No._____

In the
SUPREME COURT OF THE UNITED STATES

ERIC MARTINEZ, 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 Writ of Certiorari

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Questions Presented

I. When federal law compels the use of state law to define and punish crime, and the state allows probation in lieu of a conviction, does federal law also allow it?

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In the
SUPREME COURT OF THE UNITED STATES

ERIC MARTINEZ, Petitioner

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Petition for Writ of Certiorari

Eric Martinez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Eric Martinez* is published at 1 F.4th 7888 and is attached as Appendix A.

Statement of Jurisdiction

On June 14, 2021, the Tenth Circuit issued its opinion. On March 19, 2020, this Court entered an order that had the effect of extending the time within which to file a petition for a writ of certiorari in this case to November 11, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Indian Major Crimes Act, 18 U.S.C. § 1153

(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, a felony assault under section 113, 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.

Assimilated Crimes Act, 18 U.S.C. § 13

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Statement of the Case

On the Navajo Nation, Mr. Martinez, a Navajo, used a hammer to break a hole in the front door near the doorknob of a residence. An accomplice pried open the backdoor. Mr. Martinez pled guilty to one count of burglary under the Indian Major Crimes Act, 18 U.S.C. § 1153, and New Mexico Stat. Ann. § 30-16-3. Mr. Martinez argued for a conditional discharge under New Mexico law. A conditional discharge allows a defendant to serve a term of probation, without an adjudication of guilt, and upon successful completion requires dismissal of the charges. A person who successfully completes the probationary punishment of a conditional discharge does not have a felony conviction on her record. The district court determined it did not have the authority to impose a conditional discharge. The Tenth Circuit agreed, reasoning a conditional discharge is not an available sentence under federal law because it is a sentencing scheme, like parole eligibility.

Reasons for Granting the Writ

A circuit split exists between the Ninth Circuit and the Tenth Circuit on the question of whether the Indian Major Crimes Act and the Assimilated Crimes Act—both of which compel the use of state law to define and punish crime—permit the application of state law that allows probation in lieu of a conviction? The Ninth Circuit held yes. The Tenth Circuit held no. This Court should grant a writ of certiorari to resolve the question and foreclose a deepening circuit split on this important question

Introduction

Two statutes, the Assimilated Crime Act (ACA) and the Indian Major Crimes Act (IMCA) graft state criminal law onto criminal cases arising on federal jurisdiction. 18 U.S.C. § 13; 18 U.S.C. § 1153. The ACA, enacted in the 1820s, serves a gap-filling function for federal enclaves, including Indian Country, by using state law to define and punish crime. Under the ACA an individual "is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State … shall be guilty of a *like offense* and subject to

a *like punishment*." 18 U.S.C. § 13(a) (emphasis added). Similarly, the IMCA states that where federal law fails to define one of the enumerated major crimes, it "shall be defined and punished in accordance with the laws of the State." 18 U.S.C. § 1153(b). Currently only incest, burglary, and felony child abuse or neglect, require use of the state law.

Both statutes also apply to Indian defendants. In 1885, Congress enacted the IMCA to give jurisdiction to the federal government over major crimes committed by Indians in Indian Country. Indians are also subject to the ACA for "victimless" crimes occurring on reservations. *See e.g. United States v. Smith*, 925 F.3d 410, 421 (9th Cir. 2019), *cert. denied,* 140 S. Ct. 407, 205 L. Ed. 2d 231 (2019) (holding "the Indian-on-Indian exception in the ICCA [Indian County Crimes Act, 18 U.S.C. § 1152] does not preclude application of the ACA to all 'victimless' crimes[.]"); *United States v. Thunder Hawk*, 127 F.3d 705, 707 (8th Cir. 1997) (holding that the ACA could apply to an Indian for the "victimless" crime of drunk driving).

