

Reason to Fear
The Cultural Defense of Hooty Croy

Defense Case Outline to Accompany the Video

Capitalizing on Race and Culture:

The Croy Acquittal and its Application to Future Minority Cases

By Denise Ferry

Introduction

In May of 1990 Patrick Hooty Croy, an American Indian, was acquitted in his San Francisco capital retrial of the homicide of a Yreka police officer, attempted murder of several other officers and robbery.

The most important element in shaping the Croy victory was that the race of the defendant was made the central issue of the defense. A "cultural defense", normally confined to the penalty phase, was incorporated into all stages of the pretrial and trial proceedings. The presentation of issues from the context of a cultural perspective had such a profound impact on the jurors that in their estimation the case was "clearly about racism," and the charges were "just the backdrop" and "the only possible verdict under the circumstances was acquittal." What the cultural defense was and how it may be applied in future cases is the subject of this article.

History of the Croy Case

On a hot July night in Yreka, 1978, Patrick Hooty Croy, then age 22, and four of his relatives (ages 17 to 26) stopped at a local store for beer. The store clerk became verbally abusive and incited a physical altercation with two young women in the group. As the group left, a Yreka police car coincidentally drove into the parking lot. The store clerk directed the police to "get them", and a chase ensued and continued to the Croy cabin. Several hours of gunfire followed between the Indians (who had one .22 hunting rifle among them) and 27 police officers (armed with rifles, shotguns, .357 magnums and semi-automatics). One police officer was killed and one was injured. Three of the Indian youths, including Patrick Croy, were also wounded.

The local media coverage was relentless and clearly biased: A lowlife, drunken, trouble-making Indian had killed one of Yreka's finest. After the trial was moved from Siskiyou County to Placer County, the defense attorneys presented a diminished capacity defense. Mr. Croy was convicted of murder, attempted murder on two police officers, assaults on four officers, and robbery. He then received a sentence of death.

Thanks to the intervention of Gail Weinheimer, Allan Keown and other California Appellate Project staff, all but the conspiracy and assault convictions were overturned by the Rose Bird court in December 1985 and a new trial was ordered.

What is the "Cultural Defense"?

The cultural defense is the presentation at trial of the pressures which have been placed upon the minority defendant by the dominant culture and how these pressures have impacted upon his or her life and the conduct at issue. These pressures come vertically in time through the collective cultural memory passed down to the defendant of the oppression and hardship experienced by his forebears and horizontally across time through the contemporary spectrum of institutional and social pressures brought to bear directly on the life of the defendant himself. The underlying theory of the cultural defense as conceived of in Croy is that it is not possible to fully prepare to defend any minority defendant without exploring the potential ways of using this cultural background during each stage of the criminal process. Although its application, in some form, has sometimes been utilized in penalty phases, its incorporation into other phases of the trial may also be necessary.

In order to discuss the Croy case properly, and to offer it as a model for future cases, it is necessary to give a brief synopsis of the actual cultural background of Patrick Croy since the cultural defense flowed from that information.

Cultural History of Patrick Croy

Beginning in the mid-1800's, the State of California and most of its citizens adopted a policy to rid the land of the Indian people that had lived there for thousands of years. During a 20 year period (1850-70) 80 percent of the indigenous people died. This catastrophe has still not been officially acknowledged.

Particularly in rural areas of California, there continues an unofficial and often unrecognized policy of repression and intimidation which affects the day-to-day life of every Indian person in that community. A host of treaty rights, land claims and conflicting views of land use make the presence of Indians in rural areas of California a potential threat to the interests of the dominant community. Indian people continue to be in the way, resented for their mere presence.

In the community at large there are many unchallenged stereotypes of Indian people. These stereotypes tend to be largely criminal in nature: violent, drunken, lazy, dishonest. They have remained in place partly because of a continuing need to justify the

historical treatment of Indian people and because, in response to the massacres, those Indians who survived drew into themselves and lived in the kind of physical and social isolation that prevents any real contact that would lead to the breaking down of those stereotypes.

