No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Anthony Lamont Mason, II,

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

Virginia L. Grady
Federal Public Defender

Dean Sanderford
Assistant Federal Public Defender
Counsel of Record for Petitioner
Office of the Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002
Email: Dean_Sanderford@fd.org

Question Presented

This case presents a legal question under the Indian Major Crimes Act (IMCA), 18 U.S.C. § 1153, that is increasingly important in the wake of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and that the Tenth Circuit has resolved inconsistently depending on whether the case arises from Indian Country in New Mexico or Indian Country in Oklahoma.

In New Mexico cases, the Tenth Circuit holds that an apparent statutory minimum for a state crime that a state court would be permitted to suspend or defer is not an actual minimum that must be imposed in federal court under the IMCA. But in Oklahoma cases, like this one, the Tenth Circuit refuses to look to whether a state court could suspend or defer the sentence and holds that an apparent minimum is mandatory in federal court based solely on the fact that the sentencing statute uses language traditionally associated with a mandatory minimum.

The question presented is whether federal sentencing courts should treat a sentence that is optional in state court as mandatory in federal court under the IMCA just because the state sentencing statute uses language traditionally associated with a mandatory minimum.

Related Proceedings

- *United States v. Mason*, No. 4:21-cr-00270-SJM-1, United States District Court for the Northern District of Oklahoma (judgment entered September 7, 2022).

- *United States v. Mason*, No. 22-5083, United States Court of Appeals for the Tenth Circuit (judgment entered October 24, 2023; rehearing denied January 24, 2024).

Table of Contents

Appendix

Table of Authorities

Page

Cases

Federal Statutes

State Statutes

Other Authorities

Petition for Writ of Certiorari

Opinion Below

The decision of the United States Court of Appeals for the Tenth Circuit is reported at *United States v. Mason*, 84 F.4th 1152 (10th Cir. 2023), and can be found in the Appendix at A6.

Basis for Jurisdiction

The Tenth Circuit issued its opinion affirming the district court's judgment on October 24, 2023. (A6.) The Tenth Circuit denied rehearing on January 24, 2024. (A12.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved

18 U.S.C. § 1153. Offenses Committed in Indian Country

(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.

Statement

This case involves the prosecution of a state crime in federal court pursuant to the Indian Major Crimes Act (IMCA), 18 U.S.C. § 1153. The IMCA authorizes the federal government to prosecute certain enumerated offenses when committed by an "Indian" in "Indian Country." § 1153(a). Some of the enumerated offenses (e.g., "a felony assault under section 113" of Title 18) are defined as federal crimes when committed "within the exclusive jurisdiction of the United States." § 1153(a). For those offenses, the IMCA borrows the penalties assigned to the offense under federal law. *Id.* For the enumerated offenses without a federal analogue, the IMCA assimilates state law, providing that the offense "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." § 1153(b).

Appellant Anthony Lamont Mason, II, was charged under the IMCA with first-degree burglary. Because burglary is one of the enumerated offenses that is not generally defined and punished by federal law, he was charged with first-degree burglary under Oklahoma law, Okla. Stat. tit. 21, §§ 1431, 1436. He was convicted by a jury, and his presentence report initially calculated an advisory guidelines range of 51 to 63 months in prison. But the report also concluded that he was subject to an 84-month (7-year) mandatory minimum because the Oklahoma burglary penalty statute provides that first-degree burglary shall be punished by a prison "term not less than seven (7) years." Okla. Stat. tit. 21, §§ 1436. Mr. Mason objected, arguing that the seven-year statutory penalty was not actually a mandatory minimum

because a state court would be permitted to suspend or defer the sentence, which could result in no prison time at all. Considering itself bound by language in *United States v. Jones*, 921 F.3d 932 (10th Cir. 2019), that described Oklahoma's burglary statute as a mandatory minimum, the district court rejected the argument and sentenced Mr. Mason to 84 months in prison. (A2-A5.)

On appeal, Mr. Mason renewed his argument that Oklahoma law did not set an actual mandatory minimum. He maintained that the language in *Jones* on which the district court relied was dicta because *Jones* involved New Mexico law, not Oklahoma law. He further asserted that the holding of *Jones* supported his position because *Jones* determined that a New Mexico statute that imposed a seeming minimum was not actually a minimum because a state court would be permitted to suspend or defer the sentence.

A panel of the Tenth Circuit affirmed. It held that *Jones*'s description of Oklahoma law was not dicta because the distinction *Jones* drew between Oklahoma law and New Mexico law was essential to the court's reasoning. (A10-A11.) The panel also concluded that whether an Oklahoma state court could suspend or defer the sentence was "irrelevant" because the Oklahoma statute used language – the phrase "not less than" – that is "traditionally associated with a mandatory minimum" and therefore "reflect[ed] Oklahoma's desire to impose a mandatory minimum." (A10 n.2.) In the panel's view, *Jones* conducted an "in-depth analysis" into whether a New Mexico court could suspend or defer sentence only because the statute at issue, unlike

the Oklahoma burglary statute, lacked language associated with a statutory minimum. (A10).