Both the ACA and IMCA "provide a method of punishing a crime committed on government reservations in the way and to the extent

that it would have been punishable if committed within the surrounding jurisdiction." *United States v. Sain*, 795 F.2d 888, 890 (10th Cir. 1986). For both statutes, state law sets the outer limits of the punishment that can be imposed. *See United States v. Vaughan,* 682 F.2d 290, 294 (2d Cir.1982) ("It is a well established principle that a state statute that fixes the length of a prison term should control the sentence imposed by federal courts under the Act."); *United States v. Queensborough,* 227 F.3d 149, 160 (3d Cir.2000) ("Courts have interpreted 'like punishment' to mean that state law sets the minimum and maximum punishment while the federal sentencing guidelines should be used to determine the actual sentence within that range; *United States v. Young,* 916 F.2d 147, 150 (4th Cir.1990) ("[T]he 'like punishment' requirement of the [ACA] mandates that federal court sentences for assimilated crimes must fall within the minimum and maximum terms established by state law, and that within this range of discretion federal judges should apply the Sentencing Guidelines to the extent possible."); *United States v. Marmolejo,* 915 F.2d 981, 984 (5th Cir. 1990) ("The ACA therefore limits the range of punishment to the minimum and maximum sentences provided by state law."); *United*

States v. Norquay, 905 F.2d 1157, 1161 (8th Cir.1990) ("We interpret the Major Crimes Act to require only that the sentence imposed for burglary fall within the minimum, if any, and maximum sentence established by state law.… Within that range, the sentence should be calculated according to the Federal Sentencing Guidelines.") (citations omitted); *United States v. Garcia,* 893 F.2d 250, 254 (10th Cir.1989) (holding that the ACA "requires courts to impose sentences for assimilative crimes that fall within the maximum and minimum terms established by state law"); *United States v. Gaskell,* 134 F.3d 1039, 1045 (11th Cir.1998) ("We leave intact the established rule that a term of incarceration under the ACA cannot exceed the limits set by assimilated state law.").

UNDER THE ACA AND IMCA STATE LAW PRESCRIBES THE RANGE OF SENTENCES THAT CAN BE IMPOSED.

State law dictates how the sentence is imposed but Federal policy determines how the sentence is administrated. In *United States v. Smith*, 574 F.2d 988 (9th Cir. 1978), the Ninth Circuit Court of Appeals held state law set the length of the sentence but not the defendant's

eligibility of parole. Washington State's penalty for sexual assault[1] required a sentence of twenty years and the inmate only became eligible for parole after serving a minimum of three years. The Court explained that it was well established that state law "fixes the length of a prison term" that the federal court can impose. *Id.* at 992. Importing the state's outer limits of the sentence fulfill the ACA's mandate that defendants be "subject to a like punishment." 18 U.S.C. § 13(a). The requirement the inmate serve three years before becoming eligible for parole impinges on "federal correctional policies." *Id.* "To hold otherwise would be to have two classes of prisoners serving in the federal prisons: Assimilative Crimes Act prisoners and all other federal prisoners." *Id.*

The Second Circuit echoed this reasoning in *United States v. Vaughan,* 682 F.2d 290 (2d Cir.1982). Mr. Vaughan was convicted[2] via the ACA of second-degree burglary under the New York Penal Code. *Vaughan,* 682 F.2d at 292. New York provides that recidivists convicted

[1] The federal statute in force at the time defined rape only in terms of women and girls. Therefore the sexual assault of one male federal prisoner by another was prosecuted under the ACA.

[2] He was also convicted of Assault under 18 U.S.C. § 113(d) and was sentenced to six-months to serve concurrently to the burglary count but that conviction and sentence are of no import here.

of violent felonies receive increased sentences; New York considers second-degree burglary a violent felony. *Id.* In addition, New York requires recidivists to serve a minimum of four years before becoming eligible for parole. *Id.* The judge sentenced Mr. Vaughn to the eight year minimum required by New York's recidivist statute and further required Mr. Vaughan serve four years before becoming eligible for parole. *Id.* The Second Circuit Court of Appeals upheld the imposition of the eight year sentence but not the requirement that four years be served before he became eligible for parole.