When the actual killing of Indians diminished, the survivors fell under the care of various governmental bodies that proved to be harsh and pernicious. The health, education, and legal assistance which was provided, eroded the community and led to its present entrenchment at the bottom of all social indices for health, life expectancy, education, employment and at the top for suicide, alcoholism and family dysfunction. So blatant was the abuse of Indian people by their governmental guardians that the federal government has had to intervene as late as 1978 and pass such fundamental legislation as the Indian Child Welfare Act to prevent the continued wholesale removal of Indian children from their families and the Native American Freedom of Religion Act to clarify that indeed there is an Indian religion and that it is entitled to the same protection as any other religion.

The Croy Retrial and its Application of the Cultural Defense

It is not possible to cover four years of trial preparation and the eight-month trial in any kind of detail. Rather, this article will discuss some specific examples of the way in which the cultural defense was woven into each stage of the case and then focus on a discussion of a model for the construction of any death penalty defense for a minority person in future cases.

The starting point of the defense preparation consisted of the defense team (attorneys, investigators and paralegals) developing a working knowledge of Patrick Croy's Indian background and the racial oppression he and his community had experienced in Siskiyou County. That knowledge was gained through conversations with him, local Indian people, Indian experts, Indian leaders and written material.

This understanding led to the rejection of the inappropriate diminished capacity defense for the retrial. Self defense was the true defense and could prevail, particularly if augmented with a cultural explanation. We felt confident that if the jury understood how both Mr. Croy's and the police officers' state of mind was imbued with the historic relations between Indians and whites (i.e., that the police were playing out the role of the vigilantes of the last century, and likewise, that Mr. Croy's actions that night were an outgrowth of the historic state of mind of his forefathers which caused him to believe that, like them, he was about to be killed), they would return a verdict of not guilty.

Change of Venue

From the basic understanding of the cultural background, we felt solid in our conviction that based on historic relations between Indians and whites in all rural Northern California counties, Mr. Croy's retrial had to be removed from Placer County. It was also clear that the all-white jury we would likely face in Placer County would have a difficult time objectively hearing our self-defense case, which would be based upon the contention that white police officers tried to kill Indians. We relied upon the traditional criteria for change of venue and emphasized the lurking danger of a prior conviction in a small community, but the thrust of our motion was the cultural defense. Our investigation showed that recent events in the last 20 to 30 years in Placer County placed the Indian community in a negative light and had inevitably contributed to the anti-Indian climate which resulted in Croy's first conviction there. His mere presence, should he be retried there would reactivate all the old anti-Indian stereotypes and biases. During the four-day evidentiary hearing, eight witnesses, six of whom were Indian people, testified regarding the history of Indian/white relations in California generally and in Placer County specifically. We bolstered this contention with a survey interpreted by venue expert Professor Ed Bronson from Chico. Another witness, local public defender Dave Humphrey, substantiated the danger in Indian-defendant cases by relating a post-jury interview that revealed one juror in deliberation saying "well, this is exactly what happens when an Indian gets liquored up or has too much to drink." It demonstrated the difficulty of uncovering anti-Indian bias in voir dire despite specific questions which had been designed to unearth it.

We contended that only in an urban environment, with its diverse population, more tolerant views and removal from the ongoing competition for local natural resources, could an Indian find a fair and impartial jury.

Judge Richard L. Gilbert, responding in part to the cultural defense testimony of our witnesses, ordered a change of venue, noting that

...the potential for residual bias against the defendant in the context of traditionally preconceived notions [regarding Indian people] raises a risk that prejudice will arise during the presentation of the evidence unrelated to the facts.

In these times of overburdened courts, it was not easy to find an alternative venue for trial. After a year of searching, the only two counties that became available were Stanislaus and San Joaquin, both as unacceptable to the defense as Placer County. In a two-day hearing, we demonstrated that racial bias against Indian people also existed there. An Indian woman from the local Indian education program testified regarding the

contempt with which the entire community viewed the attempt of the Indian community to defend a legally protected Indian burial site. A local educator discussed minority voting rights suits against the local government. Professor Bronson analyzed the local media's anti-Indian bias and its effect upon that community.

Pretrial Motions

The cultural background of our client was raised in two pretrial motions: First in a motion to strike the special circumstances as impermissibly charged due to the defendant's race, which was denied. Second, in a pretrial motion to admit evidence of the historical and contemporary Indian/white relations in the context of self-defense, which was granted.

