenile, 280 F.3d at 1021. The court in Male Juvenile went on to accept the Enas court’s decision, holding that, “a tribal court exercising its power to prosecute a non-member Indian under the Indian Civil Rights Act acts as a separate sovereign, making a subsequent prosecution by the federal government permissible under the dual sovereignty double jeopardy doctrine.” Male Juvenile, 280 F.3d at 1021. It is therefore apparent from both Enas and Male Juvenile that the power to prosecute non-member Indians is an inherent power of tribal governments and that the dual sovereignty exception to double jeopardy therefore applies in the present case, making the extension of federal jurisdiction over Petitioner valid.

II. Equal Protection

Petitioner claims his equal protection rights under the Fifth Amendment have been violated by the decision to prosecute him under the Major Crimes Act, 18 U.S.C.§ 1153, and the failure to prosecute his non-Indian cohort in the burglary. “While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’” Schneider v. Rusk, 377 U.S. 163, 168 (1964), see also Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. Schlesinger v. Ballard, 419 U.S. 498, 500 (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411 U.S. 677, 681 (1973).

The prosecution of Petitioner does not violate the Fifth Amendment’s guarantee of equal protection because 1) the statute under which he is being charged, the Major Crimes Act, 18 U.S.C. § 1153, is constitutional as it provides for equal protection of Indians, and 2) there is no selective enforcement in this case. Petitioner alleges that he is being prosecuted because of his racial identity as an Indian, and that the failure to prosecute his alleged co-conspirator, Mr. Robert Smith, is due to his status as a non-Indian. For Petitioner to make a valid equal protection claim as his defense against prosecution he must either show that the statute under which he is being charged uses an impermissible racial classification and cannot withstand a strict scrutiny analysis, or that he is being selectively prosecuted because of his race while another equally culpable actor was not prosecuted because of
his race. Petitioner can make neither claim with any effectiveness. First, the Supreme Court has repeatedly held the Major Crimes Act to be constitutional under the Fifth Amendment. United States v. Antelope, 430 U.S. 641 (1977); Keeble v. United States, 412 U.S. 205 (1973). Second, any successful selective enforcement claim must contain evidence of a discriminatory purpose, which Petitioner's claim lacks.

A. Congress retains the plenary power, not subject to strict scrutiny by the courts, to regulate Indians as a separate people with their own political institutions.

As an initial matter, the Major Crimes Act, under which Petitioner is being prosecuted in federal court, has been held to be within Congress' plenary power to regulate Indian affairs.\(^4\) In determining that the Major Crimes Act is constitutional under the Fifth Amendment, the Antelope Court said, "this Court has consistently upheld federal regulations aimed solely at tribal Indians, as opposed to all persons subject to federal jurisdiction." Antelope, 430 U.S. at 649. As the Court noted in Morton v. Mancari, 417 U.S. 535, 552 (1974), the Constitution "singles Indians out as a proper subject for separate legislation."

Petitioner may claim because he is not an enrolled member of the Cheyenne River Sioux Tribe, on whose reservation the crime occurred, to prosecute him as an "Indian" under the Major Crimes Act is to prosecute him as a racial Indian, and not a political one. While the Antelope Court noted that "federal jurisdiction under the Major Crimes Act does not apply to 'many individuals who are racially to be classified as Indians,'" Antelope, 430 U.S. at 647 (quoting Morton, 417 U.S. at 553), Petitioner is not to be classified as a racial Indian for purposes of federal prosecution. He is an enrolled member of an Indian tribe, the Rosebud Sioux, and he committed a crime within Indian country. Thus, Petitioner is subject to federal criminal jurisdiction under the Major Crimes Act, just as the respondents in Antelope were. "[A]s enrolled tribal members, respondents were subjected to federal jurisdiction only because their crimes were committed within the confines of Indian country . . . ." Antelope, 430 U.S. at 647. Indeed, Petitioner is subject to federal jurisdiction under the Major Crimes Act not because he is a racial Indian, but because he is an enrolled member of the Rosebud Sioux Tribe.\(^5\)

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4. Congress' plenary authority to regulate Indian affairs derives from the United States Constitution, which gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3.

