Brief of Amicus Curiae, *United States v. Kills Plenty*, 466 F.2d 240 (8th Cir. 1972) (No. 71-1661) (David H. Getches and Thomas L. Smithson, Native American Rights Fund).

IN THE

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 71-1661

Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

PERCY KILLS PLENTY,

Appellant.

BRIEF OF AMICUS CURIAE

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STATEMENT

The Native American Rights Fund files this brief amicus curiae by leave of this Court granted through letter to John J. Simpson, Esq., attorney for appellant herein, under the date of May 26, 1972.

The Native American Rights Fund is a private, non-profit corporation organized for the purpose of and dedicated to protecting the rights and enhancing the welfare of American Indians and providing legal representation and counsel in cases of major significance. The Fund files this brief because of the importance of the issues of tribal sovereignty and the relationship between tribal and federal courts.

Amicus adopts appellant's statement of the case.

ARGUMENT

It is the position of the Native American Rights Fund as Amicus Curiae that the acquittal of Percy Kills Plenty in the Rosebud Sioux Tribal Court on charges of driving while intoxicated bars by collateral estoppel the relitigation of the issue of intoxication in the subsequent federal prosecution for involuntary manslaughter, notwithstanding the fact that the power of an Indian tribe to punish criminal offenses is inherent rather than derivative from the sovereignty of the United States government. Amicus respectfully submits that the United States government is so inextricably involved in the administration of justice in tribal court, and the Congress' plenary power over such matters is so extensive that this case demands the rejection of the doctrine of dual sovereignty applied as between state and federal prosecution and requires the application of collateral estoppel.

The United States Supreme Court has defined "collateral estoppel" as a principle which "means simply that when an issue of ultimate fact has determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970). While this doctrine is applicable to successive criminal proceedings, Ashe, supra, it has been

held that the determination of an issue of fact in the court of one sovereign is no bar to relitigation of that issue in a subsequent prosecution in a court of another sovereign, Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Feinberg, 383 F.2d 60, 71 (2d Cir. 1967).

However, the rule that an adjudication of a factual issue in one court is binding on another court only when the two tribunals are "arms of the same sovereign" is relevant solely to the state-federal dichotomy. The leading case of Bartkus v. Illinois, supra, which allowed a state prosecution after a federal acquittal for the same offense, speaks only in terms of that relationship. The only other findings of dual sovereignty have involved the relationship between states and their municipalities, e.g., Barnett v. Gladden, 255 F. Supp. 450, 453 (D. Or. 1966), affirmed on other grounds, 375 F.2d 235 (9th Cir. 1967), but state and municipal courts were held to be instrumentalities of the same sovereign in Waller v. Florida, 397 U.S. 387, 393 (1970).

In United States v. DeMarrias, 441 F.2d 1304 (8th Cir. 1971), it was argued before this circuit that a tribal court and federal district court are arms of the same sovereign. However, the Court found that it was unnecessary to decide that issue because the doctrine of collateral estoppel was not applicable to the facts of that case.

It is beyond question that power of an Indian tribe to

make conduct by its members criminal and punish the same is a residual and inherent attribute of tribal sovereignty and Indian nationhood, and not a power derived from the United States. The leading case on this subject is Ex Parte Crow Dog, 109 U.S. 556, 27 L.Ed. 1030, 3 S.Ct. 396 (1883). In that case it was held that neither the Treaty with the Sioux of April 29, 1868, 15 Stat. 615, nor the 1877 Agreement, 19 Stat. at L. 254, repealed Section 2146, U.S. Rev. Stat., which excepted crimes by one Indian against another from federal jurisdiction. As a result of the Supreme Court holding, Crow Dog's conviction of the murder of Spotted Tail in Dakota Territorial Court was vacated.

Public reaction to the release of Spotted Tail's killer was so intense that Congress passed the Seven Major Crimes Act, the Act of March 3, 1885. That statute provided that seven major crimes[1], if committed by an Indian against any Indian or other person in Indian country, would be prosecuted under the same laws and penalties as other offenses within the exclusive jurisdiction of the United States.