Jury Selection

With the help of Karen Jo Koonan and Deana Logan at the National Jury Project, jury questionnaires and voir dire questions directed at the issue of race were incorporated into the jury selection process. Of the seven men and five women jurors who ultimately deliberated the case, three were black, two were Hispanic, two were Asian and five were white.

Guilt Phase

The prosecution asserted three different theories to support its first degree murder charge: That Mr. Croy conspired with others to kill police officers; that the killing occurred during the commission of a robbery; and that Mr. Croy committed premeditated and deliberated murder. The defense to both the robbery and the conspiracy was that they did not occur. Mr. Croy admitted shooting the officer, but in self-defense, acting as a reasonable person would have acted under similar circumstances. The cultural evidence presented by the defense in the following areas contributed to the jury's acquittal on all counts.

1. Experts in anthropological linguistics and eyewitness identification were called to explain how the prosecution's non-Indian witness who allegedly heard and identified certain defendants talk about "shooting the sheriff" (the basis for the conspiracy theory) could have misidentified, misunderstood or misinterpreted the speakers. The defendants had been discussing "shooting poofitch" (going deer hunting); the experts verified that the Indian word for deer was "poofitch" and compared it phonetically with "sheriff".

Other areas of the linguist's testimony explained that Indian speech patterns differ from non-Indian speech. In addition, even if angry statements had been made by some of the Indian people, the linguist pointed out how anger and frustration felt by minority groups are vented by hostile language which should not be interpreted as literal expressions of intent. He also discussed how the silence by Indian listeners to this hostile language should not be viewed as an acceptance or adoption of the sentiments but to the contrary signified disapproval and rejection by this particular community. The eyewitness expert, Elizabeth Loftus, emphasized the dangers of cross-cultural identifications made by the non-Indian witnesses.

2. Expert witnesses in the field of Indian history and contemporary affairs testified regarding the interactions between the Indian and non-Indian communities in Siskiyou County. This evidence was relevant to Mr. Croy's state of mind, i.e., his good faith belief, whether reasonably or unreasonably held, that it was necessary to defend himself with lethal force. A large map of the area with numerous overlays illustrating the significant historical events (settlements, gold mining, massacre sites), was used in conjunction with the historian's testimony. A local Indian educator and an Indian administrator of local social services programs discussed the contemporary relationships between the Indian and non-Indian communities. Ed Bronson presented an analysis of the depiction of Indian people in the local media over an eight-year period. In his opinion, Indian people received consistently negative and hostile coverage, particularly in their struggle for Indian rights. The comic strip "Tumbleweeds", which ran daily in the paper, exacerbated this image in its characterizations of Indian people as lazy, dishonest, violent, and sneaky.

3. The testimony of an Indian psychologist who had interviewed Mr. Croy over the years, and finally Mr. Croy himself, provided the nexus between the foregoing cultural evidence and his state of mind that evening. Mr. Croy had himself grown up hearing stories of the genocide of his people; and he and his relatives had repeatedly been subjected to police harassment. This evidence confirmed the defense contention that a reasonable person in Mr. Croy's situation would have responded in the same manner; he would have run from police when chased even though he hadn't done anything wrong; he would have been afraid to surrender to the police once the shooting at the cabin area started; and he would have ultimately fired the fatal shot. Special jury instructions were drafted which incorporated the cultural evidence into or supplemented the CALJIC instructions on flight, self-defense and homicide. The jury was thus able fully and fairly to apply the law to the facts.

Jury Responses to Cultural Defense

Shortly after the acquittal, Ms. Koonan conducted extensive interviews with several members of the jury. Their comments confirmed the impact of the cultural defense evidence:

The cultural defense testimony set the tone of the case....Everyone said it was very important....Obviously the jury accepted that presentation or it wouldn't have come to the conclusion it did....The defense case progressed so well because the cultural defense was so well integrated into the case.

One juror stated that upon hearing the charges, he thought they sounded “so damning” and “wondered how the defendant was going to respond” As the testimony developed, that juror felt that “the main issue was racism.”