5. As noted above, Petitioner is also a "de facto" member of the Cheyenne River Sioux
Petitioner may claim that the Major Crimes Act is itself unconstitutional because it utilizes an impermissible racial classification in targeting Indians as the only group subject to punishment under the statute. Based on the reasoning in Morton, the use of the term "Indian" in the language of the statute is not a racial categorization subject to strict scrutiny analysis as the Fourteenth Circuit Panel erroneously concluded. United States v. Iron Hawk, 400 F. 3d 200 (14th Cir. 2002). Rather, it is a political categorization and is reflective of the historical treatment of Indians as protectorates of the United States government. Morton, 417 U.S. 535, 553. For this reason, the statute is subject only to rational basis analysis. The pertinent part of the Major Crimes Act reads:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States (emphasis added).

Major Crimes Act, 18 U.S.C. § 1153(a). The text of the statute specifically provides that Indians who commit crimes in Indian country shall be subject to equal treatment as non-Indians committing the same offenses within federal jurisdiction. Moreover, the Supreme Court has completely rejected equal protection challenges to this statute. Antelope, 430 U.S. at 641 (1977); Keeble, 412 U.S. at 212. The Antelope Court directly addressed the question "whether . . . federal criminal statutes violate the Due Process Clause of the [Vol. 28]

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Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.” Antelope, 430 U.S. at 642. As a basis for its holding, the Antelope Court held the classification of Indians under the Major Crimes Act is a political one arising from “the unique status of Indians as a ‘separate people’ with their own political institutions.” Id. at 646; see also Morton, 417 U.S. at 553 (establishing that federal regulation of Indian tribes is not to be viewed as the regulation of a racial group, but, rather, as governance of once-sovereign political groups). The Ninth Circuit Court of Appeals subsequently applied Antelope when it rejected an equal protection challenge to the Major Crimes Act in United States v. Yazzie, 693 F.2d 102, 104 (9th Cir. 1982) (holding that the use of state standards in 18 U.S.C. § 1153 to punish prohibited conduct does not violate equal protection). It is therefore clear from the established precedents that the Major Crimes Act does not rely on an unconstitutional racial classification.

2. United States v. Rogers was misconstrued by the Fourteenth Circuit Court of Appeals and does not apply to the Major Crimes Act.

The Fourteenth Circuit Court of Appeals below held, as a basis for its dismissal of Petitioner’s indictment, that the relevant case law treats Indians as essentially racial in nature. United States v. Iron Hawk, 400 F.3d 200 (14th Cir. 2002). This holding contravenes the well accepted and long established rule that Indian status is, in fact, a political classification and not an impermissible racial classification. Morton, 417 U.S. at 553. The appeals court relied on United States v. Rogers, 45 U.S. 567 (1846), in which the Court held that a white person seeking exemption from federal criminal jurisdiction, who became a member of a Cherokee tribe through marriage, is not “Indian” for purposes of federal criminal jurisdiction. The Rogers Court held:

[A] white man who at mature age is adopted in an Indian tribe does not thereby become an Indian . . . . He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception [for Indians] is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, — of the family of Indians.

Rogers, 45 U.S. at 572-573. The appeals court was right to point out that Rogers turned on a categorization of the defendant in that case as a racial non-Indian. However, the appeals court extrapolated an overly-broad legal conclusion from the Rogers holding. The Rogers Court, in fact, established
two criteria to “test” for Indian status: 1) the degree of Indian blood; and 2) tribal or governmental recognition as an Indian; a test that subsequent courts have generally followed. Keys, 103 F.3d at 761; United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979). Both the Keys court and the Broncheau court applied Rogers, and went on to hold that federal jurisdiction based on Indian status does not violate the Equal Protection Clause because the term “Indian” describes a political group and not a racial group. This is, in fact, well settled law after Morton, 417 U.S. at 551-552, and its progeny. Thus, the characterization of Indians as a “racial group” in Rogers is confined to that case only, and has been implicitly rejected by the Supreme Court in cases that directly address the classification of Indians in the Major Crimes Act itself. Antelope, 430 U.S. at 646; Keeble, 412 U.S. at 212.