Mr. Mason petitioned for rehearing en banc, and the full court denied rehearing without calling for a vote. (A12.)

Reasons for Granting the Petition

I. The Tenth Circuit's Decision Arbitrarily Disadvantages Indian Defendants in Oklahoma Compared to Indian Defendants in New Mexico.

Certiorari is warranted because the Tenth Circuit's decision arbitrarily creates an intra-circuit disparity regarding how Indian defendants are sentenced under the IMCA. Under the Tenth Circuit's decision, a federal court that sentences an Indian defendant for an Oklahoma crime must impose a seeming mandatory minimum sentence even if that sentence would be entirely optional in state court. But when sentencing an identically situated Indian defendant convicted of a New Mexico offense, a federal court is free to disregard the apparent minimum in recognition of the fact that a state court would not have to impose it. *See United States v. Jones*, 921 F.3d 932, 941 (10th Cir. 2019). This Court should grant certiorari because there is no defensible reason for this disparity.

The New Mexico statute at issue in *Jones* provided for a "'basic sentence'" of nine years. Id. at 939 (quoting N.M. Stat. Ann. § 31-18-15(A)-(B)). New Mexico law authorized sentencing courts to reduce the basic sentence based on mitigating circumstances, but it provided that "'in no case shall'" the reduction "'exceed one-third of the basic sentence.'" *Id.* (quoting N.M. Stat. Ann. § 31-18-15.1(G)). The question in

Jones was whether this apparent six-year floor represented a mandatory minimum that had to be imposed in federal court. *Id.* at 933. The court held that it did not, and key to its reasoning was the fact that, under state law, the six-year sentence was optional because nothing prohibited a state court from imposing a suspended or deferred sentence. *Id.* ("Because the New Mexico legislature has not dictated that any portion of the sentence for violation of [the statute at issue] cannot be altered, suspended, or deferred, there is no minimum term established by New Mexico law").

In this case, the Tenth Circuit distinguished *Jones* on the grounds that the Oklahoma burglary statute, unlike the statute at issue in *Jones*, used language "traditionally associated with a mandatory minimum – the words "not less than." (A10.) But the statutory language at issue in *Jones* – "in no case shall" is in no way less mandatory in nature than the phrase "not less than." If anything, it's more emphatically mandatory. While both statutes set an apparent floor, the New Mexico statute underscores the floor's seeming absoluteness, providing that "in no case" shall a court sentence below it.

The distinction that the panel opinion draws between the two statutes is therefore illusory and creates a doctrinal system that arbitrarily disadvantages Indian defendants in Oklahoma. While in New Mexico cases the Tenth Circuit will look under the hood to see whether the seeming statutory minimum is actually mandatory, in Oklahoma cases it shuts its eyes to the true nature of the sentence. These approaches are irreconcilable, and this Court should grant certiorari to eliminate the disparity created by the Tenth Circuit's decision.

Certiorari is all the more warranted because the disparate effects of the panel's decision will not be limited to the individual state statutes at issue here and in *Jones*. New Mexico's "basic sentence" scheme generally applies to all noncapital felonies, and with few exceptions, assigns each class of felony a basic sentence. N.M. Stat. Ann. § 31-18-15(A) (providing, e.g., that the basic sentence for a "second degree felony" is "nine years imprisonment"). And the New Mexico rule that any reduction from the basic sentence based on mitigating circumstances cannot exceed one-third of the basic sentence applies across the board to non-youthful offenders. § 21-18-15.1(G).

Similarly, the Oklahoma legislature has used the statutory phrase "not less than" to designate statutory minimums throughout Oklahoma's criminal code, not just in the burglary statute. See, e.g., Okla. Stat. tit. 21, §§ 17.67.2 (use or threat to use explosive); 722 (second degree manslaughter); 1115 (rape); 1289.17A (felony discharge of firearms); 1621 (forgery). Under *Jones* and the decision in this case, the mandatory language in the New Mexico statutes will be treated differently from the mandatory language in the Oklahoma statutes – for no compelling reason.