Ms. Koonan also asked about their reaction to each specific cultural witness. Regardless of their feeling about the content, the jurors were profoundly impressed with the fact that many of the expert witnesses were themselves Indians; and this added greatly to the impact of their testimony.

This general understanding of the cultural background of Mr. Croy was of critical importance in several specific areas. In rejecting the prosecution’s conspiracy theory, the jury relied upon the linguist’s testimony regarding the chances of misinterpretation by white listeners to the Indian youths’ conversation. The acceptance of other testimony regarding racism in Siskiyou County led some jurors to remark that if there was any conspiracy to commit murder that evening, it was on the part of the police. Most important, the jurors believed that the police used excessive force that evening, based on cultural evidence, in conjunction with the testimony of police expert Frank Saunders. The defendants’ failure to surrender was also made understandable to the jury after listening to the cultural evidence.

Application of the Cultural Defense to All Minority Defendant Cases

No matter what the ethnic background of a minority defendant, the defense must begin with an examination of the cultural context of the individual. Although the specific examples cited in this article involve an Indian defendant, the overall approach applies to all minority clients.

Investigation and Trial Preparation

It is very important that the defense team gain a solid grasp of the defendant's cultural background as early as possible since this affects the investigative work and correspondingly shapes the decisions regarding strategy.

Every attempt must be made to locate respected leaders and experts from the defendant's community who can sit down with the defense team in the beginning and help look at cultural issues which are relevant to the case. These individuals can usually be located in the Ethnic Studies departments of universities, community health clinics, social service agencies and legal defense and cultural groups. If approached in a spirit of openness and respect, individuals will come forward who are willing to talk with you in an effort to assist a member of their community facing such serious charges.

These individuals, once familiar with the facts of the case, can usually suggest culturally sensitive people who can help interview the client in their capacities as psychologists or psychiatrists and testify at trial. They can also, particularly if they are educators, help identify studies and experts which speak to the specific interaction of traumas and ethnicity in your case.

These individuals can also be helpful in examining ways to bridge the gap between the legal team and the defendant and his community. For instance, the Indian community is both alienated and intimidated by the dominant culture's legal system, which has been experienced as an incomprehensible and hostile force in their lives. This mistrust extends to the category of defense attorneys and investigators, (no matter how well intended) who are viewed as "just part of the system" and who "don't listen to us." When this attitude is combined with an ingrained reluctance to discuss "Indian business" with outsiders, an environment exists in which it is extremely difficult to build the trust necessary to gather the facts and compile the personal history necessary for the defense. Any sincere attempt to understand the cultural background of the defendant and to conduct one's interaction with the defendant, his family and community according to the norms of that community will be greatly appreciated and ultimately rewarded. Indian people, for instance, are extremely courteous and place a great value on respectfully listening to one another. If basic courtesies are not observed, no real information of value can be revealed because the right relationship to convey the information has not been established.

Community leaders, if asked, can be helpful in suggesting ways to minimize intercultural friction and misunderstanding between the defense team and the client and his community since they themselves have had to become adept at interacting between the two worlds. The inclusion on the defense team itself of paralegals or investigators

who are themselves from the defendant's community is another way to facilitate the work.

Paying particular attention to your client's needs in jail, including facilitating regular visitation by family members, will help in the development of a meaningful attorney/client relationship. If the family isn't visiting, discrete inquiries need to be made because often there is not sufficient funds for transportation. When preparing for penalty phase, it is often necessary to have joint conferences with family members and the client.

The client may also benefit from the visits of a spiritual advisor. Special request of, or some degree of pressure upon jail administrators may be needed, since only Christian services are available in most jails. In the case of Indian people, California Indian Legal Services in Oakland has been successful in litigating this issue on behalf of incarcerated American Indians' right to their traditional religious practices. Visitation by counselors of the same background as the defendant may assist in preparing your client mentally for the trial. Such individuals can often be located in local social service programs or in programs specially targeted to your defendant's community. If alcohol was involved in the offense, your client's commencement of counseling at this early stage would demonstrate a willingness and potential for change; thus, these counselors from the defendant's community may become valuable trial witnesses.