Noting that state law determines the length of the sentence, the Court reasoned where federal law borrows from state law, Congress intended those prosecutions to "reflect local policies of the various states." *Id.* at 294. The *Vaughan* Court concluded, "State statutes mandating recidivist sentences reflect important local policies underlying the sentencing of criminals." *Id.* Thus, it held that the federal court had to follow the state's recidivist statutes in imposing the sentence. But the Court also held that in administering the sentence, the federal court was not so constrained. Therefore, Mr. Vaughan did not have to serve four years before becoming eligible for parole. The

Court reasoned that as Mr. Vaughan was "a federal prisoner confined in a federal correctional facility, federal correctional policies should govern the conditions for his release on parole." *Id*. at 294. This ensures all federal prisoners are treated equally. Further, "the correctional administration of federal prisons would be left in disarray if state policies concerning parole, such as good time credits, were enforced under the Act." *Id.*

THE ACA AND IMCA GIVE CONTROLLING WEIGHT TO THE STATE'S DESIGNATION OF AN OFFENSE AS A FELONY OR MISDEMEANOR, EVINCING CONGRESSIONAL DEFERENCE TO A STATE'S CONTROL OVER THE SEVERITY OF AN OFFENSE.

Unlike the administration of the service of a sentence, Congress, in the ACA and IMCA gives controlling authority to state polices defining the imposition and severity of a sentence. This comports with "Congress' intent that federal prosecutions under the Act should reflect local policies of the various states." *Vaughan*. 682 F.2d at 294. Thus a state's determination on whether an offense should be a felony or a misdemeanor controls. *See e.g. United States v. Kelly*, 989 F.2d 162 (4th Cir. 1993); *United States v. Teran*, 98 F.3d 831 (5th Cir. 1996). In Texas the first "DWI offense was classified as a misdemeanor that carried a maximum penalty of two years imprisonment." *Teran*, 98 F.3d at 83.

Federal law sets the maximum punishment for a felony at a year. *See* 18 U.S.C. § 3581. The *Teran* Court had to decide whether to adopt Texas' designation of DWI as a misdemeanor or Texas' judgment that DWI had a maximum sentence of two years. It held that Texas' classification of DWI as a misdemeanor controlled.

In *Kelly*, the Second Circuit confronted the same question presented in *Teran*: Does the state's designation of a crime as misdemeanor or the state's maximum punishment beyond a year control? The Second Circuit kept the state's designation as a misdemeanor and held the maximum sentence was set by the federal contours of a sentence for misdemeanors. By honoring the states' misdemeanor designation, the ACA furthered the states legislatures' intent that offenders avoid the various collateral consequences attending a felony conviction. The State's policies regarding the imposition of the punishment control over the administration of the sentence.

POLICIES ALLOWING PROBATION IN LIEU OF A CONVICTION REFLECT A STATE'S JUDGMENT OF THE SEVERITY OF AN OFFENSE AND CONSTITUTE PUNISHMENT UNDER THE ACA AND IMCA.

Maryland also has a "Probation Prior to Judgement" statute that allows a defendant to serve a sentence of probation in lieu of having a conviction on her record. Md. Code Ann., Crim. Proc. § 6-220. Over forty years ago, the District Court in Maryland determined this was an available punishment under the ACA. It reasoned incorporating this punishment best met "the purpose of the Assimilative Crimes Act as a method of punishing a crime committed on government reservations 'only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the state'." *United States v. Holley*, 444 F. Supp. 1361, 1368 (D. Md. 1977) *quoting United States v. Press Publishing Co*., 219 U.S. 1, 10 (1911).