3. Rational Basis: The Major Crimes Act has passed rational basis scrutiny, and is within Congress’ plenary authority over Indian affairs.

Finally, the Major Crimes Act has withstood rational basis analysis. Yazzie, 693 F.2d at 104; Antelope, 430 U.S. at 649. In each case, the court held that it is rational for Congress to enact a law that treats Indians in the same manner as all other persons subject to federal jurisdiction. Id. at 649. Petitioner may contend that in this case there was disparate treatment because Mr. Smith committed the same crime in the same location and was not subject to any punishment, whereas Petitioner was subject to both federal criminal sanction and tribal court sanction. This contention, however, is also without merit. As a general matter, Congress is not required to eliminate all differences in treatment between Indians and non-Indians, as long as all persons subject to federal jurisdiction are treated the same. Antelope, 430 U.S. at 646; Yazzie, 693 F.2d at 104. If, as Respondent believes, there is no federal jurisdiction over Mr. Smith in this case, then it is simply not necessary for Mr. Smith and Petitioner to be treated equally. If there is federal jurisdiction, Petitioner’s only claim can be one of selective enforcement since it is well established that the Major Crimes Act is constitutional. Petitioner’s selective enforcement claim, as discussed below, is similarly unavailing.

B. Selective Enforcement: Whether or not Mr. Smith is subject to federal jurisdiction, Petitioner’s selective enforcement claim fails.

To sustain an equal protection claim based on selective enforcement, Petitioner must show 1) that he was singled out for prosecution “on the basis of an impermissible ground such as race, religion, or exercise of [his] constitutional rights, United States v. Kidder, 869 F. 2d 1328, 1336 (9th Cir.
(1989); and 2) that the selective prosecution was motivated by a discriminatory purpose. 

Id. at 1336; Wayte v. United States, 470 U.S. 598, 608 (1985). Petitioner can show neither.

On the first factor, Petitioner was selected for prosecution in federal criminal court because of the crime he committed under a statute that brings him squarely under federal criminal jurisdiction, and not because of his race. Mr. Smith, on the other hand, is not subject to federal criminal jurisdiction pursuant to the rule created in McBratney, 104 U.S. 621 (1881), that a crime between non-Indians on an Indian reservation is a matter of state jurisdiction. The fact that Mr. Smith was not selected for prosecution implies nothing to support a claim that Petitioner was selected because of his race. On the second point, that the selective prosecution must be motivated by a discriminatory purpose, Petitioner can point to no evidence to support such a claim.

For Petitioner to prove either prong of his selective enforcement claim, he must, as a precursor, establish that Respondent could have prosecuted both Petitioner and Mr. Smith. Because there is no federal jurisdiction over Mr. Smith, Petitioner's selective enforcement claim necessarily fails.

1. McBratney and its progeny firmly establish that crimes between non-Indians on a reservation are matters of state, and not federal jurisdiction.

Respondent was merely following settled law when deciding not to indict Mr. Smith for lack of jurisdiction. In McBratney, a non-Indian defendant, who murdered another non-Indian on the Ute reservation in Colorado, challenged his indictment and conviction in federal court on the ground that he was not subject federal jurisdiction for a crime he committed on an Indian reservation. The McBratney Court held that "the Circuit Court of the United States for the District of Colorado has no jurisdiction of this indictment [and] should deliver up the prisoner to the authorities of the State of Colorado to be dealt with according to law." McBratney, 104 U.S. at 624. The Supreme Court has since interpreted McBratney to mean that "a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law." Antelope, 430 U.S. at 643. In Prentiss v. United States, 206 F.3d 960 (10th Cir. 2000), the Tenth Circuit Court of Appeals, in discussing the implications of the Indian Country Crimes Act, 18 U.S.C. § 1152 (1948), set forth a three-part rule for what level of government has jurisdiction in which cases:
Accordingly, under § 1152, contrary to the language of the statute but consistent with constitutional, sovereignty, and trustee concerns, crimes within Indian country that did not involve an Indian are, therefore, state crimes, see, e.g., McBratney, 104 U.S. 621, 26 L.Ed. 869, crimes between an Indian and a non-Indian are federal crimes, and crimes exclusively between Indians are, with some exception, matters of tribal law rather than state or federal law.