The enactment of the Seven Major Crimes

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[1] The seven crimes were murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. 23 Stat. 385, Ch. 341, § 9.

Act[2], while recognizing the inherent power of Indian tribes to punish offenses, expressed the feeling of the Congress that tribal law and custom did not result in justice, especially in matters of a serious nature. See Comment, Tribal Self-Government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955, 957 (April, 1972).

Notwithstanding the fact that Congress deprived Indian tribes of the power to punish these seven major offenses, it has never been denied that power to punish offenses was an inherent power of the tribes. Ex parte Crow Dog, supra, and Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). Neither has it been denied, however, that Congress may take away any and all of this inherent tribal jurisdiction to punish offenses by the adoption of legislation in the exercise of its plenary power to regulate Indian affairs. Lone Wolf v. Hitchcock, 187 U.S. 553 at 565, 47 L.Ed 299 (1903). Amicus respectfully submits that it is

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[2]Prior to the enactment of the Seven Major Crimes Act, several other statutes dealt with the criminal jurisdiction of the United States. See the Act of 1796, (1 Stat. at large, 469, Ch. 30), the Act of 1802 (2 Stat. at large, 139, Ch. 13), § 25 of the Indian Intercourse Act of 1834, (4 Stat. at large, 733, Ch. 161). The pattern of these statutes was to enumerate and define crimes by Indians against whites and whites against Indians, but Indian crimes by Indians were left to be dealt with by each tribe for itself according to its local customs. Donnelly v. U.S., 228 U.S. 243 at 270, 57 L.Ed. at 831 (1913). § 25 of the Indian Intercourse Act subsequently became § 2145 of the United States Revised Statutes. That section extended to Indian country the general laws of the United States as to crimes.

within this plenary power of the federal government to apportion the judicial business relating to Indians between tribal, federal, and state courts. This power makes the United States the only significant sovereign in the field, regardless of the origin or source from which tribal power to punish offenses flows.

The plenary power of Congress has been exercised in many ways: adopting standards for the administration of tribal criminal justice, depriving tribes of jurisdiction to adjudicate certain offenses, and in some cases, transferring all criminal jurisdiction to state governments.

In the exercise of this plenary power Congress expanded the list of major crimes over which the federal courts have jurisdiction to eight in 1903, to ten in 1932, to twelve in 1966 and thirteen in 1968[3].

In another major exercise of its plenary power, Congress, in the Act of August 15, 1953, transferred certain jurisdiction over Indians committing crimes in Indian country to some state courts of five specific states. Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162. Similarly, the consent of the United States was given to other unnamed states to assume criminal jurisdiction pursuant to Public Law 280.

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[3] The crime of assault with a dangerous weapon was added in 1903. 32 Stat. 793. In 1932 incest and robbery were added to the list of major crimes. 47 Stat. 336. Assault with intent to commit rape and carnal knowledge were added in 1966. 80 Stat. 1100. And the crime of assault resulting in serious bodily injury was added in 1968. 82 Stat. 80.

Several states, though not South Dakota, acted to assume civil or criminal jurisdiction of the permission granted in Public Law 280 prior to the enactment of the 1968 Civil Rights Act, which added the requirement that the Indian tribes in the area to be affected by the assumption of state jurisdiction, consent to the assumption of that jurisdiction by the state. 25 U.S.C. § 1326.

