No. 20-_____

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK IVAN JIM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether *United States v. Antelope*, 430 U.S. 641 (1977), should be overruled because the Major Crimes Act, 18 U.S.C. § 1153—which transforms certain acts committed in "Indian Country" into federal crimes only where the defendant is an "Indian"—denies those of Native American descent the equal protection of the law in violation of the Fifth Amendment?

Related Proceedings

- *United States v. Jim*, No. 10-cr-02653-JB, U.S. District Court for the District of New Mexico. Judgment entered June 22, 2012.
- *United States v. Jim*, Nos. 12-2085 & 12-2120, U.S. Court of Appeals for the Tenth Circuit. Judgment entered May 12, 2015.
- *Jim v. United States*, No. 15-5956, U.S. Supreme Court. Petition for Writ of Certiorari denied October 13, 2015.
- *United States v. Jim*, No. 10-cr-02653-JB, U.S. District Court for the District of New Mexico. Judgment entered September 24, 2018.
- *United States v. Jim*, No. 18-2144, U.S. Court of Appeals for the Tenth Circuit. Judgment entered February 25, 2020.

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Opinions and Orders Below

The order and judgment of the court of appeals affirming Mr. Jim's resentencing (App'x A) is not reported, but can be found at 804 F. App'x. 895 (10th Cir. 2020) (unpublished). The order of the district court upon Mr. Jim's resentencing is reported at 347 F. Supp. 3d 847 (D.N.M. 2018). The previous opinion of the Tenth Circuit affirming Mr. Jim's conviction on appeal but reversing his original sentence on the government's cross-appeal is reported at 786 F.3d 802 (10th Cir. 2015). The order of the district court upon initial sentencing is reported at 877 F. Supp. 2d 1018 (D.N.M. 2012). Other orders of the district court are reported at 839 F. Supp. 2d 1157 (D.N.M. 2012) and 791 F. Supp. 2d 1096 (D.N.M. 2011).

Basis for Jurisdiction

The Court of Appeals for the Tenth Circuit entered the judgment under review on February 25, 2020. App'x A. Mr. Jim did not request rehearing by that court. On March 19, 2020, this Court entered a general order extended the deadline to file a writ of certiorari in this case (and many others) by 60 days. This petition is timely filed on or before the July 24, 2020, deadline. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

1. The Fifth Amendment to the U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Major Crimes Act, 18 U.S.C. § 1153 (2006)[1]:

> (a) 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, felony child abuse or neglect, 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.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

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[1] This statute was amended in 2013 as part of the Violence Against Women Reauthorization Act, which replaced three of the assault crimes with "felony assault under section 113." *See* Pub. L. No. 113-4, tit. IX, § 906(b), 127 Stat. 54, 125 (2013).

3. 18 U.S.C. § 3242 (2018):

> All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

Statement of the Case

Petitioner Derrick Ivan Jim stands convicted of being "an Indian" who committed the crime of aggravated sexual abuse "in Indian Country." 2012 App., Vol. 1 at 101–02, 816.[2] Mr. Jim was indicted as "an Indian." *Id.* at 101. At trial, the government introduced a prior admission by Mr. Jim that he "hold[s] himself out as an Indian"—and that, when asked if he was "Indian," he replied "[y]es." *Id.* at 524; 2012 App. Vol. 3 at 1046. It elicited testimony that Mr. Jim's tribal enrollment record says that he is "one-half degree Navajo Indian blood." 2012 App., Vol. 1 at 743. It presented a stipulation that Mr. Jim "is an enrolled member of the Navajo Nation . . . by virtue of his Indian blood." *Id.* at 1084–85. And the jury was instructed, in accordance with Tenth Circuit law, that "the term 'Indian' means a person who (1) has some Indian blood; and (2) is recognizes as an Indian by a tribe or the federal government." *Id.* at 426.

The district court exercised jurisdiction under 18 U.S.C. § 3242, which allows federal district courts to hear cases "punishable under section 1153"—the Major Crimes Act—involving "Indians" committing crimes in "Indian country." After trial, it sentenced Mr. Jim to 360 months in prison. 2012 App., Vol. 1 at 1105. In his original appeal, Mr. Jim argued that the district court's exercise of jurisdiction over him by virtue of his Indian blood violated the Fifth Amendment's Equal Protection Clause.

[2] References to the record on appeal are to the 2012 or 2018 appeal ("2012 App." and "2018 App."), volume, and page number. References to appellate court documents are to the title, then to the 2012 or 2018 appeal.

Suppl. Opening Br. at 2–5, 2012 App. He raised that issue again in his petition for writ of certiorari. Pet'n for Writ of Cert. at 6–12.

After the government prevailed in its cross appeal, the court resentenced Mr. Jim to life in prison. 2018 App, Vol. 1 at 75. On appeal, Mr. Jim once again raised an equal protection challenge to the district court's continued exercise of jurisdiction. Opening Br. at 49–55, 2018 App. And he raises that same argument here.