*Prentiss*, 206 F.3d at 968 (noting in a following footnote that the Indian Major Crimes Act makes some crimes between Indians occurring in Indian country a matter of federal jurisdiction). 6

Because Mr. Smith is not subject to federal criminal jurisdiction, Petitioner cannot claim that he was treated differently than Mr. Smith under this statute, since all that is required of the statute is that it treats people who are subject to federal jurisdiction equally, which it does. *Antelope*, 430 U.S. at 649. The statute is simply not required to ensure the elimination of all disparities in the treatment of Indians and non-Indians. *Id.* at 646; *Yazzie*, 693 F.2d at 104.

2. *Petitioner may claim that the Enabling Act of South Dakota provides for federal criminal jurisdiction, but Petitioner’s selective enforcement claim fails nonetheless.*

Petitioner may assert that Mr. Smith is subject to federal criminal jurisdiction based on the Enabling Act that made South Dakota a state. Petitioner may further assert that this argument is not inconsistent with the holding in *McBratney*. In *McBratney*, which concerned a crime on the Ute reservation in Colorado, the determinative factor was that the Enabling Act of Colorado retained state jurisdiction over Indian lands. *McBratney*, 104 U.S. at 624. South Dakota’s Enabling Act is different, however, in that it cedes jurisdiction over Indian lands to the federal government. The Act reads:

> [t]hat the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof,

6. The existence of federal jurisdiction over non-member Indians should not be read to exclude tribal jurisdiction. Rather, the *Prentiss* test should be read as recognizing federal jurisdiction in addition to the pre-existing tribal jurisdiction under 25 U.S.C. § 1301(2). In essence, the *Prentiss* test shows that there is concurrent jurisdiction between tribal courts and federal courts.
and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.


Precedent also supports the view that Indian lands in South Dakota fall under the exclusive jurisdiction of the United States Congress. Hollister v. United States, 145 F. 773 (8th Cir. 1906); Brown v. United States, 146 F. 975 (8th Cir. 1906). The Hollister Court held that,

Pursuant to the requirements of the enabling act of Congress, the people of South Dakota in the adoption of their Constitution in 1889 agreed, among other things, by article 26, that all Indian lands should remain under the absolute jurisdiction and control of Congress until the Indian title thereto should be extinguished by the United States.

Hollister, 145 F. at 778. Furthermore, in a comparison of McBratney and Hollister, the Brown court noted that the McBratney rule only applied to crimes committed "in a sovereign state the admission of which into the Union, without any exception with respect to the Indian reservations therein or the jurisdiction over them, removed those reservations from the plenary authority of the United States . . . ." Brown, 146 F. at 977. Moreover, the Brown court noted that the Hollister case "related to a crime committed in an Indian reservation in South Dakota, jurisdiction to punish which had been completely ceded to the United States by the state and accepted by Congress before its commission." Id. (emphasis added). Thus, Petitioner has some basis for his necessary (to make an equal protection) claim of federal jurisdiction over Mr. Smith. While rational, this argument nonetheless contravenes the well established Supreme Court precedent that there is no federal jurisdiction over crimes between two non-Indians on an Indian reservation. Antelope, 430 U.S. at 643; see also, Prentiss, 206 F.3d at 968.

7. Incidentally, the local state prosecutor in South Dakota interpreted the Enabling Act of South Dakota to exclude state jurisdiction over Mr. Smith. Of course, the local prosecutor's discretionary acts have no bearing on whether or not Respondent is guilty of infringing on Petitioner's equal protection rights under the United States Constitution.
Furthermore, even if this Court accepts Petitioner's claim that Mr. Smith is subject to federal jurisdiction, Petitioner's selective enforcement claim is still without merit because it was Respondent's belief that there was no federal jurisdiction, and not a discriminatory intent, that prevented Mr. Smith's indictment. If this Court accepts Respondent's interpretation of McBratney, then the fact that Mr. Smith was not charged is, at worst, a consequence of a flawed application of precedent in a complicated area of jurisprudence. This mistake, if there was one, certainly does not imply that Mr. Smith was not indicted because of his race as a non-Indian, or that Petitioner's indictment and prosecution is motivated by racial discrimination. In other words, even if the court accepts the proposition that Respondent could have indicted Mr. Smith, the reason for not doing so does not sustain a selective enforcement claim because there was no invidious racial discrimination.