Moreover, the Tenth Circuit's decision will reach beyond the IMCA and apply under the more expansive Assimilated Crimes Act (ACA), 18 U.S.C. § 13. Like the IMCA, the ACA assimilates state law for offenses committed in federal enclaves, including Indian reservations. *See United States v. Garcia*, 893 F.2d 250, 253 (10th Cir. 1989) (discussing the ACA). But unlike the IMCA, which authorizes prosecution only for certain serious crimes, § 1153(a), the ACA assimilates all offenses of the state in which the enclave is located, except those proscribed by "an enactment of

Congress." § 113(a); *see also Lewis v. United States*, 523 U.S. 155 (1998). Because the IMCA and ACA both fill gaps in federal law by borrowing from state law and also "involve the same sentencing procedures," the interpretation of one statute informs the interpretation of the other. *United States v. Martinez*, 1 F.4th 788, 790 n.1 (10th Cir. 2021). The Tenth Circuit's reasoning in this case will therefore bleed over into the Tenth Circuit's interpretation of the ACA, making the need for certiorari even more acute.

II. The Tenth Circuit's Decision is Wrong and Will Affect Many Cases in the Wake of *McGirt v. Oklahoma*.

This Court should also grant certiorari because the Tenth Circuit reached an incorrect result, and its mistake will cause unfair results in numerous cases going forward.

There is no sound justification for treating a sentence that is optional in state court as mandatory in federal court. But that's what the Tenth Circuit's decision does. Non-Indian defendants convicted of first-degree burglary in Oklahoma state court are not necessarily subject to the burglary statute's seven-year minimum because, in many cases (including this one), the state court could impose a suspended or deferred sentence, which could ultimately result in the defendant serving no prison time at all.

Oklahoma law broadly empowers sentencing judges to "[s]uspend the execution of the sentence in whole or in part, with or without probation." Okla. Stat. tit. 22, § 991a(A)(1). Although there are exceptions, they are narrow, exempting only defendants who have been convicted of certain, specified crimes, id., and a narrow

class of recidivists, § 991a(C). Oklahoma law also allows sentencing judges to defer the imposition of sentence, § 991c(A), and if the defendant successfully completes the deferment period, he is "discharged without a conviction of guilt," his initial adjudication of guilt is "expunged" from his record, and his charges are "dismissed with prejudice to any further action," § 991c(D). The deferment procedures are broadly available to defendants without a prior felony conviction and who have not received a deferred sentence for a felony conviction in the last 10 years. § 991c(D). As Mr. Mason explained below, he would have been eligible for either a suspended or deferred sentence if he had been prosecuted in state court.[1] Op. Br., *United States v. Mason*, No. 22-5083 (10th Cir), at 9-13.

The Tenth Circuit's decision deems the existence of these suspension and deferment procedures to be "irrelevant" to whether the burglary statute actually prescribes a mandatory minimum. (A10 n.2.) In the Tenth Circuit's view, the burglary statute conclusively reveals "Oklahoma's desire to impose a mandatory minimum" because it uses the phrase "not less than." (A10.) But the court's decision never explains why it makes sense (or is just) to stop with the burglary statute's language. If, as here, an examination of the statutory context reveals that the sentence is not in fact mandatory, then the statutes as a whole actually reveal Oklahoma's desire not to impose a mandatory minimum. There is no reason for a court to blind itself to that

[1] Contrary to the panel's suggestion, (A10 n.2), no speculation is required to conclude that Mr. Mason would be eligible for a suspended or deferred sentence in state court. The relevant statutes (cited above) are clearly written and set bright-line rules for eligibility.

fact. Whether a defendant is forced to serve a state law minimum should turn on whether the term is a real-world minimum, not on whether the legislature happened to use words that the Tenth Circuit associates with a minimum.

The effect of the decision below will be to disadvantage Indian defendants in federal court as compared to those prosecuted for the same crimes in state court. It is only because Mr. Mason is an Indian and committed the burglary in this case in Indian Country that he is subject to a mandatory minimum sentence of seven years in prison. If Mr. Mason were a non-Indian, or if he had committed his offense outside the boundaries of the reservation, he could have been placed on probation and not served any prison time at all.

The discriminatory effect of the Tenth Circuit's decision alone warrants certiorari, but the fallout from *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), makes review by this Court even more pressing. *McGirt*'s reordering of reservation boundaries in Oklahoma has resulted in a dramatic increase in Indian Country prosecutions in the Northern and Eastern Districts of Oklahoma. In the Northern District, there were 439 federal prosecutions in fiscal year 2022 compared to just 328 in fiscal year 2021, and during the same time period, federal prosecutions nearly doubled in the Eastern District, from 89 to 179 cases.[2] If this Court does not grant certiorari, there will surely be more Indian defendants subjected to illusory

[2] These figures are drawn from the United States Sentencing Commission's Federal Sentencing Statistics, which are available online at https://www.ussc.gov/topic/data-reports.

mandatory minimums as a result of the panel's decision. This Court should grant certiorari.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Dean Sanderford
DEAN SANDERFORD
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002
Email: Dean_Sanderford@fd.org

March 7, 2024