Reasons for the Allowance of the Writ

Derrick Ivan Jim was convicted under the Major Crimes Act, which provides that "[a]ny Indian" accused of committing certain crimes in "Indian Country"—including aggravated sexual abuse—is "subject to the same law and penalties as all other persons committing" those offenses "within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a) (emphasis added); *see also* 18 U.S.C. § 3242 (granting district court jurisdiction over Major Crimes Act prosecutions).

But Mr. Jim was not just a "person[]"committing an offense "within the exclusive jurisdiction of the United States." Rather, he was only subject to federal prosecution under the Major Crimes Act because he is an "Indian." If he were not, then even in Indian Country he would not have been subject to federal prosecution—only New Mexico state prosecution. *See United States v. McBratney*, 104 U.S. 621 (1881).[3]

[3] Non-Indians accused of committing aggravated sexual abuse in Indian Country can be subject to federal prosecution under a different statute, 18 U.S.C. § 1152, but only if their alleged victims are Indian. In this case, the victim's Indian status (if any) was neither alleged nor proved. *See* 2012 App., Vol. 1 at 101–02, 816.

Although this Court upheld the Major Crimes Act in *United States v. Antelope*, 430 U.S. 641 (1977), against a claim that it violates Native Americans' right to the equal protection of the law, free from invidious race discrimination, it should reconsider that holding now. As is clear from post-*Antelope* appellate rulings and scholarly commentary, as well as the actual evidence presented at his trial, Mr. Jim was subject to federal law—and, more specifically, the possibility of a life sentence—for one overarching reason: because of his race.

I. This Court's attempt to distinguish between "Indian" as a political classification and "Indian" as a racial classification has proved unworkable.

In the 1970s, this Court embarked upon a project to distinguish between classifications of Native Americas as "members of quasi-sovereign tribal entities" and treatment involving "invidious racial discrimination." *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 552–54 (1974). As part of that line of cases, this Court approved of Bureau of Indian Affairs ("BIA") hiring preferences for "qualified Indians" because the "criterion" was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 537, 554. This Court also upheld the Major Crimes Act as a "[f]ederal regulation of Indian tribes" rather than "legislation of a racial group consisting of Indians." *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quotation marks omitted).

Since that time, it has become clear that the division that the Court was attempting to create—between political status on the one hand and racial status on the other—is unworkable in both theory and practice.

Indeed, the foundational assumption supporting Congress's supposed plenary power over Indians is that they are the "remnants" of a particular "race." *See, e.g., United States v. Bryant*, 136 S. Ct. 1954, 1967–68 (2016) (Thomas, J., concurring) (identifying no "sound constitutional basis" for the proposition "that Congress can punish assaults that tribal members commit against each other on Indian land . . . based on the paternalistic theory that Congress must assume all-encompassing control over the 'remnants of a race' for its own good") (quoting *United States v. Kagama*, 118 U.S. 375, 384 (1886). Moreover, the legal definition of Indian is inherently racial, as both Congress and Indian tribes themselves define who is Indian based—at least in part—on blood quantum. *See, e.g., Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013) ("This case is about a little girl (Baby Girl) who is classified as an Indian [by the Indian Child Welfare Act] because she is 1.2% (3/256) Cherokee."); 25 U.S.C. § 163 (2018) (authorizing Secretary of the Interior to create tribal membership rolls that must contain "quantum of Indian blood").

And in practice, state and federal courts continue to rely on an antebellum test that includes a "blood quantum" prong (alongside a tribal affiliation prong) to determine who is Indian for criminal jurisdiction purposes. *See United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984) ("some degree of Indian blood"); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("some Indian blood"); *United States v. Zepeda*, 792 F.3d 1103, 1106 (9th Cir. 2015) (en banc) ("some quantum of Indian blood"); *United States v. Prentiss*, 273 F.3d 1277, 1282 (10th Cir. 2001) ("degree of Indian blood"); *State v. Sebastian*, 243 Conn. 115 (1997) ("some Indian blood"); *State*

v. LaPier, 242 Mont. 335, 340, 342 (1990) ("Indian by race"; "significant amount of Indian blood"); *State v. Salazar*, 2020-NMCA-021, ¶ 8 ("Indian blood"); *State v. Nobles*, 373 N.C. 471, 476 (2020) ("some Indian blood"); *State v. Reber*, 2007 UT 36, ¶¶ 21–22, 26 (2007) ("significant degree of Indian blood"); *State v. Daniels*, 104 Wash. App. 271, 280 (2001) ("Indian in the racial sense"). This blood quantum requirement is taken quite explicitly from *United States v. Rogers*, a Taney Court opinion about a predecessor statute to the Major Crimes Act that makes clear that it (like the law it is interpreting) uses the word "Indian" to mean "of the race generally" and not "members of a tribe." 45 U.S. 567, 573 (1846).