Efforts should be made to encourage the defendant's community's attendance at the trial. Following the Croy trial, many jurors told us they were very impressed with the Indian people who came to court to show their support for the defense. Local agencies and/or community centers can be contacted for assistance in distributing notices of the trial; oftentimes family members can be extremely helpful in this area.

Trial Presentation

Pretrial Presentation

When considering change of venue and other pretrial motions and jury selection, your client's race may be an important factor upon which to focus, as the Croy case demonstrates.

Guilt Phase

The cultural background of the defendant can impact the presentation of the defense at the guilt phase. The status of the defendant as a minority may have had a direct effect on his behavior or other people's behavior at the time of the incident. Whenever the defendant's state of mind is relevant to the offense charged, cultural evidence is admissible.

For example, when the defense is self-defense, cultural evidence may be relevant to demonstrate that the defendant not only acted based upon an honest, good faith belief that his life was in peril, but also that he acted as a reasonable person "similarly situated."

Cultural evidence may also be relevant where the defense is insanity or where drug or alcohol-related mental illness surfaces leading to diminished actuality. If substance abuse is an ingredient in the defendant's background, this area should be thoroughly explored by an expert. It is crucial that the expert have specific experience with the defendant's community because of the important difference in drinking patterns and cultural relationship to alcohol from one community to another.

The defendant's cultural beliefs may also provide some justification or excuse for his actions, which could reduce the degree of culpability. When the defendant claims that he did not commit the offense, cultural evidence may be relevant in establishing the defendant's good character or lack of motive to commit the particular offense. If, for example, the client is a spiritual person, his religious beliefs may be inconsistent with the behavior at issue, e.g., possession or use of drugs or weapons.

Cultural evidence may also be relevant as impeachment evidence to establish bias, interest or motive on the part of prosecution witnesses, especially any non-Indian eyewitnesses.

Penalty Phase

Cultural evidence can provide substantial mitigation in a penalty phase trial. In the case of an American Indian defendant even if the client wasn't raised on a reservation, or wasn't "raised Indian" or doesn't "look Indian" or was adopted into and raised in a non-Indian environment, or even "doesn't consider himself Indian," his culture is still a central fact of his life. Whether he has experienced the guilt and fear and anger of denying his culture, or the pain of trying to find a way to be Indian in a society which is hostile to Indian people and their values, this background has certainly influenced his life. Particularly for penalty phase preparation, the question is not "Is my client's race relevant?" but "What are the myriad ways in which my client's race is relevant and how can these ways be most effectively put before the jury?"

Penalty phase evidence should be based on information which began to be accumulated at the inception of the defense effort to acquaint the defense team with the client's background and to facilitate relations between him, his family and the community. In the intervening months (or years, as in the Croy case), the picture should be fleshed out and ready to present to the jury as the cultural background and foundation for the mitigation argument of the penalty phase.

In the Croy case, for example, penalty phase preparation included research into the history of the area – including the Indian way of life before contact with the miners

and settlers and the genocide that followed. The continuing trauma suffered by the Indian community at present was also documented, in the form of education, health and employment statistics. The current social interaction between Indians and the dominant society was examined: To what degree did Indian people feel unwelcome in the dominant culture, what were the local conflicts, and what were the experiences of Mr. Croy and his family specifically.

It is not possible in this article to examine all the potential penalty phase themes inherent in a cultural defense. What follows is a discussion of just a few that are basic to Indian life.

Alcohol Treatment Programs

The profound impact of alcohol on Indian lives cannot be overstated. Fetal Alcohol Syndrome is a scourge of the community, and alcohol is a leading cause of medical, accidental and homicidal death. Even if the client had in the past been offered or participated in alcohol treatment programs or other social services, if they were not administered by Indian people themselves, they had little chance of success. If the defendant is American Indian with a background of alcohol abuse, you can compare the traditional AA program with an alcohol treatment lodge which is operated by the Indian community where the emphasis is placed on ceremonies to rebuild spiritual strength and pride of the individual. This evidence will diffuse the prosecutor's use of a defendant's past failure to be "rehabilitated" by programs offered to him by the system. In fact, he was never given a realistic chance to succeed.