The Ninth Circuit has twice upheld this sort of "statutory hybrid provid[ing] a second chance for an accused to avoid the stigma of conviction." *Holley*, 444 F. Supp. at 1366. In *United States v. Bosser*, 866 F.2d 315 (9th Cir. 1989), the Ninth Circuit considered whether the ACA extended to Hawaii's deferred-acceptance statute. Like Maryland's

statute, under Hawaii's deferred-acceptance statute the defendant pleads guilty and the court imposes "certain probation-like conditions." *Bosser*, 866 F.2d at 316; Haw. Rev. Stat. Ann. § 853-1. If the defendant successfully completes probation, the court dismisses the charge. *Id.* The defendant does not end up with a felony conviction on her record. *Id.* at 317. The Ninth Circuit Court of Appeals held "the Hawaii legislature believes that the stigma of a felony record may be excessive punishment for the commission of a felony under some circumstances, the sentencing judge in an ACA prosecution must respect that judgment. To do otherwise would violate the ACA's fundamental purpose of punishing assimilated crimes 'only in the way and to the extent that it would have been punishable' in state court proceedings." *Bosser*, 866 F.2d at 317.

The Ninth Circuit affirmed its reasoning that by honoring the states' determination of available punishments, it fulfilled the ACA's purpose. *United States v. Sylve*, 135 F.3d 680 (9th Cir. 1998) explained "[t]he question what is 'punishment' is best resolved by looking to whether the state intended the scheme to be a form of punishment." 135 F.3d at 683. If the state considers it a form of punishment, then it is an

available outcome under the ACA. 135 F.3d at 683. This incorporates ACA's purpose of honoring the state's determination of crime and punishment including the state's legislature's intent that certain offenders can avoid the various collateral consequences attending a felony conviction.

Like both Maryland and Hawaii, the Washington Legislature created a deferred prosecution program where a defendant serves a sentence of probation in lieu of a conviction. Wash. Rev. Code Ann. § 10.05.020. The Washington Supreme Court determined Washington's deferred prosecution program was punishment. *Sylve*, 135 F.3d at 683. The *Sylve* Court concluded, "Viewed functionally, it is a form of punishment to be incorporated through the ACA." *Id.* at 683-84. It comports with the distinction between imposition and administration of punishment.

THE SPLIT BETWEEN THE NINTH AND TENTH CIRCUITS WILL DEEPEN IF NOT RESOLVED BY THIS COURT.

Probation in lieu of a conviction is allowed under the ACA and IMCA in the Ninth Circuit. But not the Tenth Circuit. That split will deepen in the coming years and threaten ever-widening disparities

between similarly-situated defendants based only on where they happen to be charged with a crime.

The Tenth Circuit held that New Mexico's conditional discharge statute, allowing probation in lieu of conviction, was not allowed under the ACA or IMCA. In so doing, the Tenth Circuit turns its back on the accepted analysis that the ACA and IMCA incorporate the state's judgment on the consequences of an offense. The Fifth and Second circuit held the ACA required them to adopt the state's designation of an offense as a misdemeanor over the state's range of imprisonment. Together with the Ninth Circuit, these decisions reflect established law that the ACA and IMCA incorporate the state's judgment that certain offenders should avoid the various collateral consequences attending a felony conviction while still imposing some punishment. The Tenth Circuit's logic rejects this.

The Tenth Circuit recasts New Mexico's conditional discharge as administering rather than imposing a sentence. In this way, the Tenth Circuit reasons it falls within accepted exceptions to features of the ACA and IMCA. New Mexico conditional discharge is the minimum punishment that can be imposed. It does not require federal

correctional policy adopt a state's measure of good time credit or parole eligibility. It only requires the federal law to accept the range of punishment the state's legislature thought acceptable for certain offenses – something that under the ACA and IMCA, federal law already does. The Tenth Circuit fails to acknowledge that lowest end of the range of punishment that can be imposed under New Mexico law is a conditional discharge. This puts it squarely at odds with the Ninth Circuit Court of Appeals.