Even if the blood quantum prong were eliminated from the Major Crimes Act analysis, however, the remaining tribal affiliation test—whether it looks for tribal enrollment, tribal affiliation, or federal government recognition[4]—is itself really based on blood quantum and ancestry, and cannot honestly be distinguished from a racial classification. This is because "virtually all tribes are simultaneously constituted as both racial and political bodies." David C. Williams, "The Borders of the Equal Protection Clause: Indians as Peoples," 38 UCLA L. REV. 759, 761 (1991).

Recognition of this fact has led several serious Indian law scholars to admit that the legal classification of Indian cannot be separated from race. As Professor Williams has explained, "Indian law really is an aberration in American law: a legally

[4] *See St. Cloud v. United States*, 702 F. Supp. 1456, 1461–62 (D.S.D. 1988) (discerning "factors" from prior federal cases that "guide the analysis of whether a person is recognized as an Indian" under "the second prong of *Rogers*").

condoned system that treats individuals differently—at least in some cases and to some extent—because of their race." *Supra*, at 762; *see also id.* at 868 (arguing that "[t]he Major Crime Act" should be vulnerable to an equal protection attack because it "seems to rest on a conviction that Indians as 'savages' are unable to govern themselves"). And in a recent article, Professor Fletcher went even further, arguing that in all cases "the legal classification of Indians requires governments to make classifications on the basis of race." Matthew L.M. Fletcher, "Politics, Indian Law, and the Constitution," 108 CAL. L. REV. 495, 499 (2020).

These issues are readily apparent in Mr. Jim's case, where evidence of Mr. Jim's "blood quantum" was presented and argued, and the jury was required to determine whether he had any "Indian blood." And even if the jury had only been asked to consider Mr. Jim's tribal membership, that would still have served as a proxy for race. The Navajo (like most tribes) require proof of Indian "blood" for tribal membership. *See, e.g.*, Navajo Nation Code Ann. Tit. 1, § 701 (requiring members have "at least one-fourth degree Navajo blood"); *see also id.* § 702 (explaining that no one "can ever become a Navajo, either by adoption, or otherwise, except by birth").

Antelope hung its hat on its understanding of "Indian" to refer to the political status of a tribally enrolled person. But the origins of the Major Crimes Act are racial. Lower courts continue to look to blood quantum, an explicitly racial basis for the exercise of federal criminal jurisdiction. And tribal membership eligibility itself is pred-

icated on race via blood quantum. This Court should grant a writ of certiorari to address the equal protection problems with why and how federal courts really exercise jurisdiction under the Major Crimes Act.

II. The Major Crimes Act's racial classification exposes Native Americans to the much harsher outcomes of the federal justice system.

Had Mr. Jim not been Native American, he could not have been charged with a violation of the Major Crimes Act, and the district court would not have had jurisdiction over his prosecution. Most importantly, he would not have received a life sentence. Instead, he could only have been charged by the State of New Mexico, where he would likely have faced a maximum sentence of 24 years in prison.[5]

Mr. Jim is not alone. All across this country, "Indians are convicted at higher rates than non-Indians to federal prison [and] sentenced to disproportionately longer prison sentences than non-Indians for the same crimes." Fletcher, *supra*, at 527 n. 218. In fact, the "disparity . . . between sexual abuse offense sentences in the federal court and those in state courts" not only "disproportionately affects Native Americans" as a result "of the jurisdictional framework that places a far high proportion of Native Americans in federal court"—but it does so "by design." U.S. Sentencing

[5] The comparable state charge, criminal sexual penetration in the second degree, can carry up to a 12 year sentence per count if aggravating circumstances are proven. *See* N.M.S.A. §§ 30-1-12, 30-9-11(D) & (E), 31-18-15.1(G).

Comm'n, Report of the Native American Advisory Group 19–20 (Nov. 4, 2003).[6] Federal sentences for these crimes were deliberately "set at their present levels to address egregious sexual abuse cases that arose in Indian Country." *Id.* at 20.

This Court has justified the exercise of federal criminal jurisdiction over Indians in Indian Country as being for their benefit as "wards of the nation" who receive "no protection" from "the states where they are found." *United States v. Kagama*, 118 U.S. 375, 383–84 (1886). But in *Antelope*, what actually happened is that this "Court upheld a jurisdictional arrangement that hurt both tribal self-government and individual Indians." Williams, *supra*, at 791; *see also* David Heska Wanbli Weiden, "This 19th Century Law Helps Shape Criminal Justice in Indian Country," *New York Times* (July 19, 2020) (arguing that Major Crimes Act "hasn't helped Native Americans"). Racial discrimination is always invidious, even when permitted with the best of intentions. This Court should grant a writ of certiorari for this reason as well.

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[6] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf.

Conclusion

Mr. Jim asks that his petition for a writ of certiorari be granted so that this Court might reconsider its decision in *Antelope* and hold that the Major Crimes Act denies those of Native American descent the equal protection of the law in violation of the Fifth Amendment.

Respectfully submitted,

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