Most recently the Congress exercised its plenary power over Indian criminal justice in the Indian Civil Rights Act, Public Law 90-284, April 11, 1968, 82 Stat. 77 et. seq. In addition to altering the procedure by which criminal jurisdiction might be acquired by states at the expense of tribes[4], the Act imposed upon tribal courts new and sweeping constitutional guarantees, not theretofore assertable by an Indian against his tribal court. Among the rights now accorded Indian defendants in tribal court are the right to counsel at his own expense, the right to a jury trial of six persons, the limitation of tribal power to punish him to $500 or six months, and a general guarantee of due process.[5] In addition, 25 U.S.C. § 1303 makes available the writ of habeas corpus to federal court to review the detention of any person upon the authority of an Indian tribe. In essence, the

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[4] P.L. 90-284, Title IV, § 401, 82 Stat. 78, 25 U.S.C. § 1321 (a).

[5] P.L. 90-284, Title II, §§ 201, 202, April 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1301, 1302.

Congress, exercising its plenary power in the field of Indian affairs, has made United States district judges the final arbiters of the validity of the substance and procedure of tribal criminal laws. The federal courts have begun to exercise this responsibility. Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969), Longcassion v. Leekity, 334 F. Supp. 370, (D. N.M. 1971).

Many other examples of federal power to effect the administration of tribal justice may be cited. The tribal code under which Kills Plenty was charged and acquitted is, no doubt, modeled upon the Code of Indian Offenses, adopted by the federal government for Courts of Indian Offenses and set forth in 25 C.F.R., Chapter I, Subchapter B, Part 11.[6] It is a matter of record in the instant case that the tribal judge was a federal employee, paid with federal funds. While these instances are not so significant as the power to expand, contract, and destroy tribal criminal jurisdiction set forth above, nonetheless they serve to illustrate the massive federal involvement in the administration of tribal justice.

This federal involvement, together with the history of the development of Indian courts (as distinguished from

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[6] See authorization to Secretary of Interior to recommend to Congress a model code, P.L. 90-284, Title III, § 301, April 11, 1968, 82 Stat. 78, 25 U.S.C. § 1311.

the inherent origin of the power to make conduct criminal and punish it) was the basis for the holding that the tribal courts of the Fort Belknap Reservation were, in part, arms of the federal government. Colliflower v. Garland, 342 F.2d 369 (9th Cir., 1965). The reasoning of Colliflower was extended in Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir., 1969). These cases upheld the issuance of federal habeas corpus to determine the validity of detention under order of a tribal court. Whether or not the court was correct in issuing habeas corpus prior to the Congressional granting of that power in the 1968 Civil Rights Act, 25 U.S.C. § 1303, the reasoning of those decisions supports the contentions of Amicus here.

In spite of the source of tribal criminal power, however, the reality is that the Congress, since 1885, has exercised its superior power to apportion tribal criminal judicial business and to regulate the field of Indian criminal justice. In reality, therefore, it is only the power of the federal government which must be looked to in the analysis of this case. See, U.S. v. Kagama, 118 U.S. 375 (1886). In the view of Amicus, it is insignificant that Congress has chosen to confer major criminal jurisdiction on federal courts, leaving what is essentially misdemeanor jurisdiction in the tribal court. While the result in Kills Crow v. United States, 451 F.2d 323

(8th Cir. 1971) is troublesome, that result merely recognizes the manner in which Congress has apportioned Indian criminal jurisdiction. It does not stand as a monument to the separation of two sovereigns, each of which defines and punishes its offenses separately.

In spite of the foregoing, it is contended by the United States that the doctrine of collateral estoppel is inapplicable to the present case because the successive prosecutions herein are by separate sovereigns. The Government urges this Court to analogize the relationship of the federal government to Indian tribes to the dual sovereignty relationship of the federal and state governments. Appellee's Brief at 7.

Amicus respectfully submits that such an analogy is entirely inapposite here. Congress may not enact changes in state criminal law and procedures although those procedures and laws are subject to Constitutional limitations on state power which are either explicit, or which are applied to the states through the Fourteenth Amendment to the United States Constitution. From what has been said above, it is clear that the federal government exercises plenary power to alter the substance and procedure of Indian criminal justice which it cannot exercise in regard to states.