This split will only deepen if not resolved by this Court. Many states have some version of probation in lieu of conviction. *See e.g.* Alaska Stat. § 12.55.078 (suspending entry of judgment); Ark. Code Ann. §5-4-901 et seq. (pre-adjudication probation); Fla. Stat. Ann. § 948.01; *Thomas v. State*, 356 So. 2d 846, 847 (Fla. Dist. Ct. App. 1978) (explaining for a defendant put on probation without an adjudication of guilt, if he successfully completes probation he is not a convicted person.); Haw. Rev. Stat. Ann. § 853-1 (deferred acceptance); Idaho Code Ann. § 19-2601 (withholding of sentence); *State ex rel. City of Sandpoint v. Whitt*, 146 Idaho 292, 295 (Ct. App. 2008) ("The option of a withheld judgment is provided to the sentencing court in order to spare

the defendant, particularly a first-time offender, the burden of a criminal record."); Iowa Code Ann. § 907.3 (deferred judgment); La. Code Crim. Proc. Ann. art. 893(E)(2) (suspension and deferral of sentence); Me. Rev. Stat. tit. 17-A, § 1901 et seq. (deferred disposition); Md. Code Ann., Crim. Proc. § 6-220 (probation before judgment); N.M. Stat. Ann. §31-20-13(conditional discharge); Okla. Stat. Ann. tit. 22, § 991c (deferred sentence); Tex. Code Crim. Proc. Ann. art. 42A.101 et seq. (deferred adjudication); Wash. Rev. Code Ann. § 10.05.020 (deferred prosecution). These states also have federal enclaves. Whether the federal courts assimilate these state laws under the ACA or IMCA is a critical question. This Court should grant a writ of certiorari before the split in circuits grows deeper.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: November 12, 2021

s/ Aric Elsenheimer

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Appendix A

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

June 14, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC MARTINEZ,

Defendant - Appellant.

No. 20-2126

**Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:19-CR-00565-JCH-1)**

Aric G. Elsenheimer, Assistant Federal Public Defender, Albuquerque, New Mexico, for Defendant - Appellant.

David Patrick Cowen, Assistant United States Attorney (and John C. Anderson, United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff - Appellee.

Before **TYMKOVICH**, Chief Judge, **KELLY**, and **McHUGH**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Eric Martinez appeals from the district court's imposition of a 27-month sentence for his burglary conviction under the Indian Major Crimes

Act. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm.

Background

In February 2016, Mr. Martinez and two accomplices burglarized a residence within the boundaries of the Navajo Nation in McKinley County, New Mexico. During the burglary, Mr. Martinez used a hammer to break a hole in the front door near the doorknob to gain entry to the residence. An accomplice pried open the back door. Mr. Martinez placed the hammer on a table in the living room. He and his accomplices took valuable items from the residence, including electronics, jewelry, and ceremonial shawls and robes.

Mr. Martinez was charged under the Indian Major Crimes Act (IMCA), which applies state criminal codes to "assimilated" offenses committed in Indian Country that are not defined under federal law. Mr. Martinez ultimately pled guilty to an assimilated New Mexico burglary offense under N.M. Stat. Ann. § 30-16-3. At sentencing, Mr. Martinez argued that federal law permitted the district court to impose a conditional discharge. This would allow a term of probation without entry of a judgment of conviction, a sentence possible had his case been adjudicated in New Mexico state court. He also objected to a two-level sentencing enhancement under U.S.S.G. § 2B2.1(b)(4) for possessing a dangerous weapon on the basis that he did not use the hammer as a weapon during the burglary.

The district court rejected these arguments. The district court ruled that a conditional discharge was not available in federal court and that Mr. Martinez's

possession of the hammer during the burglary warranted the two-level enhancement. The district court additionally found that a conditional discharge would not be appropriate under the circumstances even if it were available, and sentenced Mr. Martinez to 27 months and a year of supervised release.

Discussion

In reviewing the district court's application of the Sentencing Guidelines, we review legal questions de novo and factual findings for clear error. United States v. Wolfe, 435 F.3d 1289, 1295 (10th Cir. 2006).

A. Conditional Discharge

As an initial matter, the government notes that we can affirm without ruling on the availability of a conditional discharge in federal court. The district court decided that even if a conditional discharge were available, it was not appropriate in this case. Mr. Martinez did not address this argument in his briefing. However, at oral argument he contended that we should reach the issue because the district court "started at the wrong place" in determining Mr. Martinez's sentence. The government responds that any such error would have been harmless. We need not reach these arguments, however, because we find that the district court did not err in concluding that a conditional discharge was unavailable.

