No.21-6319

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

Petitioner's Reply Brief to Brief in Opposition

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The Assimilated Crimes Act (ACA) (18 U.S.C. § 13) and the Indian Major Crimes Act (18 U.S.C. § 1153) provide the maximum and minimum sentences for assimilated crimes[1]. A conditional discharge (where the defendant admits guilt but does not have a conviction entered and serves a term of probation) is the minimum available sentence in New Mexico. Under the ACA and IMCA, then, a conditional discharge is an available sentence. The Ninth Circuit allows such a sentence but the Tenth Circuit does not.

The Government acknowledges the ACA and IMCA fulfill the same gap-filling purpose for federal enclaves, including Indian Reservations. B.I.O. 11. It recognizes that courts routinely rely on one to interpret the other. *Id.* Nonetheless, it argues the statutes are simply too distinct for any such reliance. *Id*. But the difference the Government relies on, the variance between "subject to like punishment" and "punished in accordance with the law of the State …", is not a meaningful difference. B.I.O. 11 *comparing* 18 U.S.C. § 13(a) *with* 18 U.S.C § 1153(b). Both statutes "provide a method of punishing a crime

[1] Under the IMCA only three crimes (incest, burglary, and felony child abuse or neglect) require use of the state law.

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).

The Government next argues that amending the Sentencing Reform Act in 1990 to explicitly apply the Sentencing Guidelines to crimes committed under the ACA and IMCA constitutes a sea-change. *See* 18 U.S.C. § 3551. According to the Government, this upheaval precludes a sentence of conditional discharge and renders the Ninth Circuit's decisions in *United States v. Sylve*, 135 F.3d 680 (9th Cir. 1998) and *United States v. Bosser*, 866 F.2d 315 (9th Cir. 1989) obsolete. B.I.O. 11-13. Specifically, the Government states *Bosser's* claim that its holding does not conflict with any Federal Rule or other federal law "is not true today." B.I.O. 12. But the 1990 amendment simply clarified that the Sentencing Guidelines apply to sentences imposed under to IMCA and ACA. The entire amendment reads: "Section 3551(a) of title 18, United States Code, is amended by inserting 'including sections 13 and 1153 of this title,' after 'any Federal statute,'." CRIME CONTROL ACT OF 1990, 104 Stat. 4789, 4843, 101 Public Law 647. *See also*, Jon M. Sands, Indian Crimes and

Federal Courts, 11 Fed. Sent'g. Rep. 153, 153 (1998) ("In 1990, Congress amended 18 U.S.C. § 3551(c) to make the guidelines applicable to all Major Crimes Act and Assimilative [Crimes] Act offenses").

Prior to *Booker*, the Government's argument carried some weight. The Guidelines did not give a district court the discretion to suspend a sentence of imprisonment; any suspension would be contrary to federal law. But, the post-*Booker* discretionary Guidelines show the government's position as nothing more than an empty formalism. The Government's attempt to limit the precedential value of *Sylve* and *Bosser* fails – neither relied upon the inapplicability of the Guidelines.

The Government acknowledges the available sentences remain probation, a fine, or a term of imprisonment. B.I.O. 12. It argues that Section 3551 does not use the words "conditional discharge" and therefore it is unavailable to the district court. B.I.O. 9-10. This elevates form over function. The question is whether it is a punishment available under state law not whether Section 3551 uses the exact words to describe it.

A conditional discharge is punishment. The statute requires a

defendant to be "found guilty" before a conditional discharge can be granted. N.M. Stat. Ann. § 31-20-13(A). This conforms to Section 3551's requirement that a defendant has "been found guilty." After this admission, the defendant must successfully complete a term of probation. *Id*. Probation is a form of punishment.

The Fifth Circuit explained, under the ACA the court looks to the purposes of the punishment to determine if the State punishment (parole) is sufficiently similar to the Federal punishment (supervised release). *United States v. Marmolejo*, 915 F.2d 981, 985 (5th Cir. 1990). The *Marmolejo* Court determined they were sufficiently similar. Under this rubric, as the provisions of supervised release echo New Mexico's probation provisions, a conditional discharge is an available federal punishment. *Compare* 18 U.S.C. § 3601 *et seq*. with N.M. Stat. Ann § 31-20-5. Thus, the Government's argument that a conditional discharge, or the like, "would 'be disruptive to the federal prison system'" rings false. B.I.O. 9 (internal citation omitted).

The Government also highlights the unarguable point that "neither *Bosser* nor *Sylve* involved New Mexico's conditional discharge law." B.I.O. 11. It ignores the sentencing schemes in *Bosser* and *Sylve*

which are the functional equivalent of New Mexico's conditional discharge. The schemes allow a defendant to serve a term of probation and upon successful completion of supervision have no record of conviction. The defendant "places his head on the block, where it remains for the probationary period." *Sylve,* 135 F.3d at 683. Thus, "Viewed functionally, it is a form of punishment to be incorporated through the ACA" and the IMCA. *Id.* at 683-84. The two sentence schemes addressed by the Ninth Circuit were and are virtually identical to a conditional discharge in New Mexico.

Lastly, the Government asserts this case is not worthy of this Court's review because "the district court expressly found that even if it had the authority to sentence petitioner to a conditional discharge, it would not have done so…". B.I.O. 13. The sentencing authority of the court is a question of law. When the court misunderstands the law it applies, it necessarily brings the "fairness, integrity, or public reputation of judicial proceedings" into question. *United States v. Atkinson*, 297 U.S. 157, 160 (1936). *Cf. Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016) ("[W]hen a defendant shows that the district court used an incorrect range, he should not be barred from

relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used.")

The law is clear: the district court must remain within the minimum and maximum punishment set by the State. The Tenth Circuit, by refusing to allow a conditional discharge as possible sentence, ignores the New Mexico's judgment regarding a just sentence. The Ninth Circuit by allowing the functional equivalent of a conditional discharge respects the state's judgment regarding just punishment.

Conclusion

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

Respectfully submitted,

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