Given the facts of this case and the reality of

the federal-tribal relationship, there is a more appropriate analogy. Felix Cohen has suggested that, in the field of tribal powers in the administration of criminal justice,

> ...an Indian tribe bears a relation to the Government of the United States... similar...to that relationship which a municipality bears to a state. An Indian tribe may exercise complete jurisdiction over its members within the limits of the reservation, subordinate only to the expressed limitations of federal law.
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> COHEN, HANDBOOK OF FEDERAL INDIAN LAW, University of New Mexico reprint of 1942 edition, at 148.

Amicus does not urge, nor does this case require, that Cohen's "municipal" analogy be adopted by this Court as a touchstone for the analysis of tribal political power in any field but that presented by the facts of this case. Such a generalization, without the benefit of concrete controversies ripe for adjudication would likely be erroneous and an abrogation of the federal courts' consistent guardianship of "the authority of Indian governments over their reservations." Williams v. Lee, 358 U.S. 217, 223, 3 L.Ed. 2d 251, 79 S.Ct. 269 (1959).[7]

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[7]The designation of a tribe as having municipal relationship to the federal government, of course, says nothing regarding the absence of state jurisdiction over Indians in Indian country. See Kennerly v. Montana District Court, 400 U.S. 423 (1971), Williams v. Lee, 358 U.S. 217 (1959), Kain v. Wilson, 161 N.W.2d 704 (1968), Pourier v. Board of County Commissioners of Shannon County, 157 N.W.2d 532 (1968), Employment Security Department v. Cheyenne River Sioux Tribe, 119 N.W. 2d 285 (1963), Smith v. Temple, 152 N.W.2d 547 (1967). No such question is presented here. (Footnote 7. continued on next page).

Cohen's analogy is particularly appropriate here, although the source of tribal political power is inherent in its existence as an Indian nation, while the source of the power of a municipality in a state is the state legislature and the state constitution. Waller v. Florida, 397 U.S. 387, 393 (1970). That is, before the exercise of federal plenary power regarding tribal criminal jurisdiction, the Indian tribe possesses all criminal jurisdiction; prior to the affirmative action of a state legislature or constitutional convention, a municipality may possess no criminal jurisdiction and it may not in fact, even exist. However, as the federal government limits tribal criminal jurisdiction, and as the state government confers criminal jurisdiction on the municipality, it is possible that both the tribal government and the municipality may end up with the same power. Significantly, additions to and subtractions from the criminal jurisdiction of both smaller governments are entirely within the plenary power of the larger governments. Accordingly, in practical terms, the federal government bears the same unitary relationship to the Indian tribes which the state

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7(Continued)

Similarly, the inherent and internal powers of an Indian tribe over its members in fields other than criminal justice are not involved. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956), Oglala Sioux Tribe v. Barta, 146 F. Supp. 917 (1956), aff'd 259 F.2d 553 (1958).

For these purposes, tribes are "domestic dependent nations." Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1833).

governments bear to their municipal subdivisions. Given this reality, it would be unsound to impose upon the federal tribal relationship the dual sovereignty concept which exists as between the federal government and the states. Dual sovereignty is, after all, a concept uniquely grounded in the theory of federalism which is premised upon the creation of a national sovereign by the cession of certain powers by several independent sovereigns. This does not describe the relationship of Indian tribes to the federal government in any way.

On the basis of the foregoing, Amicus respectfully contends that tribal courts are, for the purpose of criminal jurisdiction at least, arms of the federal sovereign at whose sufferance they exist. Accordingly, the identity of parties necessary to the application of collateral estoppel clearly exists in the present case. Under the rule of Ashe v. Swenson, 397 U.S. 436 (1970) this Court should refuse to permit the relitigation by the federal district court of an issue already resolved favorably to Appellant in tribal court.

CONCLUSION

For the foregoing reasons Amicus respectfully contends that the relief prayed for by Appellant should

be granted and the conviction below reversed.

Dated this 14th day of June, 1972.

Respectfully submitted,

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By_____
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