New Mexico's conditional discharge statute permits a court to forego entering an adjudication of guilt following a conviction and instead enter a conditional discharge placing the defendant on probation. N.M Stat. Ann. § 31-20-13(A). If the

defendant violates any of the terms of the probation, the court may then enter an adjudication of guilt and otherwise sentence the person. N.M. Stat. Ann. § 31-20-13(B). A conditional discharge is only available to those found guilty of crimes eligible for a deferred or suspended sentence under New Mexico law. N.M. Stat. Ann. § 31-20-13(A).

The IMCA assimilates into federal law the definition and punishment of certain state crimes that, like burglary, are "not defined and punished by Federal law." 18 U.S.C. § 1153(b). The assimilated state offense becomes a federal offense punishable under federal law. United States v. Wood, 386 F.3d 961, 962 (10th Cir. 2004). In sentencing a defendant for an assimilated offense, a federal court may not impose a sentence that falls outside the range of minimum and maximum punishments authorized for the offense under state law. United States v. Garcia, 893 F.2d 250, 251–52 (10th Cir. 1989) (superseded by statute, 18 U.S.C. § 3551(a)).[1]

Incorporation of state law is limited to the maximum and minimum penalties for the offense and does not extend to "state 'sentencing schemes.'" United States v. Jones, 921 F.3d 932, 937–38 (10th Cir. 2019). On this basis, we have held that state law provisions authorizing suspended sentences are not incorporated under the IMCA. Id. (citing Wood, 386 F.3d at 963).

[1] Garcia dealt with the Assimilative Crimes Act (ACA) rather than the IMCA. However, because the statutes are similar and involve the same sentencing procedures, we consider ACA cases in interpreting similar provisions of the IMCA. Wood, 386 F.3d at 962 n.2.

Mr. Martinez relies primarily on two out-of-circuit cases to support his contention that the district court had authority to impose a conditional discharge. In United States v. Bosser, the Ninth Circuit held that Hawaii's deferred acceptance rule, which operates much like New Mexico's conditional discharge, is a form of punishment available to defendants sentenced for assimilated crimes in federal court. 866 F.2d 315, 317 (9th Cir. 1989). In so holding, the court emphasized that deferred acceptance constitutes punishment "within the meaning of the ACA" and therefore was available under federal law. Id. at 317–18. In United States v. Sylve, the Ninth Circuit similarly held that Washington's pre-conviction rehabilitation program is assimilated into federal law under the ACA. 135 F.3d 680, 683–84 (9th Cir. 1998). Relying on these cases, Mr. Martinez argues that a conditional discharge is punishment under state law and is therefore incorporated by the IMCA. Hence, such an alternative is available to federal courts at sentencing.

These cases are distinguishable. Bosser was decided in 1989, one year before the Sentencing Reform Act was amended to specify that the federal sentencing framework applies to convictions under the ACA and the IMCA. See 18 U.S.C. § 3551(a). And in any event, the cases are not binding on this court and are inconsistent with Tenth Circuit case law. In Wood, we explained that a federal court cannot apply a state sentence suspension provision to depart from a state mandatory minimum sentence because "the Guidelines deny a district court the discretion to suspend a sentence of imprisonment." 386 F.3d at 963. Mr. Martinez contends that Wood was undermined by the Supreme Court's decision in United States v. Booker,

543 U.S. 220 (2005), rendering the Guidelines advisory rather than mandatory. However, Wood did not turn on the then-mandatory nature of the guidelines. Instead, the decision was based on the conclusion that federal courts assimilate only the maximum and minimum penalties under state law and do not assimilate state sentencing schemes that conflict with the Guidelines. See Wood, 386 F.3d at 963. And more recently in Jones, we concluded that New Mexico's conditional discharge provision affects the minimum mandatory sentence under New Mexico law for an offense subject to that provision. 921 F.3d at 942. However, we also reiterated the conclusion that federal courts incorporate only the minimum and maximum sentences under state law and do not incorporate state sentencing schemes. Id. at 941. Under the Sentencing Reform Act and the IMCA, Mr. Martinez could have been sentenced to probation, a fine, or imprisonment. 18 U.S.C. § 3551(b). But the district court could not assimilate a state provision permitting a conditional discharge.