Conclusion

Petitioner has raised two substantive defenses: that his Fifth Amendment guarantee against double jeopardy, and that his equal protection rights, have been violated. Specifically, in arguing that his Fifth Amendment guarantee against double jeopardy has been violated, Petitioner argues that the Duro override legislation, 25 U.S.C. § 1301(2) (Indian Civil Rights Act), should be read to grant jurisdiction over non-member Indians to only tribal courts. Rather, this Court should reject such a narrow interpretation of the Major Crimes Act, 18 U.S.C. § 1153, in light of the history of congressional intent to maintain concurrent tribal court and federal court jurisdiction. The Major Crimes Act was enacted to specifically grant federal court jurisdiction over the fourteen enumerated crimes in the Act. Additionally, 25 U.S.C. § 1301(2) (1990) recognizes the inherent power of tribal governments to assert jurisdiction over Indians, including non-member Indians. Read together, it is clear from these two statutes that Congress intended for concurrent jurisdiction to exist between the tribal courts and federal courts over non-member Indians.

Additionally, this Court can look to Wheeler to find that the Fifth Amendment guarantee against double jeopardy is not violated by prosecutions in both tribal courts and federal courts. 435 U.S. 313 (1978). Specifically, the Wheeler court found that as both the federal government and tribal governments are sovereign nations the dual sovereignty exception to double jeopardy applies. Id. The holding in Wheeler has been applied to non-member Indians, like Petitioner, in Enas and Male Juvenile. The Enas court held that the dual sovereignty exception applies in cases involving non-
member Indians, because tribal governments have the inherent power to prosecute non-member Indians, as evidenced by 25 U.S.C. § 1301(2) (1990). The Male Juvenile court concurred with the holding in Enas, as the court held that because tribal governments are sovereigns they possess the right to prosecute non-member Indians. Male Juvenile, 280 F.3d at 1021. As a result of the holding in Wheeler and the subsequent application to non-member Indians in Enas and Male Juvenile, this Court should reject Petitioner's claim that his Fifth Amendment guarantee against double jeopardy has been violated because the dual sovereignty exception applies in this case.

Petitioner's defense to his indictment in federal court on Fifth Amendment equal protection grounds is also without merit. First, the statute under which Petitioner was charged is constitutional. The Major Crimes Act has previously withstood equal protection challenges, and the Supreme Court has consistently held that it is rational for Congress to ensure that Indians who commit crimes on a reservation are subject to the same laws as all other persons who are subject to federal jurisdiction and who have committed the same offenses.

Because the statute itself is valid, Petitioner's only other equal protection claim is that he was selectively prosecuted because he is Indian. This claim is similarly unavailing. Petitioner's non-Indian alleged partner in the burglary was simply not subject to federal jurisdiction under either the statutory scheme Congress has devised for regulating crimes in Indian country or settled Supreme Court precedent. It is impossible that Petitioner was 1) selected for prosecution over Mr. Smith because of his race, and 2) that the prosecution was motivated by a discriminatory intent. Neither contention is valid because it was jurisdictionally not possible to prosecute Mr. Smith under federal law. Alternatively, even if it was possible to prosecute Mr. Smith in federal court, the fact that Respondent thought it to be impossible negates the necessary discriminatory intent required to sustain a selective enforcement claim. For the above reasons, Petitioner's equal protection claim fails. Simply put, he was indicted and charged in federal court for his role in burglarizing a private home on an Indian reservation, which is against the laws of the United States.

Ultimately, this Court must reject Petitioner's claims that his guarantee against double jeopardy, and that his equal protection rights, are being infringed by his prosecution in federal court. To hold otherwise would be to upset Congress' carefully enacted statutory scheme to regulate Indian affairs, as well as Supreme Court precedent.