Education

As the city of Oakland recently found, over 80% of Indian students drop out before the 12th grade. There are many culturally based reasons for Indian children's poor performance in school. Unless a teacher is unusually sensitive, lack of classroom participation can be interpreted as disinterest or inability to learn – when in fact the child's failure to raise a hand may be the result of cultural teachings that it is impolite to push oneself forward or act in a competitive manner in a social situation. The content of the curriculum and quality of textbooks used in the schools is also likely to be a contributing factor to the child's failure, as they seldom instill in the Indian child a feeling of self-respect of cultural identity. Indian educational experts can assist in presenting this information to the jury.

Post-Traumatic Stress Disorder

Close to 90% of the Indian people who fought in the Vietnam War volunteered. Why? What uniquely Indian traumas did they suffer? How did society deal with that trauma? Post-combat treatment services proved inappropriate to Indian soldiers because it did not take place within the Indian cultural framework. It was not until a special Vietnam Veteran's Center for Indian people was established, and Indian communities instituted purification ceremonies for the returning vets, that some meaningful assistance had become available. It can be said that those Indian veterans who have not had the opportunity to participate in these particular programs remain untreated.

Alienation from the Dominant Culture

Another way to help the jury understand what it means to be an Indian is to ask them how they would feel about living in a society that in the past outlawed their religion and continues to refuse to recognize their religion: that in the past forcibly removed a generation of their children by sending them to boarding school and currently continues to attempt to place Indian children in non-Indian foster homes. How would a juror feel if the graves of their ancestors were dug up and their bones and possessions declared federal property and displayed by the most respected museums.

Use of experts and other evidence

As post-trial interviews with the Croy jurors confirmed, it is very important that to the extent possible experts who are Indians themselves present the cultural evidence. On the one hand, they speak in their professional capacities with an authority that is difficult for the jury to deny or distance themselves from. On the other hand, their mere presence in court as articulate, distinguished Indian people breaks down the monolithic negative stereotypes of American Indians. In preparation for cross examination, defense counsel should explore with these experts the reasons why they were able to overcome the obstacles which were so overwhelming to your client.

Equally important is the consultation with Indian experts in trial preparation, especially where interviews with the client are necessary.

Videos made by and about Indian people can eloquently portray issues very difficult to imagine, such as the effects of alcoholism and the extreme cultural differences between Indian and non-Indian life and life on a reservation.

By the close of the penalty phase, the presentation of cultural evidence will have explained how the defendant has been victimized as an Indian person and why the jury should spare the defendant's life.

Conclusion

The case of Patrick Hooty Croy involved the most dramatic possible example of the collision between a minority defendant and the dominant culture and involved two cultures very visibly at odds. However, every minority defendant's life involves elements of cultural conflict and repression albeit on a more subtle level. Therefore, preparation for the defense of any minority defendant needs to incorporate the following process:

- (1) examination of the historical and cultural background of the defendant.
- (2) Understanding of the pressures that cultural background has placed on the individual and his family.
- (3) Exploration of potential use of this cultural background during each stage of the criminal process.

The defense team, presumably unacquainted with the defendant's background, can locate individuals from the defendant's community who can assist them in:

- (1) looking at the case for its cultural context;
- (2) securing materials for self-education and for use at trial;
- (3) finding experts to assist at trial;
- (4) and approaching the defendant's community in a way which will promote cooperation.

This effort will be greatly rewarded. One of Patrick Croy's jurors acknowledged the importance of the cultural defense evidence in commenting:

People have to first understand people's background, what their cultures are. And, if you don't understand a person's culture, how can you sit there and judge a person? You can't. You don't know what happened in that person's life from the time they got up, able to walk, and go out on their own. You don't know that. You can't judge a book by its cover.

Only if jurors are provided with the complete context of the events at issue can they begin to judge your client fairly.

The information set forth in this article was the result of a defense team comprising many individuals who pooled their different skills and life experiences to formulate the cultural defense. Those who devoted their time and energy beyond the call of duty included Diana Samuelson, Bia DeOcampo, Nilak Butler and Jim Bustamante. Those who argued it so persuasively at trial were J. Tony Serra and Jasper Monte. This article was written in collaboration with Ms. Samuelson. Thanks to Jim Thomson for his advice and help.

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