B. Dangerous Weapon Enhancement

Mr. Martinez next challenges the district court's application of the two-level sentencing enhancement for possession of a dangerous weapon.

Section 2B2.1(b)(4) of the Sentencing Guidelines provides for a two-level increase if "a dangerous weapon [] was possessed" during the offense. The commentary to the rule specifies that a dangerous weapon is "an instrument capable of inflicting death or serious bodily injury," or one that either "closely resembles such an instrument" or was used "in a manner that created the impression that the object was such an instrument." U.S.S.G. §§ 1B1.1 n.1(E); 2B2.1 n.1.

Mr. Martinez does not dispute that he possessed a hammer during the burglary. Rather, he argues that the hammer does not qualify as a dangerous weapon under § 1B1.1 because he did not use the hammer as a weapon during the offense. For support, Mr. Martinez points to § 2A2.2, the guidelines provision governing aggravated assault. He notes that the commentary to that section states that the term dangerous weapon "has the meaning given that term in § 1B1.1" and "includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury." U.S.S.G. § 2A2.2 n.1. He contends that the exclusion of the second part of this definition from § 1B1.1 means that items not ordinarily used as weapons, like hammers, do not qualify as dangerous weapons under § 1B1.1 unless they are actually used as weapons.

This argument overlooks the text of §§ 2B2.1 and 1B1.1, which require only that a defendant "possess[]" "an instrument capable of inflicting death or serious bodily injury." Therefore, unlike § 2A2.2, which focuses on the use or threatened use of the object, § 2B2.1 is concerned only with the defendant's possession of the object and the object's dangerous capabilities. Indeed, the Second Circuit has considered and rejected an argument nearly identical to Mr. Martinez's. The fact the defendant did not use a sledgehammer as a weapon when he used it to gain entry to a bank was "irrelevant to the issue of possession" and the enhancement therefore was properly applied. United States v. Pope, 554 F.3d 240, 245–46 (2d Cir. 2009). Clearly, a hammer is "an instrument capable of inflicting death or serious bodily

injury," U.S.S.G. § 1B1.1 n.1(E),[2] and there is no dispute that Mr. Martinez possessed a hammer during the burglary. The sentencing enhancement therefore was properly applied.

AFFIRMED.

[2] Citing cases in which unusual items have been held to constitute dangerous weapons, e.g., United States v. Hatch, 490 F. App'x 136, 140 (10th Cir. 2012) (tennis shoes); United States v. Tolbert, 668 F.3d 798, 802 (6th Cir. 2012) (plastic water pitcher), Mr. Martinez argues that a broad definition of "dangerous weapon" could lead to absurd results. First, these cases are of limited relevance because they involve defendants convicted of assault. See, e.g., Hatch, 490 F. App'x at 138; Tolbert, 668 F.3d at 799. As discussed above, the assault guidelines are concerned with the defendant's use of an object to cause injury or with the intent to do so. See U.S.S.G. § 2A2.2(b)(2)(B). The guidelines applicable to burglary, however, are concerned with the defendant's possession of an object capable of causing serious injury. See U.S.S.G. §§ 1B1.1 n.1(E); 2B2.1 n.1. In any event, even if it is possible that a case could arise in which Mr. Martinez's concern may be well-founded, it is beyond reasonable dispute here that a hammer is capable of causing death or serious injury.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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June 14, 2021

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RE: 20-2126, United States v. Martinez
Dist/Ag docket: 1:19-CR-00565-JCH-1

Dear Counsel:

Attached is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: David Patrick Cowen

CMW/at